SUPREME COURT NO. 97569-8

NO. 77848-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERIC VIGIL,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Millie M. Judge, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Eric Vigil, appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Vigil seeks review of the decision in State v. Eric Vigil, No. 77848-0-I (Slip Op. filed July 22, 2019), which is attached as an appendix.

C. REASONS TO ACCEPT REVIEW

This Court should accept review because the decision conflicts with published decisions of this Court and the Courts of Appeals by failing to adhere to the rule that a defendant is entitled to have the jury properly instructed on the law relevant to defense theories supported by the record and when properly requested by the defense. RAP 13.4(b)(1) & (2).

D. ISSUE PRESENTED FOR REVIEW

To determine if the State has met its burden to prove a defendant is guilty of child molestation based solely on over-the-clothes touching, should the jury be instructed on the legal principle that there must be some additional evidence the touch was done for purposes of sexual gratification beyond the mere fact of the over-the-clothes touch?

E. STATEMENT OF THE CASE

The Snohomish County Prosecutor charged petitioner Eric Vigil with two counts of third degree child molestation and one count of communicating with minor for immoral purposes. CP 130-33. It was alleged that Vigil committed these offenses against K.C. (d.o.b. 06/22/01), a fourteen-year old girl. CP 138-40. A trial was held before the Honorable Judge Millie M. Judge. 2RP 1-456.

Vigil met K.C.'s stepfather, Bruce Burns[1] on a fishing trip and they became friends. 2RP 94-97. After meeting they would go on frequent fishing trips. 2RP 97-98.

Bruce invited Vigil to come to his home for his family's 2015 Thanksgiving dinner and to spend the night. 2RP 98-99, 104, 147. Vigil was assigned the spare upstairs bedroom in the Burns' split-level home. 2RP 147-49. The only others spending the night were Bruce, his wife and mother of K.C., Helen Burns, and K.C. 2RP 94, 124, 139. The home had three bedrooms upstairs, including the spare bedroom assigned to Vigil, and one downstairs, used by K.C. 2RP 106.

[1] Reference is made in this petition to both Bruce Burns and his wife Helen Burns. For clarity, they will be referred to by their first names.

The Burns' Thanksgiving dinner concluded at about 7 or 7:30 pm, when Bruce left to drive his mother and sister home. 2RP 100, 103. According to Helen, she went to bed shortly after Bruce left, but before some of the other guests had left for the night. 2RP 159, 168. Helen recalled seeing Vigil drinking beer and recalled him commenting to her the next morning that he could not believe he only had 13 beers. 2RP 160-62. Helen also recalled Vigil having some of the whiskey that was shared that evening. 2RP 170-71. Despite the level of alcohol consumption by Vigil, Helen said she never saw him acting irregularly that evening, nor did he act as if anything "weird" had happened the next morning. 2RP 161, 169-70.

Helen testified she left folded bedding in the spare bedroom for Vigil to use, but it went used, which she assumed meant no one used the bedroom the previous night. 2RP 162. Helen recalled finding Vigil smoking in the garage the next morning, so she made a pot of coffee and chatted with him in the garage as they smoked. 2RP 161. Helen believed Vigil left their home at about noon or 1 p.m. 2RP 163.

According to Helen, K.C.'s friend Paige came to visit at some point and did not leave until about 4 p.m. 2RP 163. Helen claimed that after Paige left, K.C. came out of her bedroom sobbing hysterically, so much so she could not explain why she was in such a state. 2RP 163-64.

Helen said she stopped K.C. so she could bring Bruce to hear what she had to say. 2RP 163. K.C. claimed that the night before Vigil had touched her breast and buttocks over her clothes, camped outside her room all night and periodically opened her bedroom door before closing it again, and at one point came into her room, offered her a beer, which she declined, then asked for a kiss, which she also declined, and then told her she needed to "give him her lips." 2RP 165.

Bruce testified similarly to Helen but claimed K.C. made the allegations shortly after Vigil left. 2RP 126-30. Bruce agreed he did not see Vigil act out of the ordinary or even interact with K.C. while at the Burns' house. 2RP 124, 136.

The Burns' reported the K.C.'s claims to police either "right away" or the following day. 2RP 70, 130 166. Several days later, Detective Belinda Paxton interviewed K.C. 2RP 316. K.C. repeated the allegation against Vigil made earlier to her mother and stepfather. 2RP 321.

Vigil subsequently agreed to an interview with Paxton. A redacted version of the interview was presented to the jury. 2RP 327-40.

When asked if he knew why they were interviewing him, Vigil said he had "no clue," but noted he had already been informed it involved K.C., which made him start "freaking out," because he had no clue what he and K.C. "would do." 2RP 328.

Vigil recalled drinking a lot of beer on Thanksgiving, estimating he had 14 beers, which is more than usual. 2RP 328. He agreed he was "[p]retty high" on Thanksgiving, and admitting he woke up with a "migraine." 2RP 329. Vigil recalled waking up on the downstairs hallway floor near the bathroom at about 2 a.m. and flopping into the upstairs spare bedroom for the rest of the night without bothering with the bedding. 2RP 329-31.

When confronted with K.C.'s allegations, Vigil said he could not remember doing any of the things she claimed. 2RP 331-33. Vigil did recall waking up in the hallway at about 2 a.m. and K.C. coming out of her room and reminding him there was a bed for him upstairs. 2RP 333. Vigil also recalled knocking on and opening her bedroom door to say goodbye the next morning. 2RP 334.

Vigil also told Paxton he only has alcohol-induced blackouts when he mixes beer and hard liquor. Vigil admitted he may have had some of the whiskey shared at Thanksgiving but could not specifically recall. 2RP 335. Vigil admitted having a blackout in his 20s and doing things he could not remember later. 2RP 337-38. Vigil admitted he could not remember what happened at the Burns' home on Thanksgiving beginning about one hour after dinner. 2RP 338. Vigil did not testify at trial.

According to K.C., she knew Vigil as a friend of her stepfather's, and prior to Thanksgiving 2015 had only interacted with him during two camping/fishing trips. 2RP 176. Regarding the Thanksgiving gathering, K.C. recalled being drafted to help her stepfather do the dinner dishes after the meal, then going to her room to change into her sleepwear - pajama shorts, underwear, bra and t-shirt – and then grabbed a "thick" double-layered blanket off her bed to wrap herself in before returning to socialize. 2RP 194-95, 202, 215. When she returned, her mother was finishing up the kitchen and her Aunt Mary, cousin Alex and Vigil were sitting around a table adjacent to the kitchen and her uncle and stepfather were downstairs in the family room. 2RP 196-97.

K.C did not feel like sitting in a chair, so she sat on the floor between her cousin Alex and Vigil. 2RP 196, 198-99. K.C. recalled being very tired, having not slept the night before, and was swaying back and forth until she felt Vigil's a hand on her back and he started rubbing over her t-shirt and thick blanket. 2RP 199, 202, 267. Her cousin Alex was still at the table. Id.

K.C. did not think it was "that big a deal," assuming Vigil was just trying to be nice, and it was relaxing. 2RP 200-01. When Vigil started rubbing her shoulders, however, K.C. thought it was getting "weird" and uncomfortable, especially when his hand started moving towards the front

of her body, albeit still over her thick blanket and clothes. 2RP 201-02. K.C. claimed Vigil's hand eventually was over her left breast rubbing up and down, causing her bra to move. 2RP 201-02. K.C. agreed Vigil never attempted to put his hand under her blanket or clothing. 2RP 251.

K.C. ended the massage by pretending she had been asleep and woken up and decided to go downstairs to see everyone in the family room. 2RP 203-04, 251. After about five minutes, K.C. decided to say her goodbyes, which routinely involved giving hugs to everyone, and she did so with everyone present including Vigil. 2RP 205, 213.

When hugging Vigil, K.C. recalled putting her arms around him for the hug and Vigil putting one hand on her back and the other on her buttocks and rubbing. 2RP 214. K.C. said his hands were under the blanket, but over her clothes. 2RP 214-15, 256. K.C. did not think anyone saw how Vigil hugged her. When the hug ended K.C. said she went to her room and closed the door. 2RP 215.

Despite lack of sleep the night before, K.C. was unable to fall asleep, so she watched television for about 30 minutes before finally dozing. 2RP 216-17. K.C. claimed she awoke at some point because of a scratchy feeling on her arm. 2RP 217. When she opened her eyes, she saw Vigil standing next to her bed holding her arm and he had his mouth on her arm. 2RP 217-18. K.C. said she pulled her arm away and asked

Vigil why he was there. Vigil allegedly replied he had brought a beer for them to share. 2RP 218. K.C. told Vigil she did not want beer, at which point Vigil asked K.C. if she wanted him to leave her room, and she told him yes. Vigil then asked K.C. for a kiss before leaving. 2RP 219. K.C. testified she told him no, so Vigil turned to head out the door, but stopped on the way and said, "Give me your lips," to which K.C. replied, "[N]o. Get out." Vigil left. 2RP 220.

K.C. said she was unable to go back to sleep after Vigil left, so she played on her electronic devices and eventually cleaned her room. At some point she took garbage into the garage and discovered Vigil on the floor outside her door. When K.C. asked what he was doing, Vigil told her he thought he "had to go the bathroom or something." 2RP 221-22. Thereafter both Vigil and K.C. went to the garage, where they found Bruce asleep in a chair. K.C. disposed of her garbage, then woke Bruce and walked him upstairs to bed. 2RP 223. When she returned downstairs Vigil was still in the garage, so she returned to her room and closed the door. 2RP 224. K.C. claimed that thereafter Vigil repeatedly opened her door and looked in throughout the night, closing the door whenever she looked his way. 2RP 224-25. K.C. said she tried blocking the door with a towel, but Vigil was still able to open the door. 2RP 225. K.C. claims she was unable to sleep the rest of the night. 2RP 227.

K.C. admitted she told no one about the incidents, not even her best friend Paige, who she spent the day after Thanksgiving with, about Vigil's touching and his strange behavior throughout the night, until Paige left at about 4 p.m. She then told her mother. 2RP 227-30, 260.

The defense proposed the following jury instruction:

> If the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, some additional evidence of sexual gratification is required.
>
> State v. Harstad, 153 Wash. App. 10, 21, 218 P.3d 624, 628-29 (2009).

CP 100 (Proposed Defense Instruction 7).

The trial court refused to give the instruction. The court noted all the cases addressing this area of the law were in the context of sufficiency of the evidence claims, not improper instruction claims. The court reasoned that under State v. Veliz, 76 Wn. App. 775, 888 P.2d 189 (1995), it is not error to not give the proposed instruction if a proper instruction defining "sexual contact" is provided, which the trial court did. CP 73 (Court's Instruction 11); 2RP 387. The jury subsequently found Vigil guilty as charged, and he appealed. CP 8, 56-58; 4RP 2-5.

The Court of Appeals rejected Vigil's challenge to the trial court's refusal to give Proposed Defense Instruction 7, based on the same

reasoning as the trial court, that under Veliz, it was not required. Appendix.

F. ARGUMENT

THE DECISIONS HERE AND IN VELIZ ARE WRONG AND CONFLICT WITH DECISIONS FROM THIS COURT AND THE COURT OF APPEALS AND THEREFORE REVIEW IS WARRANTED.

"Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact." State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), review denied, 170 Wn.2d 1022 (2011) (citing State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005)); accord, State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). "To guard against false convictions, a structural commitment of our criminal justice system, the trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is *completely* unsupported by evidence." Id. (emphasis in original).

It is reversible error to refuse to give a proposed instruction if it properly states the law and the evidence supports it. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). When a trial court refuses to give a

defense proposed instruction based on a ruling of law, this Court reviews that decision de novo. State v. Sullivan, 196 Wn. App. 277, 291, 383 P.3d 574 (2016), review denied, 187 Wn.2d 1023, 390 P.3d 332 (2017); State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

Here, Defense Proposed Instruction 7 was rejected based on a rule of law, i.e., under Veliz it is not required. 2RP 387; Appendix at 4. Therefore, de novo review is appropriate.

(a) Defense Proposed Instruction 7 properly stated the law.**Error! Bookmark not defined.**

A person commits the crime of third degree child molestation when the person has sexual contact with a child who is at least fourteen years old but less than sixteen years old, not married to the person or in a registered domestic partnership, and who is at least forty-eight months younger than the person. RCW 9A.44.089. "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2).

It has been the law in Washington for decades that in the context of a molestation charge "additional proof of sexual purpose [is required] when clothes cover the intimate part touched." Harstad, 153 Wn. App. at 21 (citing State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991),

review denied, 118 Wn.2d 1013, 824 P.2d 491 (1992)). Vigil's proposed instruction correctly set forth this law;

> If the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, some additional evidence of sexual gratification is required.

CP 100 (Proposed Defense Instruction 7).

(b) The correct statement of the law in Defense Proposed Instruction 7 was applicable to Vigil's defense.

Vigil's defense was that he had no memory of engaging in the acts K.C. alleged. 2RP 331-33. And to the extent did touch K.C. as alleged, Vigil's argued the State failed to prove it was for purposes of sexual gratification. 2RP 446-47.

Because Vigil argued any touching that did occur was not for purposes of sexual gratification, the defense proposed instruction was necessary to properly inform jurors of the applicable law. The evidence showed that any touching that could have constituted "sexual contact" between Vigil and K.C. was over K.C.'s clothes. Thus, to convict Vigil of either count of molestation, whether the massage or the hug, the jury was required to find there was some additional evidence corroborating it was for purposes of sexual gratification beyond the mere fact of the touch. Harstad, 153 Wn. App. at 21. Whether there was credible evidence to

make such a factual finding was a matter for the jury to decide. Koch, 157 Wn. App. at 33.

Defense Proposed Instruction 7 would have made manifestly clear for jurors this aspect of Washington law, which applies when the alleged touching occurred over the clothes, as K.C. alleged here. 2RP 251, 256.

(c) The trial court's refusal to give Defense Proposed Instruction 7 and the Court of Appeals affirmance of that decision is based on *Veliz*, which should be overruled.

The trial court did not reject the proposed instruction because it misstated the law, but instead because of the 1995 decision in Veliz, which concluded the instruction defining "Sexual contact" is sufficient, even though the touching was over the clothes. 76 Wn. App. at 779.[2] This Court should accept review and conclude Veliz was wrongly decided and conflicts with prior precedent.

It is worth noting that in the 23+ years since Veliz was decided, it has been cited only once in a published[3] decision; Norris v. Morgan, 622 F.3d 1276, 1293 n.20 (9th Cir. 2010), in which the Court noted

[2] The Westlaw version of the decision in Veliz appears to use the phrase "sexual contact" and "sexual conduct" interchangeably, as the definition quoted as to "sexual conduct" is identical to the statutory definition of "sexual contact." RCW 9A.44.010(2).

[3] Veliz is referenced in State v. Berg, 177 Wn App. 119, 310 P.3d 866, 876 (2013), rev'd, 181 Wn.2d 857, 337 P.3d 310 (2014), but only in the unpublished portion (see paragraphs 122 & 123, citing Veliz for the proposition that cases addressing sufficiency of the evidence claims have no bearing on cases involving jury instruction issues).

Washington requires some additional evidence to corroborate a for-purposes-of-sexual-gratification finding in a molestation prosecution when the touching is over the clothes. The few unpublished cases citing Veliz simply accepted the decision at face-value, as did the Court of Appeals here.[4] Appendix.

The reasoning in Veliz is flawed for at least a couple of reasons. First, it appears the decision was based at least in part on the appellate court's factual determination that "given the type of contact and its extended nature, the evidence is clearly sufficient to establish that he touched A.F. for the purpose of sexual gratification." 76 Wn. App. at 778 n.5 (emphasis added). Given the alleged touching in Veliz was "about 20-30 seconds" of over-the-clothes circular rubbing of a girl's "private spot in

[4] See State v. Cochran, 193 Wn. App. 1018, review denied, 186 Wn.2d 1006, 380 P.3d 452, (2016), 2016 WL 1461851, Slip Op. 3-4 (by instructing jury "Sexual contact may occur through a person's clothing" without also instructing "that additional evidence of sexual gratification is required when a child molestation charge is based on inappropriate touching through clothing" did not constitute an improper judicial comment on the evidence); State v. Carr, 179 Wn. App. 1031 (2014), 2014 WL 645181, Slip Op. at 3 n.4 (rubbing hand back and forth against the shirt covered breast was sufficient as a matter of law to find it was for a "sexual purpose"); State v. Grove, 139 Wn. App. 1095 (2007), 2007 WL 2234596, Slip Op. at 1, 3 (by instructing "Sexual contact may occur through a person's clothing" did not require also instructing "that additional evidence of sexual gratification is required when a child molestation charge is based on inappropriate touching through clothing"); State v. D.R.A., 121 Wn. App. 1046 (2004), 2004 WL 1102931, Slip Op. at 2 (citing Veliz for the proposition that the "'Intimate parts' has a broader connotation than sexual parts and includes 'parts of the body in close proximity to the primary erogenous areas ...' including hips, buttocks, and lower abdomen.'"); State v. Pena, 118 Wn. App. 1070 (2003), 2003 WL 22333204, Slip Op. at 2 (in denying insufficient evidence claim, court distinguishes Veliz and Powell, supra, because evidence supported skin to skin contact); State v. Reed, 95 Wn. App. 1042 (1999), 1999

front" as they lay together after they both awoke early in a room full of other relatives, the appellate court's factual determination is not as "clearly" as it claims, and in any event inappropriate because "[a]ppellate courts have rejected appellate fact-finding since the Eisenhower administration." Barriga Figueroa v. Prieto Mariscal, 3 Wn. App. 2d 139, 150, 414 P.3d 590 (2018), (Korsmo, J, dissenting) (citing Thorndike v. Hesperian Orchards, Inc., 54 Wn.2d 570, 343 P.2d 183 (1959)). Although the Veliz Court couches this finding as if it were addressing a sufficiency of the evidence claim, no such claim was before the Court and therefore constitutes *dicta*.

Second, Veliz was not challenging the sufficiency of the evidence, but instead the trial court's refusal to give an instruction like that proposed by Vigil. Compare 76 Wn. App. at 777 (defense proposed instruction by Veliz based on Powell, supra) with CP 100 (Defense Proposed Instruction 7 based on Harstad, supra). Thus, although the Veliz court was correct that Powell does not specifically hold such an instruction is required, both Powell and Harstad confirm the legal principle that "in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the

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WL 305230, Slip Op. at 7 (cites Veliz for proposition that the "type and extent of contact can show sexual gratification when touching is through clothing").

primary erogenous areas, the courts have required some additional evidence of sexual gratification." Powell, 62 Wn. App. at 917 (footnote omitted); Harstad, 153 Wn. App. at 21 ("'Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touch was for the purpose of sexual gratification,' although we require additional proof of sexual purpose when clothes cover the intimate part touched.") (quoting Powell, at 917).

It is this legal principle that both Veliz and Vigil sought to ensure jurors were instructed on because it was a legal principle significant to their defenses, which was that any touching of the intimate parts that may have occurred was not done for a sexual purpose of sexual gratification. For either defendant to effectively make this argument, jurors needed to thoroughly understand the applicable law associated with over-the-clothes-touching based molestation charges as established under Powell and Harstad. Absent such instruction, jurors in both cases were left unaware of the additional evidence required for conviction.

The trial courts here and in Veliz failed to safeguard against erroneous convictions when they denied defense requested instructions on the additional evidence requirement. This should be reversible error because the proposed instruction correctly stated law that was directly applicable to the defense theories, and there was evidence to support those

theories, which here included K.C. wearing a double-layer heavy blanket over her clothes, such that Vigil may not have known he was touching K.C.'s inappropriately during the massage and hug, and therefore it was not done for purposes of sexual gratification. Koch, 157 Wn. App. at 33; Ager, 128 Wn.2d at 93.

(d) The failure to give Defense Proposed Instruction 7 prejudiced Vigil because it unfairly relieved the State of its burden of proof.

Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3. A conviction "cannot stand if the jury was instructed in a manner that would relieve the State of this burden." State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000).

Here, the trial court refused to give Defense Proposed Instruction 7. Vigil's jury, therefore, was never properly educated on the relevant law. It was never explained that to find an over-the-clothes touch of K.C. by Vigil was for purposes of sexual gratification each juror had to conclude there was credible corroborating evidence beyond the mere fact of the touch that it was for a sexual purpose, as required by Powell and Harstad.

Vigil is not claiming the evidence was insufficient to convict. The problem is not the quantum or quality of evidence. The problem is the instructions failed to properly set forth the legal framework within which jurors were to consider the evidence presented.

Vigil's jurors were never informed that merely touching the clothed intimate parts of a child is insufficient to prove it was done for purposes of sexual gratification. As such, one or more jurors may have concluded the State satisfied its burden to prove a sexual purpose by the mere fact of the touch, which is insufficient under Powell and Harstad. The trial court's refusal to give Defense Proposed Instruction 7 unfairly eased the State burden to prove the molestation charges.

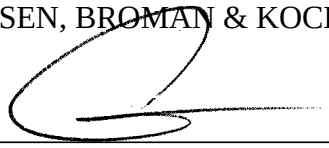
G. CONCLUSION

The Court of Appeals should have declined to follow Veliz because it is wrongly decided and because it conflicts with the Court of Appeals decisions in Powell, Harstad and Koch, and this Court's decisions in Barnes, Clausing and Ager. This Court should therefore grant review under RAP 13.4(b)(1) & (2).

DATED this 21st day of August, 2019

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. ERIC DEAN VIGIL, Respondent.	No. 77848-0-I DIVISION ONE UNPUBLISHED OPINION FILED: July 22, 2019

CHUN, J. — A jury convicted Eric Vigil of two counts of third degree child molestation.[1] At trial, Vigil requested a jury instruction requiring additional evidence of sexual gratification where touching of intimate parts occurs through clothing. The trial court determined the instruction was unnecessary under State v. Veliz, 76 Wn. App. 775, 778-79, 888 P.2d 189 (1995). We agree and affirm.

I. BACKGROUND

Vigil celebrated Thanksgiving in 2015 at the home of his friend, Bruce Burns. Knowing Vigil lived a significant distance away, Burns invited him to stay the night. The next day, Burns's 14-year-old stepdaughter, K.C., reported that Vigil had touched her breast and squeezed her buttocks over her clothing. K.C. also told her parents that Vigil entered her room, offered her a beer, and asked

[1] The jury also convicted Vigil of one count of communication with a minor for immoral purposes. Vigil does not appeal this conviction.

her to "give him her lips" and kiss him. After K.C. told Vigil to leave her room, he stayed outside her bedroom door all night and kept opening and closing her door.

K.C.'s parents contacted police. The State charged Vigil with two counts of third degree child molestation, and one count of communication with a minor for immoral purposes.

At trial, K.C. recounted the following: Vigil rubbed her back over her clothes and a blanket she had wrapped around her shoulders. Vigil then moved his hand up toward the top of her shoulder and continued rubbing. Soon after, Vigil began rubbing his hand down the front of K.C.'s body. Specifically, he rubbed up and down K.C.'s left breast on the outside of her shirt and the blanket. Later, when K.C. hugged him goodnight, Vigil "grabbed" her buttocks under the blanket but outside of her shorts.

K.C. went to her bedroom and eventually fell asleep. She woke up because of a "scratching feeling" on her elbow and arm and found Vigil holding her arm and putting his mouth on it. Vigil offered K.C. a beer, which she declined. Vigil asked K.C. repeatedly if she wanted him to leave her room, and she responded yes. Before he left, he asked for a kiss and said "give me your lips." K.C. again declined and told Vigil to leave her room. He left her room. But later that night K.C. found him sitting outside her door. Vigil opened and closed her door several times throughout the night. K.C. also heard the clicking sound of a cell phone camera during one of the times Vigil opened her door.

After conclusion of all testimony, Vigil proposed the following jury instruction on sexual gratification: "If the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, some additional evidence of sexual gratification is required." The trial court declined to give the instruction.

A jury convicted Vigil as charged. Vigil appeals.

II. DISCUSSION

A. Jury Instruction

Vigil contends the trial court's failure to issue his requested jury instruction deprived him of his right to due process and a fair trial. Vigil proposed this instruction based on cases concluding that the State must present additional evidence of sexual gratification where the evidence shows only touching through clothing. See State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991) (discussing the sufficiency of the evidence); State v. Harstad, 153 Wn. App. 10, 21, 218 P.3d 624 (2009) (same). The trial court declined to issue the instruction because this court previously determined that Powell addressed only the sufficiency of the evidence of molestation and "does not stand for the proposition that a trial court is required to instruct the jury that it must find additional evidence of sexual gratification in order to find the defendant guilty of child molestation." Veliz, 76 Wn. App. at 778-79. We agree with the trial court and adhere to the decision outlined in Veliz, 76 Wn. App. at 779.

"Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law." State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The standard of review for jury instructions varies based on the decision under review. State v. Condon, 182 Wn.2d 307, 315, 343 P.3d 357 (2015). "The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo." State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). Here, the trial court determined that Vigil's proposed instruction was not required as a matter of law under Veliz. 76 Wn. App. at 777. Therefore, we review the decision de novo.

The trial court correctly refused to give Vigil's suggested instruction in accordance with existing case law. In Veliz, the defense proposed a similar jury instruction during a trial for first degree child molestation where the evidence showed the touching occurred over clothing. 76 Wn. App. at 777. Veliz claimed the trial court's refusal to give the instruction precluded him from arguing his theory of the case. Veliz, 76 Wn. App. at 777. This court disagreed, concluding:

> [T]he instructions actually given to the jury in this case required it to find that Veliz touched A.F. for the purpose of sexual gratification. The jury was instructed that, to convict Veliz, it must find that he had sexual contact with A.F. In a separate instruction, the term "sexual conduct" was defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party." Thus, the instructions allowed Veliz to argue that he had not touched A.F. or, alternatively, if he had, that the touching was not for the purpose of sexual gratification. The instructions were therefore sufficient.

Veliz, 76 Wn. App. at 779.

In this case, the jury instructions provided the same opportunity for argument as those approved in Veliz. The trial court provided the "to convict" instruction requiring the jury to find Vigil had sexual contact with K.C. A separate instruction gave the definition of "sexual contact" as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." These instructions permitted Vigil to argue that he did not touch K.C. and that any touching was not for the purpose of sexual gratification.

The trial court's instructions were sufficient for Vigil to argue his theory of the case. The trial court correctly followed Veliz, and we see no compelling reason to disregard this precedent.

B. Entry of Findings of Fact and Conclusions of Law

Vigil requests remand for entry of written findings of fact and conclusions of law as required by CrR 3.5(c). The trial court held the CrR 3.5 hearing on June 15, 2017, at which time the court ruled orally on the admissibility of Vigil's statement to the police. As of the filing of Vigil's appellate brief on May 30, 2018, the trial court had yet to enter the requisite findings of fact and conclusions of law on that proceeding. The trial court belatedly entered the findings and conclusions on June 7, 2018. Because the trial court has complied with CrR 3.5(c), this court can no longer provide the relief sought and Vigil's request is moot. See Snohomish County v. State, 69 Wn. App. 655, 660, 850 P.2d 546 (1993) ("A case is technically moot if the court cannot provide the basic relief

originally sought or can no longer provide effective relief") (internal citation omitted).

Affirmed.

Chun, J.

WE CONCUR:

NIELSEN, BROMAN & KOCH P.L.L.C.

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