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DIVISION II
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STATE OF WASHINGTON
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NO. 42313-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PEDRO HERNANDEZ,

Appellant.

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

The Honorable Michael Evans, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ASSIGNMENT OF ERROR 1

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 1

1. Procedural facts: 1

2. Testimony at trial 4

D. ARGUMENT 9

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE CONTACT WITH J.V. AND K.V. WAS FOR PURPOSES OF SEXUAL GRATIFICATION 9

E. CONCLUSION 13

TABLE OF AUTHORITIES

WASHINGTON CASES **Page**

State v. French, 157 Wn.2d 593, 141 P. 3d 54 (2006).....11

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....10

State v. Howe, 151 Wn.App. 338, 212 P.3d 565 (2009).....11

State v. Jackson, 145 Wn.App. 814, 187 P.3d 321 (2008).....10, 11

State v. T.E.H., 91 Wn.App. 908, 960 P.2d 441 (1998).....11

State v. Powell, 62 Wn.App. 914, 816 P.2d 86 (1991),
review denied, 118 Wn.2d 1013 (1992).....11. 12. 13

State v. Price, 127 Wn.App. 193, 110 P.3d 1171(2005),
aff'd, 158 Wn.2d 630, 146 P.3d 1183 (2006).....12

UNITED STATES CASES **Page**

Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781
(1979).....10, 11

In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970).....10

REVISED CODE OF WASHINGTON **Page**

RCW 9A.44.086.....10

RCW 9A.44.086(1).....10

RCW 9A.44.010(2).....11

RCW 9.94A.535(3)(g).....12

A. ASSIGNMENT OF ERROR

1. There was insufficient evidence to find the appellant guilty of child molestation in the second degree of his nieces J.V. and K.V., as alleged in Counts III and V.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. The appellant was convicted of two counts of child molestation in the second degree. In addition to proving that the appellant touched an "intimate part" of his nieces, the State was required to produce additional evidence that the touching was for the purpose of gratifying a sexual desire. In this case, there was no such evidence. Must the appellant's convictions in Counts III and V be vacated? Assignment of Error No. 1.

C. STATEMENT OF THE CASE

1. Procedural facts:

The Cowlitz County Prosecuting Attorney charged Pedro Hernandez by third amended information on March 23, 2011 with the following offenses:

Count	Charge	Alleged victim	Intervening period
Count I	Assault in the fourth degree with sexual motivation	Jane Doe 1 (A.V.)	Between February 3, 2007 and October 1, 2009

Count II	Rape of a child in the third degree	Jane Doe 2 (J.V.)	Between May 6, 2006 and May 5, 2008
Count III	Child molestation in the second degree, or in the alterative, child molestation in the third degree	Jane Doe 2 (J.V.)	Between May 6, 2006 and May 5, 2008, or in the alternative, between May 6, 2008 and May 5, 2009
Count IV	Attempted child molestation in the second degree, or in the alternative, attempted child molestation in the third degree	Jane Doe 2 (J.V.)	Between May 6, 2006 and May 5, 2008, or in the alternative, between May 6, 2008 and May 5, 2009
Count V	Child molestation in the second degree	Jane Doe 3 (K.V.)	Between May 22, 2009 and June 1, 2010
Count VI	Child molestation in the second degree	Jane Doe 3 (K.V.)	Between May 22, 2009 and June 1, 2010

Clerk's Papers [CP] 89-94.

The State alleged Counts II through VI were part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. RCW 9.94A.535(3)(g). CP 90-94. Notice of intent to seek an exceptional sentence was filed on November 2, 2010. CP 17-18.

Trial commenced on March 22, 2011, the Honorable Michael Evans presiding. The jury found Hernandez not guilty of Counts I and VI. CP 205-06, 219-20. The jury found Hernandez guilty of child molestation in the second degree as alleged in Counts III and V, and attempted child molestation in the second degree as alleged in Count IV. CP 209, 213, 217. In the special verdict forms, the jury found that Counts III, IV, and V were "part of an ongoing pattern of sexual abuse of the same victim." CP 212, 215, 218.

The jury left the verdict form in Count II blank. CP 207. When asked by the court, the presiding juror said that additional time would not be of benefit in order to reach a verdict in Count II. 3Report of Proceedings [RP] at 383-84.[1] After polling the jury, the court accepted the verdicts and discharged the jury. 3RP at 387. The court declared a mistrial as to Count II. 3RP at 390.

The court imposed 75 months in Count III, 42.75 months in Count IV, and 75 months in Count V. CP 228. Based on the jury's finding of aggravating factors, the court also imposed an exceptional sentence by ordering Counts III and IV to be served consecutively, for a total sentence of

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[1]The record of proceedings consists of three volumes:
1RP—September 30, October 12, October 19, November 2, December 14, 2010, January 13, March 3, March 17, and March 21, 2011, hearings;
2RP—March 22, 2011, jury trial; and
3RP—March 23, and March 24, 2011, jury trial, and June 9, 2011, sentencing.

117.75 months. CP 228. Findings and conclusions regarding the exceptional sentence were entered by Judge Evans on June 9, 2011. CP 223-243.

Timely notice of appeal was filed June 20, 2011. CP 246. This appeal follows.

2. Testimony at trial:

Pedro Hernandez has been married to Jamie Hernandez for fourteen years. 3RP at 233, 261. Their house is in Longview, Washington. 2RP at 39. Hernandez' brother-in-law is Donald Vanderhoff. 3RP at 252. Mr. Vanderhoff's son has three daughters, J.V., K.V., and A.V. 3RP at 252. Their mother is Lori Vanderhoff, who lives in Kelso, Washington. 2RP at 33, 179. She is divorced from the girls' father, Don Vanderhoff II, who lives in Longview. 2RP at 33, 183. The girls spent weekends at their father's house. 2RP at 33. Hernandez was often referred to as Uncle Pedro in the record.

J.V.--Counts III and IV:

J.V. was born May 6, 1994. 2RP at 32. J.V. stated that she spent time with her Aunt Jamie at her house and they were 'best friends," but that when

she was twelve, her Uncle Pedro started to touch her inappropriately. 2RP at 36, 37. She stated that at Uncle Pedro's house in Longview, he would come up behind her and "rub against [her] butt or he would come from behind [her] and rub against [her] chest." 2RP at 37, 38, 39, 41. She said the touching would last a "few seconds." 2RP at 38. When he touched her buttocks, his hand would stay still and not move, and the contact would last "[j]ust a few seconds." 2RP at 39. She would tell him to stop and that she did not like it. 2RP at 39. She said he would shake his head and walk away. 2RP at 39, 40. She testified that this occurred from when she was 11 or 12 until she was 14. 2RP at 42. She said that she did not tell anyone because she was afraid that she would not be able to see her Aunt Jamie any more. 2RP at 42.

J.V. stated that sometimes she, Aunt Jamie and Uncle Pedro would sleep in the same bed, and that one time when she was 14 she woke up and felt him rubbing her body. 2RP at 46, 47. She pretended to be asleep, and he then put his finger or fingers in her vagina. 2RP at 47.

J.V. stated that Uncle Pedro would ask her to suck his penis or if she would let him stick his tongue in her vagina, and gestured to her to come into the bedroom. She said that she would either walk away or ignore him. 2RP at 50, 52. She also testified that he would make gestures to her, which she

interpreted as asking her if she wanted to suck his penis, and that this happened on more than ten occasions. 2RP at 50, 51, 52. She stated that between ages 11 and 14, when she slept on the couch at his house, he would put his hands between her legs or start rubbing her rear and her chest. 2RP at 51. She stated that this happened "a few" times. 2RP at 51.

J.V. did not tell anyone about these incidents until she told her friend S.G. in the summer of 2009 that she had been abused. 2RP at 54.

At J.V.'s 16th birthday party in May, 2010, S.G. was angry. 2RP at 33. J.V. found S.G. in her bedroom telling A.V. that Hernandez had grabbed her back pocket and told her that he was fixing her cell phone. 2RP at 55. At that time J.V. went to Aunt Jamie and told her that Uncle Pedro had been touching her breasts and buttocks. 2RP at 56.

S.G. stated that while at J.V. 's 16th birthday party, she was standing on the porch and that Hernandez reached behind her and cupped her phone which was in her rear pants pocket. 2RP at 165, 166, 167. Hernandez told her that he saw that her phone had fallen out of her pocket and he was putting it back in. 2RP at 170.

K.V.---Count V:

K.V. was born May 22, 1997. 2RP at 94. She stated when she was at

Uncle Pedro's house when she was 11, he would run his hands down her back and grab her rear with both hands for a "couple seconds." 2RP at 97. She would tell him to stop and pull away from him. 2RP at 97, 98. She said that when she was 12 or 13 at her father's house, Uncle Pedro grabbed her by the waist from behind when she was bent over, and that her rear touched his penis though her clothing. This lasted for three seconds. 2RP at 99, 100. She said that she stood up and turned around and told him to stop, and he told her to shut up. 2RP at 98, 100.

K.V. stated that when she was 11, while she was sitting on a counter at her father's house, Uncle Pedro walked past her and put his hand between her legs and touched her in the middle of her inner thigh. 2RP at 106, 108.

K.V. said that when she was 13, at her cousins' birthday party at Uncle Pedro's house, he went to the bathroom and as he passed by he touched her breast with his hand. 2RP at 101. She said that she thought he did it accidentally, but when he returned from the bathroom, he touched her breast again, and she believed he did it intentionally. 2RP at 103, 104.

K.V. testified that at Pedro's house, she was watching TV and Uncle Pedro came out of his bedroom, kneeled in front of her and kissed her and put his tongue in her mouth. 2RP at 109, 110. She pulled away and he said for

her to put her tongue in his mouth and she said no. 2RP at 109, 111.

A.V.

A.V., who was born February 3, 1993, testified that Uncle Pedro started to touch her in the summer of 2007, when she was 15. 2RP at 132, 135. She testified that she was sitting on a couch next to Uncle Pedro at his house and he grabbed her rear for two or three seconds as she was getting up form the couch. 2RP at 139. She stated that he apologized and said that he did not mean to touch her. 2RP at 139.

When J.V. was in the hospital in August, 2009, A.V., stayed at Uncle Pedro's house. 2RP at 141. She stated that she was sitting on the couch next to him and had her four year old cousin sitting in her lap. She was holding the television remote control in her hand, keeping it away from her cousin, and Uncle Pedro grabbed at the remote and brushed his hand across her chest. 2RP at 141. He apologized and said that it was an accident when she asked him about it. 2RP at 144.

Pedro Hernandez:

Hernandez denied touching J.V.'s breast or buttocks, and denied

touching her vagina. 3RP at 261, 262, 263. He denied touching K.V.'s rear when hugging her, and denied touching her thigh at her father's house. 3RP at 264. He denied touching any of the girls from behind when they were bent over. 3RP at 265. He stated that he was from an affectionate family and that he had hugged the girls and played with them by poking and swatting them, but that it was not done with sexual motivation. 3RP at 262, 266. He denied making sexual comments to the girls or asking for oral sex, and said that he had only told A.V. she should not have sex and that she should study. 3RP at 262. He stated that he mentioned sex with J.V.; he did it to "check them out," but did not bring it up to see if they wanted to have sex with him. 3RP at 287. He denied that he asked J.V. to perform oral sex and denied grabbing her buttocks or breasts. 3RP at 262, 263. He described his family as being very "huggy" and affectionate, and categorically denied touching any of the girls in a sexual manner. 3RP at 267, 271. He stated that he did kiss K.V. and put his tongue in her mouth, but he did it because he had just eaten a hot pepper and he did it "because we always joked around like [that.]" 3RP at 264.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT THE CONTACT WITH J.V. AND K.V.

WAS FOR PURPOSES OF SEXUAL GRATIFICATION.

Pedro Hernandez was convicted of two counts of child molestation in the second degree in Counts III and V. Reversal and dismissal is required because there was insufficient evidence that Hernandez touched J.V. and K.V. for the purpose of sexual gratification. Under RCW 9A.44.086:

> A person is guilty of child molestation in the second degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.086(1).

In all criminal prosecutions, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Green,* 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

To convict Hernandez of child molestation in the second degree, the State must prove beyond a reasonable doubt that he engaged in sexual contact with J.V. and K.V. RCW 9A.44.086. "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). Such "intimate parts of a person" can be either clothed or unclothed. *State v. Howe,* 151 Wn.App. 338, 346, 212 P.3d 565 (2009) (citing *State v. Jackson,* 145 Wn.App. 814, 819, 187 P.3d 321 (2008)).

Sexual gratification is not an element of the crime but defines the term "sexual contact" and requires a showing of purpose or intent. *State v. French*, 157 Wn.2d 593, 610-11, 141 P. 3d 54 (2006). A showing of sexual gratification is required "because without that showing the touching may be inadvertent." *State v. T.E.H.,* 91 Wn.App. 908, 916, 960 P.2d 441 (1998).

Sexual gratification may not be inferred from "touching of intimate parts of the body other than the primary erogenous areas;" in such cases, "courts have required some additional evidence of sexual gratification." *State v. Powell*, 62 Wn.App. 914, 917-18, 816 P.2d 86 (1991), review denied, 118 Wn.2d 1013 (1992). In *Powell,* the defendant hugged a child around the chest, touched her groin through her underwear when helping her off his

lap, and touched her thighs. *Id.* at 916. The court noted that each touch was outside the child's clothes and was susceptible to an innocent explanation. *Id.* at 918. The touching was described as "fleeting" and the evidence of the defendant's purpose was "equivocal." *Id.* at 917–18. The court determined that the evidence was insufficient to support the inference that the defendant touched the child for the purpose of sexual gratification. *Id.* at 918. The court held that, under such facts, the State could not prove sexual gratification without extrinsic evidence beyond the circumstances of the touching. *Id.* at 918.

Here, no presumption arises that touching J.V. and K.V. was for the purpose of sexual gratification. *See State v. Price,* 127 Wn.App. 193, 202, 110 P.3d 1171(2005), *aff'd,* 158 Wn.2d 630, 146 P.3d 1183 (2006); *Powell,* 62 Wn.App. at 917. The record shows that in each case, any contact Hernandez had with either girl was over their clothing, on their buttocks or breasts. Moreover, the testimony is clear that in cases where he was alleged to have touched them with his hand, he hand remained still and did not move, and was only in contact with the girls' chest or buttocks for a matter of seconds. In each case, the touching was attributable to an innocent explanation. Hernandez testified that he was from an affectionate family.

Moreover, he testified that he liked to joke and that he frequently "swatted" or "poked" the girls in playful manner. Similarly, the kiss that K.V. described in ascribable to Hernandez's penchant for joking around; in this case he testified that he had just eaten a chili pepper and that he kissed her as a joke.

There was no additional evidence establishing that any touching was for the purpose of sexual gratification. The record substantiates there was insufficient evidence that Hernandez touched J.V. and K.V. for the purpose of sexual gratification. The superficial touching as described by the girls fails to constitute sexual contact done for the purpose of gratifying sexual desire. Moreover, Hernandez's role in the family as the girls' uncle further dispels any inference that the touching was for sexual gratification. *State v. Powell,* 62 Wn. App. at 917 (Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.)

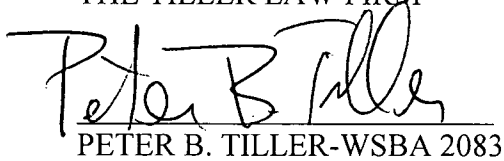
Reversal and dismissal is required because no rational trier of fact could find beyond a reasonable doubt that Hernandez touched J.V. and K.V. for the purpose of sexual gratification.

E. CONCLUSION

For the foregoing reasons, Pedro Hernandez respectfully requests this Court reverse and dismiss his convictions in Counts III and V.

DATED: December 27, 2011.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on December 27, 2011, that this Opening Brief was mailed by U.S. mail, postage prepaid, to David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to Susan Baur Clark County Prosecutor, 312 SW 1st Ave., Kelso, WA 98626, and to the appellant, Mr. Pedro Hernandez, DOC #800327, Stafford Creek Correction Center, 191 Constantine Way, Aberdeen, WA 98520, true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 27, 2011.

PETER B. TILLER