NO. 47736-0-II

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

STATE OF WASHINGTON, Respondent

v.

ALEXANDER PAUL ANDREW KNIGHT, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01267-5

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The trial court did not abuse its discretion in admitting M.P.'s statements to her mother and the detectives pursuant to RCW 9A.44.120.

II. There was sufficient evidence to support Knight's conviction for child molestation in the first degree.

STATEMENT OF THE CASE

On June 28, 2014, M.P. was touched by Alexander Knight (hereafter 'Knight') in a way that made her feel "weird." RP 674-78. She told her mom, the police were called, and Knight was charged by information with one count of Child Molestation in the First Degree. RP 685-86; CP 1. Prior to trial, the State moved to admit statements M.P. made the day of the incident to her mother and to two Vancouver Police detectives who interviewed her. RP 14-106. Knight's first trial on this matter resulted in a mistrial. RP 535. A second trial was held in Clark County Superior Court and the jury found him guilty of Child Molestation in the First Degree. RP 922; CP 17. Knight was sentenced to a standard range sentence and this appeal timely follows. CP 130.

The Court held a hearing on the state's motion to admit M.P.'s statements to her mother and to police detectives pursuant to RCW 9A.44.120. RP 31-106. The court heard testimony that M.P. is Truly Parsons' 9 year old daughter; she was born March 8, 2005. RP 15. Ms.

Parsons indicated that on the afternoon of June 28, 2014 M.P. came home from playing at a friend's house. RP 16. Soon after she got home, Knight and M.P.'s young friend, K, came to the door. RP 16. M.P. did not want to talk to K or go outside and play; M.P.'s mother asked M.P. what was wrong. RP 16-17. M.P. told her mom, "I don't want to talk about it," and that she was scared. RP 18. M.P. told her mom "he touched my butt" and tried to kiss her. RP 18. M.P. demonstrated the touch for Ms. Parsons by rubbing her hand up and down the crack of her bottom. RP 18. Ms. Parsons immediately called her husband and then the police and told the 911 operator what her daughter had told her. 1 RP 18.

M.P. testified at the 9A.44 hearing that she knows the difference between the truth and a lie, and she was able to recount what occurred on June 28, 2014. RP 23-27.

Detective Deanna Watkins of the Vancouver Police Department testified in the hearing as well. RP 31-42. She indicated that she works for the Children's Justice Center and has special training in interviewing young children. RP 31-32. When she interviewed M.P., Detective Watkins went through the importance of telling the truth, not to guess about anything and for M.P. to correct her if she was wrong. RP 33-34. Detective Watkins had no competency concerns regarding M.P.; M.P.

responded appropriately to questions. RP 37. During the interview M.P. described that Knight rubbed her butt and asked her to kiss him. RP 35-36.

Detective Julie Carpenter of the Vancouver Police Department also worked the case with Detective Watkins. RP 43. She interviewed M.P. along with Detective Watkins. RP 43-44. During the interview M.P. demonstrated to her that the touching on her buttocks by Knight was a "spooning motion with her full hand; and she went back and forth, back and forth." RP 45.

As part of the 9A.44.120 hearing, the Court listened to the tape recorded interview by Detectives Watkins and Carpenter of M.P. RP 53-86.

After hearing argument of the parties, the trial court ruled the statements M.P. made to her mother and to the detectives were admissible pursuant to RCW 9A.44.120. RP 113. Specifically, the court stated that M.P. had no motive to lie that had been "developed to the Court" and that in running the evidence through the *Ryan* factors that the statements came across "with a fairly high level of indicia of reliability." RP 109.

At trial, M.P. testified that she lived with her mom and dad at 2306 E. 35th Street in Vancouver. RP 670-71. She has never been married. RP 647, 672. M.P. was born on March 8, 2005. RP 646-47, 670. M.P. was friends with two little girls who lived next to her, A and K; she used to

play with them quite a bit. RP 648, 672-73. M.P. remembers one day the summer prior to trial she went over to A and K's house to play. RP 674. K, K's dad, Chris, and Knight, K's uncle, were there. RP 674. At one point Chris left for a few minutes and M.P. and K stayed at the house with Knight. RP 675, 695. During that time M.P. found herself alone with Knight in the living room. RP 675-76. Knight was sitting in a chair in the living room and he grabbed M.P. from under her armpits and lifted her up onto his lap. RP 677. Knight then used his hand to touch M.P. on her butt and was rubbing it. RP 678. As he rubbed, Knight was getting closer and closer to M.P.'s "perineum." RP 678. M.P. described the perineum as being "the flap of skin in between—in between your private area and your butt." RP 678. Knight's hand moved forwards and backwards while it was on M.P.'s butt. RP 679. His hand went closer and closer to her perineum, but also went deeper, as he rubbed. RP 679. Knight then asked M.P. to kiss him. RP 679. The touching made M.P. feel weird. RP 679. She jumped off Knight's lap and went to sit on the couch. RP 680. When K's dad got home M.P. said that she had to leave. RP 680.

After M.P. left, Knight called her by name from the fence. RP 682. At trial M.P. did not remember what, if anything, Knight said to her at the fence. RP 682. M.P.'s neighbor, Brandy Jennings witnessed this interaction. Ms. Jennings lives across the street from M.P. and M.P.'s

neighbors' residence, where the incident occurred. RP 626. She saw M.P. running out of K and A's residence and ran around the fence to go to her house. RP 630. As M.P. was running from K and A's house, Knight stopped her and tried to talk to her. RP 631. He appeared to summon her with his hand gestures. RP 640. Something about this interaction did not sit right with Ms. Jennings. RP 644. M.P. stopped running and hesitated. RP 632. To Ms. Jennings it appeared M.P. did not want to go over to the fence and did not want to stop and talk to Knight. RP 632. Ms. Jennings observed some kind of interaction between Knight and M.P., but could not hear the words that were said. RP 632. M.P. then continued on to her house. RP 632. The interaction seemed very odd to Ms. Jennings; she testified that it did not look right. RP 632-33. This interaction was brief, lasting less than 10 to 15 seconds. RP 641-42.

M.P. then finished walking home and watched TV. RP 682-83. M.P. was gone for about an hour when she returned to her house. RP 650. Ms. Parsons was home when M.P. arrived back at home and they watched some TV. RP 651. Ms. Parsons was surprised to see her daughter arrive back home so early; it was out of the ordinary because M.P. usually would stay out playing later with her friends. RP 650. M.P. was also being unusually quiet. RP 654.

About 45 minutes later, Knight came to her front door with K. RP 654, 684. When M.P. saw who it was she pushed herself back into the couch. RP 684. Knight said that K wanted to ask M.P. a question. RP 656-57. Ms. Parsons then turned to M.P. and said that K wanted to talk to M.P. RP 657. M.P. shook her head and would not do anything. RP 657. Ms. Parsons then said "K[] wants to ask you a question." RP 657. M.P. said "no" loudly and adamantly. RP 661. Knight and K then left. RP 657. M.P. was feeling scared. RP 685. Ms. Parsons then asked her daughter what was going on because her abrupt behavior towards her close friend, K, was very unusual. RP 657, 685. At first, M.P. said she did not want to talk about it, but Ms. Parsons pressed her to tell her what was going on. RP 658. M.P. told her mom what had happened with Knight; her mom looked like she was "freaking out" as she heard what happened. RP 686.

M.P. told her mom that Knight touched her butt and tried to kiss her. RP 659. M.P. then demonstrated to her mother how Knight touched her on the butt. RP 659. M.P. rubbed her hand up and down her butt crack. RP 659. During the demonstration the edge of M.P.'s hand was rubbing in her butt crack. RP 663. While M.P. was telling her mom what happened she was scared and was talking quietly. RP 659. Ms. Parsons immediately called her husband and then called 911. RP 659. M.P. The police came to M.P.'s house. RP 660. As Ms. Parsons spoke to the responding police

officer, M.P. acted scared and hid her face against her mother's hip. RP 660. M.P. spoke a little to the first police officer. RP 686. M.P. spoke to two detectives at the police station later that same evening. RP 687.

When the neighbor, Ms. Jennings, saw the police respond to M.P.'s residence she decided she should tell M.P.'s mom about the scene she had witnessed between Knight and M.P. RP 633-34. Ms. Jennings then sent Ms. Parsons a text message that said,

> Okay. When M[] ran out earlier—ran out the neighbor's house earlier, the guy from there signaled for her to come here. So she walked up the back porch and he was saying something to her. That was a while ago. And I don't know why, but something about it just seemed weird. Anyhow, hope everything's okay.

RP 635.

Within hours of this incident on June 28, 2014, Detectives Deanna Watkins and Julie Carpenter of the Vancouver Police Department interviewed M.P. RP 701, 714, 753. They interviewed M.P. alone. RP 701. During the interview the detectives used the principles of using open-ended, non-leading questions they learned through a special Harborview training on how to talk to children. RP 702. The detectives told M.P. it was ok to say "I don't know" in response to a question rather than guessing or making something up, to let them know if she did not understand a question, and encouraged M.P. to correct them if they got

something wrong. RP 715. The detectives also went over the difference between a truth and a lie. RP 715.

While they interviewed M.P., Detective Carpenter noticed a change in M.P.'s demeanor from talking about general things to talking about the incident with Knight; when she discussed how she felt about the incident she dropped her head down and became sad. RP 717. M.P. also appeared embarrassed at times and angry at times. RP 717. M.P. told the detectives that Knight was tickling her, then lifted her up to put her on his lap and used his hand to rub her bottom in an up and down motion; he then asked her to kiss him. RP 717. While M.P. described this she appeared very embarrassed and sad; she was teary-eyed. RP 718.

M.P. told the detectives that she was at her friend K's house and K's uncle (Knight) was there, along with K's dad, Chris, and K. RP 721-22, 724. Chris left and K and M.P. watched a movie while sitting on the couch in the living room. RP 727. Knight was also in the living room sitting in a chair playing on the computer. RP 727. At some point K left the room. RP 728. M.P. said she got up to go check on K when Knight, who was sitting on a chair at the computer, grabbed her around the waist in a bear-hug type fashion and tickled her hard. RP 730-31. M.P. told Knight to stop and he then lifted her up onto his lap and then touched her butt. RP 732. M.P. described the touching as "rubbing up and down my

butt." RP 732. M.P. said Knight then turned her around and asked her to kiss him. RP 732. M.P. said she then jumped off his lap and went over to the couch and that Knight told her "don't tell anyone or I'll get in trouble." RP 748.

When M.P. demonstrated to the detectives how Knight touched her she used a cupping motion and used the words "up and down." RP 756. M.P. described the touching by Knight to the detectives several times. She described Knight as "rubbing on [her] butt," and "rubbing, like, up and down like this." RP 732-33. M.P. also indicated Knight touched her bottom with his hand and "it felt weird and [she] didn't like it." RP 735. M.P. further described that Knight's hand went "up and down" and got "closer and closer to her perineum." RP 741. M.P. defined a "perineum" as being "the little crack in between your butt and your pee-pee." RP 741. M.P. indicated that every time Knight's hand went down it got closer to her perineum. RP 742. This touching made M.P. upset and scared. RP 742. M.P. described to the detectives that she got off Knight's lap and waited on the couch until K's dad, Chris, got home and then she left. RP 737. As she left, Knight called her over and asked if they were still friends. RP 738.

Detective Carpenter talked to Knight during her investigation and he told her his birthdate is August 24, 1985. RP 716. The State admitted

into evidence as exhibit 22 a certified copy of Knight's Washington State driver's license. RP 716-17. The license indicates Knight's date of birth is August 24, 1985. RP 717.

ARGUMENT

I. The trial court did not abuse its discretion in admitting M.P.'s statements to her mother and the detectives pursuant to RCW 9A.44.120.

Knight alleges the trial court abused its discretion in admitting statements by the victim pursuant to RCW 9A.44.120. The trial court properly considered the relevant legal standard and the record and properly admitted M.P.'s statements at trial. Knight's claim fails.

On appeal, the Court reviews a trial court's admission of a child's statements under RCW 9A.44.120 for a manifest abuse of discretion. *State v. Beadle*, 173 Wn.2d 97, 112, 265 P.3d 863 (2011); *State v. Hischfield*, 99 Wn.App. 1, 3, 987 P.2d 99 (1999). A trial court abuses its discretion "only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). Knight argues the trial court below abused its discretion in finding the statements M.P. made to her mother and to the detectives in this case were admissible under RCW 9A.44.120.

RCW 9A.44.120 provides that statements made by a child victim who is under the age of ten, that describe any act of sexual contact are admissible in criminal proceedings if the court finds that the time, content and circumstances of the statement provide sufficient indicia of reliability and the child either testifies, or is unavailable and there is corroboration. RCW 9A.44.120. The trial court below admitted M.P.'s statements to her mother and the two detectives pursuant to this statute. M.P. was available and testified at trial. Knight was able to fully confront M.P. about her testimony on the stand and her statements to her mother and the detectives. The trial court properly found the time, content and circumstances of the statements M.P. made were reliable and admissible under RCW 9A.44.120.

The statements made by M.P. were reliable as contemplated by the statute. Case law has interpreted the meaning of RCW 9A.44.120 and our appellate courts have given trial courts several criteria to consider in determining the reliability of a child victim's statements. A trial court should consider whether there is an apparent motive to lie, the general character of the victim, whether more than one person heard the statements, whether the statements were made spontaneously, the timing of the declaration and the relationship between the declarant and the witness, whether the possibility of the declarant's faulty recollection is

remote, and whether the circumstances surrounding the statements are such that there is no reason to suppose the declarant misrepresented the defendant's involvement. *State v. Ryan*, 103 Wash.2d 165, 691 P.2d 197 (1984); *State v. Parris*, 98 Wash.2d 140, 654 P.2d 77 (1982); *State v. Karpenski*, 94 Wn. App. 80, 971 P.2d 553 (1999); *State v. C.J.*, 148 Wa.2d 672 (2003).

There is no magic number of these factors that need to be met before the statements are found to be reliable. The Supreme Court has noted that "not every factor listed in *Ryan* needs to be satisfied before a court will find a child's hearsay statement reliable under the child hearsay statute." *State v. Swan*, 114 Wash.2d 613, 652, 790 P.2d 610 (1990). The court must determine whether the factors have been substantially met. *See State v. McKinney*, 50 Wn. App. 56 (1987). In *State v. Grogan*, 147 Wn.App. 511, 195 P.3d 1017 (2008), a first degree child molestation case, the trial court did not abuse its discretion by admitting statements the child gave to defendant's step-daughter regarding the abuse because there was no indication of a motive for the child to lie, the child was a generally truthful child and the statements were spontaneous. Although three of the *Ryan* factors did not indicate reliability, the factors were found to be substantially met. *State v. Grogan*, 147 Wn. App. 511 (2008).

Knight argues the trial court improperly found that M.P. was competent to testify. However, "a child's competence to testify at trial is not relevant to the issue of whether hearsay statements are admissible." *State v. Borboa*, 157 Wn.2d 108, 120, 135 P.3d 469 (2006). The admission of a child's statements under RCW 9A.44.120 does not depend on the child's competency to testify at trial, but on whether the comments and circumstances surrounding the statement indicate it is reliable. *C.J.*, 148 Wn.2d at 685. Furthermore, the trial court was in the best position to determine competency. The determination of a child's competency rests "primarily with the trial judge who sees the witness, notices his manner, and considers his capacity and intelligence [,] ... matters that are not reflected in the written record for appellate review." *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)) M.P. was 10 years old at the time of the second trial. RP 670. All witnesses are presumed competent to testify. RCW 5.60.050. Age is not a proper criterion to determine the competency of a witness. *State v. Allen*, 70 Wn. 2d 600, 1967 (citing *State v. Smith*, 3 Wn.2d 543 101 P.2d 298 (1940)). From M.P.'s testimony at the 9A.44.120 hearing and at the trial, it is clear she was fully competent to testify; she understood the questions and was able to respond appropriately. M.P. was clearly competent based on all the surrounding circumstances and Knight's attorney appropriately did not contest this

finding. Furthermore, the trial court saw M.P., saw her demeanor and heard her testimony at the 9A.44.120 hearing and found that her competency was "obvious." RP 108. The trial court properly found she was clearly competent to testify and no legitimate argument could be made that M.P. was not competent to testify.

Knight argues that M.P. had a clear motive to lie about his involvement. However, at the 9A.44.120 hearing no evidence supporting M.P. having a motive to lie about Knight's involvement ever came out. Even the court noted that there was no evidence M.P. had any motive to lie. RP 109. M.P. and her mother never testified about anything that would give rise to an inference that M.P. had a motive to lie, and Knight did not testify at the 9A.44.120 hearing. At trial, the testimony only supported a finding that M.P. and M.P.'s family had no negative feelings towards Knight prior to this incident. M.P.'s mother had never met Knight before and she testified that she liked Knight's brother and the brother's girlfriend, her neighbors. RP 650. M.P. testified at trial that K and A were her closest friends and she did not get to play with them anymore after this incident occurred. RP 672-73. The evidence only shows that M.P. had no motive to lie about Knight's involvement in this case as her coming forward lost her her closest playmates and friends.

One of the factors to consider is whether more than one person heard the statements the child made that are sought to be admitted into evidence. M.P.'s statements, under this criteria, show particular reliability as her statements to her mother, though made only to one person, were then repeated that same day to two separate police officers. M.P.'s statements to police officers were also recorded. This factor weighed heavily in favor of admitting M.P.'s statements.

Knight further argues the statements M.P. made were not "spontaneous." For purposes of the child hearsay analysis, a "spontaneous" statement is a statement that a child volunteers in response to questions that are not leading and do not in any way suggest an answer. *State v. Carlson*, 61 Wn.App. 865, 872, 812 P.2d 536 (1991). Unlike an excited utterance, the statements need not be contemporaneous with the event in question. *Id; State v. Young*, 60 Wn. App. 95 (1991). M.P.'s statements to her mother were clearly "spontaneous" as meant by case law. M.P.'s mother had no idea what M.P. was about to disclose, and did not contemplate she was about to hear her child had been molested. Further, M.P.'s mother asked an open-ended, non-leading question, asking her daughter to tell her what was going on because M.P. was acting weirdly. M.P.'s statements to the detectives were also "spontaneous" as meant by the statute. The detectives testified, and the admitted recording

corroborates, they asked open, non-leading questions of M.P. M.P. is the one who volunteered the information and statements regarding the molestation. None of the detectives' questions in any way suggested an answer. M.P.'s statements here were "spontaneous" and thus this factor weighs in favor of admission of M.P.'s statements.

Knight also argues that the timing of M.P.'s disclosure also favors exclusion. Knight argues that M.P. got in trouble from Knight and that is what prompted the disclosure. However no evidence of M.P. getting in trouble was presented at the 9A.44.120 hearing; the court did not have this allegation to consider. Furthermore, M.P. disclosed to her mother within an hour of the molestation occurring, and discussed the incident with police that same day. No significant period of time passed in which M.P.'s memory was likely to fade. Furthermore, she disclosed to the person with whom she was most comfortable, and closest to, at a time when she was clearly having a difficult time emotionally processing what had happened to her. The circumstances surrounding her disclosure to her mother show only that these statements were reliable.

The factor of M.P.'s recall potentially being faulty heavily weighs in favor of admission. M.P. was not a more typical child molestation victim recalling events that happened months or years prior, but made statements about an incident that occurred only one hour prior to her

mother, and several hours prior to police. The likelihood of faulty recall about an event that occurred so close in time to when the statements were made is quite small.

A vast majority of the *Ryan* factors weigh heavily in favor of admission of M.P.'s statements to both her mother and to the detectives. The trial court indicated it was considering the *Ryan* factors and "indicia of reliability" and found that the statements M.P. made came "across with a fairly high level of indicia of reliability." RP 109. The trial court considered the proper law, considered the evidence with which it was presented, and properly found M.P.'s statements to her mother and the detectives was admissible under RCW 9A.44.120. The trial court clearly did not abuse its discretion and Knight's claim should be denied.

Even if this court finds that the trial court abused its discretion in admitting the statements M.P. made to her mother and the detectives, the error was harmless. The error in admission of a child's hearsay statements is one of constitutional magnitude, and thus constitutional harmless error analysis would apply. *State v. Rohrich*, 82 Wn.App. 674, 679, 918 P.2d 512 (1996). When an error is of constitutional magnitude, the error is harmless if "the untainted evidence is so overwhelming that it necessarily leads to the same outcome." *State v. Mayer*, 184 Wn.2d 548, 566, 362 P.3d 745 (2015) (citing *In re Pers. Restraint of Cross*, 180 Wn.2d 664,

688, 327 P.3d 660 (2014)). The statements M.P. made to her mother and the detectives were markedly similar to the testimony she gave at trial. The untainted evidence from M.P.'s mother and the detectives show a little girl who was emotionally upset, felt fear and shame about an incident that had occurred. This evidence along with M.P.'s testimony overwhelmingly shows Knight's guilt. Any error was harmless.

II. There was sufficient evidence to support Knight's conviction for child molestation in the first degree.

Knight claims the evidence presented at trial was insufficient to convict him of Child Molestation. There was more than sufficient evidence presented at trial that Knight touched M.P. for the purpose of sexual gratification. Knight's claim fails.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. Amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn.App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Evidence is sufficient if *any rational finder of fact* could have found the essential elements of the crime beyond a reasonable

doubt. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman,* 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

"Criminal intent may be inferred from circumstantial evidence or from conduct, where the intent is plainly indicated as a matter of logical probability." *State v. Billups*, 62 Wn.App. 122, 126, 813 P.2d 149 (1991) (citing *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983) and *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). The appellate court's role does not include substituting its judgment for the jury's by reweighing the credibility of witnesses or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "'It is not necessary that [we] could find the defendant guilty. Rather, it is sufficient if a reasonable jury could come to this conclusion.'" *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1358 (9th Cir. 1993) (overruled in part on other grounds by *United States v. Peterson,* 140 F.3d 819, 822 (9th Cir. 1998)) (quoting *United States v. Nicholson*, 677 F.2d 706, 708 (9th Cir. 1982)).

The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997) (*citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). "The fact finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn.App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

Knight argues there was insufficient evidence to prove that he touched M.P. for the purpose of sexual gratification because the touching was done over M.P.'s clothes. The type of touching M.P. described supports a rational jury finding Knight touched her in an intimate body part for the purpose of sexual gratification.

To prove Knight committed the crime of Child Molestation in the First Degree the State had to prove that he knowingly had "sexual contact" with M.P., a person who was less than the age of twelve and to whom Knight was not married and that Knight was at least thirty-six months older than M.P. RCW 9A.44.083. Knight only contests the element of "sexual contact" on appeal. In determining whether the sexual contact element of a child molestation charge has been satisfied, our appellate courts must look to the "totality of the facts and circumstances presented."

Harstad, 914 Wn.App. at 21 (citing *State v. Brooks*, 45 Wn.App. 824, 826, 727 P.2d 988 (1986)).

"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. RCW 9A.44.010(2). Intimate contact occurs when "a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper." *State v. Jackson,* 145 Wn.App. 814, 819, 187 P.3d 321 (2008). Body parts that are in "close proximity to the primary erogenous areas" can be considered intimate body parts. *In re Welfare of Adams,* 24 Wn. App. 517, 521, 601 P.2d 995 (1979). It is common sense that the buttocks are an intimate body part. *See In re Welfare of Adams,* 24 Wn.App. 517, 520, 601 P.2d 995 (1979) (stating "[a]s with the buttocks, we believe that the hips are a sufficiently intimate part of the anatomy that a person of common intelligence has fair notice that the nonconsensual touching of them is prohibited....").

Our Courts have held that 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. *State v. Wilson,* 56 Wash.App. 63, 68, 782 P.2d 224 (1989), *review denied,* 114 Wash.2d 1010 (1990); *State v. Ramirez,* 46 Wash.App. 223, 730 P.2d 98

(1986). However, in those cases in which the evidence shows touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas, the courts have required some additional evidence of sexual gratification. *See e.g., State v. Camarillo,* 115 Wash.2d 60, 63, 794 P.2d 850 (1990) (holding rubbing the zipper area of a boy's pants sufficient); *State v. Johnson,* 96 Wash.2d 926, 639 P.2d 1332 (1982) (finding that evidence that an unrelated male with no caretaking function wiped a 5–year–old girl's genitals with a wash cloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by his having her perform fellatio on him). In *State v. Harstad,* 153 Wn.App. 10, 218 P.3d 624 (2009), a child molestation case, the Court on appeal found the evidence was sufficient to show sexual gratification when the evidence showed the defendant "rubb[ed]" an intimate body part of the victim's. *Harstad*, 153 Wn.App. at 22. In *State v. Price,* 127 Wn.App. 193, 110 P.3d 1171 (2005), another child molestation case, the Court on appeal found the evidence was sufficient to support a finding of sexual gratification when the evidence showed the defendant rubbed the victim's vagina enough to cause redness and swelling. *Price*, 127 Wn.App. at 202.

In *State v. Powell,* 62 Wn.App. 914, 816 P.2d 86 (1991), the Court on appeal found that when the evidence at trial shows the touching

occurred through clothing there must be some additional evidence of sexual gratification. *Powell,* 62 Wn.App. at 918. However, the evidence in *Powell* showed that the touch was "fleeting" and "susceptible of innocent explanation." The facts involved in Knight's case are distinguishable from those in *Powell,* and are similar to those in *Harstad, supra* and *Price, supra.* The evidence at Knight's trial shows the touching M.P. described was in no way "fleeting" or "susceptible [to] innocent explanation." The additional evidence of Knight rubbing up and down on M.P.'s buttocks, getting closer and closer to her perineum each time his hand went down, and asking that she kiss him show that the touch was more than "fleeting" or "incidental." Knight clearly had a sexual motive by rubbing M.P. on an intimate body part and by asking her to kiss him.

For many reasons the evidence supports the jury's finding that Knight touched M.P. for sexual gratification: he was an unrelated adult with no caretaking function, his hand touched M.P. on her buttocks, into the crack of her butt cheeks and close to her perineum, the touching involved rubbing up and down, and Knight asked M.P. to kiss him immediately following the touching. There was overwhelmingly sufficient evidence to allow a rational trier of fact to find that Knight touched M.P. on an intimate body part for the purpose of sexual gratification, especially when all the evidence is taken in the light most favorable to the State.

Knight's arguments are almost exclusively based on his own testimony, ignoring the testimony of M.P. The jury as the trier of fact heard all the witnesses and determined which witnesses it found more credible. By finding Knight guilty of child molestation, the jury necessarily found that Knight touched M.P. for sexual gratification. The jury rejected Knight's version of events and thereby rejected any claim Knight had that the touching of M.P. was "susceptible of innocent explanation." Not only did the jury clearly reject Knight's version of events, but a sufficiency of the evidence claim admits the truth of the State's evidence and cannot be based on only the defendant's testimony. Knight used his hand to rub up and down on M.P.'s buttocks, going in between her butt cheeks and coming close to her perineum, and he asked her to kiss him. This touch is in no way fleeting or innocent. Knight clearly committed the crime of Child Molestation in the First Degree and the jury properly convicted him on sufficient evidence. Knight's claim fails.

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CONCLUSION

The trial court properly admitted the statements M.P. made to her mother and the detectives on the day the incident occurred pursuant to RCW 9A.44.120, and the jury properly convicted Knight of Child Molestation in the First Degree with sufficient evidence. Knights claims fail and the trial court should be affirmed in all respects.

DATED this 11 day of March, 2016.

Respectfully submitted:

ANTHONY F. GOLIK
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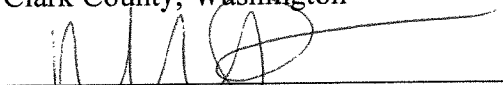
By: 

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CLARK COUNTY PROSECUTOR

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