No. 91650-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GEOFF SETH RYAN SAGUN,

Petitioner.

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

Cause No. 13-1-00315-5 / COA No. 46005-0-II

The Honorable Robert Lewis, Judge

PETITION FOR REVIEW

Geoff Seth Ryan Sagun, DOC 370721
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Geoff Seth Ryan Sagun asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this Petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), Petitioner seeks review of the Court of Appeals decision in State v. Geoff Seth Ryan Sagun, No. 46005-0-II, filed April 22, 2015. A copy of the order denying Petitioner's motion to modify and the commissioner's ruling is in the Appendix at pages A-1 through A-5.

C. ISSUE PRESENTED FOR REVIEW

> THE 6th & 14th AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE 1, SECTIONS 3 & 22 OF THE WASHINGTON STATE CONSTITUTION GUARANTEE THE EFFECTIVE ASSISTANCE OF COUNSEL. HERE, COUNSEL FAILED TO REQUEST A JURY INSTRUCTION ON A LESSER INCLUDED OFFENSE INSTRUCTION OF FOURTH DEGREE ASSAULT. DID COUNSEL'S ERROR PREJUDICE MR. SAGUN BY ALLOWING HIM TO BE SUBJECTED TO A TRIAL THAT WAS FUNDAMENTALLY UNFAIR?

D. STATEMENT OF THE CASE

1. Procedural Facts:

After a jury trial before the Honorable Robert Lewis in November 2013, petitioner Geoff Seth Ryan Sagun (Sagun) was found guilty of three counts of first degree child molestation and one count of indecent liberties for conduct involving A.K.G. For each count, the jury found the aggravating factor of "the offense was part of an ongoing pattern of sexual abuse of the

same victim." Clerk's Papers (CP) 230-35, 238-39. No exceptions or objections were taken to the jury instructions and Sagun's counsel did not propose a to-convict jury instruction on the lesser included offense of fourth degree assault. 6RP 539;[1] CP 189.

On February 21, 2014, the trial court sentenced Sagun to an indeterminate sentence of 300 months to life. CP 269; 7RP at 644.

Timely notice of appeal was filed on March 4, 2014. CP 293. On February 25, 2015, Eric B Schmidt, Court Commissioner, entered a ruling affirming Sagun's judgment and sentence. On March 10, 2015, Sagun filed a motion to modify the commissioner's ruling. On April 22, 2015, the Court of Appeals entered an order denying the motion to modify. This petition follows.

2. Testiony at Trial:

Sagun is the stepfather of A.K.G., who was born July 3, 1998. A.K.G. and her mother lived a chaotic life, characterized

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[1] The report of proceedings consists of seven volumes:

1RP - May 16, May 22, June 18, June 27, and August 15, 2013;
2RP - August 16, September 11, November 1, November 7, and November 14, 2013;
3RP - November 18 & 19, 2013, CrR 3.5 Suppression hearing and jury trial;
4RP - November 20, 2013, jury trial;
5RP - November 20, 2013, jury trial;
6RP - November 21, 2013, jury trial; and
7RP - February 5, February 21 (Sentencing), and March 4, 2014.

by frequent moves between Oregon and Washington, and involvement by Child Protective Services. 3RP 202, 268, 269, 387, 390. A.K.G. testified that while she lived with her mother, brother and Sagun in Woodland, Washington in 2008, Sagun engaged in sexual contact with her on several occasions. 3RP 233. She testified that Sagun "spooned" with her while watching television on a couch, and that he put his hand down her pants while holding her down. 3RP 200, 223, 236, 240, 274. A.K.G. testified that Sagun also put his hand up her shirt and tried to touch her breast, but that she prevented him from doing so. 3RP 241. A.K.G. also testified that during a separate incident, again while on a couch in the living room, Sagun attempted to take her hand and force her to put it down his pants. 3RP 242. She stated that she was able to stop him and that she did not see his penis and did not touch it. 3RP 242-43. She stated that she was trying to get away from him and that she was able to go to her room in the house to escape. 3RP 246. She stated that there were four incident in which he touched her or attempted to force her to touch him. 3RP 247.

A.K.G.'s mother, Khristina Johns, testified there was an incident in 2007 during which A.K.G. walked into her mother's bedroom and saw her mother and Sagun having sex, and that Sagun did not stop and that he looked at A.K.G. during this incident

5RP 424; 6RP 435. Ms. Johns also stated that Sagun would frequently walk around nude in front of A.K.G. Jason Olson, a former friend of Sagun's, testified that he saw A.K.G. and Sagun cuddled under a blanket on a couch at their house at Brush Prairie, Washington, on one occasion when he visited. 6RP 487-88. He stated that Sagun commented to him that A.K.G. had seen him naked and that Sagun thought it "was perfectly normal for him to walk that way -- walk around naked with a younger daughter -- stepdaughter in the house ...." 6RP 491.

A.K.G. was contacted by a police detective and she denied that she had made any accusations against Sagun. 4RP 256-57. At trial she testified that she had not told the truth when she denied that she had said that Sagun had had sexual contact with her. 3RP 191; 4RP 257.

Christopher Johnson, a psychologist, testified that some teenagers delay the reporting of sexual abuse, and that they do so for a variety of reasons. 5RP 315-16.

Sagun did not testify at trial. 6RP 529.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE SUPREME COURT SHOULD ACCEPT REVIEW AND DETERMINE WHETHER DEFENSE COUNSEL'S FAILURE TO REQUEST AN INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF FOURTH DEGREE ASSAULT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL. THIS CASE RAISES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW AND THE COURT OF APPEALS DECISION CONFLICTS WITH STATE v. GRIER, 171 Wn.2d 17, 246 P.3d 1260 (2011), AND SHOULD BE DETERMINED BY THE SUPREME COURT, RAP 13.4(b)(1)&(3).

A. Standard of Review

A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. Amends. 6, 14; Wash. Const., Art. 1, Sections 3 & 22. An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. State v. A.N.J., 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) whether counsel's performance fell below an objective standard of reasonableness, and, if so, (2) whether counsel's deficient performance prejudiced the defense. Strickland, 466 U.S. at 687-88; State v. Thomas, 109 Wn.2d at 226. There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive

the defendant of a fair trial." Strickland, 466 U.S. at 687.

If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. State v. Lord, 117 Wn.2d at 883; State v. McNeal, 145 Wn.2d 325, 362, 37 P.3d 280 (2002). However, a criminal defendant can rebut the presumption of reasonableness by showing that there "is no conceivable legitimate tactic that explains counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)(quoting State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). The relevant question is not whether counsel's choices were strategic or tactical, but whether they were objectively reasonable. State v. Grier, 171 Wn.2d at 33-34 (citing Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). To demonstrate prejudice, a defendant must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different." A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694).

B. Fourth Degree Assault is a Lesser-Included Offense of First Degree Child Molestation

Here, trial counsel was ineffective for failing to propose

a lesser included offense instruction for fourth degree assault where it was supported in both law and fact, and Sagun was prejudiced by counsel's error; therefore, reversal is required.

A defendant has a right to have a lesser included offense instruction presented to the jury. RCW 10.61.006; State v. Stevens, 158 Wn.2d 304, 310, 143 P.3d 817 (2006).

Citing Stevens, the Court of Appeals noted that "The parties agree that had Sagun's counsel requested lesser included offense instructions for fourth degree assault as to the child molestation counts, Sagun would have been entitled to those instructions." Ruling Affirming Judgment and Sentence, Appendix at pg. A-4. As such, here, there is no controversy over entitlement to the lesser included instruction; all parties agree that Sagun could have demonstrated the legal and factual prongs set forth in State v. Workmam, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), and therefore he was entitled to a to-convict jury instruction on fourth degree assault had counsel requested such an instruction.

C. Defense Counsel Unreasonably Failed to Request a Jury Instruction on the Lesser-Included Offense of Fourth Degree Assault

Trial counsel's failure to request a to-convict instruction for fourth degree assault constitutes deficient performance because there was evidence supporting an inference that Sagun assaulted A.K.G., but did not have sexual contact with her.

Here, the Court of Appeals rejected the State's contention that Sagun "may have elected for an "all or nothing" strategy in which he chose not to seek lesser included instructions. Grier, 171 Wn.2d at 43." Ruling Affirming Judgment and Sentence, Appendix at pg. A-4 (But there is no evidence in the record that Sagun and his counsel made a joint decision to pursue the "all or nothing" strategy). Instead, the Court of Appeals "assumed that Sagun's counsel's failure to request the lesser included instructions constituted deficient perforance," satisfying the first prong of the Strickland test, but nevertheless went on to hold that he failed to establish the second prong of the Strickland test (prejudice) because "Based on the evidence presented, there is no reasonable probability" that a jury could find that Sagun "touched A.K.G., thereby committing fourth degree assault, but did so without engaging in sexual contact with A.K.G., as required for first degree child molestation." Id. This reference is internally inconsistent with the Court's conclusion that enough evidence existed to give the lesser included offense instruction had it been asked for. Clearly if the instruction was given and there was evidence supporting non-sexual contact, it is reasonably probable the jury could have reached a different verdict.

Because the Court of Appeals acquiesced to deficient

performance, the only issue is whether the deficient performance was prejudicial and conflicts with State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). RAP 13.(4)(1)&(3).

D. Defense Counsel's Performance was Prejudicial

To demonstrate ineffective assistance of counsel, a defendant must show that defense counsel's representation was deficient and that the deficient performance prejudiced the defense. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing State v. Thomas, 109 Wn.2d at 225-226) (applying the two-pronged test in Strickland). To demonstrate prejudice, Sagun must show that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d at 226. Focusing "on the fundamental fairness of the proceeding whose result is being challenged" (Strickland, 466 U.S. at 696), it is evident that counsel's performance prejudiced Sagun to an extent that clearly undermines confidence in the outcome of his trial and creates a serious likelihood that justice was not served.

Assuming, as this Court must, that the jury would not have convicted Sagun of first degree child molestation unless

the State met its burden of proof (State v. Grier, 171 Wn.2d at 32-33), the availability of a compromise verdict is probable and could have changed the outcome of Sagun's trial. Only where acquittal was a realistic goal — is the decision not to tender a lesser included offense a tactical decision, not an error. Here, assuming it was counsel's decision and not a complete lack of judgment, the evidence clearly demonstrates A.K.G. was touched, but the larger question for the jury was whether the contact was sexual. Therefore, had Sagun argued that he was guilty at most of fourth degree assault, it would have established he was not guilty of sexual contact, i.e., first degree child molestation. And this probability is very reasonable based on the fact that the jury acquitted him of the more serious charges of rape of child in the first degree and rape/attempted rape in the second degree. CP 230-34, 238. A.K.G.'s credibility was clearly questionable in the minds of the jury as to the more serious charges, therefore, it is likely they may have also questioned the less serious ones had they been given other options. Based on the evidence presented, it would not be realistic for Sagun's counsel to claim A.K.G. was not touched; therefore, it was not a permissible exercise of trial strategy to not request a lesser included offense instruction.

Additionally, the difference in maximum penalties between

his child molestation convictions and convictions for fourth degree assault is tremendous. Because it is a gross misdemeanor, fourth degree assault carries a maximum jail term of one year. RCW 9A.36.041(2); RCW 9.92.020. In contrast, first degree child molestation is a level X offense. RCW 9.94A.515. The disparity in the punishment Sagun faced supports finding defense counsel rendered ineffective assistance by failing to present the jury with the option of convicting him of the lesser included offense of fourth degree assault, which placed Sagun in great risk that the jury would convict him because it found his spooning with A.K.G., and her assertion that he touched her by putting his hand down her pants and by putting his hand up her shirt while holding her down, to be inappropriate and disturbing, even if it did not find it was necessarily sexual in nature.

Here, because the State did not present any physical evidence corroborating A.K.G.'s testimony, the jury's determination of guilt turned almost entirely on the credibility of the complaining witness. By failing to request an instruction on fourth degree assault, Sagus's defense counsel placed him at risk that the jury would find A.K.G. credible in regard to their apprehension of Sagun touching her, even if not done for sexual gratification, thus finding him guilty of some offense, and resolving any doubts on the sexual nature

of Sagun's touching in favor of guilt. Clearly, the evidence introduced at trial left it likely that the jury would convict Sagun of some crime. Given the likelihood that they jury would find him guilty, and given the great disparity in punishment between first degree child molestation and fourth degree assault, it cannot be said that it was a legitimate trial strategy for trial counsel to fail to request that the jury be instruction on fourth degree assault.

Under these circumstances, defense counsel's failure to propose a lesser included offense instruction for fourth degree assault constitutes deficient performance and prejudice, contrary to the Court of Appeals' conclusion. Therefore, this Court should grant review and reverse Sagun's convictions.

E. The Court of Appeals Decision Conflicts with State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011)

This Court recently reaffirmed that a criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d at 33 (quoting State v. Reichenhach, 153 Wn.2d at 130). Significantly, Grier also recognizes that "not all strategies or tactics on the part of defense counsel are immune from attack." Id. Despite a clear case of deficient performance

and prejudice, the Court of Appeals ignored the "reasonable probability" test and failed to focus on "the fundamental fairness of the proceeding whose result is being challenged." Strickland, 466 U.S. at 694 & 696. Related to a potential guilt verdict for fourth degree assault, the court stated "... for a jury to so find, it would have to find that Sagun touched A.K.G., ..., but did so without engaging in sexual contact with A.K.G., ... Based on the evidence presented, there is no reasonable probability of a jury doing so. Sagun fails to demonstrate ineffective assistance of counsel." Ruling Affirming Judgment and Sentence, Appendix pg. A-4.

This decision conflicts with Grier because it presupposes the presumption of reasonable performance and prejudice can never be rebutted when the evidence supports giving a lesser included offense, but at the same time also supports the greater offense. However, when the evidence goes both ways, it cannot be said, like the Court of Appeals concludes, that "there is no probability of a jury doing so," i.e., find guilt for the lesser included offense. The conflict arises here, because the Court of Appeals is not capable of second guessing the "probability" of a verdict a reasonable juror may have rendered had the lesser included offense been given as an option. If the Court of Appeals is correct in its conclusion (i.e., ability to guess), then no case will ever suffer prejudice from

deficient performance when counsel fails to request a lesser included offense and the evidence actually supported it. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d at 226.

Sagun contends that its fundamentally unfair for the Court of Appeals to base its "confidence" in the outcome of a potential verdict on pure speculation when the evidence goes both for and against guilt on a lesser included offense instruction that should have been given. When the lesser included offense should have been given, guilt or innocence lies with the province of the jury -- not the Court of Appeals. Grier allows the Court of Appeals to supplant its confidence in a particular outcome instead of focusing on whether it was unfair for Sagun's jury to be deprived of the opportunity to hear and decide based on the evidence and instructions presented. Strickland, 466 U.S. at 694-96. This invasion conflicts with Strickland and Sagun's right to a fair trial.

This Court should grant review and revisit the decision in Grier and clarify whether prejudice can ever be established when there is enough evidence to support giving a lesser included offense instruction that was not given, and whether a guilty verdict on the greater offense automatically precludes prejudice where the evidence goes both ways. RAP 13.4(b)(1).

F. CONCLUSION

The right to effective assistance of counsel is "fundamental to, and implicit in, any meaningful modern concept of ordered liberty." State v. A.N.J., 168 Wn.2d 91, 96, 225 P.3d 956 (2010). This case raises a significant constitutional question, and question as to whether the Court of Appeals' decision conflicts with State v. Grier and Sagun's right to a fair trial, as well as a conflict with Strickland v. Washington, 466 U.S. at 694-96. RAP 13.4(b)(1)&(3). Additionally, because these conflicts infringe upon "any meaningful modern concept of ordered liberty," Sagun's petition involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

This Court should accept review, clarify State v. Grier and its harmony with Strickland and Sagun's right to a fair trial, reverse the Court of Appeals' decision affirming the judgment and sentence, and remand the case to the trial court for a new trial.

DATED this 23 day of June, 2015.

Respectfully Submitted,

Geoff Seth Ryan Sagun DOC 370721
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State v. Geoff Seth Ryan Sagun,
S.Ct. No. 91650-1 / COA No. 46005-0-II

CERTIFICATE OF SERVICE/MAILING

I, GEOFF SETH RYAN SAGUN, hereby certify and declare that I served a true and correct copy of the following document(s): PETITION FOR REVIEW, on opposing cosunel, as follows:

(X) U.S. Mail First Class Postage Prepaid
Deposited in the AHCC/Prison Mailbox-Legal Mail

( ) United Parcel Service, Next Day Air
( ) ABC/Legal Messenger
( ) Inter-Institution Mail/AHCC
( ) Hand Delivered By:

TO: Rachael Rogers Probstfled, WSBA No. 37878
Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
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I, GEOFF SETH RYAN SAGUN, certify and declare under penalty of perjury under the laws of the State of Washington and the United States of America that the foregoing is true and correct.

EXECUTED this 23 day of June, 2015, at Airway Heights, Spokane County, Washington.

X
Geoff Seth Ryan Sagun, DOC370721 / RA41L
Airway Heights Corrections Center
P.O. Box 2049
Airway Heights, WA 99001-2049

APPENDIX

1) Order Denying Motion to Modify, April 22, 2015; and (A-1)

2) Ruling Affirming Judgment and Sentence, February 25, 2015. (A-2 thru A-5)

APPENDIX
A-1 thru A-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. GEOFF SAGUN, Appellant.	No. 46005-0-II ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated February 25, 2015, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 22nd day of April, 2015.

PANEL: Jj. Bjorgen, Worswick, Lee

FOR THE COURT:

Bjorgen, A.C.J.

ACTING CHIEF JUDGE

FILED
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DIVISION II
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A-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON,

Respondent,

v.

GEOFF SETH RYAN SAGUN,

Appellant.

No. 46005-0-II

RULING AFFIRMING JUDGMENT AND SENTENCE

Geoff Sagun appeals from his convictions for three counts of first degree child molestation and one count of indecent liberties, arguing that he received ineffective assistance of counsel when his counsel did not request lesser including jury instruction for fourth degree assault. He raises additional issues in his Statement of Additional Grounds (SAG). This court considered his appeal as a motion on the merits under RAP 18.14. Concluding that he has not shown he received ineffective assistance of counsel and that his additional issues lack merit, this court affirms Sagun's judgment and sentence.

A.G., Sagun's former stepdaughter, testified that in 2008, when she was 10 years old and was living with Sagun, her mother and her brother, Sagun engaged in sexual contact with her on a number of occasions. Those incidents included Sagun: (1) putting his hands inside her pants, putting his fingers inside and moving his fingers around; (2)

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touching her breasts underneath her clothes; (3) again touching her inside her pants; (4) putting her hands inside his pants; and (5) while unsuccessfully attempting to unbutton her pants, again touching her breasts. On each occasion, she told Sagun to stop and no one else was in the house. When first contacted by police, she denied having made any allegations against Sagun. She testified that she was not telling the truth when she first spoke with the police.

The State charged Sagun with one count of first degree rape of a child, three counts of first degree child molestation, one count of rape in the second degree, one count of indecent liberties, and one count of attempted second degree rape. Sagun did not request lesser included jury instructions for fourth degree assault as to the child molestation counts. The jury found him guilty of the three counts of first degree child molestation and the one count of indecent liberties, but acquitted him on the remainder.

Sagun argues that he received ineffective assistance of counsel because his trial counsel did not request lesser included instructions for fourth degree assault as to the three child molestation counts. To establish ineffective assistance of counsel, Sagun must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that as a result of that deficient performance, the result of his case probably would have been different. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This court presumes strongly that trial counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014).

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The parties agree that had Sagun's counsel requested lesser included instructions for fourth degree assault as to the child molestation counts, Sagun would have been entitled to those instructions. *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) (fourth degree assault is a lesser included crime as to second degree child molestation). Sagun contends that there is no legitimate reason for his trial counsel not to have requested those instructions. The State responds that Sagun may have elected for an "all or nothing" strategy in which he chose not to seek lesser included instructions. *Grier*, 171 Wn.2d at 43. But there is no evidence in the record that Sagun and his counsel made a joint decision to pursue the "all or nothing" strategy.

Even assuming that Sagun's counsel's failure to request the lesser included instructions constituted deficient performance, Sagun fails to establish the required resulting prejudice. He must show that had the lesser included instructions been requested and given, there it is probable that the jury would have found him guilty of fourth degree assault, rather than first degree child molestation, as to one of the counts. But for a jury to so find, it would have to find that Sagun touched A.G., thereby committing fourth degree assault, but did so without engaging in sexual contact with A.G., as required for first degree child molestation. Based on the evidence presented, there is no reasonable probability of a jury doing so. Sagun fails to demonstrate ineffective assistance of counsel.

Sagun raises two issues in his SAG. First, he contends that the investigating officer should not have been allowed to sit at counsel table during the other witnesses' testimony. But the State is permitted to have an investigating officer at counsel table, even if that officer later testifies. *State v. Grant*, 77 Wn.2d 47, 54, 459 P.2d 639 (1969).

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Second, he contends that the State's witnesses met with the deputy prosecutor and the investigating officer in a conference room prior to their testimony, during which inappropriate laughter could be heard. But he does not show how this conduct affected his trial. The issues Sagun raises in his SAG lack merit.

Because Sagun's appeal raises issues that are clearly controlled by settled law, it is clearly without merit under RAP 18.14(e)(1). Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Sagun's judgment and sentence are affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 25th day of February, 2015.

Eric B Schmidt

Eric B. Schmidt
Court Commissioner

cc: Peter B. Tiller
Rachael R. Probstfeld
Hon. Robert Lewis
Geoff S. Sagun

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