

original

NO. 35418-7-II

Comm

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON
Respondent,

v.

ALFREDO WATZON POZO,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 06-1-00679-0
The Honorable Thomas J. Felnagle, Presiding Judge

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A. ASSIGNMENT OF ERROR

Mr. Pozo received ineffective assistance of counsel.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Does trial counsel render effective assistance where trial counsel fails to request the jury be instructed on a lesser included crime?

C. STATEMENT OF THE CASE

Summary of testimony

3.5 hearing

Brent James Eggleston

Detective Eggleston works for the Lakewood Police Department.

RP 23. On February 5, 2006, Detective Eggleston was called into work and interviewed Mr. Pozo. RP 24-26.

When Detective Eggleston initially contacted Mr. Pozo, Mr. Pozo was in a holding cell. RP 26. Mr. Pozo was not in handcuffs and, as far as Detective Eggleston knew, was not under arrest. RP 26. Detective Eggleston performed a pat-down search on Mr. Pozo then took Mr. Pozo to an interview room. RP 26. Before Detective Eggleston was able to advise Mr. Pozo of his *Miranda* rights, Mr. Pozo began speaking about the incident "in a rapid fashion." RP 26.

Detective Eggleston confirmed that Mr. Pozo was able to read and write English, then had Mr. Pozo read the advisement of rights card along

with Detective Eggleston as Detective Eggleston read the rest of the form out loud. RP 26-28. Mr. Pozo acknowledged his *Miranda* rights, agreed to talk to Detective Eggleston, and did not request an attorney. RP 28.

Detective Eggleston interviewed Mr. Pozo for an hour and a half. RP 30. At the end of the interview, Detective Eggleston arrested Mr. Pozo for Child Molestation in the First Degree and took Mr. Pozo back to the holding cell. RP 30-31.

Officer James Lofland

Officer Lofland is a police officer with the City of Lakewood. RP 44.

On February 5, 2006, Officer Lofland was called to a scene where he came into contact with Mr. Pozo in a parking lot. RP 44-45. When he arrived, Officer Lofland approached Mr. Pozo and observed that Officer Herritt was trying to talk to Mr. Pozo and that Mr. Pozo was crying. RP 45-46. Officer Lofland took custody of Mr. Pozo and attempted to calm him down while Officer Herritt went to speak to the person who had called the police. RP 46.

Officer Lofland spoke with Mr. Pozo and attempted to calm him down. RP 46-47. While Officer Lofland was speaking with Mr. Pozo, a supervisor arrived and it was determined that, due to the nature of the call and the age of the alleged victim, that Mr. Pozo should be taken to the

police station where he could be interviewed by an investigator. RP 48-49.

Officer Lofland transported Mr. Pozo to the police station. RP 49. Officer Lofland told Mr. Pozo he was not under arrest and did not handcuff him. RP 49. Officer Lofland read Mr. Pozo his *Miranda* rights, which Mr. Pozo indicated he understood, then Officer Lofland transported Mr. Pozo to the police station. RP 49-50. Upon arriving at the police station, Officer Lofland put Mr. Pozo into a holding cell. RP 50-51.

Officer Karen Herritt

Officer Herritt works for the Lakewood Police Department. RP 53. On February 5, 2006, Officer Herritt was working and came into contact with Mr. Pozo when she was dispatched on the report of a disturbance. RP 54-55. While en route to the scene, Officer Herritt learned that the nature of the call had changed to a call of a female who had witnessed her boyfriend molesting her nephew. RP 55.

When Officer Herritt arrived at the scene, Mr. Pozo approached Officer Herritt's vehicle with his arms raised and was crying, yelling, and talking very fast. RP 55. Officer Herritt spoke to Mr. Pozo for several minutes, but couldn't understand most of what he was saying. RP 55. Mr. Pozo told Officer Herritt that the boy had a mark on his buttocks and wanted Mr. Pozo to look at it, that Mr. Pozo had not done anything wrong

and hadn't touched the boy. RP 58.

Officer Herritt stopped talking to Mr. Pozo when other officers arrived at the scene. RP 55-56. Officer Herritt asked the other officers to stay with Mr. Pozo and then she went to Shurna, Mr. Pozo's girlfriend, in the people in the house. RP 56.

Officer Herritt spoke with Shurna for less than ten minutes. RP 56. After speaking with Shurna, Officer Herritt called her supervisor to find out how her supervisor wanted to handle the situation. RP 56.

Officer Brian Markert

Officer Markert works for the Lakewood Police Department. RP 62.

On February 5th, 2006, Officer Markert was dispatched to a call involving Mr. Pozo. RP 63. When Officer Marker first responded to the scene, Mr. Pozo was sitting on the bumper of a police vehicle with Officer Lofland standing nearby and Officer Herritt walking in between the vehicle and the residence. RP 64. Mr. Pozo was hysterical and was crying, yelling loudly, and gesturing. RP 64.

Officer Markert overheard Mr. Pozo tell Officer Lofland that the victim had wanted to show Mr. Pozo a mark on his buttocks, had pulled down his trousers, and then Ms. Gray walked into the room and thought that Mr. Pozo was molesting the boy. RP 64-65. Officer Market

overheard Mr. Pozo speak in accented English that Officer Markert could clearly understand. RP 65. After hearing this, Officer Markert went inside the residence and had no further contact with Mr. Pozo at the residence. RP 65.

Officer Market next had contact with Mr. Pozo early the next morning when Officer Markert transported Mr. Pozo from the police station to the Pierce County Jail. RP 65. When he learned he was being transported to the Pierce County Jail, Mr. Pozo became hysterical and told Officer Markert that he had not touched the victim's buttocks and that he was only masturbating. RP 66-67.

Michelle Breland

Ms. Breland works as a pediatric nurse practitioner in the Child Abuse Intervention Department at Mary Bridge Children's Hospital in Tacoma. RP 71-72. Ms. Breland performs medical exams on children who are suspected of having been abused. RP 72. One of the purposes of her evaluations is to gather evidence for a criminal prosecution. RP 86.

On February 6, 2006, Ms. Breland examined L.H. RP 76. Ms. Breland spoke with L.H. without L.H.'s parent or guardian present. RP 77. Prior to speaking to L.H., Ms. Breland had heard from L.H.'s mother that L.H.'s aunt had discovered Mr. Pozo masturbating while rubbing L.H.'s bottom and that L.H. had never made any statements or disclosure

of sexual abuse to his mother. RP 90.

Ms. Breland told L.H. that he was at the hospital for a checkup and that Ms. Breland understood something had happened to his body and asked L.H. what part of his body it had happened to. RP 79-80. L.H. pointed to his genital area and indicated he called his penis his private. RP 80. Ms. Breland asked L.H. what had happened and L.H. told Ms. Breland that his private had been touched by the hand of an adult boy. RP 80-81. L.H. told Ms. Breland that the man who touched him was named Alfredo and that L.H.'s mother knew Alfredo. RP 81-82. L.H. told Ms. Breland that it hurt when Alfredo touched him and L.H. asked Alfredo to stop but that Alfredo would not stop. RP 81-82. L.H. told Ms. Breland that the touching occurred in his room and had occurred twice. RP 81-82.

After speaking to L.H., Ms. Breland performed a physical examination of L.H. with L.H.'s mother in the room. RP 83.

Alfred Watzon Pozo

Mr. Pozo only completed school through the second grade, does not speak much English and can only read a little English. RP 116-117.

On February 5, 2006, Mr. Pozo was arrested at his girlfriend's house in Lakewood. RP 117. Mr. Pozo's girlfriend is named Jenna Gray. RP 117. When Mr. Pozo was detained he was not handcuffed. RP 118. Mr. Pozo was transported to the Lakewood Police Station where he was

put in a room with a door he could not open. RP 118-119.

While at the police station, Mr. Pozo signed an advisement of rights form, and Detective Eggleston advised Mr. Pozo of his *Miranda* rights. RP 121-123, CP 51-52. Mr. Pozo signed the advisement of rights form indicating that he understood his *Miranda* rights in English because the police told him he had to sign it that way. RP 124-125. Mr. Pozo answered yes on the advisement of rights form because he hadn't done anything wrong and wanted to get out of the police station. RP 125. Mr. Pozo did not understand what was written on the advisement of rights form and did not ask any questions because he does not like to ask questions. RP 124-126. Even if Mr. Pozo did not understand a question that Detective Eggleston asked him, Mr. Pozo was going to answer yes because he wanted to get out of the police station. RP 126-127.

Trial

Officer Karen Herritt

Karen Herritt is a Police Office for the City of Lakewood. RP 214.

On February 5, 2006, Officer Herritt was dispatched to a call regarding a sexual molestation at 9127 Washington. RP 217. En route to the call, the allegation changed to one of child molestation. RP 218.

When Officer Herritt arrived at the address, Mr. Pozo ran out at her waiving his arms to flag her down. RP 218. Officer Herritt got out of her

car and Mr. Pozo ran up to her and put his hands up. RP 219.

Mr. Pozo was crying, hysterical, speaking rapidly, and was difficult to speak to because he was so upset. RP 220. Mr. Pozo was speaking heavily accented English very fast. RP 220.

Officer Herritt spoke with Mr. Pozo for five minutes. RP 220. Mr. Pozo told Officer Herritt that L.H. had wanted to show Mr. Pozo a mark on L.H.'s butt and that Mr. Pozo had not stuck his finger in anyone's butt. RP 220. Mr. Pozo stated that all he had done was look at a mark on L.H.'s butt. RP 221. Mr. Pozo was cooperative and told Officer Herritt that he wanted to be tested. RP 235-237.

Officer Herritt stayed with Mr. Pozo until another officer arrived. RP 221. When Officer Lofland arrived, Officer Herritt went inside the residence with Ms. Gray. RP 221. Mr. Pozo was hysterical when Officer Herritt left. RP 220.

Ms. Gray was very angry and upset and was yelling at Officer Herritt what had happened. RP 222. Ms. Gray told Officer Herritt that she had gone upstairs and saw Mr. Pozo standing in L.H.'s bedroom. RP 225. Ms. Gray told Officer Herritt that L.H. was lying face down on the bed with his butt exposed. RP 225. Ms. Gray told Officer Herritt that Mr. Pozo was standing over L.H. facing the door with one hand on L.H.'s butt and masturbating with the other hand. RP 226.

After speaking to Ms. Gray, Officer Herritt called her supervisor. RP 228. Officer Herritt's supervisor determined that Detective Eggleston would come and talk to Mr. Pozo. RP 229. L.H.'s mother arrived and was very upset. RP 229.

Officer Brian Markert

Officer Markert works for the Lakewood Police Department. RP 246.

On February 5, 2006, Officer Markert was dispatched to an address on Washington Boulevard regarding a child molestation incident that was initially reported as a disturbance. RP 249. As Officer Markert was proceeding to the scene, Officer Herritt radioed that she was on scene and speaking with the suspect. RP 250. When Officer Markert arrived at the scene, he saw Officer Lofland near a patrol car speaking to Mr. Pozo. RP 250-251.

Mr. Pozo was speaking loudly in English and gesturing. RP 251. Officer Markert overheard Mr. Pozo say that L.H. wanted Mr. Pozo to look at a mark on L.H.'s butt and that Mr. Pozo was doing so when Ms. Gray walked into the room. RP 251. Officer Markert only spent a few moments with Mr. Pozo before he went inside the house. RP 251.

Officer Markert went into the house to see if Officer Herritt needed any help. RP 252. Officer Markert saw that Officer Herritt was speaking

to the person who called the police, Ms. Gray. RP 252. Officer Market asked where the victim was and Ms. Gray told Officer Market the victim was in the bedroom and led Officer Markert to the bedroom. RP 252. L.H. was sitting on the bed wearing pajamas and white socks. RP 252.

Officer Markert observed a tissue on the floor of the bedroom and went back to his vehicle to retrieve a digital camera. RP 253. While walking back to the house, Officer Markert saw L.H.'s mother drive into the parking lot and start running toward the house saying, "My baby, my baby." RP 253.

Officer Markert contacted L.H.'s mother inside the house and told her that the police needed to investigate what was going on inside the house, so L.H.'s mother went back outside. RP 254. L.H.'s mother agreed to allow the police to photograph inside the house and to collect evidence. RP 254.

Exhibits one through ten are pictures of the path from the outside of the house to L.H.'s bedroom. RP 255.

Later that evening, Officer Markert transported Mr. Pozo from the Lakewood Police Station to the Pierce County Jail. RP 256. As Officer Markert was transporting Mr. Pozo, Mr. Pozo said that he didn't touch any little boy's bottom and had just been masturbating. RP 262.

Shurna Gray

Ms. Gray met Mr. Pozo in August of 2004 and dated him for two years. RP 268-269. Ms. Gray's niece has two children: Z.H. and L.H. RP 272. Ms. Gray was around her niece's children all the time and used to babysit for her niece. RP 272.

On February 5, 2006, Ms. Gray watched the Superbowl at her niece's house while her niece went to watch the Superbowl at a friend's house. RP 274. Ms. Gray went to her niece's house to watch the kids. RP 274. Mr. Pozo accompanied Ms. Gray to her niece's house. RP 275.

When the Superbowl was over, Ms. Gray told L.H. to go up to his room and get ready for bed. RP 279. Ms. Gray and Mr. Pozo went out to smoke some cigarettes and move some of Ms. Gray's belongings in the garage. RP 275, 279. Mr. Pozo went back inside. RP 282. Ms. Gray went back inside the house to check on L.H. RP 282. When Ms. Gray went to L.H.'s room, she found the door to L.H.'s room open and discovered Mr. Pozo inside the room masturbating. RP 282. Mr. Pozo hadn't "jacked off" but was "on his way." RP 315.

Mr. Pozo had his right hand on his penis and his left hand on L.H.'s butt. RP 283. Ms. Gray said, "What's going on?" and started hitting Mr. Pozo. RP 283. Mr. Pozo pulled his pants up and said, "I'm sorry, it won't happen again, don't call the police." RP 283. Ms. Gray told Mr. Pozo to leave and that she was calling the police. RP 289.

Ms. Gray called the police and then called L.H.'s mother. RP 293.
Ms. Gray told L.H.'s mother that she needed to get home because Ms. Gray had caught Mr. Pozo messing with L.H. RP 293.

Officer James Lofland

Officer Lofland works as a police officer for the City of Lakewood. RP 330.

On February 5, 2006, Officer Lofland responded to a call at the 9100 block of Washington Boulevard. RP 332. Officer Lofland was the second officer on the scene. RP 332-333. Officer Herritt was already at the scene and was out of her vehicle and talking to Mr. Pozo. RP 333. Officer Lofland got out of his vehicle and approached Officer Herritt. RP 333. Officer Herritt asked Officer Lofland to take charge of Mr. Pozo. RP 333.

Mr. Pozo was very emotionally distraught. RP 333. Mr. Pozo was emotional and crying and was hard to understand because he had a foreign accent. RP 334. Officer Lofland had Mr. Pozo sit on the bumper of Officer Lofland's car while Officer Lofland tried to calm Mr. Pozo down. RP 335. Mr. Pozo told Officer Lofland that he hadn't done anything wrong and that all he had done was look at L.H.'s injury. RP 336.

Officer Lofland stayed with Mr. Pozo for about an hour until a supervisor decided that Mr. Pozo needed to speak to an investigator. RP

336. Officer Lofland then transported Mr. Pozo to the Lakewood Police Department. RP 336. Prior to transporting Mr. Pozo, Officer Lofland read Mr. Pozo his *Miranda* rights. RP 336.

Once Mr. Pozo arrived at the police station, Officer Lofland put Mr. Pozo in a holding cell. RP 338. Officer Lofland spoke with the detective, then took Mr. Pozo from the holding cell to the interview room. RP 338. After the interview was over, Officer Lofland escorted Mr. Pozo back to a holding cell. RP 338.

Officer Ralph Rocco

Officer Rocco works as a special assault unit investigator with the Lakewood Police Department. RP 347.

On February 5, 2006, Officer Rocco responded to an address in the 9100 block of Washington Boulevard. RP 348-349.

When Officer Rocco arrived, he was asked to interview Ms. Gray. RP 350. Officer Rocco gave a tape of the interview to Detective Eggleston. RP 352.

Dashikia Hardy

Ms. Hardy lives at 9127 Washington Boulevard in Lakewood. RP 355. Ms. Hardy has lived there for three years with her son, L.H. RP 355.

When Ms. Hardy is working and going to school, her Aunt, Ms. Gray, watches Ms. Hardy's kids. RP 357. Ms. Hardy has known Mr.

Pozo for a year as the boyfriend of her aunt, Ms. Gray. RP 358.

On February 5, 2006, Ms. Hardy watched the Superbowl at a friend's house in Renton. RP 358-359. Ms. Hardy asked Ms. Gray to watch her kids. RP 354.

As Ms. Hardy was driving home from the party, she got a call from Ms. Gray. RP 360. Ms. Gray told Ms. Hardy what was going on so Ms. Hardy called a neighbor to go over to Ms. Hardy's house. RP 361.

When Ms. Hardy arrived at her home the police were already there and Mr. Pozo was in the back of a patrol car. RP 362, 364. Ms. Hardy got out of her car and ran to her house but an officer stopped her and wouldn't let her go inside. RP 363. The police calmed Ms. Hardy down and had Ms. Hardy sit on a neighbor's porch. RP 363.

The next day Ms. Hardy took L.H. to Mary Bridge Hospital. RP 363. Ms. Hardy spoke with people at Mary Bridge about what had happened and a medical exam was done. RP 364.

Detective Brent Eggleston

Detective Eggleston works with the Lakewood Police Department in the special assault unit. RP 366-367.

On February 2, 2006, Detective Eggleston received a call telling him an alleged sexual had occurred in Lakewood involving a six-year-old boy and an adult male. RP 369. Detective Eggleston was told that that the

subject was in custody and willing to give a statement. RP 370. Detective Eggleston was told that Mr. Pozo was at the Lakewood headquarters so he responded there to interview Mr. Pozo. RP 369-370.

Detective Eggleston arrived at the station and spoke with officers who had responded to the scene to get some information about what was going on. RP 371. Detective Eggleston then contacted Mr. Pozo. RP 372.

Mr. Pozo was in a holding cell. RP 373. Detective Eggleston and Officer Lofland walked Mr. Pozo to the interview room. RP 374. Detective Eggleston explained that he was there to get Mr. Pozo's side of the story. RP 375. Mr. Pozo began talking about the case and Detective Eggleston had to stop Mr. Pozo in order to read Mr. Pozo his *Miranda* rights. RP 375.

Mr. Pozo was very upset and was speaking quickly. RP 376. Mr. Pozo was speaking English with a accent and told Detective Eggleston that he could read and write the English language. RP 377. Mr. Pozo was able to read the first line of the *Miranda* card to Detective Eggleston. RP 377. Mr. Pozo said that he understood his *Miranda* Rights and wanted to voluntarily answer questions. RP 379. Mr. Pozo signed the bottom of the *Miranda* card. RP 379. Mr. Pozo never asked Detective Eggleston to clarify anything and did not ask for a lawyer. RP 380.

Mr. Pozo said he had been babysitting with Ms. Gray, who was his girlfriend. RP 383. Mr. Pozo said that he was watching cartoons with L.H. in L.H.'s room when L.H. said something about his buttocks being itchy and asked Mr. Pozo to look at the itchy spot on L.H.'s buttocks. RP 384-385. Mr. Pozo stated that he called for Ms. Gray to come look but that L.H. told Mr. Pozo "no." RP 390. Mr. Pozo said that he asked L.H. to pull his pants down to where they were half way down his buttocks. RP 385.

Mr. Pozo noticed a small mark like a hickey on the upper left hand area of L.H.'s buttocks. RP 385. Mr. Pozo told Detective Eggleston that the hickey was not red but Mr. Pozo could not verbalize the color. RP 389. Mr. Pozo said that the fingers of both his hands were around the mark and that his hands were nowhere near L.H.'s "crack" RP 386-387. Mr. Pozo said that Ms. Gray walked in on him as he was examining L.H.'s buttocks, accused Mr. Pozo of touching L.H.'s butt and putting his finger in L.H.'s butt, and then started to hit him. RP 386-387.

Mr. Pozo stated that he was fully clothed, the light in the room was on, and the door to the room was open. RP 389.

When Detective Eggleston told Mr. Pozo that a tissue had been found in L.H.'s bedroom, Mr. Pozo said that he had masturbated to a cartoon while thinking about an ex-girlfriend. RP 391. Mr. Pozo initially

told Detective Eggleston that he had masturbated in L.H.'s bedroom while L.H. was in the bathroom outside the bedroom. RP 391-392. Mr. Pozo then changed his statement to he had gone into L.H.'s bedroom and L.H. came in and sat down and Mr. Pozo began masturbating with his penis pulled through his unzipped fly. RP 392.

Detective Eggleston asked if L.H. could have seen Mr. Pozo's penis and Mr. Pozo told Detective Eggleston that when he saw L.H. he covered his lap with both his hands and also covered his penis and closed his legs. RP 393. Mr. Pozo told Detective Eggleston that L.H. got onto the bed and began watching cartoons and Mr. Pozo slowly put his penis back into his pants and zipped up his fly. RP 394.

Mr. Pozo said that four or five minutes elapsed between the moment he stopped masturbating and the moment he began looking at L.H.'s buttocks. RP 395. Mr. Pozo denied masturbating to the point of ejaculation. RP 395.

At the end of the interview, Mr. Pozo was placed back into the holding cell and another officer arrived and took Mr. Pozo into custody. RP 398. Detective Eggleston told Mr. Pozo what he was under arrest for and that Mr. Pozo would be transported to the jail. RP 398. Mr. Pozo began to cry and stated that he didn't molest anyone. RP 398.

Michelle Breland

Ms. Breland is a pediatric nurse practitioner. RP 418. Ms. Breland works at Mary Bridge Children's Hospital in the Child Abuse Intervention Department. RP 419. Ms. Breland performs medical examinations on children where there have been allegations of sexual abuse. RP 419-420.

Ms. Breland described the process of how children are referred and examined by her at the hospital. RP 420-422.

On February 6, 2006, Ms. Breland examined L.H. RP 422. L.H. had been brought to the emergency room and the emergency room had referred L.H. to Ms. Breland. RP 423. Ms. Breland spoke with Ms. Hardy about what had happened. RP 423. After speaking with Ms. Hardy, Ms. Breland met with L.H. in the exam room. RP 425.

Ms. Breland told L.H. that she understood that something had happened to L.H. the day before and L.H. responded by showing Ms. Breland a healed scar and saying that he had been burnt. RP 429. Ms. Breland then asked L.H. who he was with the day before and L.H. did not answer. RP 429. Ms. Breland then asked L.H. if she understood correctly that something had happened to L.H. the day before and L.H. said yes but that he didn't want to talk about it. RP 429-430.

Ms. Breland told L.H. that it was important that she know some things about what had happened to his body so Ms. Breland could do a good checkup. RP 430. Ms. Breland then asked L.H. what part of his

body was the subject and what had happened. RP 430. In response, L.H. pointed to his genital area. RP 430. Ms. Breland asked L.H. if he had a name for that part of his body and L.H. shrugged his shoulders. RP 430. Ms. Breland told L.H. that some people call it a private and some people call it a penis and asked L.H. if he called it any of those things. RP 430. L.H. said "private." RP 430. Ms. Breland clarified that the private is the part that L.H. went pee with. RP 430-431.

L.H. said that his private hurt when he went to the bathroom. RP 431. L.H. said that his private hurt on the day of the examination and that it hurt the day before when he went pee. RP 431. L.H. told Ms. Breland that it had hurt when he went pee for a long time. RP 431.

Ms. Breland asked L.H. if he had any owies on his private and L.H. said he did. RP 431. L.H. did not know how the owies got there and that it didn't hurt when he went poop. RP 431.

Ms. Breland asked L.H. if she understood correctly that something had happened to his private the day before the exam and he said yes. RP 431. L.H. said that his private had been touched by an adult male hand. RP 432. L.H. said that Alfredo had touched his private and that it hurt and L.H. had asked Alfredo to stop but Alfredo wouldn't stop. RP 432. L.H. said that Alfredo did not do anything else to him that hurt. RP 432. L.H. also told Ms. Breland that Ms. Hardy had touched his private to check for

bruises. RP 432-433. L.H. also told Ms. Breland that Alfredo had no reason to touch L.H.'s private. RP 432-433.

After asking L.H. these questions, Ms. Breland performed a physical exam on L.H. RP 433. L.H. was healthy and had no bruising or and sign of any visible injury or bruises in his genital area or bottom. RP 434.

L.H.

L.H. was seven at the time of trial. RP 442. L.H. testified on July 24, 2006, but could not remember his birthday on June 26, 2006. RP 442. L.H. could not remember the name of his teacher the prior year at school. RP 443. L.H. believed that he lived in the city of Washington. RP 443.

L.H. did not know why he was in court to testify and did not remember the Superbowl. RP 445. L.H. did remember that the police came to his house because something happened to him, but L.H. couldn't testify about what happened because he didn't want to. RP 445-446.

L.H. testified that on the day the police came, something bad happened to him. RP 447. L.H. testified that a bad person did something "real, real bad" to him. RP 448. L.H. testified that something happened to his back and that he was fully clothed and his clothes were not off a little bit. RP 448. L.H. did not remember where the event occurred in his house and didn't remember what he was doing. RP 448.

L.H. stated that something was done to his spine and that a man sitting at a table in the courtroom in a brown shirt did it to him. RP 449. L.H. testified that he was downstairs watching T.V. when the event happened. RP 450.

L.H. testified that the man touched L.H.'s body with his hand. RP 451.

Factual and Procedural Background

Ms. Gray's niece has two children: Z.H. and L.H. RP 272. Ms. Gray was around her niece's children all the time and used to babysit for her niece. RP 272.

On February 5, 2006, Ms. Gray went to her nieces house to watch her niece's children while her niece went to a Superbowl party at a friend's house. RP 274. Mr. Pozo accompanied Ms. Gray to her niece's house. RP 275. Ms. Gray met Mr. Pozo in August of 2004 and dated him for two years. RP 268-269.

When the Superbowl was over, Ms. Gray told L.H. to go up to his room and get ready for bed. RP 279. Ms. Gray and Mr. Pozo went out to smoke some cigarettes and move some of Ms. Gray's belongings in the garage. RP 275, 279. Mr. Pozo went back inside. RP 282. Ms. Gray went back inside the house to check on L.H. RP 282. When Ms. Gray went to L.H.'s room, she found the door to L.H.'s room open and

discovered Mr. Pozo inside the room masturbating. RP 282.

Mr. Pozo had his right hand on his penis and his left hand on L.H.'s butt. RP 283. Ms. Gray said, "What's going on?" and started hitting Mr. Pozo. RP 283. Mr. Pozo pulled his pants up and said, "I'm sorry, it won't happen again, don't call the police." RP 283. Ms. Gray told Mr. Pozo to leave and that she was calling the police. RP 289. Ms. Gray called the police and then called L.H.'s mother. RP 293. Ms. Gray told L.H.'s mother that she needed to get home because Ms. Gray had caught Mr. Pozo messing with L.H. RP 293.

Officers Herritt, Lofland, Markert, and Rocco responded to the scene. RP 217, 249, 332, 348-349. When Officer Herritt arrived at the address, Mr. Pozo ran out at her waiving his arms to flag her down. RP 218. Officer Herritt got out of her car and Mr. Pozo ran up to her and put his hands up. RP 219. Mr. Pozo was crying, hysterical, speaking rapidly, and was difficult to speak to because he was so upset. RP 220. Mr. Pozo was speaking heavily accented English very fast. RP 220.

Officer Herritt spoke with Mr. Pozo for five minutes. RP 220. Mr. Pozo told Officer Herritt that L.H. had wanted to show Mr. Pozo a mark on L.H.'s butt and that Mr. Pozo had not stuck his finger in anyone's butt. RP 220. Mr. Pozo stated that all he had done was look at a mark on L.H.'s butt. RP 221. Mr. Pozo was cooperative and told Officer Herritt that he

wanted to be tested. RP 235-237.

Officer Herritt stayed with Mr. Pozo until another officer arrived. RP 221. When Officer Lofland arrived, Officer Herritt asked Officer Lofland to take charge of Mr. Pozo then went inside the residence with Ms. Gray. RP 221, 333. Mr. Pozo was hysterical when Officer Herritt left. RP 220.

Officer Lofland had Mr. Pozo sit on the bumper of Officer Lofland's car while Officer Lofland tried to calm Mr. Pozo down. RP 335. Mr. Pozo told Officer Lofland that he hadn't done anything wrong and that all he had done was look at L.H.'s injury. RP 336.

When Officer Markert arrived at the scene, he saw Officer Lofland near a patrol car speaking to Mr. Pozo. RP 250-251.

Mr. Pozo was speaking loudly in English and gesturing. RP 251. Officer Markert overheard Mr. Pozo say that L.H. wanted Mr. Pozo to look at a mark on L.H.'s butt and that Mr. Pozo was doing so when Ms. Gray walked into the room. RP 251. Officer Markert only spent a few moments with Mr. Pozo before he went inside the house. RP 251.

Officer Markert went into the house to see if Officer Herritt needed any help. RP 252. Officer Markert saw that Officer Herritt was speaking to the person who called the police, Ms. Gray. RP 252. Officer Market asked where the victim was and Ms. Gray told Officer Market the victim

was in the bedroom and led Officer Markert to the bedroom. RP 252.
L.H. was sitting on the bed wearing pajamas and white socks. RP 252.

Officer Markert observed a tissue on the floor of the bedroom and went back to his vehicle to retrieve a digital camera. RP 253. While walking back to the house, Officer Markert saw L.H.'s mother drive into the parking lot and start running toward the house saying, "My baby, my baby." RP 253.

Officer Markert contacted L.H.'s mother inside the house and told her that the police needed to investigate what was going on inside the house, so L.H.'s mother went back outside. RP 254. L.H.'s mother agreed to allow the police to photograph inside the house and to collect evidence. RP 254.

Exhibits one through ten are pictures of the path from the outside of the house to L.H.'s bedroom. RP 255.

Ms. Gray told Officer Herritt that she had gone upstairs and saw Mr. Pozo standing in L.H.'s bedroom. RP 225. Ms. Gray told Officer Herritt that L.H. was lying face down on the bed with his butt exposed. RP 225. Ms. Gray told Officer Herritt that Mr. Pozo was standing over L.H. facing the door with one hand on L.H.'s butt and masturbating with the other hand. RP 226.

After speaking to Ms. Gray, Officer Herritt called her supervisor.

RP 228. Officer Herritt's supervisor determined that Detective Eggleston would come and talk to Mr. Pozo. RP 229. L.H.'s mother arrived and was very upset. RP 229.

Officer Lofland stayed with Mr. Pozo for about an hour until a supervisor decided that Mr. Pozo needed to speak to an investigator. RP 336. Officer Lofland then transported Mr. Pozo to the Lakewood Police Department. RP 336. Prior to transporting Mr. Pozo, Officer Lofland read Mr. Pozo his *Miranda* rights. RP 336.

Once Mr. Pozo arrived at the police station, Officer Lofland put Mr. Pozo in a holding cell. RP 338. Officer Lofland spoke with the Detective Eggleston, then Officer Lofland and Detective Eggleston took Mr. Pozo from the holding cell to the interview room. RP 338, 374.

Detective Eggleston explained that he was there to get Mr. Pozo's side of the story. RP 375. Mr. Pozo began talking about the case and Detective Eggleston had to stop Mr. Pozo in order to read Mr. Pozo his *Miranda* rights. RP 375.

Mr. Pozo was very upset and was speaking quickly. RP 376. Mr. Pozo was speaking English with a accent and told Detective Eggleston that he could read and write the English language. RP 377. Mr. Pozo was able to read the first line of the *Miranda* card to Detective Eggleston. RP 377. Mr. Pozo said that he understood his *Miranda* Rights and wanted to

voluntarily answer questions. RP 379. Mr. Pozo signed the bottom of the *Miranda* card. RP 379. Mr. Pozo never asked Detective Eggleston to clarify anything and did not ask for a lawyer. RP 380.

Mr. Pozo said he had been babysitting with Ms. Gray, who was his girlfriend. RP 383. Mr. Pozo said that he was watching cartoons with L.H. in L.H.'s room when L.H. said something about his buttocks being itchy and asked Mr. Pozo to look at the itchy spot on L.H.'s buttocks. RP 384-385. Mr. Pozo stated that he called for Ms. Gray to come look but that L.H. told Mr. Pozo "no." RP 390. Mr. Pozo said that he asked L.H. to pull his pants down to where they were half way down his buttocks. RP 385.

Mr. Pozo noticed a small mark like a hickey on the upper left hand area of L.H.'s buttocks. RP 385. Mr. Pozo told Detective Eggleston that the hickey was not red but Mr. Pozo could not verbalize the color. RP 389. Mr. Pozo said that the fingers of both his hands were around the mark and that his hands were nowhere near L.H.'s "crack" RP 386-387. Mr. Pozo said that Ms. Gray walked in on him as he was examining L.H.'s buttocks, accused Mr. Pozo of touching L.H.'s butt and putting his finger in L.H.'s butt, and then started to hit him. RP 386-387.

Mr. Pozo stated that he was fully clothed, the light in the room was on, and the door to the room was open. RP 389.

When Detective Eggleston told Mr. Pozo that a tissue had been found in L.H.'s bedroom, Mr. Pozo said that he had masturbated to a cartoon while thinking about an ex-girlfriend. RP 391. Mr. Pozo initially told Detective Eggleston that he had masturbated in L.H.'s bedroom while L.H. was in the bathroom outside the bedroom. RP 391-392. Mr. Pozo then changed his statement to he had gone into L.H.'s bedroom and L.H. came in and sat down and Mr. Pozo began masturbating with his penis pulled through his unzipped fly. RP 392.

Detective Eggleston asked if L.H. could have seen Mr. Pozo's penis and Mr. Pozo told Detective Eggleston that when he saw L.H. he covered his lap with both his hands and also covered his penis and closed his legs. RP 393. Mr. Pozo told Detective Eggleston that L.H. got onto the bed and began watching cartoons and Mr. Pozo slowly put his penis back into his pants and zipped up his fly. RP 394.

Mr. Pozo said that four or five minutes elapsed between the moment he stopped masturbating and the moment he began looking at L.H.'s buttocks. RP 395. Mr. Pozo denied masturbating to the point of ejaculation. RP 395.

At the end of the interview, Mr. Pozo was placed back into the holding cell and another officer arrived and took Mr. Pozo into custody. RP 398. Detective Eggleston told Mr. Pozo what he was under arrest for

and that Mr. Pozo would be transported to the jail. RP 398. Mr. Pozo began to cry and stated that he didn't molest anyone. RP 398.

After the interview was over, Officer Lofland escorted Mr. Pozo back to a holding cell. RP 338. Later that evening, Officer Markert transported Mr. Pozo from the Lakewood Police Station to the Pierce County Jail. RP 256. As Officer Markert was transporting Mr. Pozo, Mr. Pozo said that he didn't touch any little boy's bottom and had just been masturbating. RP 262.

The next day Ms. Hardy took L.H. to Mary Bridge Hospital. RP 363. Ms. Hardy spoke with people at Mary Bridge about what had happened and a medical exam was done. RP 364.

Ms. Breland is a pediatric nurse practitioner and works at Mary Bridge Children's Hospital in the Child Abuse Intervention Department. RP 418-419. Ms. Breland performs medical examinations on children where there have been allegations of sexual abuse. RP 419-420.

On February 6, 2006, Ms. Breland examined L.H. RP 422. Ms. Breland spoke with Ms. Hardy about what had happened. RP 423. After speaking with Ms. Hardy, Ms. Breland met with L.H. in the exam room. RP 425.

Ms. Breland told L.H. that she understood that something had happened to L.H. the day before and L.H. responded by showing Ms.

Breland a healed scar and saying that he had been burnt. RP 429. Ms. Breland then asked L.H. who he was with the day before and L.H did not answer. RP 429. Ms. Breland then asked L.H. if she understood correctly that something had happened to L.H. the day before and L.H. said yes but that he didn't want to talk about it. RP 429-430.

Ms. Breland told L.H. that it was important that she know some things about what had happened to his body so Ms. Breland could do a good checkup. RP 430. Ms. Breland then asked L.H. what part of his body was the subject and what had happened. RP 430. In response, L.H. pointed to his genital area. RP 430. Ms. Breland asked L.H. if he had a name for that part of his body and L.H. shrugged his shoulders. RP 430. Ms. Breland told L.H. that some people call it a private and some people call it a penis and asked L.H. if he called it any of those things. RP 430. L.H. said "private." RP 430. Ms. Breland clarified that the private is the part that L.H. went pee with. RP 430-431.

L.H. said that his private hurt when he went to the bathroom. RP 431. L.H. said that his private hurt on the day of the examination and that it hurt the day before when he went pee. RP 431. L.H. told Ms. Breland that it had hurt when he went pee for a long time. RP 431.

Ms. Breland asked L.H. if he had any owies on his private and L.H. said he did. RP 431. L.H. did not know how the owies got there and

that it didn't hurt when he went poop. RP 431.

Ms. Breland asked L.H. if she understood correctly that something had happened to his private the day before the exam and he said yes. RP 431. L.H. said that his private had been touched by an adult male hand. RP 432. L.H. said that Alfredo had touched his private and that it hurt and L.H. had asked Alfredo to stop but Alfredo wouldn't stop. RP 432. L.H. said that Alfredo did not do anything else to him that hurt. RP 432. L.H. also told Ms. Breland that Ms. Hardy had touched his private to check for bruises. RP 432-433. L.H. also told Ms. Breland that Alfredo had no reason to touch L.H.'s private. RP 432-433.

After asking L.H. these questions, Ms. Breland performed a physical exam on L.H. RP 433. L.H. was healthy and had no bruising or and sign of any visible injury or bruises in his genital area or bottom. RP 434.

On February 9, 2006, Mr. Pozo was charged with child molestation in the first degree. CP 1-2.

A 3.5 hearing was held to determine the admissibility of Mr. Pozo's statements to the various police officers. RP 4, 22-142. A hearing to determine the admissibility of L.H.'s hearsay statements to Ms. Breland was also held. RP 12-13, 71-111. Additionally, a hearing was held to determine whether or not L.H. was competent to testify at trial. RP 142-

168.

The trial court found that all statements made by Mr. Pozo to police were admissible at trial. RP 142. The trial court found L.H.'s statements to Ms. Breland were admissible. RP 111. The trial court found that L.H. was competent to testify at trial. RP 166-168. No Findings of Fact, Conclusions of Law, or written Orders were entered regarding the 3.5 hearing, the admissibility of L.H.'s statements to Ms. Breland, or L.H.'s competency to testify.

The jury trial began on July 19, 2006. RP 214.

During the testimony of Officer Herritt, the State sought to have Officer Herritt testify as to what Ms. Gray told her. RP 225. Trial counsel for Mr. Pozo objected on grounds that such testimony was hearsay, but the trial court overruled the objection. RP 225.

L.H. was seven at the time of trial. RP 442. L.H. testified on July 24, 2006, but could not remember his birthday on June 26, 2006. RP 442. L.H. could not remember the name of his teacher the prior year at school. RP 443. L.H. believed that he lived in the city of Washington. RP 443.

L.H. did not know why he was in court to testify and did not remember the Superbowl. RP 445. L.H. did remember that the police came to his house because something happened to him, but L.H. couldn't testify about what happened because he didn't want to. RP 445-446.

L.H. testified that on the day the police came, something bad happened to him. RP 447. L.H. testified that a bad person did something “real, real bad” to him. RP 448. L.H. testified that something happened to his back and that he was fully clothed and his clothes were not off a little bit. RP 448. L.H. did not remember where the event occurred in his house and didn’t remember what he was doing. RP 448.

L.H. stated that something was done to his spine and that a man sitting at a table in the courtroom in a brown shirt did it to him. RP 449. L.H. testified that he was downstairs watching T.V. when the event happened. RP 450.

L.H. testified that the man touched L.H.’s body with his hand. RP 451.

The jury found Mr. Pozo guilty of one count of child molestation in the first degree. RP 502-504.

Notice of Appeal was timely filed on October 11, 2006.

D. ARGUMENT

It was ineffective assistance of counsel for trial counsel for Mr. Pozo to fail to request that the jury be instructed on the lesser included crime of fourth degree assault.

In order to show that he received ineffective assistance of counsel, a appellant must show (1) that trial counsel’s conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the

deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2005).

There is a strong presumption that defense counsel's conduct is not deficient, however, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, 153 Wn.2d at 130, 101 P.3d 80.

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

"Both the defendant and the State have a statutory right to have lesser included offenses presented to the jury." *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006), *citing* RCW 10.61.006.

An instruction on a lesser included offense is warranted when two conditions are met: "[f]irst, each of the elements of the lesser offense must be a necessary element of the offense charged[, and] [s]econd, the evidence in the case must support an inference that the lesser crime was committed." *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

1. An instruction on fourth degree assault was warranted in this case.
 - a. *Each of the elements of fourth degree assault are necessary elements of first degree child molestation.*

In *Stevens*, the court analyzed whether fourth degree assault was a lesser included crime of the crime of second degree assault. The court's analysis is applicable to the facts of this case as well.

Fourth degree assault is defined as an assault not amounting to assault in the first, second, or third degree, nor a custodial assault. RCW 9A.36.041(1). The term assault itself is not statutorily defined so Washington courts apply the common law definition. Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm. *Clark v. Baines*, 150 Wn.2d 905, 909 n. 3, 84 P.3d 245 (2004). For purposes of this case, the definition of assault that applies is an unlawful touching with criminal intent. Second degree child molestation requires a showing of sexual contact between the defendant and a victim who is at least 12 years old but less than 14 years old. Sexual contact is a touching of the sexual parts of a person for the purpose of sexual gratification. RCW 9A.44.010(2). Second degree child molestation, therefore, is a touching of the sexual parts of a 12 or 13 year old child for the purpose of sexual gratification. *Second degree child molestation necessarily includes the elements of fourth degree assault.* Thus, the legal prong of our inquiry is satisfied.

Stevens, 158 Wn.2d at 311, 143 P.3d 817 (emphasis added).

The only difference in the elements of second degree child

molestation and first degree child molestation is the ages of the parties involved. See RCW 9A.44.083 and RCW 9A.44.086. Thus, under *Stevens*, fourth degree assault is a lesser included offense of first degree child molestation.

- b. *The evidence in this case supported an inference that the lesser crime was committed.*

The evidence in this case consisted of Ms. Gray's testimony of what she saw when she walked into L.H.'s bedroom, the testimony of police officers regarding what Mr. Pozo told them happened, the testimony of Ms. Breland regarding what L.H. told her happened, and the testimony of L.H. himself. Mr. Pozo's defense was that he had been masturbating in L.H.'s bedroom but that when L.H. entered the room Mr. Pozo stopped masturbating and examined a mark on L.H.'s buttocks at L.H.'s request. RP 384-395. The evidence introduced at trial supported an inference that Mr. Pozo committed the crime of assault in the fourth degree rather than the crime of first degree child molestation.

2. In was ineffective assistance of counsel for Mr Pozo's trial counsel to fail to request that an instruction on fourth degree assault be given.

As discussed above, the giving of an instruction on fourth degree assault would have been proper since fourth degree assault is a lesser included offense of first degree child molestation and the facts of the case

warranted giving the instruction. Therefore, it was not objectively reasonable for Mr. Pozo's trial counsel to fail to request the instruction.

3. Mr. Pozo was prejudiced by his trial counsel's failure of request the jury be instructed on the lesser included offense of fourth degree assault.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). "Failure to give such instructions is prejudicial error." *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 976 P.2d 624 (1999).

Where there is evidence to support giving a lesser included offense instruction, failure to give it has never been held harmless. *State v. Parker*, 102 Wn.2d 161, 164, 683 P.2d 189 (1984). Here, because there was evidence to support instructing the jury on fourth degree assault, the failure of Mr. Pozo's trial counsel to request such an instruction prejudiced Mr. Pozo.

E. CONCLUSION

As stated above, it was ineffective assistance of counsel for Mr. Pozo's trial counsel to fail to request that the jury be instructed on fourth degree assault as a lesser included crime of first degree child molestation. This court should vacate Mr. Pozo's conviction and remand for a new trial.

DATED this 30th day of April, 2007.

Respectfully submitted,

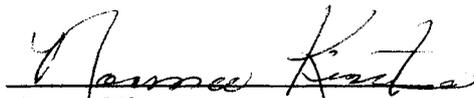


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CERTIFICATE OF SERVICE

The undersigned certifies that on April 30, 2007, she delivered by U. S. Mail to: the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and appellant, Alfredo Watzon-Pozo, DOC # 986917, Monroe Corrections Center, Special Offenders Unit (D Unit), Post Office Box 514, Mail Station No. B 84 Monroe, WA. 98282-0514, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on April 30, 2007.


Norma Kinter