

NO. 38807-3-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JASON CHARLES WELLS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 07-1-03182-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether counsel was ineffective where he chose to withdraw an instruction on a lesser included offense which would have been inconsistent with the defense strategy?
2. Whether counsel was ineffective if he chose to withdraw the instruction on a lesser included offense to pursue an acquittal only or "all or nothing" strategy?
3. Whether a trial court must instruct the jury on a lesser included offense where the defendant has specifically withdrawn it and the State has not requested it?
4. Whether a defendant has the right to pursue a defense strategy of acquittal only?
5. Whether the defendant has demonstrated prejudice resulting from allegedly deficient performance of trial counsel?
6. Whether trial counsel was ineffective where he proposed an instruction on voluntary intoxication that correctly stated the law?

B. STATEMENT OF THE CASE.

1. Procedure

On June 18, 2007, the state charged Jason Wells (hereinafter referred to as the defendant) with one count of child molestation in the first degree. CP 1-2. October 23, 2008, the State amended the charge to

attempted child molest in the first degree. On November 12, 2008, the case was assigned for trial to Hon. James Orlando. RP 1 ff. Before pretrial motions and jury selection, the State moved to withdraw the amended information and proceed to trial on the original charge: child molestation in the first degree. RP 9. The defendant agreed. *Id.* The jury found the defendant guilty as charged. CP 108. On January 9, 2009, the court sentenced the defendant. CP 142-156. The defendant filed a timely notice of appeal on January 29, 2009.

2. Facts

On June 15, 2007, Melissa and Dan Rosenberg decided to go out for an evening with friends. RP 252. The Rosenbergs had their neighbor, Becky Rosendahl, babysit their 5 year old daughter, B.R., and their year-old son. RP 252. The Rosenbergs met their friends at a nearby bar called “Q’s.” RP 253. The defendant, a friend of Dan’s from work, was at the bar with the group. RP 254, 283. The defendant and Dan were both in the Air Force at McChord Air Force Base in Pierce County. RP 283.

In the course of the evening at Q’s, the defendant and Dan Rosenberg became intoxicated. RP 255, 257, 289. Because the defendant was too intoxicated to drive, it was decided that he would sleep at the Rosenberg’s home. RP 257. Melissa Rosenberg drove Dan and the defendant to the Rosenberg’s home. RP 258.

Melissa Rosenberg pulled into the garage and went upstairs to tell the babysitter that she could go. RP 258. Dan and the defendant were making a loud commotion in the garage. RP 258. Melissa helped the defendant upstairs and put him in the guest room on a futon. RP 259. He was fully clothed. RP 259. For the time being, Dan remained on the garage floor. RP 293.

Later that morning, at approximately 8:30, Melissa went up to her son's room to check on him. RP 261. She noticed that B.R.'s bedroom door was open. *Id.* She looked in and saw that a man's pants were at the foot of the girl's bed. *Id.* Melissa entered and found the defendant in the twin bed with B.R. RP 261, 280. The defendant was naked. RP 261. He was partially covered by the sheet and comforter in the girl's bed. *Id.* B.R. was on her side, curled up in the fetal position. *Id.*

Melissa yelled at the defendant, asking him what he was doing. RP 262. She pulled the covers back and got the defendant out of B.R.'s bed. *Id.* Melissa saw that B.R.'s pajama bottoms and panties had been removed and were on the floor by the bed. *Id.* Melissa later found the defendant's watch on B.R.'s dresser and his underwear tangled in her bedding. RP 265.

Melissa's screams brought Dan Rosenberg upstairs. RP 295. He saw that his daughter was wearing no pajama bottoms or underwear. *Id.* He saw the defendant putting his pants on and had no underwear. RP 296. Dan asked the defendant if the defendant had touched B.R. RP 298. The defendant admitted that he had. *Id.*

The Rosenbergs kicked the defendant out of the house. RP 264. Dan called the police. RP 299. The Rosenbergs then took B.R. to Mary Bridge Children's Hospital for an examination. RP 267. There, a detailed interview was scheduled for a later date. RP 267.

Rebecca Rosendahl lived across the street from the Rosenbergs. RP 308. She provided daycare for the Rosenberg children and was very close to B.R.. RP 314. One day after school, Ms. Rosendahl noticed that B.R. seemed sad. RP 315. As this was unusual for the child, Ms. Rosendahl asked her if she was upset or worried. *Id.* B.R. did not immediately reply, but eventually described to Ms. Rosendahl how the defendant had gotten into bed with her and touched her. RP 316. B.R. went on to tell Ms. Rosendahl that the defendant tried to make her touch him also. *Id.* B.R. identified the defendant as "Jason." RP 317.

B.R. went to Mary Bridge Children's Hospital where she spoke with a forensic child interviewer and was examined by a nurse practitioner. RP 344, 386. B.R. told them that the defendant had removed his clothing and then hers. RP 369, 396. She told the nurse practitioner that the defendant had touched her "bottom," indicating her genitals. RP 395, 396. She said that they were in her bed lying down at the time. RP 369, 396. She also said that the defendant asked her to touch his body. RP 396.

C. ARGUMENT.

1. THE DEFENSE TACTICAL DECISION TO WITHDRAW THE PROPOSED JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF ASSAULT IN THE FOURTH DEGREE WAS REASONABLE.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *Thomas*, 109 Wn.2d at 225-26.

There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable

effect upon the trial's outcome do not establish a constitutional violation.

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489.

- a. Counsel's performance was not deficient where the defense made a strategic decision by choosing between inconsistent defenses.

Defense counsel decides what strategy will be followed in trial. *See State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). If defense counsel's conduct can be characterized as trial strategy or tactics, it cannot serve as a basis for a claim of ineffective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

Sometimes, counsel must choose between inconsistent defenses. When counsel does, such a choice is trial strategy, not ineffective assistance of counsel. *See State v. Mannering*, 150 Wn.2d 277, 287, 75 P.3d 961 (2003)(counsel not ineffective for failure to pursue defense of duress where it was inconsistent with defense of lack of intent); *State v. Benn*, 120 Wn.2d 631, 663-664, 845 P.2d 289 (1993), *federal habeas corpus later granted on other grounds*, *Benn v. Lambert*, 283 F. 3d 1040 (9th Cir. 2002)(counsel not ineffective for choosing to limit materials in

death penalty mitigation, where defendant originally denied all involvement); *State v. Johnson*, 113 Wn. App. 432, 493, 54 P.3d 155 (2002)(counsel not ineffective for failing to argue self-defense where defendant denied all involvement).

In the present case, the *mens rea* element of the charged crime, child molestation in the first degree, is intent. *State v. Stevens*, 158 Wn.2d 304, 309, 143 P.3d 817 (2005). The *mens rea* of assault in the fourth degree is also intent. *Id.* at 311. Here, the defense theory that voluntary intoxication prevented the defendant from forming the requisite intent would have applied to both child molestation in the first degree and assault in the fourth degree. Therefore, requesting an instruction on a lesser-included offense of assault in the fourth degree would be inconsistent with the defense theory. By arguing that the defendant committed the misdemeanor, defense counsel would run the risk of confusing the jury and/or conceding that the defendant had the ability to form the intent to commit a crime. The jury could conclude that the crime was that charged.

- b. After evaluating the evidence in the case, counsel made a strategic decision to withdraw the instruction on the lesser-included offense.

The decision of whether to request an instruction on a lesser-included offense is a matter of trial strategy. *See State v. Hoffman*, 116 Wn.2d 51,112, 804 P.2d 577 (1991); *United States v. Windsor*, 981 F.2d

943, 947 (7th Cir. 1992). The decision not to request a lesser-included instruction will not constitute ineffective assistance when requesting the instruction would conflict with a reasonable trial strategy. *Kubat v. Thieret*, 867 F.2d 351, 364-365 (7th Cir. 1989), *cert. denied*, 493 U.S. 874 (1989)(seeking lesser-included instruction in kidnapping case would conflict with alibi defense); *see also Moyer v. State*, 620 SE2d 837 (Ga. App. 2005); *Autrey v. State*, 700 N.E.2d 1140, 1141 (Ind. 1998)(a tactical decision not to tender a lesser included offense does not constitute ineffective assistance of counsel, even where the lesser included offense is inherently included in the greater offense).

It is not unusual for a defendant to complain to an appellate court when the defendant's choice of trial strategy fails. In *State v. Hoffman*, *supra*, the defendant was charged with aggravated murder in the first degree. There, as in the present case, the defense, after consultation between counsel and defendant, declined instructions on lesser included offenses and argued that the State had failed to prove the charge. After the jury convicted as charged, the defendant argued that the court should have instructed on the lesser offense anyways. The Supreme Court found no error by the trial court:

The defendants cannot have it both ways; having decided to follow one course at the trial, they cannot on appeal now change their course and complain that their gamble did not pay off. Defendants' decision to not have included offense

instructions given was clearly a calculated defense trial tactic...

116 Wn.2d at 112.

To prove an offense is a lesser included offense, the party requesting the instruction must meet a two prong inquiry. First, under the legal prong, all of the elements of the lesser offense must be a necessary element of the charged offense. Second, under the factual prong, the evidence must support an inference that the lesser crime was committed. *State v. Workman*, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978). The evidence “must raise an inference that only the lesser included/inferior degree offense was committed to the exclusion of the charged offense.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Moreover, “the evidence must affirmatively establish the defendant’s theory of the case-it is not enough that the jury might disbelieve the evidence pointing to guilt.” *Id.* at 456.

Here, assault in the fourth degree met the legal prong as a lesser included offense. *See State v. Stevens*, 127 Wn. App. 269, 110 P.3d 1179, *affirmed*, 158 Wn. 2d 304, 143 P.3d 817 (2005). However, although it appears the State had no objection to the instruction, it is questionable whether it met the factual prong. B.R. was unable to remember the defendant, the events, or making statements about him. RP 232-234. But, the defendant admitted touching her. RP 298, 322. This was unlikely enough evidence for the jury to find that the defendant committed only the

lesser offense, without disbelieving all the other evidence pointing toward guilt.

The factual weakness of the lesser only was acknowledged by defense counsel and the court. During the discussion regarding whether the lesser offense instruction on attempted child molestation should be given, defense counsel argued that, on the evidence heard, either the act charged was committed or it was not. RP 547. The court agreed that either the defendant touched the victim for sexual gratification or the defendant did not touch her. RP 549. The court later acceded to the State's argument. It also offered to give the assault in the fourth degree instruction. RP 551. It is apparent from this record that defense counsel and the court both felt that the State's case was "all or nothing."

- c. The record reflects that the decision to withdraw the instruction on the lesser included offense was strategic and made after a discussion between defendant and his counsel.

In the past, the Washington Court of Appeals has cautioned against speculating on the choices and reasons for strategies the defense pursues. In *State v. Norman*, 61 Wn. App. 16, 808 P.2d 1159 (1991), the defendant was charged with manslaughter for failing to obtain medical treatment for his diabetic son. The defendant was a member of an extremist religious group. After he was found guilty, he alleged counsel was ineffective for

failing to present a mental defense. The Court declined to consider the allegation without additional information:

The contentions now made would require us to make a determination of the truth of defendant's *ex parte* post trial claims concerning matters occurring out of court. For all we know, an evidentiary hearing would disclose that the defendant's present statements are controverted and that the decisions made concerning trial management were tactical decisions of trial counsel in discharge of his duty to best represent the defendant. If there be a basis for the claims now made in an effort to show that, after considering the entire record, the accused was denied a fair and impartial trial, that basis must be established in a separate proceeding, the merits of which we do not prejudge.

61 Wn. App. at 27, quoting *State v. Humburgs*, 3 Wn. App. 31, 36-37, 472 P.2d 416 (1970). Inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's handling of a case, including trial decisions. *Strickland v. Washington*, 466 U.S. at 691.

In the present case, the record reflects that the defense made a decision regarding instructions on lesser included offenses, and chose to withdraw the proposed instruction regarding the lesser included offense of assault in the fourth degree. The defense originally proposed instructions regarding assault in the fourth degree as a lesser included offense. CP 70,71,72, 74, 75. After the State rested, the defendant's motion to dismiss was denied. RP 468. During an ongoing discussion regarding jury instructions, defense counsel told the court that he still intended to request the instruction on the lesser offense, but that he might withdraw it. *Id.* Later, after the defense rested, the discussion of jury instructions

continued. At that time, defense counsel told the court that he would withdraw the instructions on assault in the fourth degree. RP 541.

The parties later argued regarding whether any instructions should be given on lesser included offenses. The argument was focused on the State's request for an instruction on attempted child molestation in the first degree. After considering the prosecutor's argument and authority, the court decided to instruct on the lesser included offense of attempted child molestation in the first degree. The court went on to say that if it gave the State's instruction, it would also instruct on the lesser included offense of assault in the fourth degree. RP 551, 553. The following exchange took place:

Mr. Purtzer [defense counsel]: All right. And then you are also inclined to give the fourth degree assault.

The Court: That certainly is an inferior degree.

Mr. Purtzer: It would be. I am not sure we want to request that. Let me talk to Mr. Wells about that.

The Court: That is your decision.

RP 553-554. The court then took a brief recess for the parties to review some case law. After a discussion of those cases (RP 554-557), the court returned to whether the defense wanted the instruction on assault in the fourth degree:

The Court: The other issue, Mr. Purtzer, is does your client want or are you requesting assault fourth degree?

Mr. Purtzer: We are not requesting the assault fourth degree.

RP 557.

This record reflects that the decision was made after a discussion between the defendant and his attorney. The record does not reflect how the decision was made, or for what reasons. The reviewing Court must not speculate on how that decision was made. The defendant does not allege that counsel failed to inform him regarding lesser included offense, or that the defendant was misinformed or misled in any way. If he chooses to do so, it must be raised or treated as a Personal Restraint Petition (PRP) where information outside the record may be presented to the Court, so that it may make an informed decision on the issue. *See State v. McFarland*, 127 Wn. 2d at 335.

d. *State v. Pittman* and *State v. Ward* are wrongly decided.

In two decisions, Division I of the Court of Appeals has disapproved of “all or nothing” strategies. *See State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004), and *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006). In *State v. Grier*, 150 Wn. App. 619, 208 P.3d 1221

(2009)¹, Division II relied heavily on the reasoning in *Ward* and *Pittman*, including quoting from dicta in *Keeble v. United States*, 412 U.S. 205, 212-213, 93 S. Ct. 1933, 36 L. Ed. 2d 844 (1973). However, as pointed out in detail below, Division I recently backed away from the holdings in its cases. Division I has criticized the prior decisions for failing to give enough deference to the strong presumption of the effective assistance of counsel in such cases, and specifically criticized reliance on the dicta quoted from *Keeble*.

Keeble was charged with assault with intent to commit serious bodily injury. Keeble and the victim were both members of the Crow Creek Sioux tribe. The crime occurred on the reservation. At the close of trial, Keeble requested the jury be instructed on the lesser included offense of simple assault. *Keeble*, 412 U.S. at 206. The court refused because, while the crime charged was covered under the Major Crimes Act of 1885 (18 U.S.C. §1153), simple assault was not. The issue before the Supreme Court was “whether an Indian prosecuted under the Act is entitled to a jury instruction on a lesser included offense where that lesser offense is not one of the crimes enumerated in the Act.” *Id.* The Supreme Court held that the Major Crimes Act did not prohibit the trial court from instructing on a lesser included offense not covered by the Act. *Keeble*, at 214.

¹ For the reasons generally argued in this brief, the State respectfully disagrees with the Court’s holding in *Grier*. The State has filed a Petition for Review in the Supreme Court.

In the course of its decision the Supreme Court observed that “[I]t is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction.” *Keeble*, at 212. The Court went on to remark that where a defendant is legally entitled to an instruction on a lesser included offense, it should be given because of the risks inherent in a jury trial. *Id.* at 212-213. The Court acknowledged that this part of the opinion was unnecessary to its holding. *Id.*, at 213.

Keeble is inapposite to the decisions in *Pittman*, *Ward*, *Grier*, and the present case. In all of these other cases, unlike *Keeble*, the trial court was prepared to instruct on the lesser included offense. In each case, it was the defendant who decided to withdraw or forgo the instruction for strategic reasons. *Keeble* is arguably authority to require the trial court to instruct on a lesser included offense if the defendant requests it and the law permits it. *Keeble* is not authority for the proposition that the court should give the instruction even where the defendant does not want it.

A little over a month after Division II filed its opinion in *Grier*, Division I filed a published opinion in *State v. Hassan*, 151 Wn. App. 209, 211 P.3d 441 (2009). Hassan was charged with possessing marijuana with intent to deliver, based upon observations by a police officer, and a subsequent search of a nearby backpack. At trial, Hassan pursued an “all or nothing” strategy. He denied selling the marijuana, and possession of the backpack containing much of the evidence. The defense conceded that

he possessed marijuana, but challenged the evidence of intent to deliver. The court asked if the defense was going to propose an instruction on the lesser included offense of possession, the defense replied that they were not. The defense went on to urge an acquittal, arguing insufficient evidence of intent to deliver. The jury convicted. In his appeal, Hassan alleged that his attorney was ineffective for failing to seek the lesser included offense.

The Court of Appeals held that because the decision not to request an instruction on a lesser included offense was strategic or tactical, it was not ineffective assistance of counsel. *Hassan*, at 211. In its decision, Division I quoted from *Hoffman*, 116 Wn.2d at 112 (included in argument above). *Hassan*, at 219. The Court distinguished *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004). The Court questioned the validity of the holdings in *Ward* and *State v. Pittman*, 134 Wn. App. 376, 166 P.3d 720 (2006). *Hassan*, at 221, n. 6. The Court questioned the reliance of both cases on distinguishable dicta in *Keeble v. United States*, 412 U.S. at 212-213. *Id.* Like *Ward* and *Pittman*, Division II in *Grier* uses the same questionable quote from *Keeble*. *Grier*, at 23.

The Court's analysis of the legal issue in *Hassan* also raises questions regarding the validity of *Pittman*. The legal issue in each case was the defense strategy regarding the element of defendant's intent. In *Pittman*, the issue was the intent to commit a crime in the entered building. In *Hassan*, it was the intent to deliver drugs. In both cases, the

defense conceded lesser criminal behavior: criminal trespass in *Pittman* and possession of marijuana in *Hassan*. The defense attorneys in both cases challenged the State's evidence and urged acquittal because the State could not carry its burden. However, the Court in *Hassan* did not view *Pittman* as authority, despite it being recently decided in the same division.

- e. *Pittman, Ward, and Grier* would essentially require the trial court to *sua sponte* instruct the jury on a lesser included offense where neither party has requested it and the defense has specifically rejected it.

Courts do not give, nor is it error to fail to give instructions which have not been requested or proposed by the parties. *State v. Roberts*, 142 Wn.2d 471, 501, 14 P.3d 713 (2000). Nor are instructions on lesser included offenses required where they are not requested. *State v. Hoffman*, 116 Wn. 2d at 111-112; *State v. Mak*, 105 Wn.2d 692, 747, 718 P. 2d 407 (1986); *State v. Red*, 105 Wn. App. 62 65, 18 P.3d 615 (2001).

Grier places the trial court in the position of giving instructions that neither party has requested and, there is no issue regarding legal error. This puts the Court in the difficult position of reviewing trial strategies. Proposing jury instructions is a task generally required of counsel. *See* CrR 6.15. The trial court should intervene only in cases where, considering the entire trial proceedings, there appears to be an issue of ineffective assistance of counsel.

- f. A defendant has the right to pursue a defense strategy of his own choosing, including acquittal only.

Art. I, § 22 of the Washington Constitution guarantees an accused many rights. He has the right to represent himself, even despite warnings of the court. *State v. Vermillion*, 112 Wn. App. 844, 850-851, 51 P.3d 188 (2002). He also has the right to a public trial, including the right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The right to present a defense is limited to admissible, relevant evidence, but by little else. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007).

The legal system, and the criminal justice system in particular, is an adversarial system. In it, counsel represents and advocates for the defendant. See generally, *Strickland v. Washington*, 466 U.S.at 685. The defense decides trial strategy and how to conduct his case. *State v. Cross*, 156 Wn.2d 580, 606, 132 P.3d 80 (2006). Except for clear instances of ineffective assistance of counsel, the court must defer to the strategic and tactical decisions of the defense.

- g. No prejudice can be presumed to result from the decision not to seek instructions on the lesser included offense.

For a finding of ineffective assistance of counsel, the defendant must also demonstrate prejudice. To demonstrate prejudice, the defendant must show that the outcome of the trial would probably have been

different if counsel had offered the instruction. *State v. Brett*, 126 Wn.2d 136, 199, 892 P.2d 29 (1995).

Here, the defendant cannot demonstrate that the result would have been different if the instruction on assault in the fourth degree had been given. As argued below, both the crime charged and assault in the fourth degree require intentional acts. Based upon all the evidence in the present case, it cannot be said that the jury would necessarily have found that the defendant only committed assault in the fourth degree.

2. COUNSEL WAS NOT INEFFECTIVE WHERE HE PROPOSED A JURY INSTRUCTION THAT CORRECTLY STATED THE LAW REGARDING VOLUNTARY INTOXICATION.

Child molestation in the first degree contains two mental elements.

The statute states:

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

RCW 9A.44.083 (emphasis added). Where the primary actor has the sexual contact, the requisite mental state is intent. *State v. Stevens*, 158 Wn.2d at 309. The “knowing” element applies where a person causes another to have sexual contact.

The intent element is required by the definition of “sexual contact”:

“Sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2); *Stevens*, at 309. However, “sexual gratification” is not an element of child molestation. *State v. Lorenz*, 152 Wn.2d 22, 35, 93 P.3d 133 (2004). It is “a definition clarifying the meaning of the essential element “sexual contact.”” *Id.*

In the present case, the defendant proposed an instruction on voluntary intoxication. CP 81. The court instructed the jury that it could consider voluntary intoxication in determining whether the defendant could form the requisite mental state of intent. CP 95.

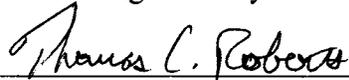
Counsel’s proposed instruction correctly stated the law. It also used the applicable mental state that placed the highest burden of proof on the State. This prevented the jury from equating “for the purpose of” with a lower mental state such as “knowing” or even “reckless.” This was likely an important distinction for the jury in this case, because they sent out a question asking if “for the purpose of” was the same as “intent.” CP 213. The voluntary intoxication instruction proposed by defense counsel was not deficient performance. The defendant cannot demonstrate ineffective assistance of counsel.

D. CONCLUSION.

While the defendant could have requested instructions on the lesser included offenses of assault in the fourth degree, he purposely chose not to. This was a matter of trial tactics, not ineffective assistance of counsel. Courts should intercede in defense strategies only in clear cases of ineffective assistance of counsel. The State respectfully requests that the defendant's conviction be affirmed.

DATED: November 10, 2009

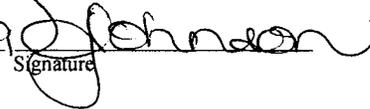
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

11/09/09 
Date Signature

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