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DIVISION II

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STATE OF WASHINGTON
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NO. 38453-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMY ANDERSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF MASON COUNTY

Before the Honorable Toni A. Sheldon, Judge

OPENING BRIEF OF APPELLANT

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P/m 3/18/09

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A. ASSIGNMENTS OF ERROR

1. Appellant's right to confrontation was violated when the court admitted testimonial hearsay statements from a minor regarding an alleged act of child molestation admitted pursuant to RCW 10.58.090, where appellant had no opportunity to cross examine the declarant.

2. Appellant did not receive effective assistance of counsel where his attorney failed to request an instruction for fourth degree assault as a lesser-included charge of first degree child molestation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A child complainant statement in an alleged incident that occurred in either October 2000 or October, 2002, was admitted by the trial court pursuant to RCW 10.58.090, where the minor made a statement to a nurse at St. Peter's Sexual Assault Clinic on December 22, 2003 that he was molested by appellant. The interview at the Sexual Assault Clinic was conducted pursuant to or in conjunction with a law enforcement investigation. The child did not testify at trial, however, the trial court found the hearsay statement to the nurse was not testimonial and admitted the statement.

- a. Did the court erroneously conclude the hearsay statements were not testimonial?
- b. Did the admission of the child's hearsay statement violate appellant's right to confrontation?

Assignment of Error 1.

2. Appellant's attorney did not propose an instruction for the lesser-included offense of fourth degree assault. Was counsel's failure to propose the lesser-included instruction deficient performance that prejudiced appellant? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural history:

Jeremy Anderson [Anderson] was charged by information filed in Mason County Superior Court on April 15, 2008, with one count of first degree child molestation, contrary to 9A.44.083. Clerk's Papers [CP] at 1-2. M.A.E. was the named victim. CP at 1-2.

On June 23, 2008 the State filed notice of intent to offer evidence of two sex offenses allegedly committed by Anderson and evidence of convictions for two counts of communication with a minor for immoral purposes, pursuant to RCW 10.58.090. CP at 122-23.

Trial to a jury began August 27, 2008, the Honorable Toni Sheldon presiding.

The court permitted the State to introduce evidence of two uncharged sex offenses and evidence of two 2007 convictions for communication with a minor for immoral purposes pursuant to RCW

10.58.090. Report of Proceedings [RP] at 82-90, 91, 149-50. Exhibits 11 and 12.

The first uncharged offense is alleged to have occurred in October 2000 or October, 2002. Anderson was accused of molesting C.C.S., an eleven year old male. RP at 69. C.C.S. allegedly disclosed the incident in November 2003 in school, and the minor was interviewed by Detective Harry Heldreth of the Shelton Police Department. RP at 69. C.C.S. was seen by Nancy Young of Providence St. Peter's Hospital Sexual Assault Clinic on December 22, 2003, at which time the minor made statements similar to what was said to Det. Heldreth. RP at 147-48, 154-55.

The second uncharged offense allegedly occurred in February, 2001 and involved a minor child—K.R.P. RP at 69-70.

Outside the presence of the jury, Nancy Young testified that she works at the Sexual Assault Clinic at St. Peter's Hospital, and that her role is to "coordinate the sexual assault nurse examiner program which responds to rape victims in the emergency center at Providence." RP at 147. Ms. Young examines children "partly" as "a team approach to the response to investigation of child abuse cases" RP at 147. She examined a child named C.C.S. on December 22, 2003. RP at 147.

Over defense objection, Judge Sheldon found that the uncharged

incident involving C.C.S. and that statement by C.C.S. to Nancy Young were non-testimonial under *Crawford v. Washington*.¹ RP at 149-50. The court found that “the purpose of this exam [of C.C.S.], or this interview, was not something that was going to be generated for use in a criminal prosecution, but instead a medical exam as part of a team approach; that this was the medical arm.” RP at 150.

The court also found that the uncharged offense involving K.R.P. and the convictions for communication of a minor for immoral purposes were not subject to analysis under *Crawford*. RP at 91-92.

No objections or exceptions to the court’s instructions to the jury were made. RP at 191.

The jury returned a verdict of guilty to the charge of first degree child molestation. CP at 75.

The matter came on for sentencing on October 3, 2008. The court sentenced Anderson within the standard range. RP (10/3/08) at 228; CP at 13-28.

Timely notice of appeal by the defense was filed on October 3, 2008. CP at 9. This appeal follows.

2. Trial testimony:

M.A.E. was in Kneeland Park in Shelton, Washington in the summer of 2007 when a man rode up to him on a bicycle. RP at 100.

¹541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

M.A.E. was ten years old at the time of trial. RP at 25. The man told M.A.E. to go into the bathroom and get on the floor. RP at 100. The man then got on top of M.A.E. and lay on top of him. RP at 100. M.A.E. stated that the man rubbed his "hot dog" against M.A.E.'s "hot dog." RP at 101. M.A.E. testified that "hot dog" means penis. RP at 101. He did not remember how long the incident lasted. RP at 101. He stated that he and the man had their clothing on during the incident. RP at 108. In court, M.A.E. identified Jeremy Anderson as the man in Kneeland Park. RP at 102.

M.A.E. was interviewed by Detective Harry Heldreth of the Shelton Police Department in November, 2007. RP at 127. M.A.E. picked Anderson from a montage of six photos prepared by Det. Heldreth. RP at 128.

On October 31, 2007, during a session with a counselor at Behavioral Health Resources, M.A.E. said that the man had asked him to lay on the floor of the bathroom at Kneeland Park and had rubbed his penis on him with their clothes on. RP at 112.

Dawn Minnich, of Minnich Polygraph Service, stated that during an evaluation of Anderson on January 21, 2008, he told her that he had met a five year old boy in a park and asked him to go into the bathroom. RP at 161. While there, he laid down, had the boy get on top of them and

“then they rubbed together.” RP at 161. Anderson said that this had happened when he was 21 years old. RP at 161.

Pursuant to RCW 10.58.090, the State introduced an interview by Det. Pfitzer of Anderson conducted February 28, 2001. RP at 136. In the interview, Anderson stated that he touched the genitals of a five year old on at least two occasions. RP at 138.

Nancy Young testified that C.C.S. was examined at the Sexual Assault Clinic on December 22, 2003, and he told her that Jeremy Anderson “had touched his penis” and had gotten on top of him and rubbed his penis on C.C.S.’s penis. RP at 155. C.C.S. did not testify.

D. ARGUMENT

1. THE ADMISSION OF C.C.S.’S TESTIMONIAL STATEMENTS TO NANCY YOUNG VIOLATED ANDERSON’S RIGHT TO CONFRONTATION.

The State alleged that Jeremy Anderson molested C.C.S. in 2000 or 2002. CP at 125-26. C.C.S. did not testify at the trial. Judge Sheldon, however, permitted Nancy Young under RCW 10.58.090 to testify to C.C.S.’s hearsay statement that he told her on December 22, 2003 that Anderson had molested him. RP at 155. The hearsay statement was improperly admitted because it was testimonial and therefore subject to analysis under *Crawford*.

“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .” U.S. Const. amend.

VI. The Washington Constitution provides: “In criminal prosecutions the accused shall have the right . . . to meet the witnesses against him fact to fact . . .” Const. art. I, § 22.

The rule against hearsay addresses values similar to those protected by the confrontation clause. *State v. Rohrich*, 132 Wn.2d 472, 477-78, 939 P.2d 697 (1997) (confrontation clause, like hearsay rules, represents a preference for live testimony to maximize the truth-determining function of criminal trials); *Idaho v. Wright*, 497 U.S. 805, 814, 111 L.Ed.2d 638, 110 S. Ct. 3139 (1990) (hearsay rules and the confrontation clause are designed to protect similar values).

The admissibility of hearsay statements in criminal trials depends, in part, on whether those statements are testimonial. *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A testimonial statement is inadmissible unless the declarant either: (1) appears at trial; or (2) is unavailable and the defendant had a prior opportunity to cross-examine on the statement. *Id.* at 68; accord *State v. Clark*, 139 Wn.2d 152, 158, 985 P.2d 377 (1999) (defendant’s opportunity to cross-examine regarding hearsay statements satisfies Confrontation Clause).

The Confrontation Clause permits an unavailable witness's testimonial statements to be introduced at trial only if the witness has been subject to cross-examination. *Crawford v. Washington*, 541 U.S. at 53-54. Specifically, where a child's testimonial hearsay is at issue, a defendant's right to confrontation bars its admission without cross-examination, even if the trial court finds the hearsay reliable. *Bockting v. Bayer*, 399 F.3d 1010, 1021 (9th Cir. 2005), *amended*, 408 F.3d 1127 (9th Cir. 2005), *reversed on other grounds sub mon.*, *Whorton v. Bockting* 549 U.S. 406, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007).

While *Crawford* did not provide a comprehensive definition of the term testimonial it articulated three core classes of testimonial statements: ex parte, in-court testimony or its functional equivalent; extrajudicial statements in formalized testimonial materials, such as affidavits, depositions, or prior testimony; and statements made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial. *State v. Shafer*, 156 Wn.2d 381, 389 n.6, 128 P.3d 87 (2006) (citing *Crawford*, 541 U.S. at 51). A statement "knowingly given in response to structured police questioning" is testimonial under "any conceivable definition." *Crawford*, 541 U.S. at 53 n.4.

C.C.S.'s statement to Nancy Young was made pursuant to an ongoing police investigation. The State alleged that in November, 2003, C.C.S. disclosed that he was molested by Anderson, and that it occurred in October 2000 or October 2003. CP at 125-26. C.C.S. was interviewed by Det. Heldreth, who conducted a "forensic interview." CP at 125-26. C.C.S. was subsequently seen by Nancy Young at the Sexual Assault Clinic. CP at 126. Young stated that her role is in part to respond to "investigation of child abuse cases" RP at 147. Young stated that she was aware of the allegation of sexual abuse when she saw C.C.S. RP at 155. The investigation at the Sexual Assault Clinic was made following Det. Heldreth's forensic investigation. Young was aware of the police investigation. Ms. Young's questioning of C.C.S. was done in conjunction with or in furtherance of Det. Heldreth's investigation, and was conducted to gather evidence in anticipation of a possible prosecution and trial. The interview falls within the category of police interrogations and C.C.S.'s statement made at the interview constitutes testimonial hearsay.

This Court's holding in *State v. Hopkins*, 137 Wn.App. 441, 154 P.3d 250 (2007) likewise supports the conclusion that C.C.S.'s statement to Young was testimonial. In *Hopkins*, a two-and-a-half year old child was interviewed by a social worker who testified her job was to investigate

whether the child's allegations were truthful and provide the results of the interview to police. 137 Wn. App. at 447. The *Hopkins* Court held the child's statements to the social worker were testimonial reasoning the social worker "was also acting in a government capacity for CPS and, in that capacity, she obtained statements from MH (the child) that the State used to prosecute Hopkins." *Id.* at 458.

Here, Young too was acting in a government capacity. The name of her organization is the Sexual Assault Clinic—implying that it investigates medical cases stemming from crimes—specifically sexual assault. Young testified that she investigates "rape victims." RP at 147. It is inconceivable to imagine that the results of any evaluations or investigation by the Sexual Assault Clinic would not be provided to the police, particularly where Young was aware of a police investigation of the incident. Thus, like the statements made to the social worker in *Hopkins*, the statement made to Young was testimonial and inadmissible.

The Washington Supreme Court has ruled that a violation of the right to confrontation is subject to a constitutional harmless error analysis. *State v. Watt*, 160 Wn.2d 626, 634-35, 150 P.3d 640 (2007). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). "The presumption may be overcome if

and only if the reviewing court is able to express an abiding conviction, based on its independent review of the record, that the error was harmless beyond a reasonable doubt, that is, that it cannot possibly have influenced the jury adversely to the defendant and did not contribute to the verdict obtained.” *State v. Ashcraft*, 71 Wn. App. 444, 465, 859 P.2d 60 (1993). The reviewing court “decides whether the actual guilty verdict would have been rendered by a hypothetical [trier of fact] faced with the same record, except for the error.” *State v. Jackson*, 87 Wn. App. 801, 813, 944 P.2d 403 (1997), *aff’d*, 137 Wn.2d 712, 976 P.2d 1229 (1999).

The State cannot show the improper testimony did not contribute to the verdict. There was no physical or forensic evidence to support M.A.E.’s allegation. Because the State’s evidence rests in part upon the uncharged alleged molestation of C.C.S. it is likely the jury based its decision on the fact that Young reported an offense that appeared to be virtually identical to the molestation reported by M.A.E. Therefore, Young’s improper testimony could have influenced the jury and contributed to the verdict. The error in admitting the testimony was not harmless and Anderson’s conviction should be reversed.

2. **ANDERSON’S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY DID NOT PROPOSE AN INSTRUCTION FOR**

**THE LESSER-INCLUDED OFFENSE OF
FOURTH DEGREE ASSAULT.**

“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).

- a. **An instruction on fourth degree assault was warranted in this case.**
 - i. **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 child molestation. The court’s analysis is applicable to the facts of this case as well.

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(footnotes omitted).

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 supports an inference that the lesser crime was committed.

The evidence in this case consisted of M.A.E.'s testimony that he was approached in Kneeland Park by a man who rode up to him on a bicycle. RP at 100. He identified the man as Anderson. RP at 102. He testified that Anderson told him to come with him into the bathroom at the

park and lie down on his back on the floor. RP at 100. He stated that Anderson then got on top of him and was rubbing against his "hot dog." RP at 100, 101. He stated that hot dog referred to his penis. RP at 101. He stated that he and Anderson both had their clothes on, and that Anderson did not ask him to take his clothes off. RP at 108.

Minnich questioned Anderson about sex offenses as part of an evaluation. RP at 160. She stated that he told her that he met a five year old boy at a park and asked him into the bathroom. RP at 161. She testified that he said that while they had their clothes on had the boy lie on top of him "and then they rubbed together." RP at 161.

Minnich did not state that he said what specifically rubbed together or that he said it was done for the purpose of sexual gratification. The State did not present evidence that Anderson had an erection or that he committed the alleged offense for sexual gratification.

The evidence introduced at trial supported an inference that Anderson committed the crime of assault in the fourth degree rather than the offense of first degree child molestation.

Here, trial counsel failed to request an instruction for fourth degree assault. 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 this test,

the reviewing court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 698.

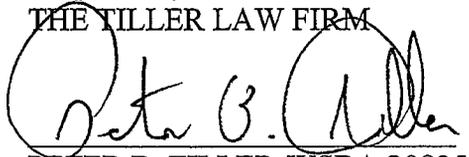
Where there is evidence to support giving a lesser included offense instruction, failure to give it has never been held harmless. *State v. Parker* 102 Wn.2d 161, 164, 683 P.2d 189 (1984). Here, because there was evidence supporting the lesser-included offense, it was ineffective for trial counsel to fail to request such an instruction and resulted in prejudice to Anderson.

E. CONCLUSION

Based on the foregoing reasons, either alone or together, Jeremy Anderson was denied his right to a fair trial and his conviction should be reversed.

DATED: March 18, 2009.

Respectfully submitted,
THE TILLER LAW FIRM


PETER B. TILLER-WSBA 20835
Of Attorneys for Jeremy Anderson

APPENDIX

STATUTES

RCW 9A.44.083

Child molestation in the first degree.

(1) 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.

(2) Child molestation in the first degree is a class A felony.

RCW 10.58.090

Sex Offenses — Admissibility.

(1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.

(2) In a case in which the state intends to offer evidence under this rule, the attorney for the state shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.

(4) For purposes of this section, "sex offense" means:

(a) Any offense defined as a sex offense by RCW 9.94A.030;

(b) Any violation under RCW 9A.44.096 (sexual misconduct with a minor in the second degree); and

(c) Any violation under RCW 9.68A.090 (communication with a minor for immoral purposes).

(5) For purposes of this section, uncharged conduct is included in the definition of "sex offense."

(6) When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

(a) The similarity of the prior acts to the acts charged;

(b) The closeness in time of the prior acts to the acts charged;

(c) The frequency of the prior acts;

(d) The presence or lack of intervening circumstances;

(e) The necessity of the evidence beyond the testimonies already offered at trial;

(f) Whether the prior act was a criminal conviction;

(g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and

(h) Other facts and circumstances.

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STATE OF WASHINGTON, Respondent, vs. JEREMY ANDERSON, Appellant.	COURT OF APPEALS NO. 38453-1-II MASON COUNTY SUPERIOR NO. 08-1-00203-9 CERTIFICATE OF MAILING
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The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Jeremy Anderson, Appellant, and Gary Burluson, Mason County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on March 18, 2009, at the Centralia, Washington post office addressed as follows:

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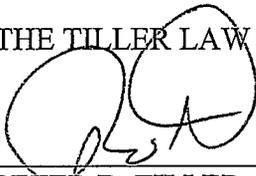
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Dated: March 18, 2009.

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PETER B. TILLER – WSBA #20835
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