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Supreme Court No. _____
COA No. 38453-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMY ANDERSON,

Petitioner.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jeremy Anderson, the appellant below, asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Anderson seeks review of Division Two's unpublished opinion in *State v. Anderson*, No. 38453-1-II (Slip Op. filed December 8, 2009). A copy of the opinion is attached hereto as Attachment A.

C. ISSUES PRESENTED FOR REVIEW

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. 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 recited by the nurse as part of C.C.S.'s history to the nurse was not testimonial and admitted the statement. Should this court accept review and hold that the Court erroneously concluded the hearsay statements were not testimonial and that the admission of the child's hearsay statement violate the appellant's right to confrontation? RAP

13.4(b)(3); RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

1. Trial testimony:

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 RCW 9A.44.083. Clerk's Papers [CP] at 1-2. M.A.E. was the named victim. CP at 1-

2.

The case was tried to the Honorable Toni Sheldon on August 27, 2008.

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.

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.

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.

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.

2. Proceedings on Appeal:

On appeal, Anderson argued that the trial court violated his right to confront the witnesses by admitting a minor’s hearsay statements about an alleged act of child molestation, and that his attorney provided ineffective assistance of counsel by failing to request an instruction for fourth degree assault as a lesser included offense. Brief of Appellant at 11-20. The Court rejected all of Anderson’s arguments. For the reasons set forth below, he seeks

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

review.

E. ARGUMENT

1. THE COURT OF APPEALS ERRED IN FINDING THAT THE TRIAL COURT JUDGE'S RULING ADMITTING C.C.S.'S TESTIMONIAL STATEMENTS TO NANCY YOUNG WAS NOT A VIOLATION OF 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 history, which consisted of hearsay statements to others that Anderson had touched his penis. 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. 4062, 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 statements, which Nancy Young learned as part of C.C.S.’s history, were propounded to the jury 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 participation and sexual assault examination 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.

Division Two held that Young did not interview C.C.S. to ascertain whether he was telling the truth or to aid in a criminal investigation of Anderson. *Anderson*, Attachment A at 5. The Court found that the alleged incident was “discussed in an effort to obtain C.C.S.’s medical history for the purposes of diagnosis and treatment” and that C.C.S.’s statements to Young were not testimonial. *Id.*

Anderson disagrees with the Court’s assessment. Division

Two'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.

This 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 Court of Appeals erred in finding that the statements were not testimonial under *Crawford*. The Court of Appeals’ affirmance of the trial court’s decision that the statements were not testimonial was based on a cursory assessment of the facts and

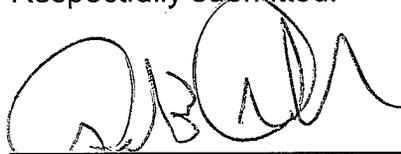
merits review by this Court. This Court should accept review and hold that the error in admitting the testimony was not harmless, and that the error requires reversal.

F. CONCLUSION

For the foregoing reasons, Jeremy Anderson respectfully requests this petition for review be granted.

DATED this 5th day of January, 2010.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'P. B. Tiller', written over a horizontal line.

PETER B. TILLER, WSBA 20835
Of Attorneys for Petitioner

A

FILED
COURT OF APPEALS

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STATE OF WASHINGTON

BY _____
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

JEREMY M. ANDERSON,
Appellant.

No. 38453-1-II

UNPUBLISHED OPINION

ARMSTRONG, J. — Jeremy Anderson appeals his conviction for first degree child molestation, arguing that (1) the trial court violated his right to confront the witnesses by admitting a minor's hearsay statements about an alleged act of child molestation and (2) his counsel ineffectively represented him by failing to request a jury instruction on fourth degree assault as a lesser included offense. We find no error and, thus, affirm.

FACTS

The State charged Jeremy Anderson with first degree child molestation in violation of RCW 9A.44.083. The State alleged that Anderson had sexual contact with M.A.E., who was less than 12 years old at the time. The State also gave notice that it intended to offer evidence that Anderson had two earlier uncharged sex offenses and convictions for two counts of communication with a minor for immoral purposes, pursuant to RCW 10.58.090.¹

At a pre-trial hearing, the State described the uncharged offense concerning an 11-year-old male, C.C.S., who disclosed to a school counselor, a detective, and Nancy Young, a registered nurse practitioner, that Anderson had sexually molested him in October 2002. The

¹ RCW 10.58.090 provides that 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 ER 404(b), if the evidence is not inadmissible pursuant to ER 403.

court ruled that the State could present this evidence subject to analysis under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

At trial, the State proffered Young's testimony regarding C.C.S.'s statements to her during his medical examination as evidence of this uncharged offense. The court ruled that the statements were not testimonial under *Crawford*, reasoning that the purpose of the medical exam was not to generate information for use in a criminal prosecution. Young then testified that before taking C.C.S.'s medical history, she was aware C.C.S. had earlier disclosed that Anderson had touched his penis.² Young also testified that she asked C.C.S. if he had anything to add to what he told the detective and he said, "[N]o, not really." Report of Proceedings (RP) at 155.

Regarding the charged incident, M.A.E. testified that Anderson laid on top of him in a public bathroom and rubbed his penis against his penis. The investigating detective testified to M.A.E.'s disclosures during an interview, which were substantially similar to his trial testimony. Dawn Minnich, who gave Anderson a polygraph test, testified that Anderson told her about an incident that occurred in a public bathroom, generally matching the details and time frame of the victim's story.³

² Both briefs mischaracterize Young's testimony by quoting excerpts and describing them as C.C.S.'s statements to Young. Anderson claims that "Nancy Young testified that C.C.S. . . . 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." Br. of Appellant at 11. But it is clear from the transcript that Young was merely recounting her knowledge of C.C.S.'s history prior to examining him: "The history was that [C.C.S.] had made a disclosure that an acquaintance, Jeremy Anderson, had touched his penis. And Jeremy had gotten on top of [C.C.S.] and rubbed his penis on—on [C.C.S.'s] penis. And that [there] was a concern that there possibly could have been more contact. But that was—that was the history I had at the time." RP at 155.

³ M.A.E.'s account and Anderson's statement to Minnich differ in one respect: Anderson told Minnich that he had the little boy get on top of him, while M.A.E.'s story was consistently that Anderson was the one on top.

Neither party objected to the court's proposed instructions to the jury. Defense counsel did not request an instruction for assault in the fourth degree as a lesser included offense. The jury convicted Anderson of first degree child molestation.

ANALYSIS

I. RIGHT TO CONFRONTATION

Anderson contends that the trial court erred in permitting Nancy Young to testify to C.C.S.'s hearsay statement that Anderson touched his penis because it was testimonial under *Crawford*.⁴ The statement, according to Anderson, was testimonial because it was made pursuant to an ongoing police investigation, and Young was acting in a governmental capacity.

The Sixth Amendment confrontation clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The Fourteenth Amendment applies a defendant's Sixth Amendment rights to the states. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). We review alleged violations of the confrontation clause de novo. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

The admission of testimonial hearsay violates a defendant's Sixth Amendment right of confrontation unless the witness is unavailable and there was a prior opportunity to cross-examine with regard to the statement. *Crawford*, 541 U.S. at 53-54. Although *Crawford* does not provide a comprehensive definition of "testimonial," it articulated three core classes of testimonial statements: (1) ex parte, in-court testimony or its functional equivalent; (2)

⁴ Young's testimony was actually double hearsay: Young testified to statements C.C.S made to a detective and that she apparently learned about from talking with the detective. But Young did not object at trial and did not assign error to the double hearsay; thus, the issue is not before us.

extrajudicial statements contained in formalized testimonial materials; and (3) statements made under circumstances which would lead an objective witness reasonably to believe the statements would be available for use at a later trial. *Crawford*, 541 U.S. at 51-52. Nontestimonial statements do not implicate the confrontation clause and are admissible if they fall within a hearsay exception. *State v. Saunders*, 132 Wn. App. 592, 601, 132 P.3d 743 (2006). Generally, a victim's statements to a health care provider are not considered testimonial when taken for the purposes of medical diagnosis and treatment. *See State v. Moses*, 129 Wn. App. 718, 730, 119 P.3d 906 (2005); *State v. Fisher*, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005).

In *State v. Hopkins*, 137 Wn. App. 441, 454-55, 154 P.3d 250 (2007), we considered whether a victim's statements to a social worker were testimonial. We pointed out several factors that tended to show the victim's disclosures at the initial interview were not testimonial: (1) the interview was unrelated to any potential criminal prosecution; (2) the social worker performed the safety assessment to ensure the child was genuinely safe and secure where she was living; and (3) she asked innocuous, nonleading questions in response to which the victim spontaneously reported sexual abuse. *Hopkins*, 137 Wn. App. at 456. During a second interview, the victim's disclosures were testimonial because the social worker was tasked to (1) investigate whether the allegations of sexual abuse were accurate and truthful, (2) ask questions regarding information gained during the investigation, and (3) record her notes for the express purpose of providing information to law enforcement. *Hopkins*, 137 Wn. App. at 457. Put simply, while the social worker was not working at the behest of law enforcement, her eventual role overlapped with and aided law enforcement. *Hopkins*, 137 Wn. App. at 456-57.

Here, Young performed the sexual assault exam on C.C.S. as part of a “team approach” to investigations of child abuse. RP at 147. Young also received information from law enforcement before examining C.C.S., including C.C.S.’s disclosures to a detective. But Young stated that the exams are the medical portion of the team approach, not forensic interviews. She explained that information received from referrals is used to discern medical concerns and assist in taking the medical history of the victim. Unlike in *Hopkins*, Young did not interview C.C.S. to ascertain whether he was telling the truth, or to aid a criminal investigation of Anderson. Nor does it appear that she asked leading questions about Anderson. In fact, C.C.S. was taken to the clinic because of an alleged incident by someone other than Anderson. Thus, the interview was not related to the prosecution of Anderson; rather, the incident was discussed in an effort to obtain C.C.S.’s medical history for the purposes of diagnosis and treatment. We conclude that C.C.S.’s statements to Young were not testimonial under *Crawford*.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Anderson next contends his counsel ineffectively represented him by not requesting a jury instruction on fourth degree assault as a lesser included offense. Anderson argues he was entitled to the instruction because (1) each element of fourth degree assault is a necessary element of first degree child molestation and (2) the evidence supported an inference he committed the lesser offense. To support this inference, Anderson claims the State did not present evidence that he had an erection or that he committed the alleged offense for sexual gratification. We disagree.

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective,

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the defendant must show that (1) counsel's representation was deficient and (2) the deficient representation prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). A defendant must also overcome a strong presumption that counsel's conduct was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Legitimate trial strategy or tactics cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

A defendant is entitled to an instruction on a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the offense charged (the legal prong) and (2) the evidence in the case supports an inference that the lesser crime was committed (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Anderson satisfies the legal prong under *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) (second degree child molestation necessarily includes the elements of fourth degree assault). Since the only difference in first and second degree child molestation is the ages of the parties involved, fourth degree assault is also a lesser included offense of first degree child molestation. See RCW 9A.44.083, .086.

To establish the factual prong, it is not enough that the jury might disbelieve the State's evidence; instead, there must be affirmative evidence that the defendant committed the lesser included offense. *State v. Speece*, 115 Wn.2d 360, 363, 798 P.2d 294 (1990) (citing *State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). The evidence must raise an inference that *only* the lesser included offense was committed to the exclusion of the offense charged. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000); *State v. Ieremia*, 78 Wn. App.

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746, 755, 899 P.2d 16 (1995) (the evidence must support an inference that the defendant committed the lesser offense *instead of* the greater one). When determining whether the evidence at trial was sufficient to give the instruction, we view the supporting evidence in the light most favorable to the party requesting the instruction. *Fernandez-Medina*, 141 Wn.2d at 455-56.

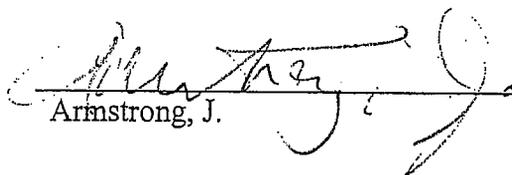
To warrant a lesser instruction on fourth degree assault, Anderson must point to evidence that he touched M.A.E., but not for the purpose of sexual gratification.⁵ Anderson claims Minnich's testimony supports a lesser offense here because Minnich did not state that Anderson said it was done for the purpose of sexual gratification. Anderson also claims M.A.E. did not testify that Anderson had an erection or that he asked M.A.E. to take his clothes off. But even taken in the light most favorable to Anderson, this evidence does not support an inference that Anderson committed only fourth degree assault to the exclusion of the offense charged. *Fernandez-Medina*, 141 Wn.2d at 455. Minnich testified that she started her interview with Anderson by asking about prior *sex offenses*. In response, Anderson described the incident in the public bathroom, generally matching the details and time frame of the victim's story. And this, coupled with the victim's testimony that Anderson laid on top of him and rubbed his penis against M.A.E.'s, precludes the possibility that Anderson touched M.A.E. for any purpose other than sexual gratification. Thus, the factual prong of *Workman* has not been met; and counsel was not deficient for failing to request an instruction on the lesser offense fourth degree assault.

⁵ To convict a defendant for first degree child molestation, the State must prove, inter alia, that the alleged contact between the perpetrator and the victim was done for the purpose of sexual gratification. RCW 9A.44.083, .010. Fourth degree assault occurs when there is an unlawful touching with criminal intent. *Clark v. Baines*, 150 Wn.2d 905, 908 n.3, 84 P.3d 245 (2004).

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We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

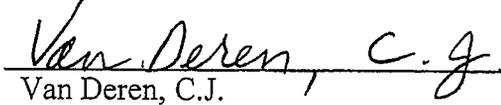


Armstrong, J.

We concur:



Quinn-Brintnall, J.



Van Deren, C.J.