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No. 102712-5

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JAMES LOUIS LYON, PETITIONER

ANSWER AND CROSS-PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington, the respondent below, asks this court to deny James Lyon's petition to this court seeking review of the decision referred to in Section B, below.

B. DECISION OF COURT OF APPEALS

The State of Washington requests this court to deny review of the Court of Appeals' December 5, 2023, "Unpublished Opinion" in case number 56675-3, which affirmed Lyon's jury trial conviction for child molestation in the first degree from Mason County Superior Court No. 20-1-00274-23.

However, if this Court grants Lyon's petition and accepts review of the Court of Appeals decision, then pursuant to RAP 13.4(d), the State asks this Court to overrule *State v. Stevens*,

158 Wn.2d 304, 143 P.3d 817 (2006), and hold that assault in the forth degree is not a lesser included offense of the crime of child molestation.

C. STATE'S RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1) The Court of Appeals did not err when it found that Lyon failed to meet the factual prong of the lesser included offense of assault in the fourth degree.

2) This Court's decision in the case of *State v. Stevens*, 158 Wn.2d 304, 143 P.3d 817 (2006), is both incorrect and harmful where it holds that the crime of simple assault is a lesser included offense to the crime of child molestation.

D. STATEMENT OF THE CASE

The relevant facts of this case are set forth in the Court of Appeals decision of this case, which is attached to Lyon's brief as an exhibit. In summary, however, the facts are as follows.

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During the events giving rise to this case, the defendant-appellant, James Lyon, was married to Markie Lyon. RP 499. James and Markie Lyon had three children. RP 499.

Markie Lyon is sisters with Penny Holland, who was married to Darren Holland. RP 516. Penny and Darren Lyon had three children, one of whom was SH. RP 494, 516.

On occasion, SH would spend the night at the Rainbow Lake home of James and Markie Lyon. RP 499, 500, 501, 521. However, in the late summer or early fall of 2019, the Lyon's lost their home and had to move "into a less-than-desirable housing situation." RP 500. This caused the Hollands to lose confidence in the Lyons' ability to care for the children. RP 500, 520. The last time SH was at the Lyons's Rainbow Lake home was maybe in mid-summer, possibly July, of 2019. RP 501, 520, 521, 526.

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About six months after the last time that SH was at Lyon's home, he brought his kids to the Hollands' house so they could take a bath. RP 502. About a week later, SH disclosed that James Lyon touched her lady parts, meaning her vagina. RP 495, 516-17, 519, 523. SH said that this happened when all the kids were sleeping in Lyon's living room. RP 518-19. The next day, the Hollands called the police and reported the incident. RP 494-95, 516.

SH was interviewed by a forensic child interviewer. RP 561. During the interview, SH disclosed that Lyon had molested her several times, and she described how Lyon molested her on the couch in his living room the last time she was there and that she was six years old when it happened. RP 573-75; Ex.s 4, 6. SH was also examined by a nurse practitioner. RP 580-81, 584. SH disclosed that she awoke to

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Lyon rubbing her vagina. RP 588, 598-99. SH disclosed that this occurred at Lyon's house and that her siblings were there. RP 588.

The State charged Lyon with one count of child molestation in the first degree. CP 11-12. Following a jury trial, the jury returned a guilty verdict. CP 41. The instant appeal followed. CP 77. Further facts are provided as necessary to develop the State's arguments, below.

E. ARGUMENT

1) The Court of Appeals did not err when it found that Lyon failed to meet the factual prong of the lesser included offense of assault in the fourth degree.

On the facts of the instant case, assault is not a lesser included offense of child molestation under the factual prong of the two-part test set forth in *State v. Workman*, 90 Wn.2d 443,

584 P.2d 382 (1987). Accordingly, Lyon was not entitled to a lesser included instruction for assault; therefore, his counsel was not ineffective for having failed to request one.

First, the State charged Lyon with one count of child molestation in the first degree and alleged that the acts constituting this offense occurred March 1, 2019, and September 30, 2019. CP 11-12, 35. The State presented evidence that Lyon touched SH's vagina during this charging period. RP 500-01, 521, 526-27. The State presented evidence that the charged offense occurred while SH was asleep on the couch in Lyon's living room. RP 473, 518-19, 588. The child victim was born in October of 2012. RP 6. Thus, the child was six years old during the charging period at issue. At a child forensic interview, which was admitted as evidence at trial, the child said that the act of molestation at issue occurred when she

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was six years old. Ex. 6, VIDEO_ts, vts_01_1.VOB at 12:49-51.

During opening statement, Lyon's counsel conceded that Lyon touched SH's vagina, but asserted that "it was for purely hygienic purposes, and that's it." RP 462. During trial, Lyon testified that he touched the child's vagina on an occasion prior to August of 2018, that this happened in the bathroom, and that it was for purely hygienic purposes. RP 606, 610, 614-16, 631.

Here, the State alleged that Lyon touched SH's vagina for the purpose of sexual gratification while she was asleep on his couch in his living room in the summer of 2019. CP 11-12; RP 473, 500-01, 518-19, 521, 526-27, 588. Lyon did not deny this allegation. He did not address it all. Instead, he presented evidence of an incident that occurred in a different place, the bathroom rather than living room, and which preceded the

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charging period by at least eight months. RP 606, 610, 615, 616, 625, 631.

Hence, the evidence does not support a finding that the touching of SH's vagina as alleged in the information and proved at trial was the crime of simple assault rather than child molestation. Because evidence did not support an inference that the lesser crime of assault was committed, Lyon was not entitled to a lesser-included jury instruction. *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). It follows that because Lyon was not entitled to the lesser-included instruction, he cannot show prejudice due to his attorney's failure to ask for one. Accordingly, Lyon's claim of ineffective assistance of counsel on this point must fail. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

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Still more, however, Lyon was not entitled to an instruction for the lesser included offense of assault because there is no evidence that he committed assault. In *State v. Stevens*, 158 Wn.2d 304,143 P.3d 817 (2006), this Court held that the applicable definition of assault is "an unlawful touching with criminal intent[.]" *Id.* at 311. In the instant case, Lyon asserts that he touched the child's vagina for a hygienic purpose and not for sexual gratification. Just as a doctor or nurse might touch a child's sexual or intimate part for a medical purpose, a custodian or caretaker of a child might touch a child for a hygienic purpose and such touching would not be unlawful, particularly if the touching was not done with criminal intent. Lyon denied any criminal intent for touching the child's vagina. He claimed that the touching was for a hygienic purpose, not for a criminal purpose. To be entitled to a lesser included

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instruction for assault, the evidence "must support an inference that the lesser crime was committed." *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Here, there was no such evidence. Accordingly, Lyon was not entitled to the lesser included instruction. *Id.*

It follows that because Lyon was not entitled to the lesser-included instruction, he cannot show prejudice due to his attorney's failure to request it. To prevail on his claim of ineffective assistance of counsel, Lyon must show both that his trial counsel's performance was deficient and that there is a reasonable probability that the outcome of the trial would have been different had counsel's deficient performance not occurred. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

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2) This Court's decision in the case of *State v. Stevens*, 158 Wn.2d 304, 143 P.3d 817 (2006), is both incorrect and harmful where it holds that the crime of simple assault is a lesser included offense to the crime of child molestation.

In its brief to the Court of Appeals, at pages 10-12, the State argued that *State v. Stevens*, 158 Wn.2d 304, 143 P.3d 817 (2006), is both incorrect and harmful where it holds that the crime of simple assault is a lesser included offense to the crime of child molestation. The Court of Appeals acknowledged the State's argument, but it held that "[u]nless and until our supreme court overturns Stevens, Stevens remains 'binding on all lower courts.'" *State v. Lyon*, No. 56675-3-II at p.8 (quoting *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)). Thus, this issue reviewable pursuant to RAP 13.4(d).

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The State contends that under the legal prong, assault is not a lesser included offense to child molestation, because assault includes elements of harm or offense and the lack of consent, but child molestation does not include these elements.

If consent or a lack of harm or offense are a defense to assault, and if assault is a lesser included offense to child molestation, then consent and lack of harm or offense would be elements of child molestation, or at least in a trial where assault is a lesser included offense, those elements would become relevant. Including consent or lack of harm or offense as an element risks severe psychological harm to children who are confused by the guilt and shame they may feel if they reacted to the act of sexual contact by experiencing sexual pleasure. Some children, such as child prostitutes, might consent to the act of molestation. Others may consent merely because they

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are curious about sex or desire sexual experience. A child may not realize the future psychological, or physical, harm that might result from engaging in sex with an adult.

A child's consent or the presence of or lack of immediately manifest harm or offense should not be relevant to the crime of child molestation. The plain language of the statute at issue here, RCW 9A.44.083 (child molestation in the first degree), does not require proof of the lack of consent or the manifestation of harm. But the charge of assault, as applicable to a mere touching, does.

F. CONCLUSION

The criteria for review as established by RAP 13.4(b) do not support Lyon's petition for review. The State, therefore,

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asks this Court to support the finality of the jury's verdict in this case and deny Lyon's petition for review.

However, if the Court accepts review of this case, the State asks the Court to also accept review of the State's request for this Court to overrule State v. Stevens and hold that assault is not a lesser included offense to child molestation.

I certify this answer is 1,927 words. RAP 18.17(c)(10).

DATED this 5th day of February 2024, at Shelton, Washington.

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