

NO. 46005-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

GEOFF SAGUN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

The Honorable Robert Lewis, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. Trial counsel's failure to request a jury instruction on a lesser included offense of fourth degree assault constituted ineffective assistance of counsel.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Whether the appellant was denied his State and Federal constitutional right to effective counsel where the appellant, through counsel's argument, denied having sexual contact with the complaining witness but and where evidence at trial demonstrated the appellant could have committed fourth degree assault, and where his counsel failed to propose a jury instruction on the lesser included offense of fourth degree assault? Assignment of Error No. 1.

C. STATEMENT OF THE CASE

1. **Procedural facts:**

After a jury trial before the Honorable Robert Lewis in November 2013, appellant Geoff Sagun (Sagun) was found guilty of three counts of first degree child molestation and one count of indecent liberties for conduct involving A.K.G. The jury found the aggravating factor of "the offense was part of an ongoing pattern of sexual abuse of the same victim." Clerk's

Papers (CP) 230,-35, 238-39.

Neither exceptions nor objections were taken to the jury instructions. Sagun's defense counsel did not propose a to-convict jury instruction on the lesser included offense of fourth degree assault. 6Report of Proceedings RP at 539;¹ CP 189.

On February 21, 2014, the trial court sentenced Sagun to an indeterminate sentence of 300 months to life. CP 269; 7RP at 644.

Timely notice of appeal was filed on March 4, 2014. CP 293. This appeal follows.

2. Testimony at trial:

Geoff Sagun is the stepfather of A.K.G., who was born July 3, 1998. A.K.G. and her mother lived a chaotic life, characterized by frequent moves between Oregon and Washington, and involvement by Child Protective Services. 3RP at 202, 268, 269, 387, 390. A.K.G. testified that while she lived with her mother, brother and Sagun in Woodland, Washington in 2008,

¹The record of proceedings consists of seven volumes:
1RP—May 16, May 22, June 18, June 27, and August 15, 2013;
2RP—August 16, November 14, September 11, November 1, November 7, 2013;
3RP—November 18, November 19, 2013, CrR 3.5 suppression hearing and jury trial;
4RP—November 20, 2013, jury trial;
5RP—November 20, 2013, jury trial;
6RP—November 21, 2013, jury trial; and
7RP—February 5, February 21, and March 4, 2014.

Sagun engaged in sexual contact with her on several occasions. 3RP at 233. She testified that Sagun “spooned” with her while watching television on a couch, and that he put his hand down her pants while holding her down. 3RP at 200, 233, 236, 240, 274. A.K.G. testified that Sagun also put his hand up her shirt and tried to touch her breast, but that she prevented him from doing so. 3RP at 241. A.K.G. also testified that during a separate incident, again while on a couch in the living room, Sagun attempted to take her hand and force her to put it down his pants. 3RP at 242. She stated that she was able to stop him and that she did not see his penis and did not touch it. 3RP at 242, 243. She stated that she was trying to get away from him and that she was able to go to her room in the house to escape. 3RP at 246. She stated that there were four incidents in which he touched her or attempted to force her to touch him inappropriately. 3RP at 247.

A.K.G.’s mother, Khristina Johns, testified there was an incident in 2007 during which A.K.G. walked into her mother’s bedroom and saw her mother and Sagun having sex, and that Sagun did not stop and that he looked at A.K.G. during this incident. 5RP at 424, 6RP at 435. Ms. Johns also stated that Sagun would frequently walk around nude in front of A.K.G. Jason Olson, a former friend of Sagun’s, testified that he saw A.K.G. and

Sagun cuddled under a blanket on a couch at their house at Brush Prairie, Washington, on one occasion when he visited. 6RP at 487-88. He stated that Sagun commented to him that A.K.G. had seen Sagun naked and that Sagun thought it “was perfectly normal for him to be that way—walk around naked with a younger daughter—stepdaughter in the house” 6RP at 491.

A.K.G. was contacted by a police detective and she denied that she had made any accusations against Sagun. 4RP at 256-57. At trial she testified that she had not told the truth when she denied that she had said that Sagun had had sexual contact with her. 3RP at 191, 4RP at 257.

Christopher Johnson, a psychologist, testified that some teenagers delaying in reporting sexual abuse, and that they do so for a variety of reasons. 5RP at 315, 316.

Sagun did not testify at trial. 6RP at 529.

D. ARGUMENT

1. DEFENSE COUNSEL’S FAILURE TO REQUEST AN INSTRUCTION FOR THE LESSER INCLUDED OFFENSE OF FOURTH DEGREE ASSAULT DENIED SAGUN HIS RIGHT TO EFFECTIVE COUNSEL

A criminal defendant has the constitutional right to the assistance of

counsel. U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22.

Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. *Kimmelman v. Morris*, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). 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 *Strickland*, the appellate 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. Ineffective assistance of counsel claims are reviewed *de novo*. *State v. S.M.*,

100 Wn. App. 401, 409, 996 P.2d 1111 (2000). There is a presumption that counsel's assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122, review denied, 105 Wn.2d 1013 (1986). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 687.

There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)(citing *Strickland*, 466 U.S. at 689). If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

The Court of Appeals reviews a claim of ineffective assistance of counsel de novo. *State v. White*, 80 Wn.App. 406, 410907 P.2d 310 (1995), review denied 129 Wn.2d 1012, 917 P.2d 130 (1996).

- a. Fourth degree assault is a lesser-included offense of first degree child molestation

Here, trial counsel was ineffective for failing to propose a lesser

included offense instruction for fourth degree assault where it was supported in both law and fact. Sagun was prejudiced by counsel's error and therefore reversal is required.

A defendant has a right to have lesser included offenses presented to the jury. RCW 10.61.006; *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). A defendant is entitled to an instruction on a lesser-included offense if (1) each of the elements of the lesser offense is a necessary element of the offense charged (the legal prong), and (2) the evidence 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).

Sagun was charged with three counts of child molestation in the first degree under RCW 9A.44.083.

Under the statute, 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.36.041(1) defines fourth degree assault as an assault not amounting to assault in the first, second, or third degree, nor amounting to custodial assault. Fourth degree assault is a gross misdemeanor. RCW

9A.36.041(2). The term "assault" is not statutorily defined, but Washington courts recognize and apply three definitions of common law 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. *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006). The offense of child molestation requires a showing of "sexual contact" between the defendant and a child. RCW 9A.44.010(2) defines "sexual contact" as "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."

In *Stevens*, the Supreme Court held that second degree child molestation necessarily includes the elements of fourth degree assault. 158 Wn.2d at 311. Because the only difference between the degrees of child molestation is the ages of the parties involved, fourth degree assault is also necessarily a lesser included offense of first and third degree child molestation. Accordingly, the legal prong of the *Workman* is satisfied. A.K.G.'s testimony that Sagun spooned with her and put a hand down her pants, tried to force her hand down his own pants, and that he put his hand in

her shirt, all of which supports an inference that Sagun committed only fourth degree assault and not child molestation. 4RP at 246, 241. Sagun demonstrated the legal and factual prong of the *Workman* test and therefore he was entitled to a to-convict jury instruction on fourth degree assault had counsel requested such an instruction.

- b. Trial counsel was ineffective for failing to request a jury instruction on the lesser-included offense of fourth degree assault

Trial counsel's failure to request a to-convict instruction for fourth degree assault constitutes deficient performance because there was evidence supporting an inference that Sagun assaulted A.K.G., but did not have sexual contact with her. Due to the significant difference in penalties between fourth degree assault and the child molestation offenses for which Sagun was convicted, defense counsel's deficient performance prejudiced the appellant.

Moreover, counsel's failure to request a jury instruction on the lesser-included offense of fourth degree assault was not a legitimate trial strategy.

A trial counsel's deliberate tactical decision may constitute ineffective assistance of counsel if it falls outside the wide range of professionally competent assistance. *State v. Grier*, 150 Wn. App. 619, 640, 208 P.3d 1221 (2009) (citing *State v. Pittman*, 134 Wn. App. 376, 390, 166 P.3d 720

(2006)), *review granted*, 167 Wn.2d 1017, 224 P.3d 773 (2010).

The difference in maximum penalties between his child molestation convictions and convictions for fourth degree assault is tremendous. Because it is a gross misdemeanor, fourth degree assault carries a maximum jail term of one year. RCW 9A.36.041(2); RCW 9.92.020. In contrast, first degree child molestation is level X offense. RCW 9.94A.515. The disparity in the punishment Sagun faced supports finding defense counsel rendered ineffective assistance by failing to present the jury with the option of convicting him of the lesser included offense of fourth degree assault defense counsel's failure to request a lesser included fourth degree assault instruction placed Sagun in great risk that the jury would convict him because if it found his spooning with of A.K.G., and her assertion that he touched her by putting his hand down her pants and by putting his hand up her shirt while holding her down, to be inappropriate and disturbing, even if it did not find it was necessarily sexual in nature. Here, because the State did not present any physical evidence corroborating A.K.G.'s testimony, the jury's determination of guilt turned almost entirely on the credibility of the complaining witness. By failing to request an instruction on fourth degree assault, Sagun's defense counsel placed him at risk that the jury would find A.K.G. credible in regard

to their apprehension of Sagun touching her, even if not done for sexual gratification, thus finding him guilty of some offense, and resolving their doubts on the sexual nature of Sagun's touching in favor of guilt.

Trial counsel explicitly adopted an "all-or-nothing" strategy regarding the counts: the jury would be faced with the choice either finding Sagun guilty of first degree child molestation or not guilty of the offenses. The evidence introduced at trial left it likely that the jury would convict Sagun of some crime. Given the likelihood that the jury would find him guilty, and given the great disparity in punishment between first degree child molestation and fourth degree assault, it cannot be said that it was a legitimate trial strategy for his trial counsel to fail to request that the jury be instructed on fourth degree assault. See also, *Grier*, 150 Wn.App. at 642-643.

Under these circumstances, defense counsel's failure to propose a lesser included offense instruction for fourth degree assault constitutes deficient performance that prejudiced the appellant and does not constitute a legitimate trial strategy. Therefore, this court should reverse his convictions.

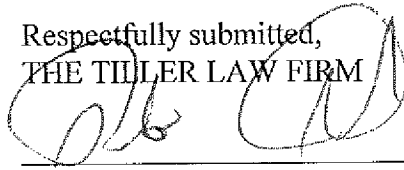
E. CONCLUSION

Denial of his right to effective assistance of counsel requires that

Sagun's convictions should be reversed.

DATED: August 27, 2014.

Respectfully submitted,
THE TILLER LAW FIRM

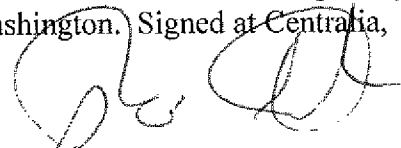


PETER B. TILLER-WSBA 20835
Of Attorneys for Geoff Sagun

CERTIFICATE OF SERVICE

The undersigned certifies that on August 27, 2014, that this Opening Brief of Appellant was e-filed to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copy was mailed to Ms. Anne Cruser, Clark County Prosecutor's Office, P.O. Box 5000, Vancouver, WA 98666-5000, and was mailed by U.S. mail, postage prepaid, to the appellant, Mr. Geoff Sagun, DOC # 370721, Coyote Ridge Correction Center, P.O. Box 769, Connell, WA 99326, LEGAL MAIL/SPECIAL MAIL.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 27, 2014.



PETER B. TILLER

RCW 9A.36.041

Assault in the fourth degree.

(1) A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.

(2) Assault in the fourth degree is a gross misdemeanor.

RCW 9A.44.010

Definitions.

As used in this chapter:

(1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(2) "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.

(3) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(4) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or

consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(5) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(6) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(7) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

(8) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(9) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or benefit of a minor; or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(10) "Person with a developmental disability," for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1)(c) or (e) and 9A.44.100(1)(c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically dependent persons at the facility.

(12) "Person with a mental disorder" for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a "mental disorder" as defined in RCW 71.05.020.

(13) "Person with a chemical dependency" for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is "chemically dependent" as defined in *RCW 70.96A.020(4).

(14) "Health care provider" for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

(15) "Treatment" for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide.

(16) "Frail elder or vulnerable adult" means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person found incapacitated under chapter 11.88 RCW, a person over eighteen years of age who has a developmental disability under chapter 71A.10

RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

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.

TILLER LAW OFFICE

August 27, 2014 - 3:49 PM

Transmittal Letter

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