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

STATE OF WASHINGTON, RESPONDENT

v.

ALFREDO WATSON POZO, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle, Presiding Judge

No. 06-1-00679-0

BRIEF OF RESPONDENT

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

1. Does defendant establish that defense counsel's decision not to request an instruction on assault in the fourth degree constitute ineffective assistance of counsel when there was a clear tactical reason not to request such an instruction?

B. STATEMENT OF THE CASE.

1. Procedure

On February 9, 2006, ALFREDO WATZON POZO, hereinafter "defendant," was charged by information with child molestation in the first degree contrary to RCW 9A.44.083, in Pierce County Superior Court Cause No. 06-1-00679-0. CP 2.

At a CrR 3.5 hearing, the court ruled that statements made by the victim to a nurse were admissible under ER 803(a)(4) as a medical exception to ER 802 regarding hearsay. RP 96, 104. The court also ruled that the defendant understood his Miranda¹ rights prior to making voluntary statements to officers, and that such statements were admissible. RP 142. After a child competency hearing, the court ruled that the victim, a child, was competent to testify at trial. RP 168.

On July 19, 2006, all parties appeared for a jury trial before the Honorable Judge Thomas Felnagle. RP 202. The defendant was found

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

guilty as charged of child molestation in the first degree on July 25, 2006. CP 28-50; RP 503-504.

The defendant's standard sentencing range was a minimum 51 to 68 months with a maximum of life. (10/06/06) RP 4². The court sentenced the defendant to a minimum term of 68 months with a maximum term of life, with credit for 243 days served. (10/06/06) RP 5-9. The court also ordered the defendant to obtain a psychosexual evaluation and follow-up treatment, register as a sex offender, remain on community custody for life, have no contact with the victim, and pay legal financial obligations totaling \$2,300. (10/06/06) RP 5, 8. The defendant filed a timely Notice of Appeal on October 11, 2006. CP 73.

2. Facts

On February 5, 2006, the defendant accompanied his girlfriend, Shurna Gray, to the home of Gray's niece, Dashikia Hardy. RP 268, 274-275. Hardy was attending a Super Bowl party at a co-worker's house and asked her aunt to baby-sit her two children. RP 274. Gray baby-sat for her niece frequently, often while the defendant was present. RP 275.

After watching the Super Bowl on television in the first floor living room, Gray sent the victim, her niece's six year-old son, to the second floor to get ready for bed. RP 279. Meanwhile, Gray and the defendant went to the garage to smoke a cigarette and remove some of her belongings which she stored there. RP 276, 279. The defendant left the

² The Verbatim Report of Proceedings dated October 6, 2006, is not included in the series of consecutively paginated volumes and will be referred to by date.

garage and returned to the main part of the house while Gray stayed to organize and remove boxes. RP 282. About ten minutes later, Gray returned to the main part of the house to check on the victim and went directly to his bedroom on the second floor. RP 312. As she approached the open door of the bedroom, it shocked her to see the victim lying face down on his bed with his pants and underwear pulled down near his knees. RP 286. The defendant was standing over the victim, masturbating with his right hand while rubbing the victim's buttocks with his left hand. RP 283. With his thumb positioned near the "crack" of the victim's buttocks, the defendant moved his left hand in a massaging motion. RP 284. The victim's demeanor indicated that he was afraid and confused. RP 285.

Upon noticing Gray standing at the door, the defendant apologized immediately, promising that it would never happen again. RP 283. He stated "I'm sorry... [i]t won't happen no more... [d]on't call the police." RP 283. As the defendant pulled up his pants, Gray rushed toward him, hitting him repeatedly while directing the victim to pull up his pants and go to his sister's room. RP 283, 290-291. Gray hurried down the stairs, wrestled the phone away from the defendant and called the police, despite the defendant's pleas not to do so. RP 290. Gray also called her niece to inform her of the incident, then spoke with a neighbor who came outside after hearing the commotion. RP 293, 329.

Lakewood Police Officer Karen Herritt was the first to arrive at approximately 9:39 p.m. RP 218. When she arrived, the defendant rushed toward her patrol car, crying hysterically and speaking rapidly. RP 220.

Although Officer Herritt struggled to understand him, he repeated that he wanted to be “tested” and that he had not “stuck his finger up anybody’s butt,” but was merely looking at a mark on the victim’s buttocks at the boy’s request. RP 220. Shortly thereafter, Officer James Lofland arrived and Officer Herritt left him outside with the defendant while she went into the house to protect the scene and speak to Gray. RP 221. Officer Lofland attempted to calm the defendant and eventually sat him in the back of the patrol car, without handcuffs, to get him out of the rain. RP 335. Officer Lofland read the defendant his Miranda rights, which he understood, and drove him to the Lakewood Police Station so that he could be interviewed by Detective Brent Eggleston. RP 336, 370.

In the interview, the defendant explained that after he left Gray in the garage, he went upstairs to watch cartoons in the victim’s bedroom, where he sat on the floor while the boy laid on the bed. RP 384. The defendant stated that the victim complained of an itchy spot on his buttocks and asked him to look at it. RP 385. He directed the victim to pull down his pants so that he could see the mark, which the defendant described as similar to a hickey. RP 385. The defendant emphasized to the detective that he never put his fingers anywhere near victim’s “crack,” but that he had placed the ends of both fingers near the mark for approximately 2 seconds so he could examine it more closely. RP 386-387, 389, 390. The defendant also said that he was fully clothed while examining victim. RP 389. At that point, he explained, Gray walked in and began hitting him, accusing him of molesting the victim. RP 387.

After the defendant explained his account of the incident, Detective Eggleston asked if anything else happened in the room. RP 391. The defendant replied that his account was complete. RP 391. Detective Eggleston then informed him that a tissue had been found on the floor of the room. RP 391. In contrast to his original account, the defendant responded that the victim was actually in the bathroom when he initially went upstairs and that he sat alone in the bedroom and masturbated for about two seconds until the victim came out of the bathroom. RP 391-392, 406. Upon noticing the victim entering the room, the defendant hid his penis with his hands and discreetly zipped up his pants. RP 393-394. He stated that he and the victim watched cartoons for about four or five minutes before the victim asked him to look at the mark on his buttocks. RP 395, 406. At the conclusion of the interview, Detective Eggleston offered the defendant the opportunity to personally write a statement, but he declined. RP 397.

On February 6, 2006, the day following the incident, Hardy took the victim to see Michelle Breland, a pediatric nurse practitioner at the Child Abuse Intervention Department at Mary Bridge Hospital. RP 418-419. Breland conducted a brief interview with the victim followed by a physical examination. RP 421. In response to her questions, the victim indicated that a man named Alfredo touched his penis with his hand. RP 432. At the conclusion of the check-up, Breland discussed the results with Hardy and made a referral for the victim to receive counseling. RP 435-436.

C. ARGUMENT.

1. DEFENDANT FAILS TO ESTABLISH THAT COUNSEL'S DECISION NOT TO REQUEST AN INSTRUCTION ON ASSAULT IN THE FOURTH DEGREE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THERE WAS A CLEAR TACTICAL REASON FOR NOT REQUESTING SUCH AN INSTRUCTION.

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish that counsel was ineffective, the defendant bears the burden of showing that counsel's performance was deficient and such deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

Counsel's performance was constitutionally deficient if it fell below an objective standard of reasonableness based on consideration of all the circumstances such that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. McFarland at 334-335, State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986). Courts gauge deficiency under a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based

solely on matters within the trial record established at the proceedings below. McFarland, 127 Wn.2d at 335. Judicial scrutiny of the record is highly deferential in favor of counsel in order to eliminate the distorting effects of hindsight. Strickland, 466 U.S. at 689.

A defendant is prejudiced by such a deficiency if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” McFarland, 127 Wn.2d at 336.

- a. Defense counsel’s decision not to request a jury instruction on the lesser included charge of assault in the fourth degree was a legitimate strategic decision that does not constitute deficient representation.

Defendant must show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. McFarland, 127 Wn.2d at 336. A person commits fourth degree assault if, “under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.041(1). The term “assault,” however, is not statutorily defined, so Washington courts recognize three common law definitions. State v. Aumick, 126 Wn.2d 422, 426 n.12, 894 P.2d 1325 (1995). The pertinent definition of assault is “an unlawful touching with criminal intent.” See, generally, State v. Stevens, 158 Wn.2d 304, 311, 143 P.3d 817 (2006). Generally, the definition includes an intentional touching of another person, with unlawful force, that is harmful or offensive. WPIC 35.50. A touching is

offensive if the touching would offend an ordinary person who is not unduly sensitive. Id.

Defense counsel's decision not to request a lesser included charge of assault in the fourth degree was not deficient because it represented sound trial strategy. An instruction on fourth degree assault includes both the elements of unlawful touching and intent to commit a crime. See, WPIC 35.50. The defense theory, however, is that even if the defendant touched the victim, he lacked criminal intent at the time he did so. RP 482, 483. When questioned by officers, the defendant consistently denied touching the victim with any intent to harm him or receive sexual gratification. RP 220-221, 251, 338, 385. A request for an instruction on fourth degree assault, in particular the element of criminal intent, directly contradicts defendant's account of the incident that he only touched the victim in order to help him, and that he did so at the victim's request. Rather than request an instruction that undermines his client's version of the incident by implying that some form of touching and criminal intent existed, defense counsel was likely trying to obtain an outright acquittal by casting doubt on those elements. Such a strategy was objectively reasonable under the circumstances.

- b. The court would have denied a request for a jury instruction on the charge of assault in the fourth degree because such instruction was not justified under the factual prong of *Workman*.

In general, the crimes charged in an information are the only crimes of which a defendant may be convicted and on which a jury may be

instructed. State v. McJimpson, 79 Wn. App. 164, 171, 901 P.2d 354, review denied, 129 Wn.2d 1013, 917 P.2d 576 (1996). Nevertheless, a defendant may be convicted of, and a jury instructed on, a crime that is a lesser offense necessarily included in the offense charged. State v. Berlin, 133 Wn.2d 541, 544-545, 947 P.2d 700 (1997). The right to present a lesser included offense to the jury is a statutory right. RCW 10.61.006. Either the defense or the prosecution may request a lesser included offense instruction. State v. Tamalini, 134 Wn.2d 725, 728, 953 P.2d 450 (1998).

In State v. Workman, 90 Wn.2d 443, 584 P.2d. 382 (1978), the Supreme Court formulated the test for when a party is entitled to an instruction on a lesser included offense. A defendant is entitled to a lesser included offense instruction if (1) each element of the lesser offense is a necessary element of the charged offense (the legal test), and (2) the evidence supports an inference that defendant committed the lesser offense (the factual test). State v. Pastrana, 94 Wn. App. 463, 972 P.2d 557, 561 (1999), citing State v. Workman, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978).

The legal test provided by Workman is met here if the charge of first degree child molestation necessarily includes the elements of fourth degree assault. In State v. Stevens, 158 Wn.2d 304, 143 P.3d 817 (2006), the court found that second degree child molestation necessarily includes every element of fourth degree assault. Id. at 311. The only difference between second degree child molestation and first degree child molestation is an age threshold. See, RCW 9A.44.083, 9A.44.086. The

holding in Stevens, therefore, is also applicable to a charge of first degree child molestation where the age threshold is met, because the other elements remain the same as second degree child molestation. In this case, the legal test provided by Workman is met because the victim falls within the age range covered by first degree child molestation and the charge necessarily includes all elements of fourth degree assault.

The factual prong of Workman, however, is not met. In State v. Porter, 150 Wn.2d 732, 82 P.3d 234 (2004), the court articulated the evidentiary showing required by the factual prong of Workman:

To satisfy the second Workman requirement . . . “we have held that the evidence must raise an inference that *only* the lesser included . . . offense was committed to the exclusion of the charged offense.” State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). In other words, “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.

Porter, 150 Wn.2d at 737 (internal citations omitted).

Where the Supreme Court denied an instruction on a lesser included offense, it determined that the evidence did not support an inference that only the lesser offense was committed. In State v. Pacheco, 107 Wn.2d 59, 726 P.2d 981 (1986), the Court considered whether the jury should have been instructed on a lesser included offense of unlawfully carrying a weapon where the primary charge was first degree robbery. Id. at 68. The evidence demonstrating that the defendant unlawfully carried a knife was a security videotape which also showed that he used the knife to commit robbery. Id. at 61-62. Thus, the evidence that proved the lesser offense also proved the remaining elements of the

greater offense. Id. at 70. The jury, therefore, was unable to rationally find that *only* the lesser offense was committed. Id.

The Supreme Court also denied an instruction on a lesser included offense where it determined that the defense theory negated at least one element required to establish that the lesser offense was committed. In State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990), the Court considered whether the trial court correctly refused to instruct the jury on a lesser included offense of second degree murder where the primary offense charged was aggravated first degree murder. Id. at 806. Both offenses contain an element of intent to cause death. Id. at 805. At trial, however, the defendant asserted that, due to her diminished capacity, she did not have the intent to kill the victim when she hired a person to attack him. Id. at 805. The court found that the defense theory negated the intent element required to find second degree murder, rendering an instruction on such an offense unwarranted. Id. at 806.

Similarly, as argued below, the defense in the present case sought to negate the intent element by asserting that the contact occurred for a care-giving function. The officers' testimony provided the defendant's account of the incident. When questioned by officers, the defendant consistently maintained that he was looking at a mark on the victim's buttocks at the victim's request. RP 220-221, 251, 338, 385. Under the defendant's theory, any touching that occurred was not done for the purposes of gratifying sexual desires or with an intent to touch the victim unlawfully, but was done with the consent of the victim for medical

assistance. If the jury found the defendant's account to be credible, then neither fourth degree assault nor first degree child molestation occurred, because both charges require an element of intent. The officers' testimony regarding the victim's account of the incident negates the element of intent and, in turn, invalidates the required inference that the lesser included offense was committed.

Moreover, the defendant alleges that defense counsel should have requested an instruction on the lesser included offense of fourth degree assault. Brief of Appellant at p. 36. At trial, the court instructed the jury that to find the defendant guilty of child molestation in the first degree, the State must show that (1) on or about the 5th day of February, 2006, the defendant had sexual contact with L.H., (2) L.H. was less than twelve years old at the time of the sexual contact and was not married to the defendant, (3) L.H. was at least thirty-six months younger than defendant, and (4) this act occurred in the State of Washington. CP 32. It also instructed the jury that the term "sexual contact" contained in the first element means "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party." CP 30. While sexual gratification is not an explicit element of first degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification. State v. Stevens, 158 Wn.2d 304, 309-310, 143 P.3d 817, 820 (2006).

Other than the officers' testimony discussed above, the evidence in the present case consisted of Gray's testimony of what she saw when she

walked into the victim's bedroom, the testimony of Breland regarding the victim's statements during a medical examination, and the victim's testimony about what occurred.

Gray testified that she saw the defendant masturbating while massaging the victim's buttocks. RP 283. Although those acts may be construed as showing the elements of fourth degree assault, they are more consistent with the sexual contact element of first degree child molestation because they show a purpose of sexual gratification. Similar to the videotape in Pacheco, Gray's testimony establishes the common elements of the two charges, but also establishes the remaining element of the greater offense: the purpose of sexual gratification. Gray's testimony, therefore, does not support an inference that *only* the lesser offense was committed.

Breland, the nurse that examined the victim, testified that the victim told her a man named Alfredo touched his penis with his hand. RP 431-433. The victim testified at trial, however, that the defendant touched him "below [his] back" with his hand. RP 449. Although the testimonies are inconsistent, both establish that the defendant touched the victim in a sexual or intimate part of his body. It can be reasonably inferred that touching a child on an intimate part of the body is done for the purpose of sexual gratification. See, State v. Marcum, 61 Wn. App. 611, 612 n.1, 811 P.2d 963 (1991)(evidence that defendant put his hand down inside the front of victim's trousers was enough to raise an inference that he did so for sexual gratification). Both statements made by the victim, therefore,

support a reasonable inference that the defendant committed first degree child molestation and not only fourth degree assault. Finally, the jury could have found the victim's statements made closer in time to the incident to be more accurate.

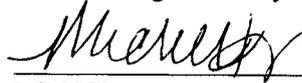
An instruction on fourth degree assault was not warranted under the factual prong of the Workman analysis because there was no evidence supporting a reasonable inference that the defendant committed *only* fourth degree assault. State v. Porter, 150 Wn.2d 732, 737, 82 P.3d 234 (2004). The court would not have given the instruction even if defense counsel had requested it. Consequently, the defendant was not prejudiced because the outcome of the trial was unaffected by defense counsel's decision not to request the instruction and he did not receive ineffective assistance of counsel.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that the conviction be affirmed.

DATED: June 27, 2007.

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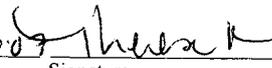


Kaj Hackinen
Legal Intern

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.

Arnold

6-26-07 
Date Signature

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