

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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**Court of Appeals No. 38807-3-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**JASON CHARLES WELLS,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 07-1-03182-2  
The Honorable James R. Orlando, Presiding Judge**

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**I. ASSIGNMENT OF ERROR**

Mr. Wells' right to a fair trial was violated by ineffective assistance of counsel.

**II. ISSUES PRESENTED**

1. Was Mr. Wells' trial counsel ineffective for failing to request that the jury be instructed on fourth degree assault as a lesser included crime?
2. Was Mr. Wells' trial counsel ineffective for proposing a jury instruction which misstated the law regarding voluntary intoxication and the ability of a defendant to form the requisite intent to commit a crime?

**III. STATEMENT OF THE CASE**

***Factual and Procedural Background***

On June 15, 2007, Melissa Rosenberg and her husband, Daniel Rosenberg, decided to go to a bar with some friends, including Mr. Jason Wells, a friend of Mr. Rosenberg's from work. RP 249-250, 252, 282-284, 286-288. The Rosenbergs left their five-year-old daughter, B.R., in the care of a babysitter, Ms. Rebecca Rosendahl. RP 251-252, 287, 309. The Rosenbergs had socialized with Mr. Wells a few times and had never had any problems with him. RP 249-250. Mr. Wells had interacted with B.R. and had done nothing out of the ordinary. RP 250.

The Rosenbergs arrived at the bar around 8:30 or 9 p.m. RP 253. When the Rosenbergs arrived at the bar, Mr. Wells was already there and had already begun drinking. RP 254, 288. The purpose of the Rosenbergs

and Mr. Wells meeting at the bar was to have a “drunk fest” and to get drunk. RP 272. Mr. Rosenberg drank beer, mixed drinks, and took shots. RP 255. Mr. Wells also drank beer, mixed drinks, and shots. RP 255-256, 271. The Rosenbergs and Mr. Wells stayed at the bar drinking until 1 a.m. RP 256, 271.

By the end of the night, Mr. Rosenberg and Mr. Wells were both drunk. RP 257. Mr. Rosenberg was more drunk than usual. RP 291. Mr. Wells was so intoxicated that the Rosenbergs decided not to let Mr. Wells drive home and to let him spend the night at their house. RP 257. As the parties left the bar, Mr. Wells was “pretty intoxicated” and had difficulty walking and couldn’t walk to the Rosenberg’s car without assistance. RP 257, 269-270. Mr. Wells was falling-down-drunk and was so drunk he was not able to function. RP 274-275.

Ms. Rosenberg drove to the Rosenberg’s home, opened the garage door, and went inside to let Ms. Rosendahl know that the Rosenbergs were home and Ms. Rosendahl could leave. RP 258. As Ms. Rosenberg went into the home, Mr. Rosenberg and Mr. Wells got out of the car, went into the garage, and began wrestling with each other and being loud. RP 258, 293. Ms. Rosenberg returned to the garage and found Mr. Rosenberg passed out on the garage floor. RP 270. Ms. Rosenberg did not see any vomit in the garage at that time. RP 270. Ms. Rosenberg helped Mr.

Wells upstairs to the spare bedroom. RP 259. Mr. Wells had to physically help Mr. Wells up the stairs because he couldn't walk up the stairs and was babbling incoherently and Ms. Rosenberg could not understand him. RP 259, 270-271. Ms. Rosenberg put Mr. Wells fully clothed on the futon in the spare room. RP 259. Ms. Rosenberg then went back downstairs and went to bed. RP 260.

Mr. Rosenberg woke up in the garage around 3 a.m. and discovered vomit all over the floor and on his shoes. RP 293-294, 302. Mr. Rosenberg cleaned up the vomit, took a shower, changed his clothes, and went to bed with Ms. Rosenberg around 3:30 a.m. RP 294.

At some point in the night, Ms. Rosenberg went up to check on Mr. Wells because his cell phone kept ringing. RP 276. Mr. Wells was passed out drunk so Ms. Rosenberg went back downstairs and went back to sleep. RP 276.

Around 8:30 a.m. the next day, June 16, 2007, Ms. Rosenberg was awakened by noises from her one-and-one-half-year-old baby, C.R., coming over the baby monitor. RP 260-261. Ms. Rosenberg went upstairs to check on C.R. and saw that the door to B.R.'s bedroom was open. RP 261. B.R. usually slept with her door closed. RP 251. Ms. Rosenberg looked inside B.R.'s bedroom and saw a pair of men's pants at the foot of B.R.'s bed. RP 261. Ms. Rosenberg walked into the bedroom and found

Mr. Wells naked on his back in B.R.'s bed, partially covered by the bed sheet and comforter. RP 261. B.R. was asleep on her side in the fetal position facing away from Mr. Wells. RP 261. Ms. Rosenberg yelled "as to what he was doing in her bed," went to B.R.'s side of the bed, pulled the covers back, and got B.R. out of the bed. RP 262. Ms. Rosenberg discovered that B.R.'s underwear and pajama bottoms had been removed and were laying next to her bed. RP 262. Ms. Rosenberg went to take B.R. downstairs to Mr. Rosenberg as Mr. Wells woke up, put his clothes on, and said that he didn't do anything. RP 262.

Mr. Rosenberg was awakened by Ms. Rosenberg screaming that he needed to come upstairs immediately. RP 295. Mr. Rosenberg ran upstairs and was met halfway by Ms. Rosenberg holding B.R. RP 264, 295. Ms. Rosenberg told Mr. Rosenberg that Mr. Wells was naked in bed with B.R. RP 296. Mr. Rosenberg immediately went to B.R.'s bedroom, opened the door and found Mr. Wells pulling up his pants. RP 296. Mr. Wells looked shocked and said, "I don't know how I got here." Mr. Rosenberg told Mr. Wells that Mr. Wells needed to leave. RP 296.

After Mr. Wells left, Mr. Rosenberg took B.R. downstairs to the master bedroom to talk to her. RP 297. Ms. Rosenberg went into B.R.'s bedroom. RP 297. Mr. Rosenberg asked B.R. if Mr. Wells had touched B.R. and she said yes. RP 298. Mr. Rosenberg asked B.R. where Mr.

Wells had touched her and she said she didn't know. RP 298.

Ms. Rosenberg found Mr. Wells' watch on B.R.'s dresser and found Mr. Wells' underwear tangled in the sheets of the bed. RP 265. Ms. Rosenberg took Mr. Wells' watch and underwear and threw them at Mr. Wells as he sat on the porch of the Rosenberg's home. RP 266. Ms. Rosenberg told Mr. Wells that he needed to get as far away from the Rosenberg's house as possible immediately. RP 266. Mr. Wells then called law enforcement and reported that there was a person in his house who had molested his daughter. RP 299. Mr. Rosenberg took B.R. to the Mary Bridge Children's Hospital E.R. and had her examined. RP 300, 399. The examination revealed that B.R. was normal. RP 399.

Pierce County Sheriff's Deputy Eric Hook was working on June 16, 2007 when he received a complaint from dispatch of a man and a woman who had woken up in the morning to find that a friend of theirs was in the bed of their five-year-old daughter and that the man was naked and the daughter's pants were removed. RP 414. Deputy Hook responded to the Rosenberg's residence, but, en route, he was informed that the friend had left the Rosenberg's home. RP 415. It was reported that Mr. Wells would go to the bar to retrieve his car, so Deputy Hook traveled to the bar. RP 415. Deputy Hook did not observe Mr. Wells or his vehicle in the parking lot of the bar, so he contacted Ms. Rosenberg and

obtained Mr. Wells' home address and went to look for MR. Wells at his home. RP 415.

Deputy Hook arrived at Mr. Wells' home and saw a vehicle matching the description of Mr. Wells' vehicle. RP 416. Deputy Hook knocked on Mr. Wells' door and Mr. Wells answered. RP 416-417. Mr. Wells confirmed that he was Jason Wells and Deputy Hook immediately handcuffed Mr. Wells. RP 417. Mr. Wells was very tired, was "dragging," had bloodshot eyes, seemed as if he had just woken up, and looked as if he had been drinking recently. RP 417, 430. Deputy Hook asked Mr. Wells if he knew why Deputy Hook was at Mr. Wells' house and Mr. Wells answered, "Yes, it had to do with what just happened over at my friend's house." RP 417-418. At that point, Deputy Hook stopped Mr. Wells from talking and read him his constitutional rights in accordance with *Miranda*. RP 418. Mr. Wells indicated that he understood his rights and that he wished to continue to speak with Deputy Hook. RP 418-419.

Mr. Wells told Deputy Hook that he had gone to a bar with friends the previous night, had drank to much and couldn't drive, and spent the night at his friend's house. RP 426. Mr. Wells said that he was put to bed fully clothed and that B.R.'s bedroom was across the hall form the bedroom where he was placed. RP 427. Mr. Wells said that he didn't

remember how his clothes were removed or how he got into B.R.'s bedroom. RP 427. Mr. Wells said that he did not rape B.R., but that he accidentally touched he. RP 428-429. Deputy Hook arrested Mr. Wells and took him to jail to be booked. RP 429.

On June 18, 2007, Mr. Wells was charged with one count of child molestation in the first degree in violation of RCW 9A.44.083. CP 1.

On June 21, 2007, Ms. Keri Arnold-Harms, a child interviewer with the Pierce County Prosecutor's Office, interviewed B.R. RP 344, 364. B.R. told Ms. Arnold-Harms that someone had "loved" on her and described "loving on" someone as when somebody loves you they will always love you. RP 368. B.R. never made clear what sort of activity was encompassed in "loving on" another person. RP 368. B.R. said that "Jason" had come into her bedroom. RP 370. B.R. said that they were both in her bed, she was lying on her back and he was lying on his stomach, he was naked, and that he removed her pants and panties. RP 368-369. At one point, B.R. indicated that something had happened to her bottom, but then said that nothing had happened to her bottom when Ms. Arnold-Harms attempted to clarify what B.R. meant. RP 369. B.R. also told Ms. Arnold-Harms that she felt the "loving" on her tummy. RP 377. B.R. also told Ms. Arnold-Harms that Jason appeared to be disoriented and that he had no idea what was going on. RP 379.

Michelle Breland is a pediatric nurse practitioner at Mary Bridge Children's Hospital. RP 386. Ms. Breland performs medical evaluations of children who have allegedly suffered abuse. RP 387. Ms. Breland evaluated B.R. on June 21, 2007, the same day that B.R. was seen by Ms. Arnold-Harms. RP 390. B.R. told Ms. Breland that she did not have any owies. RP 395. B.R. told Ms. Breland that Jason had touched her body in a way she didn't like and that he had touched her bottom. RP 395. B.R. stood up and indicated her genital area as the area she was referring to. RP 395. B.R. said that Jason had touched her with his hands, that "it felt like it hurted," that he touched her on her skin, and that he removed her pants and panties. RP 396. B.R.'s physical exam was normal. RP 398.

On September 11, 2008, the State filed notice pursuant to RCW 9A.44.120 that it would seek to introduce the hearsay statements made by B.R. to Mr. Rosenberg, Ms. Arnold-Harms, and Ms. Breland. CP 13.

On October 8, 2008, Pierce County Sheriff's Deputy Donlin spoke with Ms. Rosendahl at the prosecutor's request. RP 458-461.

On October 20, 2008, the State filed notice pursuant to RCW 9A.44.120 that it would seek to introduce the hearsay statements made by B.R. to Ms. Rosendahl. CP 14.

On October 23, 2008, the State filed an amended information charging Mr. Wells with child molestation in the first degree. CP 15.

On November 12, 2007, the State withdrew its motion to amend the charge to attempted child molestation. RP 9.

On November 12, 13, and 17, hearings were held on the admissibility of Mr. Wells' statements to Deputy Hook, the admissibility of B.R.'s hearsay statements, and B.R.'s competency to testify at trial. RP 1-226. The trial court ruled that B.R. was competent to testify and that B.R.'s hearsay statements were admissible. CP 55-57, 58-59.

On November 19, 2008, Mr. Well's case proceeded to trial. CP 229.

At trial, B.R. testified and had no recollection whatsoever of the alleged events of June 15-16, 2007. RP 228-235. B.R. did not recognize Mr. Wells, B.R. didn't know if anyone had ever given her body any touches she didn't like, nobody had ever slept in B.R.'s bed that she didn't like, B.R. didn't remember talking to Ms. Arnold-Harms, B.R. didn't remember talking to Mr. Rosenberg about anyone touching her, B.R. hadn't heard the phrase "loving" before, B.R. didn't remember Ms. Breland checking her body out or remember ever talking to Ms. Breland, didn't remember ever talking to Ms. Rosendahl about someone coming into her room and taking her clothes off, and didn't know if anyone had ever done anything bad to her. RP 231-235.

Based on B.R.'s utter lack of recollection of any facts related to

this case and failure to disclose any information relating to inappropriate sexual touching, counsel for Mr. Wells moved to exclude all of B.R.'s hearsay statements since he would be unable to cross-examine B.R. about those statements. RP 237-238. The trial court denied the motion. RP 242.

At trial, Ms. Rosendahl testified that in September or October of 2007, she was babysitting B.R. one day when B.R. got off the school bus looking sad. RP 315. Ms. Rosendahl asked B.R. if she was having a bad day and B.R. said no. RP 314-315. Ms. Rosendahl continued to question B.R. about how she was feeling until B.R. said that she was upset or worried about "the night that he touched me" and the night that Ms. Rosendahl babysat B.R. RP 315-316. Ms. Rosendahl asked B.R. what happened, and B.R. told Ms. Rosendahl that "he" had got in bed with her and touched her. RP 316. B.R. told Ms. Rosendahl that "he" was "Jason. RP 316-317.

Ms. Rosendahl testified that B.R. told her that "he tried to make her touch him, but the statement Ms. Rosendahl wrote for Deputy Donlin did not indicate that B.R. had said that Mr. Wells had tried to make B.R. touch him, Deputy Donlin's report does not indicate that Ms. Rosendahl told him B.R. told her that Mr. Wells tried to make B.R. touch him, and Deputy Donlin did not recall at trial that Ms. Rosendahl had ever told him

that B.R. told her that Mr. Wells tried to make B.R. touch him. RP 317, 322-326, 459-462.

Ms. Rosenberg testified that B.R.'s behavior had not changed due to the incident with Mr. Wells. RP 267.

Initially, counsel for Mr. Wells proposed a lesser included jury instruction of fourth degree assault. RP 468. However, counsel for Mr. Wells later withdrew the request for the fourth degree assault jury instruction. RP 541.

Over objection from Mr. Wells, the court instructed the jury on attempted child molestation as a lesser included crime. RP 558, 562-563; CP 86-107.

The jury found Mr. Wells guilty of child molestation in the first degree. RP 643; CP 108.

Mr. Wells was sentenced to 51 months confinement and received a community custody sentence of life. CP 142-156.

Notice of appeal was filed on January 29, 2009. CP 187-207.

#### **IV. ARGUMENT**

##### **Mr. Wells received ineffective assistance of counsel.**

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth

Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9<sup>th</sup> Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (*citing State v. Rosborough*, 62 Wn..App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel’s performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). To establish prejudice, a defendant must show that but for counsel’s performance, the result would have been different. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing State v. Early*, 70 Wn..App. 452, 460, 853 P.2d 964 (1993)). The defendant need only show a reasonable probability the outcome would have differed sufficient to undermine confidence in the outcome in order to demonstrate prejudice. *Strickland*, 466 U.S. at 693-94, 104 S.Ct. 2052, 80 L.Ed.2d 674.

There is a strong presumption that trial counsel’s performance was adequate, and exceptional deference must be given when evaluating

counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (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, 410, 907 P.2d 310 (1995), *review denied* 129 Wn.2d 1012, 917 P.2d 130 (1996).

- A. It was ineffective assistance of counsel for Mr. Wells' trial counsel to fail to request that the jury be instructed on fourth degree assault as a lesser included offense.

In determining whether a defendant received ineffective assistance of counsel when the defendant's trial counsel failed to request a lesser included instruction, the appellate court engages in a three-part analysis:

We first determine whether the defendant was entitled to the instruction-voluntary intoxication. *See State v. King*, 24 Wn.App. 495, 501, 601 P.2d 982 (1979) (counsel not ineffective for failing to present a defense not warranted by the facts). We next decide whether it was appropriate not to ask for the instruction. *See State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995) (requiring defendant to show absence of legitimate strategic or tactical rationales for challenged attorney conduct). Finally, we must decide whether he was prejudiced. *See State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001) (rejecting argument that failure to propose an instruction to which

defendant was entitled under the law constitutes per se ineffective assistance of counsel).

*State v. Kruger*, 116 Wn.App. 685, 690-691, 67 P.3d 1147, review denied 150 Wn.2d 1024, 81 P.3d 120 (2003).

- i. Mr. Wells was entitled to an instruction on fourth degree assault.

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).<sup>1</sup> 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. Pacheco*, 107 Wn.2d 59, 68-69, 726 P.2d 981 (1986); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

Mr. Wells was charged with child molestation in the first degree under RCW 9A.44.083. Under RCW 9A.44.083,

A person is guilty of child molestation in the first degree

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<sup>1</sup> See also *Keeble v. United States*, 412 U.S. 205, 250, 93 S.Ct. 1993, 36 L.Ed.2d 844 (1973) (“It is no answer to petitioner's demand for a jury instruction on a lesser offense to argue that a defendant may be better off without such an instruction. True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction ... precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.”.)

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.

Under RCW 9A.44.010, “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.

A person commits fourth degree assault when he or she assaults another under circumstances not amounting to first, second, or third degree assault or custodial assault. RCW 9A.36.041(1).

Washington recognizes three common law definitions of assault, in the absence of a definition from the legislature. *Stevens*, 158 Wn.2d at 308, 143 P.3d 817. These three types are: “(1) an attempt, with unlawful force, to inflict bodily injury upon another [attempted battery]; (2) an unlawful touching with criminal intent [battery]; and (3) putting another in apprehension of harm whether or not the actor actually intends to inflict or is capable of inflicting that harm [common law assault].” *State v. Nicholson*, 119 Wn.App. 855, 860, 84 P.3d 877 (2003) (alterations in original), *overruled on other grounds State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007). An assault by battery also requires that the unlawful contact is either harmful or offensive. *See, e.g., State v. Garcia*, 20 Wn.App. 401, 403, 579 P.2d 1034 (1978).

Since B.R. was not harmed and no evidence suggests that Mr. Wells ever had the intent to harm B.R., the definition of assault which would apply in this case would be an unlawful touching of another which the other found to be offensive.

Here, part of Mr. Wells' defense was that he was too intoxicated to form the requisite intent that his touching of B.R. was done for purposes of sexual gratification. In support of this theory he presented the testimony of Mr. And Ms. Rosenberg that Mr. Wells was so intoxicated that he could not walk and was babbling incoherently and had passed out in the guest room of the Rosenberg's home and Mr. Wells' statements to Ms. Rosenberg and Deputy Hook that he had no memory of how he got into B.R.'s bedroom or how he got naked. Mr. Wells also presented the expert testimony of Dr. David Moore that alcohol compromises one's cognitive abilities and one's ability to act purposefully, and that the more alcohol one consumes, the more one's cognitive abilities and ability to act purposefully degrades. RP 497. Dr. Moore testified that the fact that a person has an alcohol induced blackout, such as Mr. Wells' blackout on the night of June 15, 2007, means that that person was unable to process cognitive thoughts with a purpose to achieve a specific goal. PR 518. In other words, because Mr. Wells was so intoxicated that he had no memory of the events which occurred after he arrived at the Rosenberg's home, Mr.

Wells was experiencing an alcohol induced blackout and during this time was unable to act with the requisite legal definition of intent to be found guilty of child molestation.

Had the jury believed Dr. Moore's testimony, the jury might have believed that Mr. Wells did indeed remove his clothes and B.R.'s clothes and touch B.R., but that Mr. Wells intoxication rendered him unable to touch B.R. with the intent that the touching be done for purposes of sexual gratification. Under this interpretation of the facts, an instruction on fourth degree assault defined as the touching of B.R. which B.R. found offensive was proper and Mr. Wells was entitled to such an instruction.

- ii. It was appropriate to ask for the instruction and it was not a legitimate trial tactic for Mr. Wells' trial counsel to not ask for the instruction.

As stated above, 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.

Courts have used three themes to gauge whether a tactical decision not to request a lesser included offense instruction is sound or legitimate: (1) The difference in maximum penalties between the greater and lesser offenses; (2) whether the defense's theory of the case is the same for both the greater and lesser offenses; and (3) the overall risk to the defendant, given the totality of the developments at trial.

*State v. Grier*, 150 Wn.App. 619, 640-641, 208 P.3d 1221 (2009).

- a. *Difference in penalties between fourth degree assault and first degree child molestation.*

Fourth degree assault is a gross misdemeanor. RCW 9A.36.041(2). Gross misdemeanors may not be punished by a period of confinement of more than one year. RCW 3.66.060; RCW 9A.20.021(2); RCW 9.92.020; RCW 9.95.210(2). First degree child molestation is a class A felony (RCW 9A.44.083(2)) with a seriousness level of ten. RCW 9.94A.515. Mr. Wells had an offender score of zero (CP 142-156), making his standard range sentence for first degree child molestation 51-68 months. RCW 9.94A.510. Additionally, at the time Mr. Wells was sentenced, former RCW 9.94A.712 provided that the court was required to impose a term of community custody equal to the statutory maximum term of confinement for the crime committed, which for a class A felony is life. RCW 9A.20.021. Thus, fourth degree assault carries a potential punishment far less than does first degree child molestation.

- b. *Mr. Well's defense was the same for both fourth degree assault and first degree child molestation.*

Mr. Wells' defense at trial was that his alcohol consumption rendered him unable to form the requisite intent to commit any crime since

he was acting during an alcohol induced blackout. This defense would have been the same for both first degree child molestation and fourth degree assault.

c. *The overall risk to Mr. Wells was great, given the totality of the evidence introduced at trial.*

The only disputed element of the crime was whether or not Mr. Wells acted with the requisite intent to be found guilty of first degree child molestation. As stated above, Mr. Wells' defense was that he was too intoxicated to have formed the requisite intent and he presented the testimony of Dr. Moore in support of this theory. Mr. Wells' trial counsel apparently adopted an "all-or-nothing" strategy: the jury would be faced with the choice of either finding Mr. Wells guilty of first degree child molestation or not guilty of any crime.

In *Grier*, the court wrote:

In theory, the "all or nothing" defense tactic is effective when one of the elements of a crime is highly disputed and the State has failed to establish every element beyond a reasonable doubt; in such a situation, the jury must acquit the defendant based on a reasonable doubt about proof of that element. Here, Grier's defense counsel likely hoped for an acquittal, relying on the scant direct evidence that Grier intended to kill Owen, or was even armed, and the relatively strong evidence that Grier was acting in self defense or defense of her son as Owen advanced toward her in her own home.

But defense counsel's asking the jury to acquit Grier on the

insufficient evidence of the intent element alone was unreasonable because of the overwhelming evidence that Grier was guilty of some offense: In short, Owen's being shot and killed was highly disproportionate to his advancing toward Grier and shoving her.

*Grier*, 150 Wn.App. at 642-643, 208 P.3d 1221.

This case is similar to *Grier*. As in *Grier*, the evidence in this case overwhelmingly indicated that Mr. Wells had committed some offense. It is highly unlikely that any jury would completely acquit a man who was found naked in the bed of a five year old girl where the girl claimed that the man removed his and her clothes, touched her, and tried to get her to touch him. But at the same time, the evidence was extremely strong that Mr. Wells was highly intoxicated and most likely was acting while in an alcoholic blackout. Further, Ms. Rosenberg, the alleged victim's mother, testified that B.R.'s behavior had not changed as a result of this incident and B.R. testified that she had no memory of Mr. Wells or of the events of the night of June 15, 2007.

As in *Grier*, the evidence introduced at trial left it highly likely that the jury would convict Mr. Wells of some crime. Given the likelihood that the jury would find Mr. Wells 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 Mr. Wells' trial counsel to fail to request that the jury be instructed on fourth

degree assault.

- iii. Mr. Wells was prejudiced by his trial counsel's failure to request a jury instruction on fourth degree assault.

“In order to meet the ineffective assistance of counsel test, the defendant must also demonstrate a reasonable probability that, but for defense counsel's deficient performance, the trial results would have differed.” *Grier*, 150 Wn.App. at 644, 208 P.3d 1221.

The prejudice that Mr. Wells suffered as a result of his trial counsel's decision to forego requesting an instruction on fourth degree assault was aptly summarized in *Grier*:

Defense counsel's failure to request lesser included instructions significantly prejudiced Grier. As the court in *Pittman* warned, the lack of lesser included instructions, where warranted by the evidence, puts in an untenable position a jury that is convinced beyond a reasonable doubt that she has committed a crime: The jury wants to hold the defendant culpable and to convict her of some crime, but is given only one option, here, second degree murder.

*Grier*, 150 Wn.App. at 646, 208 P.3d 1221.

The jury in this case was likely convinced that Mr. Wells committed some crime, but was left in the position of finding Mr. Wells guilty only of first degree child molestation. It is highly probable that, given the strong evidence that Mr. Wells was severely intoxicated, the jury would have found Mr. Wells not guilty of child molestation and, instead,

returned a verdict of guilty of fourth degree assault, had it been offered such a choice.

Mr. Wells' trial counsel was ineffective in failing to request the jury be instructed on fourth degree assault. Mr. Wells was prejudiced by his trial counsel's performance in that he was convicted of first degree child molestation rather than fourth degree assault.

- B. It was ineffective assistance of counsel for Mr. Wells' trial counsel to fail to propose jury instructions which properly defined the defense of voluntary intoxication.

Instructions are adequate if they allow a party to argue its theory of the case and do not mislead the jury or misstate the law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Whether the jury instructions state the applicable law is a question of law which we review de novo. *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d 542 (2002), cert. denied 538 U.S. 945, 123 S.Ct. 1633, 155 L.Ed.2d 486 (2003).

As stated above, Mr. Wells' defense at trial was that his voluntary intoxication rendered him incapable of forming the requisite level of intent to commit the crime of child molestation in the first degree. In support of this defense, Mr. Wells' trial attorney proposed a jury instruction which ultimately became jury instruction number 7. The proposed instruction and jury instruction number 7 are identical, and read as follows: "No act

committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.” CP 80-82, 86-107. This instruction was based on Washington Pattern Jury Instruction (WPIC) number 18.10, which reads, “No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted][or][failed to act] with \_\_\_\_\_.” The WPIC indicates that the bracketed material is to be used as applicable.

Counsel for Mr. Wells chose to fill in the blank left in WPIC 18.10 only with the word intent. However, this was contrary to the purpose of the voluntary intoxication statute and jury instruction and lead to a situation where the jury, with the encouragement of the prosecutor, misunderstood the applicable law.

A voluntary intoxication defense allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the required mental state. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking

affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d 37, review denied 119 Wn.2d 1024, 838 P.2d 690 (1992). The evidence “must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged.” *State v. Gabryschak*, 83 Wn.App. 249, 252-53, 921 P.2d 549 (1996).

Child molestation in the first degree occurs when a person has sexual contact with another person who is less than twelve years old, is not married to the perpetrator, and the perpetrator is at least three years older than the victim. RCW 9A.44.083. The concept of “intent” is relevant to the charge of first degree child molestation because, in order to prove sexual contact, the State must establish that the defendant acted with the purpose of sexual gratification. RCW 9A.44.010; *see also State v. Stevens*, 158 Wn.2d 304, 309-310, 143 P.3d 817 (2006), discussing intent and second degree child molestation (“In order to prove “sexual contact,” the State must establish the defendant acted with a purpose of sexual gratification. Thus, while sexual gratification is not an explicit element of second degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification. Intent is relevant to the crime of second degree child molestation because it is necessary to prove the element of sexual contact.”).

In this case, the State had the burden of establishing that Mr. Wells touched B.R. with the intent or desire that the touching would give him sexual gratification. Mr. Wells' defense was that his level of intoxication prevented him from being able to form the "intent" or desire that his actions would give him sexual gratification. To support his theory, Mr. Wells presented the testimony of Dr. Moore that the fact that a person has an alcohol induced blackout means that that person was unable to process cognitive thoughts with a purpose to achieve a specific goal. PR 518.

However, during cross-examination of Dr. Moore, the prosecutor's questions equating volitional acts with "intentional" acts deliberately cultivated a misunderstanding on the parts of the jury that nothing more than a "volitional" act was required to prove that Mr. Wells acted with the requisite "intent" that his actions would give him sexual gratification. During cross-examination of Dr. Moore, the prosecutor repeatedly equated the ability of a person to perform volitional acts or to perform acts with simple goals, such as the removal of clothing or the decision to enter a room, with the ability of that person to form the "intent" that that person's actions would achieve the person's desire to satisfy that person's sexual. RP 525-532.

The prosecutor's questioning oversimplified the issue before the

jury and improperly suggested to the jury that the legal standard of Mr. Wells' ability to form "intent" that the State had to meet was simply that Mr. Wells was able to perform volitional acts. This is contrary to the law regarding the defense of voluntary intoxication. The voluntary intoxication statute recognizes that there are different levels of "intent" applicable to a persons acts. In one sense, all acts completed by a person are "intentional" in that the acts are volitional acts performed by the person. However, the voluntary intoxication statute recognizes that volitional action, alone, is not a sufficient indicator of criminal "intent" to find a person guilty of a crime. The voluntary intoxication statute acknowledges that circumstances will arise where, though an individual is performing volitional acts, that individual's voluntary intoxication renders it impossible for that person to form the "intent" or desire that his or her volitional acts constitute a crime.

In this case, following the prosecutor's cross-examination of Dr. Moore, the jury was left with the incorrect impression that, in order to find Mr. Wells guilty of child molestation even where there was evidence that he was highly intoxicated, the jury only had to find that Mr. Wells was able to perform volitional acts, rather than that Mr. Wells had the ability to perform volition acts *and* the ability to appreciate that those volitional acts would satisfy some higher desire, such as Mr. Wells' sexual

gratification.

The confusion of the jury regarding what “intent” meant in the context of his case is evidenced by the question sent out by the jury during deliberations. The question sent out by the jury was as follows: “On instruction No. 9(1) [,] does sexual contact imply intent when talking about the purpose of gratifying sexual desires? i.e. Does [“]for the purpose of[”] equal [“]intent[”]?” CP 84. It is clear that the jury did not understand that, in this case, “intent” did not relate to Mr. Wells’ ability to perform simple volitional acts, but specifically was related to Mr. Wells’ ability to form the more complex mental concept that his volitional actions in touching B.R. would satisfy his sexual desires.

In this context, the decision of Mr. Wells’ trial attorney to fill in the blank line in WPIC 18.10 only with the word “intent” constituted ineffective assistance of counsel. The complicated nature of how “intent” was relevant in this case required a much more detailed description of what aspect of Mr. Wells’ behavior his voluntary intoxication effected. A more effective and correct instruction would have read, “No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with the ability to form the desire and understanding that his actions would sexually gratify him.”

Trial counsel's decision to submit the voluntary intoxication instruction that was submitted cannot be considered to be a legitimate trial strategy. "Intent," both the meaning of it and Mr. Wells' ability to form it, was the central issue in this case. The complex nature of how "intent" is considered in regards to child molestation combined with the defense of voluntary intoxication made jury instructions which clearly and adequately explained "intent" in the context of this trial an absolute necessity. The jury instruction submitted by trial counsel for Mr. Wells was inadequate to properly describe the defense of voluntary intoxication, much less how voluntary intoxication is applied in a case of alleged child molestation. The end result of trial counsel's failure to request and submit proper jury instructions is that the jury was misled by the prosecutor's attempts to obfuscate the meaning of "intent" in the context of this case, as is evidenced by the jury's question sent out during deliberation. The insufficient instructions proposed by defense counsel led to the jury being misled by the prosecutors suggestion that volitional action is the same as action taken with the ability to understand and form the intent that the actions fulfill Mr. Wells' sexual desires. This misunderstanding of the level of "intent" Mr. Wells was required to be able to form in order to be found guilty of child molestation led to the jury finding Mr. Wells guilty of first degree child molestation.

**V. CONCLUSION**

For the reasons stated above, this court should vacate Mr. Wells' conviction and remand for a new trial.

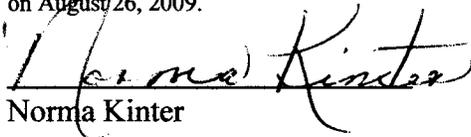
DATED this 26<sup>th</sup> day of August, 2009.

Respectfully submitted,



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The undersigned certifies that on August 26, 2009, she delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by United States Mail to appellant, Jason C. Wells, c/o Kevin and Gina Conklin, 2709 North Harmony Road, Spokane Valley, Washington 99027, true and correct copies of this Opening Brief. 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 August 26, 2009.

  
Norma Kinter

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STATE OF WASHINGTON  
BY  NOTARY