

84066-1

FILED  
COURT OF APPEALS  
DIVISION II

09 MAY 26 AM 9:38

STATE OF WASHINGTON  
BY cm  
DEPUTY

No. 38453-1-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

JEREMY M. ANDERSON,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable Toni A. Sheldon, Trial Court Judge  
Cause No. 08-1-00203-9

---

BRIEF OF RESPONDENT

---

EDWARD P. LOMBARDO  
Deputy Prosecuting Attorney for  
Gary P. Burleson, Prosecuting Attorney

Mason County Prosecutor's Office  
521 N. Fourth Street  
P.O. Box 639  
Shelton, WA 98584  
Tel: (360) 427-9670 Ext. 417  
Fax: (360) 427-7754

**TABLE OF CONTENTS**

A. Appellant's Assignments of Error.....	1
B. Issues Pertaining to Assignments of Error.....	1-2
C. Evidence Relied Upon.....	2
D. Statement of the Case.....	2-8
1 & 2. Procedural History & Statement of Facts.....	2-7
3. Summary of Argument.....	7-8
E. Argument.....	9-17
1. ANDERSON'S RIGHT TO CONFRONTATION WAS NOT VIOLATED WHEN THE TRIAL COURT ADMITTED STATEMENTS FROM MINORS REGARDING SEPARATE INCIDENTS OF CHILD MOLESTATION UNDER RCW 10.58.090-SEX OFFENSES-ADMISSIBILITY-BECAUSE:	
(a) THE TRIAL COURT JUDGE METICULOUSLY PARSED THE STATUTE AND MADE A FULL RECORD OF HER DECISION; AND	
(b) THE STATUTE ITSELF CONTAINS CHECKS AND BALANCES TO PROTECT THE RIGHTS OF THE ACCUSED.....	9-13
2. THE TRIAL COURT DID NOT ERR BY ADMITTING STATEMENTS FROM MINORS REGARDING SEPARATE INCIDENTS OF CHILD MOLESTATION UNDER RCW 10.58.090 WHEN ANY ERROR, IF IT OCCURRED IN THIS CASE, WAS HARMLESS BEYOND A REASONABLE DOUBT UNDER THE OVERWHELMING UNTAINTED EVIDENCE TEST BECAUSE:	
(a) ANDERSON HAD CONFRONTATION WITH M.A.E., THE 10 YEAR OLD VICTIM, WHO TESTIFIED THAT;	
(b) ANDERSON LAY ON TOP OF HIM IN A PUBLIC BATHROOM; AND	

(c) ANDERSON RUBBED HIS "HOT DOG"  
AGAINST HIS (M.A.E.'s) "HOT DOG." .....13-15

3. ANDERSON DID NOT RECEIVE INEFFECTIVE  
ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY  
EMPLOYED A LEGITIMATE TRIAL STRATEGY AND  
ARGUED FOR OUTRIGHT ACQUITTAL INSTEAD OF  
POSSIBLE CONVICTION OF A LESSER INCLUDED  
OFFENSE.....16-17

F. Conclusion.....18

## **TABLE OF AUTHORITIES**

### **1. Washington Cases**

<u>State v. Day</u> , 51 Wn.App. 544, 754 P.2d 1021 (1988).....	16
<u>State v. Grenning</u> , 142 Wash.App. 518, 174 P.3d 706 (2008).....	14, 15
<u>State v. Guloy</u> , 104 Wash.2d 412, 705 P.2d 1182 (1985).....	14
<u>State v. Hopkins</u> , 137 Wash.App. 441,154 P.3d 250 (2007).....	11
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983).....	10
<u>State v. Jensen</u> , 203 P.3d 393, 396(citations pending)(2009).....	16
<u>State v. McFarland</u> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	16
<u>State v. Roberts</u> , 25 Wn.App. 830, 611 P.2d 1297 (1980).....	10, 11

### **2. U.S. Supreme Court Cases**

<u>Crawford v. Washington</u> , 541 U.S. 36,124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).....	6, 7, 11, 14, 15
<u>Davis v. Alaska</u> , 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).....	10
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	16

### **3. Constitutional Authority**

Article I, Section 22, Washington State Constitution.....	10
---	----

**4. Statutory Authority**

RCW 10.58.090-Sex offenses-Admissibility.....1, 2, 4, 6-15

**5. Court Rules**

RAP 10.3(b).....2

**6. Evidence Rules**

ER 403-Exclusion of Relevant Evidence on Grounds  
of Prejudice, Confusion, or Waste of Time.....12

ER 404(b)-Character Evidence Not Admissible to Prove Conduct;  
Exceptions; Other Crimes.....9, 12

## A. ASSIGNMENTS OF ERROR

1. Appellant's right to confrontation was violated when the court admitted testimonial hearsay statements from a minor regarding an alleged act of child molestation admitted pursuant to RCW 10.58.090, where appellant had no opportunity to cross examine the declarant.
2. Appellant did not receive effective assistance of counsel where his attorney failed to request an instruction for fourth degree assault as a lesser-included charge of first degree child molestation.

## B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Anderson's right to confrontation violated when the trial court admitted statements from minors regarding separate incidents of child molestation under RCW 10.58.090-Sex offenses-Admissibility-when:
  - (a) the trial court judge meticulously parsed the statute and made a full record of her decision; and
  - (b) the statute itself contains checks and balances to protect the rights of the accused?
2. Did the trial court err by admitting statements from minors regarding separate incidents of child molestation under RCW 10.58.090, when any error, if it occurred, was harmless beyond a reasonable-doubt under the overwhelming untainted evidence test after:
  - (a) Anderson<sup>1</sup> had confrontation with M.A.E., the 10 year old victim,<sup>2</sup> who testified that;
  - (b) Anderson lay on top of him in a public bathroom; and
  - (c) Anderson rubbed his "hot dog" against his (M.A.E.'s) "hot dog"?<sup>3</sup>

---

<sup>1</sup>Anderson's date of birth; 7/10/86. CP 3.

<sup>2</sup> At the time of incident, M.A.E. was 9. RP Vol. V 25: 8-17; 60: 23-24.

<sup>3</sup> The deputy prosecutor for the State clarified with M.A.E. during M.A.E.'s testimony that his use of the term "hot dog" here referred to his and Anderson's penises, respectively. See: RP Vol. V, 100: 5-25; 101: 1-11.

3. Did Anderson receive ineffective assistance of counsel when his attorney employed a legitimate trial strategy and argued for outright acquittal instead of possible conviction of a lesser included offense?

#### C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP."  
The Clerk's Papers shall be referred to as "CP." The Appellant's Brief shall be referred to as "AB."

#### D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Anderson's recitation of the procedural history and facts and adds the following:

The trial court judge in Anderson's case began her analysis of whether or not statements regarding Anderson's separate, uncharged incidents of child molestation should be admitted under RCW 10.58.090-

Sex offenses-Admissibility-by finding:

[B]y a preponderance of the evidence that the uncharged prior incidents alleged and outlined in the memorandum of authorities by the State probably occurred. RP Vol.V 83: 4-7.

The judge then separated three incidents which she termed "scenarios," involving Anderson and sex offenses. RP Vol.V 82-95. Scenario "A," involved a prior conviction for communication with a minor for immoral

purposes with a violation date of August 14, 2007. RP Vol.V 85: 17-20. Scenario "B" referenced Anderson's "uncharged conduct of contact with a young male in the woods behind the Junior High Apartments" in either "October 2000 or October 2002." RP Vol.V 85: 21-25; 86: 7. The "young male" with scenario "B" was listed as being eleven years old, and identified by the initials of C.S.S. RP Vol.V 69: 3-12; Vol.VI 153: 8-10. With scenario "B," C.S.S. told Nancy Young of the Providence St. Peter Hospital Sexual Assault Clinic that Anderson had "gotten on top of [him] and rubbed his penis on C.S.S.'s penis." RP Vol.VI 155: 9-12.

In scenario "C," Anderson had inappropriate contact with a child with the initials of K.R.P. in a motor home during February 2001, involving "a disclosure that the defendant had made this 5 year old boy touch his penis." RP Vol.V 69: 25; 70: 1; 87: 16-25; 88: 1-6. Anderson admitted in scenario "C" that "on at least two occasions," he had made the 5 year old touch his penis. RP Vol.V 87: 24-25; 88: 1. In a disclosure to his mother, K.R.P. said that Anderson, "tried to do naughty things to me in the motor home." RP Vol.V 69: 22-25. When K.R.P.'s mother asked what naughty was, K.R.P. disclosed that Anderson, "wanted him to touch his 'pee pee.'" RP Vol.V 69:25; 70: 1-2. K.R.P. told his mother that he, "started to scream for his sister and the defendant let him out of the motor

home.” RP Vol.V 70: 2-3. K.R.P.’s sister confirmed that she heard him screaming for her from inside the motor home. RP Vol.V 70: 3-5.

(a) Analysis: Scenarios “B” and “C” Under RCW 10.58.090(6)(a)-(h)

In parsing scenarios “B” and “C” in terms of RCW

10.58.090(6)(a)-(h) analysis, the trial court began by addressing prong (a) “the similarity of the prior acts to the acts charged”:

With regard to scenario B, which is the uncharged conduct of contact with a young male in the woods behind the Junior High Apartments, there is a significant similarity in the factual outline. First of all this is said to have occurred in the woods, and the present case is said to have occurred in a public park. And both of those can be looked at as distinguishable from a location such as a home or other private residence. RP Vol.V 85: 21-25; 86: 1-3.

The trial court advanced its analysis of prong (a) by comparing the ages of M.A.E., “9 years old,” with that of C.S.S., “somewhere between the ages of 8 and 10.” RP Vol.V 86: 4-13. Similarly, the trial court also noted that the gender of the victims in both scenarios “B” and here was “male,” that Anderson told both victims to “lie down...Again asserting a control over the child,” and that “the penises of the two are rubbed together.” RP Vol.V 86: 13-20. In analyzing scenario “C,” Anderson made a, “signed, voluntary statement indicating that he made...[a] 5 year old juvenile touch his, the defendant’s, penis, on at least two occasions” RP Vol.V 83: 14-17.

After making the necessary comparison, the trial court ruled as follows:

The Court will find based upon the outline and the offer of proof that there is a significant similarity between this uncharged conduct in scenario B and the charges that are before the Court in this case. RP Vol.V 86: 21-24.

Next, the trial court examined prong (b) “the closeness in time of the prior acts to the acts charged.” RP Vol.V 87: 1-2. In addressing this prong of the law, the trial court found that “the time frame is within a 6 year time period,” noting that the allegation from scenario “C” occurred in February 2001, and the “allegation within the current information is in 2007.” RP Vol.V 87: 3-6. As was noted above, scenario B occurred in either “October 2000 or October 2002.” RP Vol.V 85: 21-25; 86: 7.

With prong (c) “the frequency of the prior acts,” the trial court found that they “are highly frequent,” in that “we have multiple prior acts occurring within the previous seven years.” RP Vol.V 88: 19-25; 89: 1-4.

For prong (d) “the presence or lack of intervening circumstances,” the court simply noted, “none have been presented.” RP Vol.V 89: 5-7. On prong (e) “the necessity of the evidence beyond the testimonies already offered at trial,” the court noted that at this time (when she made her findings) Anderson might “present an alibi defense,” and that “there may be a necessity for evidence beyond the testimony already presented at

trial...” RP Vol.V 89: 8-16. On prong (f) “whether the prior act was a criminal conviction,” the court found that this was “true for scenario “A,” but not for “scenarios B or C.” RP Vol.V 89: 17-19.

With prong (g) “whether the probative value is substantially outweighed by the danger of unfair prejudice<sup>4</sup>,” the trial court reasoned that:

[A]s argued by the State, all evidence that the State would intend to present is generally prejudicial to the defendant... The test is whether there is unfair prejudice. And in looking at that, the Court has to look at as well, at the reason that the legislature put this in place. And the policy behind their thinking in putting a new Evidence Rule together modeled on the federal rule, and the federal cases that are decided thereunder. RP Vol.V 89: 22-25; 90: 1-5.

The trial court went on to conclude that the evidence of scenarios “A,” “B,” and “C” had “significant probative value” and that it was “not unfairly prejudicial...” RP Vol.V 90: 6-8. Noting that it would give the jury a “limiting instruction,” the court found that “little if any” confusion of the issues would occur, and ruled the evidence admissible under RCW 10.58.090. RP Vol.V 90: 21-23. Prong (h) was not analyzed directly.

In analyzing scenarios “B” and “C” under Crawford, the judge determined with “B” that if the statements were “made for the purposes of

---

<sup>4</sup> The full language of RCW 10.58.090(6)(g) is: Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

medical treatment,” that she would not find them to be testimonial. RP Vol.V 92: 5-8. As for scenario “C,” the trial court ruled that because the State wanted to introduce Anderson’s own statement and indicated that Detective Heldreth of the Shelton Police Department would testify, that it would not be barred under Crawford. RP Vol.V 93: 4-8. A jury found Anderson guilty as charged of one count child molestation in the first degree. RP Vol.VI 215: 20-25.

### 3. Summary of Argument

Anderson’s right to confrontation was not violated when the trial court admitted statements from minors regarding separate incidents of child molestation under RCW 10.58.090-Sex offenses-Admissibility- because: (a) the trial court judge meticulously parsed the statute and made a full record of her decision; and (b) the statute itself contains checks and balances to protect the rights of the accused. RCW 10.58.090(6) contains eight separate factors that must be balanced before a ruling on the admissibility of statements can occur, and the trial court judge here made a full record which accomplished that. As an added precaution, the trial court also gave a limiting instruction<sup>5</sup>, which cautioned the jurors that Anderson was, “not on trial for any act, conduct or offense not charged in the information.” RP Vol.VI 197: 19-21; CP 60.

Even if the Court should find that Anderson was denied confrontation under RCW 10.58.090 when he was not able to confront C.C.S. and K.R.P., he was able to confront his accuser in this case; M.A.E., the 10 year old victim.

If any error occurred it was harmless beyond a reasonable doubt under the overwhelming untainted evidence test because: (a) Anderson had confrontation with M.A.E., who testified that; (b) Anderson lay on top of him in a public bathroom; and (c) Anderson rubbed his “hot dog” against his (M.A.E.’s) “hot dog.” This evidence alone so overwhelmingly leads to Anderson’s guilt that the admission of statements from separate and uncharged sex offense cases involving C.C.S. and K.R.P. under RCW 10.58.090 was harmless beyond a reasonable doubt.

Lastly, Anderson did not receive ineffective assistance of counsel because his attorney employed a legitimate trial strategy and argued for outright acquittal instead of possible conviction of a lesser included offense. The judgement and sentence of the trial court is complete and correct, and the State respectfully requests the Court to affirm.

---

<sup>5</sup> Instruction No. 6.

E. ARGUMENT

1. ANDERSON'S RIGHT TO CONFRONTATION WAS NOT VIOLATED WHEN THE TRIAL COURT ADMITTED STATEMENTS FROM MINORS REGARDING SEPARATE INCIDENTS OF CHILD MOLESTATION UNDER RCW 10.58.090-SEX OFFENSES-ADMISSIBILITY-BECAUSE:
  - (a) THE TRIAL COURT JUDGE METICULOUSLY PARSED THE STATUTE AND MADE A FULL RECORD OF HER DECISION; AND
  - (b) THE STATUTE ITSELF CONTAINS CHECKS AND BALANCES TO PROTECT THE RIGHTS OF THE ACCUSED.

Anderson's right to confrontation was not violated when the trial court admitted statements from minors regarding separate incidents of child molestation under RCW 10.58.090-Sex offenses-Admissibility- because: (a) the trial court judge meticulously parsed the statute and made a full record of her decision; and (b) the statute itself contains checks and balances to protect the rights of the accused.

~~In a criminal action in which the defendant is accused of a sex~~ offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403. RCW 10.58.090(1). When evaluating whether evidence of the defendant's commission of another sexual offense or offenses should be excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors:

- (a) The similarity of the prior acts to the acts charged;
  - (b) The closeness in time of the prior acts to the acts charged;
  - (c) The frequency of the prior acts;
  - (d) The presence or lack of intervening circumstances;
  - (e) The necessity of the evidence beyond the testimonies already offered at trial;
  - (f) Whether the prior act was a criminal conviction;
  - (g) Whether the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence; and
  - (h) Other facts and circumstances.
- RCW 10.58.090(6)(a)-(h).

The Sixth Amendment to the United States Constitution and Article I, Section 22, of the Washington Constitution require that a criminal defendant be given an opportunity to confront and cross examine adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The defendant must be permitted to expose to the jury the fact ~~from which jurors, as sole triers of fact and credibility, could appropriately~~ draw inferences relating to the reliability of the witnesses. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

When a criminal prosecution turns on the testimony of one witness, the credibility of that witness is especially critical. State v. Roberts, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980). In the prosecution of sex crimes, the right of cross-examination often determines the outcome. Roberts, 25 Wn.App. at 834-835. In such cases, the credibility

of the accuser is of great importance, essential to the prosecution and defense alike. Roberts, 25 Wn.App. at 835.

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation. Crawford v. Washington, 541 U.S. 36, 69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

As outlined above, the trial court judge in Anderson's case carefully and methodically addressed each and every prong of RCW 10.58.090 and ultimately found that statements from scenarios "B" and "C" were admissible. Scenario "A" falls into a different category of admissibility, because it involves a prior conviction for a sex offense and not uncharged conduct. While Anderson correctly argues that the Court in State v. Hopkins held that the child victim's statements to a social worker were testimonial, that case was decided on March 6, 2007 and over a year before RCW 10.58.090 went into effect on June 12, 2008.<sup>6</sup> State v. Hopkins, 137 Wash.App. 441, 451, 154 P.3d 250 (2007). What the enactment of RCW 10.58.090 indicates is, as the trial court judge noted, a change at the legislative level:

...[T]he Court has to look at as well, at the reason that the legislature put [RCW 10.58.090] in place. And the policy behind their thinking in putting a new Evidence Rule

---

<sup>6</sup> Reviser's Note, RCW 10.58.090.

together modeled on the federal rule, and the federal cases that are decided thereunder. RP Vol.V 89: 22-25; 90: 1-5.

This new RCW contains a rigorous series of checks and balances that requires judges to carefully weigh the evidence presented. As part of that balancing test, subsection (1) also requires it to pass muster under<sup>7</sup> an ER 403 balancing test as an added precaution:

- (1) In a criminal action in which the defendant is accused of a sex offense, evidence of the defendant's commission of another sex offense or sex offenses is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403. RCW 10.58.090(1).

The record in Anderson's case shows that the trial court judge followed the law and made both a thoughtful and rational decision. As an added precaution, she also gave limiting Instruction No. 6, which cautioned the jury as follows:

~~In a criminal case in which the defendant is accused of an offense of sexual assault or child molestation, evidence of the defendant's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.~~

However, evidence of a prior offense on its own is not sufficient to prove the defendant guilty of the crime charged in the information. Bear in mind as you consider this evidence, at all times the State has the burden of

---

<sup>7</sup> WA ER 403: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

proving that the defendant committed each of the elements of the offense charged in the information. I remind you that the defendant is not on trial for any act, conduct or offense not charged in the information. RP Vol.VI 197: 13-20; CP 60.

The record speaks for itself in Anderson's case, in that the trial court judge carefully balanced all the competing tests before rendering her decision, and error did not occur.

2. THE TRIAL COURT DID NOT ERR BY ADMITTING STATEMENTS FROM MINORS REGARDING SEPARATE INCIDENTS OF CHILD MOLESTATION UNDER RCW 10.58.090 WHEN ANY ERROR, IF IT OCCURRED IN THIS CASE, WAS HARMLESS BEYOND A REASONABLE DOUBT UNDER THE OVERWHELMING UNTAINTED EVIDENCE TEST BECAUSE:

- (a) ANDERSON HAD CONFRONTATION WITH M.A.E., THE 10 YEAR OLD VICTIM, WHO TESTIFIED THAT;
- (b) ANDERSON LAY ON TOP OF HIM IN A PUBLIC BATHROOM; AND
- (c) ANDERSON RUBBED HIS "HOT DOG" AGAINST HIS (M.A.E.'s) "HOT DOG."

The trial court did not err by admitting statements from minors regarding separate incidents of child molestation under RCW 10.58.090 when any error, if it occurred in this case, was harmless beyond a reasonable doubt under the overwhelming untainted evidence test because:

- (a) Anderson had confrontation with M.A.E., the 10 year old victim, who testified that;
- (b) Anderson lay on top of him in a public bathroom; and
- (c) Anderson rubbed his "hot dog" against his (M.A.E.'s) "hot dog."

Under the overwhelming untainted evidence test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Guloy, 104 Wash.2d at 425; see: State v. Grenning, 142 Wash.App. 518, 542, 174 P.3d 706 (2008). Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. Guloy, 104 Wash.2d at 425-426.

Should this Court hold that Anderson's right to confrontation was violated under Crawford through the trial court's analysis under RCW 10.58.090, that error should be deemed harmless because any reasonable jury would nonetheless have found him guilty of child molestation. It is beyond reasonable doubt that any reasonable jury would have found Anderson guilty, because there is no plausible explanation, aside from perhaps insanity, that he could have used to rebut M.A.E.'s testimony; that Anderson, an adult, took him, a young child, into a public bathroom, laid on top of him and rubbed his penis against his. RP Vol. V, 25: 10-15; 27: 1-9; 28: 19-25; 29: 1-6; 100: 5-25; 101: 1-11. This is similar to the rationale advanced in State v. Grenning, where the Court reasoned that:

[E]ven absent RW's statements to his mother and doctor, the untainted evidence of Grenning's guilt was overwhelming. Each count was supported by graphic photographs found on Grenning's personal computer. Grenning took the photographs while committing the crimes against RW and BH. The pictures depict Grenning raping and molesting children. Grenning's, BH's, and RW's faces are visible in many of the photographs that depict child rape and molestation. The record is replete with evidence supporting Grenning's convictions...

We have no reasonable doubt that even absent the hearsay, the jury viewing the photographs, viewing the items seized from Grenning's residence, hearing BH's testimony, and listening to the audio recording would have found Grenning guilty beyond a reasonable doubt. We hold that any violation of Crawford was harmless. Grenning, 142 Wash.App. at 542.

In Anderson's case, nothing could have been more persuasive than 10 year old M.A.E. taking the stand and relating how Anderson, an adult, had rubbed his penis against his. If any error occurred in Anderson's case through the trial court's use of the balancing test in RCW 10.58.090 and its interpretation of the statements of C.S.S. and K.R.P. under Crawford, then it was harmless beyond a reasonable doubt.

3. ANDERSON DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY EMPLOYED A LEGITIMATE TRIAL STRATEGY AND ARGUED FOR OUTRIGHT ACQUITTAL INSTEAD OF POSSIBLE CONVICTION OF A LESSER INCLUDED OFFENSE.

Anderson did not receive ineffective assistance of counsel because his attorney employed a legitimate trial strategy and argued for outright acquittal instead of possible conviction of a lesser included offense.

In order to show ineffective assistance of counsel, the defendant must show that his attorney's performance was deficient, and that the deficiency prejudiced him. State v. Jensen, 203 P.3d 393, 396 (2009); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant is prejudiced when he can show that but for his counsel's errors, there was a reasonable probability that the trial result would have differed. State v. McFarland, 127 Wash.2d 322, 337, 899 P.2d 1251 (1995). If counsel's conduct can be characterized as legitimate trial strategy or tactics, it will not be deemed ineffective. State v. Day, 51 Wn.App. 544, 553, 754 P.2d 1021 (1988).

In closing, court-appointed counsel for Anderson made the most fundamental argument a defense attorney can make; the State failed to prove its case. Anderson's attorney argued that the "inconsistencies" in the victim's testimony, particularly as to how and more specifically when

the sexual contact occurred, in part created reasonable doubt. RP Vol. VI 205: 3-16. More importantly, defense counsel argued that because the State could not pinpoint when the sexual contact occurred, that Anderson, in conjunction with essentially alibi testimony from Tammy Reed and Robert Iverson, may have been falsely identified. RP Vol. VI 205: 18-25; 206: 1-25; 207: 1-11.

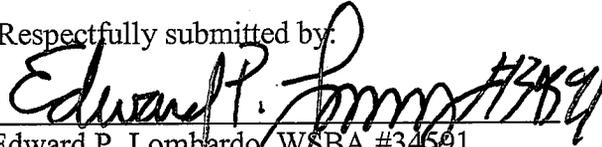
Any defense request for an instruction on fourth degree assault would have demolished this argument because the jury would have viewed it as counsel trying to have it both ways: Anderson could not have molested MAE because he (Anderson) was not in Shelton during the timeframe alleged, but if he was, assault fourth degree is the only crime that he could have committed. By arguing that his client was completely innocent, Anderson's attorney employed a classic strategy that the jury, after hearing all the testimony, simply did not accept; a verdict that in no way indicates that Anderson received ineffective assistance of counsel.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 20<sup>TH</sup> day of MAY, 2009

Respectfully submitted by:



Edward P. Lombardo, WSBA #34591  
Deputy Prosecuting Attorney for Respondent  
Gary P. Burleson, Prosecuting Attorney  
Mason County, WA

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 JEREMY M. ANDERSON, )  
 )  
 Appellant, )  
 )  
 \_\_\_\_\_ )

No. 38453-1-II

DECLARATION OF  
FILING/MAILING  
PROOF OF SERVICE

FILED  
COURT OF APPEALS  
DIVISION II  
09 MAY 26 AM 9:38  
STATE OF WASHINGTON  
BY [Signature] DEPUTY

I, EDWARD P. LOMBARDO, declare and state as follows:

On WEDNESDAY, MAY 20, 2009, I deposited in the U.S. Mail,  
postage properly prepaid, the documents related to the above cause number  
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Peter B. Tiller  
The Tiller Law Firm  
PO Box 58  
Centralia, WA 98531-0058

I, EDWARD P. LOMBARDO, declare under penalty of perjury of  
the laws of the State of Washington that the foregoing information is true  
and correct.

Dated this 20<sup>TH</sup> day of MAY, 2009, at Shelton, Washington.

  
Edward P. Lombardo, WSBA #34391