IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RODNEY ERDLE, Appellant.	No. 40575-0-II UNPUBLISHED OPINION

Penoyar, J. – Rodney Erdle appeals his five child molestation convictions, claiming that trial counsel's failure to request lesser included instructions on fourth degree assault denied him his right to effective assistance of trial counsel. He also claims that the trial court erred in prohibiting him from having contact with his minor sons. We affirm his convictions but remand for resentencing.

Facts

In October 2002, AGM and JRM moved into an apartment in Vancouver with their sister Sabrina and her boyfriend, Erdle. At that time, AGM was twelve years old and JRM was ten years old. Erdle frequently tickled the girls. JRM testified that Erdle would tickle or rub her between her legs within an inch of her vagina and beneath her breasts. AGM testified about an incident when Erdle slid his hands up under her shirt and placed his hands on her breasts.

In November, they moved into a house in Vancouver where they lived for about two years. During that time, Erdle continued tickling the girls. AGM testified about two instances of molestation. During one, Erdle lifted AGM's shirt and bra and kissed her between the breasts. During the other, AGM was sitting in the hallway on the floor when Erdle came up to her, began

tickling her between the thighs, and reached up under her skirt and placed his hand on her vagina outside of her underwear. JRM testified that the situation in the home was worse than in the apartment as Erdle continued the tickling and often watched her getting dressed when the door was ajar.

Based on this conduct, the State charged Erdle by third amended information with five counts: two counts of first degree child molestation[1] against JRM, one count of second degree child molestation[2] against AGM, and two counts of third degree child molestation[3] against AGM. The trial court instructed the jury on these charges but not on any lesser-included offenses because neither the State nor Erdle requested them.

Erdle admitted to tickling the girls but he denied that he did so to gratify any prurient interest. He admitted that he may have accidentally brushed against the girls' intimate parts but he denied that he did so intentionally. The jury returned guilty verdicts on all five counts. The sentencing court imposed a standard range 173-month sentence[4] and, as a sentencing condition, the following:

> You shall not have any contact with minors. This provision begins at time of sentencing. This provision shall not be changed without prior written approval by the community corrections officer, the therapist, the prosecuting attorney, and the court after an appropriate hearing.

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[1] For violating RCW 9A.44.083.

[2] For violating RCW 9A.44.086.

[3] For violating RCW 9A.44.089.

[4] The sentencing court imposed 173 months' incarceration for the first degree child molestation convictions, 116 months' incarceration for the second degree child molestation conviction, and 96 months' incarceration for the third degree child molestation convictions, all to be served concurrently.

Clerk's Papers (CP) at 96.

analysis

A. Effective Assistance of Counsel

Erdle first claims that his trial counsel's failure to request a lesser-included fourth degree assault conviction denied him his constitutional right to effective assistance of counsel. He argues that the evidence supported giving the instruction and that counsel's decision to forgo such an instruction was not a legitimate trial tactic. In particular, relying on a series of court of appeals decisions employing a three-part test in similar circumstances, he argues that the stark difference in penalties, that the trial theory would not have changed, and the high risk that a jury would convict of some offense made counsel's decision an unreasonable strategy.[5]

Our Supreme Court recently addressed the approach the appeals courts have taken in the cited cases and rejected this three-part test formulated to adjudge the legitimacy of trial counsel's decision to forgo a lesser included instruction. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The court held that this test undermined the fundamental presumption that counsel provided effective representation. *Grier*, 171 Wn.2d at 38-40.

The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel. Wash. Const. Art. 1, § 22; U.S. Const. amend. 14, § 1. The test for ineffective assistance of counsel has two parts. One, it must be shown that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness. Two, it must be shown that such conduct prejudiced the defendant, *i.e.*, that there is a reasonable

[5] Erdle relies on the following cases: *State v. Grier*, 150 Wn. App. 619, 640, 208 P.3d 1221 (2009), *overruled*, 171 Wn.2d 17, 246 P.3d 1260 (2011); In re *Personal Restraint of Crace*, 157 Wn. App. 81, 236 P.3d 914 (2010), *review granted*, 171 Wn.2d 1035 (2011); *State v. Breitung*, 155 Wn. App. 606, 230 P.3d 614 (2010), *review granted*, 171 Wn.2d 1016 (2011); *State v. Smith*, 154 Wn. App. 272, 278-79, 223 P.3d 1262 (2009); *State v. Pittman*, 134 Wn. App. 376. 390, 166 P.3d 720 (2006); and *State v. Ward*, 125 Wn. App. 243, 250, 104 P.3d 670 (2004).

possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Applying *Grier* to the facts here, the record does not overcome the presumption that counsel provided effective assistance. First, we note, had the defense requested a fourth degree assault instruction, the law and the facts would have supported it. *See State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) (fourth degree assault is lesser-included offense to second degree child molestation); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (defendant is entitled to lesser-included instruction if each element of lesser offense is necessarily included in greater offense and the evidence supports an inference the lesser crime was committed).

As the *Grier* Court observed, however, the decision to forego a lesser included instruction is a joint decision between defense counsel and the defendant. Here, there is no record to show whether Erdle concurred in the decision to present the case to the jury as all or nothing or whether counsel acted without consultation. As we noted above, to overcome the presumption in favor of effective representation, the proponent must show from the record that counsel's conduct fell below an objectively reasonable standard. We can make the same observation the *Grier* Court made, "Grier and her defense counsel could reasonably have believed that an all or nothing strategy was the best approach to achieve an outright acquittal. . . . That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance analysis." 171 Wn.2d at 43 (citations omitted). Nothing in the record overcomes the presumption that trial counsel's performance was effective.

Also failing is Erdle's ability to show actual prejudice. As in *Grier*, for this claim to

succeed, we would have to improperly assume that the jury compromised its verdict because it wanted to find Erdle guilty of something because it disapproved of his conduct, not necessarily because the evidence was sufficient to prove the offenses charged. 171 Wn.2d at 43-44. Conversely, we would need to believe that the jury would compromise the verdict it rendered in order to find the lesser-included offense rather than the greater offense. But as the *Strickland* Court instructed, "a court should presume . . . that the judge or jury acted according to the law." 466 U. S. at 694. Because the jury returned guilty verdicts, we must presume that the jury found Erdle guilty beyond a reasonable doubt of the charged offenses. *Grier*, 171 Wn.2d at 43-44. Given this finding and the presumption that the jury followed the law, the jury would have found Erdle guilty as charged even if offered a lesser included offense. Erdle cannot show prejudice and his claim fails.

B. No-Contact Condition

One of Erdle's community custody conditions is that he not have "contact with minors under the age of eighteen." CP at 99. This provision took effect immediately at sentencing. Erdle aptly complains that this provision improperly denies him contact with his own sons yet neither the record nor findings demonstrate any specific risk to them and it unduly burdens his constitutional right to parent his children.[6]

In *State v. Ancira*, the court observed:

> Parents have a fundamental liberty interest in the care, custody, and control of their children. [*Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982).] Prevention of harm to children is a compelling state interest, [*In re Dependency of C.B.*, 79 Wn. App. 686, 690, 904 P.2d 1171 (1995)] and the State does have an obligation to intervene and protect a child when a parent's "actions or decisions seriously conflict with the physical or mental health of the

[6] Erdle's sons were five and six years old on February 10, 2010, when the Department of Corrections prepared a pre-sentence investigative report.

> child." [*In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980)]. But limitations on fundamental rights are constitutional only if they are "reasonably necessary to accomplish the essential needs of the state." [*State v. Riles*, 135 Wn.2d 326, 350, 957 P.2d 655 (1998)]. The fundamental right to parent can be restricted by a condition of a criminal sentence if the condition is reasonably necessary to prevent harm to the children. [*State v. Letourneau*, 100 Wn. App. 424, 439, 997 P.2d 436 (2000)]. Therefore, we must determine whether the record supports the proposition that prohibiting Ancira from all contact with his children is reasonably necessary to protect them from the harm of witnessing domestic violence.
>
> We conclude that the State has failed to demonstrate that this severe condition was reasonably necessary to prevent the children from witnessing domestic violence.

107 Wn. App. 650, 653-54, 27 P.3d 1246 (2001).

Here, the record does not specifically reveal how Erdle poses a risk to his biological sons or establish that no contact is necessary in order to protect them from him. *See Letourneau*, 100 Wn. App. at 442 (condition prohibiting unsupervised contact with her minor children was not reasonably necessary to prevent her from sexually molesting them because there was no evidence that she was a pedophile or posed a danger to her children).

While Erdle asks us to strike the condition entirely, we disagree that that is the appropriate remedy here. Because the record does not reflect the sentencing court's consideration of this issue or the possibility of narrowing any potential restriction on Erdle's parenting rights, we remand for the sentencing court to consider this issue.

We affirm Erdle's conviction but remand for consideration of whether the no-contact order should apply to Erdle's sons and, if so, whether a less restrictive option is all that is reasonably necessary to protect his sons.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so

ordered.

Penoyar, C.J.

We concur:

Armstrong, J.

Johanson, J.