IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY M. ANDERSON, Appellant.	No. 38453-1-II UNPUBLISHED OPINION

Armstrong, J. — Jeremy Anderson appeals his conviction for first degree child molestation, arguing that (1) the trial court violated his right to confront the witnesses by admitting a minor's hearsay statements about an alleged act of child molestation and (2) his counsel ineffectively represented him by failing to request a jury instruction on fourth degree assault as a lesser included offense. We find no error and, thus, affirm.

FACTS

The State charged Jeremy Anderson with first degree child molestation in violation of RCW 9A.44.083. The State alleged that Anderson had sexual contact with M.A.E., who was less than 12 years old at the time. The State also gave notice that it intended to offer evidence that Anderson had two earlier uncharged sex offenses and convictions for two counts of communication with a minor for immoral purposes, pursuant to RCW 10.58.090.[1]

At a pre-trial hearing, the State described the uncharged offense concerning an 11-year-old male, C.C.S., who disclosed to a school counselor, a detective, and Nancy Young, a

[1] RCW 10.58.090 provides that 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 ER 404(b), if the evidence is not inadmissible pursuant to ER 403.

registered nurse practitioner, that Anderson had sexually molested him in October 2002. The court ruled that the State could present this evidence subject to analysis under *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

At trial, the State proffered Young's testimony regarding C.C.S.'s statements to her during his medical examination as evidence of this uncharged offense. The court ruled that the statements were not testimonial under *Crawford*, reasoning that the purpose of the medical exam was not to generate information for use in a criminal prosecution. Young then testified that before taking C.C.S.'s medical history, she was aware C.C.S. had earlier disclosed that Anderson had touched his penis.[2] Young also testified that she asked C.C.S. if he had anything to add to what he told the detective and he said, "[N]o, not really." Report of Proceedings (RP) at 155.

Regarding the charged incident, M.A.E. testified that Anderson laid on top of him in a public bathroom and rubbed his penis against his penis. The investigating detective testified to M.A.E.'s disclosures during an interview, which were substantially similar to his trial testimony. Dawn Minnich, who gave Anderson a polygraph test, testified that Anderson told her about an incident that occurred in a public bathroom, generally matching the details and time frame of the victim's story.[3]

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[2] Both briefs mischaracterize Young's testimony by quoting excerpts and describing them as C.C.S.'s statements to Young. Anderson claims that "Nancy Young testified that C.C.S . . . told [her] that Jeremy Anderson 'had touched his penis' and had gotten on top of him and rubbed his penis on C.C.S.'s penis." Br. of Appellant at 11. But it is clear from the transcript that Young was merely recounting her knowledge of C.C.S.'s history prior to examining him: "The history was that [C.C.S.] had made a disclosure that an acquaintance, Jeremy Anderson, had touched his penis. And Jeremy had gotten on top of [C.C.S.] and rubbed his penis on—on [C.C.S.'s] penis. And that [there] was a concern that there possibly could have been more contact. But that was—that was the history I had at the time." RP at 155.

[3] M.A.E.'s account and Anderson's statement to Minnich differ in one respect: Anderson told

Neither party objected to the court's proposed instructions to the jury. Defense counsel did not request an instruction for assault in the fourth degree as a lesser included offense. The jury convicted Anderson of first degree child molestation.

ANALYSIS

I. Right to Confrontation

Anderson contends that the trial court erred in permitting Nancy Young to testify to C.C.S.'s hearsay statement that Anderson touched his penis because it was testimonial under *Crawford*.[4] The statement, according to Anderson, was testimonial because it was made pursuant to an ongoing police investigation, and Young was acting in a governmental capacity.

The Sixth Amendment confrontation clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Fourteenth Amendment applies a defendant's Sixth Amendment rights to the states. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). We review alleged violations of the confrontation clause de novo. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007).

The admission of testimonial hearsay violates a defendant's Sixth Amendment right of confrontation unless the witness is unavailable and there was a prior opportunity to cross-examine with regard to the statement. *Crawford*, 541 U.S. at 53-54. Although *Crawford* does not provide a comprehensive definition of "testimonial," it articulated three core classes of testimonial

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Minnich that he had the little boy get on top of him, while M.A.E.'s story was consistently that Anderson was the one on top.

[4] Young's testimony was actually double hearsay: Young testified to statements C.C.S made to a detective and that she apparently learned about from talking with the detective. But Young did not object at trial and did not assign error to the double hearsay; thus, the issue is not before us.

statements: (1) ex parte, in-court testimony or its functional equivalent; (2) extrajudicial statements contained in formalized testimonial materials; and (3) statements made under circumstances which would lead an objective witness reasonably to believe the statements would be available for use at a later trial. *Crawford*, 541 U.S. at 51-52. Nontestimonial statements do not implicate the confrontation clause and are admissible if they fall within a hearsay exception. *State v. Saunders*, 132 Wn. App. 592, 601, 132 P.3d 743 (2006). Generally, a victim's statements to a health care provider are not considered testimonial when taken for the purposes of medical diagnosis and treatment. *See State v. Moses*, 129 Wn. App. 718, 730, 119 P.3d 906 (2005); *State v. Fisher*, 130 Wn. App. 1, 13, 108 P.3d 1262 (2005).

In *State v. Hopkins*, 137 Wn. App. 441, 454-55, 154 P.3d 250 (2007), we considered whether a victim's statements to a social worker were testimonial. We pointed out several factors that tended to show the victim's disclosures at the initial interview were not testimonial: (1) the interview was unrelated to any potential criminal prosecution; (2) the social worker performed the safety assessment to ensure the child was genuinely safe and secure where she was living; and (3) she asked innocuous, nonleading questions in response to which the victim spontaneously reported sexual abuse. *Hopkins*, 137 Wn. App. at 456. During a second interview, the victim's disclosures were testimonial because the social worker was tasked to (1) investigate whether the allegations of sexual abuse were accurate and truthful, (2) ask questions regarding information gained during the investigation, and (3) record her notes for the express purpose of providing information to law enforcement. *Hopkins*, 137 Wn. App. at 457. Put simply, while the social worker was not working at the behest of law enforcement, her eventual role overlapped with and

aided law enforcement. *Hopkins*, 137 Wn. App. at 456-57.

Here, Young performed the sexual assault exam on C.C.S. as part of a "team approach" to investigations of child abuse. RP at 147. Young also received information from law enforcement before examining C.C.S., including C.C.S.'s disclosures to a detective. But Young stated that the exams are the medical portion of the team approach, not forensic interviews. She explained that information received from referrals is used to discern medical concerns and assist in taking the medical history of the victim. Unlike in *Hopkins*, Young did not interview C.C.S. to ascertain whether he was telling the truth, or to aid a criminal investigation of Anderson. Nor does it appear that she asked leading questions about Anderson. In fact, C.C.S. was taken to the clinic because of an alleged incident by someone other than Anderson. Thus, the interview was not related to the prosecution of Anderson; rather, the incident was discussed in an effort to obtain C.C.S.'s medical history for the purposes of diagnosis and treatment. We conclude that C.C.S's statements to Young were not testimonial under *Crawford*.

II. Effective Assistance of Counsel

Anderson next contends his counsel ineffectively represented him by not requesting a jury instruction on fourth degree assault as a lesser included offense. Anderson argues he was entitled to the instruction because (1) each element of fourth degree assault is a necessary element of first degree child molestation and (2) the evidence supported an inference he committed the lesser offense. To support this inference, Anderson claims the State did not present evidence that he had an erection or that he committed the alleged offense for sexual gratification. We disagree.

We review de novo a claim that counsel ineffectively represented the defendant. *State v.*

Thach, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective, the defendant must show that (1) counsel's representation was deficient and (2) the deficient representation prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). A defendant must also overcome a strong presumption that counsel's conduct was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Legitimate trial strategy or tactics cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

A defendant is entitled to an instruction on a lesser included offense when (1) each of the elements of the lesser offense is a necessary element of the offense charged (the legal prong) and (2) the evidence in the case supports an inference that the lesser crime was committed (the factual prong). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). Anderson satisfies the legal prong under *State v. Stevens*, 158 Wn.2d 304, 311, 143 P.3d 817 (2006) (second degree child molestation necessarily includes the elements of fourth degree assault). Since the only difference in first and second degree child molestation is the ages of the parties involved, fourth degree assault is also a lesser included offense of first degree child molestation. *See* RCW 9A.44.083, .086.

To establish the factual prong, it is not enough that the jury might disbelieve the State's evidence; instead, there must be affirmative evidence that the defendant committed the lesser included offense. *State v. Speece*, 115 Wn.2d 360, 363, 798 P.2d 294 (1990) (*citing State v. Fowler*, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). The evidence must raise an inference that *only*

the lesser included offense was committed to the exclusion of the offense charged. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000); *State. v. Ieremia*, 78 Wn. App. 746, 755, 899 P.2d 16 (1995) (the evidence must support an inference that the defendant committed the lesser offense *instead of* the greater one). When determining whether the evidence at trial was sufficient to give the instruction, we view the supporting evidence in the light most favorable to the party requesting the instruction. *Fernandez-Medina,* 141 Wn.2d at 455-56.

To warrant a lesser instruction on fourth degree assault, Anderson must point to evidence that he touched M.A.E., but not for the purpose of sexual gratification.[5] Anderson claims Minnich's testimony supports a lesser offense here because Minnich did not state that Anderson said it was done for the purpose of sexual gratification. Anderson also claims M.A.E. did not testify that Anderson had an erection or that he asked M.A.E. to take his clothes off. But even taken in the light most favorable to Anderson, this evidence does not support an inference that Anderson committed only fourth degree assault to the exclusion of the offense charged. *Fernandez-Medina*, 141 Wn.2d at 455. Minnich testified that she started her interview with Anderson by asking about prior *sex offenses*. In response, Anderson described the incident in the public bathroom, generally matching the details and time frame of the victim's story. And this, coupled with the victim's testimony that Anderson laid on top of him and rubbed his penis against M.A.E.'s, precludes the possibility that Anderson touched M.A.E. for any purpose other than sexual gratification. Thus, the factual prong of *Workman* has not been met; and counsel was not

[5] To convict a defendant for first degree child molestation, the State must prove, inter alia, that the alleged contact between the perpetrator and the victim was done for the purpose of sexual gratification. RCW 9A.44.083, .010. Fourth degree assault occurs when there is an unlawful touching with criminal intent. *Clark v. Baines*, 150 Wn.2d 905, 908 n.3, 84 P.3d 245 (2004).

deficient for failing to request an instruction on the lesser offense fourth degree assault.

We affirm.

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.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, C.J.