Issue List
Criminal Case/Child molest conviction

A. Is battery a lesser included offense of Lewd and lascivious conduct with a child, and if so, did the court err in failing to give the lesser included offense instruction on its own motion?

B. Trial court's refusal of circumstantial evidence instruction. Did the trial court erred in refusing to give trial counsel's requested instruction on how the jury was to treat circumstantial evidence?

1. The court gave a circumstantial evidence instruction pertaining to only the evidence of intent. The court treated this as a circumstantial evidence of intent case. However, this simply loaded or tipped the scale that there was no dispute in what happened. There was a dispute in the evidence from the following facts:

a. Locking the door–for sex or to get away from wife?
b.. Wife's conduct
c. The central dispute was whether the touching occurred in the bed or not, not the intent behind the touching? Defendant said it did not occur, Ryota testified it did not, prosecution relied on CSAS testimony (circumstantial evidence) to argue it did happen
d. Kids yelling from behind the closed door.
e. The children's conduct during the interviews and appearance at trial. Was it jet lag or evidence of trauma?
f.. Argument that defendant tried to suppress the children's testimony.

C. Ineffective assistance of counsel issues on appeal

1. Failure to object to wife's personal opinion about nature of touching.

a. DA made the defendant's wife into his accuser and jury. Email to DA that she told her children that their father was arrested due to his conduct with them, and to keep it a secret. (5 R.T. 533.)
b. DA elicits that wife did not think her husband was in trouble for taking baths with the children. (5 R.T. 541.)
c. Why was there no objection to DA's examination of wife and police officer about wife's opinion that the touching was sexual in nature: "she said she assumes it is a sexual thing." (RT 574.)
d. Trial counsel acknowledges it was improper to allow police officer to state he suspected sexual abuse from wife's letter to school teacher (RT 827), but prosecutor refers to it in closing argument (RT 1062, 1065), as does defense (RT 1120).

e. Defense counsel knew the prosecutor would attempt to elicit wife's personal opinion regarding husband's conduct with the children because it came up in the police interviews and was mentioned at the preliminary hearing. (5 R.T. 480-481.)

f. Police officer testifies that wife said she did not sleep with her husband and he forced the children to take turns sleeping with him and that they did not like it. She responded that she assumed it was a sexual thing. (5 R.T. 573-574, 587.) There was no indication that she had ever seen her husband touching the children in a sexual way. (5 R.T. 589.)

2. Defense counsel's failure to object to prosecutor's insinuation that defendant convinced his children not to incriminate him when there was no opportunity for him to have done so because he was under a protective order which prevented him from seeing the children alone. Defendant testified that since the time of his arrest, he had not spoken with the children about the case or their testimony because it was not allowed by the court as a condition of his supervised visitation. (6 R.T. 726.)

3. Defense counsel's failure to object to or seek to limit the Child Sexual Abuse Accommodation Syndrome "CSAS" testimony. It appeared to be irrelevant. CSAS is admissible only to rebut a charge of recent fabrication or to support a child's credibility by dispelling mistaken conceptions about how children react to an alleged molestation event. There were other explanations for childrens' reaction to the alleged event (i.e., mother pressuring children). The prosecution's theory was that the mother was influencing the children, so there was no need to dispel a juror misconception about delayed disclosure of abuse. In *People v. Bowker* (1988) 203 Cal.App.3d 385, 249 Cal.Rptr. 886, the Court of Appeal said that when an allegedly abused child "recants his story in whole or in part, a psychologist could testify on the basis of past research that such behavior is not an uncommon response for an abused child." (*Id.* at p. 394, 249 Cal.Rptr. 886.) Although the expert in *Bowker* had referred to the "child abuse accommodation syndrome," the Court of Appeal observed: "[A]n expert has little need to refer to the syndrome in order to testify that a particular type of behavior is not inconsistent with a child having been abused." (*Id.* at p. 392, 249 Cal.Rptr. 886.) The District Attorney investigator who testified about CSAAS repeatedly referred to the "syndrome," testified that he used it in his investigations, and gave a general description of all aspects of the syndrome to the jury.

4. Defense counsel told the jurors in opening statement that he would call a psychologist to testify that the defendant did not have psychological profile

of a deviant then failed to call the psychologist as a witness. The psychologist's interviews of client were complete at time of trial. Defense brings up facts that there is no Sexual Abuse Response Team "SART" exam or evidence of pedophilia in final argument (RT 1099), but then fails to call the psychologist to support that view. Prosecution had no competing psychological expert on their witness list.

5. Defense counsel failed to object to the videotapes of the childrens' interviews going back into the jury room during deliberations. This is like having the accuser appear "live" during deliberations and in the most credibility supportive context. Cases supportive of exclusion of tapes from jury room include: **U.S. v. Binder** (9th Cir. 1985) 769 F.2d 595, 600-601, *overruled on other grounds by* **U.S. v. Morales** (9th Cir. 1997) 108 F.3d 1031, 1035, fn.1.; **Chambers v. State** (Wyo. 1986) 726 P.2d 1269, 1276, 1277; **Taylor v. State** (1986) 727 P.2d 274, 277; **Martin v. State** (Okla. 1987) 747 P.2d 316, 319-20; **People v. Montoya** (Colo. 1989) 773 P.2d 623, 626, *superceded on other grounds as stated in* **People v. Pahlavan** (2003) 83 P.3d 1138; **State v. Michaels** (N.J. 1993) 264 N.J. Super. 579, 643-644; **Summage v. State** (2004) 248 Ga. App. 559, 561; **Tullis v. State** (Fla. 1998) 716 So. 2d 819, 820; **Young v. State** (1994) 645 So. 2d 965, 968. But section 1137 of the Penal Code provides that the jurors, upon retiring for deliberation, may take with them all papers which have been received into evidence (except depositions). But see, People v. Beverly, 233 Cal.App.2d 702, 718, 43 Cal.Rptr. 743 cert. den., 384 U.S. 1014, 86 S.Ct. 1937, 16 L.Ed.2d 1035.) Did defense counsel know he could object to the transcript of the tape recording of child going to the jury? It looks like he did not from the discussion surrounding the motion for new trial and absence of objection. (RT 610) Discussions about prelim transcript not being given to jury. (RT 822)

6. Defense counsel intentionally antagonized the judge in front of the jury so that judge threatened to hold him in contempt. *See Long v. State,* 31 Md.App. 424, 432, 356 A.2d 588, 592 (1976) (holding that trial judge's order to arrest defense witness in front of jury and accompanying comments indicated his "disbelief of the witness," thus committing prejudicial error); *Bryant*, 207 Md. at 585, 115 A.2d at 511; *Johnson v. State* 352 Md. 374, *387-388, 722 A.2d 873,879 (Md.,1999)

7. Defense counsel's stipulation to irrelevant Battered Woman Syndrome (BWS) testimony. Here, wife was talking to people about what husband was doing to her. Showed the bruise on her arm to someone from social services. Wrote to the teacher about the incident with the defendeant scolding her and the child over a toy. Wife did not appear afraid of husband and would not have claimed to be a battered woman. Note: find case law

on its limitations, and ask psychological expert for articles. There was no proof of any of the stages of BWS talked about in the testimony from prosecution's expert.