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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the evidence sufficient to support the jury's guilty verdict for attempted rape in the second degree where defendant held victim down despite her struggling, and where the victim was too intoxicated to be capable of consent?
2. Was the evidence sufficient to support the jury's guilty verdict for resisting arrest when it required three police officers and two applications of a taser before the defendant could be into custody?
3. Has defendant failed to meet his burden in showing ineffective assistance of counsel where he can show neither deficient performance nor resulting prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On December 3, 2007, the State filed an information in Pierce County Superior Court charging defendant, Christopher Flynn, with one count of attempted rape in the first degree and one count of resisting arrest. CP 1-2. The State later amended the information, reducing the charge in count I to rape in the second degree and adding one count of indecent liberties. CP 9-10. Trial began before the Honorable Bryan E. Chushcoff on August 10, 2009. After a CrR 3.5 hearing, the court found

that defendant's custodial statements would be admissible in the State's case-in-chief. CP 130-4, RP 75-77.

The jury found defendant guilty of attempted rape in the second degree, indecent liberties, and resisting arrest. CP 104, 107-08. The court conditionally dismissed the indecent liberties conviction pursuant to *State v. Womac*, 130 Wn. App. 450, 123 P.3d 528 (2005), in order to prevent a violation of double jeopardy. CP 135-36. At sentencing on October 9, 2009, the court imposed a standard range sentence of 198 months to life for attempted rape in the second degree based upon an offender score of 9. CP 137-41. Defendant received credit for 677 days time served. CP 142-62. For the misdemeanor, the court sentenced defendant to 365 days in jail, with 365 days credit for time served.¹ CP 165-9. Defendant entered a timely notice of appeal. CP 180.

2. Facts

On November 29, 2007, D.R.² had a couple of drinks at home with a neighbor, then went to Dawson's Bar and Grill on 56th and South Tacoma Way in Tacoma, Washington to meet her sister. RP 109, 111. D.R. arrived at the bar, and sat alone waiting for her sister who was supposed to meet her around 10:00pm. RP 110-1, 286. D.R. had a couple

¹ Defendant notes resisting arrest is a misdemeanor, and carries a maximum sentence of 90 days, but does not challenge the 365 days sentence. Petitioner's brief p. 25. Defendant received credit for 677 days time served for the felony conviction, and 365 days credit for time served on the misdemeanor conviction. CP 142-62, 165-9.

² Initials will be used in the brief rather than the victim's full name for privacy reasons.

more drinks while she waited. RP 111. D.R. described herself as intoxicated, and not wanting to talk to anyone. RP 112. Defendant approached D.R. at the bar and persistently asked her questions. RP 112-14. D.R. alternatively ignored defendant, or told him she did not want to be bothered; she testified that he was making her uncomfortable. RP 112-3. D.R. got up from the bar and walked to the restroom, which was located by the back door. RP 114. Defendant was waiting there when she came out of the restroom. RP 114. He grabbed the victim's shirt and pulled her out the back door of the bar. RP 114-5.

Randy Smith had been sitting close to the victim at the bar, witnessed what was going on, and intervened on her behalf. RP 289. He told defendant that, "the young lady didn't appear she wanted to be bothered," and asked him to leave her alone. *Id.* Defendant told Mr. Smith to mind his own business, which Mr. Smith did for a time. *Id.* At around 1:00am Mr. Smith watched defendant "dragging [the victim] out the back of the bar." RP 290. Defendant was holding D.R. while she was stumbling backwards. *Id.*

D.R. testified that once she was outside behind the bar, she ended up on her knees, and defendant had his hand on the back of her head. RP 116. He was trying to force his penis into her mouth. PR 116. The victim told defendant "No," and to leave her alone. RP 117. She kept turning her head from right to left to prevent defendant's penis from entering her mouth. RP 117. D.R. explained that defendant's penis was hitting her

cheeks as she tried to keep it out of her mouth. *Id.* It seemed to D.R. that defendant got frustrated, so he maneuvered her onto her back and began trying to remove her clothing. RP 117-8. D.R. continued to struggle and kick defendant. RP 117. D.R. testified that she was yelling, “No,” “Get off me,” and “Stop.” RP 120. She tried to use her pants to keep defendant from getting close to her, but he managed pull her pants all the way off of her. RP 117-8. D.R. kept trying to scoot back, and squirm. RP 121-2. She recalled thinking that she “needed to get [her] clothes back on, that [she] needed help.” RP 121.

About five minutes after the victim and defendant had gone out the back door, Mr. Smith left through the front door, and got in his car to go home. RP 291. On his way home, Mr. Smith looked down the ally behind the bar and saw D.R. lying on her back on the ground with defendant on top of her. RP 292-3. The victim’s pants were down, and Mr. Smith was able to see her underwear. *Id.* Defendant was between D.R.’s legs, and was holding her arms down while she struggled to get away from him. RP 293-4. Mr. Smith heard her “just kind of like hollering” to express her objection. RP 294. Mr. Smith drove down the ally and told defendant to get off of D.R. or he would call the police. RP 294. Defendant told Mr. Smith to “mind [his] own fucking business.” RP 294-5. Mr. Smith then drove to the parking lot at the end of the ally, and called 9-1-1 to report what he had seen. RP 236.

The 9-1-1 operator placed a dispatch call for a rape in progress. RP 236. Officers Smith and Frisbie arrived less than 30 seconds after the dispatch call as they were only 2 blocks from the scene at the time. RP 230-1. As the officers arrived, they saw defendant on top of the victim, who was naked from the waist down. RP 232, 365. Defendant was in between her legs holding her under her buttocks. RP 232, 364. He was thrusting, and appeared to be having sexual intercourse with the victim. *Id.* Officer Frisbie told the jury that defendant looked at the approaching patrol car, but did not disrupt his attempts to have intercourse with the victim. RP 364. The officer remembered thinking it was strange that defendant was “staring straight at our car” but did not stop what he was doing. *Id.*

The officers ordered defendant to get off the victim and defendant complied. RP 233, 367. The officers noted that defendant’s penis was sticking out of his pants. RP 234, 366. Once defendant was off of the victim she told the officers “thank you” in a soft voice. RP 235, 369. The victim did not stand up. RP 235, 370, 479. Both officers described her as, “out of it,” “intoxicated,” and “in a daze.” RP 235, 370.

The officers ordered defendant to face away from them and put his hands up. RP 235-6, 367. Defendant started to comply with the officers’ instructions, but turned back around to face them and reached down towards his waist. RP 237, 367-8. Officer Smith, now concerned for his

and his partner's safety, deployed his taser to control defendant. RP 237. After being tasered, defendant continued forward toward the officers, who forced him to the ground. RP 238-9. Officer Gutierrez arrived on the scene and helped to detain defendant. RP 337, 369. The three officers managed to get defendant's right arm behind his back, but he would not lower his left arm. RP 239, 338, 368-9. Defendant was "physically uncooperative," and kept his arm above his head, and the officers were unable to pull it down to put defendant in handcuffs. *Id.* Officer Smith deployed a second taser cartridge in order to control defendant. RP 239, 369. Defendant struggled so much while the officers tried to handcuff him that he tangled the wires on the officer's taser. RP 240. After he had been tasered a second time, the three officers were able to place defendant in handcuffs. RP 239, 369.

After being handcuffed, read his rights, and placed in the back of the patrol vehicle, defendant spoke with Officer Smith. RP 252-5, CP 130-4. Officer Smith testified that defendant stated that the victim had "asked to smoke some crack out of his pipe," and he had agreed to exchange crack cocaine for oral sex. RP 253. Defendant said that in the process of this exchange she had fallen, and he was helping her up. *Id.* When Officer Smith asked defendant why his penis was out of his pants, defendant stated that his "pants never stay up." *Id.* The officer asked why

defendant would have sex with a woman who was so drunk that she couldn't walk, and defendant told him "I never put it in... Look at me. I get it for free." RP 253-4.

While the other officers dealt with defendant, Officer Gutierrez approached the victim. RP 338-9, 345-6. D.R. told Officer Gutierrez that she had told defendant "over and over again" to stop, but he would not. RP 346. Officer Gutierrez stated that D.R. was crying and couldn't believe what had happened to her. He noted that she appeared intoxicated and upset. RP 338.

Officer Brown, a female officer, was called in to speak with the victim. RP 479. D.R. was still sitting on the ground, naked from the waist down. RP 479. Paramedics arrived at the scene as well, and gave the victim a blanket. RP 480. Officer Brown told the jury that the victim appeared intoxicated, upset, and very scared. RP 480-1. The victim was transported to Tacoma General Hospital by the Tacoma Fire Department. RP 480. D.R. was admitted to the emergency room at about 2:30am. RP 221.

At the hospital, the victim was hesitant to discuss what had happened to her with Officer Brown, and did not give much detail about the incident at that time. RP 480-1. Eventually, D.R. told Officer Brown that she had left the bar, and the next thing she knew, defendant was on top of her. RP 482. Officer Brown noted bruising that looked like fingerprints on the underside of the victim's arm, which the victim told her

had been inflicted by defendant. RP 481, 483. The victim told Officer Brown, "It was horrible. I just wanted him to stop. He was taking advantage of me." RP 483-4.

Doctors tested the victim's blood alcohol content and found it to be 0.385. RP 193. Her level of intoxication was so significant that the sexual assault nurse let her sleep for seven to eight hours before being able to get consent for the rape examination. RP 193-5.

During the sexual assault exam, which occurred sometime around 9:00 or 10:00am, the sexual assault nurse noted a large purple and black bruise on the victim's right hip posterior aspect. RP 181, 191, 221. The nurse took photographs of this bruising. *Id.* The victim indicated soreness on the back of her head, but no bruising had developed at the time the nurse performed the examination. RP 205. D.R. was given an IV dose of Ativan, an anti-anxiety medication to help her calm down. RP 213. D.R. testified that she noticed further bruising on the inside of her legs where they had been pushed apart when she got home that afternoon. RP 159.

The defense called Heidi Maas, the bartender from that evening. RP 406-7. She testified that she did not notice defendant and the victim arguing, nor had she seen D.R. dragged out of the bar. RP 412, 417-8. Ms. Maas testified that if anyone had drunk too much that night at her bar

or had seen defendant causing a problem someone probably would have notified her. RP 414. She also noted that the victim and her sister looked enough alike that a person could mistake one for the other. *Id.*

Defense also called Officer Shea Wiley who took forensic evidence from the crime scene, and from the victim at the hospital. RP 457-9. Officer Wiley testified that she did not know if DNA testing was ever ordered in the case. RP 472. Her statements also developed an inconsistency in testimony about the amount of light available in the alley that night. RP 460-1.

Officer Shelbie Brown was called by the defense to testify regarding statements the victim had made to her at the time of the incident. RP 481-2. Officer Brown testified that the victim said she had fallen down, and the “next thing she knew” defendant was on top of her, but that she did not think defendant had penetrated her. RP 481.

Additionally, defense presented expert testimony from Dr. Michael Hlastala about the effects of alcohol on the human body and memory. RP 426-56. Dr. Hlastala explained the symptoms that could be expected when a person’s blood alcohol level was as significant as the victim’s, including a lack of awareness of her surroundings, and an inability to remember. RP 437-41.

The defendant did not testify.

C. ARGUMENT.

1. THE STATE ADDUCED SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF ATTEMPTED RAPE IN THE SECOND DEGREE AND OF RESISTING ARREST.

In determining whether the evidence presented at trial was sufficient to support a guilty verdict, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Rangel-Reyes*, 119 Wn. App. 494, 499, 81 P.3d 157 (2003); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Any reasonable inferences from the evidence must be interpreted most strongly against defendant in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Challenging a verdict based on insufficiency of the evidence admits all evidence presented by the State and any reasonable inferences as true. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial evidence is no less reliable than direct evidence. *State v. Lubers*, 81 Wn. App 614, 619, 915 P.2d 1157 (1996). In order to determine defendant's intent, the trier of fact may infer that he intended for the natural and probable consequences of his actions to occur. *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983). Additionally, "intent may be inferred from circumstantial evidence." *Id.* (citing *State v. Shelton*, 71 Wn.2d 838, 839, 431 P.2d 201 (1967)).

When there is a conflict in the evidence or testimony, it is up to the jury to determine which is credible. *Id.* (See also *State v. Young*, Wn.2d 613, 618, 574 P.2d 1171 (1978); *State v. Reynolds*, 51 Wn.2d 830, 833, 322 P.2d 356 (1958)). Determinations of credibility are not reviewable on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- a. Sufficient evidence was adduced at trial for the jury to determine that defendant committed attempted rape in the second degree.

In order to convict for attempted rape in the second degree the State must prove:

- (1) That on or about the 30th day of November, 2007, the defendant did an act which was a substantial step toward the commission of Rape in the Second Degree;
- (2) That the act was done with the intent to commit Rape in the Second Degree; and
- (3) That the act occurred in the State of Washington.

CP 63-103, jury instruction no. 18. Rape in the second degree occurs when defendant:

“Engages in sexual intercourse with another person (1) by forcible compulsion, or (2) when the other person is incapable of consent by reason of being physically helpless or mentally incapacitated.”

CP 63-103, jury instruction no. 8. Stated another way, in order to prove attempted rape, the State must establish that defendant, with the intent to have sexual intercourse, took a substantial step toward having sexual intercourse with D.R. by forcible compulsion or where she was unable to

consent. *State v. Jackson*, 62 Wn. App. 53, 55, 813 P.2d 156 (1991) (citing RCW 9A.44.050; RCW 9A.28.020; *State v. Workman*, 90 Wn.2d 443, 449, 584 P.2d 382 (1978). “A substantial step is conduct, which strongly indicates a criminal purpose and which is more than mere preparation.” CP 63-103, jury instruction no. 17.

Defendant’s intent to engage in sexual intercourse with D.R. was supported by overwhelming evidence. The most telling evidence of defendant’s intent is his own statement to police. Defendant told Officer Smith that he and the victim had agreed to exchange oral sex for crack cocaine, and “she was giving [him] a blow job.” RP 253-4. Defendant clearly intended to have sexual intercourse with the victim.

Defendant’s intent to engage in sexual intercourse with the victim was further supported by the other evidence presented to the jury. Testimony from two police officers and a bystander showed that defendant had his penis exposed and was on top of the victim, who’s lower half was exposed. RP 232, 292-4, 365. Each of these witnesses testified that they had seen defendant thrusting into the victim. *Id.* The natural consequence of defendant’s actions is sexual intercourse, and the jury was able to infer defendant intended for that consequence to occur.

Defendant was so intent on having sexual intercourse with D.R. that he was not going to let anything stop him. He was not deterred by the victim telling him she didn’t want to be bothered, or by her ignoring him

in the bar. RP 113, 289. He was not dissuaded by Mr. Smith who asked him to leave the victim alone in the bar. The evidence showed that defendant was so intent on having sexual intercourse with D.R. that he was willing to use physical force to overcome the victim's resistance. He was not stopped by having to drag D.R. out of the bar to get her alone. RP 115. Even the victim yelling "no" and "leave me alone" was not enough to stop defendant from trying to fulfill his intentions. RP 116. Instead he tried to force his penis into the victim's mouth by holding onto her head. RP 116. When that didn't work defendant moved D.R. onto her back and pulled off her clothing from the waist down. RP 117. Defendant was undeterred by the victim's struggle which was apparent to Mr. Smith when looking down the ally. RP 292-4. Defendant was undeterred by the victim's yells, which Mr. Smith heard from down the ally. RP 294. Even Mr. Smith's interference and the knowledge that the police were being called didn't slow defendant down. Instead, defendant told Mr. Smith to "mind [his] own fucking business," and continued to thrust until the police arrived and ordered him to get off the victim. RP 294-5. Defendant's actions indicate that he intended to have sexual intercourse with the victim, even if he had to do so by force.

Defendant's intent to have sexual intercourse with the victim was not deterred by her severe intoxication which rendered her unable to

consent either. A person is incapable of consent when she is physically helpless or mentally incapacitated. CP 63-103, jury instruction no. 8.

Mental incapacitation is defined as:

That condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

Id.

The victim's substantial level of intoxication was readily apparent to the other people she came into contact with that night. RP 193, 235, 289, 370, 480-1. Both Mr. Smith and the victim testified that she was unable to walk out of the bar without stumbling. RP 112, 286-7, 290. Mr. Smith was unable to understand the words D.R. was yelling in the ally. RP 294, 297. Officers testified that D.R.'s speech was slurred and repetitive. RP 338, 486. Additionally, Officer Gutierrez noted that D.R.'s eyes were glossy, and she smelled strongly of alcohol. RP 347. Defendant nevertheless proceeded to engage in, or attempt to engage in, oral sex with the victim, and later to attempt vaginal intercourse with her. RP 116-7, 253-4.

When D.R. was admitted to the hospital following the incident she had a BAC of 0.385, almost five times the legal limit. RP 428. This level is near the highest end of the range of intoxication referred to as the "coma

level” or the “stupor level.” RP 429. The symptoms associated with this stage of intoxication are anesthesia, impaired consciousness, lack of coordination and approaching paralysis, and apathy. RP 434. Hospital staff had to let her sleep for seven or eight hours before they deemed her capable of consenting to the rape examination. RP 194. Despite a severe level of intoxication that was readily apparent to other witnesses, defendant removed D.R.’s pants and undergarments and positioned himself between her legs to have sex with her. RP 117, 232, 364. Defendant’s actions show he intended to engage in sexual intercourse with D.R. despite her severe and readily apparent intoxication which rendered her mentally incapacitated and unable to consent.

The jury was presented with a number of facts which allowed them to determine that defendant had taken a substantial step toward committing rape in the second degree, and that he took that step in Washington State. Defendant was not merely preparing when he dragged D.R. out of the bar and into the ally. RP 290. That bar and ally are located in Tacoma, Washington. RP 109, 282, 363. His actions strongly indicated his criminal purpose when he removed D.R.’s clothing from the waist down, and when he exposed his own genitals. RP 117-8, 293-4. He took additional substantial steps when he climbed between her legs, and held her arms down, and when he held onto her buttocks and thrust his hips. RP 118, 120, 232, 293-4, 364. Each of these steps individually

strongly indicates defendant's criminal purpose. Taken together they leave little doubt that defendant was well on his way to raping the victim by use of physical force on a victim whose intoxication rendered her incapable of consent.

- b. The State adduced sufficient evidence at trial for the jury to find defendant guilty of resisting arrest.

The evidence presented at trial was sufficient to support the jury's guilty verdict for resisting arrest. In order for the jury to convict defendant for resisting arrest they must find:

- (1) That on or about the 30th day of November, 2007, the defendant prevented or attempted to prevent a peace officer from arresting him;
- (2) That the defendant acted intentionally;
- (3) That the arrest or attempt to arrest was lawful; and
- (4) That the any of these acts occurred in the State of Washington.

CP 63-103, jury instruction no. 34.

A "peace officer" is any "duly appointed city, county or state law enforcement officer." RCW 9A.04.110(15). An arrest is lawful when the officer has probable cause to believe that defendant had committed the crime. CP 60-103, jury instruction no. 33. Probable cause exists where facts known to a reasonably cautious officer justify a belief that defendant committed the crime. *Id.* The jury may consider the officer's experience and expertise in determining whether the facts justified that belief. *Id.*

The arresting officers were “peace officers” as they were officers for the Tacoma Police Department. RP 226, 360. The officers were on duty in Tacoma, Washington on November 30, 2007, and encountered and arrested defendant behind Dawson’s Bar, located in Tacoma, Washington. RP 230, 236. Evidence presented to the jury clearly showed defendant attempted to prevent his arrest, and was arrested in the State of Washington by peace officers.

The arrest was lawful as the arresting officers had probable cause to arrest defendant as soon as they arrived on the scene. After being dispatched to a rape in progress, the officers arrived at the location of the reported crime, and saw defendant on top of a half naked woman. RP 109, 232, 236, 363, 365. Defendant appeared to be having sexual intercourse with the victim. RP 232, 364. He did not stop thrusting, even after seeing the police arrive in the ally. RP 364. It does not require significant extrapolation to believe that defendant was engaged in the crime to which the officers were responding. A reasonably cautious officer, especially one with years of experience, could believe that defendant was committing the crime of rape reported to 9-1-1. Once at the scene, the officers were presented with more than enough evidence to believe that defendant should be arrested.

The officers were attempting to place defendant under arrest upon their arrival at the scene. RP 236-367. They exited their car running, and ordered defendant to get off the victim, turn around and place his hands in

the air. RP 235-6, 367. Officer Smith explained on the stand that having suspects turn away from the officer is a standard safety measure taken when placing a suspect under arrest where it is unclear whether that suspect is armed or not. *Id.* Defendant began to comply by getting off D.R. and turning away from the officers. *Id.* The jury could reasonably infer that defendant knew he was being placed under arrest at that time and was refusing to comply with the officers' order.

Instead of complying with the officers' orders, defendant turned back around and reached towards his waist. *Id.* Officer Smith tasered defendant because his failure to comply with orders was presenting a safety concern. RP 237. If defendant had not understood he was being placed under arrest, or had not otherwise been preventing his own arrest when the officers arrived at the scene, he would have allowed the officers to handcuff him after being tasered. Rather than cooperating, defendant continued forward toward the officers. RP 239, 338, 368-9. He was tasered again, taken to the ground, and one handcuff was secured around his wrist. RP 237-9, 338, 368-9. Even after being placed in one handcuff, defendant continued to be "physically uncooperative," and would not allow his second arm to be lowered. *Id.* Defendant's continuous struggle which ultimately required three officers and two applications of a taser to quell, is ample indication that he acted intentionally to prevent the officers from arresting him.

2. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS COUNSEL'S CONDUCT WAS STRATEGIC AND WITHIN THE STANDARDS OF PROFESSIONAL CONDUCT.

The prosecution's case must "survive the crucible of meaningful adversarial testing" in order for the right to effective assistance of counsel to have been fulfilled. *United States v. Cronin*, 466 U.S. 648, 656, 80 L.Ed.2d 657, 104 S. Ct. 2045 (1984). When a true adversarial proceeding has been conducted the protection envisioned by the Sixth Amendment has occurred, even if defense counsel has made demonstrable errors of tactics or judgment. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 91 L.Ed.2d 305, 106 S.Ct. 2574, 2582 (1986).

A defendant who raises a claim of ineffective assistance of counsel must demonstrate that: (1) his or her attorney's performance was deficient, and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, matters that go to trial strategy or tactics do not show deficient performance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, defendant must show that a reasonable probability exists that the

result of the trial would have been different, but for counsel's errors. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of an attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

The standard of review for effective assistance of counsel is whether the court can conclude that defendant received effective representation and a fair trial, after examining the whole record. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot form a basis for a claim of ineffective

assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). Defendant must show, from the record as a whole, that defense counsel lacked a legitimate strategic reason to support his or her challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In order to prevail on a claim of ineffective assistance of counsel for a failure to object at trial, defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

- a. Defense counsel's lack of objection to the use of the term victim was not deficient where the court denied his motion in limine to exclude the term.

Defendant contends that his counsel was ineffective for failing to object to the use of the term "the victim" in reference to D.R. Petitioner's brief p. 32. The record reveals that defense counsel attempted to have the word "victim" excluded from the trial by bringing a motion in limine; the court denied this motion. RP 86.³ Generally, a denial of a motion in limine creates a standing objection for the losing party, unless the trial court indicates further objections are required to preserve the issue. *State*

³ Defendant has not assigned error to the trial court's ruling on this motion.

v. *Kelly*, 102 Wn.2d 188, 193, 685 P.2d 564 (1984), citing *State v. Koloske*, 100 Wn.2d 889, 676 P.2d 456 (1984). The court below did not indicate that further objections were required to preserve the issue in this case. RP 86. Counsel cannot be ineffective for not objecting again when a standing objection is already in place. Moreover, because the court denied the motion in limine, it is unlikely that any objection would have been sustained. Thus, defendant cannot show any prejudice flowing from any failure to object during the course of trial.

Defendant also contends that his counsel was ineffective for using the word “victim” to refer to D.R. Petitioner’s brief p. 32. The defense brief identifies six pages in the record where this error allegedly occurred. Petitioner’s brief p. 32. On two of these pages, the word victim does not appear. RP 223, 266. On one, Officer Smith was describing how an incident report gets filled out and stated, “The passenger would still fill in the blank boxes with the suspect’s name, victim’s name, time of incident.” RP 259. He was neither referring to the case at hand, nor to D.R., but rather to the procedure officers follow in order to complete their paperwork. RP 259-60. One cited incident where the word “victim” was used during the trial. RP 369. This was Officer Frisbie testifying that a blanket was given to the victim at the scene. *Id.* This leaves two instances where counsel referred to D.R. as “the victim.” RP 275, 376. Of these, one was a question was phrased with the word “victim,” but an objection for an improper question was sustained. RP 376. Finally, defense counsel

asked, “Do you recall what clothes the victim was wearing or Ms. [R] was wearing?” RP 275. Counsel corrected his own use of the word before finishing his question.

In denying the motion in limine to exclude the word from the trial, the court noted that it is too easy for people to use the word in common speech. RP 86. Recognizing the ease with which the term can be used, the rare use of the term during the course of trial, even if unintentional, cannot fall outside the wide range of professionally competent assistance. Counsel’s use of the word “victim” on one occasion where he promptly corrected himself is well within the professional range of competent assistance; therefore it is not error justifying reversal.

Even if defense counsel’s use of the word was error, its use in this case was insufficient to unduly influence the jury. The case did not turn on D.R.’s testimony, and it is unlikely there was any enhancement of her credibility from the use of the word “victim.” Even if some enhancement of her credibility did occur from the use of the word “victim” it did not prejudice defendant. The jury had substantial evidence on which to base its verdict, including photographs of bruises on D.R.’s body, a tape of the 9-1-1 call reporting the crime, and testimony from four police officers, a third party bystander, and a sexual assault nurse, all in addition to D.R.’s testimony. *Passim*. The use of the word “victim” to refer to D.R. was cumulative to all the evidence presented from which the jury could conclude she was indeed a victim. It is not probable that the outcome of

the case would have been different if the word “victim” had been entirely excluded from trial. Defendant has failed to meet his burden under *Strickland*.

- b. Defense counsel’s lack of objection to hearsay evidence was a trial tactic, not deficient performance.

Defendant argues that his trial counsel was ineffective for allowing inadmissible hearsay statements from the victim to be entered without objection. Counsel’s choice of whether or not to object at trial is a “classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989). “Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Id.*, (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)), *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980).

Defendant argues that defense counsel failed to object to inadmissible hearsay evidence on two occasions during the trial. Petitioner’s brief, p. 29. The first of the two statements was a statement from D.R. in which she explained the lasting effects of the incident on her life. D.R. stated, “I’m changed. I won’t be the same. I don’t go out at night. I don’t trust people. I don’t go anywhere by myself. I just wanted it to go away.” RP 123. Defendant fails to explain how this statement

qualifies as hearsay evidence. Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Because the statement was a description of the victim’s current state of mind while testifying at trial, it is not hearsay.

Lay testimony about the emotional or psychological trauma suffered by the victim after an alleged rape is admissible. *State v. Black*, 109 Wn.2d 336, 348. In *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987), the evidence of psychological trauma was offered through an expert witness. The court deemed expert testimony of post-rape trauma to be improper because the scientific evaluation of post-rape trauma was not sufficiently reliable. The court was explicit in its ruling that lay testimony of trauma was admissible, and that it was only expert testimony which was precluded. The victim is clearly a lay witness as she was not purported to have any scientific qualifications, and she described only her own feelings, not a diagnosis. As a lay witness, her testimony was admissible as evidence.

Defendant argues that because it is testimony of the victim’s state of mind, the evidence must be relevant to a material issue of fact before the jury in order to be admissible. Petitioner’s brief, p. 30. Defendant cites *State v. Haack*, 88 Wn. App. 423, 439, 958 P.2d 1001 (1997), and the cases cited within it, as cases analogous to the case at hand. Petitioner’s brief, p. 30. In *State v. Haack* the testimony in question was

made by the victim and used to establish his state of mind, however the testimony was not a simple statement of how he felt, but rather an explanation of why he felt that way. 88 Wn.App at 438. To explain his state of mind, the victim testified that he had heard that Haack thought that he had been set up to be robbed by the victim. *Id.* In each of the cases cited within *State v. Haack*, the statement about the victim's state of mind was made by a third party because the victim was deceased. *State v. Cameron*, 100 Wn.2d 520, 531, 674 P.2d 650 (1983), *State v. Parr*, 93 Wn.2d 95, 98-104, 606 P.2d 263 (1980), *United States v. Brown*, 160 U.S. App. D.C. 190, 490 F.2d 758 (D.C. Circuit 1973). The courts in each of the cases admitted the hearsay evidence because it was relevant to the victim's state of mind and probative of a question of fact in the case.

This case is distinguishable from those cases in that the victim was testifying as to her own state of mind. The evidence was not being established through hearsay by a third party, or explained by hearsay from the victim. In this case, the evidence was not hearsay, and under *Black* the evidence was properly admitted as relevant to a material issue of fact because it tends to show that the sexual intercourse was not consensual.

The second statement which defendant argues should have been the subject of an objection was testimony from D.R. that her sister had told her that the sister knew defendant from drug treatment meetings. Petitioner's brief p. 32. While this testimony was hearsay, defense counsel's failure to object was not error but a tactical decision. These

statements were consistent with defense's theory that defendant and D.R.'s sister had a former relationship, which may have involved drug use. RP 126. Defense counsel asked multiple witnesses if D.R. and her sister looked alike in order to support defendant's statements to police that the victim was his friend. RP 124, 414, 547. If the evidence could be seen by the jury to support defendant's case, defense counsel has a tactical reason not to object to the admissibility of such evidence.

Alternatively, counsel may have wished to avoid calling attention to a statement that may otherwise appear irrelevant to jury members by objecting to it. The Washington State Supreme Court has held that it is acceptable strategy for counsel to refrain from objecting to avoid emphasizing testimony. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The statement the victim made was short, and allowing it to pass with as little attention as possible was a strategic choice.

Defendant argues this testimony was likely to cause an unfair prejudice from the jury believing defendant had a serious drug problem. Petitioner's brief p. 32. This evidence was not the only evidence of defendant's drug use. Multiple witnesses described defendant as being intoxicated, high or "dazy," and testimony showed that defendant was found with a crack cocaine pipe on his person at the time of his arrest. RP 369, 370, 410. Given this evidence it is equally likely, if not more so, that testimony that defendant was seeking drug treatment would reflect well on

him. The failure to object was neither egregious, nor did it involve testimony “central to the State’s case.” *State v. Madison*, 53 Wn. App. At 763.

Defendant’s focus of these relatively minor actions by defense counsel distracts this court from the standard of review for claims of ineffective assistance of counsel. Such claims are evaluated based on the record as a whole. *State v. White*, 81 Wn.2s at 225. Defense counsel was clearly not deficient when the record is examined in its entirety. The most compelling indication that the State’s case was tested by the adversarial proceeding is the fact that defendant was convicted of the lesser included offense of attempted rape in the second degree, not the charged offense of rape in the second degree. CP 104.

Moreover, there are ample indications in the record that defense counsel’s representation was not deficient. Defense counsel interviewed D.R. and witnesses, called witnesses in defendant’s favor, and cross examined all witnesses called by the State. RP 105, 125, 160, 195, 224, 258, 278, 298, 314, 342, 347, 372, 380, 406, 426, 457, 477. Counsel made motions in limine to prevent the use of the word victim, and witnesses from calling what they had seen “rape.” RP 98-100. Defense counsel objected throughout the course of the trial to testimony, questioning and evidence, and responded to objections made by the State. RP 93, 184, 240, 312, 315, 317, 339, 353. Counsel also proposed jury instructions, and took exception to the courts failure to instruct the jury on voluntary

intoxication, as well as some lesser included offenses. CP 45-62, RP 497-503. Counsel made an opening statement, as well as a closing statement, in which he presented alternative theories to poke holes in the State's evidence by calling into question how much the victim could remember, and pointing out inconsistencies in testimony and the lack of DNA evidence to the jury. RP 102, 534-559. The record as a whole provides overwhelming indications that defense counsel was competent, and effective. Defendant has failed to meet the burden imposed on him by *Strickland* to show that he was denied his right to counsel under the Sixth Amendment.

D. CONCLUSION.

For the aforementioned reasons, the State respectfully requests the Court affirm defendant's convictions.

DATED: August 3, 2010.

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STATE OF WASHINGTON

BY E
TERRY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below:

8-3-10 M. K. [Signature]
Date Signature