

NO. 36153-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL H. PLANT,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF RESPONDENT

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I. STATE'S REPOSE TO ASSIGNMENTS OF ERROR

1. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE DEFENDANT GUILTY OF CHILD MOLESTATION IN THE FIRST DEGREE.
2. DEFENSE COUNSEL'S DECISION NOT TO PRESENT A VOLUNTARY INTOXICATION DEFENSE WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL AS HIS DECISION WAS LEGITIMATE TRIAL TACTICS.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. WHETHER THERE WAS SUFFICIENT EVIDENCE THE DEFENDANT ACTED FOR THE PURPOSES OF HIS SEXUAL GRATIFICATION WHEN HE WAS SEXUALLY AROUSED BOTH BEFORE AND AFTER TOUCHING A.N., HE GROPED HER MOTHER OVER HER OBJECTION, HE WAS RUBBING A.N.'S LEGS BEFORE TOUCHING HER VAGINAL AREA AND MOVED HIS FINGERS LIKE A PIANO OVER HER VAGINAL AREA.
2. WHETHER DEFENSE COUNSEL'S DECISION NOT TO PRESENT A VOLUNTARY INTOXICATION DEFENSE WAS A LEGITIMATE TRIAL TACTIC WHEN THE DEFENDANT INDICATED HE INTENTIONALLY TOUCHED A.N. TO TEST WHETHER SHE WAS PREVIOUSLY MOLESTED.

III. STATEMENT OF THE CASE

The State charged the Defendant, Daniel Plant, with one count of child molestation in the first degree occurring on June 17, 2006. CP 5-6. The Court conducted a *Ryan* Hearing on December 11-12, 2006 and found

A.N. (d.o.b. 6/9/2000), the alleged victim, competent to testify, and the statements she made to her mother and Investigator Lozano admissible. 1RP 34-190, 2RP 250-53. The trial court also conducted a 3.5 hearing in which the defendant testified. 2RP 194-261. Following a trial on January 22-24, 2007, a jury found the Defendant guilty of child molestation in the first degree. CP 55.

At trial, A.N. testified she, her mother Susan Lewis-Norbury, and the Defendant were on the bed in the living room. 4RP 329-30. There was a movie playing on the television. 4RP 329-30. A.N. was wearing her two-piece pajamas and underwear and was under the covers on the bed. 4RP 330. Her mother was asleep next to her, but the Defendant was not sleeping. 4RP 330.

A.N. said the Defendant did something she didn't like that night. 4RP 331. She testified the Defendant touched her pee spot under her clothes with his fingers. 4RP 331-334. The touching was skin to skin, but he did not go inside her body and it did not hurt. 4RP 334, 336-37. She explained she felt sad when he touched her. 4RP 336. A.N. also said she remembered telling Olga Lozano and her mother about what the Defendant did, and she told them the truth about what happened. 4RP 337-338. A.N. said the Defendant was always nice to her, but she was

mad at him and didn't like him anymore because he did something wrong by touching her. 4RP 346, 348.

A.N. also testified her brother Cole touched her like the Defendant touched her, but this happened after Plant touched her. 4RP 339. A.N. distinguished the touching by Cole as he touched her with his pee-pee. 4RP 340-342. She said her brother still lived with her at home, she was fine with him living with her, but wasn't sure if she was mad at Cole. 4RP 342, 348.

After A.N. testified, her mother, Susan Lewis-Norbury testified. Ms. Lewis-Norbury watched A.N. testify and stated she could tell A.N. was nervous and embarrassed on the stand and was bothered because she felt A.N. was capable of answering the questions. 4RP 398.

Ms. Lewis-Norbury explained she knew the Defendant for about three years and they were really good friends. 4RP 352. Their relationship wasn't sexual, but the Defendant would sporadically spend the night at her place. 4RP 352-53. Susan described Plant like an uncle to A.N., and when he was over at the house they would play a lot of games. 4RP 353. Plant did not generally baby-sit A.N. 4RP 353. However, one time just prior to the incident Susan let the Defendant baby-sit A.N. jointly with her seventeen year-old son Blake because Susan had to rush to see her deathly ill mother. 4RP 353-54.

On the night of the incident, Susan stated she and A.N. returned near midnight the night of June 16, morning of June 17 after visiting her sick mother. 4RP 354. Susan was still wound up and put on a long-lasting movie to calm down. 4RP 354, 357, 386. The Defendant showed up at her apartment a little bit later. 4RP 351, 355. When the Defendant arrived he was staggering, barely able to stand up, slurring his words, and smelling strongly of alcohol. 4RP 355-56. Susan reprimanded Plant because she didn't like him smelling of alcohol around the kids, but told him he could come inside if he would be quiet and go to sleep. 4RP 356.

Susan, A.N., and the Defendant were laying down on the queen-size bed in the living room. 4RP 357-58. Usually the Defendant slept on the floor when he was staying, however, Susan allowed him on the bed to watch the movie. 4RP 358. When they were on the bed, Plant began wrestling with Susan and being silly. 4RP 358-60. During this time, Plant asked Susan if they could have sex, but just pretend like they didn't. 4RP 367. Susan told Plant she didn't want to have sex with him, because it would ruin their friendship. 4RP 367-68. However, Plant kept pushing it, trying to hug Susan and groping her. 4RP 367. Susan had enough of this behavior and told Plant to stop. 4RP 367. Plant ended up laying on his side on a pillow between Susan's legs, and one of her legs was over Plant's left arm. 4RP 359, 388.

After Plant settled down between Susan's legs, A.N. was on one side of Susan and Plant was rubbing A.N.'s legs and feet. 4RP 361, 388. It was getting cool and Susan pulled the blanket up underneath Plant's head, covering A.N. and herself up to her hips. 4RP 361. Plant continued to rub A.N.'s legs under the blanket, rubbing her knees and above. 4RP 362. Susan told him to stop because he was keeping A.N. awake. 4RP 362. Plant did not immediately stop however, and the rubbing occurred off and on over the next couple of hours. 4RP 361-62. Eventually, Susan became angry with Plant and told him to stop immediately and not touch A.N. again. 4RP 361-62. At this point Susan dozed off. 4RP 363.

Susan awoke with a start when she heard A.N. say in a very serious voice, "Dan, stop." 4RP 363. Susan threw back the cover and saw Plant's hand was high on A.N.'s leg. 4RP 364. Plant jerked his hand away, with a look like he'd just been caught. 4RP 364. Susan asked Plant what he was doing and told Plant he was keeping A.N. awake. 4RP 364. Plant didn't respond and Susan made Plant move from between her legs. 4RP 365. Susan was going to allow Plant to stay, but he got really weird again and belligerent. 4RP 365. Susan described Plant's weirdness. She said that when Plant moved from her and was sitting up on the bed, he had his pants open. 4RP 366. She saw Plant had a condom and Plant asked her if she wanted to help him put it on his penis. 4RP 366, 369. Susan

could see Plant's exposed penis, but didn't look long enough to determine if he had an erection. 4RP 366, 369-70. She covered A.N.'s face with her hands and told Plant he would have to leave. 4RP 369. Plant agreed to go outside and said things would be different when he came back in. 4RP 369. Susan informed him he was not welcome back that night. 4RP 369.

The next morning, when Susan and A.N. were alone, A.N. told Susan she had something to tell her. 4RP 370-71. A.N. told Susan, Dan touched her under her clothes where girls go pee and pulled down her shorts and underwear to show Susan where the touching happened. 4RP 371. Susan immediately called the police. 4RP 372.

Olga Lozano, an investigator with the Longview Police Department, interviewed A.N. shortly thereafter. 4RP 404. A.N. told Lozano that A.N., her mother, and Plant were on the bed. 4RP 408. A.N. was next to her mother and Plant was laying in between her mother's leg and over the side of her leg. 4RP 408. A.N. said she and Plant were under the covers and Plant touched her on her pee, by pulling down the top part of her waistband of her underwear. 4RP 408-09. While Plant touched A.N., A.N. said he was moving his fingers on her private area like he was playing a piano. 4RP 410. She told Lozano that it hurt and wasn't good. 4RP 410. A.N. told Plant to stop and then her mother pulled back the covers and said for him to stop. 4RP 409.

Eight or nine days later, Lozano interviewed Plant. 4RP 415. During the interview Lozano noted Plant's fingernails were fairly long and sharpened to points. 4RP 425. During the interview, Plant's answers to Lozano's questions were well thought out and he took a long time to answer before responding. 4RP 432. Plant told Lozano A.N. had a nightmare that night and he was rubbing her belly to help soothe her. 4RP 420. He denied that he was playing with A.N., but did say that he was also rubbing her feet and legs. 4RP 420-21. At first, Plant denied touching A.N.'s pubic area. 4RP 421. When Lozano confronted him with Susan's pulling back the covers, Plant said he remembered her pulling back the covers and either Susan or A.N. telling him to stop. 4RP 421. When Lozano asked him if it was possible he might have mistakenly touched A.N.'s pubic area for Susan's, Plant said it was possible. 4RP 421. Lozano asked Plant if he blacked out that night. 4RP 421-22. Plant denied any blacking out. 4RP 422. When she suggested that Plant might be curious about touching A.N., Plant said he was not that kind of a person and it wasn't something he would do. 4RP 422. When Lozano asked Plant if he had any concerns about A.N., Plant replied that he thought A.N.'s two older brothers might be sexually molesting her because they were sharing her bedroom at the time. 4RP 422.

Lozano asked Plant several times if he ever put his hands inside A.N.'s underwear. 4RP 422. She received a variety of responses. 4RP 422. Plant first told her it was possible if he had fallen asleep, second he denied touching her, and then third said he purposefully touched A.N.'s pubic area to test her to see if she had been molested previously. 4RP 421-23. In Plant's opinion, A.N. had not been molested based upon her reaction to him touching her. 4RP 423. Lozano asked Plant more about the test he performed. 4RP 423. Plant said the test stopped at the pubic area and he did not get any sexual gratification from the touching. 4RP 423. Also that after the touching, he felt uncomfortable and this was one of the reasons he wanted to leave. 4RP 423. Plant's opinion was that he didn't do anything to A.N. and was being professional. 4RP 425.

About four months later, the prosecutor's office contacted Lozano to investigate abuse to A.N. by her brother Cole. 4RP 428-29. Lozano subsequently interviewed both A.N. and Cole, confirming the abuse. 4RP 429-431.

The defense did not present any testimony or evidence. 4RP 477. The court gave the jury the instructions, including an instruction for the lesser-included offense of assault in the fourth degree. CP 37-44, 4RP 457. During defense counsel's closing argument, counsel urged the jury to find the Defendant guilty of the lesser-included offense of assault in the

fourth degree. 4RP 469, 475. Counsel conceded the Defendant touched A.N., but reasoned he did it to check if A.N. was previously molested, and not for purposes of sexual gratification. 4RP 470, 472, 474. Counsel even argued the Defendant, although he had been drinking that night, was right in his conclusions of the molestation. 4RP 474-75. Counsel argued what Plant did was wrong and the way he went about testing his theory was inappropriate, but it did not constitute sexual gratification. 4RP 477, 480.

IV. ARGUMENT

I. THERE WAS SUFFICIENT EVIDENCE PRESENTED BY THE STATE TO CONVICT THE DEFENDANT OF CHILD MOLESTATION IN THE FIRST DEGREE.

The Appellant correctly recites the law governing a challenge for sufficiency of the evidence. However, the State would like to add that in reviewing a case for sufficiency of the evidence, the appellate court defers to the trier of fact regarding a witness's credibility or conflicting testimony. *See State v. Price*, 127 Wn.App. 193, 202, 110 P.3d 1171, 1175 (Div. II 2005).

The Appellant challenges the jury's finding of guilt on the charge of child molestation in the first degree for insufficiency of the evidence, alleging the lack of evidence to prove the defendant intentionally touched A.N. for sexual gratification. *See App. Brf.* at 9.

To convict the defendant of child molestation in the first degree the State had to show the defendant had sexual contact with A.N., that he was at least 36 months older than A.N., that A.N. was under the age of 12 years and not married to the defendant, and the acts occurred in the State of Washington. RCW 9A.44.083 (2007). Sexual contact is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either or a third party.” RCW 9A.44.010(2) (2007).

To prove sexual contact, the State must show the defendant touched A.N. for the purpose of sexual gratification. Sexual gratification is not an element of child molestation in the first degree. *See State v. Lorenz*, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004). It is merely a definition of sexual contact and explains that innocent or inadvertent contact does not amount to sexual contact. *See id.*, *State v. Stevens*, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

“Proof that an unrelated adult with no caretaking function has touched the intimate parts of a child supports the inference the touching was for the purpose of sexual gratification.” *State v. Powell*, 62 Wn.App. 914, 917, 816 P.2d 86 (Div 3, 1991). In cases involving touching over clothing, courts have found that physical evidence of prolonged touching or rough touching will suffice, that repeated touching may be considered,

and the victim's testimony she felt violated by the touching may be argued to prove touching for sexual gratification. *See State v. Stevens*, 127 Wn.App. 269, 277-78, 110 P.3d 1179, 1184 (2005) *rev'd on other grounds*, *State v. Stevens*, 158 Wn.2d 304, 143 P.3d 817 (2006) (allowing the State to argue the inference that because the victim felt violated, the defendant acted with intent and purpose), *State v. Price*, 127 Wn.App. 193, 201-02, 110 P.3d 1171 (Div. 2, 2005), *State v. Powell*, 62 Wn. App. 914, 917-18, 816 P.2d 86 (Div 3, 1991).

In *State v. Price*, 127 Wn.App. 193, 196, 110 P.3d 1171 (Div. 2, 2005), four-year-old R.I.T. came home from day care and told her mother that she had an "owie" and started pinching herself in front of her diaper. When the mother looked under the diaper, she saw R.I.T.'s vaginal area was bright red and swollen. *See id.* R.I.T. began making pinching motions and said Price had rubbed her there. *See id.* Price denied any intentional touching and said he may have accidentally touched her because she was a needy child. *See id.* at 197. The appellate court found there was sufficient evidence of sexual gratification because the defendant's contact involved rubbing of duration such that the mother could see the redness after R.I.T. came home from day care. *See id.* at 202.

In *Powell*, Windy D., a fourth grader, testified a man she knew as Uncle Harry, hugged her around the chest, and as he assisted her off his lap placed his hand on her “front” and bottom on her underwear under her skirt. *See State v. Powell*, 62 Wn.App. 914, 916, 816 P.2d 86 (Div 3, 1991). Additionally, at a different time while Windy was alone with Powell in his truck, he touched both her thighs over her clothes. *See id.* The court determined that while Powell was referred to as an “uncle,” the title was honorary and he was just a visitor in the child’s home. *See id.* at 916, FN 1. Additionally, the court determined Powell was never entrusted with the care of Windy D. *See id.* However, because the touching was over the child’s clothing, Division Three determined the purposes of the touching were equivocal and could be innocent. *See id.* at 917-18. The court relied heavily on the surrounding circumstances Powell was assisting Windy D off his lap, he apologized for the touching and said it was an accident, and that Windy could not describe how Powell touched her. *See id.* As such, Division Three stated that touching over clothing required some additional evidence of sexual gratification. *See id.* at 917-19.

In *State v. Whisenhut*, 96 Wn.App. 18, 23-24, 980 P.3d. 232 (Div 3, 1999), Division Three distinguished the facts in *Powell*. Mr. Whisenhut was found to have touched a five-year old three times while she rode the

school bus with him. *See id.* at 20. Specifically, the child testified Whisenhut reached over the seat and touched her on her privates, under her skirt, but over her body suit. *See id.* at 20, 24. The court found the touching was not equivocal or fleeting and there was no innocent explanation for the touching. *See id.* at 24.

In the instant case, there was evidence the Defendant touched A.N. for the purposes of sexual gratification. The Defendant was in bed with both Susan and A.N. when he started wrestling with Susan and making sexual advances towards her. 4RP 358-61, 367, 388. He asked Susan if they could have sex and when she rebuked him, he continued to try to hug her and grope her. 4RP 367. After being told no, Plant was then rubbing A.N.'s legs and refused to stop after being repeatedly told. 4RP 361-62. It was after Susan fell asleep that Plant touched A.N.'s vaginal area under her clothing. 4RP 331-334, 367. A.N. described Plant touching her as both that it hurt and it didn't hurt, and that he moved his fingers like he was playing a piano. 4RP 334, 336-37, 408-10. Additionally, when Susan pulled back the covers, Plant looked like he had been caught. 4RP 364. When Susan confronted Plant about what he was doing, Plant became weird. 4RP 365. Susan had him move to the edge of the bed and saw that his pants were open and his penis exposed. 4RP 366, 369-70. Plant then

asked Susan if she would help him put on a condom he had in his hand.
4RP 366, 369-70.

These facts clearly show the Defendant was acting for the purposes of sexual gratification. The Defendant was not a usual caretaker of A.N. 4RP 353-54. Thus, under *Powell*, any skin-to-skin touching of the sexual parts is automatically assumed to be for the purpose of sexual gratification. *See State v. Powell*, 62 Wn. App. 914, 917, *see also State v. Marcum*, 61 Wn. App. 611, 612 FN1, 811 P.2d 963 (Div 2, 1991) (defendant's placing his hand down a young boy's pants was sufficient to support the inference of sexual gratification). In this case, Plant's touching was under the clothing and his fingers moved up and down. Additionally, the defendant was feeling sexually amorous just prior to the touching of A.N. Moreover, even when Susan told the Defendant she didn't intend to have sexual intercourse with him, he continued to touch Susan in a sexual way and then touched A.N., having to be told to stop. Lastly, Plant's open pants, exposure of his penis, and comment to Susan indicate the touching sexually aroused him. *See State v. Gary*, 99 Wn. App. 258, 265, 99 P.2d 1220 (Div 3, 2000) (sufficient evidence of sexual gratification exists when the defendant has a physical reaction to the touching).

The Defendant argues that because there were no prior incidents of touching and Susan trusted Plant with A.N.'s care there was insufficient evidence of sexual gratification. However, as stated above, the Defendant was not a usual caretaker of A.N. In fact, he only watched her jointly one time with her older brother, when Susan was forced to attend to her sick mother. 4RP 353-54. Additionally, while Plant was like an uncle to A.N., he was at the house sporadically and their relationship only occurred in front of other family members and really the two only played games at home. 4RP 353. Lastly, the Defendant statements to Investigator Lozano were conflicting about whether he touched A.N. and Plant finally settled on the theory he touched her as a test to determine if she was previously molested. Thus, under *State v. Powell* and *State v. Price*, there is sufficient indicia the Defendant touched A.N. for the purposes of sexual gratification.

II. DEFENDANT WAS NOT DENIED THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL'S DECISION NOT TO ARGUE VOLUNTARY INTOXICATION OR REQUEST A VOLUNTARY INTOXICATION INSTRUCTION WAS LEGITIMATE TRIAL STRATEGY AND WOULD NOT HAVE CHANGED THE OUTCOME OF THE CASE.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wn.App. 256, 262,

576 P.2d 1302, 1306 (1978); *see also* U.S. CONST. AMEND. VI, WASH. CONST. art. 1, § 22. “[T]he substance of this guarantee is that courts must make ‘effective’ appointments of counsel.” *Jury*, 19 Wn.App. at 262, 576 P.2d at 1306 quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976). Moreover, this test places a weighty burden on the defendant to prove two things: (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Counsel is considered ineffective if his representation falls below an objective standard of reasonableness. *See State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced if there is a reasonable probability that but for the deficient performance, the outcome would have been different. *See In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Moreover, counsel is presumed effective. *See Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122 (1986). To determine whether defense counsel was ineffective, the court should review whether the defendant was entitled to a voluntary intoxication instruction. This review is de novo. *See State v. Kruger*, 116 Wn. App. 685, 690-91, 67 P.3d 1147 (2003), *rev denied*, 150 Wn.2d 1024, 81 P.3d 120 (2003).

Revised Code of Washington section 9A.16.090 states:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090 (2007).

“A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected

the defendant's ability to form the requisite intent or mental state.” *State v. Kruger*, 116 Wn. App. 685, 691 citing *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d 37 (1992). Thus, the evidence “must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged.” *State v. Gabryschak*, 83 Wn.App. 249, 252-53, 921 P.2d 549 (1996). Because a person can be intoxicated and still form the requisite intent, mere evidence of drinking is insufficient to earn the instruction. *See State v. Harris*, 122 Wn. App. 547, 552-53, 90 P.3d 1133 (Div 2, 2004). A person must show the effects of the alcohol on the body or mind. *See Kruger*, at 692.

Under the factors outlined in *Kruger*, child molestation in the first degree contains a mental state of intent because sexual contact implies the defendant had to commit the touching for the purposes of his sexual gratification. *See State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817 (2006). Secondly, the State presented evidence the defendant consumed alcohol. Susan Lewis-Norbury testified she smelled alcohol on Plant, and Plant was having trouble walking and talking. 4RP 355-56. However, as to the third element, the Defendant did not present evidence his drinking affected his ability to form the requisite intent or mental state.

At trial, the Defendant did not testify, nor present evidence. 4RP 447. The State’s evidence showed Susan had a logical conversation with

the Defendant after he arrived. Specifically, the Defendant asked her to have sex and rationalized they could behave as though they didn't, so as not to ruin their friendship. 4RP 358-67. Additionally, the State's evidence showed the touching occurred several hours after Plant arrived at the home. 4RP 369. There wasn't any testimony as to the defendant's level of intoxication at the time of the touching or at the time he left, nor how his intoxication affected his mental state during the touching. 4RP 369.

In *State v. Harris*, 122 Wn. App. 547, 551, the Defendant faced charges of murder in the second degree and unlawful possession of a firearm. At trial, a witness testified Harris consumed crack cocaine the day of the shooting and hadn't been sleeping. *See id.* at 550. The witness also testified when Harris was high on cocaine, he typically acted paranoid and would see and hear things that were not there. *See id.* at 550. The testimony at trial was Harris went over to the victim's residence later in the day and purchased more cocaine. *See id.* Harris was sitting down in the front room of the home and according to the witnesses, without provocation got up and shot the victim three times from twelve feet away. *See id.* Harris testified he fired in self-defense, after he heard the victim and another person plotting to beat him up and when they approached him with a stick. *See id.*

The Court in *Harris* found, while there was evidence of the required mental state and evidence Harris ingested crack cocaine, there was insufficient evidence the cocaine prevented him from developing the required mental state. *See id.* at 553. Specifically, the court found the defendant negated any chance of the voluntary intoxication instruction when he testified he intentionally shot the victim in self-defense. *See id.*

Additionally, in *State v. Mriglot*, 88 Wn.2d 573, 578, 564 P.2d 784 (1977), the court held “evidence of intoxication based merely on opinion, unsupported by facts on which to base it, is speculative and conjectural.” In *Mriglot*, a jury convicted the defendant of forgery for passing checks over a two-day period. *See id.* at 577. The defendant testified approximately two days before passing the checks, he drank about half a case of beer over a couple of hours and something was put in his drink which sent him into a tailspin. *See id.* at 577. Whatever was put in his drink caused him to lose recollection for a few days and all he could remember was he went many places and did many things, but couldn’t remember exactly what he did. *See id.* A friend testified the defendant appeared upset and unkempt after the crime, and inferred from defendant’s comments he was under the influence of a drug. *See id.* The court held this evidence only amounted to a scintilla of intoxication evidence and

found insufficient testimony of the defendant's condition at the time of the crime to warrant an intoxication instruction. *See id.*

The instant case is similar to *Harris* and *Mriglot* because there was evidence of the Defendant's intoxication. But like *Harris*, the defense theory negated the defense of voluntary intoxication. In the interview with Investigator Lozano, Plant told Lozano he touched A.N. because he was worried A.N.'s older brothers molested A.N., and he was testing her to see if his theory was true. 4RP 421-23. Plant told Lozano he was being professional, hadn't done anything wrong, and in his opinion, A.N. was not molested based upon her reaction. 4RP 421-423, 425. Defense counsel elicited testimony it was true A.N. was molested by her brother. 4RP 339-42, 348, 428-31. Additionally, defense counsel argued to the jury in closing that while Plant's decision was perhaps misguided, he didn't perform the act for sexual purposes and the jury should convict him of assault in the fourth degree. 4RP 474-480. Thus, it was the defense theory that Plant intentionally touched A.N. without the purpose of sexual gratification, not that he unintentionally touched A.N. This theory negated a voluntary intoxication defense.

Additionally, the case is like *Mriglot*, because the defendant's evidence was speculative and conjectural as to how the alcohol affected Plant at the time of the crime. Since there was insufficient evidence of the

defendant's mental state at the time of the offense and his theory negated a defense of voluntary intoxication, Plant was not entitled to a voluntary intoxication jury instruction. Hence, defense counsel was not ineffective for failing to request an instruction that wasn't warranted by the evidence.

Should the court find the voluntary intoxication instruction and defense was warranted under the evidence, the Defendant must show that counsel's failure to argue the defense or request the instruction was a failure to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122 (1986).

"In considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of counsel complained of go to the theory of the case or to trial tactics." *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121, 126 (1980). Specifically, the Defendant must show that counsel's decision not to pursue voluntary intoxication was not related in any way to trial tactics or strategy. *See Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy).

Like the defense counsel in *Harris*, Plant's defense counsel argued the theory the Defendant touched A.N. intentionally, but without sexual purpose. It is a legitimate trial tactic for counsel to not cloud the issues before a jury and argue inapposite theories. *See In re Howerton*, 109 Wn.App. 494, 507-08, 36 P.3d 565 (Div 1, 2001). In the *Personal Restraint Petition of Howerton*, 109 Wn.App. at 497, the jury found Howerton guilty of first degree premeditated murder. Howerton appealed arguing his counsel was ineffective for failing to present evidence from an expert that Howerton was likely a follower rather than the leader in the crime given Howerton's low functioning intellect and stunted psychological development. *See id.* at 507-508. Division One found trial counsel's decision not to present the evidence was a legitimate trial tactic because the defense theory of the case was Howerton never played a role in the murder, nor that he was an accomplice. The court stated, "[d]efense counsel's decision to refrain from introducing evidence to contradict its own theory of the case was clearly supported by legitimate strategic or tactical considerations." *Id.* at 508.

In the present case, it would be incongruous to argue the defendant was so intoxicated to not be able to form the requisite sexual purpose, but also have enough where-with-all to formulate a plan to test A.N. and purposefully touch A.N. to gauge her reaction.

Should the court believe defense counsel's performance was deficient, the Defendant must prove there was a reasonable probability that but for the deficient performance, the outcome would have been different. *See In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). In order to show a reasonable probability, one must assume the jury could have believed the Defendant was so intoxicated as to not be able to form the intent of sexual gratification. This would be highly unlikely, given the evidence of the Defendant's sexual arousal both before and after the inappropriate touching. Specifically, the jury would have to discount the Defendant's sexual advances on Susan and his obvious exposure of his penis and invitation for Susan to help him put a condom on his penis. As such, it is not likely the outcome would be different and Defendant fails to prove counsel was ineffective.

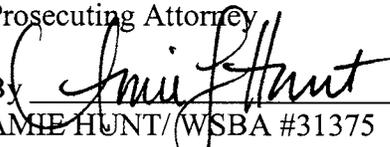
V. CONCLUSION

The State requests the Court affirm the trial court and deny the appeal based upon the above arguments.

Respectfully submitted this 12th day of February, 2008

SUSAN I. BAUR

Prosecuting Attorney

By 

AMIE HUNT / WSBA #31375

Deputy Prosecuting Attorney

Representing Respondent

**COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,)	NO. 36153-1-II
)	Cowlitz County No.
Respondent)	06-1-00830-5
)	
vs.)	CERTIFICATE OF
)	MAILING
DANIEL H. PLANT,)	
)	
Appellant.)	
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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

I, Audrey J. Gilliam, certify and declare:

That on the 12 day of February, 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and addressed envelope, containing Brief of Respondent addressed to the following parties:

Valerie Marushige
Attorney at Law
23619 55th Place S.
Kent, WA 98032

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 12 day of February, 2008.



Audrey J. Gilliam