

COURT OF APPEALS
DIVISION II

COPIED FOR PM 1:58

STATE OF WASHINGTON
BY JW
DEPUTY

NO. 39458-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CLIFFTON STOLLE,

Appellant.

APPELLANT'S BRIEF

James L. Reese, III
WSBA #7806
Attorney for Appellant

612 Sidney Avenue
Port Orchard, WA 98366
(360)876-1028

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	
Assignments of Error	1
No. 1- No. 5	1
Issues Pertaining to Assignments of Error	1
No. 1	1
No. 2- No. 5	2
B. STATEMENT OF THE CASE	3
<i>Statement of Testimony</i>	3
<i>Detective Davis</i>	5
<i>Ryan L. Nanez</i>	7
C. ARGUMENT	
I. THE TRIAL COURT FAILED TO MAKE A WRITTEN RECORD AFTER HEARING AS REQUIRED BY CrR 3.5©).	9
II. THE TRIAL COURT ERRED WHEN IT ADMITTED THE DEFENDANT’S CONFESSION.	12
<i>Standard of Review</i>	13
<i>State v. Wolk</i>	15
<i>Stolle was Interrogated</i>	21
III. MR. STOLLE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT OFFER WPIC 6.41.	22
<i>Standard of Review</i>	24

<i>Standard of Review</i>	25
IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE REQUEST TO HAVE THE TRANSCRIPT OF THE DEFENDANT'S TAPED CONFESSION ACCOMPANY THE TAPE AND EXHIBIT.	27
<i>Standard of Review</i>	27
V. THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF THE CRIME OF INDECENT LIBERTIES.	29
<i>Standard of Review</i>	29
<i>The Elements</i>	30
D. CONCLUSION	34
E. APPENDIX	
Fifth Amendment	A
Fourteenth Amendment	B
Sixth Amendment	C
CrR 3.5	D
WPIC 6.41	E

TABLE OF AUTHORITIES

TABLE OF CASES

<i>In re Riley</i> , 122 Wn.2d 772, 863 P.2d 554 (1993)	24,25
<i>Sorenson v. Raymark Industries</i> , 51 Wn.App. 954, 756 P.2d 740 (1988)	27
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978)	26

<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (1993)	24
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986)	29
<i>State v. Broadaway</i> , 135 Wn.2d 118, 942 P.2d 363 (1997)	10,13
<i>State ex. Rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)	28
<i>State v. Cunningham</i> , 93 Wn.2d 823, 613 P.2d 1139 (1980)	28
<i>State v. Cunningham</i> , 116 Wn.App. 219, 65 P.3d 325 (2003)	10,12,15
<i>State v. Forrester</i> , 21 Wn.App. 855, 587 P.2d 179 (1978)	28
<i>State v. France</i> , 121 Wn.App. 394, 88 P.3d 1003 (2004)	12
<i>State v. Frazier</i> , 99 Wash.2d 180, 661 P.2d 126 (1983)	28
<i>State v. Green</i> , 94 Wn.2d 2167, 616 P.2d 628 (1980)	29
<i>State v. Head</i> , 136 Wn.2d 619, 964 P.2d 1187 (1998)	10
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	10
<i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986)	29
<i>State v. Jeffries</i> , 105 Wn.2d 398, 717 P.2d 722, <i>cert denied</i> ,	

93 L.Ed.2d 301 (1986)	24,25
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991), <i>cert. denied</i> , 113 S.Ct. 164 (1992)	26
<i>State v. Lorenz</i> , 152 Wn.2d 22, 93 P.3d 133 (2004)	13
<i>State v. McFarland</i> , 127 Wn.2d 332, 899 P.2d 1251 (1995)	25
<i>State v. Miller</i> , 92 Wn.App. 693, 964 P.2d 1196 (1998), <i>review denied</i> , 137 Wn.2d 1023 (1999)	12
<i>State v. Post</i> , 118 Wn.2d 596, 826 P.2d 599 (1992)	13,14
<i>State v. Sardinia</i> , 42 Wn.App. 533, 713 P.2d 122 (1986)	24
<i>State v. Sargent</i> , 111 Wn.2d 641, 762 P.2d 1127 (1988)	14,21
<i>State v. Stough</i> , 96 Wn.App. 480, 980 P.2d 298 (1999)	25
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	24,25
<i>State v. Watkins</i> , 53 Wn.App. 264, 766 P.2d 484 (1989)	12
<hr/>	
<i>Berkemer v. McCarty</i> , 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1982)	14
<i>California v. Beheler</i> , 463, U.S. 1121, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)	14,15

<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970)	29,30
<i>Jackson v. Virginia</i> , 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)	29
<i>McMann v. Richardson</i> , 397 U.S. 759, 25 L.Ed. 763, 90 S.Ct. 1441 (1970)	24
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	9,13,14,18,20,21
<i>Rhode Island v. Innis</i> , 446 U.S. 291, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980), <i>cert. denied</i> , 456 U.S. 930 (1982)	21
<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)	24,25
<i>United States v. Axsom</i> , 289 F.3d 496 (8 th Cir. 2002)	17
<i>United States v. Turner</i> , 528 F.2d 143, (9 th Cir. 1975), <i>cert. denied</i> , 423 U.S. 996 (1976)	28
<i>United States v. Wallace</i> , 323 F.3d 1109 (8 th Cir. 2003)	17
<i>United States v. Wolk</i> , 337 F.3d 997 (8 th Cir. 2003)	15,16,17,20

CONSTITUTIONAL PROVISIONS

Fifth Amendment	1
Fourteenth Amendment	1,29
Sixth Amendment	1,24
Const. Art. 1, sec. 22	24

A. Assignments of Error

Assignments of Error

1. The trial court erred when it failed to enter written findings of fact or conclusions of law required by CrR 3.5 following a suppression hearing.
2. The trial court erred when it admitted into evidence the defendant's taped confession in violation of the 5th and 14th amendments.
3. The defendant was denied effective assistance of counsel in violation of the 6th and 14th amendments.
4. The trial court abused its discretion when it admitted a tape recorded statement of the defendant's confession and did not allow a transcript of the recording to also be admitted as an exhibit to accompany the tape.
5. There was not sufficient evidence to convict the defendant of the crime of indecent liberties in violation of the 14th amendment.

Issues Pertaining to Assignments of error

1. Whether the trial court erred when it neglected to enter written findings of fact as to: "(1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusions as to whether the statement is admissible and the reasons therefor" as required by CrR3.5(c) following a suppression hearing involving multiple, incriminating statements to the police by Mr. Stolle that were admitted during the trial?
(Assignment of Error 1.)

2. Whether the trial court erred when it orally ruled that the defendant's taped confession was voluntary, taken when he was not in custody and therefore admissible as evidence? (Assignment of Error No. 2.)
3. Whether the defendant was denied effective assistance of counsel when his attorney did not request that an instruction based on WPIC 6.41 (Out of Court Statements by Defendant) be included in the jury instructions? The circumstances surrounding the taking of the defendant's statements was questioned by the defense during trial following an unsuccessful CrR 3.5 hearing and argued to the jury during closing argument? (Assignment of Error No. 3.)
4. Whether the trial court abused its discretion when it denied the defendant's request to have a transcript of the tape recorded statement be admitted as an exhibit or accompany the jury into deliberations when a tape recording of the defendant's statement was admitted as an exhibit? (Assignment of Error No. 4.)
5. Whether there was sufficient evidence to convict the defendant of the crime of indecent liberties where the alleged victim testified that she was semi-conscious with sleep when the defendant allegedly touched her for sexual gratification when she was in her bed? (Assignment of Error No. 5.)

B. Statement of the Case

Statement of Procedure

Mr. Stolle was charged with one count of Indecent Liberties in violation of RCW 9A.44.100(1)(b) and/or (c) and/or (d) and/or (e). CP 1-2.¹ A jury returned a verdict of guilty on March 6, 2009. CP 49. The defendant was sentenced to 15 months imprisonment where his standard range was 15 to 20 months. He had no criminal history. CP 59-60. A notice of appeal was filed on April 3, 2009. CP 58.

Statement of Testimony

Marlina Hampton testified that she was 26 years old. II RP 57. Clifton Stolle was her cousin. RP 58. On October 11, 2007 she worked at Bangor Base doing physical labor for about 16-18 hours. RP 60-1. At that time she was living with her boyfriend Ryan Nanez at the Madrona Apartments in Bremerton, Kitsap county, Washington. RP 61.

Mr. Stolle lived at the same apartment complex on the first level and she resided on the second level. RP 62. When she arrived at home after getting off of work she relaxed on the couch and played the video game Play Station 2. RP 63. After about an hour she changed into a T- shirt and underpants. RP 64. Ryan and she got into bed and he layed

¹ A special allegation of Domestic Violence was also asserted. CP 2. However, no instructions or verdict forms were submitted to the jury.

his chest against her back in the “spoon” position while lying on their sides.² RP 66.

Ms. Hampton testified that the next thing she recalled was: “I...I felt somebody touching me...Running hands down my side and then trying to insert something.” RP 67. She testified that she felt a penis from behind her: “Trying to insert into my vagina.” RP 68.

When she felt the penis the first time she said: “Not tonight, Babe. I’m tired.” Id.. She thought it was her boyfriend. RP 68-9. There was a second occasion when she felt “a little bit of the tip.” RP 70. It was touching the bare skin of her vagina. id. At that time she assumed that her underwear was off, although she did not recollect having removed it. RP 71.

On a third occasion she pushed the penis away and said: “ You need to seriously knock it off. I’m tired.” id. During the encounters the person in bed with Ms. Hampton did not say anything to her. id. She also recalled a hand touching her hips and the side of her body. RP 72.

Ms. Hampton testified that the next memory she had of what happened was when Ryan asked her what happened to her underwear. RP

² The couples’ bedroom was located in a loft that was accessible by a spiral staircase from the downstairs. The loft did not have four walls. RP 69.

74. She told him that she did not know and went back to sleep. RP 74-5.

When she woke up the next morning about 10:00 a.m. Ryan told her that he found her underwear under her pillow and he handed it to her. RP 75-6.

The next day- in the afternoon- she spoke to Ryan and asked him if he had tried to have sex with her while she was asleep. RP 77.

According to Ms. Hampton: "He said no." id. She was then advised that during the night Ryan went down to her cousin's apartment "to make a couple of cigarettes." RP 78. She was advised that during that time Mr. Stolle said that he left something up in her apartment. He went up to get it. id. After having a couple of cigarettes, Ryan returned to his and Ms. Hampton's apartment. He had left the door unlocked when he left initially. Now he discovered that the door to the apartment was locked. RP 79.

It was then determined to have Ryan contact Mr. Stolle. RP 79.

Three or four days after the incident, Ms. Hampton contacted the police. II RP 80. Ms. Hampton then identified five letters written to her prior to October 11, 2007 by Mr. Stolle. RP 81-87; ex. 1-5. Ms. Hampton concluded her direct examination by testifying that she had never given Mr. Stolle consent to touch her in a sexual manner on October 11, 2007 or at any other time. RP 88.

Detective Davis

Kenny Dale Davis testified that he was a detective with the

Bremerton police department. II RP 118. On February 5, 2008 he along with Detective Jason Vertefeuille, contacted Mr. Stolle at his residence. RP 121. He was driving a city issued vehicle. He described the vehicle as not having any lights. It was not a patrol vehicle. Id. "It—it is like a passenger car that any civilian would drive." RP 122.

Davis asked Mr. Stolle if he would accompany them back to the police station for an interview. RP 123. Mr. Stolle was advised that he was not under arrest, that he was not in custody.

When they arrived at the police station, Mr. Davis met with Mr. Stolle in an "interview room" where a table and two-three chairs were located. RP 125.-26. According to Mr. Davis he explained to Mr. Stolle that; "...I needed him to understand that he was not in custody; he did not have to answer any questions; if he did answer questions, he was free to stop answering questions at any time; and that he was free to leave at any time." RP 127.

According to the Detective's testimony: "He said he laid down on the bed beside her and he said she pretty much rolled – or he rolled towards her....He said she was lying on her back then, and it seemed like he thought he was Mr. Nanez." RP 129. He continued; "He said that she seemed to be sort of semiconscious, I believe, and he just said that she seemed like he (sic) thought that it was Mr. Nanez in bed with her." RP

130.

According to the Detective, Mr. Stolle then described how he touched her breasts and nipples from the outside of her shirt. RP 130. “He said he then touched her vagina with his penis.” id. “He said she took her underwear off and that he pulled his own pants down and— or pulled his pants off and boxer shorts down and rubbed his penis against her vagina.” RP 130-1. Stolle said his penis was not erect, he did not ejaculate and he did not penetrate Ms. Hampton. RP 131, 133.

Then there was a knock at the door. Stolle answered the locked door in his boxer shorts with his pants in his hand. He told Mr. Nanez that he had fallen asleep on the couch in the apartment. RP 132.

After the interview, Mr. Stolle agreed to give a recorded statement. RP 135. This statement was admitted as exhibit 6 and played for the jury in open court while they read from transcripts of the recorded statement.

Ryan L. Nanez

Ryan Lee Nanez testified that he was living with Ms. Hampton on October 11, 2007 at 1104 Cambrian Avenue, Bremerton, Washington. III RP 182.. That evening he went down to Mr. Stolle’s apartment after Ms. Hampton fell asleep. III RP 184. Five or ten minutes later, Clifton Stolle stated that he was going upstairs to get his mother’s ashes and inquired whether the door to their apartment was unlocked. id.

Fifteen minutes past and Mr. Nanez went back to his apartment to find the door locked. RP 188.. He knocked on the door, got no response and went back to Clifford's apartment. RP 190. He inquired of an occupant whether Clifford had returned from upstairs. The response was negative. id.

Ten minutes later Mr. Nunez repeated the same knocking on the locked apartment and returned to Clifford's downstairs apartment. RP 192. He retrieved a Gatorade bottle, returned to his apartment and banged on the door with the plastic bottle. id. Mr. Nunez testified: "Cliff had opened the door, and while he opened the door, he was pulling up his pants and his boxers...And I was like, ""Dude, you need to leave. You got to go, Dude."" RP 192-3.

When he got in bed with Marlina he noticed that her panties were missing. RP 194. He asked her where they were and why her tee shirt was half off. Marlina replied: ""I don't know. We will figure it out in the morning." id. When she woke up Marlina advised Mr. Nunez that she had found her panties stuffed between the mattress and the box springs of their bed. RP 195.

Mr. Nunez testified that he spoke to Ms. Hampton a "couple of nights later" and "She said somebody was trying to have sex with her in her sleep. That's all she could remember." III RP 198.

Then, four or five nights after the incident he confronted Mr. Stolle. He testified: "I asked, "did you try to have sex with your cousin in her sleep?" He goes, "Yes, man. That's why I have been staying away from her the last couple of days. That's why I haven't been talking to her." I was like, "Okay, Cliff. That's all I needed to hear." III RP 201.

C. Argument

I. THE TRIAL COURT FAILED TO MAKE A WRITTEN RECORD AFTER HEARING AS REQUIRED BY CrR 3.5 (c).

The trial court denied the defendant's motion to suppress the evidence in an oral opinion. On March 4, 2009 the trial court ruled that the defendant's statements to Detective Davis at the Bremerton police station were voluntary and were given when Mr. Stolle was not in custody. I RP 31. In essence the court held that there was no custodial interrogation and that *Miranda* warnings were not required.

Thereafter, the case was tried before the same judge. No where does the record show entry of a written Order denying the defendant's motion to suppress the evidence. No where in the record does the suppression court comply with the mandatory requirements of CrR 3.5 (c).

That mandatory rule unequivocally states:

"Duty of Court to Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and

(4) conclusion as to whether the statement is admissible and the reason therefor."

It was stated in *State v. Cunningham*, 116 Wn.App.219, 227, 65

P.3d 325 (2003):

"We take this opportunity to remind counsel that the timely filing of findings and conclusions after a suppression hearing is not an empty formality. It is required by court rule. CrR 3.5(c). Written findings and conclusions facilitate and expedite appellate review of the issues. *State v. Head*, 136 Wn.2d 619, 622-23, 964 P.2d 1187 (1998) (addresses findings entered at conclusion of bench trial). They also enable the State and the defendant to focus on the issues supported by the record, which will prevent the pursuit of issues that are obviously lacking merit. *Id.* at 623."

The defendant is prejudiced. As stated in *State v. Hill*, 123 Wn.2d 641,647, 870 P.2d 313 (1994): "... in reviewing findings of fact entered following a motion to suppress, we will review only those facts to which error had been assigned. Where there is substantial evidence in the record supporting the challenged facts, those facts must be binding on appeal."

The trial court did not enter any findings of fact regarding the voluntariness of the confession. The test is stated in *State v. Broadaway*, 133 W.2d 118,133, 942 P.2d 363 (1997): "...we will review the record to determine whether there is substantial evidence from which the trial court could have found the confession voluntary under the totality of the circumstances."

Under *Broadaway*, "...failure to challenge the trial court's

"conclusions" as to disputed facts (2) and (3) would leave them verities on appeal ..." id. at 133. The Supreme Court stated:

"We hold that the rule to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged; and, if challenged, they are verities if supported by substantial evidence in the record." id. at 131.

Without the assistance of written findings of fact and conclusions of law an appellant is unable to designate written assignments of error to narrow the scope of review.

A good example is the case at bench. The trial court is supposed to set forth both the disputed facts and the undisputed facts. One important disputed fact was whether Detective Davis- or another detective- advised Mr. Stolle at his apartment when they first contacted him whether he was advised of anything other than being advised that he was not in custody. I RP 10. (compare testimony of advisement at the police headquarters: I RP 11-12.)

Without the CrR 3.5(c) requirement being met, an appellant is forced to sift through the trial court's oral decision and make up his own argument. The trial court stated in its oral opinion for instance: " He was told that he was not in custody; he was told he was free to leave; he was told he did not have to answer any questions." I RP 30. Obviously, the trial court was referring to the apparent advisement at the police station. Mr.

Stolle- presumably- would not be advised that he was free to leave his own home.

State v. France, 121 Wn.App. 394, 88 P.3d 1003 (2004) stated the rule on appeal:

"CrR 3.5 requires the trial court to enter written findings of fact and conclusions of law with sections on undisputed facts, disputed facts, conclusions regarding disputed facts, and the conclusion and reasons regarding the admissibility of the defendant's statements. CrR 3.5(c), *State v. Miller*, 92 Wn.App. 693, 703, 964 P.2d 1196 (1998), *review denied*, 137 Wn.2d 1023 (1999). The trial court's failure to comply is error, but such error is harmless if the court's oral findings are sufficient for appellate review. *Miller*, 92 Wn. App. at 703."

Finally, the trial court made no written findings with regard to the ultimate test employed by Washington courts which is the objective standard of "...whether a reasonable person in the same situation would perceive that he was free to leave." *State v. Cunningham*, 116 Wn.App. at 278) (*State v. Watkins*, 53 Wn.App. 264,274, 766 P.2d 484 (1989)).

Mr. Stolle was prejudiced by the lack of written findings of fact and conclusions of law as required by CrR 3.5(c).

II. THE TRIAL COURT ERRED WHEN IT ADMITTED THE DEFENDANT'S CONFESSION.

The trial court conducted a CrR 3.5 hearing prior to trial. I RP3. At the conclusion of the hearing the court found that the defendant's statements were voluntary and admissible during the trial because he was

not in custody. I RP 31.³

Detective Davis testified at the hearing that on February 5, 2008 he and another detective initiated contact with Mr. Stolle at his Bremerton residence. I RP 8. The detectives asked Mr. Stolle to accompany them to the police station for an “interview. id. Detective Davis advised Mr. Stolle that he was not in custody. RP 10. Stolle sat in the front seat with a “cover officer” positioned in the backseat observing both front seat occupants.

I RP 9.

Stolle was escorted, unhandcuffed, to a second floor room. id. He was advised “...that he was not in custody, he was free to leave, and he did not have to answer any questions.” RP 11. He was also advised that he could stop answering questions at any time. id.

Standard of Review

A trial court’s custodial determination is reviewed *de novo*. *State v. Broadaway*, 135 Wn.2d 118, 131, 942 P.2d 363 (1997). According to *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004):

“*Miranda* warnings are required when an interrogation or interview is (a) custodial (b) interrogation (c) by a state agent. *State v. Post*, 118 Wn.2d 596, 605, 826 P.2d 172, 837 P.2d 599 (1992.”

³ The trial court did not enter any written findings of fact or conclusions of law to support its ruling. See CrR 3.5 (c), *supra* at 9-10.

It is conceded in the case at bench that *Miranda* warnings were not given to the primary suspect, Mr. Stolle; either at his home or at the police station.⁴ I RP 11. According to *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966): “By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been, taken into custody or otherwise deprived of his freedom of action in any significant way.”

The test for a determination of whether a suspect is in custody is whether a reasonable person in the individual’s position would believe he or she was in police custody to a degree associated with a formal arrest. This is an objective test stemming from the holding in *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983).

Custodial means that a person’s freedom of movement was restricted at the time they are questioned by law enforcement. *See generally, State v. Sargent*, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988). According to *State v. Post*, 118 Wn.2d at 607 (“defendant must show some objective facts indicating his...freedom of movement [or action] was

⁴ According to *Berkemer v. McCarty*, 468 U.S. 420, 429, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984) quoting *Miranda v. Arizona* 384 U.S. at 444: (“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”)

restricted [or curtailed]”).

See also, *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003): the test is whether a suspect's freedom "is curtailed to a "degree associated with formal arrest" ("That determination is based on how a reasonable person in the same circumstances would have perceived the situation.") (citing *California v. Beheler*, 463 U.S. at 1125.)

In the case at bench, Mr. Stolle was in custody at the time when he was driven to the police department in an unmarked police vehicle by two detectives and was taken to an interrogation room by elevator to the second floor of the detective division. There he made incriminating statements confessing to the crime under investigation. Ex. 6. A reasonable person in Mr. Stolle's position would believe the he was in police custody before arriving and at the Bremerton Police Department. The circumstances in this case constituted a loss of freedom associated with formal arrest.

United States v. Wolk

In *United States v. Wolk*, 337 F.3d 997 (8th Cir. 2003) the court outlined a six part test of non-exhaustive indicia to consider whether an individual is in custody.

Wolk was convicted of transporting and possession of child pornography. The defendant was advised at his office by FBI agents that

they had obtained a search warrant for his residence. He was advised that he did not have to return home but, "his wife wished for him to be there". *id.* at 1001.

Wolk drove to his home and sat down in the living room with three FBI agents. His wife was in the kitchen. He was advised; "if he wanted to talk [;] it was of his own free will and that he was free to go at any time. [H]e was not under arrest." *id.* at 1001. Wolk stated that he was willing to talk to the officers. When confronted, "Wolk then admitted that he had child pornography on his computer, that he had been collecting it for two years, and that he had sent child pornography from the file server in his house. Wolk indicated that he archived his file server onto three CD's and his computer." *id.* at 1001.

The following is a list of six common, but non-exhaustive indicia to determine whether an individual is in custody set forth in *Wolk*:

- (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest;
- (2) whether the suspect possessed unrestrained freedom of movement during questioning;
- (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions;
- (4) whether strong arm tactics or deceptive stratagems were employed during questioning;
- (5) whether the atmosphere of the questioning was police

dominated; or,
(6) whether the suspect was placed under arrest at the termination of the questioning.

United States v. Wallace, 323 F.3d 1109, 1112 (8th Cir. 2003). In applying these indicia we employ a balancing test. *Axsom*, 289 F.3d at 501. "The first three indicia are mitigating factors which, if present, mitigate against the existence of custody at the time of questioning. Conversely, the last three indicia are aggravating factors which, if present, aggravate the existence of custody." *Id.* at 500-01."

United States v. Wolk, 337 F.3d at 1006 (citing *United States v. Axsom*, 289 F.3d 496 (8th Cir. 2002)).⁵

Applying this six part test to Mr. Stolle, the only reasonable conclusion is that he was in custody far before the taped statement was started after his initial interrogation. Although the first factor, whether Mr. Stolle was advised he was free to go, weighs in favor of the state, each of the other five factors weigh in favor of Mr. Stolle.

The second factor is whether Mr. Stolle possessed unrestrained freedom of movement during the questioning. Here, Mr. Stolle was taken to an interrogation room by elevator to the second floor of the detective

⁵ The *Wolk* court established an objective test of the circumstances and stated at 1006: "Further, "we must examine both the presence and extent of physical and psychological restraints placed upon the person's liberty during the interrogation in light of whether a reasonable person in the suspect's position would have understood his situation to be one of custody." *Axsom*, 289 F.3d at 500 (citation omitted)."

division. The questioning took place in an isolated room that was sparsely furnished. I RP 10; II RP 125-26. He did not have freedom of movement during interrogation. This is one of the psychological factors employed by police departments to undermine a suspect's will to resist.

It was stated in *Miranda v. Arizona, supra*, at 445:

“...the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features -incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.”

The third factor is whether the suspect initiated contact or voluntarily acquiesced to official requests to respond. There is no dispute that the police initiated contact with Mr. Stolle at his apartment. Only then did he respond to police requests to accompany them in their vehicle to the city's police headquarters. I RP 7-8

The fourth factor is whether strong arm tactics or deceptive stratagems were employed during questioning. Mr. Stolle, who had no criminal history, was questioned directly by detective Davis and was not allowed to write out his own statement. I RP 17. At no time during the tape recordings was Mr. Stolle asked whether or not he understood the

question that was asked of him. I RP 20.

Detective Davis was asked on re-cross-examination during the CrR 3.5 hearing:

Q. And when you were asking him those questions – such as do you understand you are not in custody? You understand you are free to leave? Is this statement being given voluntarily? Is this statement being given without threats or promises? – he just gave “yes” answers, didn’t he?
A. Correct.” I RP 25.

Comparison should be made to the DSHS Western State Hospital’s Forensic Psychological Report of August 13, 2008, six months after the interrogation took place. Mr. Stolle had been previously diagnosed with Post Traumatic Stress Disorder, Major Depressive Disorder, recurrent, Learning disorder Not Otherwise Specified, and Borderline Intellectual Functioning on May 29, 2007 CP 20.

The Western State Report contained the following regarding competency:

“...it helps Mr. Stolle to write things down “in its simplest form,” to aid with his memory and comprehension. Considering that he tends to be a “people-pleaser,” and might simply nod his understanding, follow-up questions are recommended to assure that he truly understands what is being discussed. Rewording a question or other information also might be a useful technique.....”⁶ 7 CP 24.

⁶ Detective Davis testified on cross examination: Q. Nowhere in the transcript, however, did you ask my client if there was some other way in which the question could be put to him A. No. Q. At any time did you

The fifth factor is whether the atmosphere of questioning was police dominated. As shown above, the atmosphere of police questioning was police dominated. Mr. Stolle had no friend or attorney present with him at the time of questioning. Detective Davis admitted on cross examination that the purpose of “interviewing” a suspect at the police station is to get the person out of their comfort zone. I RP 21, see also III RP 143.

This Bremerton police tactic was found to be repugnant in *Miranda v. Arizona* over four decades ago in 1966.⁷ The very purpose of escorting Mr. Stolle out of his home to the coercive atmosphere of the police headquarters was to obtain a confession to the crime under investigation..

The sixth *Wolk* factor is whether the suspect was placed under arrest at the conclusion of the questioning. The interrogation took place on February 5, 2008. I RP7. The information was filed on April 9, 2008. CP 1. The certificate of probable cause states: “Based on statements

stop in this tape recording to ask my client if he understood the questions? A. No.” I RP 20.

⁷ The Supreme Court quoted from police manuals concerning the psychological effect of interrogation in isolation: “If at all practicable, the interrogation should take place in the investigator’s office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights....” *id.* At 449-50.

provided by MH and Nanez and the confession provided by Stolle, probable cause exists to arrest Clifton William Stolle for attempted rape 2nd degree.” CP 5.

Stolle was Interrogated

Throughout his testimony, detective Davis was careful to refer to the police tactics employed as an “interview” compared to the legal requirement of an interrogation before *Miranda* warnings are required. According to *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L.Ed.2d 297, 100 S.Ct. 1682 (1980), *cert. denied*, 456 U.S. 930 (1982): “...the term “interrogation under *Miranda* refers not only to express “questioning, but also to any words or actions on the part of the police ...that the police should know are reasonably likely to elicit an incriminating response from the suspect.” This is an objective standard that is determined by what the officer knows or ought to know will be the results of his words and acts. *Sargent*, 111 Wn.2d at 651.

According to Detective Davis: “At the end of the interview, he is offered the opportunity to make a taped statement.” I RP 13. This is the planned product of interrogation: a confession without *Miranda* safeguards.

Miranda v. Arizona established a rigid, uniform constitutional requirement regardless of a person’s individual background when it ruled:

“Accordingly we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute requisite to interrogation.”

384 U.S. at 471.

III. MR. STOLLE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL DID NOT OFFER WPIC 6.41.

The defendant was denied effective assistance of counsel when his attorney did not request nor submit an instruction based on WPIC 6.41.⁸

The prosecutor argued at the CrR 3.5 hearing: “Mr. Bougher indicates that his client didn’t understand the circumstances surrounding the interview and whether he was free to leave.” I RP 28.

The defendant did not testify at the CrR 3.5 nor at the trial. The centerpiece of the defendant’s case was that the defendant’s alleged confession was not voluntary or that the circumstances surrounding Mr. Stolle’s giving a confession should be questioned by the jury. The defendant’s attorney spent a substantial amount of time cross-examining Detective Davis of the Bremerton Police Department during the trial about

⁸ WPIC 6.41 is based on CrR 3.5(d)(4) and states: “You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.” 11 *Washington Pattern Jury Instructions: Criminal* 6.41 at 196 (3d ed. 2008).

the circumstances surrounding the taking of Mr. Stolle's tape recorded statement following his verbal interrogation.⁹

In addition, the last argument of the defense during closing argument called into question the "interview process" where it was argued in part:

"Should it be of concern to us that the interview process that is being practiced by police officers is such, I submit, that probably not a single one of you would feel was fair to Mr. Stolle? And if you think perhaps it was fair to Mr. Stolle, I submit to you for your consideration none of you would want that process used to determine whether or not you had done something....

Out comes the detective, and he does his job. He tape-records 40 questions, maybe 50, of which nine have to do with the crime. And my client keeps saying yes, yes, yes...

Is that a confession? Is it a confession you trust? Is that a confession you would trust if you gave it? If your child gave it? your wife?"¹⁰ III RP 263-4.

⁹Detective Davis was cross-examined on this issue consuming about 30 pages of transcription: II RP 149-152; III RP 140-156; 157-164; 176.

[The first page of volume III should have been numbered 155 instead of page 137. The last page of volume II was page 154. As a result, pages 137-154 appear in volume II and again as initial pages 137-154 in volume III.]

¹⁰ See comments to WPIC 6.41: "The instruction is required only when the defendant challenges the voluntariness of a confession to a law enforcement official." 11 *Washington Pattern Jury Instructions: Criminal* 6.41 at 196.

Standard of Review

According to *In re Riley*, 122 Wn.2d 772, 863 P.2d 554 (1993):

"The sixth amendment to the United States Constitution guarantees a criminal defendant the right "to have assistance of counsel for his defense." U.S. Const. amend. 6. The right to counsel means the right to the effective assistance of counsel."

id. at 779-80, (citing *Strickland v. Washington*, 466 U.S. 668,686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)(citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 25 L.Ed. 763, 90 S.Ct. 1441 (1970). See also, article one, section 22 of the Washington Constitution.

The *Strickland* test is set forth in *State v. Thomas*, 109 Wn.2d 222,225-26, 743 P.2d 816 (1987):

"First, the defendant must show that counsel's performance was deficient. That requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense...See also, *State v. Jeffries*, 105 Wn.2d 398,418, 717 P.2d 722, *Cert. denied*, 93 L.Ed.2d 301 (1986); *State v. Sardinia*, 42 Wn.App. 533, 713 P.2d 122 (1986)."

(citing *Strickland v. Washington*, 466 U.S. at 687).

According to *State v. Benn*, 120 Wn.2d 631,663, 845 P.2d 289 (1993):

"A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different

but for the attorney's conduct. *Strickland v. Washington*, 466 U.S. 668,687-88, 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)."

Standard of Review

According to *State v. Stough*, 96 Wn.App. 480,485, 980 P.2d 298 (1999) (citing *State v. McFarland*, 127 Wn.2d 332,335, 899 P.2d 1251 (1995) and *State v. Thomas*, supra, 109 Wn.2d at 225-26): "Performance is deficient if it falls below an objective standard of reasonableness based on all the circumstances."

Both prongs of the *Strickland* test have been described as:

"Under one prong-the performance prong-the defendant must show that counsel's performance was deficient. Under the other prong-the prejudice prong-the defendant must show that the deficient performance prejudiced the defense."

In re Riley, 122 Wn.2d at 780, citing *Strickland*, 466 S.Ct. at 687. The Supreme court adopted this test in *State v. Jeffries*, 105 Wn.2d at 418.

According to *Thomas*,

"To meet the requirement of the second prong defendant has the burden to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*

109 Wn.2d at 226 (citing *Strickland*, at 694) ((court's italics.))

However,

"If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Adams*, 91 Wn.2d 86,90, 586 P.2d 1168 (1978)."

State v. Lord, 117 Wn.2d 829,883, 822 P.2d 177 (1991), *cert. denied*, 113 S.Ct. 164 (1992).

A large part of the cross-examination of Detective Davis during the trial centered on the circumstances surrounding the defendant's interview and the subsequent tape recorded statement, which was admitted as an exhibit. II RP 136; ex. 6. In essence, Mr. Stolle confessed to the crime of Indecent Liberties during his interrogation at the Bremerton Police Department. His trial attorney did not request WPIC 6.41. Yet he was adamant in seeking admission of the transcript of the confession to accompany the tape recorded statement. (See argument *infra* at IV).

There can be no legitimate reason or legitimate tactical reason not to request WPIC 6.41. The prejudice to the accused is further accentuated where Mr. Stolle did not testify during the trial. The only statements from him came from a tape recorded statement that was testified to and admitted during the prosecutor's case. The only other exhibits that were admitted were a series of letters. CP 50; ex. 1-5.

IV. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED THE REQUEST TO HAVE THE TRANSCRIPT OF THE DEFENDANT'S TAPED CONFESSION ACCOMPANY THE TAPE AS AN EXHIBIT.

During the trial the defense argued that the transcript of Mr. Stolle's taped confession should be marked as an exhibit and made available to the jury during deliberations. II RP48-9; ex.6.

The trial court denied the request and stated:

"What I'm going to do is permit the jury to hear the recording, and they will have copies of the transcripts to follow along with it. I am not going to permit them to have this transcript." II RP 50.

Thereafter, a copy of the defendant's taped statement was admitted into evidence. II RP 136. The recoding was then played for the jury in open court. Transcripts of the recorded statement were provided to them. Id. After the audio recording was played, the transcripts were ordered by the trial court to be collected. II RP 137.

Standard of Review

Where the decision of the trial court is a matter of discretion, it will not be disturbed on appeal except for an abuse of discretion. Evidentiary rulings are reviewed on an abuse of discretion standard. *See generally Sorenson v. Raymark Industries*, 51 Wn.App. 954, 756 P.2d 740 (1988).

An abuse of discretion is where the court's discretion is manifestly

unreasonable or exercised on untenable grounds or for untenable reasons.

State ex. Rel. Carroll v. Junker, 79 Wn.2d 12,26, 482 P.2d 775 (1971).

According to Karl B. Teglund, 5C *Washington Practice* 371 (5th ed. 2007):

“...A transcript can be a helpful listening aid, particularly when portions of the tape are nearly inaudible. The transcript is not offered into evidence to prove the contents of the tape, and thus is not barred by the best evidence rule.

The party offering the transcript must make a foundation showing of its accuracy. The court has broad discretion to allow or disallow transcripts and other listening aids.[fn]”

(the footnote cited to a number of cases including *State v. Frazier*, 99 Wash. 2d 180,661 P.2d 126 (1983)). According to Teglund: (“the court stated that a trial court may, in its discretion, permit both a recording and a transcript thereof to be admitted as exhibits and reviewed by the jury during deliberations....”) (*Frazier* cited *State v. Forrester*, 21 Wn. App. 855, 587 P.2d 179 (1978) for the rule (see note below 99 Wn.2d 188.)¹¹

See also, *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980) (quoting *United States v. Turner*, 528 F.2d 143, 167-68 (9th Cir. 1975), *cert. denied*, 423 U.S. 996 (1976) (The admission of such

¹¹ “...a tape recorded statement of the defendant and a properly authenticated transcript thereof may, within the sound discretion of the trial court, be admitted as exhibits and reviewed by the jury during its deliberations.”

transcripts as an aid in listening to tape recordings...is a matter committed to the sound discretion of the trial court.”)

V. THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF THE CRIME OF INDECENT LIBERTIES.

The prosecutor argued that the victim, Marlina Hampton was “Unconscious enough not to know who was touching her” during sexual contact by Mr. Stolle and therefore he should be found guilty of Indecent Liberties. III RP 240: (“touch her in sexual places while she is sleeping or semiconscious.” RP 242.)

Standard of Review

The standard of review for a challenge to the sufficiency of the evidence is stated as follows in *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986):

“The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is “Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 2167, 221, 616 P.2d 628 (1980).”

See also, *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

It was stated in *Jackson v. Virginia*:

“In short, *Winship*, presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal

conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”

443 U.S. at 316, 99 S.Ct. At 2787 (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

The Elements

The elements of the crime of Indecent Liberties in this case are:

“(1) That on or about October 11, 2007 through October 18, 2007 the defendant knowingly caused MNH to have sexual contact with the defendant;

(2) That this sexual contact occurred when MHN was incapable of consent by being mentally incapacitated or physically helpless;

(3) That the defendant was not married to MNH at the time of the sexual contact; and

(4) That any of these acts occurred in the State of Washington.”

CP 44, Instr. No.9, WPIC 49.02 (2nd ed. Supp. 2005); RCW 9A.44.100(1)

(b) and/or (c) and/or (d) and/or (e).

Based on the evidence in this case, there was not sufficient evidence of the mental incapacity of the alleged victim. Mental Incapacity is defined as:

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

A person is physically helpless when the person is unconscious or for any other reason is physically

unable to communicate unwillingness to an act.”

CP 43, Court’s Instr. 8; WPIC 45.05 (11 *Washington Practice* 2nd ed. Supp 2005); RCW 9A.44.010 (4),(5).

The prosecutor stated during oral argument:

“She worked a long day at Bangor doing manual labor, was tired and exhausted. She went to bed. She thought Mr. Nanez was lying next to her. She felt someone touching her sexually, a penis rubbing against her vagina, and she thought it was her boyfriend. She brushed him off: stop it, don’t do it, not in the mood, I’m tired. She falls back to sleep.” III RP 239.

During the trial Ms. Hampton was asked a series of questions on direct examination about her memory of the events of the evening of October 11, 2007 as follows:

Q. Okay. You felt a penis on you?

A. Yes.

Q. Where did you feel a penis on you?

A. Trying to insert into my vagina. II RP68.

This is not evidence that the alleged victim was mentally incapacitated at the time of the offense “that prevents a person from understanding the nature or consequences of the act of sexual contact.”

Ms. Hampton acknowledged that she understood the nature and the consequences of the sexual act. Thinking it was her boyfriend she pushed a penis away and said: “Not tonight, Babe, I’m tired.” RP 68. On the second attempt, Ms. Hampton recalled that the tip of the person’s penis

was touching the bare skin of her vagina. II RP 70. On the third occasion she pushed the penis back and said: “You need to seriously knock it off. I’m tired.” II RP 71.

Ms. Hampton was then soon asked on direct examination:

Q...When this was going on, when you felt this, this penis against your vagina, can you describe for us – you have a memory of it, correct?

A. Correct. II RP 72-3.

There was no evidence that Ms. Hampton was unconscious so that she was physically helpless at the time sexual contact was made. She remembered each of the alleged three sexual attempts.

On cross-examination Ms. Hampton was asked:

“Q. Yeah. Would you describe what your mental state was as a time when somebody is trying to penetrate you and you are pushing back? Were you awake?

A. No, not fully.” II RP 99.

Q. Can you describe for us – and I understand this is a difficult question. But can you describe for us your clarity of thought? In other words, were you still somewhat sleeping or were you wide awake? I mean describe for us what your mind set was when this was happening.

A. I was trying to wake up but I couldn’t wake up fully.

Q. You were awake enough to feel this and tell the person to stop--

A. Right....

Q. Can you articulate for us what your state of mind was at the time you felt the penis trying to be inserted into your vagina?

A. No.“ RP 72-74

Later she was asked on cross-examination:

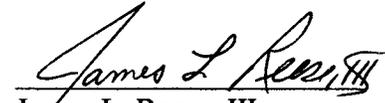
drowsy, half asleep or lethargic. Based on Ms. Hampton's own recollection, she was not mentally incapacitated or unconscious or semiconscious at the time of the offense.

E. Conclusion

This court should reverse the defendant's conviction and vacate the judgment.

Dated this 27th day of December 2009.

Respectfully Submitted,



James L. Reese, III
WSBA #7806
Court Appointed Attorney
For Appellant

AMENDMENT [V]

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT (XIV)

ss.1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

(d) Video Conference Proceedings.

(1) *Authorization.* Preliminary appearances held pursuant to CrR 3.2.1, arraignments held pursuant to this rule and CrR 4.1, bail hearings held pursuant to CrR 3.2, and trial settings held pursuant to CrR 3.3, may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in person hearing, which may in the trial court judge's discretion be granted.

(2) *Agreement.* Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrR 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

(3) *Standards for Video Conference Proceedings.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.

[Amended effective September 1, 1995; December 28, 1999; April 3, 2001.]

Comment

Supersedes RCW 10.01.080; RCW 10.46.120, .130; RCW 10.64.020, .030.

RULE 3.5 CONFESSION PROCEDURE

(a) *Requirement for and Time of Hearing.* When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) *Duty of Court to Inform Defendant.* It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the

circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) *Duty of Court to Make a Record.* After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) *Rights of Defendant When Statement Is Ruled Admissible.* If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

**RULE 3.6 SUPPRESSION HEARINGS—
DUTY OF COURT**

(a) *Pleadings.* Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) *Hearing.* If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[Adopted effective May 15, 1978; amended effective January 2, 1997.]

WPIC 6.41

GUIDES FOR EVIDENCE CONSIDERATION

WPIC 6.41

OUT OF COURT STATEMENTS BY DEFENDANT

You may give such weight and credibility to any alleged out-of-court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

NOTE ON USE

This instruction must be given upon request of a defendant when, after a CrR 3.5 hearing, the trial court has ruled that an out of court statement is admissible and the defense has raised the issue whether the out of court statement was voluntary through the evidence offered or cross-examination of witnesses.

COMMENT

CrR 3.5(d)(4).

An instruction similar to this instruction was approved in *State v. Huston*, 71 Wn.2d 226, 236, 428 P.2d 547 (1967). An instruction as to weight and credibility of a confession is a procedural right rather than an absolute constitutional right. A defendant cannot fail to request this instruction and then assign error to the court's failure to give it. *State v. Booth*, 75 Wn.2d 92, 449 P.2d 107 (1968); *State v. Taplin*, 66 Wn.2d 687, 691, 404 P.2d 469 (1965). The instruction is required only when the defendant challenges the voluntariness of a confession to a law enforcement official. The instruction is unnecessary when the prosecution offers an alleged confession to a private person. *State v. Smith*, 36 Wn.App. 133, 672 P.2d 759 (1983).

Although the instruction is normally used when the defendant challenges the voluntariness of a confession, the instruction may also be used when the prosecution offers an alleged confession and the defendant denies making the confession. *State v. Hubbard*, 37 Wn.App. 137, 679 P.2d 391 (1984), reversed on other grounds at 103 Wn.2d 570, 693 P.2d 718 (1985).

Research References

West's Key Number Digest
Criminal Law ⇨781

Legal Encyclopedias
C.J.S., Criminal Law § 1336

[Current as of July 2008.]

COURT OF APPEALS
DIVISION II

09 DEC 28 PM 1:58

STATE OF WASHINGTON
BY _____
DEPUTY

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 28th day of December, 2009, he personally hand delivered, the original and one(1) copy of Appellant's Brief in State of Washington v. Clifton Stolle, No. 39458-8-II to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, Clifton Stolle, at his last known address: Clifton Stolle, DOC #328542, Monroe Corrections Center, P.O. Box 777, Monroe, WA 98272-0777.



Signed and Attested to before me this 28th day of December, 2009
by James L. Reese, III.



Notary Public in and for the State of
Washington residing at Port Orchard.
My Appointment Expires: 4/04/13