

NO. 39458-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CLIFFTON STOLLE,

Appellant.

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STATE OF WASHINGTON
BY  DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-00409-9

BRIEF OF RESPONDENT

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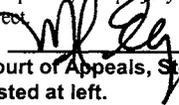
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DATED March 1, 2010, Port Orchard, WA 
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Although the trial Court erred in failing to file written findings of fact and conclusions of law following the 3.5 hearing below, whether the error was harmless when the trial court's oral ruling in the present case is sufficient to permit appellate review?

2. Whether Stolle's claim that the trial court erred in admitting the Statement Stolle made to Detective Davis (without being advised of his *Miranda* warnings) must fail when the trial court correctly found that the statements were admissible as voluntary statements made while Stolle was not in custody?

3. Whether Stolle's claim that his trial counsel was ineffective for failing to request that the jury be instructed pursuant to WPIC 6.41 must fail when the decision on whether to request such an instruction is a question of legitimate trial strategy or tactics that cannot serve as a basis for a claim of ineffective assistance of counsel?

4. Whether Stolle's claim that the trial court abused its discretion in refusing to send a transcript of Stolle's confession to the jury deliberation room with the jury must fail when Stolle has failed to explain how the trial court's decision was in error and when the trial court's ruling was based on the court's valid concerns that the transcript was inaccurate and that giving

the transcript to the jury could cause the jury to focus on the transcript to the exclusion of other evidence?

5. Whether Stolle's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found Stolle guilty beyond a reasonable doubt because the evidence was sufficient to prove that the sexual contact occurred both while the victim was physically helpless and while she was mentally incapacitated, either of which would have been sufficient to support a conviction in the present case?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Cliffon Stolle was charged by amended information filed in Kitsap County Superior Court with one count of indecent liberties. CP 75. A jury found Stolle guilty of the charged offense and the trial court imposed a standard range sentence. CP 49, 59. This appeal followed.

B. FACTS

The charge in the present case stemmed from an incident wherein Stolle had sexual contact with the victim, Marlina Hampton, while she was sleeping or semi-conscious. Stolle was subsequently interviewed by a police detective and made statements regarding the charged offense.

3.5 Hearing

A 3.5 hearing was held on March 4, 2009. RP (3/4/09) 1-31. At the hearing, Detective Kenny Davis of the Bremerton Police Department testified that he and another detective contacted Stolle at his apartment on February 5, 2008. RP (3/4/09) 6-7. Stolle answered the door to the apartment, and Detective Davis identified himself and the other detective. RP (3/4/09) 8. Detective Davis asked Stolle to come to the to the police station for an interview, but Detective Davis explained to Stolle that he was not in custody. RP (3/4/09) 8, 10. Detective Davis explained to Stolle that he wanted to talk to him regarding a complaint filed by Marlina Hampton. RP (3/4/09) 8. Stolle agreed to go to the police station, and Detective Davis drove Stolle to the station in an unmarked police car. RP (3/4/09) 7-8. Stolle rode in the front seat of the car and was not handcuffed or otherwise restrained. RP (3/4/09) 7-9.

Once they arrived at the police station, Detective Davis and Stolle went to an interview room where the detective again informed Stolle that he wanted to speak with him regarding this matter and told him again that “he was not in custody, he was free to leave, and he did not have to answer any questions.” RP (3/4/09) 10-11. Detective Davis also told Stolle that he could stop answering questions at any time. RP (3/4/09) 11.

Stolle was not restrained with handcuffs or in any other way during

the interview at the police station. RP (3/4/09) 12.¹ Detective Davis did not advise Stolle of his Miranda warnings because Stolle was not in custody. RP (3/4/09) 11. Stolle never indicated that he did not want to be there or that he didn't want to participate. RP (3/4/09) 10. Stolle then answered the detective's questions and provided a statement. RP (3/4/09) 12. At the conclusion of the interview Stolle also provided a taped statement. RP (3/4/09) 12-13. During the taped statement Stolle was asked whether he understood that he was not in custody and Stolle indicated that he understood this. RP (3/4/09) 24. Stolle also stated in the taped statement that he understood that he was free to leave at any time and that he did not have to answer any questions. RP (3/4/09) 24-25.

Stolle never expressed any hesitation in answering the detective's questions nor did he express a desire to leave. RP (3/4/09) 13-14. Once the interview concluded, Detective Davis drove Stolle back to his apartment. RP (3/4/09) 14.

At the 3.5 hearing defense counsel argued that the "cumulative effect" of the interview process was that Stolle would have been placed in a position where he would not had have believed that he was free to go, and that the statement was therefore involuntary. RP (3/4/09) 25-27.

¹ Detective Davis also testified that he did not threaten Stolle in any way, did not raise his voice with him, did not tell him in any way that he was not free to leave, nor did he ever tell

The trial court held that Stolle's statements to Detective Davis were admissible, noting that,

It is clear that he was not in custody during the inquiries by Detective Davis both at the apartment, during transport, and while he was at the police station. He was told that he was not in custody; he was told he was free to leave; he was told that he did not have to answer the questions.

RP (3/4/09) 30. The trial court then concluded,

The statements are admissible as voluntary statements made while not in custody, and they may be used at trial by the prosecution.

RP (3/4/09) 31.

Trial

At trial, the evidence showed that in October of 2007, Marlina Hampton was living in an apartment in Bremerton with her boyfriend, Ryan Nanez. RP 59-61. Stolle, who is Ms. Hampton's cousin, also lived in the same apartment complex but his apartment was located on a different level. RP 58, 62.

On October 11, Ms. Hampton got up around 5:00 am and got ready for work at the sub base at Bangor. RP 60. Ms. Hampton went to work where she worked a double shift loading and unloading food supplies for the Navy. RP 60. Ms. Hampton explained that her work was physical labor and that

Stolle that he was under arrest. RP (3/4/09) 12.

most of the loading was done by hand. RP 60.

After work, Ms. Hampton went home where she relaxed on the couch with her boyfriend and played video games for a period of time before she went to bed. RP 63-64. When she went to bed, Ms. Hampton was wearing a t-shirt and underwear. RP 65. Ms. Hampton explained that she was “really tired” when she went to bed, as it was the first time that she had ever worked such a long day at work. RP 66. Mr. Nanez came to bed at the same time, and was lying behind Ms. Hampton. RP 65-66. Ms. Hampton then went to sleep within a short time. RP 66.

The next thing Ms. Hampton remembered was that sometime during the night she felt someone touching her. RP 67. Ms. Hampton explained that she felt someone touching her with his hands and attempting to insert a penis into her vagina. RP 67-68. Ms. Hampton explained that she was lying on her side and that she felt a penis was trying to be inserted into her vagina from behind her. RP 68. Ms Hampton pushed the penis away and said, “Not tonight, babe, I’m tired.” RP 68. Ms. Hampton explained that she said this because she thought it was her boyfriend, Mr. Nanez, in bed with her and that she did not remember Mr. Nanez ever leaving the bed, and because she was not looking at the person behind her in bed. RP 67-70.

Ms. Hampton then described a second instance of an attempted

penetration and described that she could feel a penis touching the bare skin of her vagina. RP 70. She also explained at this point she was not wearing her underwear despite the fact that she had not removed her underwear and had no recollection of feeling someone else remove them. RP 70-71. Ms Hampton described that there was then a third attempt at penetration, and at this time she pushed the penis away and said “stop it,” and “I’m tired.” RP 71-72. The contact then stopped and nothing else happened. RP 72. Ms. Hampton had no recollection of anyone getting out of the bed and did not hear any knocking at the door. RP 72. The next thing she remembered was that sometime during the night Mr. Nanez asked her what happened to her underwear. RP 74. Ms. Hampton responded that she didn’t know and she then “went right back to sleep.” RP 74-75.

During the contact time Ms. Hampton continued to assume that the person behind her was Mr. Nanez. RP 72. Ms. Hampton also stated that while these events were occurring she was trying to wake up but that she “couldn’t wake up fully.” RP 72-73. She also stated that she was not “fully” awake during these events. RP 99.

The next morning Ms Hampton woke up around 10:00 am and Mr. Nanez told her that he found her underwear under a pillow. RP 75. Later that day, Ms. Hampton asked Mr. Nanez about the events of the night before and asked him if he had been trying to have sex with her while she was

asleep. RP 77. Mr. Nanez told her that he had not. RP 77. Ms. Hampton then asked if he was sure, and Mr. Nanez explained that the he had gotten up during the night and gone down to Stolle's apartment for a cigarette and that while Mr. Nanez was down there Stolle had said he had left something up in Hampton and Nanez's apartment and had gone up to retrieve it. RP 78. After making a couple of cigarettes, Mr. Nanez then came back up to the apartment but found the door was locked. RP 78-79.

Ms. Hampton thought about calling the police but explained that she was having a "dilemma" because Stolle was her cousin and she didn't want him to go to jail. RP 79. After about three or four days, however, she decided to contact the police because she "didn't want him to do it to anybody else." RP 80.²

Mr. Nanez testified at trial and explained that on the night in question Ms. Hampton was "real tired" and that after she had fallen asleep he went down to Stolle's apartment because he couldn't sleep and because he had left some tobacco in Stolle's apartment. RP 184-86. Stolle invited Mr. Nanez inside, and Mr. Nanez went into the apartment. RP 186-87. Stolle and a third party named Mike Emery were in the apartment, and Mr. Nanez then sat

² Ms. Hampton also testified that she did not give Stolle consent to touch her in any sexual manner on the night in question, had never on any occasion given him consent to touch her, and had never given him any reason to believe that he could touch her in a sexual manner. RP 88. Ms. Hampton explained that she had never given him consent to do so as Stolle is her

down on a couch and rolled a cigarette for himself and for Mr. Emery. RP 187. Shortly thereafter, Stolle asked Mr. Nanez if his apartment door was unlocked. RP 187. Mr. Nanez responded that it was and asked, "Why?" RP 187. Stolle responded that he had left his mother's ashes up there and was wondering if he could go and retrieve them. RP 187. Mr. Nanez told Stolle that the door was unlocked and that he could go up to the apartment. RP 187-88. Stolle then left the apartment. RP 187.

About 15 minutes later, Mr. Nanez went back to his apartment and found that the door was locked, which he thought was unusual. RP 187-88. Mr. Nanez then knocked on the door a couple of times but no one answered. RP 190. Mr. Nanez waited at the door for three or four minutes, and then went back to Stolle's apartment and asked Mr. Emery if Stolle had come back yet. RP 190. Stolle, however, had not returned. RP 190-91.

Mr. Nanez remained in Stolle's apartment for 10 to 15 minutes and then returned to his apartment where he found the door was still locked. RP 191-92. Mr. Nanez again knocked on the door but got no response. RP 192. Mr. Nanez waited several additional minutes at the door and then ran down to Stolle's apartment to see if Stolle had returned. RP 192. Not finding Mr. Stolle, Mr. Nanez again returned to his own apartment and this time banged

cousin. RP 88.

on the door with a bottle in an attempt to get someone's attention. RP 192. Mr. Nanez heard footsteps inside and then Stolle answered the door and appeared to be pulling up and buttoning his pants. RP 192-93. Mr. Nanez told Stolle that he needed to leave and Stolle responded, "Okay" and left. RP 193.

Mr. Nanez then went upstairs to where Ms. Hampton had been sleeping and found that she was "real groggy and still sleepy." RP 193-94. Ms. Hampton asked Mr. Nanez where he went, and Mr. Nanez told her that he had gone down to Stolle's apartment. RP 193, 196. Ms. Hampton, replied, "No, you didn't." RP 196. When Mr. Nanez explained that he had in fact left the apartment, Ms. Hampton then asked, "Who was just here?" RP 196. Mr. Nanez then told her that Stolle was the only person there. Mr. Nanez and Ms. Hampton then went to sleep and did not have any lengthy discussion either that night or the next morning. RP 195-96.

Several nights later, Mr. Nanez and Ms. Hampton were at Stolle's apartment with a few friends when Ms. Hampton began "cussing out" Stolle. RP 196. Mr. Nanez asked what was going on, but Ms. Hampton continued "cussing" at Stolle. RP 196-97. Mr. Nanez then suggested that they leave, and when they got home he asked Ms. Hampton why she was cussing at Stolle. RP 197. Ms. Hampton responded, "You don't know what's going on," and she then asked, "Well I gotta ask you a question. Did you try to

have sex with me in my sleep when I was asleep a couple of nights ago?” RP 197. When Mr. Nanez told her that he had not done so, Ms Hampton said, “Yeah, well, who was here?” RP 197. Mr. Nanez told her that Stolle had been in the apartment and explained the events of the night. RP 198. Ms. Hampton then told Nanez that somebody was trying to have sex with her in her sleep and that that was all she could remember. RP 198.

The next day Mr. Nanez confronted Stolle about what Ms. Hampton had told him. Mr. Nanez went to Stolle’s apartment and told him that he needed to talk with him and that he wanted him to be honest with him. RP 210. Mr. Nanez then asked, “Did you try t have sex with your cousin in her sleep?” RP 201.³ Stolle, responded, “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.” RP 201. Mr. Nanez got very angry but told Stolle that he wouldn’t mess with him as he had promised Ms. Hampton that he wouldn’t touch him and that they would let the police deal with it. RP 202. Stolle responded by saying, “I need help.” RP 202. Mr. Nanez then went back to Ms. Hampton and told her about what Stolle had said. RP 202-03. Ms. Hampton then got very upset and became “teary” and appeared as if she was about to cry. RP 203. Ms. Hampton then called the police. RP 203.

³ Mr. Nanez later testified that exact wording he used was, “Did you try to sleep with your cousin in her sleep?” RP 207.

Detective Robbie Davis of the Bremerton Police Department later contacted and interviewed Stolle about the events on the night in question. RP 119-20. Stolle told Detective Davis that Mr. Nanez had come down to his apartment and that they were hanging out. RP 128. At some point Stolle told Mr. Nanez that he needed to go up to Ms. Hampton's apartment to retrieve a container that held his mother's ashes. RP 128. Mr. Nanez told Stolle to go ahead and that the apartment door was unlocked. RP 128.

Stolle told Detective Davis that he then went into the apartment but couldn't find the ashes and that he then went up to the loft where Ms. Hampton was sleeping, as he was going to wake her up and ask her where the ashes were. RP 129. Without explaining why, Stolle said that he laid down on the bed next to Ms. Hampton. RP 129. She appeared to be "semiconscious" and Stolle said that she seemed to think that he was Mr. Nanez. RP 129-30. Stolle then put his arms around her and touched her breasts. RP 130. Stolle also stated that he touched her vagina with his penis, although Stolle claimed that Ms. Hampton removed her own underwear. RP 130-31. Stolle stopped because he heard a knock at the door and because he "realized this was wrong." RP 131. Stolle said he then went to answer the door (while wearing his boxer shorts and holding his pants in his hand) and found Mr. Nanez standing outside the door. RP 132. When Mr. Nanez asked him what was going on, Stolle told him that he had fallen asleep on the

couch. RP 132. Stolle then left the apartment. RP 133.

At the end of the interview, Detective Davis asked Stolle if there was anything else he would like to say. RP 171. Stolle responded by saying, “Yes. I’m very, very sorry for everything I’ve done, and I feel pitiful for everything I’ve done. So, like I said, I will cooperate and I am sorry.” RP 172.

III. ARGUMENT

A. **ALTHOUGH THE TRIAL COURT ERRED IN FAILING TO FILE WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW FOLLOWING THE 3.5 HEARING BELOW, THE ERROR WAS HARMLESS BECAUSE THE TRIAL COURT’S ORAL RULING IN THE PRESENT CASE IS SUFFICIENT TO PERMIT APPELLATE REVIEW.**

Stolle first claims that the trial court erred in failing to file written findings of fact and conclusion of law regarding its ruling pursuant to CrR 3.5. App.’s Br. at 9. Although the trial court erred in failing to enter written findings, the error was harmless as the trial court’s oral findings are sufficient to permit appellate review.

The State concedes that CrR 3.5 requires a trial court to enter written findings of fact and conclusions of law following a CrR 3.5 hearing, yet the trial court below failed to do so. Nonetheless, “failure to enter findings

required by CrR 3.5 is considered harmless error if the court's oral findings are sufficient to permit appellate review.” *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008); *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003); *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998). Similarly, failure to file written findings is harmless error if the trial court's oral opinion and the record of the hearing are so comprehensive and clear that written findings would be a mere formality. *State v. Smith*, 76 Wn. App. 9, 16, 882 P.2d 190 (1994), *review denied*, 126 Wn.2d 1003, 891 P.2d 37 (1995).⁴

In its oral ruling the trial court found that Stolle’s statements to Detective Davis were “admissible as voluntary statements made while not in custody.” RP (3/4/09) 31. In addition the trial court held that,

It is clear that he was not in custody during the inquiries by Detective Davis both at the apartment, during transport, and while he was at the police station. He was told that he was not in custody; he was told he was free to leave; he was told that he did not have to answer the questions.

RP (3/4/09) 30. This ruling is sufficient to permit appellate review. In addition, the only witness who testified at the 3.5 hearing was Detective Davis, as Stolle did not testify nor did he call any witnesses. Thus there were

⁴ In addition, a trial court's failure to enter written findings and conclusions typically requires remand for entry of findings and conclusions, not reversal. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998).

no disputed facts at issue. Given these facts, the trial court error in failing to file written findings of fact and conclusions of law was harmless as it is clear that written findings would have been a mere formality.

B. STOLLE’S CLAIM THAT THE TRIAL COURT ERRED IN ADMITTING THE STATEMENT STOLLE MADE TO DETECTIVE DAVIS (WITHOUT BEING ADVISED OF HIS *MIRANDA* WARNINGS) MUST FAIL BECAUSE THE TRIAL COURT CORRECTLY FOUND THAT THE STATEMENTS WERE ADMISSIBLE AS VOLUNTARY STATEMENTS MADE WHILE STOLLE WAS NOT IN CUSTODY.

Stolle next claims that the trial court erred in admitting Stolle’s statements to Detective Davis when Stolle had not been advised of his *Miranda* warnings. App.’s Br. at 12-22. This claim is without merit because the trial court correctly found that Stolle’s statements to Detective Davis were “admissible as voluntary statements made while not in custody,” thus *Miranda* warnings were unnecessary. RP (3/4/09) 31.

An appellate court is to review a trial court’s decision after a CrR 3.5 hearing by determining whether substantial evidence supports the trial court’s findings of fact, and whether those findings support the conclusions of law. *State v. Broadaway*, 133 Wn.2d 118, 130-31, 942 P.2d 363 (1997). “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” *State v. Solomon*, 114 Wn. App.

781, 789, 60 P.3d 1215 (2002) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)).

Furthermore, the Fifth Amendment right to *Miranda* warnings attach only when a custodial interrogation begins. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002). An investigative encounter with a suspect based on reasonable suspicion not amounting to probable cause does not require *Miranda* warnings. *State v. Huynh*, 49 Wn. App. 192, 201, 742 P.2d 160 (1987), *review denied*, 109 Wn.2d 1024 (1988).

Furthermore, an appellate court reviews a trial court's determination of a custodial interrogation de novo. *State v. Solomon*, 114 Wn. App. 781, 788, 60 P.3d 1215 (2002), *review denied*, 149 Wn.2d 1025, 72 P.3d 763 (2003). The appellate court is to apply an objective standard as to whether a reasonable person in the same situation would perceive that he was free to leave. *State v. Cunningham*, 116 Wn. App. 219, 228, 65 P.3d 325 (2003); *State v. Ferguson*, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995). The question is not whether a person actually believed he was free to leave, but whether “such a person would believe he was in police custody of the degree associated with formal arrest.” *Ferguson*, 76 Wn. App. at 566, 886 P.2d 1164 (quoting 1 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 6.6, at 105 (Supp.1991)).

Custodial interrogation is "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." *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). A *Miranda* warning is required when a person is in custody or its functional equivalent. In determining when a *Miranda* warning is necessary, the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation. *Berkemer v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). "It is settled that the safeguards prescribed by *Miranda* become applicable as soon as a suspect's freedom of action is curtailed to a degree associated with formal arrest." *Berkemer*, 468 U.S. at 440.

Police do not have to give *Miranda* warnings when questioning is part of a routine, general investigation in which the defendant voluntarily cooperates but is not yet charged. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986). Thus, persons voluntarily accompanying police to the police station as material witnesses are not under custodial interrogation if their freedom of action is not curtailed to a degree associated with a formal arrest. *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986). *See also, State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004), *citing State v. Post*, 118 Wn.2d 596, 607, 826 P.2d 172, 837 P.2d 599 (1992) ("defendant must show some objective facts indicating his ... freedom of movement [or

action] was restricted [or curtailed]").

In the present case the uncontested evidence presented at the 3.5 hearing was that Detective Davis met with Stolle at his apartment and asked Stolle to come to the to the police station for an interview, but Detective Davis explained to Stolle that he was not in custody. RP (3/4/09) 8, 10. Stolle agreed to go to the police station, and Detective Davis drove Stolle to the station in an unmarked police car and Stolle rode in the front seat of the car and was not handcuffed or otherwise restrained. RP (3/4/09) 7-9. Once they arrived at the police station, Detective Davis again informed Stolle that he wanted to speak with him regarding this matter and told him again that "he was not in custody, he was free to leave, and he did not have to answer any questions." RP (3/4/09) 10-11. Detective Davis also told Stolle that he could stop answering questions at any time. RP (3/4/09) 11. Stolle was not restrained with handcuffs or in any other way during the interview at the police station. RP (3/4/09) 12.⁵ Stolle never indicated that he did not want to be there or that he didn't want to participate. RP (3/4/09) 10. Rather, Stolle answered the detective's questions and provided a statement. RP (3/4/09) 12. Furthermore, at the conclusion of the interview Stolle also provided a taped statement in which he acknowledged that he understood that he was not in

⁵ Detective Davis also testified that he did not threaten Stolle in any way, did not raise his voice with him, did not tell him in any way that he was not free to leave, nor did he ever tell

custody and that he was free to leave at any time and that he did not have to answer any questions. RP (3/4/09) 12-13. 24-25. Finally, Stolle never expressed any hesitation in answering the detective's questions nor did he express a desire to leave. RP (3/4/09) 13-14.

Given the detective's clear statements that he was not under arrest, and was not required to come to the station or answer questions, a reasonable person in Stolle's position would not have concluded that his freedom of action was curtailed to the degree of formal arrest. Thus, Stolle was not in custody during the interview for the purposes of *Miranda*, and the trial court did not err by admitting his statements.⁶

Stolle that he was under arrest. RP (3/4/09) 12.

⁶ Stolle also argues that this court should apply the test for determining whether a suspect is in custody outlined in *United States v. Wolk*, 337 F.3d 997 (8th Cir. 2003). App.'s Br. at 15. Stolle, however, provides no authority for his apparent conclusion that Washington courts have or should adopt the *Wolk* factors. To the contrary, Washington Court's have adopted and continue to apply the test outlined by the United States Supreme Court test in *Berkemer*: that is, whether "a reasonable person in a suspect's position would have felt that his or her freedom was curtailed to the degree associated with a formal arrest." See e.g., *State v. Short*, 113 Wn.2d 35, 40, 775 P.2d 458 (1988); *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004). Furthermore, even under the *Wolk* factors the trial court's ruling was clearly correct. Finally, although Stolle briefly argues that the trial court should have considered Western State Hospital's later evaluation of Stolle, this argument should also be rejected since the relevant inquiry is not a subjective test but rather is an objective one that looks to whether "a reasonable man in the suspect's position would have understood his situation." See, *Berkemer*, 468 U.S. at 442. Thus, the Western State evaluation conducted six months after Detective Davis's interview with Stolle was irrelevant.

C. STOLLE'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST THAT THE JURY BE INSTRUCTED PURSUANT TO WPIC 6.41 MUST FAIL BECAUSE THE DECISION ON WHETHER TO REQUEST SUCH AN INSTRUCTION IS A QUESTION OF LEGITIMATE TRIAL STRATEGY OR TACTICS THAT CANNOT SERVE AS A BASIS FOR A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL.

Stolle next claims that his trial counsel was ineffective for failing to request a jury instruction based on WPIC 6.41. This claim is without merit because legitimate trial strategy or tactics, such as whether to request the instruction at issue, cannot serve as a basis for a claim of ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *In re Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove

ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, *review denied*, 150 Wn.2d 1024, 81 P.3d 120 (2003).

In addition, there is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland*, 466 U.S. at 689; *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). 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. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Furthermore, a reviewing court presumes defense counsel's decision not to request a limiting instruction was a tactical decision made to avoid highlighting the damaging evidence. *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, *review denied*, 121 Wn.2d 1024, 854 P.2d 1084 (1993); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

In the present case Stolle argues that his counsel was ineffective for failing to request that the jury be given an instruction based on WPIC 6.41. That instruction states that,

“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.”

See App.'s Br. at 22; WPIC 6.41. Stolle argues that there “can be no

legitimate reason or legitimate tactical reason not to request WPIC 6.41.”

App.’s Br. at 26.

The Washington Supreme Court, however, has previously stated specifically that,

We can visualize where, for strategic reasons, the defendant may not desire that an instruction as to weight and credibility of a confession be given because it may tend to highlight the confession in the eyes of the jurors.

State v. Taplin, 66 Wn.2d 687, 692, 404 P.2d 469 (1965). This analysis clearly applies in the present case, as defense counsel might have reasonably concluded that WPIC 6.41 might have empowered the jury to disregard defense counsel’s arguments regarding the confession as the instruction specifically tells the jury that they give the confession whatever weight they see fit. While it could be argued that the instruction could have been helpful to the defense, defense counsel might have reasonably concluded that the instruction was a double-edged sword that might not have been helpful. In addition, counsel might have reasonably concluded that the instruction might have brought undue attention that there was an actual confession. Thus, the decision whether or not to request WPIC 6.41 can clearly be a strategic or tactical decision under Washington law. The failure to request such an instruction, therefore, cannot support a claim of ineffective assistance of counsel.

D. STOLLE'S CLAIM THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO SEND A TRANSCRIPT OF STOLLE'S CONFESSION TO THE JURY DELIBERATION ROOM WITH THE JURY MUST FAIL BECAUSE STOLLE HAS FAILED TO EXPLAIN HOW THE TRIAL COURT'S DECISION WAS IN ERROR AND BECAUSE THE TRIAL COURT'S RULING WAS BASED ON THE COURT'S VALID CONCERNS THAT THE TRANSCRIPT WAS INACCURATE AND THAT GIVING THE TRANSCRIPT TO THE JURY COULD CAUSE THE JURY TO FOCUS ON THE TRANSCRIPT TO THE EXCLUSION OF OTHER EVIDENCE.

Stolle next claims that the trial court abused its discretion when it denied Stolle's request to have a transcript of his taped statement accompany the tape as an exhibit. App.'s Br. at 27. This claim is without merit because Stolle has failed to demonstrate that the trial court abused the wide discretion given to trial courts in this regard.

Stolle acknowledges that a trial court has broad discretion in deciding whether both a recording and a transcript should be admitted as exhibits and reviewed by the jury during deliberations. See App.'s Br. at 28. After conceding that a trial court has broad discretion, however, Stolle fails to explain how exactly the trial court abused its discretion in the present case. Rather, Stolle offers no argument at all.

Nevertheless, the record demonstrates that the trial court did not abuse

its discretion but rather based its ruling on two sound reasons: first, the trial court was concerned that admitting the transcript and sending to the jury with the jury during deliberations could potentially place undue emphasis on Stolle's statements to Detective Davis; and second, the court was concerned that the transcript contained some potential inaccuracies. Specifically, the trial court stated,

I think this situation comes up quite commonly. Judges, of course, are concerned about giving transcripts to the jury because then they focus on that almost to the exclusion of other evidence. And this is just one piece of evidence; it is not the be all and the end all.

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.

There is a couple reasons for that. One is, as I already mentioned, I don't want them to focus on this to the exclusion of the other testimony. But the other problem was that as I listened to the tape, while I was reading this transcript that that there is a couple places where the language of the transcript is different from the cold black and white of – or the language of the tape is different from the cold black and white of the transcript.

Of particular concern to me was on page 3 at the very top, and Detective Davis is recorded as saying in the transcript, "And you stated that you didn't touch her or don't remember touching her vagina with your hands."

And as I read that, I think, Okay, then Mr. Stole is saying, "I don't remember touching her and I don't remember touching her vagina."

But when I listen to the tape, there was clear that the detective was really saying, "And you stated that you didn't touch her – or don't remember touching her vagina," clear

that the word “vagina” was intended to be in that first phrase as well. And so that’s kind of the subtleties that don’t come out in a transcript.

I’m also not convinced that the transcript is word-for-word perfect. Again of particular concern was the top of page 4 when he’s – when Mr. Stolle is speaking freely and he is saying, “Oh shoot. I’m trying to remember many stuff. It’s just that I know that everything that I did wrong. I just started to blank out.”

And I’m not sure that an accurate transcription, but it is difficult to tell. I played it a couple of times, Mr. Stolle is stuttering a bit and so I don’t know that the transcript accurately reveals what he is trying to say. The tape certainly does.

So the transcript isn’t going back to the jurors. Now that doesn’t mean that they won’t ask for it, and we can cross that bridge when we come to it.

RP 49-51.

As both of the trial court’s concerns (undue emphasis and inaccuracy) were valid reasons supporting the courts decision, and because Stolle fails to offer any argument to the contrary, Stolle has failed to show that the trial court abused its discretion.⁷

⁷ In addition, Stolle has failed to include the transcript in question as part of the record, nor was the tape that was played for the jury transcribed in the report of proceedings (although the CD that was played has been included as an exhibit). In any event, even if Stolle could show that the trial court erred in failing to admit the transcript, any error would have been harmless since the jury unquestionably heard the tape at trial and was allowed to follow along with the transcript. The evidence of what was said, therefore, was before the jury.

E. STOLLE'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND STOLLE GUILTY BEYOND A REASONABLE DOUBT BECAUSE THE EVIDENCE WAS SUFFICIENT TO PROVE THAT THE SEXUAL CONTACT OCCURRED BOTH WHILE THE VICTIM WAS PHYSICALLY HELPLESS AND WHILE SHE WAS MENTALLY INCAPACITATED, EITHER OF WHICH WOULD HAVE BEEN SUFFICIENT TO SUPPORT A CONVICTION IN THE PRESENT CASE.

Stolle next claims that there was insufficient evidence regarding the charged offense of indecent liberties. App.'s Br. at 29. This claim is without merit because, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found guilt beyond a reasonable doubt.

The test for determining sufficiency is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

A person commits the crime of indecent liberties when he or she causes another person who is not his or her spouse to have sexual contact with him or her when the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless. RCW 9A.44.100.

The terms “mental incapacity” and “physically helpless” are defined by statute as follows:

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

“Physically helpless” means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

RCW 9A.44.010(4) & (5). Furthermore, the Washington Supreme Court has stated that a finding that a person is mentally incapacitated for the purposes of

RCW 9A.44.010(4) is appropriate where the victim had a condition that prevented him or her from meaningfully understanding the nature or consequences of sexual intercourse. *State v. Ortega-Martinez*, 124 Wn.2d 702, 711, 881 P.2d 231 (1994).

Similarly, in the context of the indecent liberties statute, a “mental defect” is an irregularity in the emotional and intellectual response of a person to his environment that renders him incapable of consenting to sexual contact. *See, State v. VanVlack*, 53 Wn. App. 86, 90, 765 P.2d 349 (1988). To establish this element, the State must prove that a victim has a mental defect that renders her incapable of consent either because she does not understand the nature and consequences of the acts or because she is otherwise incapable of granting consent. *VanVlack*, 53 Wn. App. at 91.

Furthermore, the Washington Court of Appeals has specifically held that evidence that a victim was asleep permitted the conclusion that the victim was “physically helpless,” so as to support indecent liberties conviction based on sexual touching. *See, State v. Puapuaga*, 54 Wn. App. 857, 860, 776 P.2d 170 (1989)(“The state of sleep appears to be universally understood as unconsciousness or physical inability to communicate unwillingness. Therefore, any rational trier of fact could have found beyond a reasonable doubt that the victim was physically helpless based on the evidence that she was asleep).

Similarly, Washington Courts have long held that a victim is incapable of consent if unaware of the nature of the act, even if the victim is not totally unconscious. *State v. Ely*, 114 Wash. 185, 192–93, 194 P. 988, 990–91 (1921).

In the present case, therefore, a rational jury could have concluded that Ms. Hampton, at least while she was asleep, was physically helpless and incapable of consent under RCW 9A.44.010(5). Such a conclusion would be supported by the testimony of Ms. Hampton that she did not remove her underwear. RP 70-71. In addition, Ms. Hampton did not state that Stolle had touched her breasts (as Stolle admitted he had done). From these facts the jury could have inferred that Ms. Hampton was asleep while Stolle removed Ms. Hampton’s underwear and touched her breasts. The act of touching Ms. Hampton’s breast alone would be sufficient for a conviction since “sexual contact” includes the touching of “any sexual or other intimate part” of a person done for the purpose of gratifying sexual desire. RCW 9A.44.010(2). The reasonable conclusion that a portion of the sexual contact occurred while Ms. Hampton was asleep was also bolstered by the testimony of Mr. Nanez that Stolle admitted to him that he had tried to have sex with his cousin “in her sleep.” RP 201.

In addition, viewing the evidence in a light most favorable to the State, a rational juror could have also concluded that Ms. Hampton was

“mentally incapacitated” during the period in which she was only semiconscious or half-awake, since her state of semi-consciousness prevented her from understanding the nature or consequences of the act of sexual intercourse.

Stolle concedes that, viewing the evidence in a light most favorable to the State, the evidence showed that Ms. Hampton was “half asleep” during the three instances of vaginal contact. App.’s Br. at 33-34. Stolle, however, essentially argues that because Ms. Hampton recalled these instances and because she was able to either push Stolle away or tell him to stop that she was not mentally incapacitated. Stolle’s argument, however, is without merit because it relies on an unnecessarily narrow reading of the statute, and Washington courts have previously rejected such a narrow reading of the statute.

In *State v. Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 231 (1994), the Washington Supreme Court examined the phrase “mentally incapacitated” and rejected a Court of Appeals opinion that had interpreted the phrase narrowly. As the Supreme Court noted, the statute defines mentally incapacitated as a condition “prevents a person from understanding the nature or consequences of the act of sexual intercourse.” *Ortega-Martinez*, 124 Wn.2d at 709. The Court then stated that,

The key to a proper interpretation of RCW 9A.44.010(4) is a sufficiently broad interpretation of the word “understand”. Evidence showing that a victim has a superficial understanding of the act of sexual intercourse does not by itself render RCW 9A.44.010(4) inapplicable. A finding that a person is mentally incapacitated for the purposes of RCW 9A.44.010(4) is appropriate where the jury finds the victim had a condition which prevented him or her from meaningfully understanding the nature or consequences of sexual intercourse.

A meaningful understanding of the nature and consequences of sexual intercourse necessarily includes an understanding of the physical mechanics of sexual intercourse. See RCW 9A.44.010(1) (broadly defining the physical acts considered to be sexual intercourse). It also includes, however, an understanding of a wide range of other particulars. For example, the nature and consequences of sexual intercourse often include the development of emotional intimacy between sexual partners; it may under some circumstances result in a disruption in one's established relationships; and, it is associated with the possibility of pregnancy with its accompanying decisions and consequences as well as the specter of disease and even death. While the law does not require an alleged victim to understand any or all of these particulars before a defendant can be considered insulated from liability under RCW 9A.44.050(1)(b) for having had sexual intercourse with a mentally incapacitated individual, all of the above are elements of a meaningful understanding of the nature and consequences of sexual intercourse and are important for a trier-of-fact to bear in mind when it is evaluating whether a person had a condition which prevented him or her from having a meaningful understanding of the nature or consequences of the act of sexual intercourse.

Ortega-Martinez, 124 Wn.2d at 711-12. The Supreme Court also noted that other courts have held that a superficial understanding of the physical nature and consequences of sexual activity insufficient by itself to void the

applicability of provisions defining mental incapacity in a way similar to the way it has been defined in RCW 9A.44.010(4), and that:

An understanding of coitus encompasses more than a knowledge of its physiological nature. An appreciation of how it will be regarded in the framework of the societal environment and taboos to which a person will be exposed may be far more important.

Ortega-Martinez, 124 Wn.2d at 713 (citations omitted). In addition, the Supreme Court also stated that,

It is important to distinguish between a person's *general* ability to understand the nature and consequences of sexual intercourse and that person's ability to understand the nature and consequences at a given time and in a given situation. This treatment of the two as identical contradicts the express language of the statute. RCW 9A.44.010(4) specifically notes “[m]ental incapacity is that condition existing *at the time of the offense* which prevents a person from understanding the nature or consequences of the act of sexual intercourse....” (Italics ours.) *See also State v. McDowell*, 427 So.2d 1346 (2d Cir., La.1983) (notwithstanding that victim, as a married woman and mother of children, obviously experienced intercourse and knew what it meant, the victim was incapable of understanding the nature of the act on the day of the act).

Ortega-Martinez, 124 Wn.2d at 716.

Similarly, in *State v. Al-Hamdani*, 109 Wn. App. 599, 36 P.3d 1103 (2001), the court found that there was sufficient evidence that the victim was mentally incapacitated and incapable of consent despite the fact that the

victim had told the defendant “no” and “don’t do that” when she was asked to engage in oral sex. In *Al-Hamdani*, the victim testified that she awoke to find the defendant on top of her and that she told him “no” and “don’t do that” when he asked her to engage in oral sex. *Al-Hamdani*, 109 Wn. App. at 608. In addition, the evidence showed that the victim had consumed at least 10 drinks and that her blood alcohol was estimated to be between .1375 and .21. *Al-Hamdani*, 109 Wn. App. at 609. In addition, the victim described that when the defendant was on top of her “the whole thing was dream-like” to her. *Al-Hamdani*, 109 Wn. App. 609. The defendant argued that the fact that the victim had said “no” showed that she was not mentally incapacitated, and that because she was an adult and a mother she was aware of the nature and consequences of sex. *Al-Hamdani*, 109 Wn. App.608.

The Court of Appeals, however, rejected the defendant’s arguments, noting that in a case charged as rape in the second degree under the physically helpless of mentally incapacitated prongs “a victim could even express consent, if there is sufficient evidence that the victim was capable of effective consent.” *Al-Hamdani*, 109 Wn. App. at 607. Then court then discussed the above-mentioned evidence and concluded that,

The jury could have reasonably found from the evidence that, despite [the victim’s] previous experience and her testimony that she refused to engage in oral sex, she was incapable of meaningfully understanding the nature or consequences of sexual intercourse at the time it occurred.

Al-Hamdani, 109 Wn. App. at 610.

In the present case, viewing the evidence in a light most favorable to the State, the evidence showed that Ms. Hampton not fully awake during the sexual contact that she was able to remember. Specifically, Ms. Hampton testified that during the events she was trying to wake up but that she “couldn’t fully wake up.” RP 72-73.⁸ In addition, Stolle admitted to Detective Davis that Ms. Hampton appeared to be “semiconscious” and that she seemed to think he was Mr. Nanez. RP 129-30.

From this evidence a reasonable jury could have concluded that at the time of the sexual contact Ms. Hampton was not fully awake but rather in a state of semi-consciousness which qualified as a condition that prevented her from having a meaningful understanding of the nature or consequences of the act of sexual intercourse.

Further, as Ms. Hampton condition prevented her from even being aware of who was in bed with her and touching her, a jury could have reasonably concluded that her state of semi-consciousness prevented her from consenting to acts with Stolle since she was unable understand the “nature or consequences of the act of sexual intercourse” as demonstrated by the fact

⁸ Mr. Nanez also testified that when he finally returned to Ms. Hampton she was “real groggy and still sleepy.” RP 193-94.

that she was unable to even understand who was engaging in sexual contact with her at the time, due to her condition.

Given all of these facts, and viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the sexual contact occurred both while the victim was physically helpless and while she was mentally incapacitated, either of which would have been sufficient to support a conviction in the present case.⁹ Stolle's claim of insufficient evidence, therefore, must fail.

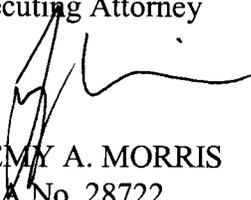
IV. CONCLUSION

For the foregoing reasons, Stolle's conviction and sentence should be affirmed.

DATED March 2, 2010.

Respectfully submitted,

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⁹ See, for instance, *Al-Hamdani*, 109 Wn. App. at 607, noting that "physically helpless or mentally incapacitated" were not alternative means and did not require sufficient evidence under both the "physically helpless or mentally incapacitated" circumstances.