IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CLIFFTON STOLLE, Appellant.	No. 39458-8-II UNPUBLISHED OPINION

Worswick, A.C.J. — Cliffton Stolle appeals his conviction for indecent liberties. He argues: (1) the trial court erred by failing to enter written findings of fact and conclusions of law following a CrR 3.5 hearing, (2) the trial court erroneously admitted his taped confession into evidence, (3) the trial court erred by refusing to admit a transcript of that confession, (4) he was denied effective assistance of counsel, and (5) insufficient evidence supports his conviction. Finding no reversible error, we affirm.

FACTS

On October 11, 2007, after a 16-18 hour work day, M.H. returned to the apartment she shared with her boyfriend, Ryan Nanez. She dressed down to a t-shirt and underpants, and got into bed with Nanez. Nanez laid his chest against her back; M.H. fell asleep. At around 11:00 that night, Nanez went downstairs to Stolle's apartment in the same complex. Five or ten minutes later, Stolle went up to Nanez and M.H.'s apartment. About 15 minutes after that, Nanez went

up to his and M.H.'s apartment and found the door locked. Nanez's knock went unanswered. Nanez went back to Stolle's apartment, then returned to his and M.H.'s apartment about ten minutes later. Nanez spent between five and ten minutes knocking on his apartment door and waiting for a response. Nanez then banged on the door with a plastic bottle. Stolle answered the door, pulling up his pants and boxer shorts. Stolle then left the apartment. When Nanez got back into bed with M.H. he noticed M.H.'s underpants off.

That night, M.H. had been asleep in her bed when she felt hands on her body and a penis touching her vagina from behind. Assuming it was Nanez, she pushed the penis away, saying he should stop because she was tired. She later felt the penis a second time, and then a third time. The third time, she pushed the penis away saying, "You need to seriously knock it off, I'm tired." II Verbatim Report of Proceedings (VRP) at 71. M.H. testified she was unable to fully wake up during these incidents.

In the morning, M.H. found that her underpants were off. She did not remember herself or anyone else removing them. Several days later, M.H. asked Nanez if he had tried to have sex with her in her sleep. Nanez said he had not. The next day, Nanez confronted Stolle and asked if Stolle had tried to have sex with M.H. Stolle said he had. M.H. reported the incident to the police on October 18.

On February 5, 2008, Detective Kenny Davis went to Stolle's residence. Detective Davis asked Stolle to come with him to the police department to discuss the complaint that M.H. had filed. Davis told Stolle "[t]hat he wasn't under arrest. He wasn't in custody." II VRP at 123. Stolle agreed to come to the police department. Stolle rode in the front seat of an unmarked

police car, and was not handcuffed. Detective Davis brought Stolle to an interview room at the police department, informing Stolle 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." II VRP at 125, 127. Detective Davis then interviewed Stolle about the incident. Stolle confessed that he touched M.H.'s breasts and touched her vagina with his penis, but said that she took off her own underpants. Stolle told Detective Davis that he stopped when he heard a knock on the door. Detective Davis recorded a summary interview with Stolle, eliciting Stolle's statements that he understood he was not in custody, as well as his confession about the incident with M.H.

The trial court held a CrR 3.5 confession hearing. At this hearing, the trial court ruled that Stolle's statements to Detective Davis were admissible as noncustodial, voluntary statements. Although the trial court directed the State to prepare written findings and conclusions consistent with this ruling, such findings and conclusions were never entered. At the same hearing, defense counsel made a motion to admit a transcript of Stolle's taped statements as evidence. The trial court denied the motion. The trial court noted that the transcript appeared inaccurate in several places, and that admitting it could cause the jury to focus too much on Stolle's confession. The trial court ruled, however, that the jury would be given copies of the transcript to follow along when they listened to the tape. At trial, the State played the tape, and the jury received copies of the transcript to follow along. Defense counsel then renewed the request to admit the transcript as evidence, which the trial court again denied.

The jury found Stolle guilty of indecent liberties. Stolle appeals.

ANALYSIS

I. CrR 3.5 Findings and Conclusions

Stolle argues that the trial court erred by failing to issue written findings and conclusions of the CrR 3.5 hearing. CrR 3.5 requires courts to hold a hearing before admitting a criminal defendant's out of court statements. After this hearing, a court must issue written findings of the disputed facts, the undisputed facts, its conclusions as to the disputed facts, and its decision as to whether the defendant's statements are admissible. CrR 3.5(c). Here, the trial court failed to issue these written findings after the CrR 3.5 hearing.

The State concedes that the trial court erred by failing to issue written findings and conclusions, but argues that this error was harmless. A trial court's failure to issue written CrR 3.5 findings and conclusions constitutes harmless error "if the court's oral findings are sufficient to allow appellate review." *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998).

Stolle argues that, "[w]ithout 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." Br. of Appellant at 11. Stolle further argues that, without written findings and conclusions, "an appellant is forced to sift through the trial court's oral decision and make up his own argument." Br. of Appellant at 11. This argument is unpersuasive. The record in this case is not excessive. Only one witness testified at the CrR 3.5 hearing, and there were no disputed facts for the court to resolve. The trial court orally concluded that Stolle gave his confession voluntarily while not in custody, outlining the factual findings supporting this conclusion. These oral findings and conclusions mirror the written findings required under CrR 3.5(c). As such, the

trial court's findings and conclusions are sufficient to permit appellate review, rendering the trial court's CrR 3.5 violation harmless. Stolle's argument on this point fails.

II. Confession

Stolle next argues that the trial court erred by admitting the confession Stolle gave to Detective Davis. Stolle argues that Detective Davis's interview was a custodial interrogation, and that Stolle's resulting statements were inadmissible because Stolle was not given *Miranda* warnings. *Miranda* warnings are required before custodial interrogation by a state agent. *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004). An appellate court reviews de novo whether a defendant was in custody. *Lorenz*, 152 Wn.2d at 36.

To support the argument that he was in custody, Stolle cites a six-part test from *United States v. Wolk*, 337 F.3d 997 (8th Cir. 2003). However, Washington courts have not adopted the *Wolk* test. Washington courts apply an objective test to determine whether the defendant was in custody: "whether a reasonable person in the individual's position would believe he or she was in police custody to a degree associated with formal arrest." *Lorenz*, 152 Wn.2d at 36-37. To establish that an interrogation was custodial, "[t]he defendant must show some objective facts indicating his or her freedom of movement was restricted." *State v. Post*, 118 Wn.2d 596, 607, 826 P.2d 172 (1992).

In *State v. Green*, 91 Wn.2d 431, 437, 588 P.2d 1370 (1979), our Supreme Court held that the defendant was not in custody when he was interviewed at a police station, but came to the station voluntarily and was free to leave. *See also State v. Lewis*, 32 Wn. App. 13, 17, 645 P.2d 722 (1982) (interview was noncustodial because the defendant came to the police station

voluntarily, was never arrested, and was free to leave at will). The same circumstances are present here. Stolle came to the interview voluntarily, was not arrested, and was told that he was free to leave at any time. There is no evidence in the record that Stolle tried to leave or was prevented from doing so. As such, Stolle has not shown any "objective facts indicating his . . . freedom of movement was restricted." *Post*, 118 Wn.2d at 607. A reasonable person in Stolle's circumstances would not have believed he "was in police custody to a degree associated with formal arrest." *Lorenz*, 152 Wn.2d at 37. Stolle's interrogation was therefore not custodial, making Stolle's confession admissible without *Miranda* warnings. Stolle's argument on this point fails.

III. Confession Transcript

Stolle next argues that the trial court erred by refusing to admit a transcript of his taped confession into evidence. Appellate courts review evidentiary rulings for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). A trial court abuses its discretion when it adopts a view that no reasonable person would take, applies the wrong legal standard, or relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). Here, the trial court excluded the transcript because admitting it could have caused the jury to focus too much on Stolle's confession, and because of inaccuracies in the transcript. Stolle has not shown any abuse of discretion, so his argument on this point fails.

IV. Ineffective Assistance

Stolle further argues that he was denied effective assistance of counsel at trial based on defense counsel's failure to offer Washington pattern criminal jury instruction 6.41 regarding the

weight and credibility of out-of-court statements. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 6.41, at 196 (3d ed. 2008) (WPIC).[1] The Sixth Amendment to the United States Constitution guarantees effective assistance of counsel. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 779-80, 863 P.2d 554 (1993) (citing *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 674 (1984)). Denial of effective assistance is manifest error affecting a constitutional right, reviewable for the first time on appeal. *See State v. Holley*, 75 Wn. App. 191, 196-97, 876 P.2d 973 (1994); RAP 2.5(a). Appellate courts review an ineffective assistance of counsel claim de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).

Washington follows the ineffective assistance of counsel test set forth in *Strickland*, 466 U.S. 668. *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). The *Strickland* test has two prongs. 466 U.S. at 687. First, the defendant must show that counsel's performance was so deficient as to no longer function as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687.[2] Second, the defendant must show that counsel's deficient performance prejudiced the defendant's case. *Strickland*, 466 U.S. at 687.[3] A legitimate trial strategy cannot serve as the basis for deficient performance. *State v. Aho*, 137 Wn.2d 736,

[1] WPIC 6.41 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."

[2] A defendant shows deficient performance by demonstrating that counsel's performance fell below an objective standard of reasonableness. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

[3] A defendant shows prejudice by demonstrating "that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *Reichenbach*, 153 Wn.2d at 130.

745, 975 P.2d 512 (1999).

Our Supreme Court has recognized that an instruction on the weight and credibility of a confession may highlight the confession in the eyes of the jurors, and that failing to give such an instruction is therefore a legitimate trial strategy. *State v. Taplin*, 66 Wn.2d 687, 692, 404 P.2d 469 (1965). As such, defense counsel's decision to not offer WPIC 6.41 can be viewed as a legitimate trial strategy and Stolle cannot satisfy the first prong of the *Strickland* test. Because both prongs must be satisfied, his ineffective assistance claim fails.

V. Sufficiency of the Evidence

Stolle finally argues that there was insufficient evidence to support his conviction. In evaluating the sufficiency of the evidence, an appellate court reviews the evidence in the light most favorable to the State. *State v. Drum*, 168 Wn.2d 23, 34, 225 P.3d 237 (2010). "The relevant question is 'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.'" *Drum*, 168 Wn.2d at 34-35 (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)).

"A person is guilty of indecent liberties when he or she knowingly causes another person who is not his or her spouse to have sexual contact with him or her or another . . . [w]hen the other person is incapable of consent by reason of being mentally defective, mentally incapacitated, or physically helpless[.]" RCW 9A.44.100(1), (1)(b). "'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). "'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." RCW 9A.44.010(4). "'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(5).

Stolle argues that the State failed to prove that M.H. was mentally incapacitated. Stolle argues that because M.H. was aware that someone was trying to have sex with her, she was not mentally incapacitated within the meaning of the statute. However, the jury could have convicted Stolle based on a finding that he had sexual contact with M.H. when she was physically helpless. One who is asleep is physically helpless. *State v. Puapuaga*, 54 Wn. App. 857, 861, 776 P.2d 170 (1989); RCW 9A.44.010(5). And touching a woman's breasts for sexual gratification is sexual contact. RCW 9A.44.010(2). In Stolle's confession, he stated that he touched M.H.'s breasts. M.H., however, did not report her breasts being touched. Taking this evidence in the light most favorable to the State, a rational jury could conclude that Stolle touched M.H.'s breasts in her sleep for sexual gratification, constituting sexual contact while M.H. was physically helpless. The jury could have rationally found Stolle guilty of indecent liberties on this basis alone. Additionally, M.H.'s testimony makes clear that she was awakened by hands on her body and a penis touching her vagina from behind. Taking this evidence in the light most favorable to the State, a rational jury could conclude that Stolle began the sexual contact while M.H. was asleep (and therefore physically helpless), and that Stolle had already committed the crime when M.H. partially woke up. Because there were multiple bases for a rational jury to find Stolle's guilt beyond a reasonable doubt, sufficient evidence supports Stolle's conviction.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

We concur:

Quinn-Brintnall, J.

Serko, J.P.T.