

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RONALD KEAL,

Appellant.

No. 38095-1-II

UNPUBLISHED OPINION

Worswick, A.C.J. — Ronald Keal appeals his convictions for resisting arrest and third degree assault. He argues that law enforcement’s warrantless entry into his wife’s apartment to arrest him violated the federal and state constitutions. We affirm.

FACTS

During 2007, Deborah Keal resided in the Woodmark Apartments complex. Her lease did not include her husband, Keal,¹ as a resident. Beginning in January, the apartment complex’s assistant property manager, Kathie Offner, began to suspect that Keal was illegally residing in Deborah’s apartment. Offner observed Keal at the complex several times a day working on his car, loitering with residents, and smoking outside, all of which violated the complex’s rules. Offner verbally warned Deborah and Keal several times about his noncompliant behavior and, when her warnings went ignored, Offner began issuing 10-day notices to comply or vacate.

Sometime in February or March, Offner issued a 10-day notice informing Deborah that Keal was an “illegal occupant” of her apartment and that either he had to apply for residency or Deborah had to vacate the premises. II Verbatim Report of Proceedings (VRP) at 65.

¹ For clarity, we refer to Deborah Keal by her first name. We intend no disrespect.

Subsequently, Keal applied to be added to Deborah's lease. The complex denied his application on April 23.

Deputy Kevin Fries, a Pierce County Sheriff's Deputy, works as a security officer for the apartment complex during his off-duty hours. While working as security at the apartment complex, Deputy Fries wore either his full deputy's uniform or a "one-piece jumpsuit" with patches identical to his full uniform, and badges. II VRP at 127. He drove a fully-marked sheriff's department patrol car while working as a security guard. Deputy Fries wore a portable radio while working as an off-duty security guard as he was required to respond to dispatch calls from the sheriff's department. Keal previously had observed Deputy Fries initiating an arrest of an individual while working at the complex.

Deputy Fries repeatedly observed Keal at the apartment complex flagging down cars, hanging out of windows, and drinking beer in the parking lot. Deputy Fries knew that Keal was not a resident of the complex and had confronted him in the past to request that he comply with the complex's rules. On March 30, 2007, Deputy Fries issued a trespass notice to Keal because he was working on his car in the complex's parking lot.² The written no-trespass notice did not contain any terms or conditions. Deputy Fries, however, told Keal that he had permission to visit only Deborah, could only enter the complex to go directly to her apartment, and had to use the same route to exit. Despite the rejected residency application and the no-trespass notice, Offner still observed Keal at the complex violating its rules.

² The complex's management had authorized Deputy Fries to issue trespass notices to individuals. Deputy Fries filed reports with the Sheriff's Department when he issued trespass notices.

On May 18, 2007, Deputy Fries was patrolling the complex's property in his patrol car while Offner rode along. During the patrol, which lasted about two hours, Offner and Deputy Fries observed Keal on the complex's grounds several times. Later, Deputy Fries saw Keal talking to a female, then walking toward Building B of the complex. According to Offner and Deputy Fries, Keal would not have been in that area of the complex had he been proceeding directly to Deborah's apartment. When Keal saw Deputy Fries pull into the parking lot and park, he began walking back toward Deborah's apartment building.

Deputy Fries exited his vehicle and asked Keal what he was doing. Keal stated that he was talking to the female. When Deputy Fries told him that he was not supposed to talk to other people on the property, Keal pointed his finger at him and said "don't f*** with me." II VRP at 148. At that point, Deputy Fries informed Keal that he was under arrest for trespassing and called for backup because "[he] could tell that [Keal] was getting confrontational." II VRP at 148-49.

At that time, Deborah emerged from her apartment and stood between Deputy Fries and Keal, and maintained that Keal was not under arrest. Deputy Fries told Deborah that Keal was indeed under arrest for trespassing, prompting her and Keal to walk backwards into her apartment. Deputy Fries continued to insist that Keal was under arrest, while Keal repeatedly insisted that he wasn't. When Deputy Fries attempted to follow Keal and Deborah into the apartment, Keal slammed the apartment's door on Deputy Fries's foot and pushed on it, preventing Deputy Fries from removing his foot or entering. Deputy Fries informed Keal that he was resisting arrest and asked him to step outside to be handcuffed. When Keal refused, Deputy Fries again informed him that he was resisting arrest.

When other deputies arrived, Keal backed away from the door, and Deputy Fries and other deputies entered the apartment. Keal then assumed a fighting stance. Deputy Fries deployed his stun gun against Keal, which did not subdue him. Keal began flailing his arms, striking Deputy Fries in the chest and jaw, and knocking him over a chair. The deputies were finally able to subdue Keal with pepper spray.

The State charged Keal with second degree criminal trespass, resisting arrest, and third degree assault. Before trial, Keal filed a motion to dismiss all three charges, which the trial court denied. In doing so, the trial court found that probable cause supported Deputy Fries's arrest of Keal for criminal trespass outside Deborah's apartment.

At trial, Keal renewed his motion to dismiss all three charges after the State rested its case. The trial court dismissed the trespass charge concluding that a reasonable jury, based on the State's evidence viewed in a light most favorable to the State, could not find Keal guilty beyond a reasonable doubt.

During the remainder of trial, Keal called Deborah's next door neighbor, Mechelle West, as one of his witnesses. West testified about the encounter between Keal and Deputy Fries outside the apartment. West also testified about the sounds she heard coming from Deborah's apartment during Keal's arrest. Deborah testified to the events outside and inside her apartment. The jury convicted Keal on the remaining charges of resisting arrest and third degree assault.

After his trial but before sentencing, Keal filed a motion to dismiss his trial counsel and trial counsel moved to withdraw from the case, which the trial court granted. Keal's new defense counsel filed a motion for a new trial, arguing that trial counsel was ineffective for failing to speak

to certain witnesses and call them to testify at trial. The motion contained the declarations of Crystallyn and Zephram Cole, who averred that they witnessed the events outside Deborah's apartment and heard the events inside her apartment. The motion also attached photographs showing Keal's injuries sustained during the arrest and the condition of Deborah's apartment after the arrest. The trial court denied the motion.

A jury convicted Keal of resisting arrest and third degree assault. Keal appeals.

ANALYSIS

For the first time on appeal, Keal contends that Deputy Fries's warrantless entry into Deborah's apartment violated both the Fourth Amendment of the federal constitution and article I, section 7 of the state constitution, and that because his arrest was unlawful, his conviction must be reversed. The State argues that exigent circumstances justified the warrantless entry.

Under RAP 2.5(a), parties generally may not raise claims for the first time on appeal. But appellants may raise claims for the first time on appeal if the errors claimed constitute manifest error affecting a constitutional right. RAP 2.5(a)(3). In order to establish manifest constitutional error, appellants must demonstrate actual prejudice resulting from the error. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). To show actual prejudice, the defendant must show that the error had practical and identifiable consequences in the trial. *Kirkman*, 159 Wn.2d at 935.

The remedy for a violation of both the Fourth Amendment and article I, section 7 is suppression of evidence under the exclusionary rule. *State v. Valdez*, 167 Wn.2d 761, 778, 224 P.3d 751 (2009); *see also Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). This rule applies to all evidence obtained either during or as a direct result of an

unconstitutional search or seizure. *Valdez*, 167 Wn.2d at 778. To determine whether the unlawful entry lead to manifest error at trial, we ask whether the exclusionary rule would have barred evidence of Keal's crimes if the issue had been raised. If, assuming that the entry was unlawful, the exclusionary rule would not have barred the evidence at issue, then admitting this evidence was not error and we need not address whether the entry was lawful. As such, we begin by assuming without deciding that the entry was unlawful, and asking whether the exclusionary rule would have barred the evidence at issue.

Keal argues that his conviction must be reversed under *State v. Counts*, 99 Wn.2d 54, 60-61, 659 P.2d 1087 (1983). In *Counts*, our Supreme Court reversed the conviction of a defendant who committed assault against the police after an unlawful entry. 99 Wn.2d at 59-61. But the *Counts* court did not consider the exclusionary rule, or find that evidence should have been excluded at trial. Rather, the court remanded for a new trial, ordering that the jury be instructed on the issue of self defense against an unlawful arrest. 99 Wn.2d at 61. *Counts* does not address the issue here, which is whether Keal has shown manifest error under the exclusionary rule. Furthermore, to the extent that *Counts* supports Keal's argument, it is no longer good law.

In *State v. Mierz*, 127 Wn.2d 460, 473-75, 901 P.2d 286 (1995), our Supreme Court held that when police officers (1) are identified as such, (2) are performing their duties in good faith, and (3) do not exploit any constitutional violation, evidence of assault against them after an unlawful entry is not barred by the exclusionary rule. The *Mierz* court reasoned that, in such circumstances, evidence of assault does not flow from the constitutional violation and thus is outside the purview of the exclusionary rule. 127 Wn.2d at 475. Also, suppressing such evidence

would allow suspects to assault police officers with impunity, contrary to public policy. 127 Wn.2d at 473-74. Assuming for the sake of argument that *Counts* would require exclusion of evidence of an assault on police officers under these circumstances, it was abrogated by *Mierz*.

First, Deputy Fries was in full uniform and driving an official sheriff's department vehicle, which identified him as a police officer while serving as the apartment complex security guard. Second, off-duty officers act in the discharge of their official duties when they are in uniform and armed, when they identify themselves as police officers, and when they are acting on probable cause that a crime has been committed. *See State v. Graham*, 130 Wn.2d 711, 723, 927 P.2d 227 (1996). Here, Deputy Fries was in uniform and armed, had probable cause to believe that Keal was trespassing, and there is no evidence that he acted in bad faith. And third, Deputy Fries did not exploit a constitutional violation because by entering Deborah's apartment he did not gain any new information about the crimes he had probable cause to arrest Keal for. Hence, under *Mierz*, the exclusionary rule would not have barred evidence of Keal's assault against Deputy Fries.

The exclusionary rule also would not have barred evidence of Keal's resisting arrest, because that crime occurred before the purportedly unlawful entry. "A person is guilty of resisting arrest if he intentionally prevents or attempts to prevent a peace officer from lawfully arresting him." RCW 9A.76.040. A person resists arrest when he walks away after being told he is under arrest. *See State v. Simmons*, 35 Wn. App. 421, 426, 667 P.2d 133 (1983). Before entering Deborah's apartment, Deputy Fries informed Keal that he was under arrest, and Keal responded by disagreeing and retreating into the apartment. The arrest was lawful based on valid probable cause. And Keal's attempt to retreat into the apartment where Deputy Fries could not

reach him completed the crime of resisting arrest. See *Simmons*, 35 Wn. App. at 426. This crime occurred before the purportedly unlawful entry. Evidence of the crime of resisting arrest therefore could not have been obtained during or as a result of the unlawful entry, and is not subject to the exclusionary rule. See *Valdez*, 167 Wn.2d at 778. As such, the exclusionary rule would not have barred any of the evidence showing Keal's resisting arrest.

Because the exclusionary rule would not have barred the evidence of Keal's resisting arrest or his assault on Deputy Fries, the purportedly unlawful entry did not prejudice Keal as to either of these crimes. Because Keal has not shown actual prejudice resulting from the claimed constitutional error, the claimed error is not manifest and we do not consider it for the first time on appeal. RAP 2.5(a); *Kirkman*, 159 Wn.2d at 935. We hold that Keal's claim under the Fourth Amendment and article I, section 7 fails.

Statement of Additional Grounds

Keal raises additional claims pro se in his statement of additional grounds (SAG).³ He raises claims of unlawful arrest under article I, section 7, trial court error in failing to dismiss the resisting arrest and third degree assault counts, ineffective assistance of trial counsel, evidentiary error, and cumulative error.

First, Keal contends that Deputy Fries' contact with him outside Deborah's apartment was a pretextual stop in violation of article I, section 7 because the allegation that Keal was trespassing was unfounded. But a law enforcement officer may arrest an individual without a warrant where the officer has probable cause to believe that the individual has committed criminal

³ RAP 10.10(a).

trespass. RCW 10.31.100(1). Here, the trial court found that Deputy Fries had probable cause to arrest Keal for criminal trespass. Keal does not assign error to this finding on appeal, and we treat it as a verity. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). We hold that his argument fails.

Second, Keal contends that the trial court erred when it dismissed the criminal trespass count, but not the resisting arrest and third degree assault counts, because the “probable cause document was insufficient.” SAG at 1. But the trial court did not find that the arrest for criminal trespass lacked probable cause. It dismissed that count because it found that no reasonable juror could find it proven beyond a reasonable doubt. Reasonable doubt is a greater standard of proof than probable cause. *See State v. Bellows*, 72 Wn.2d 264, 266, 432 P.2d 654 (1967). Thus, the trial court did not disturb its earlier finding of probable cause when it later dismissed the charge under the reasonable doubt standard. We hold that this argument fails as well.

Third, Keal contends that Deputy Fries unlawfully arrested him because Deputy Fries was an off-duty law enforcement officer working as a private security guard. As analyzed above, under *Graham*, Deputy Fries was acting in his official capacity when he arrested Keal. 130 Wn.2d at 723. Deputy Fries therefore had lawful authority to arrest Keal, and this claim fails.

Fourth, Keal contends that Deputy Fries’s warrantless arrest and entry into Deborah’s apartment requires reversal and dismissal of his convictions. As discussed above, the trial court’s unchallenged finding of probable cause supports Keal’s arrest. And Keal has failed to demonstrate manifest constitutional error regarding the warrantless entry, so his claim on this point fails.

Fifth, Keal argues that he received ineffective assistance of counsel when trial counsel did not interview potential witnesses Crystallyn Cole and Zephram Cole, did not call Joanie Palmer as a witness at trial, did not present certain evidence, such as photographs, a “taser box,” a “camera phone,” and a “CD of [Deputy] Fries” at trial, and did not file a “motion to overturn a guilty verdict.” SAG at 3.

We review claims of ineffective assistance of counsel de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel’s objectively deficient performance prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We strongly presume that counsel is effective, and the defendant must show that there was no legitimate strategic or tactical reason supporting defense counsel’s actions. *McFarland*, 127 Wn.2d at 336. To demonstrate prejudice, the defendant must show that trial counsel’s inadequate performance probably changed the outcome at trial. *McFarland*, 127 Wn.2d at 335.

A defendant raising a “failure to investigate” claim must show “a reasonable likelihood that the investigation would have produced useful information not already known to defendant’s trial counsel.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). Even if a defendant makes this showing, the court must still consider whether counsel’s deficient performance prejudiced the defendant. *Davis*, 152 Wn.2d at 739. “In evaluating prejudice, ‘ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government’s case.’” *Davis*, 152 Wn.2d at 739 (quoting *Rios v. Rocha*, 299 F.3d 796, 808, (9th Cir. 2002)) (internal quotation marks omitted).

In his motion for a new trial, Keal conceded the possibility that the testimony of Crystallyn and Zephram Cole may have been cumulative taken with Mechelle West's testimony. A review of the record confirms the cumulative nature of their testimony. Because their testimony was cumulative, Keal has not shown a reasonable likelihood that defense counsel's investigation would have produced useful information not already known. Keal argues that the additional witnesses could have affected the jury's credibility findings, but Keal's mere conjecture that credibility determinations might have weighed in his favor is inadequate to meet his burden to show ineffective assistance.

Regarding defense counsel's decision not to call Joanie Palmer as a witness, "[t]he decision whether to call a witness is ordinarily a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." *State v. Kolesnik*, 146 Wn. App. 790, 812, 192 P.3d 937 (2008). Here, defense counsel interviewed Palmer and chose not to call her as a witness. The record does not reflect and Keal does not inform the court as to the nature of her testimony or its potential effect on the trial's outcome. Because Keal has not informed the court as to the nature and occurrence of the claimed error, we do not consider whether failure to call Palmer was ineffective assistance. RAP 10.10(c).

Regarding defense counsel's failure to introduce physical evidence, Keal does not elaborate on the nature of any of it, and aside from the photographs, none of this evidence is in the record. Because the record does not contain the evidence at issue and this court has no information as to its probative value, Keal has not informed the court of the nature and occurrence of the error and we do not review whether failure to introduce this evidence was

ineffective assistance. RAP 10.10(c).

Regarding defense counsel's failure to admit the photographs, the jury heard testimony from multiple witnesses about Keal's injuries and the condition of Deborah's apartment resulting from his arrest. Relevant evidence is inadmissible where its probative value is substantially outweighed by its cumulative nature. ER 403. We find that Keal's injuries and the condition of Deborah's apartment were adequately addressed at trial, making the photographs highly cumulative, and that counsel's failure to seek their admittance was not ineffective assistance.

Regarding defense counsel's failure to submit a "motion to overturn a guilty verdict," such failure did not occur. Keal's post trial appointed counsel filed a motion for a new trial, so Keal cannot show deficient performance on this basis.

Because Keal has failed to show deficient performance and prejudice as to all of his claimed errors, we find that he has failed to show ineffective assistance of counsel and his claim to that effect fails.

Sixth, Keal contends that the trial court erred in ruling that evidence of his prior conviction for first degree robbery was admissible if he testified. Robbery is a crime of dishonesty. *State v. Rivers*, 129 Wn.2d 697, 705, 921 P.2d 495 (1996). We review a trial court's ruling allowing admission of prior convictions for a crime of dishonesty for abuse of discretion. *State v. Teal*, 117 Wn. App. 831, 844, 73 P.3d 402 (2003). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). ER 609(b) requires the trial court, in order to admit a conviction for a crime of dishonesty more than 10 years old, to determine on the record that its probative value

substantially outweighs its prejudicial effect. *See also State v. Russell*, 104 Wn. App. 422, 433, 16 P.3d 664 (2001). “The 10-year period starts at conviction or ‘release from confinement for that conviction,’ whichever is later.” *Russell*, 104 Wn. App. at 432.

The record contains only conflicting statements from the prosecuting attorney and trial counsel regarding the relevant dates. Regardless, the trial court performed the required balancing test. We hold that it did not abuse its discretion in ruling that the evidence was admissible.

Seventh, Keal argues that the trial court erred by not admitting evidence of Deborah’s acquittal of an obstructing justice charge related to the incident at her apartment and the dismissal of Keal’s criminal trespass count. We review the trial court’s decision to admit or exclude evidence for abuse of discretion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *Rafay*, 167 Wn.2d at 655. Here, the trial court concluded that the prejudice to the State’s case from admitting either piece of evidence outweighed their probative value. We hold that the trial court did not abuse its discretion.

Finally, Keal contends that the cumulative error doctrine requires reversal of his convictions. But all his claims of error fail, leaving no error to cumulate. We affirm his convictions in an unpublished opinion.

Affirmed.

38095-1-II

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:

Armstrong, J.

Appelwick, J.