IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN MICHAEL ZORN, Appellant.	No. 41742-1-II UNPUBLISHED OPINION

Penoyar, J. — John Zorn appeals his second degree assault conviction,[1] arguing that the trial court erred by imposing community custody conditions that prohibited him from possessing alcohol and ordered him to submit to a mental health screening and complete any recommended treatment. He also argues that the trial court improperly instructed the jury on the definition of reckless, relieving the State of its burden to prove a necessary element of the crime beyond a reasonable doubt. Zorn did not preserve the jury instruction issue for appellate review; accordingly, we affirm his conviction. However, because the trial court lacked statutory authority to (1) prohibit Zorn from possessing alcohol or (2) require him to submit to a mental health evaluation and treatment, we remand for the trial court to strike those conditions.

FACTS

On October 18, 2010, at a Wal-Mart in Shelton, a customer observed Zorn walking through the store "yelling . . . about the government hacking into his computer and his cell phone" and saying "he was going to talk to a CEO or the FBI or somebody." Report of Proceedings (RP) at 118. An employee observed Zorn acting "really angry and agitated, yelling . . . irrational

[1] In violation of former RCW 9A.36.021 (2007).

statements" and saying "the F-ing police and people had called him a crack dealer and they were• the FBI was after him." RP at 100. Zorn then began to leave the store and on his way out, he passed Adrian Leonard, another customer, who called Zorn a "crack head." RP at 80. Zorn exited and then immediately reentered the store, approached Leonard, and punched him in the face. Leonard sustained a broken nose and several facial fractures.

The State charged Zorn with second degree assault. The trial court instructed the jury on the requisite elements of second degree assault and defined reckless or recklessly in a separate instruction. Zorn did not object to these instructions.

The jury found Zorn guilty, and the trial court sentenced him to 12 months' confinement and 12 months of community custody. As a condition of community custody, the trial court ordered that Zorn "not possess or consume any mind or mood-altering substances, to include the drug alcohol, or any controlled substances, except pursuant to lawfully issued prescriptions." Clerk's Papers (CP) at 17. The trial court also ordered Zorn to participate in a "mental health evaluation within 30 days of release from custody" and to "successfully participate in and complete all recommended treatment." CP at 17. Zorn appeals.

ANALYSIS

I. Community Custody Conditions

Zorn argues that the trial court erred when it imposed community custody conditions that prohibited him from possessing alcohol and that ordered him to submit to a mental health evaluation and treatment. Because the court did not have the statutory authority to impose the conditions, we agree with Zorn.

A. Standard of Review

We allow a defendant to challenge for the first time on appeal whether a trial court had the statutory authority to impose sentencing conditions. *State v. Julian*, 102 Wn. App. 296, 304, 9 P.3d 851 (2000). Whether a trial court had the statutory authority to impose a sentencing condition is a matter of statutory interpretation and the standard of review is de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Our goal when interpreting a statute is to discern and implement the legislature's intent. *Armendariz*, 160 Wn.2d at 110. Where the plain language of a statute is unambiguous, the legislative intent is apparent and we will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

B. Possession of Alcohol

Zorn argues that the trial court exceeded its authority by prohibiting him from possessing alcohol where it did not play a role in the crime.[2] The State concedes this issue. We accept the State's proper concession.

A trial court may impose any prohibitions and affirmative conditions, so long as they relate to the offender's crime. RCW 9.94A.505(8). When imposing community custody, the court shall order the offender to "[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions" and it may order the offender to "[r]efrain from consuming alcohol." RCW 9.94A.703(2)(c), (3)(e).

Here, the trial court ordered Zorn not to possess alcohol. RCW 9.94A.703 does not authorize such a prohibition. Nor is it authorized by RCW 9.94A.505(8) which authorizes sentencing courts to impose crime-related prohibitions. A prohibition is "crime-related" if it directly relates to the circumstances of the crime. RCW 9.94A.030(10). As the State points out,

[2] Zorn does not challenge the condition prohibiting his consumption of alcohol.

there is no evidence that alcohol related to Zorn's crime. The trial court had no authority to preclude Zorn from possessing alcohol. The State's concession is well-founded, and we remand for resentencing.

C. Mental Health Evaluation and Treatment

Zorn next argues that the trial court lacked authority to order him to undergo a mental health evaluation and treatment without finding that (1) reasonable grounds existed to believe that he was mentally ill and (2) the condition most likely influenced the offense. The State responds that Zorn relies on out-of-date authority and that the trial court acted appropriately because it could reasonably infer that Zorn had a mental illness that contributed to the crime. Because neither the parties nor the court formally inquired into Zorn's mental status prior to sentencing, as RCW 9.94B.080 requires, we agree with Zorn.

As a condition to his community custody, the trial court ordered Zorn to undergo "a mental health evaluation" and "successfully participate in and complete all recommended treatment." CP at 17. Trial courts can order an offender to participate in "crime-related treatment or counseling services." RCW 9.94A.703(3)(c). To establish whether mental health treatment is crime related, the court must find "that reasonable grounds exist to believe that the offender is a mentally ill person . . . and that this condition is likely to have influenced the offense." RCW 9.94B.080; *see also State v. Jones*, 118 Wn. App. 199, 208–09, 76 P.3d 258 (2003). The order must be based on "a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity." RCW 9.94B.080; *see Jones*, 118 Wn. App. at 210. Chapter 9.94B RCW, which includes the mental health evaluation and treatment provision, "supplements

chapter 9.94A RCW and should be read in conjunction with that chapter." RCW 9.94B.010(2).

Here, the trial court did not obtain a presentence report or mental status evaluation and did not find that Zorn had a mental illness that contributed to his crimes. The trial court erred when, without following the statutory prerequisites, it ordered mental health treatment and counseling.

The State argues that trial courts have authority under RCW 9.94A.703(3)(d) to order an offender to "perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." But courts cannot use this broad statutory language to require mental health evaluations.[3] *See Jones*, 118 Wn. App. at 210.[4] Because the trial court erroneously required Zorn to submit to a mental status evaluation and any recommended treatment, we reverse and remand for resentencing.

II. Jury Instructions

Next, Zorn argues that the trial court erred when it provided the jury with an incorrect definition of "recklessness." He contends that by giving the jury the erroneous instruction, the

[3] In *Jones*, we concluded that if it was to characterize mental health treatment and counseling as "'affirmative conduct reasonably related' . . . with or without evidence that the offender suffered from a mental illness that had influenced his crimes, we would negate and render superfluous [the] requirement that such counseling be 'crime-related.'" 118 Wn. App. at 210.

[4] In *Jones*, we considered whether former RCW 9.94A.715(2)(b) (2000) permitted the trial court to order the defendant to participate in mental health treatment and counseling. 118 Wn. App. at 207. Former RCW 9.94A.715(2)(b) stated that when sentencing for certain crimes committed on or after July 1, 2000, a trial court may order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offenders risk of reoffending, or the safety of the community. The statute was repealed in 2009. Laws of 2009, ch. 28, § 42; Laws of 2008, ch. 231, § 57. But, here, the statute at issue, RCW 9.94A.703(3)(d), contains language identical to the language of former RCW 9.94A.715(2)(b); thus, in analyzing RCW 9.94A.703(3)(d), we adopt our analysis of former RCW 9.94A.715(2)(b).

trial court relieved the State from the burden of proving an essential element of second degree assault. Zorn asserts that this is a manifest constitutional error that we may review for the first time on appeal. Because the error was not manifest, we decline to review this issue for the first time on appeal.

A. Factual Background

The trial court's instructions to the jury included three references to the term "reckless." First, the trial court defined second degree assault: "A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." CP at 35 (Instr. 6). Second, the trial court separately defined reckless: "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation." CP at 38 (Instr. 9). Finally, the court provided the "to convict" instructions:

> To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about October 18, 2010 the defendant intentionally assaulted Adrian R. Leonard;
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> (2) That the defendant thereby recklessly inflicted substantial bodily harm on Adrian R. Leonard; and
>
> (3) That this act occurred in the State of Washington.

CP at 42 (Instr. 13). Neither party objected to these instructions.

B. Manifest Constitutional Error

We may refuse to review a claim of error not raised at the trial court, but a party may raise

a "manifest error affecting a constitutional right" for the first time on appeal. RAP 2.5(a)(3); *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). Our Supreme Court has held that errors in jury instructions may be of a constitutional magnitude where they omit an element of the crime charged. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). Zorn contends that the trial court should have substituted the term "substantial bodily harm" for the term "wrongful act" in jury instruction 9. Here Zorn raises an issue of constitutional magnitude because if in fact the jury instruction misstated the mental state required to convict Zorn of second degree assault, then the State would be relieved of its burden to prove a necessary element of the crime.

Zorn, however, fails to demonstrate that the error was manifest. A manifest error of constitutional magnitude requires a showing of actual prejudice. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To demonstrate actual prejudice, there must be a "'plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.'" *O'Hara*, 167 Wn.2d at 99 (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). To determine whether an error is practical and identifiable, we must place ourselves in the trial court's shoes to ascertain whether, given what the trial court knew at the time, the court could have corrected the error. *O'Hara*, 167 Wn.2d at 100. It is not the role of an appellate court to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. *O'Hara*, 167 Wn.2d at 100.

Here, the trial court derived the language in jury instruction 9 directly from the applicable statute.[5] The instruction was an accurate, exact statement of statutory authority. Neither the

[5] "A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk

State nor Zorn objected to the instruction and they were justified in choosing not to because, on its face, the instruction appeared accurate.

Zorn argues that *State v. Harris* held that the same jury instruction defining reckless was manifest constitutional error. 164 Wn. App. 377, 263 P.3d 1276 (2011). In *Harris*, we held that the trial court misstated the law when it instructed the jury that a person acts recklessly when they "know[ ] of and disregard[ ] a substantial risk that a wrongful act may occur." 164 Wn. App. at 384-85. We rejected the State's argument that the wrongful act definition tracked the pattern instructions, reasoning that the pattern instructions provide the "'wrongful act' in brackets immediately followed by a direction to 'fill in more particular description of act, if applicable.' 11 WPIC 10.03, at 209." *Harris*, 164 Wn. App. at 385. By instructing the jury that Harris acted recklessly if he knew of and disregarded a substantial risk that a wrongful act might occur, we held that the trial court misstated the law and relieved the State of proving a necessary element of the crime. *Harris*, 164 Wn. App. at 383, 385.

Zorn's case is distinguishable from *Harris* in two significant ways. First, Harris had preserved his argument below, so we never addressed whether the error was manifest or constitutional. 164 Wn. App. at 384. Here, in addition to failing to object to the instruction, Zorn's counsel made no attempt to distinguish a wrongful act from substantial bodily harm. Rather, when given the opportunity to address the erroneous definition of reckless, defense counsel instead focused his argument on whether Zorn's conduct grossly deviated from the expected conduct of a reasonable person in his position. Zorn's counsel never addressed any

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that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(c).

disparity between a "wrongful act" and "substantial bodily harm" and made no attempt to preserve such an argument.

Second, *Harris* was decided after Zorn's trial took place.[6] We cannot expect the trial court to have anticipated *Harris*'s reasoning and sua sponte revise the proposed jury instruction. *See O'Hara*, 167 Wn.2d at 100 (appellate courts will not address claims where the trial court could not have foreseen the potential error). The trial court and the parties were justified in understanding that the instruction was an accurate statement of the law pulled directly from a statute and not erroneous on its face. Because Zorn fails to show that the instruction had practical and identifiable consequences at trial, the error was not manifest. We decline to consider this issue for the first time on appeal. *See* RAP 2.5(a).

We remand to strike the community custody conditions prohibiting Zorn from possessing alcohol and requiring him to submit to a mental health evaluation and treatment. We otherwise affirm.

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 in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

[6] Zorn's trial took place December 14–16, 2010, and *Harris* was not filed until October 18, 2011. 164 Wn. App. 377.

Quinn-Brintnall, J.

Johanson, A.C.J.