IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RUSSELL GAIL TUCKER, Appellant.	No. 37908-2-II UNPUBLISHED OPINION

Van Deren, C.J. — Russell Tucker appeals his conviction for indecent liberties without forcible compulsion. He argues that his counsel was ineffective for failing to request a voluntary intoxication jury instruction and for eliciting impermissible opinion testimony. In the alternative, he argues that the two instances of ineffective assistance amounted to cumulative error requiring reversal. We affirm.

FACTS

On the night of January 27, 2007, Danette Denison attended a 21st birthday party for her son, Joshua Damis, at the home of Brad and Shiela Damis in Clark County, Washington. Brad is Denison's ex-husband and Joshua's father. Tucker, who is Shiela's brother, also attended the birthday party.

Denison drank a margarita and "at least five straight shots." Report of Proceedings (RP)

at 139. She testified that she takes the medication Zoloft every morning for anxiety and that she took Zoloft at approximately 4:00 am that morning. Denison does not normally drink alcohol "[b]ecause it makes [her] sick" and she "do[es]n't like the way it tastes, [she] do[es]n't like the way it makes [her] feel." RP at 137-38.

At some point during the party, Denison began feeling sick. She "went in the kitchen and sat down on the floor." RP at 142. Denison's daughter, Jessica Damis,[1] Shiela, and Joshua's friend helped Denison to the bathroom. Denison began vomiting. She testified that she became sick at approximately 12:00 am and that she "vomited till there was nothing left in [her] system." RP at 143-44. Shiela and Jessica put Denison to bed on a "blowup mattress" in a "bedroom downstairs right by the front door." RP at 145.

Tucker testified that he played pool and darts throughout the party and that he was "drinking over the course of the night." Tucker was intoxicated, but not "too intoxicated to hit the dartboard." RP at 404. He "knew [he] had had too many drinks for driving" at the end of the party, so he stayed the night. RP at 409. Tucker slept on a lounge chair in the living room, immediately outside the room where Denison slept.

Denison "remember[ed] waking up to somebody whispering very, very, very filthy things in [her] ear." RP at 146. The person was "[s]pooning [Denison] from behind" while she lay on her side. RP at 147. "He had pulled my bra completely up . . . and it was like up on my chest, and my shirt was pulled all the way up, and [he] had both of my bare breasts in each of his hands." RP at 148. It was dark in the room, but Denison was "able to see clearly who it was." RP at 149. When asked if she knew who the person was, Denison identified Tucker. Denison "jumped up

[1] Because they share the same last name, we refer to Brad, Shiela, Joshua, and Jessica Damis by their first names for clarity.

and so did [Tucker], and he started saying 'Oh, my gosh, oh, my gosh, how'd I get in here?'" RP at 149.

Denison opened the door and immediately walked upstairs. She found her niece, Khoriey Corbin, in one of the rooms upstairs, and "told [Corbin] to please get somebody to help [her] because [Tucker] is trying to do nasty stuff." RP at 151. Corbin saw Tucker approach the door to her room and she asked him what he wanted; Tucker asked where the bathroom was and then went back downstairs.

Denison and Corbin went downstairs to find Jessica. Jessica woke Brad and Shiela and told them what happened. Shiela and Brad both testified that they believed it was approximately 4:30 am the morning of January 28 when Jessica woke them up. Shiela approached Tucker, who was asleep in the chair in the living room. Tucker testified that he had no idea what Shiela was talking about when she woke him up to ask him about the incident. Brad told Tucker that he needed to leave and he did.

Clark County Deputy Sheriff Todd Baker met with Denison on January 29, 2007. Baker then visited Tucker's home. Tucker told Baker that "he had a drinking problem and he had drank [sic] way too much that night, and that somehow he ended up in Danette's bedroom." He also told Baker that he drank "a couple beers and some Captain Morgan's . . . and Coke" at the party and that "he'd blacked out, and he can't remember anything that had happened that night." RP at 363. Baker testified that Tucker did not "at any time deny that this event happened." RP at 364. Baker arrested Tucker and the State charged Tucker with one count of indecent liberties

(without forcible compulsion).[2]

At trial, Tucker called Dr. William Brady to testify regarding the effect of drinking at least four shots of alcohol while taking Zoloft on a woman of Denison's size. Brady also testified that alcohol "[p]robably could" affect "perception as it relates to a person's transition from a dream state." RP at 288. He testified that "[o]ne drink will disappear in roughly [one] hour." RP at 281. When asked about the effects of Zoloft, Brady stated, "It is a drug that affects the brain function so as to alter the normal feedback that causes many people to become profoundly depressed." RP at 290. On cross-examination, Brady testified that "full-blown hallucinations" generally occur only with "experienced alcoholic drinkers." RP at 296. He further testified that "Zoloft will disappear . . . somewhere between 24 to 36 hours" after the patient takes it. RP at 298.

The jury found Tucker guilty of indecent liberties. Tucker was sentenced to 18 months' confinement. He appeals.

ANALYSIS

I. Ineffective Assistance of Counsel

Tucker argues that his counsel was ineffective for (1) failing to request a voluntary intoxication jury instruction and (2) eliciting impermissible opinion testimony from Baker.

A. Standard of Review

"We review an ineffective assistance of counsel claim de novo." *State v. Powell*, 150 Wn. App. 139, 152, 206 P.3d 703 (2009). To prove ineffective assistance of counsel, a defendant

[2] "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)(b).

must show that his counsel's performance was deficient and that this performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). There is a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's performance is deficient if it falls below an objective standard of reasonableness, *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), but "legitimate trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel." *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007). "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed." *Powell*, 150 Wn. App. at 153.

B. Jury Instruction

Tucker first argues that his counsel was ineffective for failing to request a voluntary intoxication jury instruction. We uphold jury instructions "if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." *State v. Irons*, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). "A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory." *Powell*, 150 Wn. App. at 154.

To convict Tucker of indecent liberties without forcible compulsion, the jury was required to find beyond a reasonable doubt:

> (1) That on or about January 28, 2007 the defendant knowingly caused Danette Denison to have sexual contact with the defendant;
> (2) That this sexual contact occurred when Danette Denison was incapable of consent by reason of being physically helpless;
> (3) That the defendant was not married to Danette Denison at the time of the sexual contact; and

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

Clerk's Papers (CP) at 38. The trial court also instructed the jury that "[a] person is physically helpless when the person is unconscious or for any other reason is physically unable to communicate unwillingness to an act." CP at 40. Jury instruction 8 stated, in part, "A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime." CP at 39.

A jury may be instructed on voluntary intoxication only if there is substantial evidence that the defendant's drinking affected his ability to form the necessary mental state to commit the charged crime. *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996). Therefore, a defendant is only entitled to an instruction on voluntary intoxication if (1) a particular mental state is an element of the charged crime, (2) there is substantial evidence that the defendant was drinking, and (3) there is substantial evidence that the drinking affected the defendant's ability to form the required mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). Evidence of drinking alone is insufficient; there must be "'substantial evidence of the effects of the alcohol on the defendant's mind or body.'" *Gabryschak*, 83 Wn. App. at 253 (quoting *Safeco Ins. Co. of Am. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991)).

Here, the trial court asked Tucker's counsel about her theory of the case during her cross-examination of Denison.

> In your opening, . . . what I gleaned from that was that your theory is that this lady is making this story up because she wants to split up Brad and Shiela; or that she was intoxicated and fantasized the whole thing, two separate theories that are inconsistent with each other. Which is your theory?

RP at 169. Tucker's counsel replied that she did not believe the two theories were inconsistent:

> I think that the two theories are related because it goes to her motive to correct something that she may have misperceived and a total lack . . . . of motive, in fact, and why if she had in fact misperceived events, she would not feel the need to correct those perceptions.

RP at 169. During closing arguments, Tucker's counsel emphasized that the incident could have been a "figment of [Denison's] imagination." RP at 480. Further, Brady's testimony was about alcohol's effect on Denison, not on Tucker.

Tucker's intoxication was not relevant to his defense theories. His defense was that Denison either misperceived events or purposefully misrepresented what happened and that Tucker did nothing wrong. Therefore, a voluntary intoxication instruction did not support his theory of the case and Tucker was not entitled to the instruction.[3] *Powell*, 150 Wn. App. at 154. His counsel did not perform deficiently by failing to request such a voluntary intoxication instruction and, therefore, Tucker's argument fails.

[3] Further, there was insufficient evidence to suggest that Tucker's drinking affected his "'mind or body.'" *Gabryschak*, 83 Wn. App. at 253 (quoting *Safeco*, 63 Wn. App. at 179). The only evidence regarding Tucker's drinking was: (1) Tucker's statements to Baker that he had two beers and a mixed drink at the party, that he had a drinking problem, and that he possibly blacked out the night of the party; (2) Brad's testimony that Tucker drank more than one drink but "was . . . still able to play darts," RP at 350; (3) Tucker's testimony that he was intoxicated at the party but not "too intoxicated to hit the dartboard," RP at 404; and (4) Tucker and Brad's testimony that Tucker was too intoxicated to drive. Tucker presented no evidence beyond his statement that he may have blacked out to indicate that the alcohol affected his ability to act knowingly. *Gabryschak*, 83 Wn. App. at 253.

C. Opinion Testimony

Tucker next argues that his counsel was ineffective for eliciting Baker's opinion that Tucker was guilty. He argues that "[i]t was only in response to defense counsel's ill-conceived questioning that Deputy Baker revealed that . . . he concluded, rather than merely suspected, Mr. Tucker was guilty of committing the crime." Br. of Appellant at 10 (emphasis omitted).

Generally, no witness, lay or expert, may testify by direct statement or inference as to his or her opinion about the defendant's innocence or guilt or about a key witness's credibility. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577-78, 854 P.2d 658 (1993. Such testimony is prejudicial because it invades the exclusive province of the fact finder. *State v. Yarbrough*, 151 Wn. App. 66, 93, 210 P.3d 1029 (2009). Numerous factors determine whether witness statements are impermissible opinion testimony, "including the type of witness involved, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence before the trier of fact." *Heatley*, 70 Wn. App. at 579. But "testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *Heatley*, 70 Wn. App. at 578.

Here, defense counsel asked Baker the following questions:

> [DEFENSE COUNSEL:] . . . And at the time you spoke with Mr. Tucker, had you spoken with other witnesses in this case, including the complaining witness?
> [BAKER:] Yes, I had.
> [DEFENSE COUNSEL:] And did you believe at that time that a crime had been committed?
> [BAKER:] Possibly.
> [DEFENSE COUNSEL:] Okay. Did you have enough evidence at that time to believe that a crime had been . . . committed?
> [BAKER:] Not necessarily.
> [DEFENSE COUNSEL:] Okay. Did you make a determination here that a

crime had been committed?
[BAKER:] In this, yes, I did.

RP at 368.

This testimony is not a "direct comment on the defendant's guilt." *Heatley*, 70 Wn. App. at 578. Further, as suggested in Tucker's own brief, "[i]t appears from this exchange . . . that [defense counsel] was attempting to suggest that Deputy Baker had drawn a conclusion about the situation prior to getting the whole story."[4] Br. of Appellant at 10 (alteration in original). Defense counsel did not ask Baker whether he believed Tucker was guilty, only whether he believed at that time that a crime had been committed.

Because it was a legitimate trial tactic for defense counsel to question Baker regarding his belief that a crime had been committed and to raise the issue about whether Baker rushed to a conclusion about the matter and because she did not elicit Baker's opinion about Tucker's guilt, Tucker did not receive ineffective assistance of counsel.

II. Cumulative Error

Tucker finally argues that cumulative errors warrant reversal. He argues that, even if the two instances of ineffective assistance of counsel "'standing alone'" are not "'sufficient to justify reversal,'" the combined errors denied him a fair trial. Br. of Appellant at 12 (quoting *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000)).

"Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless." *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). But this doctrine "is limited to instances when there have

[4] In his brief, Tucker omits two lines from the dialogue between his defense counsel and Baker, including Baker's answer "Not necessarily" and Tucker's follow-up question "Okay. Did you make a determination here that a crime had been committed?" RP at 388; Br. of Appellant at 6.

been several trial errors that . . . when combined may deny a defendant a fair trial." *Greiff*, 141 Wn.2d at 929. Here, we hold that Tucker's counsel was not ineffective and, thus, there was no error. Where there is no error, there can be no cumulative error. *In re Det. of Law*, 146 Wn. App. 28, 42, 204 P.3d 230 (2008), *review denied*, 165 Wn.2d 1028 (2009).

We 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 pursuant to RCW 2.06.040, it is so ordered.

Van Deren., C.J.

We concur:

Armstrong, J.

Quinn-Brintnall, J.