IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS R. PULASKI, Appellant.	No. 40087-1-II UNPUBLISHED OPINION

Armstrong, P.J. — Thomas Pulaski appeals his conviction for vehicular assault, arguing that the trial court erred in admitting the results of his blood alcohol test and denying his motion for a mistrial on the basis of juror misconduct. He also argues that he was denied effective assistance of counsel when his trial attorney (1) failed to object to the admission of his blood alcohol test results and (2) did not appear on his behalf until 22 hours prior to trial. Finding no error, we affirm.

FACTS

On June 17, 2007, Thomas Pulaski was involved in an auto accident on Grade Street in Kelso. Pulaski exited a parking lot at a high speed and drove across four lanes of travel into Clayton Jagoo's vehicle, pinning the vehicle against the median. As a result of the collision, Jagoo suffered a concussion with loss of consciousness, a broken arm, and a skull fracture.[1]

[1] Pulaski stipulated to Jagoo's injuries.

The police transported Pulaski to the hospital, where he initially refused to submit to a blood alcohol test. After placing Pulaski under arrest, however, Officer Jeffery Brown supervised the withdrawal of a blood sample. A white powder was added to the vials containing the blood to prevent clotting. Officer Brown logged the samples into evidence and sent them to the Washington State Crime Lab for testing. The result of Pulaski's blood test was 0.21 g/100mL.

The State charged Pulaski with vehicular assault.[2] The original trial date was scheduled for September 24, 2007, and the court appointed Pulaski counsel. Pulaski moved to continue and entered a speedy trial waiver because he intended to retain his own counsel, John Hays. Pulaski moved for, or stipulated to, several continuances while represented by Hays.

On December 10, 2008, the court permitted Hays to withdraw as Pulaski's attorney, striking the next trial date. On January 21, 2009, Pulaski appeared without counsel, but informed the court that Robert Brungardt was representing him. When Pulaski next appeared without counsel, the court appointed counsel subject to full reimbursement. Pulaski was represented by appointed counsel at the next hearing, but he moved for a continuance, entered another speedy trial waiver, and restated his intent to hire private counsel.

On May 28, 2009, Pulaski asked the court to allow him to terminate his representation by appointed counsel and hire private counsel. The trial court asked, "Are you telling me you are or

[2] RCW 46.61.522(b) provides that a person is guilty of vehicular assault if he operates any vehicle while under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another. RCW 46.61.502 provides that a person is guilty of driving under the influence of intoxicating liquor or any drug if he drives a vehicle within this state (a) and the person has a blood alcohol concentration, within two hours after driving, or 0.08 or higher, or (b) while the person is under the influence of or affected by intoxicating liquor or any drug.

are not indigent?" Report of Proceedings (RP) at 68. Pulaski replied, "I'm not indigent." RP at 68. On this basis, the court allowed appointed counsel to withdraw.

The court set trial for August 17, 2009, and warned Pulaski that if he did not obtain counsel soon, he would have to represent himself at pretrial. Pulaski continued to appear without counsel. On August 13, 2009, the State moved for a continuance because Jagoo, who was living outside the country, was not available to testify on the scheduled trial date. Pulaski agreed to the continuance because he also needed Jagoo as a witness. The court set trial for October 28, 2009.

Pulaski appeared for the readiness review on October 22, 2009, asserting "his right to effective counsel." RP at 102. The court reminded Pulaski that he had already been appointed counsel, which he refused, and that he had insisted that he was not indigent. The court found that Pulaski's lack of representation was of his own doing and was not grounds to continue or dismiss the case. The court concluded that Pulaski had been dilatory in failing to hire counsel.

Brungardt appeared on behalf of Pulaski at a review hearing on October 27, 2009. The parties agreed to proceed to trial because the State had flown in Jagoo for trial. The trial began the next day, October 28, 2009.

At trial, Pulaski's blood test results were admitted as evidence without objection from defense counsel. Pulaski testified to consuming three "Long Island Ice Tea" cocktails, which he conceded consist entirely of alcohol. Pulaski's defense theory was that he was driving before the alcohol had a chance to absorb into his blood stream and that he was not yet intoxicated at the time of the accident. He argued that Jagoo, who was intoxicated and speeding, caused the accident.

Also during trial, the court learned that one of the jurors had been making inappropriate comments. When questioned by the court, another juror said that the juror in question had scoffed and said, "Yeah, right" a couple of times when the defense attorney was speaking. A different juror told the court that the juror in question said, "[Y]ou could already tell by what we had already heard that the defendant was guilty." RP at 358. No other juror heard these comments, and both the possibly affected jurors assured the court that the comments would not influence their decisions. The court excused the offending juror and denied Pulaski's motion for a mistrial based on juror misconduct.

The jury found Pulaski guilty as charged and the court sentenced him to 13 months' total confinement and 18 months' community custody.

ANALYSIS

I. Admissibility of Test Results

Pulaski argues, for the first time on appeal, that the trial court erred in admitting the results of his blood alcohol test. He claims the State failed to establish that his blood sample was properly preserved in compliance with the Washington Administrative Code (WAC). The State counters that because Pulaski did not object to the evidence when the State offered it at trial, he has waived any error.

The failure to object to the admission of evidence at trial or to testimony from state witnesses precludes appellate review. *State v. Perez-Cervantes*, 141 Wn.2d 468, 482, 6 P.3d 1160 (2000). A defendant can raise an error for the first time on appeal if it involves (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) a

manifest error affecting a constitutional right. RAP 2.5(a).

Pulaski does not assert that the claimed error falls under one of the enumerated exceptions in RAP 2.5(a). *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (without argument or authority to support it, an assignment of error is waived). Accordingly, he has waived his right to raise this alleged error on appeal. *See State v. Babiker*, 126 Wn. App. 664, 667-68, 110 P.3d 770 (2005) (holding that failure to object to the admission of blood tests on the grounds that State did not prove the blood sample contained an enzyme waived the issue on appeal).

II. Ineffective Assistance of Counsel

Pulaski next argues that his counsel was ineffective in (1) failing to object to the admission of the blood test results and (2) first appearing on his behalf only 22 hours before trial. He asserts that the timing itself shows that his attorney was not adequately prepared for trial.[3]

We review de novo a claim that counsel ineffectively represented the defendant. *State v. Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). To establish that counsel was ineffective, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient representation prejudiced his defense, i.e., there is a reasonable probability that but for the deficient performance the results of the proceeding would

[3] Pulaski also seems to argue that the trial court denied him effective representation by refusing to declare him indigent and appoint counsel. This argument is entirely without merit. First, the court appointed Pulaski counsel twice in the two years preceding trial. Pulaski, however, rejected appointed counsel and expressed his desire to retain his own counsel, assuring the court that he was not indigent. Second, an ineffective assistance of counsel claim requires a showing that counsel's performance was deficient and that he was prejudiced. Without counsel, an ineffective assistance argument simply does not apply. And Pulaski fails to argue how this legal framework applies to his assignment of error. "[The] court will not review issues for which inadequate argument has been briefed or only passing treatment has been made." *Thomas*, 150 Wn.2d at 868-69. Accordingly, we decline to review this assignment of error.

have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). We presume that defense counsel was effective, a presumption the defendant can overcome only by showing the absence of a legitimate strategic or tactical basis for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome of the trial would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant can show prejudice by establishing that if counsel had made the objections or arguments now embraced, they would have likely succeeded. *See McFarland*, 127 Wn.2d at 337 n.4.

A. Failure to Object

Pulaski argues that his counsel should have objected to the blood test results because the State failed to meet the test's admissibility requirements. Specifically, he argues that the State failed to establish that the samples contained a requisite enzyme poison.

Before blood alcohol test results can be admitted into evidence, the State must present prima facie proof that the test chemicals and the blood sample are free from adulteration that could conceivably introduce error to the test results. *State v. Wilbur-Bobb*, 134 Wn. App. 627, 630, 141 P.3d 665 (2006). A blood sample analysis is sufficient to show intoxication only when performed according to WAC requirements. *State v. Brown*, 145 Wn. App. 62, 70, 184 P.3d 1284 (2008).

WAC 448-14-020(3)(b) provides, "Blood samples for alcohol analysis must be preserved with an anticoagulant and an enzyme poison sufficient in amount to prevent clotting and stabilize

the alcohol concentration." Fulfillment of these requirements is mandatory, notwithstanding the State's ability to establish that the sample was unadulterated. *Brown*, 145 Wn. App. at 70. Further, there is a relaxed standard for foundational facts under the blood alcohol statute in that the court assumes the truth of the State's evidence and all reasonable inferences from it in a light most favorable to the State. RCW 46.61.506(4)(b);[4] *Brown*, 145 Wn. App. at 71.

Here, regardless of whether the State established a foundation for admissibility, Pulaski has not shown that trial counsel's performance was deficient. Pulaski admitted consuming three alcoholic cocktails before getting into his car; and the State drew his blood sample more than four hours after the collision. This evidence is consistent with Pulaski's theory that he was not intoxicated at the time of the accident. RP at 456-59. And the State toxicologist who analyzed Pulaski's blood sample supplied the evidence Pulaski needed to show that the blood stream absorbs alcohol over time. RP at 427-28. Under the strong presumption that counsel is effective, we cannot say that counsel's failure to object lacked any tactical basis because the exclusion of the test result was not critical to the defense and the admission of the test results did not contradict Pulaski's defense theory.

Moreover, Pulaski fails to show prejudice. Officer Brown testified that the vials of Pulaski's blood sample contained a white powder that is an anti-coagulant used to prevent clotting. RP at 274, 276. When asked if there was also an enzyme poison, Officer Brown replied,

[4] RCW 46.61.506(4)(b) provides that

> "prima facie evidence" is evidence of sufficient circumstances that would support a logical and reasonable inference of the facts sought to be proved. In assessing whether there is sufficient evidence of the foundational facts, the court or administrative tribunal is to assume the truth of the prosecution's or department's evidence and all reasonable inferences from it in a light most favorable to the prosecution or department.

"It's an enzyme. Yes." RP at 276. Had defense counsel objected at this point to the foundation, the State could have inquired further of Officer Brown as to whether the blood samples contained the requisite enzyme poison. Accordingly, Pulaski cannot show that the State would have been unable to lay a proper foundation. Thus, he has not established that but for counsel's failure to object, the trial result would have been different. Pulaski's claim of ineffective representation fails.

B. Lack of Preparation

To provide constitutionally adequate assistance, counsel must, at a minimum, conduct a reasonable investigation so that counsel can make informed decisions about how best to represent the client. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Pulaski claims that his attorney, Robert Brungardt, did not have a chance to investigate or prepare for trial because he first appeared only 22 hour before trial on October 28, 2009. But Pulaski told the court on January 21, 2009, that he had retained Brungardt as his attorney. Nothing in the record shows what work Brungardt did in preparing for trial before he actually appeared for Pulaski. Moreover, the defense needed Jagoo to testify; thus, Brungardt had no tactical basis for asking for a continuance at his first appearance. Finally, Pulaski's only complaint about the quality of Brungardt's representation was his failure to object to the admission of his blood test results. But as we have explained above, this was not deficient representation. Pulaski has failed to demonstrate that counsel ineffectively represented him.

III. Juror Misconduct

Finally, Pulaski assigns error to the trial court's denial of his motion for a mistrial based on

juror misconduct. He argues that trial court failed to conduct an adequate inquiry into the possible tainting of the jury given the dismissed juror's highly prejudicial comments.

We review a trial court's ruling on a motion for a new trial based on juror misconduct for an abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). A court abuses its discretion where its decision is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). The trial court may grant a new trial only where juror misconduct has prejudiced the defendant. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132 (2008). Although prejudice is presumed where misconduct has occurred, that presumption may be overcome by an adequate showing that the conduct did not affect the deliberations. *Depaz*, 165 Wn.2d at 856. A decision of whether the alleged misconduct exists and is prejudicial is a matter within the discretion of the trial court. *Richards v. Overlake Hosp. Med. Ctr.*, 59 Wn. App. 266, 271, 796 P.2d 737 (1990).

The trial court dismissed the offending juror and questioned the jury to determine which jurors heard the improper remarks. The court then questioned the two jurors who heard the dismissed juror's improper comments. Both jurors stated that the offending comments would not influence their consideration of the case and that they would decide the case on the basis of the evidence. Although Pulaski argues that the jury's quick verdict, within 33 minutes, is evidence of prejudice, we decline to delve into the jury's deliberation process. *Balisok*, 123 Wn.2d at 117. Based on the jurors' clear representations to the court—that they would not be influenced by the dismissed juror's comments in reaching their decisions—the trial court did not abuse its discretion in denying the motion for a new trial. *See also State v. Rupe*, 108 Wn.2d 734, 749, 743 P.2d 210

(1987) (a trial judge is best situated to determine a juror's competency to serve impartially).

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.

Armstrong, J.

We concur:

Quinn-Brintnall, J.

Van Deren, J.