IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28330-5-III**
Respondent,	)	
	)	**Division Three**
v.	)	
WAYLON DEAN HOBRECHT,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	

Siddoway, J. — Waylon Hobrecht appeals his convictions for third degree assault against a police officer, fourth degree assault, and resisting arrest, all of which arose out of a domestic relations incident and Mr. Hobrecht's conduct following police response. Mr. Hobrecht contends that his defense counsel was ineffective by failing to request a voluntary intoxication instruction. Mr. Hobrecht also appeals a condition of his court-ordered community custody that he receive evaluation and treatment for substance abuse when only alcohol contributed to his offense.

The State concedes and we accept the concession that the condition of community custody is overbroad. As to the convictions themselves, the trial record reveals evidence

that would have supported a voluntary intoxication instruction had it been requested, but at the same time reveals that the principal theory of defense was that Mr. Hobrecht was aware of his actions, for which he had an innocent explanation—a defense that was best served by presenting him as a reasonably reliable historian as to what occurred. Because counsel's decision not to request a voluntary intoxication instruction can reasonably be regarded as tactical, we affirm the convictions and remand for sentencing modification and clarification consistent with the State's concession.

FACTS AND PROCEDURAL BACKGROUND

On the afternoon and evening of March 27, 2009, Mr. Hobrecht and his fiancée, Kendra Babcock, began drinking around 4 p.m. After each drank eight beers, they began to drink rum; together, they consumed about 5 to 6 inches' worth from a bottle, with Mr. Hobrecht drinking most of that himself.

They finished drinking at Mr. Hobrecht's sister's house at around 8:45 p.m. and then walked to the home they shared. En route, they began arguing about his drinking. The argument continued at the home. Mr. Hobrecht and Ms. Babcock both later testified that the altercation never became physical.

Around 9:30 p.m. Thomas Gracie, a neighbor and off duty police officer, heard Ms. Babcock yelling and specifically heard her yell "help." Upon stepping outside his home, Mr. Gracie saw Ms. Babcock sitting on the ground, crying, as Mr. Hobrecht yelled

at her to stay out of his house. Mr. Gracie called out to Mr. Hobrecht to stop and Mr. Hobrecht turned around and went back inside. Mr. Gracie then called 911.

Officer Gary Moore was the first to respond. Upon his arrival Ms. Babcock was still outside and still crying. Officer Moore later testified that Ms. Babcock told him that Mr. Hobrecht shoved and pushed her out of the house and across the street, and that he punched her in the chin and took her house keys. Mr. Gracie testified that he overheard Ms. Babcock tell Officer Moore that Mr. Hobrecht had punched her in the face.

Officers Sean Cook and Joe Higgs arrived soon after. The three officers were unsuccessful in their attempts to get Mr. Hobrecht to open the door, so Officer Cook left to prepare an affidavit for a warrant. In his absence, Mr. Hobrecht came outside to smoke a cigarette and invited Officers Moore and Higgs inside. All the officers on the scene testified that Mr. Hobrecht appeared to be intoxicated and at various points during their encounter was unsteady on his feet.

After Officer Cook returned, he joined Mr. Hobrecht and the other officers in the home and informed Mr. Hobrecht that he was under arrest for domestic violence assault. After being told he was under arrest and being placed in wrist shackles behind his back, Mr. Hobrecht became belligerent and unruly, directing a barrage of insults and profanities at Officer Cook. Officer Cook had begun taking pictures of damage in the home and did not respond. Eventually he turned and began to walk toward the back of the house and,

according to the testimony of Officer Higgs, that appeared to further upset Mr. Hobrecht. At that point Mr. Hobrecht yelled and made a quick movement toward Officer Higgs and Officer Cook, lowering his shoulder and striking Officer Higgs around the waist with his head and shoulder. The officers characterized the action as deliberate, although they and Officer Moore could not tell whether Mr. Hobrecht's intent was to assault Officer Higgs or knock Officer Higgs out of the way in order to assault Officer Cook.

Officer Higgs pushed Mr. Hobrecht to the floor and he and Officer Cook restrained him, with Mr. Hobrecht yelling and kicking until subdued. The officers then completed their investigation of the home, which included taking pictures of a broken table and broken door that Mr. Hobrecht and Ms. Babcock later acknowledged were damaged that evening when Mr. Hobrecht fell onto the table and slammed an already-cracked door. Officers also took a picture of an angry note that Ms. Babcock had written on a white board that stated, among other things, "'I'm sick of being hurt!'" Report of Trial Proceedings (RP) at 45.

After collecting the information desired from the scene, the officers directed Mr. Hobrecht to stand up and Officer Higgs attempted to escort him outside. Before reaching the door Mr. Hobrecht dropped, spread his feet, and pushed back on the carpet. The other officers came to assist, picking Mr. Hobrecht up and carrying him outside. About halfway to the patrol car, Mr. Hobrecht quit struggling and agreed to walk to the car.

At trial, Ms. Babcock denied ever telling Officer Moore that she had been punched by Mr. Hobrecht. She testified that she and Mr. Hobrecht were struggling over a set of house keys that Mr. Hobrecht was trying to wrest from her hand and that she accidently hit herself when she lost hold of the keys while pulling on them.

During the State's case, defense counsel questioned all of the witnesses about their observations of Mr. Hobrecht's apparent intoxication. The three officers conceded that Mr. Hobrecht appeared inebriated but each stated that he was nonetheless coherent, knew who they were, appeared to understand what was being said to him, and appeared to know what was going on.

Ms. Babcock had remained in a patrol car while the officers questioned Mr. Hobrecht in the home, so she was not a witness to his blow to Officer Higgs. Mr. Hobrecht was therefore the only witness to testify to his contact with Officer Higgs, other than police.

Defense counsel questioned Mr. Hobrecht about the effects of his intoxication on the night of his arrest and he emphasized his instability, testifying, "'I was stumbling, I fell several times on the way home, as well, from my sister's. And I really – I really was uneasy. I couldn't control myself. You know, I just remember falling – I remember trying to sit down and I fell on the table in the living room where I was at.'" RP at 210.

Mr. Hobrecht testified that his contact with Officer Higgs was similarly the result

of his imbalance. He stated that he moved toward Officer Cook because he was upset that Officer Cook was walking toward his room and to what happened next:

> I told him that he had no right to go in my room and as I said that I was yelling and I turned and when I turned I was unsteady, top-heavy, and I fell. Because my hands were behind my back. Thus before the whole night I've been off balance. I did not purposely lower my shoulder into him and ram into him. I was just going towards Cook to tell him not to go to my room and I fell forward.

RP at 212. Mr. Hobrecht admitted that he is an alcoholic, testified that he had been drinking at least 14 years, and conceded that he had built up somewhat of a high tolerance.

In closing argument, defense counsel urged the jury to accept Mr. Hobrecht's testimony that his contact with Officer Higgs was "an accidental sort of contact" focusing on Mr. Hobrecht's intoxication, noting that he was unsteady on his feet and not able to stand up very well. RP at 252. She argued, "[I]f there's no intent, it's not a crime. If it was a drunk flailing about with no objective of assaulting anybody, it's not an assault." RP at 253.

She admitted that Mr. Hobrecht had resisted arrest but suggested to the jury that he was confused about why he was being arrested, since, as he and Ms. Babcock testified, he never hit her. In that connection, she characterized Mr. Hobrecht's state as "pretty wasted, intoxicated" but not "totally incoherent and he does have some memory of what

happened that night, but there was testimony that when he was first approached, he didn't comprehend what was being said to him. He didn't understand what was going on." RP at 254. She also stated "in a state of extreme intoxication you can be bewildered and confused." RP at 255.

The jury found Mr. Hobrecht guilty on all counts. As a condition of community custody, the court ordered Mr. Hobrecht to "consume no alcohol and to undergo an evaluation and treatment for substance abuse." Report of Sentencing Proceedings (RP (Sentencing)) at 11; Clerk's Papers (CP) at 29. Mr. Hobrecht timely filed this appeal.

ANALYSIS

I. Ineffective Assistance of Counsel

Mr. Hobrecht's primary argument on appeal is that he received ineffective assistance of counsel in light of his attorney's failure to request a jury instruction on voluntary intoxication. RCW 9A.16.090 provides that when the existence of a particular mental state is a necessary element to constitute a species or degree of crime, the fact of intoxication may be taken into consideration in determining the defendant's mental state.[1] The pattern instruction to be given when voluntary intoxication is an issue, completed as

[1] All of the crimes with which Mr. Hobrecht was charged required proof of intent. CP at 14 (Instruction 6, defining "assault" as requiring "an intentional touching or striking of another person that is harmful or offensive"); CP at 16 (Instruction 8, identifying, as an element of the crime of resisting arrest, that the defendant "acted intentionally").

it likely would have been in this case, would have informed the jury:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

See 11 Washington Practice, Washington Pattern Jury Instructions: Criminal 18.10, at 282 (3d ed. 2008).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *State v. Kruger*, 116 Wn. App. 685, 691, 67 P.3d 1147 (citing *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992)), *review denied*, 150 Wn.2d 1024 (2003).

A. Standards for Ineffective Assistance

The Sixth Amendment guarantees the right to counsel. The right includes more than the mere presence of an attorney; the attorney must perform to the standards of the profession. A defense attorney's failure to live up to those standards will require a new trial if the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). In order to show ineffective assistance of counsel, a defendant must show that (1) his attorney's performance was deficient and not

a matter of trial strategy or tactics and (2) he was prejudiced. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," because "[t]here are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. Accordingly, to rebut the presumption that counsel's performance was not deficient, the defendant must show "there is no conceivable legitimate tactic explaining counsel's performance." *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)).

To prevail on appeal of this claimed error, then, Mr. Hobrecht must show that (1) he was entitled to a voluntary intoxication instruction, (2) defense counsel's decision not to ask for the instruction was not based on a legitimate trial strategy, and (3) defense counsel's decision prejudiced him. *Kruger*, 116 Wn. App. at 690-91.

B. Mr. Hobrecht was Entitled to a Voluntary Intoxication Instruction

The State disputes that Mr. Hobrecht was entitled to a voluntary intoxication instruction, had he requested one. While the State agrees that the crimes with which Mr. Hobrecht was charged include a mental state and that there was substantial evidence of drinking, it argues that Mr. Hobrecht "fails to establish that his drinking on the night in

question affected his ability to form the requisite intent or mental state," and argues that absent evidence of the connection, the instruction would properly have been denied, citing *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996), which it characterizes as presenting "remarkably similar" facts. Br. of Resp't at 12-16. It points to evidence that it contends establishes that Mr. Hobrecht knew what he was doing—largely, though not exclusively, the testimony of Officers Cook, Higgs, and Moore.

In *Gabryschak* this court held that a voluntary intoxication instruction was properly denied despite evidence of intoxication but that was because there was evidence of volitional behavior by the defendant suggesting the ability to form intent and, as noted in that case, "[n]o testimony reflects that Gabryschak's speech was slurred, that he stumbled or appeared confused, that he was disoriented as to time and place . . . or that he otherwise exhibited sufficient effects of the alcohol from which a rational juror could logically and reasonably conclude that his intoxication affected his ability to think and act in accord with the requisite mental states." 83 Wn. App. at 255.

In this case, there was testimony from most of the witnesses that Mr. Hobrecht exhibited signs of impairment sufficient for a rational juror to conclude that his ability to think and act with intent was affected. The officers themselves testified that Mr. Hobrecht's speech was slurred and that he was unsteady and stumbled. Officer Moore

acknowledged writing in his report that Mr. Hobrecht was extremely intoxicated and was not able to comprehend the officer's instructions. RP at 64, 93, 184-85, 210.

Other evidence suggested that Mr. Hobrecht was coherent, but that does not preclude his entitlement to the instruction. As Mr. Hobrecht correctly argues, a defendant is entitled to the instruction whenever there is substantial evidence to support it, with the evidence bearing on the instruction being viewed in the light most favorable to the party requesting the instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Nor would the fact that Mr. Hobrecht testified to his own recollection of events and, in that connection, claimed to know what he did *not* intend, provide a basis for denying him the instruction. It is generally permissible for a defendant to argue inconsistent defenses so long as they are supported by the evidence. *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007). As observed in *Gabryschak*:

> Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

83 Wn. App. at 254 (citation omitted). There was some evidence that Mr. Hobrecht was sufficiently coherent to intend the acts charged and some evidence that he was not; the

outcome could turn on what the jury believed. Not knowing where the jury would come down on that issue, Mr. Hobrecht would have been entitled to a voluntary intoxication instruction had he requested one. *Cf. State v. Werner*, 170 Wn.2d 333, 336-37, 241 P.3d 410 (2010) (defendant charged with assault was entitled to argue accident and an instruction on defense of self-defense, since there were two versions of events and outcome would turn on what was believed).

c. Defense Counsel's Decision Not To Ask for the Instruction Can Be Explained by Trial Strategy

Nonetheless, the fact that a defendant has a right to argue and obtain instruction on inconsistent defenses supported by the evidence does not mean that it is wise trial strategy to do so. *See State v. Mannering*, 150 Wn.2d 277, 286-87, 75 P.3d 961 (2003) (decision not to assert defense of duress could be understood as strategic where it would be factually inconsistent with principal defense that defendant lacked intent to murder).

The most serious charge against Mr. Hobrecht, and the one where his own testimony would be most important, was the charge of third degree assault involving a law enforcement officer.[2] Given the testimony of almost all of the witnesses that Mr.

[2] RCW 9A.36.031(1)(g), assault in the third degree, is a class C felony. Given Mr. Hobrecht's offender score, it carried a standard range of 22 to 29 months, with a maximum term of confinement of 5 years. Assault in the fourth degree—domestic violence, RCW 9A.36.041, RCW 10.99.020, is a gross misdemeanor, presenting a maximum term of 1 year. Resisting arrest under RCW 9A.76.040 is a misdemeanor, presenting a maximum term of 90 days. CP at 23, 26.

Hobrecht had been stumbling and unsteady throughout the evening, defense counsel could well have concluded that Mr. Hobrecht's explanation that his contact with Officer Higgs was one more in a series of falls was his most viable and sympathetic defense—but since he was the only witness in the home to characterize the contact in that fashion, the defense was only available if Mr. Hobrecht was a reasonably reliable historian to what occurred. That was the crux of counsel's closing argument about intent: not that Mr. Hobrecht was drunk out of his mind and had no idea what he was doing at the time he collided with Officer Higgs, but that he was too unsteady to stop himself from falling when turning suddenly with his wrists shackled behind his back. This theory of "no intent" is not one that would be helped by a voluntary intoxication instruction and could be hurt, since the prosecution could argue the inconsistency.

Nor would an involuntary intoxication instruction have advanced the defense against the charge of fourth degree assault against Ms. Babcock; both she and Mr. Hobrecht testified that there had been no assault.

As to the resisting arrest charge, the principal defense theory was that Mr. Hobrecht's arrest was unlawful. It was only in connection with arguing this less consequential charge that defense counsel briefly commented in closing argument on Mr. Hobrecht's confusion, but she suggested that the confusion arose in part because no assault had been committed, so Mr. Hobrecht could not understand why he was being

placed in handcuffs. Here, too, counsel could have believed it important to portray Mr. Hobrecht as sufficiently lucid to feel sure there was no basis for his arrest.

Mr. Hobrecht has not shown that defense counsel's decision not to request the instruction was not legitimate trial strategy. We therefore need not address the issue of prejudice. *Hendrickson*, 129 Wn.2d at 78 (if either part of the ineffective assistance test is not satisfied, the claim fails).

II. Community Custody Condition

In completing the judgment and sentence, the trial court marked a standard form condition that "during the period of supervision the defendant shall . . . undergo an evaluation for treatment for . . . substance abuse . . . and fully comply with all recommended treatment"; the form is not designed to indicate the type of substance abuse to be addressed. CP at 29. At the time of the sentencing hearing, the dialogue between the trial court and Mr. Hobrecht concerning his need for treatment dealt only with his longstanding struggle with alcohol addiction. RP (Sentencing) at 9-11.

The State agrees on appeal that the condition of community custody requiring Mr. Hobrecht to undergo an evaluation for substance abuse and to fully comply with all recommended treatment is too broad, but asks—since it was within the trial court's authority to order Mr. Hobrecht to undergo an evaluation for alcohol and comply with treatment recommendations, a "subset" of the court's order—that we remand for

sentencing modification and clarification. Br. of Resp't at 22. We accept the State's concession and will remand as requested.

Mr. Hobrecht's convictions are affirmed. We remand for sentencing modification and clarification consistent with our decision.

A majority of the panel has determined that this opinion will not be printed in the

Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, A.C.J.

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Brown, J.