IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28991-5-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
JAMES LEE WALTERS,	)	
	)	
Appellant.	)	**PUBLISHED OPINION**

Korsmo, J. — After a night of heavy drinking, James Walters stole some keys and later fought with a police officer. The trial court declined to give an intoxication instruction requested by the defense. We conclude that the failure to give the instruction was error, but the error was harmless on all but the theft conviction.

FACTS

Mr. Walters, a former manager of the Pastime Bar in Ritzville, arrived at that establishment around 6:00 p.m. February 25, 2010, and stayed until 1:30 a.m. the next morning. During that time he consumed at least seven beers and two other shots of

alcohol. The bartender later described his intoxication level as a "four" on a one-to-ten scale. Two officers put his level of intoxication between four and six.

Ritzville Police Department Sergeant John Bartz encountered Mr. Walters in a nearby alley at 2:18 a.m. while the officer was checking a burglary complaint. Mr. Walters indicated he was out for a walk. The officer noted that Mr. Walters was holding keys on a square key ring with a large green carabiner. Mr. Walters put the key ring in his left pocket during the conversation.

Shortly after the bar closed at 1:30 a.m., the bartender noted that the bar keys were missing. After searching for half an hour, he called the manager. She came to the bar and helped look. After another fruitless search, they called police and described the missing keys that were kept on a large green carabiner. Dispatch reported the theft and broadcast the description of the missing keys. Sergeant Bartz heard the description, remembered seeing the keys on Mr. Walters, and went looking for him.

Mr. Walters operated a video arcade not far from the bar. Sergeant Bartz went to the arcade. He looked through the window and saw Mr. Walters sleeping under an air hockey table. He knocked on the window and woke Mr. Walters, who let him in. The sergeant asked for the bar keys; Mr. Walters denied having them. Sergeant Bartz told Mr. Walters that he had the keys in his left pocket. Mr. Walters put his hand in the pocket

and jiggled the key ring, but then denied having the keys. The sergeant reached in to the pocket and took the keys out while placing Mr. Walters under arrest.

Mr. Walters cursed the officer and resisted the arrest. Sergeant Bartz twice used his stun gun on Mr. Walters and called for backup. A second officer arrived and the two were able to put Mr. Walters in the patrol car and transport him to jail. At the jail Mr. Walters continued to resist the officers and kicked one of them.

Charges of third degree assault, third degree theft, and resisting arrest were filed. Mr. Walters testified that he did not remember leaving the bar and had little memory of interacting with the officers. Defense counsel requested an intoxication instruction. The trial court declined to give one, concluding that doing so would require the jury to speculate about Mr. Walters' mental state. The jury convicted as charged.

The court imposed concurrent sentences. A Nevada conviction for the unlawful taking of a motor vehicle was included in the offender score on the assault conviction. The trial court found the crime to be the equivalent of Washington's second degree taking a motor vehicle.

Mr. Walters timely appealed to this court.

ANALYSIS

This appeal presents three issues; the record only permits us to address two of

them. The issues are considered in the order presented by the appellant.

Seizure of the Keys. Mr. Walters first argues that the keys were illegally seized from his pocket and should not have been used at trial. He alternatively argues that his trial counsel was ineffective for failing to seek suppression of that evidence. The record is insufficient for us to consider his claims.

As a general rule, Washington appellate courts will not consider an argument that was not first presented at the trial court. RAP 2.5(a). One exception to that rule is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). However, an alleged error is not manifest if there are insufficient facts in the record to evaluate the contention. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The Sixth Amendment guarantees the right to counsel. To satisfy the constitutional command, an attorney must perform to the standards of the profession; failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *Id*. at 334-335. Ineffective assistance of counsel claims are adjudged under the standards of *Strickland v. Washington*, 466 U.S. 668, 689-691, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-692. In evaluating ineffectiveness claims, courts must

be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Id*. at 689-691.

There was no motion to suppress filed in this case. Typically, that means that the matter cannot be heard on appeal. *State v. Baxter*, 68 Wn.2d 416, 422-424, 413 P.2d 638 (1966) (untimely suppression motion in the trial court waived objection). Mr. Walters nonetheless contends that RAP 2.5(a)(3) permits his challenge to be heard now. The parties present different theories on why the search was or was not valid. The State argues that both the open view and exigent circumstances doctrines justified the search. Analysis of either position requires factual determinations be made concerning the circumstances of the search and the existence of any exigencies. Trial courts, not appellate courts, make factual determinations. *Quinn v. Cherry Lane Auto Plaza*, *Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010). Without those factual determinations, this court simply is not in a position to rule on these arguments.

The same problem exists with the ineffective assistance claim. When pursuing an ineffective assistance argument on the basis of a failure to seek suppression, the defendant must establish that a motion to suppress likely would have been granted. *McFarland*, 127 Wn.2d at 333-334. That standard often cannot be met when the record

lacks a factual basis for determining the merits of the claim. *Id*. at 337-338. This case is in the same circumstance. The facts are unsettled and the parties have not had the opportunity to make their respective records. Because we do not know if a motion to suppress would have been granted, we cannot determine whether counsel performed ineffectively. Accordingly, we decline to consider this issue. In light of our reversal of the theft conviction, Mr. Walters can present this argument to the trial court on remand.

Intoxication Instruction. Mr. Walters next argues that the trial court erred in denying his request for an intoxication instruction. We agree.

By statute, Washington recognizes an intoxication defense. RCW 9A.16.090. The statute recognizes that whenever a crime has a "particular mental state," voluntary intoxication "may be taken into consideration in determining such mental state." *Id*. The instruction addressing this statute is found in 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 18.10, at 282 (3d ed. 2008).

The general rules governing jury instructions are well settled. Jury instructions are sufficient if they correctly state the law, are not misleading, and allow the parties to argue their respective theories of the case. *State v. Dana*, 73 Wn.2d 533, 536-537, 439 P.2d 403 (1968). The trial court also is granted broad discretion in determining the wording and number of jury instructions. *Petersen v. State*, 100 Wn.2d 421, 440, 671 P.2d 230 (1983).

Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A criminal defendant has a right to have the jury instructed on a defense that is supported by substantial evidence. *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). To receive a voluntary intoxication instruction regarding alcohol, a defendant must show "(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected [the defendant's] ability to acquire the required mental state." *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002).

The three charged offenses all required a showing of intent. RCW 9A.36.031(1)(g); RCW 9A.56.020; RCW 9A.56.050; RCW 9A.76.040. The first element for obtaining an intoxication instruction was satisfied.

So was the second element. Intoxication or impairment from drug usage is a factual question that can be proved by lay testimony. *State v. Smissaert,* 41 Wn. App. 813, 815, 706 P.2d 647, *review denied*, 104 Wn.2d 1026 (1985). There must be a showing of drug or alcohol consumption and the effect of the consumption on the drinker. *See, e.g., Dana*, 73 Wn.2d at 535; *State v. Zamora*, 6 Wn. App. 130, 132, 491 P.2d 1342 (1971), *review denied*, 80 Wn.2d 1006 (1972). There was such evidence in this case.

While the degree of intoxication was in dispute, there was no question but that Mr. Walters had consumed at least nine drinks over the course of the evening and that they had affected him. The second element likewise was shown.

The third element is the more problematic one—did the intoxication affect Mr. Walters' ability to act intentionally? The case law is inconsistent. *Compare State v. Rice*, 102 Wn.2d 120, 122-123, 683 P.2d 199 (1984) (drunks who spilled beer and were uncoordinated while playing ping pong entitled to instruction; one felt no pain when hit by car), *with State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996) (intoxicated and angry man not entitled to instruction where no sign of alcohol's impact on reasoning abilities). In *Gabryschak*, the court drew a distinction between its fact patterns and those of several cases where there were physical manifestations of intoxication: *Rice*, 102 Wn.2d 120*; State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982) (two day drinking binge; defendant had glassy eyes and slurred speech, and ate a spider while washing it down with whiskey); *State v. Jones*, 95 Wn.2d 616, 622, 628 P.2d 472 (1981) (defendant with glassy eyes and slurred speech placed in "drunk tank").

We agree with *Gabryschak* that physical manifestations of intoxication provide sufficient evidence from which to infer that mental processing also was affected, thus entitling the defendant to an intoxication instruction. This case presents a close fact

pattern because there is no direct evidence that intoxication affected Mr. Walters' mental state. When questioned in the alley at 2:18 a.m., Sergeant Bartz described Mr. Walters as having slurred speech, droopy and bloodshot eyes, and he swayed back and forth. At their later encounter, Mr. Walters did not respond to pain compliance techniques and the sergeant had to use a stun gun twice before he could restrain him. Consistent with *Rice*, it appears that there was sufficient physical evidence of intoxication to entitle Mr. Walters to the voluntary intoxication instruction. It was error to deny the instruction.

The remaining question is whether the error was meaningful or not. Instructional error is presumed prejudicial, but can be shown to be harmless. *Rice*, 102 Wn.2d at 123. A nonconstitutional error such as this one is harmless if it did not, within reasonable probability, materially affect the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

Despite the absence of the instruction, the parties in closing argued whether or not Mr. Walters was too drunk to act intentionally. This strongly suggests that the error was not harmless because the jury lacked direction on how to apply the intoxication information to the law. *See Rice*, 102 Wn.2d at 123. As to the theft conviction, we cannot find the error harmless. The third degree theft conviction is reversed and the case is remanded for a new trial.

The other two convictions are differently situated. Those crimes were committed well after Mr. Walters left the bar and, presumably, he had begun to sober up some. More importantly, there is direct evidence that his mental state was not impaired. The assault was committed at the jail while officers were trying to book Mr. Walters into custody. He announced that he was going to kick Officer Cameron before he did so. In that circumstance, the failure to give the intoxication instruction was harmless error because there was no question but that Mr. Walters was acting intentionally.

Similarly, the evidence shows that he intentionally resisted arrest. Where he had been cooperating with the officer initially, his attitude changed when the keys were seized and he was arrested. A struggle ensued, a stun gun was repeatedly employed, and a second officer had to be called in to take Mr. Walters away. His resistive behavior continued at the jail, right up the point where he announced his intention to kick the officer. At trial, Mr. Walters even admitted that he resisted arrest. In light of the evidence and the trial testimony, the intoxication instruction would not have affected the verdict.

The lack of an intoxication instruction was harmless error on the assault and resisting arrest instructions.

Offender Score. Mr. Walters also argues that the trial court erred in including a

Nevada conviction in his offender score on the third degree assault conviction. The record establishes that the conviction was properly included in the offender score.

Out-of-state convictions are included in a Washington defendant's offender score if the foreign crime is comparable to a Washington felony offense. RCW 9.94A.525(3). The State must establish comparability of the offenses, typically by proving the out-of-state conviction exists and providing the foreign statute for the court. *State v. Ford*, 137 Wn.2d 472, 479-482, 973 P.2d 452 (1999).

The State met its burdens in this case. Mr. Walters twice admitted during testimony that he committed the offense. His counsel argued at sentencing that the crime was only a misdemeanor under Nevada law[1] and should not be counted; he did not dispute that the conviction existed. Finally, the State had the Nevada sentencing transcript and read from it at sentencing. There was ample evidence of the Nevada conviction. It was not a contested issue in the trial court.

In addition to proving the existence of the offense, the prosecutor was also required to show that it was comparable to a Washington felony. That was done here. The State presented the Nevada statute[2] to the trial court, which compared the elements of the Nevada crime to Washington's second degree taking a motor vehicle without

---

[1] Washington's classification scheme is relevant; how the foreign jurisdiction classifies its offenses is not. RCW 9.94A.525(3).

[2] Nev. Rev. Stat. § 202.2715 (2010).

permission, RCW 9A.56.075. The trial court had a legal basis for making its comparability determination.

Mr. Walters points out that the Nevada statute does not require that a car be stolen with intent to permanently deprive the owner. He argues that intent to permanently deprive is an element of all Washington theft convictions, citing to RCW 9A.56.020. While it is true that intent to permanently deprive is an element of a theft prosecution, it is not an element of taking a motor vehicle in the second degree, RCW 9A.56.075. Instead, that statute punishes what used to be known as "joyriding"—the intentional taking of another person's car, regardless of whether there was intent to permanently keep the vehicle. To that end, the statute simply requires that the defendant (1) intentionally take the vehicle of another (2) without permission. RCW 9A.56.075(1). Similarly, the Nevada offense likewise requires taking without permission. The trial court correctly found that the two offenses are comparable.

Washington classifies taking a motor vehicle in the second degree as a felony. RCW 9A.56.075(2). Thus, the Nevada conviction was correctly included in the offender score.

CONCLUSION

The convictions for third degree assault and resisting arrest are affirmed. The

conviction for third degree theft is reversed and the case is remanded for further

proceedings consistent with this opinion.

_____
Korsmo, J.

I CONCUR:

_____
Kulik, C.J.