

FILED
Court of Appeals
Division I
State of Washington
5/13/2020 4:37 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
5/14/2020
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 98532-4
COA No. 79438-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEITH JAMES WHEELER,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Keith James Wheeler requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Wheeler, No. 79438-8-I, filed on April 20, 2020. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

A defendant receives ineffective assistance of counsel if his attorney fails to propose a jury instruction on voluntary intoxication, the instruction is warranted by the evidence, and the defendant is prejudiced. Here, the undisputed evidence established that Wheeler was intoxicated during the alleged trespass and assault. The jury could have found that his intoxication undermined his ability to form the requisite mental states. Yet counsel failed to request an instruction on voluntary intoxication. Without the instruction, the jury could not find that Wheeler lacked the necessary mental states due to his intoxication. The Court of Appeals concluded counsel's failure to request an instruction on voluntary intoxication did not amount to ineffective assistance of counsel. Should this Court grant review in order to clarify counsel's duty to request an instruction on involuntary intoxication in such a situation? RAP 13.4(b)(1), (2), (3), (4).

C. STATEMENT OF THE CASE

The jury heard undisputed testimony that Wheeler was highly intoxicated during the incident, yet they were not instructed they could take intoxication into account in deciding whether he acted with the requisite mental states.

On September 24, 2018, Island County Sheriff Deputy Lane Campbell responded to a suspicious person call on Ackley Lane. RP 233-35, 287-88. Ackley Lane is a private road servicing two houses in a rural area about four or five miles from the town of Oak Harbor. RP 235, 268, 289. Brenda Ackley owns one of the houses and the land surrounding it. RP 287-88. She had seen someone sitting in a parked car on her property and she wanted the police to get the person to leave. RP 236, 290-91.

Deputy Campbell approached the car and saw Keith Wheeler sitting in the front passenger seat. RP 237. The car was parked in a wooded area next to the dirt road. RP 274. No house was visible from that location. RP 274. Campbell had seen no “No Trespassing” or “Private Property” signs other than the street sign itself which has the letters “PVT” on it, which stands for “private.” RP 274. Ackley confirmed she had no “No Trespassing” signs posted at the entrance to her property. RP 297.

Deputy Campbell spoke to Wheeler through the open car door and told him the property owner did not want him on the property and he needed to leave. RP 239-41. Campbell immediately noticed that Wheeler was “clearly high” and was “probably under some form of narcotics.” RP 239-40, 267. Wheeler was “hard to understand” and “very ambiguous” and “very vague” about why and for how long he had been there. RP 238. He was “very paranoid about being contacted” and was “sweating profusely” although the temperature was in the mid-60s. RP 238. And he was “on the nod,” that is, he would stop in mid-speech and seemingly fall asleep for a moment before waking up and continuing. RP 238-39.

Due to Wheeler’s obvious intoxication, Campbell concluded he would not allow him to drive his car away. RP 240. Campbell told Wheeler he could either walk away or Campbell would give him a ride into town. RP 240. Campbell explained these options to Wheeler “dozens of times” throughout his encounter with him, which lasted about an hour and a half. RP 240-41. But Wheeler’s impairment and paranoia prevented him from thinking clearly and taking advantage of these options. RP 243. Throughout the encounter, Wheeler displayed a “constant paranoia,” went “through mood changes,” and continued to

be “very argumentative.” RP 241. He did “an awful lot of talking,” but most of his statements were “gibberish.” RP 241, 245.

After Campbell spent about 10 to 15 minutes unsuccessfully negotiating with Wheeler, Island County Sheriff Lieutenant Jeffrey Myers arrived on the scene. RP 193, 197. Myers noticed that Wheeler’s car was missing a rear license plate and the temporary license tag affixed to the rear window was invalid. RP 199-203. Myers would not allow Wheeler to drive the car in that condition because, under the law, a person cannot drive a car on a public roadway without a valid rear license plate. RP 204.

In addition, Lieutenant Myers noticed that Wheeler was exhibiting some “confusion.” RP 204-05. He “appeared to be slow to respond to the questions that Deputy Campbell was asking,” and was “unable to maintain a . . . train of thought.” RP 204-05. Wheeler expressed confusion about who the officers were and whether they were members of law enforcement. RP 205. But it should have been apparent to him that Campbell and Myers were members of the sheriff’s office, as they were wearing uniforms with badges and “shoulder patches prominently displayed.” RP 205.

Myers and Campbell continued to negotiate with Wheeler for another 30 minutes or so but it became obvious that, due to his impairment and paranoia, Wheeler was not going to leave voluntarily. RP 205-06, 243. Wheeler claimed he was trying to leave but the officers would not let him. RP 209, 243. The officers “gave him countless opportunities just to walk away,” but due to his paranoia, Wheeler refused to walk away or to get in the back of Campbell’s car so that Campbell could drive him into town. RP 243.

Myers left the scene briefly to go and talk to Ackley. He had her sign a “Trespass Admonishment” stating she did not authorize Wheeler to be on her property. RP 206-07. But when Myers returned with the document and asked Wheeler to sign it, Wheeler “backed up and started yelling that he wasn’t going to sign anything” and “started to argue about the whole process.” RP 208, 244. He said he did not understand the form, although Myers explained it to him slowly and clearly. RP 210, 244. When Wheeler turned to get back in his car, the officers finally gave up and decided to arrest him. RP 209, 244-46.

Campbell and Myers told Wheeler he was under arrest for trespassing and tried to place handcuffs on him. RP 209, 246. Wheeler struggled and yelled. RP 209, 247. Campbell used pain compliance

techniques such as wrist holds but Wheeler appeared to be oblivious to pain. RP 248. The officers finally got the handcuffs on but when they tried to place Wheeler in the back of Campbell's car, he resisted. RP 210-12, 247-50. Myers grabbed him by the shoulders and placed him on the ground face up and held him there with his hand on his chest. RP 212. Wheeler continued to resist by kicking his legs so the officers hobbled his legs. RP 213, 250-51. Wheeler screamed "Help! Help!" and "I can't breathe. I can't breathe." RP 213, 250.

At some point while Myers held Wheeler down on the ground, Wheeler looked at him and "spit in his face." RP 213, 253.

The officers called for an aid car. RP 213, 251. As they waited for it, Wheeler continued to yell "Help! Help! I can't breathe." RP 216. He passed in and out of consciousness. RP 217. Finally the aid car arrived and transported Wheeler to the hospital. RP 218-19, 252.

Wheeler was charged with one count of third degree assault and one count of second degree criminal trespass. CP 5-6. Defense counsel did not request a jury instruction on voluntary intoxication. The jury found Wheeler guilty of both counts as charged. CP 14-15.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

Wheeler received ineffective assistance of counsel due to his attorney's unreasonable failure to request a jury instruction on voluntary intoxication.

The jury heard undisputed and extensive testimony that Wheeler was highly intoxicated at the time of the incident and that his intoxication affected his behavior and mental state. Wheeler displayed obvious confusion and paranoia and an inability to maintain a coherent train of thought. Yet defense counsel inexplicably failed to request a jury instruction on voluntary intoxication. Without such an instruction, the jury could not consider whether, due to his intoxication, Wheeler was unable to form the requisite mental states to commit the charged crimes. Counsel's failure to request a jury instruction on voluntary intoxication was unreasonable and Wheeler was prejudiced as a result. Thus, his Sixth Amendment right to the effective assistance of counsel was violated.

Whether Wheeler received ineffective assistance of counsel due to his attorney's failure to request a voluntary intoxication instruction is reviewed *de novo*. State v. Kruger, 116 Wn. App. 685, 690, 67 P.3d 1147 (2003).

1. Wheeler's constitutional right to the effective assistance of counsel encompassed the right to have counsel request a voluntary intoxication instruction if supported by the evidence.

An accused in a criminal case has a Sixth Amendment right to "effective assistance by the lawyer acting on the defendant's behalf."

State v. Adams, 91 Wn.2d 86, 89-90, 586 P.2d 1168 (1978); U.S.

Const. amend. VI. To establish an ineffective assistance of counsel claim, Wheeler must show his attorney's performance was deficient and he was prejudiced as a result. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"Effective assistance of counsel includes a request for pertinent instructions which the evidence supports." Kruger, 116 Wn. App. at 688.

Counsel's failure to request a voluntary intoxication instruction amounts to ineffective assistance of counsel if (1) the defendant was entitled to the instruction; (2) there was no legitimate strategic or tactical reason *not* to request the instruction; and (3) the defendant was prejudiced. Id. at 690-91.

Here, all three prongs of this test are satisfied.

2. Wheeler was entitled to a voluntary intoxication instruction.

By statute, Washington recognizes an intoxication defense. State v. Walters, 162 Wn. App. 74, 81, 255 P.3d 835 (2011); RCW 9A.16.090. Under the statute, whenever a crime has a “particular mental state” as a necessary element, the fact of the defendant’s intoxication “may be taken into consideration in determining such mental state.” RCW 9A.16.090.

“Voluntary intoxication does not excuse the criminality of the act but it can render the defendant incapable of forming the specific [mental state] necessary for conviction of the crime.” State v. Stacy, 181 Wn. App. 553, 569, 326 P.3d 136 (2004) (citing State v. Mriglot, 88 Wn.2d 573, 576 n.2, 564 P.2d 784 (1977)).

The proper way to present a voluntary intoxication defense is to instruct the jury that they may consider evidence of the defendant’s intoxication in deciding whether he acted with the requisite mental state. State v. Coates, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987) (citing WPIC 18.10). It is not necessary to present expert testimony to support a voluntary intoxication defense. State v. Thomas, 123 Wn. App. 771, 781-82, 98 P.3d 1258 (2004).

A defendant is entitled to a voluntary intoxication jury instruction when (1) the crime has as an element a particular mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence that the intoxication affected the defendant's ability to form the required mental state. State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002). "Intoxication" may be caused by alcohol, drugs or both in combination. State v. Conklin, 79 Wn.2d 805, 807, 489 P.3d 1130 (1971).

When these three conditions are satisfied, an instruction on voluntary intoxication is mandatory if requested. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

Here, the charged crimes of third degree assault and second degree criminal trespass have the requisite mental states as elements.

Intent was an element of third degree assault as charged. CP 46-47; RCW 9A.36.031(1)(g); Kruger, 116 Wn. App. at 692; State v. Finley, 97 Wn. App. 129, 135, 982 P.2d 681 (1999). Intoxication is a defense to intentional assault. Kruger, 116 Wn. App. at 692.

To prove second degree criminal trespass, the State bore the burden to prove Wheeler knowingly entered or remained upon Ackley's property, knowing that the entry or remaining was unlawful.

CP 50; RCW 9A.52.080(1). Intoxication is a defense to second degree criminal trespass. Finley, 97 Wn. App. at 135; State v. Simmons, 30 Wn. App. 432, 435, 635 P.2d 745 (1981) (“knowledge” is “particular mental state” contemplated by voluntary intoxication statute).

Because intent and knowledge were elements of the crimes, Wheeler was entitled to a voluntary intoxication instruction if supported by “substantial” evidence. Walters, 162 Wn. App. at 82; Kruger, 116 Wn. App. 692. The evidence may come from any source; the defendant need not testify in order to be entitled to the instruction. State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996). The evidence must be viewed in Wheeler’s favor in deciding whether it was sufficient. State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

Evidence is sufficient to support a voluntary intoxication instruction if there is substantial evidence of intoxication and evidence that the intoxication affected the defendant’s ability to form the requisite mental state. Kruger, 116 Wn. App. at 691. The evidence “must reasonably and logically connect the defendant’s intoxication with the asserted inability to form the required level of culpability to commit the crime charged.” Gabryschak, 83 Wn. App. at 252-53.

Physical manifestations of intoxication may be sufficient to support a finding that mental processing was affected, thus entitling the defendant to an intoxication instruction. Walters, 162 Wn. App. at 83. In Walters, for example, the evidence was sufficient where the defendant had slurred speech and droopy and bloodshot eyes, he swayed back and forth, and he did not respond to pain compliance techniques. Id. Similarly, in Kruger, the evidence was sufficient where Kruger had slurred speech, vomited at the police station, and was impervious to pepper spray. Kruger, 116 Wn. App. at 692. By contrast, the evidence was not sufficient in Finley, where the bartender did not believe Finley was intoxicated, Finley complied with almost all of the officers' requests, and he "was neither confused nor disoriented." Finley, 97 Wn. App. at 136.

Here, as in Walters and Kruger, the evidence was sufficient to support a jury instruction on voluntary intoxication. Both Deputy Campbell and Lieutenant Myers agreed that Wheeler was obviously intoxicated and that his intoxication affected his behavior and mental state. Wheeler was "clearly high" and probably under the influence of "some form of narcotics." RP 239. He was "sweating profusely" and

seemed oblivious to pain. RP 238, 248. He drifted in and out of consciousness. RP 217, 238-39.

In fact, Wheeler's intoxication and consequent incapacity were the hallmark feature of his interactions with the officers. He was "very paranoid about being contacted" by law enforcement and was unwilling or unable to comply with the officers' numerous and repeated requests. RP 205-13, 238-53. He did "an awful lot of talking" but he was difficult to understand and spoke in "gibberish." RP 238, 245. He seemed "confus[ed]" and was slow to respond to questions, and he was "unable to maintain a . . . train of thought." RP 204-05. The officers were able to get him to comply and finally leave the property only through the use of restraints. RP 209-13, 244-51.

When viewed in the light most favorable to Wheeler, this evidence was more than sufficient to support a jury instruction on voluntary intoxication. Any reasonable jury could have concluded that Wheeler's intoxication and altered mental state affected his ability to form the intent necessary to commit an assault, or the knowledge necessary to commit a criminal trespass. The instruction would have been mandatory had counsel requested it. Rice, 102 Wn.2d at 123; Kruger, 116 Wn. App. at 694.

3. Counsel had no legitimate tactical reason not to request an intoxication instruction.

In deciding whether counsel's performance was deficient, the question is whether a reasonable attorney should have proposed an intoxication instruction under the facts of the case. Kruger, 116 Wn. App. at 693.

Here, counsel had no reasonable tactical basis not to request a voluntary intoxication instruction. As discussed, the evidence was more than sufficient to support the instruction. And voluntary intoxication would have provided the jury with a legitimate basis to find Wheeler not guilty of the charges.

Given the level of Wheeler's intoxication and its obvious effect on his behavior, it was not reasonable for counsel not to request an instruction that would have allowed the jury to connect Wheeler's intoxication with an inability to form the requisite mental states. Counsel acknowledged in closing argument that Wheeler "was not being cooperative," was "not listening" to the officers, and "was not complying" with their commands. RP 336. Yet counsel did not request an instruction that would have allowed the jury to find that, just as Wheeler's intoxication made him incapable of complying with the

officers' commands, it also affected his ability to commit an intentional assault.

Likewise, counsel elicited in cross-examination that no "no trespassing" or "private property" signs were posted in the vicinity. RP 274, 297. By doing so, counsel implied that Wheeler was not guilty of criminal trespass because he did not know his presence on the property was unlawful. Yet counsel did not request an instruction that would have allowed the jury to find that Wheeler's intoxication prevented him from comprehending that his entry and remaining on the property was unlawful.

The Sixth Amendment right to the effective assistance of counsel guarantees the right to an attorney who will protect the accused's fundamental right to a fair trial by subjecting the State's evidence to rigorous adversarial testing. Strickland, 466 U.S. at 684. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686.

Wheeler's trial did not produce a just result because counsel ignored the obvious import of the extensive evidence of Wheeler's

intoxication and resulting incapacity. A voluntary intoxication instruction conformed to the evidence and the defense and provided a ready and available means to find Wheeler not guilty of the charges. Counsel did not downplay the evidence of intoxication. Yet counsel made no attempt to take advantage of it either. Counsel's failure to request a jury instruction on voluntary intoxication was unreasonable.

4. Counsel's failure to request the instruction prejudiced Wheeler.

Finally, Wheeler was prejudiced by his attorney's deficient performance. The question is whether there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id.

In Kruger, counsel's unreasonable failure to request an instruction on voluntary intoxication prejudiced the defendant where Kruger's intoxication was brought to the jury's attention but, without the instruction, the jury had no basis to find Kruger's intoxication affected his ability to form the necessary intent. Kruger, 116 Wn. App. at 694-95.

Similarly, here, Wheeler's intoxication was brought to the jury's attention but, without a voluntary intoxication instruction, the jury was unable to use that evidence to Wheeler's advantage. Both law enforcement officers testified extensively about Wheeler's obvious intoxication and how it affected his ability to understand or comply with the officers' commands. RP 199-217, 239-51, 267. In closing argument, defense counsel acknowledged that Wheeler was "not listening" to the officers and "not complying" with their commands. RP 336. Without a voluntary intoxication instruction, the jury had no basis to find that Wheeler's intoxication not only affected his ability to comply with the officers' commands, but also affected his ability to form the necessary mental states to commit the crimes.

In sum, Wheeler was entitled to a voluntary intoxication instruction and counsel had no legitimate basis not to request one. Wheeler was prejudiced by counsel's deficient performance. His Sixth Amendment right to the effective assistance of counsel was violated.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 13th day of May, 2020.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

| | | |
|----------------------|---|---------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 79438-8-I |
| Respondent, |) | |
| |) | DIVISION ONE |
| v. |) | |
| |) | UNPUBLISHED OPINION |
| KEITH JAMES WHEELER, |) | |
| |) | |
| Appellant. |) | |
| _____ |) | |

SMITH, J. — Keith Wheeler appeals his conviction for one count of assault in the third degree and one count of criminal trespass in the second degree. He contends that his counsel was ineffective for failing to request a jury instruction on voluntary intoxication. But Wheeler was not entitled to a voluntary intoxication instruction based on the record established below, and his counsel’s failure to request one can be explained by a conceivable legitimate tactic. Therefore, we affirm.

FACTS

The State charged Wheeler with one count of assault in the third degree and one count of criminal trespass in the second degree following an incident that occurred in September 2018. At Wheeler’s trial, Deputy Lane Campbell of the Island County Sheriff’s Office testified that he responded to a 911 call regarding a suspicious person on property belonging to Brenda Ackley.

According to Deputy Campbell, when he arrived, Ackley explained that there was someone she did not know in a vehicle on her property and she wanted the person removed. Deputy Campbell drove to the location where Ackley told him the vehicle would be and found a man, later identified as Wheeler, sitting in the passenger seat of a car. Deputy Campbell contacted Wheeler and explained why he was there. He testified that Wheeler's "answers were very ambiguous, very vague about . . . why he was there, how long he had been there." According to Deputy Campbell, Wheeler was "sweating profusely" even though the outside temperature was in the mid-60s and Wheeler was "on the nod," meaning that "[h]e'd be talking and then . . . stopping and almost like you're going [to] sleep for a second or so." Deputy Campbell also described Wheeler as "rather very paranoid of being contacted." Deputy Campbell testified that "with [his] training and 37 years of doing []his job, it was [his] impression that [Wheeler] was probably under some form of narcotics."

Deputy Campbell told Wheeler that Ackley did not want Wheeler on her property. According to Deputy Campbell, he had no intention of arresting Wheeler; rather, "[a]ll [he was] trying to do [was] just get him off Ms. Ackley's property period. That's it." Deputy Campbell testified that because he believed Wheeler was too impaired to drive, he gave Wheeler "the option of getting a ride, walking out on his own, or he's going to go to jail." Deputy Campbell testified that he explained these options to Wheeler dozens of times throughout their contact, which ultimately lasted about an hour and a half. Deputy Campbell described Wheeler's response as "very argumentative. He's paranoid. He's going through

mood changes.”

About 10 or 15 minutes into the contact, a second officer, Lieutenant Jeffrey Myers, arrived on scene and joined in Deputy Campbell’s efforts “to negotiate a compromise to where nobody goes to jail.” But, according to Deputy Campbell, Wheeler “was having none of it.”

Lieutenant Myers also testified at Wheeler’s trial. According to Lieutenant Myers, when it became clear that Wheeler was not going to leave voluntarily, Lieutenant Myers decided he “wanted to have something with teeth, if you will,” so he had Ackley sign a “Trespass Admonishment” memorializing Wheeler’s lack of authorization to be on the property and Ackley’s desire that he not return. Lieutenant Myers then brought the Trespass Admonishment back to Wheeler, who at that point was standing outside of his car, and requested that he sign to acknowledge that he had received it. According to Lieutenant Myers, Wheeler then “backed up and started yelling that he wasn’t going to sign anything and . . . started to argue about the whole process.” After an additional exchange, Wheeler started walking back toward his car. Lieutenant Myers later testified that “at that point we knew if he got back in his car, we were going to be in another stalemate. And, quite honestly, we had been there long enough.”

Deputy Campbell grabbed Wheeler’s arm and placed him under arrest. Wheeler then began to struggle, but Lieutenant Myers stepped in, and ultimately the officers were able to handcuff Wheeler. When the officers tried to get Wheeler into the back of Deputy Campbell’s patrol car, however, Wheeler was uncooperative. He stiffened up his body, and although Deputy Campbell put him

in wrist holds, Wheeler still would not comply. According to Deputy Campbell, the situation had gotten “to the point where we’re physically going to have to hurt him to get him into the back of my car.” And as the officers were “discussing issues of being pepper sprayed and maybe applying the taser, . . . [n]ext thing you know [Wheeler was] collapsing himself between [Deputy Campbell’s] passenger door and the B-pillar of [the] patrol car trying to choke himself.” Deputy Campbell testified that Wheeler was “screaming at the top of his lungs. ‘Help me! Help me! The cops are trying to kill me.’”

At that point, the officers grabbed Wheeler and placed him on the ground. Wheeler was kicking. While Lieutenant Myers held Wheeler’s torso, Deputy Campbell fought to put restraints on Wheeler’s legs. Lieutenant Myers testified that as he held Wheeler down, he heard a “hawking loogie sound” and felt something hit his face and the front of his jacket. He testified that he then saw “a glob of spit on my glasses.” Lieutenant Myers called an aid car, and ultimately, Wheeler was taken away in the aid car on a gurney.

A jury convicted Wheeler as charged. Wheeler appeals.

ANALYSIS

Wheeler contends that his conviction must be reversed because his counsel was ineffective for failing to request a voluntary intoxication instruction. We disagree.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16

P.3d 601 (2001). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.”

State v. Salas, 1 Wn. App. 2d 931, 949, 408 P.3d 383 (2018). We review ineffective assistance claims de novo. Brett, 142 Wn.2d at 873.

To establish ineffective assistance based on counsel’s failure to request a jury instruction, the defendant must show that he was entitled to the instruction, counsel was deficient in failing to request it, and failure to request the instruction caused prejudice. State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). “The burden is on the defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” State v. Classen, 4 Wn. App. 2d 520, 535, 422 P.3d 489 (2018).

As further discussed below, because Wheeler was not entitled to a voluntary intoxication instruction and because his counsel was not deficient for failing to request it, his ineffective assistance claim fails.

Wheeler Was Not Entitled to the Instruction

To be entitled to a voluntary intoxication instruction, the defendant must show “(1) one of the elements of the crime charged is a particular mental state, (2) there is substantial evidence that the defendant ingested an intoxicant, and (3) evidence that his ingestion of an intoxicant affected his ability to acquire the required mental state for the crime.” Classen, 4 Wn. App. 2d at 536. “To satisfy the third element, there must be substantial evidence of the effects of the intoxicants on the defendant’s mind or body.” Classen, 4 Wn. App. 2d at 536. Specifically, because “[a] person can be intoxicated and still be able to form the

requisite mental state to commit certain crimes,” “[t]he evidence must reasonably and logically connect a defendant’s intoxication with his inability to form the requisite mental state.” Classen, 4 Wn. App. 2d at 536-37.

Here, the crimes charged—assault and trespass—each had a particular mental state.¹ But even assuming that there was substantial evidence that Wheeler had ingested an intoxicant, there was *no* evidence logically connecting his intoxication with his ability to acquire the required mental states for the crimes with which he was charged.

Classen is instructive in this regard. There, the State charged Darrell Classen with multiple crimes arising from Classen’s actions after he accepted a ride from Crista Cole, an acquaintance, one morning in September 2015. Classen, 4 Wn. App. 2d at 526, 528. While Classen was in Cole’s car, he poked Cole’s ribs and grabbed her hair. Classen, 4 Wn. App. 2d at 526-27. He later punched Cole in her ribs, head, and face, and directed her to drive, threatening to slit her throat and cutting her arm with scissors that he found in Cole’s car. Classen, 4 Wn. App. 2d at 527. Cole eventually escaped with the help of bystanders, who restrained Classen until the police arrived. Classen, 4 Wn. App. 2d at 528. At Classen’s trial,

Cole testified that Classen had never acted unusual around her but that on the day of the incident, Classen was “saying a bunch of stuff that didn’t really make sense at the time” and called her a “cop” and a “fed.” [A bystander] testified that Classen said “odd” things like

¹ The jury was instructed that “[a]n assault is an *intentional* touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done to the person” and that “[a] person commits the crime of criminal trespass in the second degree when he or she *knowingly* enters or remains unlawfully in or upon premises of another.” (Emphasis added.)

“I’m going to live my life” and would count to five and attempt to break free of restraints. [Another witness] stated that Classen was “talking and talking and talking” and appeared agitated. [And the responding officer] testified that Classen was making “weird nonsensical statements” and odd noises and appeared to be under the influence.

Classen, 4 Wn. App. 2d at 537 (citations omitted). A jury found Classen guilty as charged. Classen, 4 Wn. App. 2d at 530.

On appeal, Classen, who had been diagnosed with amphetamine use disorder before trial, argued that the testimony from Cole and other witnesses “shows that he lacked the ability to form the required level of culpability to commit the crimes charged.” Classen, 4 Wn. App. 2d at 528, 537. We disagreed and observed that even assuming that there was substantial evidence of intoxication, “Classen failed to provide any evidence about how methamphetamine affected his ability to form the requisite mental states for the crimes.” Classen, 4 Wn. App. 2d at 537. We observed further that

[a]lthough . . . Sergeant Geddry[, the responding officer,] testified that Classen appeared to be under the influence, Sergeant Geddry did not testify as to what type of drug or intoxicant he suspected Classen to be under the influence of. Sergeant Geddry also did not testify as to whether methamphetamine or heroin affects a person’s ability to form the requisite intent to commit the crimes of kidnapping or assault. Because it is not common knowledge that methamphetamine or heroin can affect a person’s ability to form the requisite intent, Classen needed to provide competent evidence to show his ability to form intent was affected. But here, Classen failed to introduce any evidence about the effect methamphetamine had on his ability to form the requisite intent.

Classen, 4 Wn. App. 2d at 537-38. Thus, we concluded, “there is no evidence to suggest that Classen lacked the ability to form the requisite mental state,” and “Classen cannot show that a voluntary intoxication instruction likely would have

been given.” Classen, 4 Wn. App. 2d at 538. We held, consequently, that “Classen’s counsel did not provide ineffective assistance for failing to seek a voluntary intoxication instruction.” Classen, 4 Wn. App. 2d at 538.

Here, as in Classen, even assuming that there was substantial evidence that Wheeler was intoxicated, there was no evidence to suggest that Wheeler lacked the ability to form the mental state required for the crimes with which he was charged. Specifically, as Wheeler correctly points out, the officers testified that Wheeler was “sweating profusely,” seemed oblivious to pain, drifted in and out of consciousness, was paranoid, talked a lot and spoke in “gibberish,” seemed confused, did not comply with the officers’ requests, was slow to respond to questions, and was unable to maintain a train of thought. But this testimony establishes, *at most*, that Wheeler was under the influence of something. It does not, as required to support a voluntary intoxication instruction, “reasonably and logically connect [Wheeler]’s intoxication with his inability to form the requisite mental state.” Classen, 4 Wn. App. 2d at 536; *cf.* State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996) (“Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be ‘substantial evidence of the effects of the alcohol on the defendant’s mind or body.’” (quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991))). Therefore, Wheeler was not entitled to a voluntary intoxication instruction.

Wheeler disagrees and contends that “[p]hysical manifestations of intoxication may be sufficient to support a finding that mental processing was affected, thus entitling the defendant to an intoxication instruction.” He relies on

State v. Walters, 162 Wn. App. 74, 255 P.3d 835 (2011), and State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), to support this proposition. But in each of those cases, there was evidence that the defendant had ingested alcohol. See Walters, 162 Wn. App. at 78 (“After a night of heavy drinking, James Walters stole some keys and later fought with a police officer.”); Kruger, 116 Wn. App. at 688 (“Kruger showed up at [someone]’s house drunk.”). And as we explained in Classen, “[t]he effects of alcohol are commonly known and jurors can draw reasonable inferences *from testimony about alcohol use.*” 4 Wn. App. 2d at 537 (alteration in original) (emphasis added) (quoting State v. Thomas, 123 Wn. App. 771, 782, 98 P.3d 1258 (2004)). Here, there was no testimony about alcohol use. Therefore, Wheeler’s reliance on Walters and Kruger is misplaced.

Wheeler’s Counsel Was Not Deficient for Failing To Request the Instruction

Wheeler’s ineffective assistance claim also fails because his counsel was not deficient for not requesting a voluntary intoxication instruction. Specifically, and as discussed, Wheeler was not entitled to the instruction. See State v. Flora, 160 Wn. App. 549, 556, 249 P.3d 188 (2011) (“[I]f the defendant would not have received a proposed instruction, counsel’s performance was not deficient.”).

Furthermore, counsel’s conduct is presumed effective and is not deficient if it “can be characterized as legitimate trial strategy or tactics.” State v. Kylo, 166 Wn.2d 856, 862-63, 215 P.3d 177 (2009). Here, the record reveals a conceivable and legitimate tactic that explains counsel’s decision not to pursue a voluntary intoxication defense. Specifically, in colloquy that took place outside the presence of the jury, the State indicated that it intended to introduce excerpts

of a jail call between Wheeler and a bail bondsman. According to the prosecutor, Wheeler stated on the call, “My vehicle was parked somewhere and[] . . . I had a sheriff roll up on me, asked me to leave and then they wouldn’t let me leave. They wanted me to walk away and I was refusing. So they hit me with a trespass.” When the bail bondsman asked Wheeler why he refused, Wheeler responded, “Because I was in the middle of nowhere. And wasn’t trying to be walking down the highway . . . and leaving my vehicle somewhere for it to get broken into.” The State initially indicated that it planned to call a detective as a witness to authenticate the jail call. Later, however, the State decided not to call the detective in its case in chief, but instead to “[s]ave his testimony for rebuttal, if necessary.”

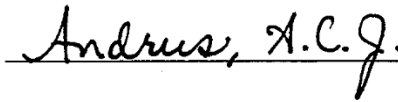
The existence and nature of the jail call, in which Wheeler cogently explained his reasons for refusing to leave the scene voluntarily, gives rise to a conceivable and legitimate reason why Wheeler’s counsel decided not to pursue a voluntary intoxication defense and, thus, not to request a voluntary intoxication instruction. Specifically, had Wheeler decided to pursue the defense, the State would likely have introduced the jail call to show that Wheeler knew exactly what he was doing during his interaction with the officers. And this evidence would have impeached, rather effectively, any evidence that Wheeler was unable to form the requisite mental states for assault and trespass. For these and the other reasons already discussed, counsel’s performance was not deficient and Wheeler’s ineffective assistance claim fails.


No. 79438-8-1/11

We affirm.

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WE CONCUR:

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 79438-8-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: May 13, 2020

WASHINGTON APPELLATE PROJECT

May 13, 2020 - 4:37 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 79438-8
Appellate Court Case Title: State of Washington, Respondent v. Keith James Wheeler, Appellant
Superior Court Case Number: 18-1-00239-8

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