

68031-5

68031-5

NO. 68031-5-1

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JEFFREY CLELL WOODS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

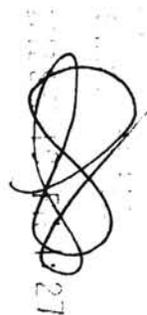
The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460



ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT	1
II. ISSUES	2
III. STATEMENT OF THE CASE.....	2
1. STATEMENT OF PROCEDURAL HISTORY	2
2. SUMMARY OF TRIAL TESTIMONY.....	4
IV. ARGUMENT	17
1. WHERE THE DEFENDANT BROKE THROUGH THE WINDOW TO GET AWAY FROM OFFICERS, THERE WAS SUFFICIENT EVIDENCE TO FIND THE DEFENDANT ACTED MALICIOUSLY.....	17
2. THE TRIAL COURT PROPERLY INCLUDED THE PRESUMPTION OF MALICE INSTRUCTION.	20
i. The claimed instructional error was not manifest.....	20
ii. The presumption of malice instruction was permissive and appropriate in this case.	22
3. THE DEFENDANT’S COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE PRESUMPTION OF MALICE INSTRUCTION.	23
4. WHERE THE DEFENDANT ADMITTED CONSUMING ALCOHOL BEFORE METHAMPHETAMINE, THERE WAS SUFFICIENT FACTUAL BASIS FOR THE TRIAL COURT TO INCLUDE COMMUNITY CUSTODY CONDITIONS PERTAINING TO ALCOHOL.	24
V. CONCLUSION	27

TABLE OF AUTHORITIES

	<u>Page</u>
<u>WASHINGTON SUPREME COURT</u>	
<u>In re Pers. Restraint of Martinez</u> , 171 Wn. 2d 354, 256 P.3d 277 (2011)	17
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	25
<u>State v. Brett</u> , 126 Wn.2d 136, 892 P.2d 29 (1995)	24
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	23
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	17
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	23, 24
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	24
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	21
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	23
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972)	23
<u>WASHINGTON COURT OF APPEALS</u>	
<u>In re Marriage of Bralley</u> , 70 Wn. App. 646, 855 P.2d 1174 (1993).....	25
<u>State v. Atkins</u> , 156 Wn. App. 799, 236 P.3d 897 (2010).....	20
<u>State v. Autrey</u> , 136 Wn. App. 460, 150 P.3d 580 (2006)	24, 25
<u>State v. Brooks</u> , 142 Wn. App. 842, 176 P.3d 549 (2008).....	25
<u>State v. Jones</u> , 118 Wn. App. 199, 76 P.3d 258 (2003)	25, 26
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992).....	22
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992)	17
<u>UNITED STATES SUPREME COURT</u>	
<u>Chapman v. California</u> , 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065 (1967)	21
<u>Estelle v. McGuire</u> , 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991)...	22
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.ed.2d (1979).....	17
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984).....	23
<u>Ulster County Court v. Allen</u> , 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)	22
<u>Yates v. Evatt</u> , 500 U.S. 391, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991)	22

WASHINGTON STATUTES

RCW 9.94A.505 25
RCW 9.94A.753 25
RCW 9A.04.110 18, 22
RCW 9A.48.090 18

WASHINGTON COURT RULES

RAP 2.5 20, 21

I. SUMMARY OF ARGUMENT

Jeffrey Woods was convicted of assaulting a police officer, criminal trespass and malicious mischief for breaking through a window at a motel he was staying at after consuming alcohol and methamphetamine. Woods contends the facts were insufficient to prove that he maliciously broke through the motel office window. This occurred after he assaulted an officer and resisted arrest. Woods had also been trying to get inside, and asked the motel manager to open the window before breaking the window. The evidence was sufficient for the jury to find he acted maliciously.

Woods contends the permissive inference of malice was inappropriate. However, the evidence permitted that inference. Woods contends his trial counsel was ineffective for failing to object to the instruction. Given the instruction was appropriate his counsel was not ineffective. Finally, Woods contends the jury exceeded its authority in imposing a condition of no alcohol during the period of community custody. Given Woods' testimony that he had consumed alcohol prior to consuming methamphetamine, there were sufficient facts to permit the condition.

II. ISSUES

1. Where a defendant broke through a window to enter the motel office and get away from officers, was there sufficient evidence for a rational trier of fact to find he acted maliciously?
2. Was there sufficient basis to permit the permissive inference of malice instruction?
3. Was trial counsel ineffective for failing to object to the inference of malice instruction?
4. Where the defendant admitted consuming alcohol before methamphetamine prior to assaulting the officer, was there sufficient basis for the trial court to include a condition of community custody prohibiting the consumption of alcohol?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On September 13, 2010, Jeffery Clell Woods was charged with two counts of Assault in the Third Degree, Possession of Methamphetamine, Criminal Trespass in the First Degree, and Malicious Mischief in the Third Degree, alleged to have occurred on September 7, 2010. CP 1-2. Woods was alleged to have assaulted two Sedro Woolley Police officers before breaking into the office of the Skagit Motel through a window. CP 4-5.

Methamphetamine was found among Woods property during a jail inventory. CP 4-5.

On October 3, 2011, Woods proceeded to trial. 10/3/11 RP 1.¹

On October 6, 2011, the trial court addressed instructions. Woods did not object to the instructions. 10/6/11 RP 130-1.

On October 7, 2011, the jury convicted Woods of assault of one officer, malicious mischief and criminal trespass. CP 102, 105, 106. The jury was unable to unanimously agree on the assault of the second officer and the possession of methamphetamine charge. CP 103, 104.

On December 1, 2011, Woods was sentenced to 14 months on the Assault in the Third Degree of the officer. CP 159. Woods was sentenced to 364 days on the misdemeanor charges to run concurrent with the felony. CP 159. The trial court included community custody of 12 months with requirement that Woods “not consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale.” CP 160, 166. Woods did not object to the condition. 12/1/11 RP 14-6.

¹ The State will refer to the verbatim report of proceedings by using the date followed by “RP” and the page number. The report of proceedings in this case are as follows:

10/3/11 RP	Trial Day 1, Jury Selection and Motions
10/4/11 RP	Trial Day 2, Opening Statement, Testimony
10/5/11 RP	Trial Day 3, Testimony
10/6/11 RP	Trial Day 4, Testimony, Jury Instructions and Closing,
10/7/11 RP	Verdicts,
11/23/11 RP	Setting Sentencing Date
12/1/11 RP	Sentencing.

On December 5, 2011, Woods timely filed a notice of appeal. CP 168.

On December 8, 2011, the State filed a notice of cross-appeal of a trial court ruling. CP ____ (Sub No. 103, Notice of Cross-Appeal, Filed December 8, 2011, Supplemental Designation of Clerk's Papers pending.) The State has chosen to withdraw that cross-appeal in light of Woods decision not to challenge the conviction for Assault in the Third Degree.

2. Summary of Trial Testimony

Angie Montgomery owned the Skagit Motel in Sedro Woolley with her husband. 10/4/11 RP 150-1. Jeffery Woods rented a room on September 6, 2010. 10/4/11 RP 152. Woods came to the office early the next morning and rang the bell for assistance. 10/4/11 RP 154-5. Woods said he was locked out and she gave him a key. 10/4/11 RP 155. Woods didn't walk away and was just standing there not moving so, she opened the door for him and he left. 10/4/11 RP 156. The interaction made her uncomfortable. 10/4/11 RP 156. She went back to bed, but he rang the bell again. 10/4/11 RP 157. Woods was concerned about the correct key and asked to be let back inside but she declined. 10/4/11 RP 157. Woods tried to open the door a number of times then tried to climb in through a window. 10/4/11 RP 158.

Ms. Montgomery was concerned that Woods was trying to get inside, so she called police. 10/4/11 RP 159, 169. Woods was outside at that point, telling her and her husband that a dog was attacking him. 10/4/11 RP 159. She could see there was no dog outside. 10/4/11 RP 159. She was very uncomfortable, but relieved when officers arrived. 10/4/11 RP 159. She did not see what occurred outside right after police arrived. 10/4/11 RP 160. A little later, she was looking outside and saw an officer try to use a taser, to no effect. 10/4/11 RP 161. She then saw Woods throw his body through the office window. 10/4/11 RP 161. She retreated further inside the office and locked the door. 10/4/11 RP 161.

On September 7, 2010, Officer Paul Eaton of the Sedro Woolley Police Department was working patrol when he came across Jeffery Woods at the Skagit Motel. 10/4/11 RP 36, 38. He saw Woods in a breezeway near the office at about 2:30 a.m. 10/4/11 RP 40. Woods face was flushed, the knees of his pants were wet and he appeared intoxicated. 10/4/11 RP 41-2. Woods told Eaton he had lost his room key. 10/4/11 RP 42. Eaton did not get out of his car and drove away. 10/4/11 RP 42.

About fifteen to twenty minutes later, Eaton responded to the Skagit Motel on the report of a male acting erratically trying to crawl through a small window. 10/4/11 RP 43, 47. Eaton identified video from the night of the incident depicting what had occurred. 10/4/11 RP 44-5. The video was

admitted. 10/4/11 RP 45 When Eaton returned, he got out and started talking to Woods asking if he was okay. 10/4/11 RP 46. Woods did not respond and appeared not to realize he had just talked to Eaton and was looking straight through Eaton. 10/4/11 RP 46. Eaton asked Woods if he had identification. 10/4/11 RP 47. Woods said he did not. 10/4/11 RP 47. Woods checked the front of his pockets for identification but never located it. 10/4/11 RP 47. Eaton's goal was to get Woods to his room and stop causing problems. 10/4/11 RP 47.

Woods started to turn as though to walk away, and the swung with his right arm trying to strike Eaton. 10/4/11 RP 49. Eaton blocked the blow and the two started struggling. 10/4/11 RP 49. Woods' fists had been clenched as he swung at Eaton who went backwards. 10/4/11 RP 49, 52. Woods was too close to use a taser or for Eaton to grab his pepper spray. 10/4/11 RP 52. Blows were exchanged as they approached Eaton's car. 10/4/11 RP 55. Eaton was struck in the cheek. 10/4/11 RP 92. Eaton tried to get Woods in a position by his car until the other officer arrived. 10/4/11 RP 53. Eaton struck Woods causing him to fall to the ground. 10/4/11 RP 53. Eaton got on top of Woods to contain him. 10/4/11 RP 53.

Officer Vollans arrived. 10/4/11 RP 55. Eaton and was trying to handcuff Woods but was unable to do so. 10/4/11 RP 56. Vollans deployed his taser, but the effect only worked for the five seconds while it was

deployed. 10/4/11 RP 56, 59. Woods then immediately started to get up. 10/4/11 RP 57, 59-60. Woods threw Eaton off and ran towards Highway 20. 10/4/11 RP 60. Eaton and Vollans pursued concerned that Woods might head out on to the roadway where the speed limit was fifty miles per hour. 10/4/11 RP 60.

Eaton followed Woods and used pepper spray to try to control Woods. 10/4/11 RP 61. The spray did not have any effect on Woods. 10/4/11 RP 61-2. Eaton got hit with some of the spray causing his eyes to shut. 10/4/11 RP 62. Eaton was able to force his eyes back open. 10/4/11 RP 62. Woods ran by Eaton and Vollans back to the motel breezeway. 10/4/11 RP 63. Eaton and Vollans were the only officers working, so they called for backup from Burlington and the county Sheriff's Office. 10/4/11 RP 64-5.

At the breezeway, Eaton and Vollans urged Woods to get on the ground. 10/4/11 RP 65. Woods did not respond. 10/4/11 RP 65. Eaton then deployed his taser but there appeared to be a disconnect due to Woods' clothing and it did not go off. 10/4/11 RP 66. Vollans then deployed his taser and Woods tried to jump through a window at the motel office. 10/4/11 RP 66. Woods broke through the screen and window itself, but only made it partway inside. 10/4/11 RP 68. Woods got back out and started grabbing shards of glass. 10/4/11 RP 68. Eaton drew his firearm because he

was concerned Woods could injure him with the glass. 10/4/11 RP 68. Vollans then pepper sprayed Woods who then jumped fully through the window into the motel office. 10/4/11 RP 68-9.

The motel manager and his wife were inside. 10/4/11 RP 69. Woods got behind the counter and Eaton was concerned Woods could get additional weapons. 10/4/11 RP 70. The manager let Eaton inside. 10/4/11 RP 70. Eaton drew his taser and deployed it a second time. 10/4/11 RP 71-2. The taser appeared to have an effect but Woods was able to pull out the taser probes. 10/4/11 RP 72. Officer Vollans was outside. 10/4/11 RP 73. Woods then grabbed a rock and threatened both Eaton and Vollans. 10/4/11 RP 73. Eaton talked to Woods saying they were there to help him and asking him to get on the ground. 10/4/11 RP 73. Woods appeared to be wiping pepper spray from his eyes. 10/4/11 RP 73. Eaton and Vollans continued to talk to Woods. 10/4/11 RP 74. Eventually Woods grabs Eaton's hand and Vollans reaches out to grab on to him as well. 10/4/11 RP 74. Eaton and Vollans escorted Woods out by his arms. 10/4/11 RP 76. They were able to get Woods outside on the ground. 10/4/11 RP 76. At that point, Officer Cates from Burlington arrived and they worked to get Woods' hands out and into handcuffs. 10/4/11 RP 77. Eaton struck at Woods to try to distract him to allow them to control Woods' hands. 10/4/11 RP 77-8. Cates was able to wrap up Woods' legs. 10/4/11 RP 78. Eaton then used his

taser on Woods' shoulder to get him to bring his arms out. 10/4/11 79. Once Eaton deployed the taser on Woods' shoulder, they were able to get Woods' arms out and get him into handcuffs. 10/4/11 RP 80. Once they got the second handcuff on Woods, he stopped fighting. 10/4/11 RP 80.

They were able to get Woods to his feet and placed into a vehicle for transport to the hospital in Vollans' vehicle. 10/4/11 RP 81, 83. At the hospital, Eaton photographed the injuries to his hands. 10/4/11 RP 84-5. Eaton saw Woods' property at the hospital including a cigarette package. 10/4/11 RP 85. Officer Musgrove replaced Vollans at the hospital before transporting Woods to the jail. 10/4/11 RP 86. At that point, Woods demeanor was cooperative and they were able to get Woods into the car. 10/4/11 RP 87. Vollans transported Woods to jail. 10/4/11 RP 97.

Officer Oscar Vollans responded to the call at the Skagit Motel. 10/4/11 RP 111. As Vollans pulled up, he saw Officer Eaton in a fight with Woods. 10/4/11 RP 114, 123-4. As Vollans got out of his car Eaton and Woods fell to the ground. 10/4/11 RP 114. Vollans got his taser out and had Eaton step back. 10/4/11 RP 114. The taser immobilized Woods for a few seconds before he got to his feet and started to run away. 10/4/11 RP 115-6. Vollans saw Eaton chase Woods towards the highway and appeared to pepper spray him. 10/4/11 RP 117. The pepper spray had no effect. 10/4/11 RP 117. Vollans deployed a second taser cartridge with little effect. 10/4/11

RP 117. Woods went toward a corner of the front office where Vollans approached. 10/4/11 RP 118. Woods broke out the office window. 10/4/11 RP 119. Vollans then sprayed Woods with pepper spray and described that Woods jumped through the motel office window. 10/4/11 RP 118-9.

Vollans described that Eaton went around to the office and went inside while Vollans went for a flashlight. 10/4/11 RP 119-20. When Vollans returned inside the motel office, he saw that Woods had armed himself with a rock the size of a kettle. 10/4/11 RP 120. Vollans told Woods he could be shot if he didn't stop what he was doing. 10/4/11 RP 120. Woods then put the rock down and started to walk to the door. 10/4/11 RP 121. Vollans and Eaton each grabbed an arm and they escorted Woods outside placing him on the ground. 10/4/11 RP 121. Woods continued to resist Vollans and Eaton by preventing them from controlling his arms. 10/4/11 RP 121. Eaton then picked up a taser and used it to stun Woods to get control of Woods' arms. 10/4/11 RP 122. They were eventually able to get Woods handcuffed and he stopped fighting. 10/4/11 RP 122-3. Woods was transported to the hospital with a few personal belongings. 10/4/11 RP 124-5. The room that Woods was seen in is a lockdown room which was bare. 10/4/11 RP 126. Vollans searched Woods' clothing finding a small glass pipe which Vollans recognized was used to ingest methamphetamine.

10/4/11 RP 127. Vollans also collected a pack of cigarettes which was on the ground in the hospital room. 10/4/11 RP 128-9.

Photographs taken at the hospital showing Vollans scraped knees were admitted. 10/4/11 RP 129-30.

James Montgomery owned the Skagit Motel with his wife, Angie. 10/4/11 RP 172. As usual, Montgomery walked around the property at about 2:00 a.m. to make sure everybody is safe and went to bed. 10/4/11 RP 173. Around 2:45 a.m. he was awoken by someone ringing the bell for assistance. 10/4/11 RP 173. His wife went out to deal with the bell but it rang again a short time later and he went out to find Woods talking to his wife through the service window. 10/4/11 RP 173. His wife looked nervous. 10/4/11 RP 174. Woods wanted to come inside and Mr. Montgomery refused. 10/4/11 RP 174. Woods really wanted to come inside and claimed there was a mean dog or beast after him. 10/4/11 RP 174. Mr. Montgomery looked outside and didn't see any animals. 10/4/11 RP 174. When Woods tried to crawl through the window, Mr. Montgomery asked his wife to call the police. 10/4/11 RP 175-6.

Mr. Montgomery saw Officer Eaton arrive and approach Woods. 10/4/11 RP 177. He heard Eaton ask Woods if he could help Woods and if Woods had any identification. 10/4/11 RP 177. Shortly thereafter, he saw Woods and Eaton run toward the front of the building. 10/4/11 RP 177. He

saw officers chase Woods out to the highway, run back and be tased. 10/4/11 RP 178. He saw Woods come around to the outside of the office. 10/4/11 RP 178. Woods then asked Mr. Montgomery to open up the window to be let inside. 10/4/11 RP 178. The window was shut with a screen over the window. 10/4/11 RP 178. Woods lunged headfirst into the window. 10/4/11 RP 191. Woods then threw himself through, jumping inside. 10/4/11 RP 178, 191. The window is three feet off the ground. 10/4/11 RP 191. Woods felt the effects of the pepper spray. 10/4/11 RP 178. The officers yelled open the door and Mr. Montgomery did and took care of Woods. 10/4/11 RP 178.

Officer Jed Cates of the Burlington Police Department responded to assist with Woods. 10/4/11 RP 198-9. When he arrived, Woods was on the ground with the Sedro Woolley Officer. 10/4/11 RP 199. Cates sat on Woods' shins and assisted in handcuffing him. 10/4/11 RP 200. It took a lot of strength for Cates to pull Woods' arm out to handcuff him. 10/4/11 RP 200.

Kirk Swensen was an emergency room physician who treated Woods on September 7, 2010. 10/4/11 RP 99, 101. Woods was sedated when Swensen first saw him after he came in around 3:30 in the morning. 10/4/11 RP 101, 106. Swensen ordered a toxicology screen which showed that Woods tested positive for amphetamines. 10/4/11 RP 102-3. Swensen

diagnosed that Woods was suffering from methamphetamine abuse. 10/4/11 RP 104. Woods was released around 7:13 that morning. 10/4/11 RP 107.

Officer Adam Musgrove transported Woods to the Skagit County jail from the hospital. 10/5/11 RP 11-3. Musgrove took control of Woods' property at the hospital. 10/5/11 RP 14. Musgrove assisted Woods in getting dressed and escorted him to the patrol car. 10/5/11 RP 15. Woods was cooperative. 10/5/11 RP 15. On the way to jail, Woods' demeanor changed. 10/5/11 RP 16. Woods became paranoid looking, moving around, shifting around and yelling. 10/5/11 RP 16. When Musgrove approached the back door, Woods had his feet drawn back ready to kick Musgrove. 10/5/11 RP 17. Musgrove went around to the other side of the vehicle and grabbed Woods pulling him out before he could turn around. 10/5/11 RP 18-9. Woods was resisting Musgrove and once Musgrove got him out, he turned toward Musgrove in the elevator room. 10/5/11 RP 19. Musgrove took Woods to the ground. 10/5/11 RP 20. The jailers took over for Musgrove when they arrived upstairs and restrained Woods' legs behind his back. 10/5/11 RP 22. After Musgrove left the jail, he was called back to pick up a bag of white powder which had been located in Woods' property. 10/5/11 RP 2203

Keith Dillaman was a jailer with Skagit County who was present when Woods arrived at the jail. 10/4/11 RP 202-3, 10/5/11 RP 5. Woods

was combative when he arrived at the jail. 10/5/11 RP 5. He was argumentative, yelling and not following directions. 10/5/11 RP 5. They had to literally pick Woods up by his legs and carry him back to a lockdown solitary holding room. 10/5/11 RP 6. Woods was too combative to change his own clothes so they placed him on a bed and took his clothes off for him. 10/5/11 RP 8. Among Woods property was a cigarette box which contained a small bag with a white substance. 10/5/11 RP 9. Dillaman provided the bag to Officer Musgrove. 10/5/11 RP 10.

Eric Finney, a former forensic scientist with the Washington State Patrol Crime laboratory, testified he tested the powder in the bag located in Woods' property and found it weighed 2.58 grams and contained methamphetamine. 10/5/11 RP 30-1, 36-8.

Karen Crary, a forensic scientist with the Washington State Patrol Crime laboratory, testified she tested the material in the glass smoking pipe. 10/5/11 RP 42-4, 48-9. She found it to contain methamphetamine. 10/5/11 RP 48.

The defense called Brian Young, an employee of Skagit County who works in video editing to testify. 10/5/11 RP 50. Through Young defense admitted a slowed-down version of a portion of the videos obtained from the security cameras at the motel. 10/5/11 RP 51, 54, 57.

The defendant, Jeffrey Woods testified. 10/5/11 RP 59-112. Woods is a journeyman lineman. 10/5/11 RP 60. He rented a room at the Skagit Motel on September 6, 2010. 10/5/11 RP 60. Woods admitted to drinking “quite a few beers” that evening. 10/5/11 RP 62. Woods realized he didn’t have his room key and went to the manager’s office. 10/5/11 RP 62. Woods contacted the manager and got another room key. 10/5/11 RP 63. He believed he got the wrong key. 10/5/11 RP 64. Woods said he was contacted by Officer Eaton at that point and talked to him including noting to Eaton that he had a couple of beers. 10/5/11 RP 65.

Woods contacted the female manager again and said he got the correct room key. 10/5/11 RP 65-6. Woods claimed he had a conversation with the manager’s husband which included a discussion about a neighbor having a dog. 10/5/11 RP 66. Woods continued to talk with the husband, when Officer Eaton approached. 10/5/11 RP 68. Woods saw that Eaton was putting on his gloves as he exited the patrol car. 10/5/11 RP 68. Woods believed Eaton was coming after him. 10/5/11 RP 69. Woods recalled Eaton asking for identification and then asked Woods to get on the ground. 10/5/11 RP 70. Woods described Eaton as being angry and loud. 10/5/11 RP 70.

Woods claimed that when he looked down to grab his wallet out of his pocket that Eaton lunged for him and was on him. 10/5/11 RP 70.

Woods raised his hands up and claimed Eaton started flinging him around. 10/5/11 RP 70. Woods recalled falling to the ground. 10/5/11 RP 71. Woods recalled being on his back and rolling over which is the last thing he could remember until later on. 10/5/11 RP 73, 75. Woods only remembered covering up and could not recall kicking or swinging at the officers. 10/5/11 RP 75.

Woods next recalled being on the ground when another police car arrived. 10/5/11 RP 77. He recalled being struck and seizing up. 10/5/11 RP 77. Woods did not recall being handcuffed. 10/5/11 RP 78. Woods next remembered being at the hospital and waking up on the table. 10/5/11 RP 78.

On cross-examination Woods admitted consuming methamphetamine and alcohol. 10/5/11 RP 104-5. Woods denied the methamphetamine from the cigarette package was his. 10/5/11 RP 105.

The State recalled Officer Eaton who testified that at the hospital, Woods had admitted to purchasing an 8-ball of methamphetamine in a bar in Sedro Woolley. 10/5/11 RP 116. At the hospital Woods also apologized to Eaton for fighting with him and that he knew he had to pay for what he had done. 10/5/11 RP 116

The jury convicted Woods of assault of Officer Vollans, malicious mischief and criminal trespass. CP 102, 105, 106

IV. ARGUMENT

1. Where the defendant broke through the window to get away from officers, there was sufficient evidence to find the defendant acted maliciously.

Woods claims there was insufficient evidence that he acted maliciously when he broke the motel window. Brief of Appellant at page 9.

The State contends since the testimony was that Woods had repeatedly sought to get inside the motel office and had asked the owner to open the window before he broke in, there was sufficient evidence that the breaking of the window was malicious.

The standard for determining whether a conviction rests on insufficient evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting Jackson, 443 U.S. at 319, 99 S.Ct. 2781). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” State v. Walton, 64 Wn. App. 410, 415, 824 P.2d 533 (1992). This standard is a deferential one, and questions of credibility, persuasiveness, and conflicting testimony must be left to the jury. Id. at 415–16, 824 P.2d 533.

In re Pers. Restraint of Martinez, 171 Wn. 2d 354, 364, 256 P.3d 277 (2011).

A person commits the crime of Malicious Mischief in the Third Degree when the person knowingly and maliciously causes physical damage to the property of another, under circumstances not amounting to

malicious mischief in the first or second degree. RCW 9A.48.090(1)(a).

RCW 9A.04.110(12) defines the term maliciously.

In this title unless a different meaning plainly is required:

...

(12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty; ...

RCW 9A.04.110(12).

Woods contends the “record is devoid of any evidence establishing Woods intended, wished or designed to vex, annoy or injure another person.” Brief of Appellant at page 10. He goes on to argue the officers testified that the defendant jumped through the window immediately after being pepper sprayed. In fact, a close analysis of the testimony actually indicates both officers testified that Woods broke the window first and then after being pepper sprayed jumped through the window.

Officer Eaton testified when he cornered Woods he deployed his taser but there appeared to be a disconnect. 10/4/11 RP 66. Vollans then deployed his taser and Woods tried to jump through a window at the motel office. 10/4/11 RP 66. Woods broke through the screen and window itself, but only made it partway inside. 10/4/11 RP 68. Woods got back out and started grabbing shards of glass. 10/4/11 RP 68. Eaton then drew his

firearm because he was concerned Woods could injure him with the glass. 10/4/11 RP 68. Vollans then pepper sprayed Woods who then jumped fully through the window into the motel office. 10/4/11 RP 68-9.

Officer Vollans testified Woods went toward a corner of the front office where Vollans approached. 10/4/11 RP 118. Woods broke out the office window. 10/4/11 RP 119. Vollans then sprayed Woods with pepper spray and described that Woods then jumped through the motel office window. 10/4/11 RP 118-9.

The officer testimony is consistent with the statements of Mr. Montgomery that Woods asked to get inside. He testified Woods asked him to open up the window to be let inside. 10/4/11 RP 178. The window is three feet off the ground. 10/4/11 RP 191. The window was shut with a screen over the window. 10/4/11 RP 178. Woods lunged headfirst into the window. 10/4/11 RP 191. Woods then threw himself through jumping inside. 10/4/11 RP 178, 191.

Given Woods demeanor and actions in fighting with the officers, his desire to get into the office, the refusal of Mr. Montgomery to let him in through the window, and the fact Woods broke the window before the first pepper spray, there was sufficient of intent to vex or annoy the motel owners.

In making the argument, Woods draws inferences in his favor contending the “timing of Woods desperate act of jumping through the

window indicates the act was an automatic response to danger rather than one to vex or annoy the motel owners.” Brief of Appellant at page 10. This argument, is inconsistent with the requirement that all logical inferences from the evidence be drawn in the light most favorable to the State.

2. The trial court properly included the presumption of malice instruction.

Woods contends the inference of malice instruction was improper. Woods did not object to the instruction below. 10/6/11 RP 130-1.

The State contends the claimed error is not manifest and the presumption of malice was not inappropriate.

i. The claimed instructional error was not manifest.

The State contends the error is not manifest such that it may be raised for the first time on appeal. RAP 2.5(a)(3)

Woods simply claims that this “Court reviews an alleged jury instruction error de novo.” Brief of Appellant at page 12 citing State v. Atkins, 156 Wn. App. 799, 807, 236 P.3d 897 (2010). However, in Atkins, there is no indication of whether or not the instruction was challenged below. Furthermore, Atkins alleged the instruction relieved the State of proving one of the elements of the offenses. Id.

The State contends the error is not manifest such that it can be raised for the first time on appeal. RAP 2.5(a)(3):

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: ... (3) manifest error affecting a constitutional right.

This court construed RAP 2.5(a)(3) in State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988) (footnote omitted):

The proper way to approach claims of constitutional error asserted for the first time on appeal is as follows. First, the appellate court should satisfy itself that the error is truly of constitutional magnitude--that is what is meant by "manifest." If the asserted error is not a constitutional error, the court may refuse review on that ground. If the claim is constitutional, then the court should examine the effect the error had on the defendant's trial according to the harmless error standard set forth in Chapman v. California.

This analysis essentially eliminates the word "manifest" from the rule. An error that is not "truly of constitutional magnitude" would simply not "affect a constitutional right." Under Scott, any error "affecting a constitutional right" will be reviewed unless it is harmless. The word "manifest" adds nothing.

Nevertheless, the Court of Appeals has given weight to the word "manifest":

In normal usage, "manifest" means unmistakable, evident, or indisputable, as distinct from obscure, hidden, or concealed. "Affecting" means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient.

State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992) (footnote omitted). According to Lynn, a constitutional error that is “purely abstract and theoretical” will not be considered for the first time on appeal. Id. at 346.

ii. The presumption of malice instruction was permissive and appropriate in this case.

A statute defines the presumption of malice.

Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty; ...

RCW 9A.04.110(12). Here the jury was instructed using the same language: “Malice may be, but is not required to be, inferred from an act done in willful disregard of the rights of another.” CP 93.

The presumption by its plain language is permissive. “A permissive presumption merely allows an inference to be drawn and is constitutional so long as the inference would not be irrational.” Yates v. Evatt, 500 U.S. 391, 402 n. 7, 111 S.Ct. 1884, 114 L.Ed.2d 432 (1991), *disapproved of on other grounds by* Estelle v. McGuire, 502 U.S. 62, 72 n. 4, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (*quoting* Ulster County Court v. Allen, 442 U.S. 140, 157, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979)).

Given the presumption was permissive, it was not inappropriate given that Woods was aware that he was going to be breaking through a

window which he had asked to enter and was aware it was the property of the motel.

3. The defendant's counsel was not ineffective for failing to object to the presumption of malice instruction.

Woods attempts to claim ineffective assistance of counsel for failure to object to the malice instruction. This appears simply to be another way around the fact that the issue was not preserved below. But given the evidence in the case, the State contends the permissive presumption was appropriate. Therefore, Woods has not established his counsel was ineffective.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) **defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;** and (2) **defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.** State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). Competency of counsel is determined based upon the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)).

State v. McFarland, 127 Wn.2d 322, 334-5, 899 P.2d 1251 (1995) (emphasis added).

Courts engage in a strong presumption counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226, 743 P.2d 816.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (emphasis added).

Since the instruction was appropriate, Woods has not established his counsel's representation was deficient. In addition, Woods has not met his burden of establishing he was prejudiced as a result.

4. Where the defendant admitted consuming alcohol before methamphetamine, there was sufficient factual basis for the trial court to include community custody conditions pertaining to alcohol.

Woods contends the trial court improperly included community custody conditions pertaining to alcohol because a blood test at the hospital indicated Woods did not have alcohol in his system. Brief of Appellant at page 17. Woods did not raise the issue below.

The State contends the trial court properly included the condition because the officer had earlier observed Woods acting intoxicated, the blood test was taken hours after the initial altercation and Woods testified that he had consumed alcohol before consuming methamphetamine.

We review a crime-related community custody condition for an abuse of discretion. State v. Autrey, 136 Wn. App. 460, 466–67, 150 P.3d 580 (2006); State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A trial court abuses its

discretion when its decision is based on untenable grounds including those that are contrary to law. In re Marriage of Bralley, 70 Wn. App. 646, 651, 855 P.2d 1174 (1993); State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A trial court may generally impose crime-related prohibitions or affirmative conditions. RCW 9.94A.505(8); Autrey, 136 Wn. App. at 466, 150 P.3d 580.

State v. Brooks, 142 Wn. App. 842, 850, 176 P.3d 549 (2008).

RCW 9.94A.753 lists permissible conditions of community custody and includes the condition of consumption of alcohol which is imposed by statute unless waived by the trial court.

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

..
(2) **Waivable conditions.** Unless waived by the court, as part of any term of community custody, the court shall order an offender to:

...
(c) Refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions;

RCW 9.94A.753.

In State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258 (2003), the Court of Appeals expressly held the trial court could preclude the use of alcohol even if alcohol did not contribute to the offense.

The legislature's 1988 amendment remains in effect today, for both community custody and community placement. On February 5, 2001, it applied when, as here, the court sentenced for a first degree burglary committed on or after July 1, 2000. Accordingly, we hold that the trial court

had authority to order Jones not to consume alcohol, despite the lack of evidence that alcohol had contributed to his offenses.

State v. Jones, 118 Wn. App. 199, 207, 76 P.3d 258, 262 (2003) (footnote references omitted).

Woods does not contest the affirmative conduct condition requiring treatment based upon his use of methamphetamine. He limits his claim to the prohibitive conduct condition that was set.

Woods testified he consumed quite a few beers earlier in the evening of the incident. 10/5/11 RP 62. Woods also admitted that he consumed methamphetamine. 10/5/11 RP 104-5. He also admitted to Officer Eaton he had purchased the methamphetamine in a bar in Sedro Woolley. 10/5/11 RP 116. This testimony is an adequate basis to include the prohibited conduct condition to prevent Woods from consuming alcohol and going to bars.

Woods relies on the fact the prosecutor had elicited that Woods' urine test was negative for alcohol. Brief of Appellant at page 17. However a careful review of the transcript shows that Woods did not say the medical records showed he had not consumed alcohol. 10/6/11 RP 107-8. After asked if his urine was zero for alcohol, he stated "It says I was out of body fluids. I had been drinking all day." 10/5/11 RP 108.

Woods contends that he "could be arrested for legal possession of alcohol by a member of his household or as a guest in his home." Brief of

Appellant at page 19. However, here the trial court actually ordered he “not consume alcohol and do not frequent establishments where alcohol is the chief commodity for sale.” CP 166. Constructive possession for alcohol within a residence is not precluded. Woods contention in this regard lack factual support.

V. CONCLUSION

For the foregoing reasons Woods convictions and sentencing conditions must be affirmed.

DATED this 18th day of September, 2012.

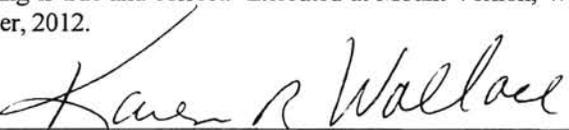
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Andrew P. Zinner, addressed as Nielsen, Broman & Koch, PLLC, 1908 East Madison Street, Seattle WA 98122.. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 18th day of September, 2012.


KAREN R. WALLACE, DECLARANT