

NO. 42010-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JOHN DAVID WILES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Linda CJ Lee

No. 10-1-04761-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to prove his attorney's deliberate omission of a voluntary intoxication instruction was ineffective assistance of counsel when it was part of a tactical decision to advance an alternative theory of the case?
2. Has defendant failed to prove the trial court's refusal to hear his pro se motion to arrest judgment was an abuse of discretion when he was represented by counsel and did not demonstrate the need for hybrid representation?

B. STATEMENT OF THE CASE.

1. Procedure

On March 8, 2011, the Pierce County Prosecutor's Office filed an amended information charging appellant, John David Wiles ("defendant"), with one count of felony violation of a domestic violence no-contact order; an aggravating factor pertaining to defendant's community custody status at the time of the offense was also alleged. CP 1, 7-8. The Honorable Linda CJ Lee presided over the trial. RP 1. The jury convicted defendant as charged. CP 60-61. Defendant and his counsel filed separate motions to arrest judgment. RP 243-246; CP 62-65, 89-94. Defendant's pro se motion requested acquittal based on a claimed failure to adequately

present evidence of his intoxication at trial and the use of a purportedly unconstitutional trial stipulation to his predicate court-order violations. CP 89-94; RP 224-245, 256-257. The court declined to hear defendant's pro se motion because he was represented by counsel; it then addressed defense counsel's motion. RP 246. Counsel's motion claimed there was insufficient evidence to support defendant's conviction. RP 243-246; CP 62-65. The court denied counsel's motion after hearing argument and defendant does not challenge that ruling on appeal. RP 251-253; App.Br. at 1.¹ The court proceeded to sentencing. RP 253-258. The court imposed a standard range sentence of forty months in the Department of Corrections. RP 253-258; CP 73-86. Defendant filed a timely notice of appeal on April 15, 2011. CP 62-65.

2. Facts

Marlon Hall and his domestic partner, Jumapili Ikuscheghan, returned to their Tacoma residence from work sometime between 6:00 p.m. and 6:40 p.m. on November 8, 2010. RP 81-83, 95. Hall found several rooms inside the house in "disarray." RP 83. Hall reported a burglary to 911. RP 84. Ikuscheghan went outside to inspect the

¹ Appellant's Brief ("App.Br.").

backyard. RP 77, 84, 160-174.² The backyard was surrounded by a fence connected by a detached garage. RP 81-85, 118. Defendant contacted Ikusheghan after she entered the yard. RP 77, 84, 160-174. Defendant is Ikusheghan's ex-husband and a court order prohibited him from contacting her at the time. RP 160, 174, 184-187, 197; Ex. 1. The police arrived approximately eight minutes later. RP 86.

Tacoma Police Officer Steven O'Keefe contacted Hall outside the residence. RP 158-159, 171. Hall seemed slightly agitated. RP 160. Ikusheghan appeared "frantic" as she walked out of the house; Officer O'Keefe sensed "urgency" in her voice. RP 160. Ikusheghan directed Officer O'Keefe to remove defendant from her property. RP 161, 174. Ikusheghan warned the police defendant had access to a shotgun in the garage. RP 77, 167. The Tacoma SWAT³ team responded to the scene. RP 106-111, 116. The SWAT team ordered defendant out of the garage. RP 111-112, 119-120. A surveilling officer saw defendant stumble as he exited the garage with his hands up in an apparent state of confusion. RP 111-112. The arresting officer did not observe anything unusual about

² Ikusheghan became increasingly uncooperative during her contact with police. RP 173. At trial Ikusheghan testified her recollection was impaired due to intoxication on the day of the offense, which conflicted with Hall's testimony that they had just commuted home from work when the incident occurred. RP 75, 81-83, 95, 167. Ikusheghan told the court she had a moral objection to testifying against defendant after she refused to acknowledge the oath to testify truthfully. RP 61-69. The trial court described Ikusheghan as one of the most reluctant witnesses the court had experienced. RP 181. The jury was instructed Ikusheghan's statements to police could only be considered to determine her credibility while testifying. RP 156.

³ Special Weapons and Tactics ("SWAT")

defendant. 119-120. Defendant was taken into custody without incident. RP 111-112, 119-120. Police found a “BB” gun resembling a shotgun inside the garage near some empty beer cans. RP 101- 102.

Defendant was the only witness called by the defense at trial. RP 183-201. Defendant stipulated to his two predicate convictions for violating a court order. CP 29-30. Defendant claimed he started drinking the morning of the incident. RP 194-205. There was no evidence of what defendant drank, the amount he consumed, or if it influenced his behavior. RP 194-205. Defendant testified he could not recall most of what occurred before his arrest. RP 194-205. Defendant did not directly attribute his memory lapse to the alleged drinking. RP 194-205. Defendant remembered knowing where Ikusheghan lived at the time and that he had not been given permission to visit her residence. RP 185-187, 194-200. Defendant also recalled knowing the no-contact order was in effect. RP 185, 187, 197; Ex. 1.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO PROVE HIS ATTORNEY’S TACTICAL DECISION TO FORGO A VOLUNTARY INTOXICATION INSTRUCTION WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

To prevail on an ineffective assistance of counsel claim a defendant must prove his or her counsel’s performance was deficient and that deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504,

518, 881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). In the instant case defendant claims his counsel was deficient for failing to propose a voluntary intoxication instruction at trial. App.Br. at 1. To prevail on this claim defendant must first establish that he was entitled to the omitted instruction. *State v. Kruger*, 116 Wn. App. 685, 690-691, 67 P.3d 1147 (2003)(citing *State v. King*, 24 Wn. App. 495, 501, 601 P.2d 982 (1979) (counsel not ineffective for failing to present an unwarranted defense.)). Defendant must then prove that his counsel's failure to propose the instruction was deficient performance. *Kruger*, 116 Wn. App. at 691 (citing *State v. McFarland*, 127 Wn.2d 322, 336, 889 P.2d 1251 (1995)). A proven deficiency will only support a finding of ineffective assistance of counsel if defendant also proves that it prejudiced the outcome of his case. *Kruger*, 116 Wn. App. at 691 (citing *State v. Cienfuegos*, 144 Wn.2d 222, 228-229, 25 P.3d 1011 (2001)).

a. Defendant was not entitled to an instruction on voluntary intoxication.

Diminished capacity from intoxication is not a true "defense." *State v. Coates*, 107 Wn.2d 882, 891-892, 735 P.2d 64 (1987). The State has no burden of disproving intoxication. *Coates*, 144 Wn.2d at 228-229. "[E]vidence of intoxication may bear upon whether the defendant acted with the requisite mental state, but the proper way to deal with the issue is

to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state." *Coates*, 144 Wn.2d at 228-229; *see also State v. James*, 47 Wn. App. 605, 736 P.2d 700 (1987); *State v. Sam*, 42 Wn. App. 586, 711 P.2d 1114 (1986); *State v. Fuller*, 42 Wn. App. 53, 708 P.2d 413 (1985). (*citing* WPIC 18.10); *see also* RCW 9A.16.090. A defendant is entitled such an instruction if: (1) a particular mental state is an element of the charged offense; (2) there is substantive evidence of intoxicant consumption; and (3) the evidence shows that activity affected the defendant's ability to acquire the required mental state. *State v. Harris*, 122 Wn. App. 547, 552, 90 P.3d 1133 (2004) (*citing State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002)); *see also State v. Gabryschak*, 83 Wn. App. 249, 252-253, 921 P.2d 549 (1996)). "Evidence of drinking alone is insufficient to warrant the instruction; ... there must be substantial evidence of the effects of the alcohol on the defendant's mind or body." *Gabryschak*, 83 Wn. App. at 253 (*citing Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992); *see also State v. Coates*, 107 Wn.2d at 891; *State v. Rice*, 102 Wn.2d 120, 122-123, 683 P.2d 199 (1984); *State v. Griffin*, 100 Wn. 2d 417, 418-419, 670 P.2d 265 (1983); *State v. Brooks*, 97 Wn.2d 873, 876-877, 651 P.2d 217 (1982); *State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981)).

In *State v. Kruger* the Court of Appeals found defense counsel's failure to propose a voluntary intoxication instruction was ineffective assistance of counsel when intent was the focus of the case and there was substantial evidence of impairment. 116 Wn. App. at 692-693. Kruger arrived at a woman's house "drunk ... obnoxious and rude." *Id.* at 688. Kruger walked away from responding officers. *Id.* at 689. Kruger attempted to strike an officer with a beer bottle before "head butting" him. *Id.* Kruger was impervious to pepper spray. *Id.* at 689, 692. Trial testimony associated imperviousness to pepper spray with "highly intoxicated" people. *Id.* at 689. Kruger vomited while in custody and "blacked out" during the incident. *Id.* at 689, 692; *compare with Gabryschak*, 83 Wn. App. at 254 (proven intoxication did not warrant a voluntary intoxication instruction even though Grabryschak appeared "very intoxicated," had detectable alcohol on his breath, overturned furniture, threatened to kill a police officer, and attempted to flee).

In the instant case the State had to prove defendant knowingly violated a no-contact order. CP 7-8, 54 Instruction No. 9. Defendant testified on March 10, 2011. RP 184-202. Defendant claimed he could not remember much about November 8, 2010. RP 184-202. Defendant said he "started drinking" sometime after 11 a.m. RP 199. Defendant claimed he did not know how he arrived at Ikuscheghan's residence. RP 194, 199. Defendant's memory lapse was not complete. RP 184-202. Defendant remembered knowing the no-contact order was in place. RP

185, 187. He recalled knowing where Ikuschenghan lived, the nine-digit access code to her home, and that he had not been invited to the property. RP 185, 194-195, 198, 200. Defendant also demonstrated a detailed memory of his contact with police. RP 195-196.

Several of the officers that participated in defendant's arrest testified at trial. RP 101-122. Officer Tiffany described defendant as compliant, but thought he looked confused when he stumbled while exiting the garage in response to police commands. RP 111-112. Officer Roberts escorted defendant off the property without incident. RP 120. Officer Roberts testified defendant responded appropriately to instructions. RP 120. Officer Roberts did not observe anything unusual about defendant's behavior. RP 118-120.

Defendant was not entitled to an instruction on voluntary intoxication. RP 101-122, 184-202. Defendant said he began "drinking" roughly six hours before the charged incident occurred, yet failed to supplement that claim with any information about what he was drinking, the quantity he consumed, or when he stopped. RP 184-202. Intoxication could not be reasonably inferred from his testimony. Officer Williams' observed some empty beer cans inside Ikuscheghan's garage; however that evidence was similarly incapable of supporting an inference that defendant was intoxicated because nothing is known about their exact number, who put them there, or when they were discarded. RP 61-89, 101-102, 184-202.

There was also no evidence that defendant manifested symptoms of alcohol impairment. RP 81-202. Officer Tiffany testified defendant appeared disorientated while responding to police commands, but he never attributed that behavior to alcohol impairment. RP 111-112. Without evidence supporting an inference that defendant was affected by alcohol his reaction while responding to police is more reasonably attributed to the unsettling effect of an unexpected confrontation with a police SWAT team. This interpretation of defendant's behavior is readily supported by his testimony. Defendant said he carefully complied with police instructions because he immediately appreciated the danger posed by the police presence. RP 195-196. He never suggested that his ability to comply was complicated by intoxication and there was no evidence he appeared intoxicated after his arrest. RP 118-120, 195-196. Defendant's claimed intoxication can only be surmised through speculation for it is not reliably supported by the record.

At the same time the only evidence of diminished capacity was defendant's claimed memory lapse while testifying approximately six months after the incident. RP 61-202. The potential relevance of that condition is similarly speculative for it was never substantively linked to his state of mind during the incident. RP 61-202. It is unknown whether the claimed memory lapse was chronic or specific to the incident. RP 183-203.

Causation is also unknown. RP 183-203. Even if the memory loss were established as having been caused by some event specific to the charged offense there is nothing in the record that would make it more reasonable to attribute it to defendant's alleged drinking than the stressful circumstances of his arrest or some other physiological anomaly unrelated to his capacity to commit the charged offense. RP 61-203.

The absence of a contemporaneous relationship between defendant's behavior during the incident and the cognitive impairment he claimed six months later distinguishes defendant's case from those where a substantive connection between intoxication and diminished capacity was found. *See e.g., State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987) (drunk and incoherent on the night of the incident with a history of blackouts); *see also Kruger*, 116 Wn. App. at 688-693 (connection between Kruger's imperviousness to pepper spray during the incident and extreme intoxication established at trial). There had to be some evidentiary basis from which to infer that defendant's memory failure after intoxication was positively correlated with diminished capacity during intoxication and that connection was never established at defendant's trial.

The dubious evidence of intoxication was also presented within the context of defendant's demonstrated capacity. Defendant demonstrated he possessed the cognitive wherewithal to travel across town to Ikuschegan's house while she was at work. RP 83-85, 198-199. He then entered her house by means of a nine-digit security access code and disrupted her

property before confronting her with a shotgun shaped pellet gun in reach. RP 77, 83-85, 101-102, 160-174, 200. At the same time defendant remained aware of his no-contact order. RP 185-197, 194-200. Shortly thereafter defendant conducted himself appropriately while dealing with the police. 111-112, 119-120. The record does not support defendant's claimed entitlement to an instruction on voluntary intoxication. See *Gabryschak*, 83 Wn. App. at 254; 116 Wn. App. at 688-689, 692.

- b. Defendant failed to prove the tactical decision to forgo a voluntary intoxication instruction was unreasonable.

“[F]ailure to request a diminished capacity instruction is not ineffective assistance of counsel per se.” *State v. Cienfuegos*, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001). “[T]he defendant bears the burden of establishing deficient performance.” *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (citing *McFarland*, 127 Wn.2d at 335). Under the *Strickland* standard performance is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33 (citing *Strickland*, 466 U.S. at 688). “The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant ... must overcome a strong presumption that counsel's performance was reasonable.” *Grier*, 171 Wn.2d at 33 (citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)).

“[C]ounsel, and not [the] client, is in charge of the choice of trial tactics and the theory of defense.” *In re Stenson*, 142 Wn.2d 710, 734, 16 P.3d 1 (2001)(citing e.g., *United States v. Wadsworth*, 830 F.2d 1500, 1509 (9th Cir. 1987); *Henry v. Mississippi*, 379 U.S. 443, 451, 85 S. Ct. 564, 13 L.Ed.2d 408 (1965); *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006) (quoting *State v. Piche*, 71 Wn. 2d 583, 590, 430 P.2d 522 (1967), cert. denied, 390 U.S. 92, 88 S. Ct. 838, 19 L.Ed. 2d 882 (1968) (internal quotation marks and alterations omitted). “[T]he lawyer has—and must have—full authority to manage the conduct of the trial...” *In re Stenson*, 142 Wn.2d at 734 (citing e.g., *Taylor v. Illinois*, 484 U.S. 400, 417-418, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988)). “When counsel’s conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Grier*, 171 Wn.2d at 33 (citing *Kyllo*, 166 Wn.2d at 863; *Garret*, 124 Wn.2d at 520; *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982).

“[A] criminal defendant can rebut the presumption of reasonable performance by demonstrating that there is no conceivable legitimate tactic explaining counsel’s performance.” *Grier*, 171 Wn.2d at 33-34 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-746, 975 P.2d 512 (1999)). There is nevertheless a strong presumption that trial counsel’s performance was adequate, and exceptional deference must be given when evaluating counsel’s strategic decisions. *In re Elmore*, 162 Wn.2d 236, 257, 172

P.3d 335 (2007) (citing *Strickland*, 466 U.S. at 689). “A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Strickland*, 466 U.S. at 689. “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Id.* at 690.

In a post-trial motion hearing defense counsel represented that it was a tactical decision to forgo an instruction on intoxication. RP 224-245. The record demonstrates a defense strategy of impugning the occurrence of the charged act instead of disputing defendant’s capacity to act knowingly. RP 61-223. During cross-examination counsel collected concessions that the charged contact was not directly observed. RP 80-81, 88-89, 102-104, 113-114, 121-122, 166-168. Counsel also won concessions that defendant remained cooperative throughout his contact with law enforcement. *Id.* Counsel did not develop evidence of intoxication. *Id.* When defendant testified about his “drinking,” counsel did not attempt to connect it to defendant’s alleged memory lapse. RP 195-204.

During closing argument counsel argued the State failed to prove that the no-contact order was violated. RP 214-223. Counsel reminded the jury of the burden of proof and emphasized that the no-contact order

did restrict defendant from merely being present at Ikuscheghan's residence. RP 215-216, 218-219; Ex. 1. Counsel then argued Ikuscheghan's demonstrated credibility problems undermined any inference of prohibited contact that might otherwise be deduced from her testimony. RP 220-222. Counsel only referenced defendant's claimed memory lapse to point out that his testimony did not augment the State's evidence of prohibited contact. RP 220.

Defendant has failed to prove deficient performance. Counsel elected to challenge proof of the charged act instead of attempting to persuade the jury that defendant was mentally incapable of committing it. This was valid trial strategy. The no-contact order at issue allowed for the possibility of defendant's lawful presence on Ikuscheghan's property so long as no prohibited contact with Ikuscheghan occurred. Ex. 1. Ikuscheghan's recantation left the State without direct evidence of a prohibited contact. RP 61-80, 156, CP 49, Instruction No. 5. Counsel tactically tied the defense to that evidentiary weakness by emphasizing it in the context of the State's burden of proof while arguing the remaining circumstantial evidence of prohibited contact was too ambiguous to support conviction. RP 214-223. Counsel simultaneously presented defendant as a conscientious person who would not have intentionally violated the terms of his no-contact order. RP 104-122, 183-195, 201-203, 214-223.

Conceding intoxication would have been antithetical to counsel's trial strategy by making easier to believe the prohibited contact occurred as consequence of defendant's compromised judgment. Acquittal would then have been largely dependant on a permissive finding that defendant had advanced past the point of alcohol induced indiscretion to incapacity. Such a finding was unlikely given defendant's demonstrated capacity during his arrest. A defense theory of voluntary intoxication was also severely undermined when Ikuscheghan's identical claim during her overtly uncooperative testimony was discredited in front of the jury. RP 75, 81-85, 95, 160-174. Defendant's case is therefore readily distinguishable from cases where diminished capacity was the only cognizable strategy. See *Thomas*, 109 Wn.2d at 227-228; *Kruger*, 116 Wn. App. at 688-693. The existence of a legitimate reason to forgo the voluntary intoxication instruction defeats defendant's claim of deficient performance. The jury's verdict should be affirmed.

c. Defendant is similarly incapable of proving prejudice.

To prove prejudice under the second prong of the Strickland test defendant must establish there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Cienfuegos*, 144 Wn.2d at 229 (citing *Strickland*, 446 U.S. at 687). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229 (Cienfuegos failed to prove he was prejudiced by his counsel’s failure to propose a diminished capacity instruction when the jury was properly instructed on the mental state required for conviction and counsel was able to argue his theory of the case) (internal citation omitted). In *Cienfuegos* the Supreme Court found the definitional instruction on knowledge adequately informed the jury that it could take cognitive impairment into account even when a diminished capacity instruction would have highlighted that fact and should have been given. *Cienfuegos*, 144 Wn.2d at 230; *see also State v. Ponce*, ___ Wn. App. ___ ; ___ P.3d ___ No. 29288-6-III (2012) (a jury does not need to be specifically instructed on matters that negate an element of the charged offense if a more general instruction adequately explains the law and enables the parties to argue their theories of the case).

Defendant has failed established that a voluntary intoxication instruction would have changed the outcome of his trial. Such an instruction would have been superfluous to the defense theory that the criminal act never occurred. RP 214-223. Had counsel pursued a voluntary intoxication defense the failure to specifically instruct on that concept would not have prejudiced defendant’s case since counsel could have adequately argued it from the court’s instructions. *See Cienfuegos*. 144 Wn.2d at 225-226; CP 43-59.

The jury was properly instructed on the presumption of innocence, the burden of proof, and the mental state element of the charged offense.

CP 46 Instruction No. 2,⁴ 53 Instruction No. 9.⁵ The jury also received the definitional instruction on knowledge deemed sufficient to apprise the jury of the potential effects of diminished capacity in *Cienfuegos*. See 144 Wn.2d at 229-230; CP 51 Instruction No. 7.⁶ The potential effects of alcohol on decision making claimed to be at issue in defendant's case are more commonly understood than the theory of "psychotic break" erroneously presented without a diminished capacity instruction in *Cienfuegos*. 144 Wn.2d at 225-226; see also *City of Seattle v. Heatley*, 70

⁴ "The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements. A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt. A reasonable doubt is one for which a reason exists and may arise from the evidence of lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt."

⁵ "To convict the defendant of the crime of violation of a court order, each of the following five elements of the crime must be proved beyond a reasonable doubt: (1) That on or about the 8th day of November, 2010, there existed a no-contact order applicable to the defendant; (2) That the defendant knew of the existence of this order; (3) That on or about said date, the defendant knowingly violated a provision of this order; (4) That the defendant had twice been previously convicted for violating the provisions of a court order; and (5) That the defendant's act occurred in the State of Washington. If you find from the evidence that all of the elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of the five elements, then it will be your duty to return a verdict of not guilty."

⁶ "A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime. If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact. When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact."

Wn. App. 573, 579-580, 854 P.2d 658 (1993) (“It has long been the rule in Washington that a lay witness may express an opinion on the degree of intoxication of another....”); see also *State v. Brett*, 126 Wn.2d 136; 892 P.2d 29 (1995); *State v. Forsyth*, 131 Wash 611, 612, 230 P. 821 (1924)). Yet *Cienfuegos* was nonetheless upheld after the Supreme Court determined counsel’s instructional error did not prejudice defendant’s case. 144 Wn.2d at 225-226. Defendant’s case is also similar to *Cienfuegos* in that the record shows counsel was able to adequately argue his theory of the case without the omitted instruction. RP 214-223. Without a showing of prejudice defendant’s claim of ineffective assistance of counsel must fail.

2. DEFENDANT HAS FAILED TO PROVE THE TRIAL COURT’S REFUSAL TO ALLOW HYBRID REPRESENTATION WAS AN ABUSE OF DISCRETION.

Defendant claims the trial court erred by refusing to hear his pro se motion to arrest judgment. App.Br. at 1. Since defendant was represented by counsel at the time the court’s decision is more accurately characterized as a refusal to allow hybrid representation. See *State v. Hightower*, 36 Wn. App. 536, 540, 676 P.2d 1016 (1984). “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” *Id.* (citing Const. art. 1 § 22). A criminal defendant has “no constitutional right ... to participate as co-counsel at trial” *Id.* Courts

will only allow hybrid representation if there is a strong showing of a “special need,” or where there has been a “substantial showing” that “the cause of justice will thereby be served. *Id.* at 541 (*quoting Wilson v. State*, 44 Md. App. 318, 330, 408 A.2d 1058 (1979); *People v. Mattson*, 51 Cal.2d 777, 797, 336 P.2d 937 (1959)). “[T]he conflicting interests of the accused and society involved in a criminal trial can be served only in an orderly proceeding. The trial judge must therefore have discretion to control the conduct of a trial to maintain dignity, decorum, and orderly procedures; to avoid unnecessary delays; and to prevent the disruption of the judicial process by the accused’s inept or disorderly self-representation....” *Hightower*, 36 Wn. App. at 542 (*citing e.g. Moore v. State*, 83 Wisc.2d 285, 265 N.W.2d 540, 546, *cert. denied*, 425 U.S. 940, 96 S. Ct. 1676, 48 L. Ed. 2d 182 (1976)). “Whether to allow hybrid representation remains within the sound discretion of the trial judge.” *Hightower*, 36 Wn. App. at 541 (*citing United States v. Halbret*, 640 F.2d 1000, 1009 (9th Cir. 1981)). “Abuse of discretion exists when a trial court’s exercise of its discretion is manifestly unreasonable or based upon untellable grounds or reasons.” *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008) (internal quotation marks and citations omitted). The unreasonableness of a trial court’s decision is manifest when it is “obvious, directly observable, overt or not obscure....” *See generally State v. Taylor*, 83 Wn.2d 594, 598, 521 P.2d 699 (1974).

Defendant's pro se motion to arrest judgment claimed evidence of his intoxication inadequately presented to the jury and challenged the constitutionality of the trial stipulation to his predicate convictions for violating court orders. CP 89-94. Defense counsel would not endorse the pro se motion. RP 244-245. Counsel framed it as claim of ineffective assistance of counsel challenging his tactical decision about how best to proceed. RP 245. The court would not hear the pro se motion because defendant was represented by counsel. RP 246. Defense counsel filed an independent motion to arrest judgment on defendant's behalf, which challenged the sufficiency of the evidence to support conviction. RP 244, 247. The court denied counsel's motion after hearing argument and defendant does not challenge that ruling on appeal. RP 246-253; App. Br. at 1.

Defendant failed to prove the trial court abused its discretion by refusing to hear his pro se motion. Defendant did not present the sentencing court with any reason to believe the interests of justice would be furthered by hybrid representation. RP 243-262; CP 89-94. Meanwhile defense counsel would not endorse defendant's motion and characterized it as raising a claim that could be adequately addressed on appeal. RP 246. It was reasonable for the court to decide its finite resources were better allocated to permitting a full hearing of the motion counsel filed on defendant's behalf.

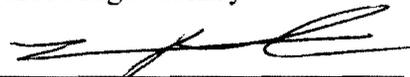
On appeal defendant claims that decision arbitrarily violated his “constitutional and statutory right” to be heard at sentencing. App.Br. at 1. Defendant’s argument ignores the fact that he does not have a constitutional right to hybrid representation at sentencing. *Hightower*, 36 Wn. App. at 540-541. His argument also seemingly confuses the statutory right to allocution with the court’s refusal to hear a pro se motion filed by a represented defendant’s. See RCW 9.94A.500(1). Defendant was provided an opportunity to speak before sentence was imposed, so any claim that RCW 9.94A.500(1) was violated is without merit. RP 256-257. Defendant’s sentence should be affirmed.

D. CONCLUSION.

Defendant failed to prove counsel’s tactical decision to forgo a voluntary intoxication instruction was ineffective or that the sentencing court abused its discretion by refusing to allow hybrid representation. His conviction and sentence should be affirmed.

DATED: February 28, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{e-file} ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2/28/12
Date

J. Johnson
Signature

PIERCE COUNTY PROSECUTOR

February 28, 2012 - 2:00 PM

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