

FILED

SEP 14 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 28991-5-III

STATE OF WASHINGTON, Respondent,

v.

JAMES LEE WALTERS, Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

James Walters was arrested and charged with stealing keys belonging to the manager of the Pastime Bar after he refused to empty his pockets and the arresting officer reached into his pocket and removed them. During his trial, Walters requested a voluntary intoxication instruction based on evidence presented that he had consumed at least nine drinks over the course of the evening, slurred his speech, was unable to stand without swaying, and was not responsive to pain. The trial court refused the instruction, and the jury convicted Walters. He was sentenced to the high end of the standard range for an offender score of one, based on a gross misdemeanor conviction from Nevada. But the trial court did not engage in any comparability analysis to determine whether the Nevada conviction was a scorable offense, and the State did not preserve the record for purposes of reviewing the offender score, the Nevada conviction, and the comparability issue on appeal. As a result of the numerous errors permeating this case, the convictions should be reversed and the case remanded.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Should evidence obtained when a law enforcement officer, while questioning the defendant, placed his hand

inside the defendant's pocket and removed it, be suppressed as the fruit of an unlawful search?

ASSIGNMENT OF ERROR 2: Did the trial court err in refusing to give Walters' proffered instruction on the defense of voluntary intoxication?

ASSIGNMENT OF ERROR 3: Did the State fail to establish that Walters' out-of-state conviction was comparable to a Washington felony for scoring purposes?

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did Sergeant Bartz unlawfully search Walters when, while questioning Walters, he placed his hand in Walters' pocket and removed a set of keys?

ISSUE 2: Is the unlawful search of Walters a manifest constitutional error that can be raised for the first time on appeal?

ISSUE 3: Did Walters receive ineffective assistance of counsel when his attorney failed to challenge Bartz's search of his person?

ISSUE 4: Did Walters present sufficient evidence to establish that his intoxication affected his ability to act intentionally such that he was entitled to a jury instruction on voluntary intoxication?

ISSUE 5: Is the record on appeal adequate to review the comparability of Walters' out-of-state conviction to a Washington felony?

ISSUE 6: Should Walters' offender score and sentence be recalculated because the State did not prove that his out-of-state conviction was comparable to a Washington felony?

IV. STATEMENT OF THE CASE

On the night of February 25, 2010, James Walters was at the Pastime Bar in Ritzville, drinking and shooting pool. Report of Proceedings (RP) (4/20/10) at 27-30. He left the bar around 1:30 a.m. after consuming at least seven beers and two shots of alcohol. RP (4/20/10) at 33, 40. Shortly afterward, when the bartender, Michael Duran, was trying to close the bar, he discovered that his keys were missing. RP (4/20/10) at 27, 35.

Duran searched for the keys inside the bar for about half an hour. RP (4/20/10) at 36. When he could not find them, he called his sister, Tiffani Costello, the manager of the Pastime. RP (4/20/10) at 27, 36. When Costello arrived, they called the police to make a report. RP (4/20/10) at 37.

Sergeant John Bartz was investigating a burglary in progress almost directly across the street from the Pastime when he saw Walters walking down the street. RP (4/20/10) at 60, 62. Bartz checked the neighborhood for possible suspects in the burglary and contacted two individuals standing by the back door of the Pastime. RP (4/20/10) at 63. They reported hearing strange noises in the alley, and one ran after somebody who was running down the alley. RP (4/20/10) at 63-64. Bartz pursued them and encountered Walters. RP (4/20/10) at 64.

When Bartz asked Walters what he was doing, Walters said he was just walking around. Bartz saw that he was carrying a set of keys on a large green carabiner. RP (4/20/10) at 64. Walters put the keys in his pocket while they were talking. RP (4/20/10) at 65.

Bartz later received the report from the Pastime about the missing keys and was dispatched to investigate. RP (4/20/10) at 66. Duran described the keys being held on a large green carabiner. Bartz thought they sounded like the keys he had seen Walters carrying earlier in the evening. RP (4/20/10) at 67.

Based on the earlier contact, Bartz went to the Hangout, a video arcade run by Walters, to try to find him. RP (4/20/10) at 67. Bartz shined his light through the windows and saw Walters asleep on the floor

underneath the air hockey table. Bartz woke Walters and asked him to open the door. When Walters let him in, Bartz told Walters that he had the keys to the bar and he needed to get them back. Walters denied that he had the keys. RP (4/20/10) at 68.

Bartz insisted that Walters had the keys, pointing out that he could see the outline of the keys in Walters' pocket. He asked Walters to check again. Walters put his hands in his pockets, jingled the keys, and took his hand out, saying he did not have the keys. Bartz then reached into Walters' pocket and removed the keys. RP (4/20/10) at 69.

When Bartz went to place Walters under arrest, Walters jerked away and told Bartz he wasn't taking him to jail. Bartz pointed his taser at Walters and told him to put his hands behind his back. Walters turned and began to walk toward the rear of the Hangout, and Bartz tased him. Walters fell to the floor and Bartz again told him to put his hands behind his back. Walters refused and Bartz tased him again. Walters then put his hands behind his back and Bartz handcuffed him. RP (4/20/10) at 70-71.

Bartz began walking Walters out of the Hangout when Walters began yelling at Bartz to lock the door. Bartz told Walters he would lock the door after Walters was secured in the police car, and Walters became upset and began to struggle. Bartz had difficulty controlling Walters and

tried to place him in a wrist lock, but Walters was not responsive to pain compliance techniques. RP (4/20/10) at 71-73.

Eventually, the struggle ended when Bartz took Walters to the ground and pinned him down. Bartz called for backup and waited until Officer Mark Cameron arrived. RP (4/20/10) at 74-75, 96. Cameron helped Bartz get Walters to his feet and into the back of the car. Walters continued to curse at the officers. RP (4/20/10) at 99. He continued to pull away from Cameron and push at him when they got to the police station. RP (4/20/10) at 100.

The officers left Walters in a dress-down cell while Bartz went back to the Pastime with the keys he had taken from Walters. RP (4/20/10) at 76. Costello identified the keys, and Bartz returned to the jail. RP (4/20/10) at 77.

The officers told Walters that they were going to remove his belt and shoes. Walters told them he wanted the cuffs off first. Two officers held Walters against a wall so they could photograph his injuries from the struggle. RP (4/20/10) at 102. They removed his belt, then forced Walters to the ground to remove his boots. As they took a hold of his boots, Walters pulled his legs up as if to kick somebody. Cameron told Walters, "Don't kick me," and Walters responded, "Oh, I'll fucking kick you."

Walters then kicked Cameron in the leg above the knee. Cameron was not injured by the kick. RP (4/20/10) at 103-04.

Bartz observed that Walters was “obviously intoxicated” and had a strong odor of intoxicants coming from his person, slurred speech, and droopy bloodshot eyes. Bartz noted that Walters swayed as he attempted to stand, and he estimated Walters’ level of intoxication as a five or six on a scale of one to ten. RP (4/20/10) at 80-81. Cameron confirmed that Walters was intoxicated and had an odor of intoxicants on his person. RP (4/20/10) at 105. Cameron also observed that pain compliance was not working to control Walters. RP (4/20/10) at 107.

As a result of the night’s events, the State charged Walters with third degree assault, resisting arrest, and third degree theft. CP 1. The case proceeded to trial, and Walters testified that he did not recall much of the evening. RP (4/20/10) at 121. He recalled being awoken at the Hangout, a brief conversation, and turning away from Bartz and being tased. RP (4/20/10) at 121-22. He remembered Bartz taking something from him but did not recall anything about the keys. And he recalled being upset and resisting Bartz, describing his conduct as “I behaved very badly.” RP (4/20/10) at 123. He recalled being pushed and pulled in the cell but did not recall kicking Cameron. RP (4/20/10) at 126.

Walters requested a “voluntary intoxication” instruction as set forth in WPIC 18.10. CP 22. The trial court refused to give the instruction, ruling that there was insufficient evidence from which the jury could conclude, without speculating, that the defendant may not have been able to form the mental state required as an element of the charge. RP (4/20/10) at 135-36. The jury convicted Walters on all three counts. RP (4/20/10) at 173.

At sentencing, the State asserted that Walters had an offender score of one based on a Nevada conviction for unlawful taking of a motor vehicle. RP (4/22/10) at 3. Walters objected to the inclusion of the Nevada conviction, arguing that it was a gross misdemeanor conviction. RP (4/22/10) at 8. Although the State apparently possessed some documentation about the Nevada conviction, it did not introduce the documentation into evidence, nor did the trial court conduct a comparability analysis to determine whether the Nevada conviction was comparable to a Washington felony for scoring purposes.¹ RP (4/19/10) at 35. Nevertheless, the trial court sentenced Walters to eight months on the

¹ During motions in limine, the State read from a document pertaining to the conviction as follows: “Every person who takes or carries away or drives away the vehicle of another with” – “without the intent to permanently deprive the owner there” – “thereafter without consent of the owner is guilty of gross misdemeanor.” RP (4/19/10) at 36. Thus, the implication is that the crime of which Walters was convicted in Nevada did not require a finding of intent.

third degree assault charge based on an offender score of one. RP (4/22/10) at 11. Walters timely appeals.

IV. ARGUMENT

Multiple errors permeating Walters' arrest, trial and sentence require a reversal of the convictions. First, when Bartz placed his hand in Walters' pocket and removed the keys, Walters was not under arrest and Bartz did not have probable cause to arrest him for any crime. Consequently, the search of Walters' person was illegal and the fruits of Bartz's search – the keys – should have been suppressed. Because the illegal search is a manifest error affecting a constitutional right, it can be raised for the first time on appeal. Alternatively, the failure of Walters' attorney to move to suppress the keys constituted ineffective assistance of counsel.

Second, by refusing to give Walters' requested instruction on voluntary intoxication, the trial court deprived Walters of the opportunity to present a defense to the charges and thereby rendered his trial fundamentally unfair. Lastly, the trial court sentenced Walters to the high end of the standard range for an offender score of one, but did not conduct the required comparability analysis to determine whether the Nevada conviction should have been included in Walters' offender score. And

although the State did not preserve evidence of Walters' conviction in the record, the evidence that has been preserved indicates that the crime of which Walters was convicted was a gross misdemeanor theft charge without an intent requirement – not comparable to any Washington felony. Consequently, Walters should have been sentenced under an offender score of zero, and the sentence he received exceeds the permissible sentence for his correct offender score.

I. THE KEYS OBTAINED WHEN BARTZ PUT HIS HAND IN WALTERS' POCKET SHOULD HAVE BEEN SUPPRESSED.

When Bartz went to the Hangout to investigate the keys missing from the Pastime, he did not have evidence that a crime had been committed, nor more than a suspicion that Walters was in possession of the missing keys. Nevertheless, when Walters refused to empty his pockets or admit to possessing the keys, Bartz violated Walters' Fourth Amendment rights by reaching into Walters' pocket and removing its contents. Walters was not under arrest, and the search does not fall within any exception to the warrant requirement. Because the keys were clearly the fruit of an unlawful search, they should have been suppressed. Consequently, the convictions must be reversed and the theft charge dismissed.

It is axiomatic that under the Fourth Amendment to the U.S. Constitution and Article I, section 7 of the Washington Constitution, individuals may not be searched and seized without a warrant supported by probable cause. *State v. McKenna*, 91 Wn. App. 554, 558-59, 958 P.2d 1017 (1998); *State v. Parker*, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999). The burden is always placed upon the State to show that a warrantless search is justified under an exception to the warrant requirement. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

Here, there is no question that Walters was not under arrest when Bartz reached into his pocket and removed the keys. A warrantless search incident to an arrest may be permitted to precede the arrest, but there must be independent probable cause for the arrest before the search commences. *State v. Chavez*, 138 Wn. App. 29, 34, 156 P.3d 246 (2007). In other words, the search cannot be justified by its fruits. *McKenna*, 91 Wn. App. at 560. Probable cause exists “when the facts and circumstances known to an officer are sufficient to warrant a prudent or cautious man to believe that a crime has been committed.” *Chavez*, 138 Wn. App. at 34. While the facts in the officers knowledge need not establish guilt beyond a reasonable doubt, they must establish more than a mere suspicion of criminal activity. *Id.*

In the present case, Bartz believed that Walters had the keys to the Pastime because earlier in the evening, he had seen Walters in possession of a set of keys that was similar to the description of the missing keys. But Bartz did not know whether they were the same keys, nor whether Walters had taken the keys with the intent to deprive the owner or had simply walked away with them accidentally. Bartz was also aware that Walters was intoxicated. Under the totality of the facts and circumstances, Bartz had nothing more than a suspicion of criminal activity until he reached into Walters' pocket. At that point, Bartz confirmed his suspicion that Walters had taken Duran's keys. But without the fruits of his search of Walters' pockets, Bartz would not have known whether the keys he saw earlier were the same keys, or whether Walters still had the keys. As such, Bartz had no knowledge of criminal activity without the fruits of his search. Under *Chavez*, the search cannot be justified and Bartz's discovery of the keys should have been suppressed.

- a. Bartz' illegal search of Walters' person is a manifest error affecting a constitutional right.

The illegality of Bartz' search of Walters' pockets was not raised below. Ordinarily, RAP 2.5(a)(3) prevents a party from raising an issue for the first time on appeal. However, an exception exists for manifest

errors affecting a constitutional right. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

An error is “manifest” when it is unmistakable, evident, or indisputable, as opposed to obscure, hidden or concealed. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). To obtain review of the claimed error, the challenger must show that the outcome likely would have been different, but for the error. *State v. Jones*, 117 Wn. App. 221, 232, 70 P.3d 171 (2003).

Here, the illegal search unquestionably presents a constitutional issue because it implicates Walters’ right to be free from unlawful searches and seizures under the Fourth Amendment to the U.S. Constitution and Article I, section 7 of the Washington Constitution. The error is manifest because it is not hypothetical or contingent; the facts supporting the error are evident in the record and require no guesswork by the court. *See McFarland*, 127 Wn.2d at 333 (error is not manifest if facts necessary to adjudicate the claimed error are not in the appellate record). And the error is prejudicial because had it been raised, Bartz’s discovery of the keys on Walters’ person should not have been presented to the jury. Without that piece of evidence, it is extremely unlikely that the jury could

have found sufficient facts on which to convict Walters of theft, even if the remaining evidence were sufficient to create a question for the jury.

b. The failure of Walters' trial counsel to challenge the search constitutes ineffective assistance of counsel.

Similarly, the failure of Walters' trial counsel to challenge the search cannot be regarded as anything but ineffective. To establish ineffective assistance of counsel, an appellant must show (1) a deficient performance that fell below objective standards of reasonableness, and (2) the deficient performance prejudiced the defense. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Because the reviewing court will presume that representation was effective, the appellant must show the absence of any legitimate tactical or strategic reason for the claimed error. *McFarland*, 127 Wn.2d at 335, 336.

Here, the failure to challenge the search was objectively unreasonable because there was no possible strategic reason *not* to challenge it. The facts supporting the claim of error were already established in the record. Walters gained no conceivable advantage by failing to seek suppression of the keys, the discovery of which in his pocket was the only evidence that could have supported his conviction on the theft charge. And the failure to move for suppression of the keys was prejudicial because, again, without proof that the missing keys were

subsequently discovered on Walters' person, the State could not have presented sufficient evidence to convict him of theft.

The search of Walters' pocket without probable cause to arrest him for a crime should have led to the evidence discovered being suppressed. Had the evidence been suppressed, it is likely that the theft charge could not have been sustained. Because the trial court erred in admitting the fruits of an unlawful search, the theft conviction should be reversed.

II. THE TRIAL COURT DEPRIVED WALTERS OF A FAIR TRIAL WHEN IT REFUSED TO GIVE AN INSTRUCTION ON VOLUNTARY INTOXICATION

The trial court's refusal to instruct the jury on voluntary intoxication deprived Walters of his ability to present a defense to the charges, all of which required that the State show that he acted intentionally. Because the refusal rendered Walters' trial fundamentally unfair, his convictions should be reversed and the case remanded for a new trial.

Walters was charged with three crimes that require a showing of intent: (1) Third degree theft (intent to deprive another of his property), *State v. Kenney*, 23 Wn. App. 220, 224-25, 595 P.2d 52 (1979); (2) Resisting arrest (intentionally prevents or attempts to prevent a peace officer from lawfully arresting him), RCW 9A.76.040(1); and (3) Third

degree assault (intent to commit an assault), *State v. Brown*, 140 Wn.2d 456, 470, 998 P.2d 321 (2000).

A party is entitled to have the court instruct the jury on the law supporting its theory of the case if the evidence is adequate to support the theory. *State v. Hackett*, 64 Wn. App. 780, 785, 827 P.2d 1013 (1992). A voluntary intoxication instruction is appropriate when (1) the crime charged has a particular mental state as an essential element; (2) there is substantial evidence of drinking; and (3) there is evidence that the intoxication affected the defendant's ability to acquire the required mental state. *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). Evidence of drinking alone is insufficient; but the instruction is warranted when there is substantial evidence of effects of alcohol on the defendant's mind or body. *Id.* at 253.

In *Gabryschak*, the evidence established that the defendant had alcohol on his breath, appeared to be intoxicated, and had a couple of drinks. 83 Wn. App. at 253. In that case, the evidence was determined to be insufficient for a jury to infer that Gabryschak was unable to form the requisite mental state. *Id.* at 254. Conversely, in *State v. Rice*, evidence that the defendants had been drinking beer all day, had difficulty hitting a ping pong ball and had been struck by a car without feeling it was

sufficient for the Supreme Court to hold that failing to give the voluntary intoxication instruction was reversible error. 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984).

Here, as in *Rice*, the evidence established that Walters was obviously intoxicated at the time Bartz saw him in the alley. He was unable to stand without swaying, smelled of intoxicants, and slurred his speech. He had consumed at least nine drinks over the course of the evening. Furthermore, the evidence at the time Bartz encountered him at the Hangout was that Walters had fallen asleep under the air hockey table and did not respond to pain compliance techniques. The evidence was more than adequate to show that Walters had consumed alcohol to the point of affecting his mind and body because the pain of being tased and placed in a wrist lock was inadequate to control him and the amount of alcohol consumed that evening was enough for a reasonable person to infer that Walters' capacity for rational thinking was impaired. The instruction should have been given.

Failure to give a requested instruction is reversible error unless it affirmatively appears that the failure to give the instruction was harmless. *Rice*, 102 Wn.2d at 123. Because the instructions were inadequate to allow Walters to argue that the State had not met its burden of proof on the

essential element of intent, the error is not harmless. *See Hackett*, 64 Wn. App. at 785-87. Had the jury been fully informed on the legal significance of Walters' intoxication, it could have rendered a different verdict. Consequently, the convictions should be reversed and the case remanded for a new trial.

III. THE STATE FAILED TO PROVE THAT WALTERS HAD A PRIOR CONVICTION IN NEVADA FOR AN OFFENSE COMPARABLE TO A WASHINGTON FELONY FOR SCORING PURPOSES

Although the record reflects that the State argued that Walters had an offender score of one based on a gross misdemeanor conviction from Nevada, the record does not include any documentation or evidence of the conviction beyond the State's bare assertion. Moreover, the Nevada conviction was not shown to be comparable to a Washington felony for scoring purposes. Because Walters' sentence is unsupported by the record, it should be vacated.

The burden is on the State to introduce evidence of the defendant's criminal history, including the existence and classification of out of state convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). A prior conviction can be used to calculate a sentence when the fact of the conviction is shown by a preponderance of the evidence. *State v. Ammons*, 105 Wn.2d 175, 186, 713 P.2d 719 (1986).

Here, the State failed to meet even this minimal burden of proving the Nevada conviction by a preponderance of the evidence. The record is entirely deficient of any evidence of Walters' conviction beyond the State's bare assertion that Walters was convicted of a gross misdemeanor having to do with unlawfully taking a motor vehicle. "[I]n imposing sentence, the facts relied upon by the trial court must have some basis in the record." *Ford*, 137 Wn.2d at 482 (quoting *State v. Bresolin*, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975)). Because the record is inadequate to show even by a preponderance of the evidence that Walters was convicted of *anything* in Nevada, the offender score is incorrect and the sentence unlawful. *See Ford*, 137 Wn.2d at 485. And because the State had a full and fair opportunity to present its case and simply neglected to do so in spite of Walters' objection to the offender score, the case should be remanded for resentencing without any further evidence. *Id.*

In addition, for out-of-state convictions, courts must "translate" the offenses "according to the comparable offense definitions and sentences provided by Washington law." *State v. Wiley*, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). To determine the comparability of an out-of-state conviction to a Washington felony, the sentencing court must compare the elements of the out-of-state crime to the elements of Washington criminal statutes in effect when the foreign crime was committed. If the elements

are not identical, the court may look to the underlying facts to determine whether they would have violated the Washington statute. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 137 (1998).

Here, the record suggests that the crime of which Walters was convicted was a gross misdemeanor involving taking a motor vehicle without the intent to deprive the owner. There is no comparable felony offense in Washington, as all theft crimes require an intent to deprive the owner of the property. *See* RCW 9A.56.020. The State did not point to any Washington offense that was comparable, and the State did not present any evidence that the underlying facts of the case would have been sufficient to convict Walters of a Washington felony.

As observed by the *Ford* court,

Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process. Determinations regarding the severity of criminal sanctions are not to be rendered in a cursory fashion. Sentencing courts require reliable facts and information. To uphold procedurally defective sentencing hearings would send the wrong message to trial courts, criminal defendants, and the public.

137 Wn.2d at 484. Here, without any evidence or regard for the due process requirements of sentencing, the trial court imposed the high end of the range based on nothing more than the State's

allegation. Walters deserved better from the State than casual disregard for his liberty. Because an offender score of one cannot be sustained on the record, the sentence should be vacated and the case remanded for resentencing.

V. CONCLUSION

Walters was convicted on evidence that should not have been admitted, deprived of the opportunity to argue in his defense, and sentenced in the absence of evidence supporting the State's request. Any one of these errors alone would be egregious, but in the collective, they manifest a blatant disregard for fairness at all stages of the proceeding. Walters respectfully requests that the Court grant him the relief set forth herein.

RESPECTFULLY SUBMITTED this ~~13th~~ day of September,
2010.


Andrea Burkhardt, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the Brief of Appellant upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Randy Flyckt
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191 Constantine Way
Aberdeen, WA 98520

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 13th day of September, 2010 in Walla Walla, Washington.



Andrea Burkhart