

FILED

NOV 09 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

NO. 28991-5-III

STATE OF WASHINGTON  
Respondent,

vs.

JAMES LEE WALTERS  
Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR ADAMS COUNTY  
CAUSE NO. 10-1-00033-0

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**BRIEF OF RESPONDENT**

JOHN G. PRENTISS, WSBA  
#28218  
Chief Deputy Prosecuting Attorney  
for Adams County

Adams County Superior Court  
210 West Broadway  
Ritzville, WA 99169  
509-659-3219

Attorney for Respondent

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## RULES

RAP 2.5(a)(3) 1, 2

## I. STATEMENT OF THE CASE

Although Appellant's Statement of the Case is generally accurate, it is selective and incomplete, resulting in a distorted view of the trial court record. For simplicity the Respondent has provided supplemental facts within the appropriate arguments sections below.

## II. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Appellant's attempt to raise a suppression issue for the first time on appeal on "manifest injustice" grounds should be denied because Appellant has failed to show actual prejudice in the record; that is, he has failed to show that the trial court would likely have granted a suppression motion had it been raised prior to trial.

Appellate courts will not review an alleged error on appeal that was not raised at trial unless it is a "manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-88, 757 P.2d 492 (1988). An appellant must show actual prejudice in the record in order to establish that the error is "manifest." State v. Contreras, 92 Wn. App. 307, 311, 966 P.2d 915 (1998). In State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995), the court explained the policy underlying this rule as follows:

As we recognized in Scott, constitutional errors are treated specially under Rap 2.5(a)

because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. Scott, 110 Wn. 2d at 686-87, 757 P.2d 492. On the other hand, “permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” Lynn, 67 Wn. App. at 344, 835 P.2d 251.

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means to obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest” – i.e. it must be “truly of constitutional magnitude.” Scott, 110 Wn. 2d at 688, 757 P.2d 492. The defendant must... show how, in the context of the trial, the alleged error actually affected the defendant’s rights...

McFarland, 127 Wn.2d at 333

The McFarland court goes on to state that a defendant, “to show he was actually prejudiced by counsel’s failure to move for suppression, must show the trial court likely would have granted the motion if made.” McFarland, 127 Wn. App. at 333-34 (emphasis added).

In the present case, Appellant cannot show the trial court likely would have granted his suppression motion for two powerful reasons:

First, under the “open view” exception to the warrant requirement, Sgt Bartz lawfully seized the keys from Appellant’s pocket after reasonably concluding based on his observation and surrounding circumstances, that the keys were stolen.

Second, the seizure was also justified under the warrant exception for exigent circumstances.

The “plain view” and “open view” doctrines are only tangentially related. State v. Seagull, 95 Wn.2d 898, 901-02, 632 P.2d 44 (1981). “Plain view” applies when an officer justifiably intrudes into a constitutionally protected area. In contrast, “open view” applies when an officer is able to detect contraband from a non-constitutionally protected vantage point. Id.

Because Sgt. Bartz keys observed the stolen keys twice: first in a public alley and later in Appellant’s place of business after having been invited in, “open view” (rather than “plain view”) applies.

Under “open view,” an officer may seize objects immediately recognizable as criminal evidence. State v. Sistrunk, 57 Wn. App. 210, 214, 787 P.2d 937 (1990). Objects are immediately recognizable as incriminating evidence when, considering the surrounding facts and circumstances, the police can reasonably

conclude they have evidence before them. State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994). In other words, seizure under the open view doctrine is based on probable cause, not absolute certainty. State v. Graham, 130 Wn. 2d 711, 725, 927 P.2d 227.

Here, Sgt. Bartz's conclusion that the keys were criminal evidence was entirely reasonable. Consider the following:

Appellant was a former manager of the Pastime Tavern and a frequent patron. RP (4/20/10) at 50.

The Pastime Tavern closes no later than 2:00 AM, even on busy nights. RP (4/20/10) at 28.

The tavern stores its cash in the till, and anyone with a key to the front door has access to the cash. RP (4/20/10) at 52.

On the night of February 25, 2009, Sgt John Bartz saw the Appellant in close proximity to the Pastime Tavern twice, both sightings occurring shortly after the tavern's 2:00 AM closing time. RP (4/20/10) at 62-63.

Sgt. Bartz's first sighting of the Appellant occurred shortly after 2:18 AM. RP (4/20/10) at 62. From a rooftop position almost directly across the street from the Pastime, Bartz spotted the

Appellant walking down the street in the direction of the Pastime. RP (4/20/10) at 62-63.

Minutes later, Sgt. Bartz saw the Appellant again under the following circumstances: Bartz saw two people, Beth Smith and Rod Kramer, standing by the backdoor of the Pastime. RP (4/20/10) at 63. Because Bartz was looking for suspects in an earlier reported burglary, he contacted Smith and Kramer and asked them if they had heard or seen anything suspicious. RP (4/20/10) at 63. Ms. Smith replied that she had been hearing suspicious noises coming from an alleyway just across the street. RP (4/20/10) at 63-64. At that moment, Mr. Kramer glanced down the alley and shouted, "John, John, somebody's running down the alley." RP (4/20/10) at 64. Then Kramer took off running after the person. RP (4/20/10) at 64. Sgt. Bartz jumped into his patrol car and followed. RP (4/20/10) at 64. As Bartz came around the corner into the alley he spotted Kramer and the Appellant. RP (4/20/10) at 64. At this point, the Appellant was still only 30 to 40 yards away from the Pastime but was walking away. RP (4/20/10) at 64-65.

Sgt. Bartz yelled at the Appellant to stop. RP (4/20/10) at 64. When the Appellant complied, Bartz asked him what he was doing. RP (4/20/10) at 64. Appellant replied that he was just out walking

around. RP (4/20/10) at 64. Bartz pressed him on the issue, but the Appellant would only repeat that he was out walking around. RP (4/20/10) at 64-65.

While talking with the Appellant, Bartz noticed the Appellant was holding in his hands a set of keys that contained a large green carabiner and a dark colored, rectangular key chain. RP (4/20/10) at 64-65. Bartz testified that he paid close attention to the keys because as a police officer he had been trained to pay close attention to a person's hands in this type of encounter. RP (4/20/10) at 65.

As they talked, the Appellant slipped the keys into his left front pants pocket. RP (4/20/10) at 65.

At about 3:01 AM, Sgt. Bartz was dispatched to that same Pastime Tavern in reference to a report of stolen keys. RP (4/20/10) at 66. The bartender, Mike Duran, gave a statement to Bartz and described the stolen keys in detail saying that they included a large green carabiner on the key chain as well as a black Rimtyme rectangular key chain holding several keys. RP (4/20/10) at 66-67.

The bartender's description of the keys instantly rang a bell because it matched the keys that Sgt. Bartz had seen the Appellant

holding in his hand minutes earlier, just down the alley from the Pastime. RP (4/20/10) at 67.

In an effort to locate the Appellant, Sgt. Bartz went to The Hangout, a video arcade run by the Appellant, and looked through the front window. RP (4/20/10) at 67-68. He saw the Appellant inside, lying underneath an air hockey table, apparently asleep. RP (4/20/10) at 68. Bartz tapped on the window and shined his light inside. RP (4/20/10) at 68. When the Appellant looked up, Bartz asked him to open the door because he needed to talk to him. RP (4/20/10) at 68.

After the Appellant let Bartz in, Bartz told the Appellant that he had the keys to the Pastime and that he needed to get them back. RP (4/20/10) at 68.

The Appellant said he didn't have them. RP (4/20/10) at 68. Bartz told Appellant that he knew he had the keys because he saw him put the keys in his pocket. RP (4/20/10) at 69. But the Appellant insisted he didn't have the keys. RP (4/20/10) at 69.

#### BARTZ

...I asked him to check his pockets for me. He reached in and pulled out the one key that he said went to the arcade door. I told him I could see – I could actually see the outline of the carabiner in

his left front pant pocket, the same pocket I watched him put the keys in. And I pointed at it and told him – I asked him to check again. He reached in and jingled the keys in his pocket, pulled his hand out and said, no, he didn't have it. I reached out and I touched it and I said, "It's right there. I can see the outline of the carabiner and the keys.

He said, "Nope, I don't have it," so I reached in and just pulled the keys out of his pocket. At that point he said, "Those aren't mine. I didn't have those."

And I went, "Okay, you're under arrest...."

RP (4/20/10) at 69.

In this instance, where the contraband nature of the keys was so strikingly apparent – not only because of the precisely matching description of the keys, green carabiner and rectangular key chain, but because of surrounding circumstances -- Appellant cannot show that the Court would likely have granted his suppression motion if made.

Additionally, the warrant exception for exigent circumstances provides a second, legally sufficient basis for seizing the keys. Again, consider the evidence:

Sgt. Bartz was on duty alone, at night, confronting the Appellant in the Appellant's own place of business. Bartz already knew the Appellant had the Pastime's keys. Yet when he confronted the Appellant about the keys and even pointed to the keys outlined in Appellant's pocket, Appellant continued to deny having them (while simultaneously jingling the keys audibly, in effect challenging Bartz to do something about it). Given these facts, if Sgt. Bartz had not seized the keys at the moment he did, the Appellant would almost certainly have disposed of the keys before Bartz could have obtained a warrant.

Again, the burden is not on the state; it is on the Appellant, and for the above reasons, the Appellant has failed to show that the trial court would likely have granted a suppression motion.

B. Appellant's claim of ineffective assistance of counsel is without merit because on these facts he cannot show that defense counsel's representation was deficient or that there is a reasonable probability that but for this alleged deficiency the result of the proceeding would have differed.

Next, Appellant tries to introduce his suppression argument via the back door by arguing ineffective assistance of counsel, alleging that his trial attorney's failure to raise the suppression issue

constituted ineffective assistance. Brief of Appellant, 14-15. But neither the law nor the facts support his position.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (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. In re Pers. Restraint of Hutchinson, 147 Wn. 2d 197, 206, 53 P.3d 17 (2002); State v. McFarland, 127 Wn. 2d 322, 334-35, 899 P.2d 1251 (1995). An appellant must overcome a strong presumption that counsel's performance was not deficient. State v. Nichols, 161 Wn. 2d 1, 8, 162 P.3d 1122 (2007).

Appellant bases his claim on counsel's alleged failure to move to suppress the stolen keys. However, the Washington Supreme Court has repeatedly emphasized that not every conceivable motion to suppress has to be made. Id. at 14. The Nichols court wrote as follows:

Not every possible motion to suppress has to be made. In McFarland, we rejected the premise that failing to move to suppress any

time there is a question as to the validity of a search or seizure is per se deficient performance. McFarland, 127 Wn. 2d at 336-37, 899 P.2d 1251. Such a rule turns the presumption of effectiveness “on its head,” and instead “the burden is on the defendant to show from the record a sufficient basis to rebut the ‘strong presumption’ counsel’s representation was effective.” Id. at 337, 899 P.2d 1251. Counsel may legitimately decline to move for suppression on a particular ground if the motion is unfounded. Thus, although the presumption of effectiveness can fail if there is no legitimate tactical explanation for counsel’s actions, State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999), there is no ineffectiveness if a challenge to the admissibility of evidence would have failed. State v. G.M.V., 135 Wn. App 366, 372 144 P.3d 358 (2006).

Nichols, 161 Wn. 2d at 14-15

In the present case, Appellant has not shown that his counsel’s alleged “failure” to file a suppression motion was anything other than a sound professional decision based on the evidence, efficiency, and a desire not to antagonize the court by making frivolous motions. Second, he has not shown there is a reasonable probability that even if his counsel had filed a suppression motion and argued it brilliantly, the defense would have prevailed. Therefore, he has not overcome the strong presumption that his counsel’s representation was not deficient.

- C. The trial court did not abuse its discretion in refusing to give Appellant's proposed instruction on voluntary intoxication.

When a voluntary intoxication instruction is sought, the defendant must show (1) the crime charged has, as an element, a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state. State v. Gabryschak, 83 Wn.App. 249, 252, 921 P.2d 549 (1996). Put another way, the evidence must reasonably and logically connect the defendant's intoxication and the asserted inability to form the required level of culpability to commit the crime charged. Id. at 252-53 (citing State v. Griffin, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983). Evidence of drinking alone is insufficient to warrant the instruction; instead there must be "substantial evidence of the effects of the alcohol on the defendant's mind or body." Id. at 253 (quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), review denied, 118 Wn.2d 1010 (1992).

Appellant argues that the trial court's refusal to instruct the jury on voluntary intoxication deprived him of a fair trial. Once again, however, his summary of the facts is incomplete and misleading – suggesting a level of intoxication that was

contradicted by five witnesses and Appellant's own actions. Here is the evidence:

On the night of February 25/26, 2010, Mike Duran was the only bartender on duty at the Pastime Tavern. RP (4/20/10) at 30. He testified that the Appellant came into the Pastime at about 6:00 PM and stayed about 7 ½ hours. RP (4/20/10) at 29-30, 33. During that 7 ½ hour period, the Appellant consumed 7 beers and 2 shots. RP (4/20/10) at 30. The drinks were spread out over the course of the evening. RP (4/20/10) at 38-39. Duran knew exactly how much the Appellant had to drink because he was the only one pouring drinks. RP (4/20/10) at 30, 41. Also, the Appellant was running a tab that evening, and the tavern saves the tabs. RP (4/20/10) at 30, 40-41. One other patron bought the Appellant a drink, but Duran included that drink in the 7 drink, 2 shot total. RP (4/20/10) at 41.

Sometime between 1:30 AM and 1:45 AM, the Appellant approached Duran, shook his hand, and said, "I'll see you later, Bro." RP (4/20/10) at 34. Then the Defendant paid his tab and left. RP (4/20/10) at 34. Duran testified that the Appellant had no trouble getting out his money, counting his money, talking, or walking out the door. RP (4/20/10) at 34-35. On an intoxication scale of 1 to 10

(1 being lowest), Duran said the Appellant was "maybe a 4." RP (4/20/10) at 35.

Tiffany Costello, the manager of the Pastime, testified that her job gave her ample opportunity to observe people under the influence of alcohol. RP (4/20/10) at 54. She said that on February 25/26 she was at the Pastime between 10:30 PM and 1:45 AM, had a good chance to look at the Appellant, watched him playing snooker, and had a brief conversation with him during the evening. RP (4/20/10) at 50-51. On an intoxication scale of 1 to 10, she rated him "about a 4." RP (4/20/10) at 54-55. And when asked if the Appellant seemed to have problems playing snooker, she said, "Nope." RP (4/20/10) at 55.

Sgt. Bartz testified that when he encountered the Appellant in the alley, the Appellant was obviously intoxicated: had a strong odor of intoxicants coming from his person, slurred speech, droopy, bloodshot eyes and swayed slightly while standing in one spot. RP (4/20/10) at 80-81. However, he said the Appellant appeared to understand what was said to him and was able to respond, did not seem confused, and did not sway or stagger while walking. RP (4/20/10) at 81-82. On an intoxication scale of 1 to 10, Bartz rated the Appellant "a 5 or a 6." RP (4/20/10) at 81.

Sgt. Bartz said that when he later re-contacted the Appellant at The Hangout Arcade, he found the Appellant lying on the floor under an air hockey table, apparently asleep. RP (4/19/10) at 8-9; RP (4/20/10) at 88. However, when Bartz tapped on the window and said he wanted to talk, the Appellant had no difficulty getting up off the floor and opening the door for him. RP (4/20/10) at 82.

Appellant argues that he "did not respond to pain compliance techniques." Brief of Appellant, p. 9. However, Sgt. Bartz's testimony contradicts this. Bartz tasered the Appellant twice. RP (4/20/10) at 70-71. The first time, the Appellant stiffened and fell onto the floor, remaining there until the electric current cut off. RP (4/20/10) at 70, 94-95. Appellant started to get up, swearing, so Bartz tasered him a again, and the Appellant fell to the floor a second time unable to move -- after which the Appellant complied with Bartz's order to put his hands behind his back, saying "Okay, okay." RP (4/20/10) at 70-71, 94-95.

Despite having been handcuffed and placed under arrest, as they were leaving the Arcade, the Appellant had the presence of mind to ask Sgt. Bartz to lock the door for him. RP (4/20/10) at 71.

The Appellant later struggled with officers several times, (RP (4/20/10 at) 71-76, 78-80, 98-104, 110-12), but his struggles were

intermittent as if timed for maximum obstructive effect. (Note for instance, that the second the Appellant's bottom touched Sgt. Bartz's car seat, he stopped resisting and voluntarily pulled his feet into the car. RP (4/20/10) at 75, 99.) Moreover, throughout, the Appellant continued to be able to converse with officers. RP (4/20/10) at 71-75, 78-79, 98-104.

Officer Mark Cameron, who came to assist Sgt. Bartz, testified that the Appellant did not seem to be dazed or confused while speaking with the officers, and when asked to rate Appellant's intoxication, answered somewhere "between a 4 or a 5." RP (4/20/10) at 105.

When asked the same question, Corrections Officer Scott Carruth, who had ample opportunity to observe Appellant at the jail, replied:

OFFICER CARRUTH

It would be easier for me to not necessarily give you a number but to describe his behavior.

PROSECUTOR

That would probably be better. How would you do that?

## OFFICER CARRUTH

He was able to stand on his feet without swaying. He had control of his body motor skills. His sentences were complete and clear. I did not notice any slurring in his verbiage, but he was agitated and he was angry. And I had heard previous that he had been drinking.

RP (4/20/10) at 105.

Most revealingly, on the issue of Appellant's capacity to form the intent to assault (i.e. kick) Officer Cameron, the evidence is that the Appellant not only formed the intent to kick Cameron, but actually announced his intent prior to kicking him. All three officers testified that Officer Cameron warned the Appellant not to kick him, at which point the Appellant announced, "Oh, I'll fucking kick you." Then, he proceeded to kick him. RP (4/20/10) at 79,104, 112.

The Appellant testified on his own behalf, but his memory was curiously selective: he did not remember when he left the Pastime, did not remember taking any keys, and did not remember kicking Officer Cameron, but somehow he was able to recall fairly precisely how many drinks he consumed. RP (4/20/10) 121, 123, 126.

Before declining to give a voluntary intoxication instruction, the trial court compared the facts in this case to the facts in the cases cited in Gabryschak and concluded that here the instruction was not appropriate. RP (4/20/10) at 132-36. In so ruling, given the evidence, the court acted well within its discretion.

- D. Appellant's sentencing claim fails because while testifying, the Appellant twice affirmatively acknowledged that he had been convicted of the crime of Unlawful Taking of a Motor Vehicle in Nevada; furthermore, the trial court was provided sufficient information regarding the elements of the Nevada offense to enable it to make an informed decision regarding its comparability to the crime of Taking of a Motor Vehicle Without Permission in the Second Degree in Washington.

Under the SRA, the State bears the burden to prove by a preponderance of the evidence the existence and the comparability of a defendant's prior-out-of-state conviction. State v. McCorkle, 137 Wn. 2d 490, 495, 973 P.2d 461 (1991).

Appellant claims that "the record is inadequate to show even by a preponderance of the evidence that Walters was convicted anything of in Nevada," let alone that his Nevada crime is comparable to a felony offense in the State of Washington. Brief of Appellant, at 19-20. Appellant's argument fails for two reasons. First, twice while testifying, the Defendant admitted having been

convicted of the crime of Unlawful Taking of a Motor Vehicle in Nevada:

DEFENSE COUNSEL

Now, I'm going to be basically going through a few background questions. One of them I want to get out of the way right now is have you been convicted in the State of Nevada of unlawful taking of a motor vehicle.

DEFENDANT

Yes, I was.

RP (4/20/10) at 117.

Appellant again affirmed his Nevada conviction during cross-examination by the prosecutor. RP (4/20/10) at 127.

Appellant's own attorney acknowledged that Appellant plead guilty to that crime but argued that his client thought he was pleading to a gross misdemeanor:

DEFENSE COUNSEL

... I'll register an objection to the one point or the inclusion of the motor vehicle theft charge in Nevada. He was originally charged with a gross misdemeanor and that's what he thought he was pleading to over there...

RP ((4/20/10) at 105.

Finally, at sentencing, the State also read aloud from a transcript of Appellant's Nevada sentencing hearing without challenge by the defense. RP (4/22/10) at 4.

In short, the fact of Appellant's Nevada conviction was established.

The comparability of Appellant's Nevada offense to Washington's offense of Taking a Motor Vehicle in the Second Degree was established as follows:

On the record, the prosecutor handed the trial court judge a copy of the relevant portion of NRS 205-2715, the Nevada statute which defined the elements of the crime of Unlawful Taking of a Motor Vehicle and listed permissible statutory inferences. RP (4/19/10) at 32-33, RP (4/22/10) at 3. The prosecutor also read aloud a portion of the statute. RP (4/19/10) at 33. After reviewing the Nevada statute, the trial court found that the Unlawful Taking of a Motor Vehicle offense in Nevada was comparable to Taking a Motor Vehicle Without Permission in the Second Degree in Washington, which is, of course, a felony. RP (4/19/10) at 33-34.

Because the elements of the crimes were the same and required the same kind of intent, the trial court had sufficient

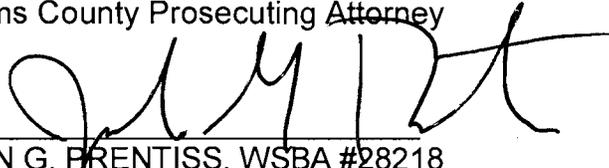
information on which to base its comparability decision without delving into the evidence underlying Appellant's Nevada conviction.

### CONCLUSION

None of Appellant's claims present serious and valid reasons for granting his relief. Therefore, the State respectfully requests that his appeal be denied.

DATED this 5<sup>th</sup> day of November, 2010.

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Adams County Prosecuting Attorney

By:   
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Chief Deputy Prosecuting Attorney



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3 Attorney at Law  
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6 Walla Walla, WA 99362

7 containing a copy of the Respondent's Brief .

8 DATED this 8<sup>th</sup> day of NOVEMBER, 2010..

9  
10 Helen Kenyon  
11 HELEN KENYON, Legal Assistant



28 SUBSCRIBED AND SWORN to before  
me this 8<sup>th</sup> day of NOVEMBER, 2010.

29 Nona J. Thompson  
NOTARY PUBLIC in and for the State of  
Washington, residing in Ritzville.  
My commission expires: 7-28-14.