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Court of Appeals
Division I
State of Washington

NO. 72468-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ERVIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A defendant is entitled to a voluntary intoxication instruction only if he presents substantial evidence of drinking or drug use and its effect on his ability to acquire the required mental state. The defendant, who was the only witness who could have offered any evidence regarding his use of intoxicants or their effect on his mental state, chose not to testify, and presented no competent evidence to support a voluntary intoxication instruction. Has he failed to show that the trial court abused its discretion when denying his request for such an instruction?

2. To establish ineffective assistance of counsel, a defendant must demonstrate both defective performance, which includes the absence of a legitimate trial strategy, and prejudice showing that the errors affected the outcome of the trial. The decision to call witnesses is presumed to be well within the range of sound trial strategy, especially if such witnesses could potentially open the door to damaging rebuttal evidence. Moreover, the record must show that additional witnesses or cross-examination would have produced information useful to the defense. Here, the defendant presents nothing to overcome the presumption of legitimate trial strategy beyond mere speculation. Moreover,

counsel faced both the prospect of opening the door to damaging ER 404(b) evidence and a jury pool that had already expressed considerable skepticism toward a voluntary intoxication defense during voir dire. Has the defendant failed to establish that the decision not to pursue such speculative testimony constituted ineffective assistance of counsel?

B. PROCEDURAL FACTS

Defendant Christopher Ervin was charged by information with assault in the third degree and malicious mischief in the first degree. CP 1-2. The State alleged that Ervin assaulted King County Sheriff's Deputy Jeff Hancock during the course of an arrest, and kicked out Deputy Joel Anderson's patrol car window. CP 3-6. A jury found Ervin guilty as charged. CP 46-47. The court sentenced Ervin to a standard range sentence of 9 months on each count, to be served concurrently. CP 66.

C. SUBSTANTIVE FACTS

On the evening of April 9, 2014, King County Sheriff's Deputy Jeff Hancock was patrolling Vashon Island when he was dispatched

to a road hazard of someone jumping in and out of traffic. 3RP 8-10.¹ 911 caller Fariborz Tavakkolian had been driving home when he saw a young man weaving in and out of traffic in the road, yelling at cars and people. 2RP 152-53. The man had a can in his hand; Tavakkolian did not describe what type, nor was he close enough to hear what the man was saying. 2RP 152-53. Tavakkolian was concerned for the safety of the public and unsure of the man's state: "I was guessing that he might have had too much to drink but it was either erratic behavior or being drunk walking in traffic." 2RP 152.

When Deputy Hancock arrived, he saw Ervin on the side of Vashon Highway, a two-lane country road. 3RP 10, 12-13. Ervin was flailing his arms next to another man named Fuller. 3RP 13-14. Hancock observed Ervin yelling profanities at passing vehicles and then picking up a beer can off the ground as if to throw it at a passing car, despite Fuller's admonitions. 3RP 14-15. Ervin then walked into the center of the road, causing two cars to come to a stop, and then hid in a store alcove and jumped out a second time with his hands up, forcing another car to swerve. 3RP 15-17.

¹ The verbatim report of proceedings consists of six non-consecutively numbered volumes, which will be referred to as follows: 1RP (July 10, 2014); 2RP (July 14, 2014); 3RP (July 15, 2014); 4RP (July 16, 2014); 5RP (August 15, 2014); 6RP (September 12, 2014).

Ervin continued to yell profanities at drivers before walking out of view. 3RP 15-17. Hancock radioed Deputy Joel Anderson and told him that they had probable cause to arrest Ervin for disorderly conduct. 3RP 17. Anderson responded that he had just spoken to and released Ervin and Fuller, and that the two men were headed toward the back entrance of the Red Bicycle Bar. RP 38-39, 55-56.

Hancock drove to the Red Bicycle, saw Ervin standing on the ramp to the beer garden in the back, and told him to stop. 3RP 18. Instead, Ervin "took off running" and headed for the front entrance of the bar, where Anderson met and arrested a "very agitated" Ervin before placing him in his patrol vehicle. 3RP 40. As the officers convened in front of the car to discuss their next steps, they heard the loud booming noises of a window being kicked and saw Ervin kick out the back patrol car window after 3-4 attempts. 3RP 19, 41.

Ervin was "really, really upset, very loud, [and] angry" as the officers placed him in front of the patrol car and attempted to calm him down. 3RP 21, 42. Anderson testified that Ervin was "screaming and yelling specifically more toward Hancock." 3RP 43. Ervin screamed "fuck you" repeatedly at Hancock, yelled that Hancock's children would die and his grandchildren wake up in hell, and accused Hancock of being a "crooked" and "corrupt cop" who would

pay for his crimes. 3RP 22, 43. Ervin then announced that he was going to spit in Hancock's face and began clearing his lungs, so Hancock placed a spit mask over his head. 3RP 22, 42-43.

Ervin actively resisted, spinning and lunging toward Hancock and sending all three men into a chain link fence. 3RP 24, 44. They bounced off the fence and back to the patrol car, where the deputies "proned" Ervin on the hood of the car. 3RP 45. In response, Ervin wrapped his leg around Hancock's leg and "basically clamped down in [sic] like a python." 3RP 25-26. Hancock testified that it "took [him] out totally" and rendered him "totally immobile" from pain. 3RP 26. Hancock dropped to the ground to release the pressure, at which point the officers brought Ervin to the ground and laid on top of him as he continued to hurl invectives at Hancock. 3RP 26.

After Ervin told them that he was "done" resisting, the officers allowed him to sit on the curb. 3RP 26-27. After a minute or so, however, Ervin began yelling again and started to stand up. 3RP 27, 46. Hancock recalled grabbing Ervin as he twisted away and "just hauled off and kicked me . . . striking my knee and my shin causing me to stumble backwards." 3RP 27. Anderson saw Ervin "burst up" and deliver such a "quick strong kick" that Hancock went from a standing position to "buckled" as he stumbled back. 3RP 46. The

officers lay on top of Ervin until Deputy Melvin Dickson arrived to assist. 3RP 28-29, 47-48.

Dickson arrived to see the officers wrestling with the screaming and non-compliant Ervin. 3RP 64. Dickson, a self-described "gym rat" who weighs 225 pounds, "leaned down and . . . told Christopher that I was going to be taking him to my car and that he had better not kick out my window." 3RP 65-66. Dickson then "reached down, picked [Ervin] up, took him over to my car and placed him in my car." 3RP 65-66. Ervin's demeanor shifted to "calm" and "relaxed" and he immediately said "ok" and stopped fighting and arguing. 3RP 66. Dickson noted that Ervin "didn't give me any problem" and the two men actually held a civil conversation for an hour as Dickson took him across the water on the ferry. 3RP 66.

Bar patron Adalaar Deruyter corroborated the officers' testimony, recalling how Ervin was using profanity and "giving [Hancock] a hard time." 3RP 74, 76. Ervin was yelling about religion and corrupt police officers, and claiming falsely that the officers were beating him. 3RP 77. Deruyter saw Ervin trying to get up and being brought to the ground, after which he started kicking at the officers with his "legs . . . flying." 3RP 77-78.

Ervin testified at the CrR 3.5 hearing. 1RP 52-69. Prior to doing so, the court informed him of his right to remain silent and the fact that his testimony could be used to impeach him should he offer inconsistent testimony at trial. 1RP 52. Ervin claimed that Deputy Hancock had not advised him of his rights that evening, painting Hancock as "irritated" and "angry" as he slammed the patrol car door on Ervin. 1RP 58, 60. Defense counsel asked no questions about any alcohol or drugs Ervin may have taken beforehand. 1RP 52-60.

During cross-examination, the State inquired about Ervin's mental state that evening. 1RP 63-64. Ervin testified that he had ingested whiskey and 2-3 beers on April 9, 2014. 1RP 63. He also said he had smoked a "smaller amount" of methamphetamine earlier that day and had "probably" been smoking marijuana throughout. 1RP 63. Ervin denied that drugs or alcohol had impaired his memory of the incident, which he asserted was "pretty good." 1RP 64.

Instead, he painted a picture of his fraught relationship with Hancock. Ervin acknowledged that he did not get along with Hancock professionally, did not consider him a friend, and believed Hancock "manipulates the system." 1RP 54-55, 64-69. He accused Hancock of previously harassing him and intentionally trying to "escalate[] the situation" that night. 1RP 69. Ervin admitted to

spitting in Hancock's face and to assaulting another deputy on two previous occasions, but claimed that he pleaded guilty to the latter only because "Hancock lied" about what had happened and Ervin had been forced to "ple[a]d guilty to it just to get out of jail."² 1RP 65.

The trial court admitted Ervin's out-of-court statements, finding that based on Ervin's own testimony about his "intoxicated state," he "lack[ed] sufficient credibility for the court to believe that the rights were not read as the officers testified to." 1RP 76.

The State made a pretrial motion to introduce evidence of the two prior assaults involving Deputy Hancock as proof of Ervin's motive, intent, and/or common scheme or plan. 2RP 4-6; Supp. CP ___ at 8-16 (sub 23, Trial Memorandum / Pla). The State noted that during the second incident in 2013, Ervin had been compliant with officers until the moment that Deputy Hancock arrived, at which point he "seemed enraged by Deputy Hancock's mere presence and continued to struggle . . . possibly [in] an attempt to assault [him]." Supp. CP ___ at App E (sub 23).

² The first incident involved a September 7, 2012 assault in which Ervin spit in Hancock's face, and kicked out the back window of his patrol car, resulting in a conviction for assault in the third degree. Supp. CP ___ at App B and C (sub 23). No drug or alcohol use was alleged. Supp. CP ___ at App B (sub 23). The second conviction involved an April 6, 2013 incident in which Ervin had yelled and thrown objects at passing cars on Vashon Highway, kicked and scratched Deputy J. Hess during his arrest, and again kicked out the back window of the patrol vehicle. Supp. CP ___ at App E (sub 23).

The State argued that these acts tended to show Ervin's hostile feelings toward Hancock and therefore established his intent to assault on this occasion. 2RP 11-13; Supp. CP ___ at 10-12 (sub 23). The trial court noted that the issue was "not an easy call," finding that the prior assaults were probative and relevant on the issue of intent but ultimately outweighed by potential prejudice to Ervin. 2RP 14-15. The court cautioned, however, that "if a defendant takes the stand and opens the door, then I think it's a different ball game. [If] [h]e says that I have no malice towards this officer or police officers, then I think it's a completely different question." 2RP 15.

In the course of ruling on the ER 404(b) motion, the trial judge noted that she assumed that the defense would argue voluntary intoxication, because "[i]f the evidence comes in as it did through the [CrR 3.5] hearing, the jury is going to be considering someone who was intoxicated." 2RP 13-15 (emphasis added). Defense counsel neither confirmed nor denied this.³ 2RP 13-14.

During voir dire, defense counsel focused extensively on the issue of drugs and alcohol, inquiring about the jury's feelings on

³ Ervin had previously asserted a defense of "general denial/self-defense" at omnibus, which he later amended to general denial at the commencement of trial. Supp. CP ___ (sub 17 Omnibus Order); 1RP 83.

substance abusers and the concept of voluntary intoxication.

1RP 70-75, 108-17. In light of this inquiry, the prosecutor indicated that he would be seeking reconsideration of the court's ER 404(b) ruling, noting, "I had no idea that voluntary intoxication might at all be referenced . . . [a]nd in light of what has been discussed, clearly I think that does trigger the absence of . . . mistake or accident, that type of argument." 2RP 154-55. The court requested briefing on the subject. 2RP 155. The State later withdrew this motion, citing it as a "tactical" decision. 3RP 4.

The venire displayed skepticism, confusion and even outright hostility toward the idea of a voluntary intoxication argument. 2RP 108-17. Although counsel repeatedly clarified that she was not asking prospective jurors whether they believed that alcohol *absolved* someone of responsibility for his actions, but whether they would consider it a factor in evaluating the elements of a crime, the members of the jury pool kept circling back to the concept that a self-inflicted condition could ultimately *excuse* someone of culpability. 2RP 108-17.

The following exchanges illustrate the reluctance and/or difficulty demonstrated by the jury pool in separating the two ideas:

JUROR 1: Are you asking if somebody is under the influence of alcohol or drugs of some kind if it's determined that they are not responsible?

MS. WIGGS-MARTIN: That's not what I'm asking. . . . [I]f you heard everything and you think, okay, this person was under the influence of alcohol And I believe the way that they were acting was related to that But are you the kind of person who says I don't care. You . . . drank. That was a volitional choice. So therefore, everything that comes after that is imputed back to that choice.

JUROR 1: I mean I would say that I would be willing to consider it . . . [b]ut I still don't think it absolves somebody of their responsibility.

MS. WIGGS-MARTIN: That's not the question. . . .The question is not does it absolve somebody of their responsibility. Right? My question is are you somebody that says I would not even consider it

JUROR 1: I mean I guess I would say I'm willing to consider it as a factor.

MS. WIGGS-MARTIN: What about you, Juror Number 2?

JUROR 2: I would say yes, if you drank or did other substances you're responsible for your actions while on the substances.

MS. WIGGS-MARTIN: Are you someone who says I'm not even going to consider it as a factor?

JUROR 2: I think I would consider it a factor.

. . . .

JUROR 4: I kind of feel like whether you drink or not you're responsible for your own actions. . . .

MS. WIGGS-MARTIN: So for you you're someone that says I would never consider it as a factor? You did say that?

JUROR 4: I guess that's probably true. I'd consider it a factor maybe in the actions but I don't consider drinking or not

drinking having anything to absolve [sic] whether you are responsible for your actions or not.

2RP 110-13.

Other jurors displayed outright hostility toward a voluntary intoxication instruction. 2RP 113-17. One juror⁴ expressed that “if someone says they’re under the influence, I think that counts against them in the sense that they should be especially careful if they’re not able to fully comprehend what they’re doing as well as I’m not really going to trust their recollection as much” 2RP 116-17. Jurors 11 and 12 indicated that they would not be “unwilling to take [alcohol or drug use] into account,” but added that their positions were “more complicated than we probably have time to go into.” 2RP 115. At most, only one juror made an unqualified statement that the juror would be willing to consider alcohol as a factor. 2RP 116.⁵

Ervin chose not to testify at trial. The only other reference made to drugs or alcohol during trial was Tavakkolian’s “guess[] that [Ervin] might have had too much to drink.” 1RP 152. Ervin

⁴ The record does not reflect the juror number.

⁵ The empaneled jury ultimately consisted of Jurors 2, 4, 6, 7, 8, 10, 11, 12, 15, 16, 19, 20, 23, and 24. 2RP 131-34; Supp. CP __ at 4 (sub 24A, Clerk’s Minutes). Although Ervin used peremptory challenges to remove two of the jurors (numbers 1 and 9) who had expressed confusion, skepticism, or “complicated” feelings about the defense, there were at least 7 other jurors who expressed similar sentiments, at least two of whom remained on the jury. 2RP 108-17, 132-34.

nonetheless requested a voluntary intoxication instruction modeled after WPIC 18.10⁶:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted intentionally.

CP 18-19; 3RP 71.

Defense counsel argued that a sufficient factual basis existed for the instruction based solely on Tavakkolian's "guess" that Ervin may have been intoxicated, Ervin's act of jumping back and forth into traffic and yelling in the background of the dispatch recording, and Hancock's testimony that Ervin had a can of beer in his hand. 3RP 84. The trial court denied Ervin's request: "There's no evidence that he was intoxicated, is there? There's no evidence of smelling alcohol on his breath, bloodshot watery eyes, any of the traditional descriptions we often see." 3RP 85. The trial court further stated that "it requires a jury to speculate," noting that "the only time the word intoxication is ever used is from the 911 call" and that the caller was not even in close enough proximity to smell alcohol. 3RP 86.

⁶ WPIC 18.10 states: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted][or][failed to act] with (fill in requisite mental state)."

At sentencing, defense counsel described an out-of-court conversation she had had with an unknown juror:

The last thing I want to say to the court is I think it's important for the court to be aware that one of the jurors came up to me after trial and she was very impacted by Mr. Ervin's situation and circumstance because she, the court might recall, counsel might recall, she had a brother who had died from methamphetamine overdose. And she asked me if it would be possible to write Mr. Ervin a letter because from her perspective having dealt with that person for many, many years with a family member, she recognized that this was obviously an issue. And she wrote a beautiful letter. I shared that with Mr. Ervin. I don't think I need to share it with anybody else because quite frankly it was a personal attempt to reach out to Mr. Ervin on this issue and hoping and offering herself as a support for him as he goes on this journey.

5RP 11.

D. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING ERVIN'S REQUEST FOR A VOLUNTARY INTOXICATION INSTRUCTION.

Ervin asserts that the trial court abused its discretion when it denied his motion to instruct the jury on voluntary intoxication. The court should reject this claim. Ervin failed to meet his burden of presenting both substantial evidence of intoxication and substantial evidence that any such intoxication affected his ability to form the intent to commit assault.

- a. Ervin Was Not Entitled To A Voluntary Intoxication Instruction Because He Presented No Evidence That He Was Intoxicated Or Unable To Form Intent.

A trial court's refusal to give a jury instruction based on matters of fact will be reviewed only for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883, 885 (1998). A court abuses its discretion where no reasonable judge would reach the same conclusion. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002) (internal quotations omitted).

RCW 9A.16.090 states: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state."

A defendant is entitled to a voluntary intoxication instruction only if: "(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected [the defendant's] ability to acquire the required mental state." State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002)

(internal quotations omitted). "Substantial evidence" is defined as evidence "sufficient . . . to persuade a fair-minded, rational person of the truth of a declared premise." Davis v. Microsoft Corp., 149 Wn.2d 521, 531, 70 P.3d 125 (2003).

RCW 9A.36.021(1)(g) states that a person commits assault in the third degree if he "[a]ssaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault." Intent is a non-statutory element of assault.⁷ State v. Hopper, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992). Ervin has thus satisfied the first requirement for a voluntary intoxication instruction. See State v. Finley, 97 Wn. App. 129, 982 P.2d 681 (1999), review denied, 139 Wn.2d 1027, 994 P.2d 845 (2000).

As noted above, "substantial evidence" of drinking or taking drugs must be presented to satisfy the second requirement:

Evidence of intoxication based merely on opinion,
unsupported by facts on which to base it, is speculative

⁷ Although Ervin assigns error to the court for denial of a voluntary intoxication instruction for both assault in the third degree and malicious mischief in the first degree, he requested the instruction regarding only the mental state of intent, which applies solely to assault in the third degree. CP 20-21. Malicious mischief in the first degree requires the different mens rea of knowledge. RCW 9A.48.070(1)(b). He has therefore failed to preserve any error regarding the malicious mischief charge for appeal.

and conjectural. As such it amounts only to a scintilla, and the issue should not be presented to the jury. It is not error to refuse to submit the defense of intoxication to the jury where it is supported merely by scintilla evidence as distinguished from substantial evidence.

State v. Mriglot, 88 Wn.2d 573, 577, 564 P.2d 785 (1977). In Mriglot, the defendant testified that he had ingested a half case of beer and then opined that he had been slipped a drug that sent him into a "tailspin" for the next two days; his psychiatric expert testified to the hypothetical effect of drugs and a friend stated that she "inferred" from the defendant's behavior that he had been drugged. Id. The court held that this constituted "no more than a scintilla." Id.

In contrast, courts have found substantial evidence of the second prong in three different situations: when an eyewitness (most often the defendant himself) testifies to the defendant's ingestion of alcohol/drugs; when there is physical evidence of intoxicants in the blood; or when a person smelled of alcohol. See, e.g., State v. Jones, 95 Wn.2d 616, 622, 628 P.2d 472 (1981) (defendant testified to drinking 9-11 beers before stabbing the victim; witness believed that defendant had "possibly" been drinking based on his bloodshot, glassy eyes and slurred speech; and police put defendant in "drunk

tank” after arrest).⁸ Without such direct evidence, courts have found failure to meet the second prong. See State v. Priest, 100 Wn. App. 451, 453-54, 997 P.2d 452 (2000) (insufficient evidence to establish intoxication at time of car theft where defendant’s BAC was .169/.172 but testimony regarding his drinking was limited to the two hours following the theft).

Even if a defendant establishes the fact of drinking or drug use, the courts have emphasized that the third requirement is a wholly separate inquiry and sets a similarly high bar. This Court, for

⁸ See also State v. Brooks, 97 Wn.2d 873, 877, 651 P.2d 217 (1982) (witnesses testified that “[d]efendant began drinking beer, whiskey and rum . . . almost constantly” in days leading to victim’s death); State v. Rice, 102 Wn.2d 120, 122-23, 784 P.2d 199 (1984) (defendant and co-defendant both testified they had been drinking beer all day and taken 2-5 Quaaludes each, had respective BAC’s of .06 and .10, and co-defendant said “he was so loaded he didn’t feel it” when he was hit by a car); State v. Thomas, 109 Wn.2d 222, 223-25, 743 P.2d 816 (1987) (barmaid testified that she served defendant five glasses of wine and had to cut her off because she was intoxicated, and defendant testified that she had suffered an alcoholic blackout and was “blitzed” and incoherent); State v. Hackett, 64 Wn. App. 780, 781-83, 785 n.2, 827 P.2d 1013 (1992) (multiple doctors testified that defendant’s post-arrest seizure was likely result of cocaine ingestion; toxicology report showed cocaine metabolites in defendant’s blood; psychologist relayed defendant’s confession that he had “ingested considerable amounts of cocaine and ‘began to hallucinate . . . [and] took a handful of Valium.’”); State v. Smissaert, 41 Wn. App. 813, 814-15, 706 P.2d 647 (1985) (“numerous witnesses including the defendant testified as to the quantity of alcohol consumed”); State v. Gallegos, 65 Wn. App. 230, 232-33, 828 P.2d 37 (1992) (witness testified to drinking vodka and smoking marijuana with defendant, who was “impaired,” falling down and running into things); State v. Gabryschak, 83 Wn. App. 249, 253-54, 921 P.2d 549 (1996) (officer testified that defendant had alcohol on his breath, three witnesses observed that defendant was intoxicated, and defendant’s mother said she considered him “too drunk to drive”); State v. Walters, 162 Wn. App. 74, 78-79, 82-83, 255 P.3d 835 (2011) (bartender testified that defendant “consumed at least seven beers and two other shots of alcohol” and was a “four” in terms of intoxication on a one-to-ten scale).

example, has held that “[e]vidence 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.’*” State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996) (emphasis added); see also Finley, 97 Wn. App. at 135 (“The evidence must reasonably and logically connect [a defendant’s] intoxication with his inability to form the requisite mental state”). As the supreme court has noted:

[I]ntoxication is not an all-or-nothing proposition. A person can be intoxicated and yet still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. . . . *[I]t is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state.*

State v. Coates, 107 Wn.2d 882, 891, 735 P.2d 64 (1987) (emphasis added).

A defendant’s violence or belligerence is not enough. “Many criminal acts follow the use of alcohol or drugs. . . . [but] the court is required to give a voluntary intoxication instruction only in those cases in which the level of mental impairment caused by alcohol or drugs *clearly affected* the defendant’s criminal responsibility by eliminating the necessary mens rea.” Finley, 97 Wn. App. at 135 (emphasis added). Despite “ample evidence” of intoxication, for

example, the defendant's belligerence toward the police in Gabryschak did not prove that he was unable to form the requisite mental state; to the contrary, "[a]t best, the evidence shows that Gabryschak can become angry, physically violent and threatening when he is intoxicated." 83 Wn. App. at 253-54.

Cases that have satisfied the third requirement for substantial evidence of an inability to form the required mental state have presented either medical opinion, eyewitness testimony describing how the intoxicants interfered with a defendant's mental processes, or objective physical manifestations of intoxication like swayed gait or bloodshot eyes.⁹

While "physical manifestations of intoxication" such as glassy eyes or slurred speech may "provide sufficient evidence from which to infer that mental processing also was affected," this type of indirect evidence holds less weight than other types of evidence. State v. Walters, 162 Wn. App. 74, 83, 255 P.3d 835 (2011).

⁹ See, e.g., State v. Hackett, 64 Wn. App. 780, 782-83, 827 P.2d 1013 (1992) (lay testimony that defendant was nervous, blue, shaking and acting abnormally; medical testimony that he suffered a cocaine-induced seizure and had near-lethal levels of cocaine in his blood; and defendant's admission that he had blacked out and hallucinated after ingesting "considerable amounts of cocaine. . . and a handful of Valium"); State v. Kruger, 116 Wn. App. 685, 689, 692, 67 P.3d 1147 (2003) (finding "ample evidence of [Kruger's] level of intoxication on both his mind and body, e.g., his 'blackout,' vomiting at the station, slurred speech, and imperviousness to pepper spray" and hospitalization "to see if he could sober up").

Thus, in Walters, the court held that Walters' slurred speech, droopy/bloodshot eyes, swaying motions, and lack of response to pain or compliance techniques at the time of his theft charge "present[ed] a close fact pattern because there is no direct evidence that intoxication affected [defendant's] mental state." Id.

Cases in which the defendant displayed signs of physical agility and/or purposeful, goal-oriented behavior despite heavy drug or alcohol use have presented insufficient evidence of an impaired ability to form mens rea.¹⁰ For example, although Walters held that physical manifestations of intoxication indicated an impaired ability to intend to commit theft, the court also held there was "direct evidence" proving that his mental state was *not* impaired during his later assault

¹⁰ See, e.g., Finley, 97 Wn. App. at 134-36 (holding that despite "ample evidence" that the defendant had been drinking, "nothing here reasonably and logically connects Mr. Finley's intoxication with an inability to form the necessary mental state[]" where he complied with most of the officer's requests, was able to walk backwards, told the officers that he understood their trespass orders and why he was under arrest, and "was neither confused nor disoriented"); Priest, 100 Wn. App. at 453-55 (defendant's ability to properly operate a motor vehicle, communicate with officers, purposely provide a false identity, and attempt to negotiate reduced charges belied any argument that alcohol had affected his ability to form mens rea); State v. Harris, 122 Wn. App. 547, 90 P.3d 1133 (2004) (despite testimony that defendant was "smok[ing] crack continuously" before the crime, which usually made him "paranoid," defendant described acting purposefully); State v. Webb, 162 Wn. App. 195, 210, 252 P.3d 424 (2011) ("[Webb's] actions show that he was capable of forming the intent to steal" where he entered a store with a gun and told the clerk he was stealing the money to support himself); State v. Gallegos, 65 Wn. App. 230, 828 P.2d 37 (1992) (despite testimony that Gallegos "had been drinking, [which] made him lose his balance, spill things, and knock things over, there was no evidence presented that the drinking impaired Gallegos' ability to acquire the intent" to rape or otherwise "lacked awareness of his actions at the time of the incident").

of a police officer where he “announced that he was going to kick Officer Cameron before he did so.” Id. at 84. Similarly, there was “direct evidence” that he had intentionally resisted arrest “[w]here he had been cooperating with the officer initially, [but] his attitude changed when [his] keys were seized and he was arrested.” Id.

Gabryschak is instructive. This Court found that there was “no evidence in the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability,” despite testimony that Gabryschak emitted the odor of intoxicants, was deemed “too drunk to drive” by his mother, and appeared “very intoxicated” to multiple witnesses. 83 Wn. App. at 253-54. To the contrary, Gabryschak’s behavior demonstrated an ability to act with intent and he displayed none of the physical signs of alcohol’s effect on one’s mental faculties:

H]e responded consistently to the officers’ requests to see and speak to the occupants of the apartment—he consistently refused, *indicating that he fully understood the nature of the requests*; he tried to break and run while being escorted to the police car, *indicating that he was well aware that he was under arrest* No testimony reflects that Gabryschak’s speech was slurred, that he stumbled or appeared confused, that he was disoriented as to time and place, that he was unable to feel the pain of the pepper spray, or that he otherwise exhibited sufficient effects of the alcohol from which a rational juror could logically and

reasonably conclude that his intoxication affected his ability to think and act in accord with the requisite mental states.

Id. at 255 (emphasis added).

Ervin cannot satisfy either the second or third requirements for a voluntary intoxication instruction. With respect to the second requirement, he simply presented no evidence at trial that he drank or took drugs, not even the “scintilla” described in Mriglot. 88 Wn.2d at 577. Ervin chose not to testify regarding his alleged drug and alcohol use and offered no other witnesses who could testify to seeing him drink any alcohol or ingest any drugs that day.¹¹ No physical evidence of intoxicants in his blood was presented. Nor was any testimony elicited that he smelled of alcohol, despite the fact that three officers were in extremely close contact with Ervin for an extended period of time.

Ervin nevertheless insists that he has met the second prong because, he claims, Tavakkolian described him as “drunk walking in traffic.” BOA 10. This contention is unavailing. First, the unredacted quote actually reads as follows: “*I was guessing that he might have had too much to drink but it was either erratic behavior or being drunk*”

¹¹ Although Gabryschak made clear that a defendant is not required to testify or present defense witnesses to qualify for an intoxication instruction and may rely instead on information drawn out during cross-examination or the State’s case-in-chief, the court also acknowledged that “affirmative evidence presented by a defendant may ordinarily be more effective.” 83 Wn. App. at 253.

walking in traffic.” 2RP 152 (emphasis added). Tavakkolian’s language on its face shows that, at most, he was merely speculating that Ervin had been drinking.

That Tavakkolian “guessed” makes sense. As the trial court correctly pointed out, the record contained no facts that Ervin had been drinking; Tavakkolian was driving by quickly in a car and had no opportunity to interact with Ervin or observe him closely enough to detect what he smelled like or whether he had bloodshot eyes. 3RP 86. Indeed, Tavakkolian testified that he could not even hear what Ervin was saying, making it impossible for him to determine, for example, whether he was incoherent or slurring. This is exactly the type of proof rejected by Mriglot as “no more than a scintilla” because it was “[e]vidence of intoxication based merely on opinion, unsupported by facts on which to base it, . . . [and] is speculative and conjectural.” 88 Wn.2d at 577.

In addition to incorrectly citing Tavakkolian’s “guess” as substantial evidence that he had been drinking, Ervin refers to Deputy Hancock’s statement about seeing Ervin with a beer can in his hand. However, Hancock observed Ervin picking the can up off the ground and throwing it at cars, not drinking from it. 3RP 14-15. The fact that

he picked it up off the ground indicated that it might not even belong to him. Id.

Ervin next claims that his “bizarre, dangerous behavior” darting into traffic and “erratic, belligerent behavior” upon arrest should be interpreted as proof that had been drinking. He specifically points to what he describes as his “crazed ranting” against Hancock, in which he accused him of being a corrupt officer, swore that his family would wake up in hell, and falsely claimed police brutality. BOA 10-11.

Ervin essentially asks this Court to assume that one must be drinking in order to make accusations of corruption against the police, treat them with hostility, or make threats toward an officer’s family. While Ervin states that all reasonable inferences must flow in his favor, this does not require the court to strain toward unreasonable inferences.

Similarly, just because Ervin ran into traffic and threw objects does not mean he had been drinking; more reasonable inferences include anger and belligerence. Gabryschak made clear that courts cannot assume that intoxicants have impaired a defendant’s ability to form intent simply because he acts with hostility and anger. 83 Wn. App. at 253-54. It is untenable to ask this court to assume that he has been drinking based on the same.

Ervin cites Kruger to support his claim that one's actions can be imputed to drinking or drug use based on behavior alone. But Kruger found "substantial evidence of Mr. Kruger's drinking" based not on his belligerent behavior, but on testimony that he had shown up at someone's house "drunk," was "impervious[] to pepper spray," began vomiting in the jail, and had to be hospitalized to be evaluated "or to see if he could sober up." 116 Wn. App. at 688-89, 692-93.

Ervin next claims that no actual evidence of his drinking or drug use was necessary because "the effects of alcohol are commonly known" and would be "obvious" to the jury. In other words, the fact that a jury could have improperly speculated about his drinking without any evidence justified the instruction. As support for this proposition, which directly contradicts the entire body of caselaw surrounding voluntary intoxication, Ervin cites Kruger, 116 Wn. App. at 692-93 and State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985).

Ervin's reliance is misplaced. Each of those cases had ample testimony that the defendant had been drinking; the issue at bar for each was not whether there had been sufficient evidence of drinking, but whether expert testimony on the effects of alcohol was required to obtain a voluntary intoxication instruction. Smissaert, 41 Wn. App. at

815; Kruger, 116 Wn. App. at 692-93. Ervin's situation is wholly different. He asks this court to assume that he was drinking or doing drugs, without any actual witness testimony or physical evidence of these acts, because he was acting in a way in which it would be "obvious" that he had done so. This reasoning is not only circular but improperly conflates the second and third prongs of the voluntary intoxication test.

For similar reasons cited above, Ervin has failed to present substantial evidence of the third prong: an impaired ability to form intent. Although Ervin cites to Walters for the proposition that indirect "physical manifestations" of alcohol alone can support the third prong, he ignores the fact that he presented none of the physical manifestations described in Walters such as slurred speech, the odor of alcohol, droopy or bloodshot eyes, swaying, imperviousness to pain or compliance techniques. 162 Wn. App. at 83.

Ervin claims that Tavakkolian saw him "staggering" in traffic, but the record does not support this claim. A close reading of the record shows that Tavakkolian said that Ervin "seemed to be weaving in and out of traffic." 2RP 152. There is no mention of him "staggering" through cars. To the contrary, Hancock described Ervin hiding and timing his jumps as if to disrupt traffic. 3RP 14-17.

Nor does the record support that Ervin was yelling "gibberish" at the police and at cars; Tavakkolian testified that he could not even hear what Ervin was saying, and Hancock described him swearing at cars, not yelling gibberish. 2RP 152-53; 3RP 15-17. While Deputy Anderson said that there was "some gibberish throughout" his interaction with Ervin, it is unclear whether he was describing the quality of the brief radio recording of Ervin's voice at the scene, to which defense counsel was referring immediately prior, or Ervin's actual words.¹² 3RP 57; Ex.4.

Hancock also described how Ervin's post-arrest diatribes were focused and coherent, not wandering "gibberish," just as bystander Adalaar Deruyter recalled not "gibberish" but angry words about religion (likely the references to Hancock's children going to hell), corrupt officers, and false claims of being beaten. 3RP 57, 74-77. Moreover, Deruyter described Ervin as "giving [Hancock] a hard time," not raving incoherently, struggling with basic comprehension, or unable to understand what he was doing. 3RP 74, 76.

¹² Nor was Ervin heard "screaming incoherently and slurring his words on the police radio recording," as he claims. BOA 12; Ex. 4. Ervin simply sounds angry, not stumbling over his words, and the poor quality of his voice can be attributed to the fact that his voice had been caught in the background of the recording, not because of any inherent incoherence. Ex. 4.

Ervin in turn disregards the fact that the very types of “direct evidence” cited in Walters as proof of one’s ability to form intent are also present in his case: like defendant Walters, Ervin announced his intent to spit in Deputy Hancock’s face prior to doing so, and displayed an ability to control his own actions in that his demeanor abruptly changed once Hancock was relieved and a different, physically imposing officer took charge of him. Walters, 162 Wn. App. at 84; 3RP 22, 42, 66.

Ervin simply displayed no signs of slowed or confused mental processes. To the contrary, the evidence showed he was focused and intent on his harassment of Deputy Hancock; physically agile like the defendant in Finley¹³ (who was able to walk backwards to his car) when he successfully used a leg move to take down Hancock; and able to understand that he was under arrest. Dickson testified that once Hancock was gone, Ervin was not only calm and cooperative but able to hold a normal conversation with him for at least an hour. This indicates that Ervin’s actions were goal-oriented and borne out of a dislike for an officer whom he believed to be corrupt, not out of an alcohol-induced delusion.

¹³ 97 Wn. App. at 136.

Ervin nonetheless frames his “bizarre, erratic, and aggressive” behavior as a “physical manifestation of intoxication,” although Walters characterized such manifestations as involuntary physical signs like watery eyes or swayed gait. 162 Wn. App. at 83; BOA 12-13. Ervin’s argument directly contradicts this Court’s holding in Gabryschak that evidence of belligerence does not imply an inability to form intent, but “[a]t best . . . shows that that [a defendant] can become angry, physically violent and threatening when he is intoxicated.” 83 Wn. App. at 253-54.

Ervin also claims that because no one testified to his feelings of pain during the struggle, this lack of pain was another “physical manifestation of intoxication.” It is unclear who Ervin believed could have testified to his feelings of pain since he himself did not take the stand; the lack of any such testimony is therefore a result of his decision to stay silent at trial, not a symptom of his intoxication at the scene. Moreover, the cases he cites describing lack of pain as an indicator involved situations far graver than the one he faced. In Rice, the defendant felt no pain when hit by a car. 102 Wn.2d at 122-23. In Walters, the defendant continued fighting after being struck twice with a stun gun. 162 Wn. App. at 83. Ervin did not

experience anything nearly as traumatic as these situations, but was simply restrained while *he* attacked officers and caused *them* pain.

Finally, Ervin offers an anonymous juror's post-verdict hearsay statements to defense counsel as proof that sufficient evidence existed for a jury to have "correctly identified Ervin's methamphetamine use," saying the trial court should also have deduced that his aggressive, erratic behavior was "typical of someone high on methamphetamine." BOA 11, 13. He is incorrect.

First, neither the letter itself nor any of the text contained within were admitted into the record, making it impossible to know what was actually said beyond counsel's "testimony." Allegations that rely on matters outside the record will not be considered on direct appeal. State v. Kinzle, 181 Wn. App. 774, 786, 326 P.3d 870 (2014) (citing State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995)). Nor do an attorney's assertions to the court constitute evidence that can be considered during a direct appeal. State v. Lougin, 50 Wn. App. 376, 379, 387, 749 P.2d 173 (1988).

Even if the letter had been made part of the record as an exhibit or by being read into the record by counsel, it would have remained unreliable as both unsworn testimony and inadmissible hearsay. State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580

(1989) (affidavits from non-members of the jury relaying juror comments are inadmissible hearsay).

Moreover, an appellate court will generally not inquire into the internal processes used by a jury to reach its verdict, because “the individual or collective thought processes [of a jury] leading to a verdict “inhere in the verdict” and cannot be used to impeach the verdict.” Breckenridge v. Valley General Hospital, 150 Wn.2d 197, 204-05, 75 P.3d 944 (2003). A juror’s post verdict statements inhere in the verdict if they are “linked to the juror’s motive, intent, or belief, or describe their effect upon him. . . .” Id. at 205.

The letter clearly contains the individual thought processes of the juror and its effect upon him or her. Moreover, it represents the very type of opinion testimony forbidden by Mriglot, unsupported by facts and “speculative and conjectural.” The summary of the letter as provided by counsel stated that the juror’s conclusions were based not on the evidence at trial but upon his or her personal experience of having a family member who was an addict. It is also unclear how the trial court could have deduced the types of behavior associated with methamphetamine use when no such evidence was presented.

This Court should reject Ervin's claim that the trial court abused its discretion where he provided virtually no evidence of intoxication or an effect on his ability to form intent.

b. Any Error Was Harmless.

Even if this Court holds that the trial court erred in not giving the voluntary intoxication instruction, any error was harmless. While instructional errors are presumed prejudicial, they are nonconstitutional and thus harmless if they did not, within reasonable probability, materially affect the verdict. Walters, 162 Wn. App. at 84.

Ervin's sole argument regarding prejudice is that his trial counsel was unable to "effectively argue intoxication" based on the lack of a voluntary intoxication instruction. He cites Kruger for support, describing how that court held that the defense was rendered "impotent" even though counsel argued the absence of intent based on the defendant's intoxication, because the jury was not correctly apprised of the law. 116 Wn. App. at 694-95. Ervin argues that Walters similarly held that the fact that the parties had argued "whether or not Mr. Walter was too drunk to act intentionally" during closing arguments "strongly suggests that the error was not harmless

because the jury lacked direction on how to apply the intoxication information to the law.” 162 Wn. App. at 84.

There are two crucial differences, however, between the above cases cited by Ervin and his own. First, in Walters and Kruger, the jury had received a great deal of evidence of intoxication at trial. Kruger, 116 Wn. App. at 688-89; Walters, 62 Wn. App. at 78, 83. While the attorneys in those cases were thus able to argue their intoxication theories based on the considerable evidence adduced at trial, the lack of an instruction robbed them of their ability to connect the evidence to the law. Ervin's case presented far less evidence than that produced in Walters or Kruger, weakening Ervin's argument that it was the lack of an *instruction* (rather than a lack of evidence) that affected the outcome of his case.

Second, unlike Walters or Kruger, neither counsel here argued voluntary intoxication at trial or even mentioned the subject of drugs or alcohol. This is highly indicative of a lack of prejudice. Before she had any reason to restrain herself from referencing Ervin's alleged state of intoxication, for example, defense counsel's opening statement lacked a single reference to drugs or alcohol, much less the beer, whiskey, methamphetamine and marijuana her client had claimed during the CrR 3.5 hearing. 2RP 148-51. The most counsel

said in her carefully fashioned remarks was that Ervin was “behaving in a manner that is not consistent with an individual who was in their right faculties” and for the jury to observe the “context.” 2RP 149. This wording is significant – counsel did not simply say that Ervin was intoxicated. This is because her client was the only one who could provide the evidence needed to make such a statement and he apparently was not going to testify.¹⁴

Similarly, neither party uttered the word “intoxication” during closing arguments or otherwise referred to Ervin drinking, taking drugs, or in any way being under the influence of substances. 3RP 101-17. While the parties argued generally about the element of intent, neither party mentioned the subject of intoxication as part of that analysis. 3RP 104-06. When the State discussed intent, for example, it did so in the context of absence of mistake, not intoxication, noting Ervin’s focused rage toward Hancock. 3RP 105.

¹⁴ Ervin’s decision not to testify made sense given that his own testimony at the CrR 3.5 hearing undercut any capacity to argue later that his ability to form the required mens rea was impaired. Ervin testified that his memory was unaffected by the substances he had consumed, and claimed it was actually “pretty good.” 1RP 64. This was borne out by his detailed account of the period of time right before the assault. 1RP 52-61. He further described his contentious relationship with Hancock, which would have exposed him to questioning about his bias and potentially opened the door to his prior assaults against Hancock. 1RP 54-55, 63-69.

Similarly, defense counsel made no mention of intoxication. Instead, because she lacked the evidence she needed after her client chose not to testify, she was reduced to vague exhortations to “consider the circumstances . . . his demeanor, how he was acting” and that “those are circumstances that you have to consider, you need to consider, because when you evaluate someone’s intent, intention being why someone does what they do, you must evaluate the circumstances of their actions.” 3RP 110, 113. The most counsel could say about Ervin’s condition was to claim vaguely that he was in an “altered state,” but she could not say from what because she had no evidence that he had ingested drugs or alcohol. 3RP 113.

As the cases have demonstrated, the lack of a voluntary intoxication instruction does not prohibit a party from arguing the evidence during closing. In Walters and State v. Hackett, for example, the parties all argued voluntary intoxication despite the court’s refusal to give the instruction. Walters, 162 Wn. App. at 84; Hackett, 64 Wn. App. 780, 784, 827 P.2d 1013 (1992). This Court should hold that any error was harmless.

2. ERVIN HAS FAILED TO MEET HIS BURDEN IN ESTABLISHING INEFFECTIVE ASSISTANCE OF COUNSEL.

Ervin argues in the alternative that he received ineffective assistance of counsel because his attorney did not produce sufficient evidence to merit a voluntary intoxication instruction. This claim fails. Counsel's ability to present a case for voluntary intoxication was wholly thwarted by Ervin's decision not to testify, not by any deficient performance on her part. Moreover, any choice she made not to pursue alternative avenues of information was a legitimate strategic decision, given the degree of resistance and confusion shown by the jury toward voluntary intoxication during voir dire, the risk of potentially exposing her client to damaging ER 404(b) evidence of his prior assaults had she pursued a more aggressive cross-examination of Hancock, and the lack of required proof that additional witnesses would have produced useful information.

a. Counsel's Conduct Constituted Legitimate Trial Strategy And Was Thus Not Deficient.

Ineffective assistance of counsel claims are reviewed *de novo*. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). To prevail on such a claim, the defendant must

show that (1) his attorney's conduct fell below an objective standard of reasonableness and (2) this resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A mere showing that an error by counsel had some conceivable effect on the outcome is insufficient. Strickland, 466 U.S. at 693. If the defendant fails to demonstrate either prong, the inquiry ends. Id.

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. The defendant must show the absence of legitimate strategic or tactical reasons to support the challenged conduct. State v. McFarland, 127 Wn.2d at 336.

Trial counsel's performance did not fall below an objective standard of reasonableness. Ervin was the only witness who could have offered sufficient facts to support the voluntary intoxication instruction, and he severely limited his counsel's ability to do so by

choosing not to testify. The trial court noted that the instruction would presumably be argued “[i]f the evidence comes in as it did through the [CrR 3.5] hearing.” 2RP 13-15 (emphasis added).

Ervin argues that because Deputy Hancock opined at the CrR 3.5 hearing that Ervin and Fuller “both appeared to be really intoxicated” while standing on the street, Ervin’s attorney should have elicited this same testimony during trial and could have further expanded on it to his advantage. 1RP 7-8. He also takes his attorney to task for not finding his friend Andy Fuller to compel him to testify on Ervin’s behalf. He is incorrect.

First, these claims have no factual basis in the record. As noted in Mriglot, “Evidence of intoxication based merely on opinion, unsupported by facts on which to base it, is speculative and conjectural.” 88 Wn.2d at 577. There is nothing in the record to show that Hancock’s opinion of Ervin’s intoxication was based on any factual observations, such as bloodshot eyes, the odor of alcohol, incoherent speech, or unsteady gait. To the contrary, his testimony conveyed a person who was purposeful, aware and angry.

The record is also insufficient to establish that Fuller possessed exculpatory evidence. A close reading shows that there is no proof that he personally witnessed Ervin ingesting the various

forms of alcohol and drugs that Ervin claimed to have taken that day. The incident happened at approximately 9:15 p.m. 3RP 10-11. Ervin testified at the CrR 3.5 hearing that he had imbibed 2-3 beers and some whiskey before “c[oming] out of the woods,” smoked some methamphetamine “earlier that day,” and “probably” smoked marijuana throughout. 1RP 63-64. Ervin also testified that he and Fuller had been doing graffiti at some point. 1RP 56-57.

No timeline was presented as to when each of these events occurred, nor any testimony about how much of it Fuller was present for, if any. Ervin mentioned that “we had kind of a party . . . that day” but never clarified to whom he was referring. Ervin essentially asks this court to presume, without any direct evidence, that Fuller was with him during the entire day and personally observed him ingest all of these substances. The record cannot sustain these assumptions.

Moreover, trial counsel’s decision not to call Fuller to the stand does not constitute constitutionally deficient performance. “The courts have indicated that the decision to call or not to call a witness is for counsel to make.” In re Pers. Restraint of Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001) (criticizing the “post trial scrutiny of . . . whether to examine on a fact, whether and how much to

cross-examine, whether to put some witnesses on the stand and leave others off . . . whether to interview some witnesses before trial or leave them alone”).

“Generally, the decision to call a witness will not support a claim of ineffective assistance of counsel.” State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987); see also State v. Schumacher, __ Wn. App. __, 347 P.3d 494, 503 (2015) (“The decision about whether to investigate, call a particular witness, or present certain evidence is a matter of legitimate trial strategy and tactics and usually cannot support an ineffective assistance claim”).

“A decision not to cross examine a witness is often tactical because counsel may be concerned about opening the door to damaging rebuttal or because cross examination may not provide evidence useful to the defense.” In re Pers. Restraint of Brown, 143 Wn.2d 431, 451, 21 P.3d 687 (2001). See, e.g., State v. Fualaau, 155 Wn. App. 347, 363, 228 P.3d 771 (2010) (holding that defense counsel’s decision not to call witnesses who could have both helped and harmed him “f[ell] well within the ambit of sound trial strategy”).

Counsel was not deficient because she did not successfully produce Fuller. Even without the above caselaw regarding trial

strategy, the record makes clear that Fuller was simply not easy to locate. Although the State initially described him as “a pretty cooperative fellow who would probably get himself here if he wanted,” it became apparent that Fuller did *not* want to, as he was ultimately “not able to get himself here” despite the help offered by deputies on Vashon. 1RP 81-82; 3RP 4. Defense counsel also acknowledged that Fuller was a difficult witness, informing the trial court, “I don’t know that my efforts to secure his presence will be fruitful and successful.” 1RP 81.

Moreover, Ervin fails to explain how he would have overcome potential Fifth Amendment issues. If Fuller was in fact part of the drug “party” that took place in the woods, as Ervin asks this Court to assume, Ervin unreasonably presumes that Fuller would have willingly testified about his own illicit drug use. This is an untenable assumption.

In addition, if Ervin and Fuller were actually under the influence, as Ervin would have this Court believe, then his memory and the value of his testimony would have been severely compromised. Trial counsel was undoubtedly aware of this conundrum; indeed, both the trial court and one of the venire members had pointed out as much. 1RP 76; 2RP 117.

Finally, Ervin himself admits that evidence of his drug use alone “would undoubtedly be prejudicial.” BOA 17. The jury pool reinforced the reality of this concern, demonstrating either hostility toward or confusion about the concept of voluntary intoxication. Most jurors struggled to understand the concept of voluntary intoxication as a mere lens through which to examine the elements of the crime, as distinguished from the unwelcome idea that it could be used as an excuse for criminal behavior. Counsel’s decision to develop her theory through State’s witnesses was a valid tactical decision to shield Ervin from the unfavorable details of his drug and alcohol use.

Trial counsel was also on notice that if she more aggressively pursued an involuntary intoxication case, the State would have been entitled to rebut this theory with ER 404(b) evidence showing that Ervin acted intentionally. All parties agreed that Ervin had a contentious and combative history with Hancock. This provided material rebuttal evidence regarding his motive and intent, and also explained why he focused his rage on Hancock while complying with other officers. Although the trial court initially denied the State’s pretrial motion to admit Ervin’s history with Hancock, it was clear that it was open to reevaluating this ruling

after the State's motion to reconsider, even requesting briefing on the subject. Given that the trial court had already stated that its initial ruling was "not an easy call," it was a valid tactic on counsel's part to exercise caution and restraint in handling Hancock's cross-examination to avoid a wave of damaging evidence in response.

b. There Was No Prejudice.

Even if a defendant can establish deficient performance for not calling witnesses, he still cannot establish prejudice unless the record shows that those witnesses would have been helpful, which must consist of more than a defendant's claims that the testimony would have been useful. See, e.g., State v. Weber, 137 Wn. App. 852, 856-58, 155 P.3d 947 (2007). As noted above, Ervin cannot establish that Hancock and Fuller held any exculpatory evidence.

In State v. Jury, a defendant argued at a motion for new trial that he had three lay witnesses who could corroborate his claim that he was in shock at the time he assaulted a police officer; however, no affidavits from these witnesses were attached. 19 Wn. App. 256, 261, 476 P.2d 1302 (1978). The court held that although counsel conducted virtually no investigation, "[w]e are not inclined to rule that actual prejudice is shown solely because defense

counsel neglected to interview witnesses who *might have helped* the defense. *There is only speculation from the record that these witnesses would have been helpful or would have offered testimony relevant to the defense.*" Id. at 265 (emphasis added).

There are no sworn statements here from Hancock and Fuller attesting to evidence of Ervin's intoxication. Thus, as in Jury, Ervin's claim that Fuller and Hancock could have provided helpful testimony regarding his intoxication consists of "only speculation from the record that these witnesses would have been helpful or would have offered testimony relevant to the defense." Jury, 19 Wn. App. at 265. Ervin cannot establish prejudice.

E. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Ervin's conviction and sentence.

DATED this 5 day of June, 2015.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, MARY SWIFT, containing a copy of the Brief of Respondent, in State v. CHRISTOPHER ERVIN, Cause No. 72468-1-I, in the Court of Appeals, Division I, for the State of Washington.

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


Name

Done in Seattle, Washington

06-05-15
Date