COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent)
)
vs.)
)
DANIEL FARIAS, Defendant/Appellant.)

NO. 306305

BRIEF OF RESPONDENT

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I. SUMMARY

On January 4, 2011 Maria Farias was found unconscious and near death inside her bedroom, covered in blood, having been severely beaten with a crucifix that had hung over her bed. Ms. Farias' son, Daniel Farias, was arrested out of the home and charged with the assault of his mother. Mr. Farias was convicted by jury of Assault in the First Degree and sentenced to 240 months in prison.

II. STATEMENT OF FACTS

On January 4, 2011 law enforcement was called to 2601 Northwest Boston in East Wenatchee for a welfare check on a female subject. (RP 65). Sheriff Harvey Gjesdal arrived at the residence at 4:04 p.m. and contacted the reporting party, Cecelia Williams. (RP 66-69). Ms. Williams advised Sheriff Gjesdal she wanted him to check on her mother, Maria Farias, to make sure she was alright. (RP 168). Although her brother, Daniel Farias, was in the home Ms. Williams was afraid to enter the residence without the police. (RP 153). Sheriff Gjesdal contacted Daniel Farias at the front door of the residence and asked him to have his mother come to the front door so that he could make sure she was okay. (RP 71-72). In response Mr. Farias walked into the

house and yelled "the cops want to talk to you" and then returned to the front door stating that she was sleeping. (RP 73-74). Sheriff Gjesdal asked Mr. Farias if he could enter the residence to check on his mother, which Mr. Farias agreed to. (RP 74). Mr. Farias led Sheriff Gjesdal to the doorway of his mother's bedroom. (RP 75). Sheriff Gjesdal observed that the room was dimly lit, and there was a big pile of blankets in the middle of the bed. (RP 75). Sheriff Gjesdal called out, "Maria, Sheriff's Office, can I talk to you", and heard a mumble come from the pile of blankets. (RP 75). Mr. Farias entered the bedroom, lifted the pile of blankets, put them back down, stating that she was "sleeping she's passed out and she's naked". (RP 76-77). At this point Sheriff Gjesdal had Cecelia Williams enter the residence to check on her mother. (RP 77). Ms. Williams entered the bedroom, pulled back the covers and started screaming that her mother had been beaten. (RP 78). Sheriff Gjesdal and Deputy Bo Allen then observed that Maria Farias' face was puffy and oozing blood, her eyes were swollen shut and she had numerous cuts all over her face. (RP 79, 100). Mr. Farias attempted to leave the bedroom by pushing past Deputy Allen, who then detained him for investigation of the assault. (RP

79, 102). Mr. Farias acknowledged that the only people inside the residence the previous night were him and his mother. (RP 101-102). An ambulance was summoned for Maria Farias. (RP 79). The bedroom contained obvious evidence that a struggle had occurred inside, including blood and broken pieces of wood. (RP 80). Mr. Farias was transported to the Douglas County Sheriff's Office for questioning about the assault. (RP 106-107).

Maria Farias was transported to Central Washington Hospital via ALS (advanced life support) ambulance and treated by Dr. Jenarah Tekippe. (RP 204). On a Glasgow coma scale Ms. Farias was rated the lowest possible score of 3. (RP 205). She was in critical condition and the full activation trauma team was called in. (RP 207). After assessment Ms. Farias' injuries were cataloged; head and neck injuries, bruising of chest and abdomen, extensive facial fractures, brain bruising/bleeding, and injuries to her hands. (RP 209-211). Her body temperature was in the mid-80's suggesting significant brain injury. (RP 211). Dr. Tekippe opined that absent medical intervention it was very doubtful Ms. Farias would have survived her injuries. (RP 219-220). Due to the severity of Ms. Farias' injuries she was airlifted to Harborview Medical Center (RP 221). Additional injuries were

discovered at Harborview; broken ribs, broken hands, shattered cheekbone, broken nose. (RP 173). She didn't regain consciousness at Harborview until a week later. (RP 175). After treatment and release from Harborview Ms. Farias moved into her daughter's home and did not return to work. (RP 176).

Sgt. Detective Dave Helvey interviewed Daniel Farias at the Sheriff's Office. (RP 232). Two taped interviews were conducted with Mr. Farias. (RP 232, Exh. 90). During the break after the first interview Mr. Farias indicated that "I think I did this to my mom." (RP 109). Detective Helvey observed that Mr. Farias' right hand appeared red and scratched. (RP 237).

In the first taped interview Mr. Farias recalled that his mother was at the house when he arrived late in the evening. (Exh. 90). She was in her bedroom and he wished her goodnight. (CP). His mother was okay when he went to bed. (Exh. 90). He recalled for Detective Helvey the events that occurred during the day and evening prior to arriving at his residence for the night. (Exh. 90). He denied using drugs, but stated that he had consumed two forty ouncers and a couple other beers. (Exh. 90). He claimed that he did not hurt his mother but had no explanation for her injuries. (Exh. 90) He remained at home all

of the next day. (Exh. 90). He acknowledged receiving a call from his sister asking about their mother but he did not check on her and told his sister she was sleeping. (Exh. 90). In the second interview Mr. Farias claimed to have no memory of the assault but acknowledged that he might have hurt his mother. (Exh. 90). He stated that his right hand hurt and felt weird. (Exh. 90).

Detective Helvey obtained a search warrant for the residence of Maria Farias. (RP 238). With the assistance of Detective Tim Scott a substantial amount of evidence was gathered detailing the violent struggle and assault of Maria Farias, including; bloody walls, hair clumps, bloody clothing, broken pieces of wood, bloody mop, bloody rags, bloody bed sheets, bloody carpets, etc. (RP 279-281). Bloody footprints were detected in the hallway outside Maria Farias' bedroom (RP 284). Shoes were recovered from the residence that matched the tread pattern of the bloody shoe print. (RP 284). Shoes worn by Daniel Farias early in the day were identified as the shoes that left the bloody footprints. (RP 286). Evidence from the residence established that attempts were made to clean up the blood on the hallway floor. (RP 325-326). Broken pieces of wood found inside Maria Farias'

bedroom and other areas of the house were pieced together by Detective Helvey. (RP 330). The pieces of wood reconstructed into a crucifix. (RP 331). Pieces of the crucifix contained blood and clumps of hair. (RP 332). The blood was determined to come from Maria Farias. (RP 338).

Cecelia Williams testified about the events leading up to the discovery of her mother in the bedroom. She explained that the Boston street residence was owned by her mother, and that Daniel Farias had been living there for approximately one year. (RP 131). She had a good relationship with her mother and communicated daily with her by telephone. (RP 132). Maria Farias was employed with Auvil Fruit for 10 years. (RP 133). During the month of January Ms. Farias would leave for work really early in the morning. (RP 133). The evening of January 3, 2011 Daniel Farias visited Ms. William's residence at approximately 9:30 – 10:30 p.m. (RP 135-136). Mr. Farias appeared intoxicated and had a case of beer with him. (RP 136). Ms. Williams drove Mr. Farias to his mother's residence and dropped him off. (RP 138). When she returned home she had her boyfriend, Roberto, call her mother to check on her. (RP 140). She observed Roberto speaking with her mother for a

short time. (RP 140). After the call was concluded Ms. Williams believed everything was okay with her mother. (RP 141).

The next day, January 4, 2011, at 7:00 a.m. Ms. Williams noticed she had a missed call from Auvil Fruit. (RP 142). She and her boyfriend drove to her mother's residence to check on her. (RP 143). They knocked on the door but got no response. (RP 143). Concluding everything was okay Ms. Williams went to work. (RP 144-145). At approximately 1:00 p.m. Ms. Williams missed another call from Auvil Fruit. (RP 145). Ms. Williams returned the call and spoke with a supervisor, learning that her mother was a no-show for work. (RP 146-147). Ms. Williams sent her boyfriend to check on her mother. (RP 147). Unsatisfied with the results her boyfriend had achieved, she drove to her mother's house. (RP 148). After arriving at the residence Ms. Williams stayed in the car and honked her horn to get someone to come to the door. (RP 152). She remained in the car because she was afraid to get out. (RP 153). After a lengthy period of time Daniel Farias opened the front door. (RP 153). Ms. Williams told her brother that she wanted to speak with her mother. (RP 153). Mr. Farias answered that she was sleeping. (RP 153). Ms. Williams related that on a prior occasion

he had used the excuse that her mom was sleeping to cover up a previous assault which caused her to question what he was claiming. (RP 154-166). Ms. Farias demanded to see her mom or the police would be called. (RP 166). Mr. Farias returned inside the house and was unresponsive to Ms. William's demands. (RP 167). Ms. Williams called the police and remained in the car until Sheriff Gjesdal arrived. (RP 167).

Daniel Farias testified in detail concerning the events that transpired leading up to the assault on his mother. He spent a large portion of the day with his girlfriend running errands. (RP 413). He paid some bills and visited his probation officer's office. (RP 414). He visited his sister, Cecelia Williams, (RP 414). After completing his errands he bought a 40-ounce bottle of beer. (RP 414). He dropped a movie off at his cousin's house. (RP 415). He had plans to go to his sister's house to watch a movie. (RP 417). At some point in the late afternoon he bought one more 40-ounce beer. (RP 419-420). He went to his sister's house, but stayed inside the car while his girlfriend went inside. (RP 421). He then went to his residence to pick up his wallet, sometime late evening. (RP 422). He claimed that someone he owed money to picked him up at his sister's house and drove him

home to get the money. (RP 423). This person then drove him to his nephew, Martin Fabias' (phonetic), house. (RP 424). He talked with his nephew's wife and kids and may have consumed a beer there. (RP 425). He stayed at his nephew's house for two or three hours. (RP 425). On his way to his sister's house he stopped off at Safeway and then the 76 gas station (buying a 12 pack of beer) . (RP 427). Mr. Farias recalled getting kicked out of the Safeway store and talking to the officers outside the 76 station. (RP 427-428). He then went to his sister's house to watch a movie. (RP 429). He indicated that he did not think he was "that drunk." (RP 430). He went inside his sister's house, trying to be sneaky to get the car keys without his sister finding out. (RP 432). His plan was to put the beer in the car. (RP 432). As he was sneaking into the house he got caught by his sister who would not let him into the house. (RP 432-433). He recalled being taken back to his mother's residence, although he thought his nephew, Martin, dropped him off. (RP 430). After being dropped off he went straight to the couch and turned on the TV. (RP 433). Mr. Farias didn't recall drinking anymore beer but thought he must have. (RP 433). His mom opened her bedroom door and spoke with him about whether he was staying there that

night, and whether he had been drinking. (RP 434). He told her he was staying the night and acknowledged he had been drinking but would be alright. (RP 434).

The next day he woke around 12:00 noon. (RP 435). He claimed to have no knowledge concerning the injuries to his mother, or the condition of the house. (RP 435-436). He denied taking any steps to clean up the blood. (RP 436).

On cross examination Mr. Farias recalled with clarity the events of January 3, 2011 ending with him sleeping on his mother's couch, but claimed a lack of memory or knowledge thereafter. (RP 503). At no time during the night did he hear anything unusual. (RP 521-22). He further reported that he just didn't think to check on his mother despite all the concern shown by Roberto and Cecelia. (RP 512).

TESTIMONY OF ALCOHOL CONSUMPTION/MENTAL STATE

Thomas Urbina, Jr. was working at Safeway the evening of January 3, 2011 when Daniel Farias attempted to purchase beer. (RP 376, 379). Mr. Farias was obnoxious, appeared to have been drinking, and had the odor of alcohol on him. (RP 377). Mr. Farias threatened Mr. Urbina with bodily harm. (RP 379). Mr. Farias was able to express himself and Mr. Urbina

understood his words. (RP 382). After Mr. Farias was told the police would be called if he did not leave, he left the store. (RP 382).

Officer James Marshall and Officer James Mott contacted Mr. Farias outside the Grant Road 76 station at approximately 12:00 midnight the evening of January 3, 2011. (RP 384). The Safeway personnel had reported Mr. Farias disorderly behavior in their store, and he was located at the 76 station. (RP 385). Mr. Farias' demeanor was described as "slightly animated" and a little intoxicated. (RP 386). He had slurred speech. (RP 387). Mr. Farias recognized Officer Marshall from prior contacts, and was cooperative with him. (RP 387). His speech was a little slurred and he was searching for words when asked questions. (RP 388). Mr. Farias was able respond appropriately to questions asked of him, and the officers were able to understand his responses. (RP 390). He didn't fall down and was able to walk to his vehicle, open the door and get in without assistance. (RP 390-391). Mr. Farias was cooperative with the officers during the entire contact. (RP 390, 394).

Officer Mott also described Mr. Farias as intoxicated. (RP 397-398). Officer Mott spent between 10-15 minutes speaking

with Mr. Farias. (RP 401). During their conversation Mr. Farias was able to communicate effectively with Officer Mott. (RP 400-402). Mr. Farias appeared to understand Officer Mott's words, track the conversation, and respond appropriately. (RP 400). Officer Motte was able to understand Mr. Farias' words and effectively communicate with him. (RP 401). After the conversation was concluded Mr. Farias walked to his vehicle and entered without any assistance. (RP 402).

Daniel Farias arrived at his sister's shortly after the contact with Officers Marshall and Mott. (RP 136).[1] Mr. Farias appeared intoxicated but was able to maintain his composure, didn't cause a disturbance, didn't wake the children, or barge his way into the house. (RP 137-138). He listened when Ms. Williams explained that he could not come into the house since he had been drinking. (RP 137). Ms. Williams drove him to their mother's house without any difficulties, and dropped him off. (RP 138-139).

During the course of Daniel Farias' direct testimony he was able to relate the events of January 3, 2011 with ease. However,

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[1] Although Cecelia Williams indicates he arrived between 9:30 and 10:00 p.m., it is apparent this visit occurred after the contact with Officers Marshall and Mott.

during cross examination he demonstrated an even more remarkable memory of the evening's details. He recalled the errands he ran (RP 476), the places he visited (RP 477), the beer he drank (RP 477, 481, 483), visit to his nephew's house (RP 491), his stop at Safeway to buy more beer (RP 492), the argument he had with the Safeway employee (RP 493-494), the stop at the 76 station to buy beer (RP 495), being contacted by the police (RP 495-496), the trip with the person he owed money too (RP 482-491), sneaking into his sister's house (RP 496-497), his sister refusing him entry into the house (RP 499-500), returning to his mom's residence and the conversation with his mother as he turned in for the night (RP 502-504). He indicated that when he last was at his sister's house he "could've even sobered up." (RP 501). The only absence of memory Mr. Farias claimed is with regard to the actual assault of his mother and the condition of the house. (RP 520-523).

III. PROCEDURAL HISTORY

On January 7, 2011 Daniel Farias was charged by information with Assault in the First Degree with a special allegation that he was armed with a deadly weapon at the time of the offense, and that the offense was an act of domestic violence.

(CP 1-2). On July 12, 2011 the information was amended to include additional allegations that the offense involved an invasion of the victim's zone of privacy, the victim was particularly vulnerable, and the act of domestic violence was part of ongoing pattern of abuse or the act manifested deliberate cruelty or intimidation of the victim. (CP 25-27).

The case proceeded to trial on December 13, 2011. At trial Mr. Farias offered two instructions on voluntary intoxication. (CP 109, 110). The court declined to provide either instruction to the jury stating:

> For the record, the Court did read all of the cases cited by both the State and the Defendant, and in addition, a couple of other cases that weren't cited by either party. The Court is familiar with the elements that are necessary, and primarily the third element that affects the ability to acquire the proper mental state. There was really only testimony that he'd had two 40-ouncers, seven beers in this particular matter. He also testified that he had some alcohol at his nephew's, didn't testify as to how much, and the officers, at about midnight, although he apparently ran into some trouble at Safeway, the officers at midnight testified that, being experienced officers in people with intoxication, that he was intoxicated, but he wasn't exhibiting the signs of being overly intoxicated, wouldn't thought he'd be the kind of person to go the hospital, that kind of thing. The Defendant himself testified that he remembered all of those contacts. The Defendant testified that he remembered going home. The Defendant testified that he remembered his mother coming to the door and saying good night to him, and then the Defendant

testified he went to the couch and fell asleep. So, those are the reasons the Court didn't give them, alright?

(RP 537-538). On December 15, 2011 Mr. Farias was convicted by jury of assault in the first degree, including all special allegations in the information. (CP 142-144). On February 6, 2012 Mr. Farias was sentenced to an exceptional sentence of 240 months in prison. (CP 179-189, 191) Mr. Farias timely filed his appeal on February 13, 2012. (CP 202).

IV. ISSUES

4.1 Did the court error in failing to provide the jury an instruction on voluntary intoxication?

4.2. Did the failure to instruct the jury on voluntary intoxication violate Mr. Farias' due process rights?

V. ARGUMENT

5.1 The Court properly refused to instruct the jury on voluntary intoxication when there was no evidence Daniel Farias' consumption of alcohol affected his ability to form the required mental state of intent.

If supported by evidence, a proposed instruction should be given if it properly states the law, is not misleading, and allows the party to argue his or her theory of the case. State v. Redmond, 150 Wash.2d 489, 493, 78 P.3d 1001 (2003). Each side is entitled to have the jury instructed on its theory of the case if there is sufficient evidence to support that theory. State v. Williams, 132 Wash.2d 248, 259, 937 P.2d 1052 (1997). Yet

all jury instructions must be supported by substantial evidence. State v. Fernandez–Medina, 141 Wash.2d 448, 455, 6 P.3d 1150 (2000). When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party. State v. Hanson, 59 Wash.App. 651, 656–57, 800 P.2d 1124 (1990).

A "voluntary intoxication" instruction allows the jury to consider evidence of intoxication when deciding whether the State proved that the defendant acted with the requisite intent. State v. Thomas, 123 Wash.App. 771, 781, 98 P.3d 1258 (2004). A voluntary intoxication defense does not require expert testimony because the effects of alcohol are commonly known and the jurors can draw reasonable inferences from the evidence presented. *Id.* at 781–82, 98 P.3d 1258.

Three conditions must be met to justify a voluntary intoxication instruction. State v. Ager, 128 Wash.2d 85, 95, 904 P.2d 715 (1995). Specifically, the court must provide a voluntary intoxication instruction when (1) the charged offense has a particular mens rea, (2) there is substantial evidence the defendant was drinking and/or using drugs, and (3) there is

evidence the drinking or drug use affected the defendant's ability to acquire the required mental state. *Id.*

Defendant offered the Court two instructions on voluntary intoxication:

> 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 with the intent to cause great bodily harm or substantial bodily harm.
>
> (CP 109).
>
> 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 with the intent to cause great bodily harm.
>
> If from all the evidence you have a reasonable doubt whether the defendant was capable of forming the intent to cause great bodily harm, you must find the defendant not guilty.
>
> (CP 110).

This instruction derives from RCW 9A.16.090 which provides:

> 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.

The first two criteria of Ager were satisfied by Mr. Farias; the crime of assault in the first degree requires proof of the mens rea of intent, and trial testimony established he consumed alcohol prior to the crime. However, the court properly denied giving the instruction as the third requirement in Ager had not been met; *there is evidence the drinking or drug use affected the defendant's ability to acquire the required mental state.* All three requirements must be met before the giving of a voluntary intoxication to a jury. Ager, supra.

In State v. Gallegos, 65 Wn.App. 230, 232, 828 P.2d 37 (Div. I, 1992) the defendant appealed his conviction of second degree rape alleging the trial court erred in refusing his proposed instruction on voluntary intoxication. During the State's case in chief, witnesses testified the defendant had been drinking orange juice and vodka as well as smoking marijuana. Witnesses testified the defendant was falling over, spilling things, knocked down a book case, and broke a lamp while the parties were hanging out at a local apartment. Id, at 233. Thereafter the victim walked to a local store to buy some superglue to fix her glasses. Id. The defendant went along because he needed to buy some cigarettes. Id. On the way

back from the store the defendant grabbed the victim's wrists and dragged her into an alley where he tried to rape her. Id. During trial the court denied the defendant's request for a voluntary intoxication instruction. Id, at 232. The Court of Appeals found the trial court did not err in failing to give the proposed voluntary intoxication instruction:

> "Under RCW 9A.16.090, it 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. Therefore, a criminal 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 his or her ability to acquire the required mental state...."

Gallegos, 65 Wn.App. at 238. The Court of Appeals found the defendant failed to establish the third element, that his drinking had affected his ability to acquire the required mental state:

> "Although Karns and Locke testified that Gallegos had been drinking, and that the drinking made him lose his balance, spill things, and knock things over, there was no evidence presented that the drinking impaired Gallegos's ability to acquire the intent to engage in sexual intercourse with T.G. by forcible compulsion. Gallegos neither testified, nor offered expert testimony or other evidence indicating that his drinking prevented him from acquiring the requisite intent or that he lacked

awareness of his actions at the time of the incident in question."

Gallegos, 65 Wn.App. at 239.

In State v. Gabryschak, 83 Wn.App. 249, 251, 921 P.2d 549 (Div. I, 1996) the defendant appealed his convictions for felony harassment and third degree malicious mischief after the trial court denied his request for a voluntary intoxication instruction. The case arose when law enforcement visited a local apartment complex in response to yelling coming from one of the units. Officers knocked on the door and requested entry, to which the defendant threatened to "kick their asses." Id. Officers eventually gained entry into the apartment unit and discovered the defendant with his mother. The defendant's mother indicated her son had kicked open the door to her unit, broke items while inside, and pushed and slapped her. Id, 252. The defendant appeared intoxicated to the officers. Id. While being escorted to a patrol vehicle the defendant tried to break free and escape. Id. While being transported to jail the defendant repeatedly threatened to kill the officer after he was released from jail. Id. The defendant was charged and found guilty of felony harassment and malicious mischief. Id. He

appealed the trial court's refusal to give his voluntary intoxication instruction. The Court of Appeals found the defendant was not entitled to the voluntary intoxication instruction:

> "In this case, Officer Anderson testified that Gabryschak 'had alcohol on his breath' and 'appeared to be intoxicated;' Clancy testified that she 'had a couple of drinks' and Garbryschak was 'intoxicated' and that she considered him too drunk to drive; Officer McCauley testified that Gabryschak was 'very intoxicated....'"
>
> "Here, ample evidence that Gabryschak was intoxicated was elicited from the State's witnesses during cross examination. Nevertheless, we find 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 to commit the crimes with which he was charged. At best, the evidence shows that Gabryschak can become angry, physically violent, and threatening when he is intoxicated....
>
> "[T]he evidence in Gabryschak's case shows that he 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; he leaned up against the back of Officer Anderson's seat and spoke with conviction into her ear while threatening to kill her once released from jail, indicating that he was fully aware of his destination. 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 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 – with knowledge in the case of the felony harassment charge, and with malice in the case of the malicious mischief charge. We are, therefore, satisfied that the trial court did not err by rejecting the voluntary intoxication instruction."
>
> Gabryschak, 83 Wn.App. at 253-255.

In State v. Sandomingo, 39 Wn.App. 709, 711, 695 P.2d 592 (Div. II 1985) the defendant was involved in an argument with another man, Ross Hill, over some records Hill refused to return. At one point Hill was walking down from a front porch when Sandomingo yelled something and fired a gun at Hill. Id. The bullet missed Hill. Id. A jury convicted Sandomingo of second degree assault; he appealed, arguing the trial court should have given his proposed voluntary intoxication instruction. Id, at 710.

On appeal Division II found the evidence insufficient to warrant the giving of the instruction.

> "The evidence here consisted of testimony that the group had been drinking in the afternoon before going to Hoquiam. Sandomingo said that he drank seven or eight beers and a glass of wine before leaving Centralia. None of the other defense witnesses knew how much he drank. Although almost every witness was asked, no one testified to any indications of intoxication. No one saw him stagger or fall or noticed him slur his words. He

> had no trouble aiming the gun, and he took over the driving when he decided a companion was too drunk to drive."

State v. Sandomingo, 39 Wn.App. at 713.

In State v. Webb, 162 Wn.App 195, 252 P.3d 424 (Div. III, 2011) the defendant took his nine-year old daughter with him when he robbed a minimart with a toy gun. Testimony was presented at trial the defendant called his former Alcoholics Anonymous (AA) sponsor and sounded upset and intoxicated. Id. During the conversation Webb sounded rational and at other times he did not. Id. After the robbery Webb called the sponsor a second time, sounding even more upset and intoxicated. Id. During the conversation Webb alternated between making sense and being incoherent. Id. Webb and his daughter arrived at the sponsor's house one and one-half hours later and appeared so drunk that he could hardly stand up. Id. The sponsor opined that Webb appeared so drunk or high that it seemed impossible for him to have driven from Thorp to Yakima. Id. The Court declined to submit a voluntary intoxication defense to the jury and the jury convicted Webb of reckless endangerment and first degree robbery. In affirming the Court's refusal to give the voluntary intoxication defense Division III stated:

> Even if we assume that Mr. Webb presented sufficient evidence to establish that he was intoxicated at the time of the robbery, the evidence, when taken in the light most favorable to Mr. Webb, is not sufficient to meet the third test. The third test requires Mr. Webb to present evidence that his drinking affected his ability to acquire the required mental state. "Put another way, the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." State v. Gabryschak, 83 Wash.App. 249, 252–53, 921 P.2d 549 (1996).
>
> State v. Webb, 162 Wn.App at 219

Two cases that highlight the degree of evidence necessary to warrant the giving of an involuntary intoxication defense are State v. Rice, 102 Wn.2d 120, 683 P.2d 199 (1984) and State v. Kruger, 116 Wn.App 685, 67 P.3d 1147 (Div. III, 2003). In State v. Rice the defendants' convictions for felony murder were over-turned and reversed based upon the trial court's failure to give a voluntary intoxication instruction when it *was* supported by the evidence. In Rice, witnesses testified the defendants were spilling beer at a local tavern, were unable to hit a ping-pong ball while playing table tennis, and a witness with a pin in his ankle stated that even in his limited physical condition he felt the defendants were so intoxicated he would still be able to outrun them. Rice, 102 Wn.2d at 121-122. The

defendants' testified that they had been drinking beer all day and had been taking Quaaludes. Id, at 122. One of the defendants testified he was hit by a car earlier in the day and "was so loaded he didn't feel it." Id, at 123. The arresting officers further concluded that both defendants were intoxicated. Id.

In State v. Kruger the Court of Appeals found counsel's performance ineffective in failing to request a voluntary intoxication instruction when it was supported by the evidence. Kruger, 116 Wn.App. at 688. The facts established Kruger showed up at Jennifer Kuntz's house drunk, behaving obnoxious and rude. Id, at 688. Kuntz asked Kruger to leave and called the police. Id. An officer responded and tried to speak to Kruger; Kruger ignored the officer and walked away. Id, at 689. The officer followed and continued to tell Kruger to stop. Id. Kruger then started to try and enter back in Kuntz's house, at which time the officer tapped Kruger on the shoulder and asked him to step off the porch. Id.

Kruger then tried to hit the officer with a beer bottle and a struggle ensued. Id. Another officer arrived and joined in trying to secure Kruger. Pepper spray was used but it seemed

to have little effect on Kruger. Id. "This is usually the case when one is highly intoxicated." Id. Officers eventually secured Kruger and placed him in a patrol car. Id. Kruger began vomiting once at the jail, and his condition was so severe the officers eventually took him to the hospital "to have an evaluation done or to see if he could sober up." Id.

On appeal, this Court found there was sufficient evidence to justify giving the instruction; "e.g. his 'blackout,' vomiting at the station, slurred speech, and imperviousness to pepper spray." Id, at 692.

The present case is akin to Gallegos, Gabryschak, Sandomingo and Webb. Although evidence was presented at trial that Mr. Farias had been drinking and was intoxicated, there was absolutely no evidence presented that he was unable to form the requisite mental state of "intent" to assault. To the contrary, there was an abundance of testimony that established Mr. Farias had control of his mental faculties. He had a clear memory of the entire day and evening of January 3, 2011, and related for the jury the various places he visited and the purpose of each visit. He recalled for the jury his intent to sneak into his sister's house to obtain vehicle keys to hide his

beer from her. This testimony highlighted the fact that mental state had not been affected to the extent that he was unable to make conscious and purposeful decisions. Upon arriving at his mother's house at the end of evening, he recalled for the jury that he turned on the television and settled onto the couch to sleep for the night. He also recalled for the jury his discussion with his mother and telling her his plan to sleep at the house that night.

Further evidence established conscious and purposeful conduct by defendant in the manner the crime scene was cleaned, and in his attempts to hide his mother's condition from detection.

Detective Helvey detailed in his testimony that the bloody hallway floor appeared to have been cleaned. (RP 282, 325-326). There were wet towels in a laundry room tub that had blood on them. (RP 279-280). A mop found in the laundry room had blood on it. (RP 280). There was clothing items found in the laundry room that had blood on them. (RP 279). In the hallway bathroom Detective Helvey located a large piece of wood that contained blood and hair, shower curtain rings with a clump of hair enmeshed in it. (RP 299-300). A blood

stain in Maria Farias' bedroom was concealed by placing a throw rug over top of it. (RP 307-308).

Cecelia Williams testified that upon learning her mother had not appeared for work, she sent her boyfriend, Roberto, to the house to check on her. (RP 147). Mr. Farias stated he might have heard Roberto come by the house and he might have told him his mother was sleeping. (RP 506-507). After learning that was unsuccessful, Ms. Williams drove to the house herself. (RP 148). Despite repeated attempts to get Mr. Farias to bring Maria Farias to the door, Mr. Farias refused to do so and claimed she was sleeping. (RP 153, 166-167). When Sheriff Gjesdal contacted Mr. Farias at the front door he made a half-hearted effort to "wake" his mother and then claimed she was sleeping. (RP 73-74). After allowing Sheriff Gjesdal into the house, Mr. Farias lifted the blankets covering his mother and claimed she was "sleeping she's passed out and she's naked." (RP 76-77).

The actions taken by Mr. Farias to clean up the scene of the crime and conceal his mother from others further demonstrates that his alcohol consumption did not impact his ability to form the intent to assault.

The court did not error in refusing to instruct the jury on Mr. Farias' proposed instructions on voluntary intoxication.

5.2 There was insufficient evidence to support the giving of the voluntary intoxication instruction, thus Mr. Farias' due process rights were not violated.

Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact. State v. Barnes, 153 Wash.2d 378, 382, 103 P.3d 1219 (2005) (citing Blaney v. Intern'l Ass'n of Machinists & Aerospace Workers, 151 Wash.2d 203, 210–211, 87 P.3d 757 (2004)). The State must prove every element of the offense beyond a reasonable doubt. If the State does not meet this burden, the jury cannot convict the defendant. U.S. Const. amend., XIV; Wash. Const. art. I, § 22; Jackson v. Virginia, 443 U.S. 307, 316, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Brown, 147 Wash.2d 330, 339, 58 P.3d 889 (2002).

Due process recognizes that jury instructions are warranted for only theories offered by the parties that are supported by sufficient evidence. Barnes, supra. Those

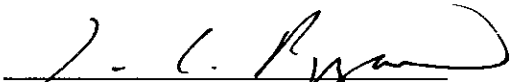
notions of due process are not violated when the court refuses to provide a voluntary intoxication defense when each prong of State v. Ager has not been established. In particular, when a defendant, like Mr. Farias, fails to establish that his level of intoxication affected his ability to form a specific mental state, no due process violation has occurred.

VI. CONCLUSION

The evidence presented at trial of Mr. Farias' alcohol consumption, and impairment of his ability to form the intent to assault his mother was insufficient to support a voluntary intoxication instruction to the jury. As stated in State v. Gallegos, "it 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." Gallegos, 65 Wn.App. at 238. Given the absence of any evidence that Mr. Farias' drinking prevented him from forming the intent to assault, the Court did not error in failing to provide a voluntary intoxication instruction to the jury or violate his due process rights.

Dated: 11/14/12

Respectfully Submitted by:



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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent	)	NO. 306305
vs.	)	AFFIDAVIT OF MAILING
DANIEL FARIAS, Defendant/Appellant.	)	

STATE OF WASHINGTON)
: ss.
COUNTY OF DOUGLAS)

The undersigned, being first duly sworn on oath deposes and says: That on the 14TH day of November, 2012, affiant deposited in the United States Mail at Waterville, Washington, postage prepaid thereon, an envelope containing a copy of this Affidavit and a copy of the Brief of Respondent addressed to:

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SUBSCRIBED AND SWORN to before me this 14th day of November, 2012.

NOTARY PUBLIC in and for the State of Washington, residing at East Wenatchee; my commission expires 02/26/2015.