

No. 48705-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DAVID RAMIREZ,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR LEWIS COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**1. Mr. Ramirez was denied the effective assistance of counsel when his attorney requested a voluntary intoxication instruction that conflicted with defense's theory of the case.**

a. Defense counsel's performance was deficient.

The State charged Mr. Ramirez with third degree assault with sexual motivation and possession of methamphetamine. CP 1-2. His sole defense to these charges was that he was experiencing hallucinations at the time he allegedly grabbed a nurse's breast and was in possession of the drug. 1 RP 24 (opening argument discussing hallucinations); 2 RP 259-60, 264 (Mr. Ramirez's testimony about the hallucinations); 2 RP 329 (relying on the hallucinations in closing argument to argue for acquittal). The evidence presented by the defense at trial was that Mr. Ramirez had involuntarily ingested the drug that produced the hallucinations. 2 RP 258-59.

Despite the fact that Mr. Ramirez's sole defense at trial was involuntary intoxication, defense counsel failed to assert this theory to the jury and instead requested the jury be instructed on voluntary intoxication. 2 RP 239-40. This constituted deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998);

*Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The State argued to the trial court that Mr. Ramirez was not entitled to a voluntary intoxication instruction. RP 292-93. On appeal, the State claims defense counsel correctly requested this instruction. Resp. Br. at 10. In support of its assertion, the State relies on *State v. O'Connell*, 137 Wn. App. 81, 94, 152 P.3d 349 (2007), stating that a defendant is entitled to a voluntary intoxication instruction where “the crime charged has a particular mental state as one of its elements.” Resp. Br. at 10; *see also* RCW 9A.16.090.

The State does not, however, identify the “particular mental state” required for assault by battery and *O'Connell*, a first degree robbery case, provides no guidance. Resp. Br. at 10. In fact, as Mr. Ramirez explained in his opening brief, assault by battery, as alleged against Mr. Ramirez, is a general intent crime. *State v. Keend*, 140 Wn. App. 858, 866, 166 P.3d 1268 (2007). In order to prove assault by battery, “the State need show only the intention to touch or strike, not the intent to injure.” *State v. Baker*, 136 Wn. App. 878, 151 P.3d 237 (2007). Similarly, possession of a controlled substance is a strict liability crime. *State v. Deer*, 175 Wn.2d 725, 735, 287 P.3d 539

(2012). Diminished capacity, or voluntary intoxication, was not a defense to these crimes because neither crime requires the State to prove specific intent or knowledge. *State v. Thomas*, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004).

In contrast to a voluntary intoxication defense, which only permits the jury to consider the individual's intoxication when determining the existence of a particular mental state, a defense of involuntary intoxication is a complete defense that excuses the criminality of the act. *State v. Mriglot*, 88 Wn.2d 573, 575, 564 P.2d 784 (1977). Involuntary intoxication was Mr. Ramirez's defense at trial, but rather than seek to have the jury instructed on this defense, Mr. Ramirez's counsel only asked that the jury be instructed on voluntary intoxication. 2 RP 239-40. This signaled to the jury that it should disregard Mr. Ramirez's stated defense at trial, and suggested they consider a defense that was actually not a defense at all. *See Op. Br.* at 17-18.

The State claims defense counsel's decision to instruct the jury on a defense other than the one presented was a reasonable strategic decision because defense counsel may have concluded a voluntary intoxication defense was more credible. *Resp. Br.* at 13. While it is

true that a legitimate trial tactic cannot serve as the basis for a claim of ineffective assistance of counsel, the attorney's trial strategy must be based on reasoned decision-making. *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007). No such reasoned decision-making is evident here, where defense counsel's actions failed to advance Mr. Ramirez's theory at trial and in fact undermined his defense by requesting the wrong instruction. Defense counsel's performance was deficient.

b. Trial counsel's deficient performance prejudiced Mr. Ramirez.

The State also claims Mr. Ramirez was not prejudiced by defense counsel's actions because a jury would not have found Mr. Ramirez did not understand "the nature and quality of his act or know that his act was wrong" – as is required to acquit based on an involuntary intoxication defense – given that it determined he acted with the purpose of intentionally touching the nurse. Resp. Br. at 17; CP 48-49; *Mriglot*, 88 Wn.2d at 575. However, these are different standards. There is a reasonable possibility a jury would have found Mr. Ramirez intentionally reached out to make contact with the nurse but did not understand the nature of his act. *See State v. Khan*, 184 Wn.2d 679, 688, 363 P.3d 577 (2015). This Court should reverse.



**2. The State presented insufficient evidence to support the jury’s finding that Mr. Ramirez demonstrated an “egregious lack of remorse.”**

The State alleged Mr. Ramirez “demonstrated or displayed an egregious lack of remorse” based upon statements the State claimed he made after he allegedly assaulted the nurse. CP 25. The jury returned a special interrogatory in the affirmative, and this finding permitted the trial court to impose an exceptional sentence. RCW 9.94A.535(3)(q).

The term “egregious lack of remorse” remains undefined by our courts or by statute. Laws of 2005, ch. 142, § 23. However, a “mundane” lack of remorse often found in individuals who engage in criminal behavior is not sufficient. *State v. Garibay*, 67 Wn. App. 773, 781, 841 P.2d 49 (1992).

In his opening brief, Mr. Ramirez discussed cases in which murderers demonstrated joy after killing their victims and were found to have demonstrated an egregious lack of remorse. Op. Br. at 21-22. In its response, the State identified other examples, but the State’s cases only offer additional support for Mr. Ramirez’s position.

The State points first to *State v. Russell*, 69 Wn. App. 237, 241-42, 848 P.2d 743 (1993), in which a defendant was convicted of homicide by abuse for beating his 20-month-old son to death with brass

knuckles. Resp. Br. at 20. This Court found the defendant demonstrated an egregious lack of remorse because he prevented the mother from obtaining medical care, interfered with medical professionals' ability to care for his son, told relatives he "fooled" the police, and indicated a willingness to party after his son's death. *Russell*, 69 Wn. App. at 251.

The State also relies on *State Ross*, 71 Wn. App. 556, 560-61, 861 P.2d 473 (1993), where the defendant pled to one count of second degree murder and two counts of first degree robbery. In that case, the defendant continued to blame the justice system for his actions, claiming that if he had not been caught for committing his first robbery, he would have been able to enlist in the military and would not have later killed a woman. *Ross*, 71 Wn. App. at 563-64. Again, this Court found sufficient evidence supported the finding that the defendant had demonstrated an egregious lack of remorse. *Id.* at 564.

In contrast to the cases cited by the State, Mr. Ramirez did not kill someone and later revel in it or blame others. After briefly touching a nurse's breast, he made inappropriate comments while still under the influence of an intoxicating substance in the emergency room. 1 RP 147. He did not direct his comments at the nurse he

assaulted, and his comments did not rise to the level present in cases where this Court has found sufficient evidence for a finding that the defendant exhibited an egregious lack of remorse. This Court should reverse the jury's finding under RCW 9.94A.535(3)(q) for insufficient evidence.

**3. The legal financial obligations imposed against Mr. Ramirez should be stricken and the case remanded because the court failed to consider Mr. Ramirez's resources and the nature of the burden the fees and costs would impose as required by RCW 10.01.160(3).**

The trial court ordered Mr. Ramirez to pay a total of \$2,900 in legal financial obligations, including \$2,100 for his court appointed attorney and \$200 in court costs. CP 83. The trial court declared that Mr. Ramirez had "the ability to earn money and make small payments on his financial obligations" but it failed to conduct an individual analysis of Mr. Ramirez's circumstances first, as required by RCW 10.01.160(3) and *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015).

The State points out defense counsel failed to object to the imposition of legal financial obligations against Mr. Ramirez, but our supreme court has repeatedly ordered remand for consideration of a defendant's ability to pay despite defense counsel's failure to object.

*See State v. Duncan*, 185 Wn.2d 430, 437-38, 374 P.3d 83 (2016). The court has reached this issue despite it not being preserved on appeal because it has “found ample and increasing evidence that unpayable LFOs ‘imposed against indigent defendants’ imposed significant burdens on offenders and our community, including ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’” *Id.* at 437 (quoting *Blazina*, 182 Wn.2d at 835-87); *see also State v. Marks*, 185 Wn.2d 143, 368 P.3d 485 (2016); *State v. Leonard*, 184 Wn.2d 505, 358 P.3d 1167 (2015) (per curium); *State v. Cole*, 183 Wn.2d 1013, 353 P.3d 634 (2015).

The trial court must engage in an adequate inquiry of Mr. Ramirez’s ability to pay discretionary legal financial obligations before they may be imposed. This Court should remand to the trial court where Mr. Ramirez was sentenced to an exceptional sentence of 84 months incarceration and his past work history was limited.<sup>1</sup> In

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<sup>1</sup> The State is correct that appellate counsel for Mr. Ramirez misunderstood the representation about where Mr. Ramirez had worked in the past. Resp. Br. at 26, n. 5. However, this does not alter the analysis. As discussed in the opening brief, Mr. Ramirez was repeatedly incarcerated throughout his life, including at the Special Commitment Center, and at the time he was arrested in this case he was relying on a friend for transportation, just learning how to use a cell phone, and had opened a bank account for the first time in his life. 2 RP 360.

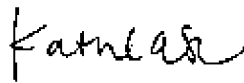
addition the State does not dispute that any costs should be waived on appeal. Resp. Br. at 25-27.

B. CONCLUSION

For the reasons stated above and in his opening brief, this Court should reverse Mr. Ramirez's convictions because he was denied his constitutional right to the effective assistance of counsel. In addition, the State presented insufficient evidence that Mr. Ramirez demonstrated or displayed an egregious lack of remorse, requiring reversal of that finding. Finally, this Court should exercise its discretion to remand Mr. Ramirez's case to the trial court for consideration of whether he can pay the legal financial obligations imposed at sentencing, and should waive any requested costs on appeal.

DATED this 10<sup>th</sup> day of April, 2017.

Respectfully submitted,



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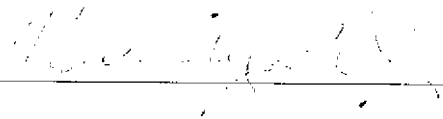
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