30630-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL FARIAS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF DOUGLAS COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in refusing to give defendant's proposed jury instruction on voluntary intoxication.

B. ISSUES

1. Witnesses described the defendant's erratic behavior, excessive drinking, and obvious intoxication. The court refused to give defendant's proposed jury instruction regarding the relevance of intoxication to determine whether the defendant was able to form an intent to assault the alleged victims. Did this refusal violate the defendant's constitutional right to present a defense, including the right to have the jury instructed on his theory of the case?

2. Due process requires the State to prove the essential elements of the charged offense beyond a reasonable doubt. Intent is an essential element of second degree assault. RCW 9A.36.021. Did the court's refusal to instruct the jury that defendant's intoxication may be considered in determining whether the State has proved intent violate the defendant's right to due process?

C. STATEMENT OF THE CASE

Daniel Farias started drinking around three o'clock in the afternoon on January 3. (RP 414, 428) He was running errands with his girlfriend, Alisa. (RP 412-13) He bought a 40-ounce bottle and drank it fast. (RP 414-15) A while later he bought a second 40-ounce bottle and drank that. (RP 419) He and Alisa headed for his sister Cecilia's house and he drank most of the second bottle on the way there. (RP 420) From that point on, his memory became rather fuzzy. (RP 422)

He had planned on hanging out at his sister's house until she got off work and then having movie night with her and his nieces. (RP 420) But it was already late in the afternoon and he had changed his mind about doing that. (RP 421) He may have gone into her house. (RP 422)

At some point in the evening he went to the trailer where he lived with his mother to get his wallet. (RP 422) He owed a guy some money so he gave the guy his sister's address and the guy drove him to the trailer. (RP 423)

After Mr. Farias gave the guy some money, he had the guy drive him to his nephew Martin's house. (RP 424) He may have brought beer to Martin's house. (RP 424-25) He stayed there for two or three hours. (RP 425) Then Martin drove him to the Safeway to buy more beer. (RP 426)

Some time after 11:00 pm, a clerk at the grocery store noticed Mr. Farias standing in line. (RP 376) Mr. Farias was being obnoxious and appeared to be drunk. (RP 377) He smelled of alcohol, and was shouting and making threatening comments. (RP 379) The clerk refused to sell him beer because he was obviously impaired, and had him escorted from the store. (RP 380)

Mr. Farias told his nephew that Safeway wouldn't sell him beer, so Martin drove him to a gas station minimart where Mr. Farias was able to buy a 12-pack of beer. (RP 427-28) When he came out of the minimart he was met by two police officers, who observed that he was intoxicated and warned him that he should not drink any more beer. (RP 384-97) His recollection is that Martin took him to his sister's house and then drove him home. (RP 429-30) He went inside, turned on the television. His mother opened her bedroom door and asked if he was staying the night, and commented that he had been drinking. (RP 433-34) By morning all his beer was gone. (RP 433-34)

Cecilia Farias's memory of the evening of January 3 differs from her brother's. He came by her house with his girlfriend to watch movies, but then left and said he would come back later. (RP 135, 177) His girlfriend stayed at Cecilia's. (RP 177)

He returned around 10:00 p.m., obviously very drunk and carrying a case of beer. (RP 135-36, 178, 181) Ms. Williams refused to let him stay at her house. (RP 137) Instead she drove him to their mother's trailer and dropped him off. (RP 138-39, 194)

The following morning someone called her phone from Auvil Fruit, where her mother was employed. (RP 141-42) Ms. Williams missed the phone calls, so she stopped by her mother's home on the way to work. (RP 142-43) The lights were on but the doors were locked, so Ms. Williams went to work. (RP 145)

That afternoon Ms. Williams called Auvil Fruit and discovered that her mother had not come to work that day. (RP 147) Ms. Williams became concerned, went to her mother's home and honked the horn until her brother came to the door. (RP 153) He told her their mother was sleeping, but she did not believe him, so she called 911. (RP 165-67) After the police arrived she went inside to her mother's bedroom. (RP 169) Beneath a small pile of blankets she found her mother and saw that she had blood on her face and bruises. (RP 170)

Mr. Farias's mother, Marie Farias, was transported to the emergency room, where the emergency room physician observed that she was unconscious, in critical condition with multiple organ systems malfunctioning, obvious external injuries including bruising and fractured

face bones, and possible internal organ injuries. (RP 204-209) Officers arrested Mr. Farias and during an interview he told them, "I think I did this to my mom." (RP 109)

Police investigation disclosed blood spatters on the wall outside the bedroom, bloodstained clothing, mop and towels, and other items. (RP 105, 279-281) A detective found bloodstains on the floor between the hallway and Mr. Fairas's bedroom. (RP 280) The State charged Mr. Farias with first degree assault. (CP 26-27)

Mr. Farias's mother had no distinct memory of the assault. (RP 256) She suggested to the jury that it might have involved a mean man who frequently came to charge money. (RP 260, 270) She was unable to remember or provide any meaningful testimony about the events of January 4. (RP 261-66)

Like his mother, Mr. Farias's memory of that night was minimal. He told the jury he didn't remember his sister taking him home. (RP 431) He remembered going into the trailer and sitting down to watch television. (RP 433) He told the jury he didn't remember drinking the beer he brought with him but since it was mostly gone in the morning, he must have drunk it. (RP 433) He remembered the brief exchange with his mother in which he told her he would be staying home and acknowledged that he was drinking. (RP 434)

He testified that he had no memory of anything that happened after that until he woke up around noon the next day. (RP 434-35) He had no idea where the bloodstains had come from or how his mother had been injured. (RP 435-36) He knew that he and his mother had been the only people in the house, but he couldn't remember anything about the night before. (RP 453) When he saw police officers arrive he thought it had something to do with his drinking. (RP 441-42)

The defense proposed a jury instruction on voluntary intoxication. (CP 109-110) The court refused to give the proposed instruction because the testimony of the store clerk and police officers showed that Mr. Farias was not overwhelmingly intoxicated when the saw him around midnight. Mr. Farias acknowledged that he remembered arriving home and watching television, and the evidence established only that he had consumed two 40-ounce bottles of beer. (RP 537-38)

The jury found Mr. Farias guilty. (CP 142)

D. ARGUMENT

1. FAILURE TO GIVE A PROPOSED INTOXICATION INSTRUCTION VIOLATED MR. FARIAS'S CONSTITUTIONAL RIGHT TO DUE PROCESS AND TO PRESENT A DEFENSE.

Evidence of intoxication is relevant to a jury's determination as to whether the accused possessed the mental state that constitutes an element of a crime:

> 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.

RCW 9A.16.090.

The intent to inflict great bodily harm is an essential element of first degree assault. RCW 9A.36.011. Despite overwhelming evidence of Mr. Farias's intoxication at the time of the assault, the court declined to give the requested jury instruction on intoxication. Failure to instruct on a defense theory when evidence supports it constitutes reversible error. *State v. Williams*, 132 Wn.2d 248, 260, 937 P.2d 1052 (1997).

A criminal defendant has the right to present a defense under the Sixth Amendment of the United States Constitution and article I, § 22 of the Washington Constitution. *Washington v. Texas*, 388 U.S. 14, 19,

87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *State v. Maupin,* 128 Wn.2d 918, 924, 913 P.2d 808 (1996).

A criminal defendant is entitled to an instruction on his or her theory of the case if the evidence supports the instruction. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010) "[J]ury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) *citing State v. Mills,* 154 Wn.2d 1, 7, 109 P.3d 415 (2005).

Denial of a defendant's right under the Sixth Amendment to present a defense is reviewed *de novo*. *State v. Jones,* 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Strizheus,* 163 Wn. App. 820, 262 P.3d 100 (2011); *see State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998).

The quantum of evidence required to support jury instructions on the defendant's theory of the case is accordingly minimal:

> [I]n criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility. He is entitled to have such instructions

> even though the sole testimony in support of the defense is his own.

Tatum v. U.S., 190 F.2d 612, 617, (D.C. Cir. 1951), *quoting* 53 Am.Jur., Trial, § 580, p. 458; *see Strauss v. United States*, 376 F.2d 416, 419 (5th Cir. 1967).

> Nearly five decades ago, we made it clear that a "criminal defendant is entitled to have instructions presented relating to any theory of defense for which there is any foundation in the evidence, no matter how weak or incredible that evidence may be." *United States v. O'Connor,* 237 F.2d 466, 474 n. 8 (2d Cir.1956). We have had occasion only recently to restate this basic principle. *See United States v. Bok*, 156 F.3d 157, 163 (2d Cir.1998) ("[A] criminal defendant is entitled to instructions relating to his theory of defense, for which there is some foundation in the proof, no matter how tenuous that defense may appear to the trial court.") (internal quotation marks omitted).

U.S. v. Crowley, 236 F.3d 104, 111 (2d Cir. 2000)

In *Crowley*, the record included evidence that one defendant was agitated and distracted during an incident, appeared to the complainant to be intoxicated or "stoned," and seemed to be carrying a bag of narcotics, and that the other defendant was sitting on the floor outside complainant's room before incident with his head against his knees, leaning against a door frame, was unable to climb up onto complainant's bed without slipping, and claimed he could not remember the incident. *Id.* The court held that the evidence was sufficient to require an intoxication instruction. *Id.*

Further, due process requires the State to prove every element of a crime beyond a reasonable doubt. U.S. Const. amend. XIV; *see* Wash. Const. Art I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Scott*, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). When the proffered defense negates an element of the charged offense, instructional error as to that defense is an error of constitutional magnitude. *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (instructional errors on self defense raise constitutional issues because that defense negates the mental element of the offense); *see State v. McCullum*, 98 Wn.2d 484, 494-96, 656 P.2d 1064 (1983). "A defendant charged with a specific intent crime is entitled to an intoxication instruction when 'the evidence would support a finding that [the defendant] was in fact intoxicated and that as a result there was a reasonable doubt that he lacked specific intent.'" *U.S. v. Kenyon*, 481 F.3d 1054, 1070 (C.A.8 2007) *quoting United States v. Fay*, 668 F.2d 375, 378 (8th Cir.1981).

In *Fay*, at 377-78, "there was testimony that defendant and his companions made several stops during the afternoon and evening of New Year's Eve to purchase beer and liquor, and that defendant had 'passed out' on the couch . . . [and] that defendant had been drinking from time to time and perhaps almost continuously during the twenty-four hour period

preceding the outbreak of violence . . . ." The court concluded that failure to give an intoxication instruction was reversible error.

Intent to assault is an essential element of second degree assault. RCW 9A.36.021; *see State v. Hopper*, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992). Evidence of voluntary intoxication may negate the intent element of an offense. *State v. Swagerty*, 60 Wn. App. 830, 833, 810 P.2d 1 (1991); *see State v. Thomas*, 123 Wn. App. 771, 781, 98 P.3d 1258 (2004). A defendant is entitled to a voluntary intoxication instruction "when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *State v. Thomas*, 123 Wn. App. at 782; *citing State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). Evidence is sufficient to support a voluntary intoxication instruction "if there is some evidence [the defendant] was drunk enough to completely lack the capacity to form the requisite intent." *United States v. Nacotee*, 159 F.3d 1073, 1076 (7th Cir. 1998).

The degree and effect of the defendant's intoxication on the formation of intent is an issue for the jury. *State v. Conklin*, 79 Wn.2d 805, 807, 489 P.2d 1130 (1971); *citing State v. Tyler*, 77 Wn.2d 726,

466 P.2d 120 (1970); *State v. Mitchell,* 65 Wn.2d 373, 397 P.2d 417 (1964); *see* St*ate v. Griffin*, 100 Wn.2d 417, 670 P.2d 265 (1983).

The issue in this case is whether the evidence presented to the jury was sufficient to create at least a reasonable doubt as to whether Mr. Farias was able to form an intent to assault his mother. RCW 9A.36.021; *State v. Werner*, 170 Wn.2d at 337; *State v. Thomas,* 123 Wn. App at 781. The trial court found the evidence was insufficient. But in determining the sufficiency of evidence to support the giving of a jury instruction, the court must draw all reasonable inferences from the evidence in favor of finding sufficiency. *State v. Douglas,* 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005).

Witnesses provided substantial evidence from which a jury could infer that Mr. Farias's intoxication affected his mental status. Ms. Williams described her brother's level of intoxication as nine on a scale of one to ten. The store clerk concluded Mr. Farias was too intoxicated to be sold additional beer. Yet, Ms. Williams testified that her brother had a case of beer with him when she took him home, and this was in addition to the two 40-ounce bottles Mr. Farias had consumed.

Mr. Farias's own inability to present the jury with a credible or lucid description of his actions on the evening of January 3 is itself evidence that his mental capacity was impaired during those events. And

although he is unable to remember consuming the beer he had with him when he arrived home, he testified that all but two bottles were gone the next morning. He testified that he had no memory of anything that occurred after he said goodnight to his mother and settled down to watch television. This is substantial evidence that Mr. Farias's intoxication affected his ability to form the requisite intent or mental state. *See State v. Thomas*, 123 Wn. App. at 782.

The effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use. *State v. Thomas*, 123 Wn. App. at 781-82; *citing State v. Kruger*,116 Wn. App. 685, 692- 93, 67 P.3d 1147, *rev. denied* 150 Wash.2d 1024, 81 P.3d 120 (2003); *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985). The witnesses' description of Mr. Farias's conduct, as well as evidence that he appeared intoxicated, had consumed a significant amount of alcohol, and had a severely impaired memory of the relevant events were sufficient evidence to require giving the instruction. The jury was entitled to decide whether Mr. Farias's testimony was credible, and to determine whether the amount of alcohol he claimed to have consumed and his lack of any memory of the time during which his mother was assaulted were sufficient to permit the jury to infer that he lacked the capacity to form the required intent.

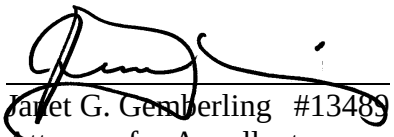
In determining the quantum of evidence that will entitle a criminal defendant to an instruction on voluntary intoxication, the court must consider the defendant's constitutional rights to present a defense, which incorporates the right to jury instructions on his theory of the case, and also his due process right to compel the State to prove every element of the offenses with which he is charged. Here, the trial court erred in failing to find, as a matter of law, that the evidence was sufficient to require a jury instruction on voluntary intoxication.

E. CONCLUSION

This court should reverse Mr. Farias's conviction and remand this matter for a new trial before a properly instructed jury.

Dated this 24th day of September, 2012.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30630-5-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
DANIEL FARIAS,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on September 24, 2012, I mailed copies of Appellant's Brief in this matter to:

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