

FILED
Jul 20, 2015
Court of Appeals
Division I
State of Washington

NO. 72468-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER ERVIN,

Appellant.

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

The Honorable Monica J. Benton, Judge

REPLY BRIEF OF APPELLANT

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Attorney for Appellant

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A. ARGUMENT IN REPLY

THE TRIAL COURT'S DENIAL OF ERVIN'S REQUEST FOR A VOLUNTARY INTOXICATION INSTRUCTION VIOLATED HIS RIGHT TO PRESENT A DEFENSE.

The State claims Ervin waived his voluntary intoxication argument with regard to the malicious mischief charge, because he "requested the instruction regarding only the mental state of intent, which applies solely to assault in the third degree." Br. of Resp't, 16 n.7. First degree malicious mischief requires knowingly and maliciously damaging an emergency vehicle. RCW 9A.48.070(1)(b). "Malice" or "maliciously" means "evil intent, wish or design to vex, annoy, or injure another person." CP 39 (emphasis added). Thus, malicious mischief also requires intent. The State's waiver argument should be rejected because the issue was properly preserved.

Furthermore, the mental state of knowledge is also established if the person acts with intent. CP 40; RCW 9A.08.010(2). Therefore, the jury could have found Ervin guilty of malicious mischief if he acted with knowledge or with intent. The verdict is ambiguous in this regard because it does not specify whether the jury found knowledge or intent. CP 47. The rule of lenity requires this ambiguous verdict to be interpreted in Ervin's favor. See, e.g., State v. Kier, 164 Wn.2d 798, 808-14, 194 P.3d 212 (2008); State v. DeRyke, 110 Wn. App. 815, 823-24, 41 P.3d 1225

(2002), aff'd on other grounds, 149 Wn.2d 906, 73 P.3d 1000 (2003). As such, the State cannot reasonably assert that the voluntary intoxication instruction did not apply to the malicious mischief charge.

The error is also of constitutional magnitude, and therefore may also be reviewed under RAP 2.5(a)(3). Jury instructions that shift the burden of proof to the accused constitute manifest constitutional error, reviewable for the first time on appeal. State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). Voluntary intoxication is a negating defense, which means it negates the element of intent. State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982). Due process requires that the State bear the burden of proving the absence of a negating defense beyond a reasonable doubt. State v. Lively, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996). Lack of a proper instruction on a negating defense improperly shifts the burden away from the State and onto the accused. The trial court's refusal to give a voluntary intoxication instruction is therefore manifest constitutional error. See Br. of Appellant, 13-15 (discussing why this error was prejudicial).

Finally, the State's waiver argument is set forth solely in a footnote. Arguments are not properly raised in footnotes, and Washington courts routinely decline to address them. State v. Johnson, 69 Wn. App. 189, 194 n.4, 847 P.2d 960 (1993) (explaining that argument raised in a

footnote will not be addressed); State v. N.E., 70 Wn. App. 602, 606 n.3, 854 P.2d 672 (1993) (same). This Court should do the same here.

Also in its response, the State addresses each of the facts individually and construes them in its own favor. The State would seemingly require overwhelming evidence of Ervin's intoxication in order for him to receive the instruction. Under this approach, the defense would rarely, if ever, be entitled to the instruction. This is plainly flawed and unsupported by well-established Washington law.

An accused has the right to have the jury instructed on a defense supported by *substantial evidence*—not overwhelming, conclusive evidence, as the State would have it. State v. Walters, 162 Wn. App. 74, 82, 55 P.3d 835 (2011). Substantial evidence simply means evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998). In evaluating whether there is substantial evidence to support a defense-proposed instruction, this Court must “interpret the evidence most favorably for the defendant,” *not* the State. Id.; accord State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005); State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000).

Indeed, this Court previously held it was error to require the accused to prove his voluntary intoxication by a preponderance of the

evidence. Carter, 31 Wn. App. at 577. This constituted impermissible burden shifting because the State needed to prove intent beyond a reasonable doubt—the accused did not bear any burden of proving absence of intent. Id. The State is attempting to do the same as in Carter by requiring Ervin to prove his intoxication beyond a reasonable doubt. This is unconstitutional burden shifting. This Court must accordingly reject the State’s approach and instead construe the totality of the facts in Ervin’s favor. Br. of Appellant, 10-13 (setting forth the facts supporting the voluntary intoxication instruction).

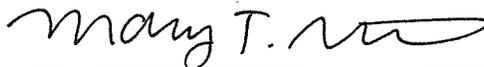
B. CONCLUSION

For the reasons articulated here and in the opening brief, this Court should reverse both Ervin’s convictions and remand for a new trial where the jury is properly instructed on voluntary intoxication.

DATED this 20th day of July, 2015.

Respectfully submitted,

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DIVISION ONE

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Respondent,)	
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v.)	COA NO. 72468-1-I
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CHRISTOPHER ERVIN,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20TH DAY OF JULY 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER ERVIN
NO. 215007079
KING COUNTY JAIL
500 5TH AVENUE
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JULY 2015.

x *Patrick Mayovsky*