

NO. 36957-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
08 APR -4 PM 12:13
STATE OF WASHINGTON
BY WJ
DEPUTY

STATE OF WASHINGTON, Respondent,

v.

WILLIAM V. HAGER, Appellant.

APPELLANT'S BRIEF

Rebecca Wold Bouchey
WSBA #26081
Attorney for Appellant

P.O. Box 1401
Mercer Island, WA 98040
(206) 275-0551

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
III.	STATEMENT OF THE CASE.....	1
IV.	ARGUMENT.....	3
	ISSUE 1: DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A JURY INSTRUCTION ON VOLUNTARY INTOXICATION WHERE MR. HAGER’S ENTIRE DEFENSE WAS THAT HE WAS AT THE TIME OF THE ALLEGED CRIME SO INTOXICATED THAT HE COULD NOT FORM THE INTENT TO COMMIT THIS CRIME.....	3
	ISSUE 2: THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. HAGER INTENDED TO COMMIT RESIDENTIAL BURGLARY	8
V.	CONCLUSION	9

TABLE OF AUTHORITIES

TABLE OF CASES

United States Supreme Court Cases

<i>Gideon v. Wainwright</i> , 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)	5
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000)	5
<i>Strickland v. Washington</i> , 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	5

Washington Cases

<i>In re Personal Restraint of Pirtle</i> , 136 Wn.2d 467,487, 965 P.2d 593 (1998)	5, 6
<i>In re Personal Restraint of Rice</i> , 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)	6
<i>State v. Coates</i> , 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987)	3
<i>State v. Finley</i> , 97 Wn. App. 129, 134, 982 P.2d 681 (1999)	6
<i>State v. Gabryschak</i> , 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996)	4
<i>State v. Gallegos</i> , 65 Wn. App. 230, 238, 828 P.2d 37 (1992)	3
<i>State v. Hackett</i> , 64 Wn. App. 780, 786, 827 P.2d 1013 (1992)	6
<i>State v. Kruger</i> , 116 Wn. App. 685, 694, 67 P.3d 1147 (2003)	6, 7
<i>State v. Rice</i> , 102 Wn.2d 120, 683 P.2d 199 (1984)	6, 7
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)	8
<i>State v. Smissaert</i> , 41 Wn. App. 813, 815, 706 P.2d 647 (1985)	6

STATUTES

RCW 9A.16.090	3
---------------------	---

I. ASSIGNMENTS OF ERROR

1. Hager was deprived of effective assistance of counsel because his trial counsel failed to propose a voluntary intoxication instruction.
2. The conviction was not supported by evidence sufficient to prove intent to commit residential burglary beyond a reasonable doubt.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was defense counsel ineffective for failing to propose a jury instruction on voluntary intoxication where Mr. Hager's entire defense was that he was so intoxicated at the time of the alleged crime that he did not understand that he was not at his girlfriend's house?
2. Was the conviction supported by evidence sufficient to prove beyond a reasonable doubt that Mr. Hager intended to commit residential burglary?

III. STATEMENT OF THE CASE

On April 4, 2007, at around 10:00 p.m., Doreen Bushnell heard noises at the front of her duplex. RP 48, 80. She looked out and saw a man holding the screen to her window looking back in. RP 82. She called

her neighbor, who followed the walking man out onto the street, where police arrested him. RP 82, 84, 43. Ms. Bushnell identified William Hager at the scene as the man she saw. RP 51.

Mr. Hager, a homeless man, testified that he was an alcoholic and had many beers that day. RP 94, 95-96, 149. Mr. Hager testified that his memory of the night in question was patchy, because he was intoxicated and suffering from a “functioning blackout,” where he was still walking, but not aware of his surroundings. RP 97, 102, 149. He had flashes of memory, one of which was seeing Ms. Bushnell looking out at him and realizing he was at the “wrong house.” RP 100. He admitted that he really did not remember what he meant to do by taking the screens off the window—that he had no memory of doing it. RP 101. However, he testified that it had happened before that he would fall asleep in the yard of his girlfriend’s house and he believed that he was confused that night and thought Ms. Bushnell’s house was his girlfriend’s. RP 102.

Mr. Hager had no memory of talking to the police, but the officer testified that he told her he was in the yard, but did not remember taking the screens off. RP 54. When asked if he was trying to break in, Mr. Hager said “No, I don’t think so.” RP 54.

The jury convicted Mr. Hager of attempted residential burglary. RP 212. This appeal timely followed.

IV. ARGUMENT

ISSUE 1: DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A JURY INSTRUCTION ON VOLUNTARY INTOXICATION WHERE MR. HAGER'S ENTIRE DEFENSE WAS THAT HE WAS AT THE TIME OF THE ALLEGED CRIME SO INTOXICATED THAT HE COULD NOT FORM THE INTENT TO COMMIT THIS CRIME.

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 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 intoxication may be taken into consideration in determining such mental state.

Although diminished capacity from intoxication is not an absolute defense, “the proper way to deal with the issue is to instruct the jury that it may consider evidence of the defendant’s intoxication in deciding whether the defendant acted with the requisite mental state.” *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987) (citing WPIC 18.10).

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. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). In other words, 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 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

In order to support a voluntary intoxication instruction, the evidence must show the effects of the alcohol:

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

Gabryschak, at 254.

In this case, there was strong evidence that Mr. Hager, a long-time alcoholic, had been drinking all day and was in fact intoxicated at the time of the alleged crime. RP 94-97, 102, 149. Intent is an element, both of residential burglary and attempted residential burglary. Therefore, Mr. Hager was entitled to an instruction on voluntary intoxication so that the jury could properly consider whether Mr. Hager’s intoxication affected his ability to form the requisite intent.

However, Mr. Hager’s attorney never requested an instruction on voluntary intoxication. Mr. Hager’s attorney was ineffective for failing to request an instruction that was central to Mr. Hager’s defense.

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness

of our adversary process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

To prevail, the defendant must show that his attorney was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the errors were so serious as to deprive him of a fair trial. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467,487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. *See, e.g., Pirtle*, 136 Wn.2d at 487. Here, intent was the focus of the defense. Mr. Hager admitted he was there. Although he had no memory of removing the screens, he did not dispute that he had done so. Instead, Mr. Hager's defense was that he was severely intoxicated and did not know what he was doing. Although the State may have disputed Mr. Hager's level of intoxication through the observations of the arresting officers, there was still substantial evidence through Mr. Hager's testimony to support an instruction. There is no need

for expert testimony on intoxication to support an instruction. *See State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985); *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003).

“A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence.” *State v. Finley*, 97 Wn. App. 129, 134, 982 P.2d 681 (1999). Because that was the case here, if Mr. Hager’s trial counsel had submitted a voluntary intoxication instruction and been rejected by the court, that would have been reversible error. *See State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984); *State v. Hackett*, 64 Wn. App. 780, 786, 827 P.2d 1013 (1992). Therefore, counsel should have requested the voluntary intoxication instruction in this case.

The second element is met by showing that, but for counsel’s unprofessional errors, there is a reasonable probability the outcome of the case would have been different. *Pirtle*, 136 Wn.2d at 487 (citing *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)). Here, the jury was instructed on the elements of the crime, including intent. CP 16, 17. Although Mr. Hager’s intoxication “was brought to the jury’s attention, it ‘was not instructed that intoxication could be considered in determining whether the defendant[] acted with the mental state essential to commit the crime’” of attempted residential burglary.

State v. Kruger, 116 Wn. App. 685, 694, 67 P.3d 1147 (2003) (citing *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)).

In *Kruger*, the court held it was ineffective assistance of counsel for defense counsel to fail to request a voluntary intoxication instruction where there was evidence from which the jury could have inferred that the defendant's intoxication prevented him from forming the requisite intent. 116 Wn. App. at 694-95. The court held that even where there is testimony given to the jury regarding intoxication, without the instruction, "the jury was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory of an intoxication defense." *Kruger*, at 694. Without the instruction, the court held, "the defense was impotent." *Kruger*, at 695.

The same is true here. The entire defense was intoxication. Without a jury instruction explaining that intoxication can be considered in determining whether the defendant acted with the requisite intent to commit residential burglary, the "defense was impotent." Therefore, it cannot be said that the absence of this instruction on the crucial issue of the case would not have made a difference to the result.

It was ineffective assistance of counsel to fail to request an instruction on voluntary intoxication and therefore the conviction must be reversed.

ISSUE 2: THE EVIDENCE WAS INSUFFICIENT TO PROVE BEYOND A REASONABLE DOUBT THAT MR. HAGER INTENDED TO COMMIT RESIDENTIAL BURGLARY.

Evidence is sufficient to support a conviction if, taking the evidence in the light most favorable to the State, it allows any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Mr. Hager was convicted of attempted residential burglary. In order to find Mr. Hager guilty, the jury had to find: (1) that Mr. Hager took a substantial step toward the commission of residential burglary, (2) that he intended to commit residential burglary. CP 17. The crime of residential burglary is committed when a person enters or remains unlawfully in a dwelling with the intent to commit a crime against a person or property therein. CP 16.

There is not sufficient evidence in this case to prove that Mr. Hager intended to commit residential burglary. The evidence showed only that Mr. Hager removed some of Ms. Bushnell's screens. RP 82, 85. There is no evidence that he attempted to open the window or door or that he attempted to break in to the house. Further, in view of Mr. Hager's severe intoxication, the State did not meet its burden of showing that he had sufficient capacity to form the intent for this crime. Therefore, there

is insufficient evidence that Mr. Hager intended to commit residential burglary.

V. CONCLUSION

Mr. Hager's conviction for attempted residential burglary must be reversed because he was deprived of effective assistance of counsel when his attorney failed to request an instruction on voluntary intoxication, that would have told the jury that intoxication can affect a person's intent to commit a crime. Further, there was not sufficient evidence to prove beyond a reasonable doubt that Mr. Hager possessed an intent to commit residential burglary. Both reasons require the reversal of Mr. Hager's conviction.

DATED: April 3, 2008

By: *Rebecca W. Bouchev*
Rebecca Wold Bouchev #26081
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on April 3, 2008, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Appellant:
William Hager
DOC #312447
McNeil Island Corrections Center
P.O. Box 881000
Steilacoom, WA 98388-1000

Rebecca W. Bouchey

Rebecca Wold Bouchey
WSB# 26081
Attorney for Appellant

FILED
COURT OF APPEALS
DIVISION II
08 APR -4 PM 12:13
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY