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A. ASSIGNMENT OF ERROR

I. MR. TUCKER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

II. CUMULATIVE ERROR DENIED MR. TUCKER A FAIR TRIAL.

B. ISSUE PERTAINING TO ASSIGNMENT

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II. MR. TUCKER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY ELICITED AN IMPERMISSIBLE OPINION ON MR. TUCKER'S GUILT.

III. CUMULATIVE EVIDENCE DENIED MR. TUCKER A FAIR TRIAL.

C. STATEMENT OF THE CASE

On January 27, 2008 Russell Tucker attended a birthday party on his sister Sheila Damis' house in Ridgefield. RP Vol. VII, p. 133-34, 136. The birthday party was for Josh Damis, Sheila's step-son. RP Vol. VII, p. 133. Danette Denison attended the party as well. RP Vol. VII, p. 133. Ms. Denison is Josh's mother. RP Vol. VII, p. 132. Brad Damis, Sheila's husband, is Josh's father and Danette Denison's ex-husband. RP Vol. VII, p. 132. Ms. Denison doesn't drink very often and takes a large daily dose of the anti-depressant Zoloft. RP Vol. VII, p. 137-138. Ms. Denison

originally came to the party with her husband but he left without her at around 9:00 p.m. RP Vol. VII, p. 136. After her husband left, Ms. Denison began drinking heavily. RP Vol. VII, p. 138-39, 143, 180. Estimates from the witnesses, including Ms. Denison, varied about how much she drank. Ms. Denison believed that she drank five shots of liquor and took sips from at least two other drinks during the three hour period between 9:00 p.m. and 12:00 to 12:30 a.m. RP Vol. VII, p. 139-40, 143. Ultimately, she couldn't remember how much she had to drink. RP Vol. VII, p. 181. All witnesses agreed that Ms. Denison began vomiting on the kitchen floor at approximately midnight, and continued vomiting both in the bathroom and in the guest bedroom. RP Vol. VII, p. 142-43, 145. She eventually went to sleep in the guest bedroom. RP Vol. VII, p. 145-46.

Mr. Tucker also drank heavily that night and became intoxicated. RP Vol. VIII, p. 351, 403. He spent most of the evening playing darts at the state of the art dart board. RP Vol. VIII, p. 348-49, 403. He participated in a darts tournament. Id. Mr. Tucker is a nurse and was aware of the commotion surrounding Ms. Denison and her illness. RP Vol. VIII, p. 400, 406-07. Sheila Damis took the primary responsibility for taking care of Ms. Denison, and Mr. Tucker checked on them a few times to make sure the situation was not medically emergent. RP Vol. VIII, p. 319, 344, 406-07. Mr. Tucker was too intoxicated to drive home

and was invited to stay on the lounge sleeper chair in the living room. RP Vol. VIII, p. 333, 351, 409. Sheila and Brad were the last to go to bed at 2:00 or 2:30 a.m. RP Vol. VIII, p. 319, 339.

Sometime the next morning between 4:00 and 6:00 a.m., Ms. Denison claimed that she woke up when she heard “filthy things” being whispered in her ear. RP Vol. VII, p. 146, Vol. VIII, p. 345. She realized at that point that a man was “spooning” her, with his hands on her bare breasts. RP Vol. VII, p. 147-48. At that point she jumped up and so did the man. RP Vol. VII, p. 149. The man said “Oh, my gosh, oh, my gosh, how’d I get in here?” RP Vol. VII, p. 149. Ms. Denison began looking for the door so she could leave the room, but had trouble finding it due to the darkness. RP Vol. VII, p. 149-50. She nevertheless claimed with certainty that the man in the room was Mr. Tucker and that she could see, in the dark room, that he was wearing jeans and a white t-shirt. RP Vol VII, p. 149, 192.

When Ms. Denison left the room she went upstairs and woke up her niece Khoriey and her daughter Jessica. RP Vol. VII, p. 152. The trio woke up Sheila’s daughter Alisa and her husband, and also Brad and Sheila. RP Vol. VII, p. 153-54. Ms. Denison excitedly told the group what happened, and Sheila asked Mr. Tucker to leave. RP Vol. VII, p. 154, RP Vol. VIII, p. 346. He did so, but came back about ten minutes

later to retrieve his glasses. RP Vol. VIII, p. 346. Ms. Denison left with Jessica and went home. RP Vol. VII, p. 157-58. She relayed her accusation about Mr. Tucker to her husband and he was angry. RP Vol. VII, p. 158. Ms. Denison made a report to the Clark County Sheriff's Department as well. RP Vol. VII, p. 158. Ms. Denison revealed that much of her account of what happened has been formulated with the assistance of her therapist, who is helping her remember what happened. RP Vol. VII, p. 185-90. None of Ms. Denison's statements to others about what allegedly happened in the bedroom were admitted at trial; her account was the sole account relied upon by the State. Report of Proceedings.

When confronted with Ms. Denison's accusation by Brad and Sheila that morning Mr. Tucker replied that he didn't know what they were talking about. RP Vol. VII, p. 228, RP Vol. VIII, p. 415. Mr. Tucker spoke with Deputy Todd Baker. RP Vol. VII, p. 361. Unfortunately, much of what Deputy Baker reported about Mr. Tucker's statements was paraphrasing rather than direct quotations. RP Vol. VIII, p. 369-81. Mr. Tucker told Deputy Baker that he didn't have any recollection of the incident and must have "blacked out." RP Vol. VIII, p. 376. Mr. Tucker recalled telling Deputy Baker that he couldn't recall ending up in Ms. Denison's room. RP Vol. VIII, p. 423. At trial Mr.

Tucker testified that he did not touch Ms. Denison. RP Vol. VIII, p. 399. He was asleep on the lounge chair and heard loud noises. RP Vol. VIII, p. 411. He got up to go the bathroom but saw that the bathroom door on the ground floor was closed. RP Vol. VIII, p. 412. Believing it was occupied, he went upstairs and was confronted by an angry young lady. RP Vol. VIII, p. 412-14. He said something to the effect of “Just looking for the bathroom.” RP Vol. VIII, p. 414. In any event, he went back downstairs instead and went back to sleep. RP Vol. VIII, p. 415. The next thing he recalled was Sheila waking him up and asking him to leave, and he did. RP Vol. VIII, p. 415.

Dr. William Brady, a medical doctor and pathologist, testified about the effects of alcohol on the brain. RP Vol. VIII, p. 274-75. He testified that alcohol can impair the brain to the degree that it could affect one’s perception while coming out of a vivid dream into a waking state. RP VIII, p. 288. He also testified that alcohol could impair one’s ability to distinguish between real events and imagined ones. *Id.*

Mr. Tucker was charged with one count of Indecent Liberties without forcible compulsion. CP 1. Defense counsel did not request a jury instruction on voluntary intoxication. Clerk’s Papers. In questioning Deputy Baker, defense counsel elicited the following testimony:

Defense counsel: “And at the time you spoke to Mr. Tucker, had you spoken with other witnesses in this case, including the complaining witness?”

Deputy Baker: “Yes, I had.”

Defense counsel: “And did you believe at that time that a crime had been committed?”

Deputy Baker: “Possibly.”

Defense counsel: “Okay. Did you have enough evidence at that time to believe that a crime had been—been committed?”

Deputy Baker: “In this, yes, I did.”

RP Vol. VIII, p. 368.

The jury returned a verdict of guilty. CP 44. Mr. Tucker received a standard range sentence. CP 49-50. This timely appeal followed. CP 61.

D. ARGUMENT

I. MR. TUCKER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO SEEK AN INSTRUCTION ON INVOLUNTARY INTOXICATION.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*,

127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ 'such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

Counsel for Mr. Tucker was ineffective for failing to request an instruction on voluntary intoxication. This instruction is found at WPIC 18.10 and states: "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 [knowledge]." "Effective assistance of counsel includes a request for pertinent instructions which the evidence

supports.” *State v. Kruger*, 116 Wn.App. 685, 688, 67 P.3d 1147 (2003), citing *State v. Finley*, 97 Wn.App. 129, 134, 982 P.2d 681 (1999). This includes an instruction on voluntary intoxication 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. *Kruger* at 691, citing *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d 37 (1992). Although diminished capacity by voluntary intoxication is not a true defense, intoxication may bear upon a defendant’s ability to have formed the requisite intent to commit the crime charged. *Kruger* at 691; *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987). Although the defense of voluntary intoxication is usually associated with crimes requiring proof of a specific intent, the defense is also appropriate when the defendant is charged with a crime for which a particular mental state, such as knowledge, is required. *State v. Lottie*, 31 Wn.App. 651, 644 P.2d 707 (1982).

Here, to prove Mr. Tucker committed the crime of indecent liberties without forcible compulsion it was required to prove that Mr. Tucker knowingly had sexual contact with Ms. Denison, and knew that she was incapable of consent by being physically helpless. The expert testimony offered by Dr. Brady as well as common experience establish

that intoxication can lead to impaired mental functioning, to include impaired perception and the potential inability to distinguish a dream experienced during a sleep state from reality. Mr. Tucker's testimony, as well as the testimony from Brad and Sheila Damis, established that Mr. Tucker was highly intoxicated. Ms. Denison's testimony established that Mr. Tucker was confused in the bedroom, just as she was. Mr. Tucker feared initially that he may have even blacked out. Although Mr. Tucker testified at trial he did not touch Ms. Denison, there was substantial evidence about both his intoxication as well as Ms. Denison's. Further, Mr. Tucker initially believed he may have done something to Ms. Denison unknowingly. In this case, Mr. Tucker had reasonable grounds to request an instruction on involuntary intoxication and such a request likely would have been granted.

An effective trial presentation by defense counsel would have included an argument to the jury by defense counsel that Mr. Tucker's intoxication could have negated his ability to act knowingly, coupled with an instruction by the court to that effect. The result of this trial likely would have been different had the jury been properly instructed about voluntary intoxication.

II. MR. TUCKER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY

**ELICITED AN IMPERMISSIBLE OPINION ON MR.
TUCKER'S GUILT.**

A witness may not express an opinion that a defendant is guilty.

Testimony which constitutes an opinion on an ultimate issue to be decided by the trier of fact invades the province of the jury and is improper. *State v. Farr-Lenzini*, 93 Wn.App. 453, 462, 970 P.2d 313 (1999). Here, defense counsel elicited an opinion from Deputy Baker that Mr. Tucker was guilty of a crime when she asked him whether he had concluded that a crime had been committed. It appears from this exchange between defense counsel and Deputy Baker that she [defense counsel] was attempting to suggest that Deputy Baker had drawn a conclusion about the situation prior to getting the whole story. However, that is not how this exchange played out in front of the jury. During this exchange Deputy Baker clearly maintained that he merely suspected a crime had been committed after speaking to Ms. Denison. It was only in response to defense counsel's ill-conceived questioning that Deputy Baker revealed that it was only after speaking with Mr. Tucker that he *concluded*, rather than merely suspected, Mr. Tucker was guilty of committing the crime.

The question defense counsel asked was specifically worded to elicit this response. She asked: "Did you have enough evidence at that time to believe that a crime had been—been committed?" Since defense

counsel knew that Deputy Baker arrested Mr. Tucker, what possible tactical reason would there be to ask this question? The only purpose that was ultimately served by this question was the jury learning Deputy Baker's personal opinion that Mr. Tucker was guilty. Eliciting an opinion that Mr. Tucker was guilty from a law enforcement witness was extremely prejudicial to Mr. Tucker.

Eliciting prejudicial evidence or testimony against one's client can constitute ineffective assistance of counsel. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). Had the prosecutor sought to elicit this opinion an objection would have certainly been sustained, and the failure to object would have constituted ineffective assistance of counsel. *Saunders* at 578, citing *McFarland* at 336-37. Here, there was evidence that both Mr. Tucker and Ms. Denison were highly intoxicated. Further, Dr. Brady testified that alcohol can impair one's ability to distinguish a vivid dream from reality. The State had to prove that Mr. Tucker knowingly caused Ms. Denison to have sexual contact with him without her consent because she was physically helpless. Had the jury been instructed properly on voluntary intoxication as it pertained to his ability to act knowingly, there is a strong probability the result of this trial would have been different absent improper opinion from the officer that

Mr. Tucker committed this crime. Mr. Tucker should be granted a new trial.

III. CUMULATIVE ERROR DENIED MR. TUCKER A FAIR TRIAL.

The cumulative error doctrine applies to cases in which "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390, 399-400 (2000) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording

of lineup in the absence of court and counsel). *State v. Fisher*, No. 79801-0 (March 12, 2009), p. 17.

Here, the cumulative effect of defense counsel's ineffective representation in failing to seek an instruction on voluntary intoxication and eliciting improper opinion testimony from the investigating officer about Mr. Tucker's guilt denied Mr. Tucker a fair trial. Absent these combined errors, the result of this trial likely would have been different. Mr. Tucker should be granted a new trial.

E. CONCLUSION

Mr. Tucker was denied effective assistance of counsel and should be granted a new trial.

RESPECTFULLY SUBMITTED this 27th day of April, 2009.



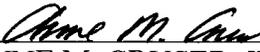
ANNE M. CRUSER, WSBA#27944
Attorney for Mr. Tucker

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5 191 Constantine Way
6 Aberdeen, WA 98520

7 and that said envelope contained the following:

- 8 (1) BRIEF OF APPELLANT
9 (2) RAP 10.10
10 (2) AFFIDAVIT OF MAILING

11 Dated this 27th day of April, 2009

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13 
14 ANNE M. CRUSER, WSBA #27944
15 Attorney for Appellant

16
17
18 I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of
19 Washington that the foregoing is true and correct.

20 Date and Place:

21 April 27, 2009, Kalama, WA

22 Signature:

23 Anne M. Cruser
24
25