

No. 49756-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JONATHON MAYSONET,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Jonathon Maysonet was heavily intoxicated when he and his wife became embroiled in an argument which became physical. Witnesses who knew Mr. Maysonet and observed his wife's injuries described Mr. Maysonet's behavior as strange due to his intoxication. Nevertheless, at Mr. Maysonet's trial for assault, the trial court refused to instruct the jury on voluntary intoxication despite the evidence and the fact that voluntary intoxication was his defense at trial. Mr. Maysonet's convictions must be reversed and the matter remanded for a new trial.

B. ASSIGNMENT OF ERROR

Mr. Maysonet's rights to present a defense and to a fair trial were denied when the trial court refused to instruct the jury regarding voluntary intoxication.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

As part of a defendant's constitutionally protected rights to present a defense and to a fair trial, the defendant is entitled to jury instructions embodying his theory of the case if the evidence supports that theory. Here, substantial evidence showed Mr. Maysonet was intoxicated that affected his mental state. Despite this, the trial court

refused to instruct the jury on Mr. Maysonet's requested voluntary intoxication jury instruction. Is Mr. Maysonet entitled to reversal of his convictions where his right to present a defense and right to a fair trial were impermissibly infringed?

D. STATEMENT OF THE CASE

Alexandra and Jonathon Maysonet had a tempestuous marriage. Mr. Maysonet enlisted in the United States Army in 2013 when he was 19 years old. 11/15/2016RP 998-99. Originally from Brooklyn, New York, Mr. Maysonet was stationed at Joint Base Lewis McChord. 11/15/2016RP 998-99.

Mr. Maysonet married Ms. Maysonet in June 2015. 11/7/2016RP 408. Ms. Maysonet had a son who was born in 2012. 11/7/2016RP 407. Mr. Maysonet was not the father of this child. 11/7/2016RP 407, 11/15/2016RP 1000. The child normally stayed with his paternal grandmother but periodically stayed with the Maysonets. 11/7/2016RP 409. In 2016, the couple was living in Lakewood in an apartment near several of Mr. Maysonet's military colleagues. 11/15/2016RP 1002-03.

Approximately once a month, the couple would go out socially to clubs and bars where they, as testified by Ms. Maysonet, would drink alcohol:

Q. Okay. And when you all would go out, how much would you all drink?

A. I don't know. We'd probably start with, like, Long Islands and AMFs,^[1] which is a lot of alcohol mixed together. So probably, like, three at that, like, that place, and the next place we'd go, we'd get, like, two. We'd just kind of trade it off.

Q. So quite a bit when you were all together?

A. Yeah.

Q. And this was, you said Thursday, Friday, Saturday?

A. Yeah. We would drink a lot, actually. We'd go out to eat and get drinks. So that was, like, during the weekday, and during weekends, we'd drink way more than that.

Q. And you said that had been going on since you had been married?

A. Yeah.

Q. And during that time, when you all would drink a lot, were there times when you saw your husband drunk?

A. Yeah. I'm pretty sure he saw me drunk as well.

¹“AMF” stood for ‘Adios Mother F**ker.’” 11/7/2016RP 517. It was described as “even stronger than a Long Island” iced tea: “It’s the same concept. It’s, like, tequila, I think even rum, vodka.” *Id.*

Q. And how would you know he was drunk?

A. He's tall, and he is -- gets more loose, and you know, it's just fun, like when we go out, it was just more, like, fun, I guess.

11/7/2016RP 416-17.

On March 24, 2016, Mr. Maysonet reenlisted in the military.

11/15/2016RP 1003. In addition, Deonte Leshore, a close friend of Mr. Maysonet's was being stationed at Fort Hood in Texas. 11/7/2016RP 418, 11/15/2016 RP 1004-05. The plan for that evening was for Mr. Maysonet, Mr. Leshore, and their friends to enjoy a night out; a guys night out. 11/15/2016RP 1005. Originally, Ms. Maysonet was not going to attend, but she changed her mind and went along as the Designated Driver. *Id.*

The group initially went to the Hooters restaurant in Tacoma, then gathered at Club Cultura, also in Tacoma. 11/7/2016RP 421-22. The men planned on drinking to the point of intoxication.

11/15/2016RP 1005.² True to their promise, the men, particularly Mr. Maysonet drank prodigiously:

²Q. Okay. So every time you guys go out back then, you would drink until you were intoxicated?

A. Basically.

Q. Is that right?

And in addition to that, you observed him have more alcohol in the VIP area?

A. Yes.

Q. Vodka?

A. Yes.

Q. Mixed drinks. He was making mixed drinks?

A. Yes.

Q. And you don't remember how many he had. It was more than one, right?

A. Yes. Way more than one.

11/8/2016RP 519.

Mr. Maysonet also described his drinking that night:

Q. So about what time did you have your first drink?

A. When I was on base, actually. That morning, I bought a bottle of Bacardi Dragon Berry and Mountain Dew. It was my drink, pregame, I guess. I took that over to Williams' house around 7:30, 8 o'clock. They were still changing out of the showers and stuff like that. They

A. Correct.

Q. Okay. And that was a normal thing you guys would do?

A. Yes.

11/8/2016RP 627 (testimony of Reniel Williams).

were drinking their own bottle, as well. They were drinking as well.

Q. What did you have to drink inside Williams' apartment?

A. Pretty much my bottle. I made two cups of the Bacardi Dragon Berry with Mountain Dew mix and pretty much killed half the ninth in about that half hour.

Q. When you say ninth, what are you talking about?

A. It's not the personnel [sic], it's not giant size. It's the one in between.

...

Q. So while you were at Hooters, did you have some more to drink?

A. Yeah, actually, had multiple Hooterades.

Q. I'm sorry. Hooterades?

A. It's a mixed drink. It was a special there at the time. It was a specialty drink at the time. I don't know if they still have it, but that was the drinks I had that night.

Q. Do you know how many Hooterades you had?

A. No, not exactly. I want to say probably two or three.

Q. And do you know what was in a Hooterade?

A. It was vodka-based and mixed with probably juices or a Sprite or something like that.

...

Q. Do you recall how many drinks you had from the bottle service in the booth area?

A. Multiple per bottle.

...

I purchased a drink before, because it was taking a little while to set up the VIP. I had an AMF before that, and a little after the VIP situation, also walking around the bar, another drink or two.

11/15/2016RP 1007-09, 1014.

At the Club Cultura, Mr. and Ms. Maysonet began to argue.

11/8/2016RP 608. The group left the Club at 1:30 am with plans to meet at a nearby Denny's restaurant. 11/8/2016RP 608. Mr. Williams and the Maysonets left in Mr. Williams' car with Ms. Maysonet driving. 11/7/2016RP 428. But the argument between Mr. and Ms. Maysonet continued and became physical. 11/8/2016RP 609. Ms. Maysonet, who was driving, struck Mr. Maysonet, seated in the passenger seat, very hard in the face. 11/8/2016RP 609. She continued to strike Mr. Maysonet as she drove. 11/8/2016RP 609-11.

Mr. Maysonet had urinated in a cup before leaving the Club in the car. 11/15/2016RP 1023. In response to Ms. Maysonet's hitting him, he threw the urine in the cup at Ms. Maysonet, hitting her on the side of her head. 11/8/2016RP 610. Ms. Maysonet stopped the car, got out and came around to Mr. Maysonet's side of the car where she struck him in the face through the open window. 11/8/2016RP 611. Mr.

Maysonet responded by throwing additional urine on his wife.

11/8/2016RP 611.

Ms. Maysonet immediately drove home, jumped out of the car, and ran into the apartment. 11/8/2016RP 612. Mr. Maysonet followed her into the apartment. *Id.*

The argument continued in the apartment with Ms. Maysonet throwing items at Mr. Maysonet and telling him to leave. 11/7/2016RP 434. At some point, Ms. Maysonet threw an Xbox at Mr. Maysonet. 11/15/2016RP 1031. What happened next was unclear. Ms. Maysonet stated she blacked out and when she regained consciousness, her nose was bleeding. 11/7/2016RP 436. She remembered Mr. Maysonet punching her three to five times while she was lying on the floor. 11/7/2016RP 439-40.

Mr. Maysonet stated after his wife threw the Xbox, she rushed at him, and while the two were standing, they had a physical fight where he quickly punched her approximately 20 times with his fist. 11/15/2016RP 1032-33. Mr. Maysonet remembered calling Mr. Leshore and remembers Ms. Maysonet yelling for help in the background. 11/15/2016RP 1039.

In response to Ms. Maysonet's shouts for help, Mr. Williams and Mr. Leshore immediately came to the apartment where they discovered Ms. Maysonet on the floor with Mr. Maysonet standing over her. 11/8/2016RP 615. Mr. Williams and Mr. Leshore described Ms. Maysonet as unrecognizable with serious facial injuries. 11/8/2016RP 616, 11/9/2016RP 856. Both described Mr. Maysonet as having a "blank stare" or looking "lost." 11/8/2016RP 617, 11/9/2016RP 856.

Mr. Williams and his wife took Ms. Maysonet to the hospital. 11/8/2016RP 620. Shortly after they left, the police arrived and arrested Mr. Maysonet. 11/9/2016RP 860. Mr. Maysonet was charged with first degree assault, felony harassment, unlawful imprisonment, and interfering with the reporting of domestic violence. CP 7-10. Each count alleged aggravating factors of domestic violence and aggravated domestic violence based upon the fact the assault took place within sight or sound of Ms. Maysonet's son. *Id.*

At trial, Mr. Maysonet proposed the following jury instruction based upon WPIC 18.10:

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 intent.

CP 19-21. In refusing to give Mr. Maysonet's requested instruction, and over his objection, the court ruled:

I believe that the substantial link [that Mr. Maysonet's drinking affected his ability to form the intent] that's required by the case law was not ever made present in this case, and I'm not going to give the instruction with respect to voluntary intoxication.

11/15/2016RP 1158-59.

In closing arguments, both parties argued Mr. Maysonet's intoxication and whether it related to the offenses. 11/16/2016RP 1200-01, 1208-09, 1212.

The jury found Mr. Maysonet guilty of the lesser degree offense of second degree assault, guilty of unlawful imprisonment and the two aggravating factors, but acquitted him of felony harassment. CP 33-39; 11/16/2016RP 1221.³ Mr. Maysonet's standard range was 12+ - 14 months, but the trial court imposed an exceptional sentence of 36 months based upon the aggravating factors (high end of 14 months plus 22 additional months). CP 205, 209; 12/2/2016RP 1248.

³The State moved to dismiss the interfering in domestic violence reporting count prior the case being submitted to the jury. 11/16/2016RP 1173. The trial court dismissed the count without prejudice. CP 195-96.

E. ARGUMENT

The trial court impermissibly infringed Mr. Maysonet's right to present a defense when it refused to give his requested voluntary intoxication jury instruction.

1. *Mr. Maysonet was entitled to have the jury instructed on his theory of the case.*

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment guarantee a defendant's right to a trial by jury. *Sullivan v. Louisiana*, 508 U.S. 275, 277, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993) (the Sixth Amendment protects the defendant's right to trial by an impartial jury, which includes "as its most important element, the right to have the jury, rather than the judge, reach the requisite finding of 'guilty.'"). Similarly, the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).

A defendant has the right to have the jury accurately instructed. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus, as part of the constitutionally protected right to present a defense, the defendant is entitled to instructions embodying his theory of the case if the evidence supports that theory. *State v. Benn*, 120

Wn.2d 631, 654, 845 P.2d 289, *cert. denied*, 510 U.S. 944 (1993).

“Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case.”

State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

Further, due process requires that jury instructions allow the parties to argue all theories of their respective cases supported by sufficient evidence, fully instruct the jury on the defense theory, inform the jury of the applicable law, and give the jury discretion to decide questions of fact. *State v. Allen*, 161 Wn.App. 727, 734, 255 P.3d 784 (2011), *aff'd*, 176 Wn.2d 611 (2013). A criminal defendant has a right to have the jury instructed on a defense that is supported by substantial evidence. *State v. Walters*, 162 Wn.App. 74, 82, 255 P.3d 835 (2011). Thus, the court must give jury instructions that accurately state the law, that permit the defendant to argue his theory of the case, and that the evidence supports. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

When considering whether a proposed jury instruction is supported by sufficient evidence, the trial court must take the evidence and all reasonable inferences in the light most favorable to the

requesting party. *State v. Fernandez-Medina*, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); *State v. Douglas*, 128 Wn.App. 555, 561-62, 116 P.3d 1012 (2005). The evidence for the instruction may come from “whatever source” that tends to show the defendant is entitled to the instruction. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The trial court is justified in denying a requested instruction only where no credible evidence appears in the record to support it. *Id.*

2. *Taking the evidence in the light most favorable to Mr. Maysonet, there was sufficient evidence to support the requested voluntary intoxication instruction.*

Mr. Maysonet presented evidence of his intoxication and how it affected him. Based on this evidence, he proposed a voluntary intoxication jury instruction. The court improperly denied Mr. Maysonet’s proposed instruction by refusing to take the evidence presented in the light most favorable to Mr. Maysonet.

Under RCW 9A.16.090, a person’s intoxication may be relevant:

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.

Voluntary intoxication is not a complete defense to a crime but is a subset of the general defense of diminished capacity. *State v. Eakins*, 127 Wn.2d 490, 498, 902 P.2d 1236 (1995); *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987). “Voluntary intoxication does not excuse the criminality of the act but it can render the defendant incapable of forming the specific intent necessary for conviction of the crime.” *State v. Mriglot*, 88 Wn.2d 573, 576 n.2, 564 P.2d 784 (1977). A voluntary intoxication defense allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant’s ability to form the required mental state. *Coates*, 107 Wn.2d at 889.

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. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002); *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d 37 (1992). 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).

Expert testimony is not required. *State v. Kruger*, 116 Wn.App. 685, 692-93, 67 P.3d 1147, 1150 (2003). “If the issue involves a matter of common knowledge about which inexperienced persons are capable of forming a correct judgment, there is no need for expert opinion.”

State v. Smissaert, 41 Wn.App. 813, 815, 706 P.2d 647 (1985).

“Certainly the effects of alcohol upon people are commonly known and all persons can be presumed to draw reasonable inferences therefrom.”

Id.

- a. *The first two requirements were not disputed and were satisfied.*

Here, the first element for obtaining an intoxication instruction was satisfied. Assault in the first degree, the original offense with which Mr. Maysonet was charged, and assault in the second degree, the offense for which he was convicted, require intent as an element of the offense. RCW 9A.36.011, RCW 9A.36.021. In addition, unlawful imprisonment requires knowledge. RCW 9A.40.040.

In addition, the second element was satisfied as well.

Intoxication or impairment from drug usage is a factual question that can be proved by lay testimony. *Smissaert*, 41 Wn.App. at 815. There must be a showing of drug or alcohol consumption and the effect of the consumption on the drinker. *State v. Dana*, 73 Wn.2d 533, 535, 439

P.2d 403 (1968); *State v. Zamora*, 6 Wn.App. 130, 132, 491 P.2d 1342 (1971), *review denied*, 80 Wn.2d 1006 (1972). There was such evidence in this case. There was no question but that Mr. Maysonet had consumed at least nine drinks over the course of the evening and that they had affected him.

b. *Taking the evidence in light most favorable to Mr. Maysonet, the third requirement was satisfied.*

The issue in this case is the third element - did the intoxication affect Mr. Maysonet's ability to form the requisite intent? The trial court found that it was not, but the court failed to look at the evidence in light of the moving party; Mr. Maysonet.

The effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use. *State v. Thomas*, 123 Wn.App. 771, 782, 98 P.3d 1258 (2004); *Kruger*, 116 Wn.App. at 692-93; *Smissaert*, 41 Wn.App. at 815. Thus, the only question is whether there was sufficient evidence produced from which a jury could find that Mr. Maysonet's level of intoxication affected his ability to form the intent necessary to commit these crimes. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

Reniel Williams, a friend of Mr. Maysonet and who was partying with Mr. Maysonet and discovered Ms. Maysonet following the phone call, noted Mr. Maysonet's odd behavior:

Q. And you said Mr. Maysonet was standing over her. Did you observe anything on him?

A. He just looked lost.

...

Q. When you walked in, you testified that Mr. Maysonet looked lost?

A. Yes.

Q. Could you elaborate? What do you mean by that?

A. He was standing over her, and his posture was, like, It's over for me. I don't know what's going on. It's like he's not even there. He didn't acknowledge us. He was just standing there.

Q. Okay. Did he look like he was out of it?

A. Yes.

Q. Did he look like he was just gone?

A. Yes.

11/18/2016RP 617, 643-44.

Mr. Leshore shared the same reaction to his friend's behavior when he and Mr. Williams discovered Ms. Maysonet:

Q. You've known him for three years approximately?

A. Yes.

Q. You ever seen that blank stare before?

A. No, never.

Q. Did it seem like he had just blacked out?

A. Yeah.

11/9/2016RP 875.

Mr. Maysonet also testified about the effects of the alcohol on him the night of the assault:

Q. Have you ever woken up the next morning and somebody said you did something and you had no recollection of it? Has that ever happened to you?

A. Yes.

Q. Did that happen this night?

A. Yes.

Q. So there are times during this night you don't have any memory of?

A. Correct.

Q. Is that what you mean when you're talking about fading out?

A. Yes.

11/15/2016RP 1137.

In addition to the evidence presented about Mr. Maysonet's behavior after Ms. Maysonet was injured, Ms. Maysonet provided

additional evidence that Mr. Maysonet's behavior changed due to his intoxication that night:

But towards the end of the night, you could hear him -- I was, like, what are you even saying? You know, like, I couldn't understand what he was saying. He was slurring his words and mixing it up, and it's just all over the place, and as it --

...

A. That is the text messages, also. I didn't understand half of those because they didn't make sense.

Q. So towards the end of the night, you were having trouble communicating with him?

A. Yes.

Q. He was saying things that were not responsive in your mind to your questions?

A. Yes.

...

Now, on the way home, you testified that he threw a cup of urine?

A. Yes, he did.

Q. On the side of your face?

A. Uh-huh. (Witness answers affirmatively.)

Q. In fact, it got into your hair?

A. Yes.

Q. Is that something he would have done if he was sober?

A. No. He's not that person at all when he's sober.

11/8/2016RP 519-23.

Despite all of this evidence of the affect of Mr. Maysonet's intoxication, the trial court ruled he had not produced sufficient evidence to support the third requirement. 11/15/2016RP 1158-62. But it is readily apparent the court, in analyzing this issue, failed to take the evidence in the light most favorable to Mr. Maysonet as the moving party. *See Fernandez-Medina*, 141 Wn.2d at 455-56. Had the court done as required, it would have given the requested instruction.

Compare Mr. Maysonet's matter with the decision in *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981). In that case, fifteen-year old Stephen Jones was accused of murder. He drank between nine and eleven beers before the incident. He suffered glassy eyes and slurred speech. Officers placed Jones in a drunk tank following his arrest. The trial court gave a voluntary intoxication instruction and the Supreme Court agreed the instruction was proper despite the State's arguments to the contrary. *Jones*, 95 Wn.2d at 622-23.

The evidence at trial provided ample support for the voluntary intoxication instruction. The trial court erred in ruling Mr. Maysonet

had not shown his intoxication affected his behavior and failing to instruct the jury on voluntary intoxication.

3. *The error in failing to instruct the jury was not a harmless error.*

The error here infringed on Mr. Maysonet's constitutionally protected right to present a defense and right to a fair trial. Errors of constitutional magnitude are not harmless unless the State proves the errors are harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). An error is harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

Despite the absence of the instruction, the parties in closing argued whether or not Mr. Maysonet's ability to form the requisite intent was affected by his intoxication. This strongly suggests that the error was not harmless because in the absence of the instruction, the jury lacked direction on how to apply the intoxication information to the law. *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). The jury was instructed that the attorneys' arguments are not the law but only the court's instructions contained the law. CP 41-43 (Court's Instruction 1).

In addition, the jury, without Mr. Maysonet's requested instruction, was not correctly apprised of the law, and he was unable to effectively argue his theory of an intoxication defense to the jury. *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977) (“[O]f what significance is it that counsel may or may not be able to argue his theory to the jury when the jury has been misinformed about the law to be applied?”).

Given the overwhelming evidence of Mr. Maysonet's intoxication and its affect on his behavior, the jury very well may have believed his intoxication hindered his ability to form the requisite intent. The error in failing to instruct on voluntary intoxication was not harmless and this Court must reverse Mr. Maysonet's assault conviction and remand for a new trial.

F. CONCLUSION

For the reasons stated, Mr. Maysonet asks this Court to reverse his convictions and remand for a new trial.

DATED this 26th day of July 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 49756-5-II
v.)	
)	
JONATHAN MAYSONET,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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