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Division II
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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

The evidence must be viewed in the light most favorable to the defendant in order to determine whether there was sufficient evidence supporting the requested instruction.

The State contends there was insufficient evidence in the record to support Mr. Maysonet's voluntary intoxication instruction. The State's argument should be rejected as it ignores the standard for viewing the evidence supporting a requested instruction.

Glaring absent from the State's brief is any mention of the seminal case on this issue, *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). The State's brief views the evidence in the light most favorable to the State as if this was an issue of sufficiency of the evidence. Because of this error, the State's argument is flawed.

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*. *Fernandez-Medina*, 141 Wn.2d at 455-56 (emphasis added). This evidence may come from "whatever source" that tends to show that the defendant is entitled to the instruction. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983). The defendant may point to any other evidence presented at trial, including the State's

evidence. *State v. Fisher*, 185 Wn.2d 836, 850, 374 P.3d 1185 (2016).

“The trial court is justified in denying a request for [an affirmative defense] instruction only where no credible evidence appears in the record to support [it].” *Fisher*, 185 Wn.2d at 849, quoting *McCullum*, 98 Wn.2d at 488.

In light of this fact, the State’s reliance on the decision *State v. Gabryschak*, 83 Wn.App. 249, 921 P.2d 549 (1996),¹ is misplaced. *Gabryschak* predated the decision in *Fernandez-Medina*, thus it fails to examine the evidence and take all reasonable inferences in the light most favorable to the defendant.

In addition, the *Gabryschak* Court began its analysis with the observation that “[i]ntoxication 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.” *Gabryschak*, 83 Wn.App. at 254. This observation is correct. But it ignores an important question—who gets to decide that question? *Gabryschak* went on to evaluate the trial evidence on the defendant’s level of intoxication and ruled that the defendant there was not drunk enough, *as a matter of*

¹ In its opinion, the *Fisher* Court reaffirmed the decision in *Gabryschak* but only as to the proposition that the defendant can use any evidence in the record to support his request for a defense instruction. 185 Wn.2d at 851.

fact, to connect his level of intoxication to the mental state required to commit the crime. *Id.* at 254–55. As noted, *Gabryschak* does not discuss or even mention what standard of review the court was applying. The question before the Court was whether the defendant had met his burden of production. *State v. Huff*, 64 Wn.App. 641, 655, 826 P.2d 698 (1992). That is, whether there was sufficient evidence presented to this jury to require the instruction. *State v. Gallegos*, 65 Wn.App. 230, 237-38, 828 P.2d 37 (1992). Anything more moves this Court into deciding just how persuasive the evidence is, which is the jury’s function. *Huff*, 64 Wn.App. at 655. Thus, while *Gabryschak* may be enlightening, it does not support the State’s argument and this Court should reject it.

The State attempts to distinguish the decision in *State v. Jones*, but that decision is important for the factual support the Supreme Court cites in affirming the trial court’s use of the instruction over the State’s objection:

The State contends that there was no evidence to support the intoxication instruction, but appellant testified repeatedly that he had been drinking beer and had drunk “nine or eleven” beers in the afternoon before the incident. RP at 305. A witness who talked to appellant a few minutes after the incident “thought possibly he had been drinking”. RP at 235. A witness who talked to appellant in the decedent’s apartment an hour before the

incident noticed that “(t)he whites of his eyes were red and his eyes were very glassy. His speech was slurred.” RP at 122. After his apprehension soon after the commission of the crime, appellant was placed for a time in the “drunk tank” at the police station. CrR 3.5 Hearing, RP at 35.

State v. Jones, 95 Wn.2d 616, 622, 628 P.2d 472 (1981).

Another important decision bearing on this issue is the decision in *State v. Kruger*, where the Court of Appeals reversed the failure to give a voluntary intoxication instruction under the very high standard of ineffective assistance of trial counsel:

The record reflects substantial evidence of Mr. Kruger’s drinking and level of intoxication. And there is ample evidence of his level of intoxication on both his mind and body, e.g., his “blackout,” vomiting at the station, slurred speech, and imperviousness to pepper spray. He was entitled to the instruction.

116 Wn.App. 685, 692, 67 P.3d 1147 (2003).

The *Kruger* Court also noted the absurdity of the defense being allowed to argue voluntary intoxication without an accompanying jury instruction:

Even if the issue of Mr. Kruger’s intoxication was before the jury, without the instruction, the defense was impotent.

Id. at 694-95. This is important because Mr. Maysonet’s ability to form the intent in light of his intoxication was a critical part of his closing

argument. 11/16/2016RP 1200-01, 1208-09. The State took advantage of this when it argued in rebuttal: “There is no instruction that says alcohol is a defense to anything because it is not. Alcohol is not a defense to any crime . . . There is no evidence that that affected his ability to act intentionally or knowingly at all.” 11/16/2016RP 1211-12. While it is technically true that voluntary intoxication is not a defense, had the jury been properly instructed, the jury could have used it to assess Mr. Maysonet’s ability to form the intent.

Taking the evidence in the light most favorable to Mr. Maysonet, there was ample evidence to support the instruction. Initially, it is important to note that the State concedes the first two requirements for the instruction and merely contests the third requirement; whether Mr. Maysonet’s drinking affected his ability to form the required mental state.² Here, there was evidence from Alexandra Maysonet and Mr. Maysonet’s friends about his ability to form the intent.

² 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).

Reniel Williams, who had been drinking with Mr. Maysonet and observed Ms. Maysonet after the assault testified Mr. Maysonet looked “lost,” like he didn’t “know what’s going on. It’s like he wasn’t even there.” 11/18/2016RP 617, 643-44.

Deonte Leshore, another person who had been drinking with Mr. Maysonet testified Mr. Maysonet had a blank stare and it seemed like he blacked out. 11/16/2016RP 1137. Ms. Maysonet testified that just prior to the assault, she had trouble communicating with her husband, that he wasn’t making sense. 11/8/2016RP 519-23. Taking the evidence in the light most favorable to Mr. Maysonet, the trial court erred in failing to instruct the jury on voluntary intoxication.

Lastly, the State misunderstands harmless error. Since the failure to instruct the jury on voluntary intoxication infringed on Mr. Maysonet’s constitutionally protected right to present a defense and right to a fair trial, the State bore the burden of proving the error was not harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The State’s argument on harmless error is one of the sufficiency of the evidence; there was sufficient evidence, ergo the error was harmless. Brief of Respondent at 24-25. This is not the standard.

Rather, the issue is whether the was harmless if this Court is 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).

Here, while Mr. Maysonet was allowed to argue his intoxication may have affected his ability to form the intent, the failure to instruct rendered that defense “impotent.” *Kruger*, 116 Wn.App. at 694-95. In light of the fact Mr. Maysonet provided sufficient evidence to warrant the giving of the instruction, the failure to do so was not harmless error.

Mr. Maysonet is entitled to reversal of his convictions.

B. CONCLUSION

For the reasons stated in this reply brief as well as the previously filed Brief of Appellant, Mr. Maysonet asks this Court to reverse his convictions and remand for a new trial.

DATED this 8th day of December 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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