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NO. 51112-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB EVELAND,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in excluding evidence relevant to appellant's defense in violation of the appellant's right to present a defense.

2. The trial court erred in denying a voluntary intoxication instruction despite sufficient evidence of methamphetamine intoxication.

Issues Pertaining to Assignment of Error

1. Appellant's defense was that he lacked the ability to form the intent to commit the offenses because he was intoxicated by his use of methamphetamine. The court excluded defense lay testimony and expert witness testimony regarding appellant's use of methamphetamine in the days immediately leading up to the date of the offenses. Did the court's exclusion of that evidence deny appellant his right to present a defense?

2. Did the trial court err when it failed to instruct the jury on voluntary intoxication where evidence proffered by appellant, but erroneously excluded, was sufficient to support the instruction?

B. STATEMENT OF THE CASE

1. Charge Verdict and Sentence

The State charged Jacob Eveland with one count of first degree murder (Count 1). CP 47-48. The State alleged Eveland was armed with a firearm and/or deadly weapon and that during the commission of the offense he manifested deliberate cruelty and/or displayed an egregious

lack of remorse. Id. Eveland was also charged with first degree arson (Count 2). CP 48. It was alleged that Eveland armed with a firearm and/or deadly weapon when he committed the arson. Id. Eveland initially entered a plea of not guilty by reason of insanity, which was later withdrawn. RP 78-82¹; CP 131-132.

A jury found Eveland guilty of both first degree murder and first degree arson. CP 81-82. The jury also found Eveland was armed with a firearm and deadly weapon when he committed the murder and that his conduct manifested deliberate cruelty. CP 83.

The standard range sentence for the murder conviction is 261-347 months and with the firearm and deadly weapon enhancements 345-431 months. CP 94. The court, however, sentenced Eveland to an exceptional sentence of 600 months based on the jury's manifest deliberate cruelty aggravating factor finding. CP 95-96, 105-107. The court sentenced Eveland to a concurrent sentence of 41 months on the arson conviction. CP 96.

¹ RP refers to the verbatim report of proceedings from August 24, September 5, October 17-20, and November 6, 2017, which consists of six volumes sequentially paginated. The verbatim report of proceedings from the hearing held on the morning of October 17, 2017 is referred to as 2RP.

2. Trial

On May 31, 2016, at approximately 9:30 p.m., Roy Jones's grandmother drove him to the house where he was living. RP 184-186, 236. Eveland owned the house and Jones lived in the basement. RP 184, 236. When she dropped Jones off, Eveland was at the house sitting in gold truck. RP 183-187. The truck belonged to a relative of Eveland's ex-wife, Terry Zolman. Zolman reported the truck stolen the day before. Zolman testified that inside the truck were two five gallon gas cans, a .22 caliber hand gun and a box of .22 caliber ammunition. RP 194-199.

Later in the evening of May 31, at about 11:00 p.m., Richard Bulley, a trooper with the Washington State Patrol, was at home with his wife when he heard two loud explosions. Bulley heard his wife yell that their neighbor's house was on fire. RP 204-206. It was Eveland's house. The house is at the end of a long driveway that passes in front of the Bulley home. RP 222, 231. After the explosions, Bulley's wife saw a truck with lights on top coming down the driveway away from the house. RP 222-224.

Bulley told his wife to call 911 and he ran to the house. RP 204-207, 230. When Bulley got there, the front of the house was engulfed in flames. RP 208. Bulley went to open a door located on the east side of the

house to see if anyone was inside. Bulley, however, noticed there was what he believed a trail of blood leading away from the door. Bulley followed the trail and found Roy Jones's body about 20 to 30 feet from the house. RP 209-213, 235, 243-246.

Six .22 caliber shell casings were found near Jones's body. RP 417, 424. An autopsy showed that Jones was the victim of multiple stab wounds and gunshot wounds. RP 480-481. Jones had been stabbed at least seven times in his back, shoulder, and lower neck. RP 483. He was shot in the chest, left arm, face and hip. RP 482. The multiple wounds caused Jones to bleed to death. RP 484.

Agents from the Bureau of Alcohol, Tobacco and Firearms (ATF), investigated the fire. RP 321-325. In the ATF's lead investigator's opinion, the fire was caused by someone pouring several gallons of gasoline down the stairwell to the basement of the house and igniting it. RP 343-345, 352.

On June 7, 2018, Seattle police found Zolman's stolen truck parked in a Seattle neighborhood. RP 298, 303, 438-439, 499. About 30 minutes later police saw Eveland get into the truck. He was arrested. RP 500. Detectives with the Seattle Police Department and Grays Harbor Sheriff's Office eventually searched the truck. RP 353-355. Inside the truck's center console was a box of .22 caliber unfired cartridges. RP

359. On the left passenger side floorboard was a gym bag. Inside the bag was a sock that appeared to have blood on it. RP 362. Also, in the truck were two pipes typically used for smoking marijuana and methamphetamine. RP 380.

A shoe Eveland was wearing when he was arrested, and the sock found in the gym bag were sent to the Washington State Patrol Crime Laboratory for analysis. Blood stains on the shoe and sock matched Jones's DNA. RP 392, 405-407.

Eveland was interrogated several times by officers with both the Seattle Police Department and the Grays Harbor Sheriff's Office. The interrogations were recorded, and the recordings were played for the jury. RP 494-497, 503-504, 509-512. Exhibits (Ex.) 120, 121, 122, 123, 128.

Eveland told police he and Jones were in the basement of Eveland's house when he stabbed Jones with a black folding knife. Jones ran from the basement. Eveland followed Jones outside and repeatedly stabbed him. Ex. 129 (transcript of Ex. 120 interrogation) at 9-13, 94-99. Eveland said he stabbed Jones because he believed Jones should "bleed out" and hurt. Ex. 125 (transcript of Ex. 122 interrogation) at 3. He then decided to shoot Jones because he did not want to subject Jones to more pain. Ex. 129 (transcript of Ex. 120 interrogation) at 9-13, 95-100. Eveland shot Jones with a .22 caliber pistol he found in Zolman's truck.

Ex. 129 at 18, 57. Eveland said he killed Jones because he believed Jones had wronged him, was the cause of the problems in his life, and Jones kept forcing methamphetamine on him. Ex. 129 at 9-10, 84, 90-94; Ex. 125 at 3. Because of his consumption of methamphetamine, Eveland said he became delusional. Ex. 129 at 93. Eveland did not plan on killing Jones it “just happened.” Ex. 129 at 11. Eveland reenacted the stabbing for the police. RP 503; Ex. 120; Ex. 129 at 109-110.

Eveland also admitted that he set fire to his house because he wanted to get rid of the bad memories associated with living there. Ex. 129 at 15-16, 101. He poured gas down the stairs, opened the windows for ventilation, then lit the gas. *Id.* at 102-103.

During the initial interrogation Eveland told police he threw the gun he used to shoot Jones in a dumpster in downtown Seattle. RP 441. Eveland was going to show police the dumpster, but when they got in the car Eveland told police he was just trying to throw them off and that he threw the gun in Wildcat creek. RP 300, 442, Ex. 124 (transcript of Ex. 121 interrogation) at 7. When Eveland was transported back to Grays Harbor from Seattle officers stopped at the creek and Eveland directed the officers were to look for the gun. RP 300-301, 444. The gun was never found. RP 301, 444.

3. Eveland's Defense and Facts Pertaining to Assignments of Error

Eveland initially pleaded not guilty by reason of insanity. That defense was later withdrawn. Eveland's defense theory then became involuntary intoxication. CP 133-139; RP 453-457, 465-470, 473-476.

Eveland proffered the testimony of several lay witnesses, Dr. David Dixon and hospital records in support of his defense theory. The lay witnesses would testify that in the weeks leading up to the May 31st, Eveland was perpetually consuming drug. They would also testify about their observations of Eveland's behavior during that period. CP 134; RP 454-455, 465. Hospital records showed that on May 25-26, a few days before the incident, Eveland required medical attention because he was intoxicated with amphetamine and was diagnosed with amphetamine psychosis. CP 22 (Dr. Dixon Report); RP 545. Eveland's proffered testimony would show that on May 29th Eveland was found at Sea-Tac airport, disheveled and sleeping in the baggage claim area. He could not explain why he was there. RP 532-534. Testimony would show that on May 30th Eveland was discovered swimming in American Lake. He was intoxicated, consuming marijuana, made strange comments, and said he was both going to Seattle to live with a girl and to Jamaica to live with two men. RP 535-543.

Dr. Dixon performed a forensic clinical psychological evaluation of Eveland. CP 10-23. In addition to administering a battery of tests, and interviewing Eveland, Dr. Dixon reviewed information regarding the May 31st incident and events in Eveland's life in the weeks before the incident, including the May 25-26 hospitalization. Dr. Dixon memorialized his evaluation in a report. CP 12-23.

Eveland told Dr. Dixon that before the incident he was smoking methamphetamine that he got from Roy Jones and a "Kelly." CP 20. He indicated that it made him out of his mind and caused him to wander around Sea-Tac Airport because he wanted to go to the sun. CP 20-21. Eveland said that someone named Patrick told him the drugs he got from Roy and Kelly were laced with MDMA. CP 21.

Dr. Dixon stated in his report that because Eveland was unable to explain the circumstances of the May 31st incident and denied he was even involved, he was unable to assess whether Eveland suffered from diminished capacity. CP 23. Dr. Dixon diagnosed Eveland with Other or Unknown Substance Abuse Disorder, Alcohol Use Disorder, and Unspecified Personality Disorder with Antisocial, Histrionic and Paranoid Personality traits. Dr. Dixon opined that the material he reviewed suggested Eveland was "toxic by his abuse of methamphetamine in the time frame around the alleged incident." CP 21-22; RP 475.

During trial, Eveland called the witnesses to testify to Eveland's behavior and drug use prior to the May 31st incident but the court consistently sustained the State's relevancy objection to the testimony. Eveland was prevented from eliciting testimony from Eveland's father and step-mother that they were aware of Eveland's struggles with drug abuse and they observed Eveland exhibiting strange behavior in the weeks before May 31st. RP 520-521, 524-525. Eveland was prevented from eliciting testimony from his ex-wife that in May, Eveland told her he was using drugs. RP 526-527. Eveland was prevented from eliciting testimony from the Port of Seattle police officer who encountered Eveland on May 29th at Sea-Tac Airport about Eveland's strange behavior. RP 532-534. And, testimony from Boe Bishop, who observed Eveland on May 30th at American Lake intoxicated, smoking marijuana and making strange comments that Bishop said a normal person would not make, was stricken. RP 535-544.

The court also excluded Dr. Dixon's testimony. The court found that although there was evidence that Eveland consumed methamphetamine on May 25th (the day he was hospitalized for amphetamine psychosis) and marijuana on May 30th, there was no evidence that Eveland consumed methamphetamine or methamphetamine laced with MDMA on May 31st or shortly before. The court also found

that although Dr. Dixon stated the documentation of Eveland's behavior a few days before May 31st and the diagnosis that Eveland was suffering from amphetamine induced psychosis when hospitalized on May 25th suggested Eveland was toxic by his abuse of methamphetamine in the time frame around May 31st, Dr. Dixon could not conclude Eveland was intoxicated with methamphetamine on May 31st. RP 545-550. Thus, the court ruled because there was no temporal relationship between Eveland's use of methamphetamine or MDMA and Eveland's inability to form intent or premeditation, Dr. Dixon's testimony was not helpful to the jury. RP 546-547, 549-551. The court also ruled that for the same reasons Eveland was not entitled to an involuntary intoxication instruction. RP 551.

C. ARGUMENT

EVELAND WAS DENIED HIS RIGHT TO PRESENT HIS INVOLUNTARY INTOXICATION DEFENSE BECAUSE THE COURT IMPROPERLY EXCLUDED RELEVANT EVIDENCE IN SUPPORT OF HIS DEFENSE AND REFUSED TO INSTRUCT THE JURY ON INVOLUNTARY INTOXICATION.

a. *Standard of Review*

The trial court's evidentiary decisions regarding the admissibility of expert testimony are reviewed for an abuse of discretion. Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991). A trial court abuses its discretion when applies the wrong legal standard, bases its

ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Lord, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007); State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

A claimed denial of the constitutional right to present a defense is reviewed de novo. State v. Clark, 187 Wn.2d 641, 648-49, 389 P.3d 462 (2017) (citing State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010)). A court also necessarily abuses its discretion by denying a defendant's constitutional rights. State v. Iniguez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

b. An Accused Has a Constitutional Right to Present a Defense

Criminal defendants have the constitutional right to present a complete defense. State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, § 22. "[T]he right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies" is a fundamental element of due process. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Further, the defense is entitled to a jury instruction to support its theory of the case when that

theory is supported by substantial evidence. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009); State v. Kruger, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003).

c. An Involuntary Intoxication Must be Given When Supported by Evidence

Where the charge is first degree murder, the State is required to prove the defendant acted with premeditated intent. RCW 9A.32.030(1)(a). A charge of first degree arson requires the State to prove the defendant knowingly and maliciously caused a fire. RCW 9A.48.020(1). Eveland's defense was that his voluntary intoxication caused by his use of drugs affected his ability to form the mental states of premeditated intent and knowledge.

A voluntary intoxication instruction allows a jury to consider the effect of voluntary intoxication by alcohol or drugs on a defendant's ability to form the necessary mental state for a charged crime. State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). "Intoxication" means "an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug." State v. Dana, 73 Wn.2d 533, 535, 439 P.2d 403 (1968); State v. Hackett, 64 Wn. App. 780, 784, 827 P.2d 1013 (1992).

The standard voluntary intoxication instruction provides that

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][or][failed to act]* with (fill in requisite mental state).

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.10 (4th ed.); accord RCW 9A.16.090.

The trial court must instruct on voluntary intoxication when (1) the charged crime includes a mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence the intoxication affected the individual's ability to form the requisite mental state. State v. Webb, 162 Wn. App. 195, 209, 252 P.3d 424 (2011); Kruger, 116 Wn. App. at 691. When these three elements are met, the trial court's refusal to give a voluntary intoxication instruction is reversible error. When evaluating whether substantial evidence supports a defense instruction, the court must interpret the evidence "most strongly" in the defendant's favor and "must not weigh the proof, which is an exclusive jury function." State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005). If warranted by the evidence, the instruction is mandatory. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

d. Eveland was Denied his Right to Present a Defense Because the Court Erroneously Excluded Evidence Relevant to Eveland's Involuntary Intoxication Defense, And That Evidence Supported an Instruction on Eveland's Theory of Case the Case.

Consistent with his theory of the case Eveland proposed a voluntary intoxication instruction based on the pattern instruction. CP 58. Because both first degree murder and first degree arson include mental states, the first factor favoring a voluntary intoxication instruction are met. The court, however, erroneously excluded evidence that, when viewed strongly in Eveland's favor, met the second and third factors.

Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401. All facts tending to establish a party's theory are relevant. State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). "[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Darden, 145 Wn.2d at 622. Moreover, Expert testimony is admissible "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702.

Eveland's proffered evidence established that in the days leading up to May 31st he exhibited bizarre and strange behavior. A few days

before the incident, Eveland was diagnosed with amphetamine psychosis. On May 29th Eveland was discovered sleeping in the baggage claim area at Sea-Tac Airport. He was disheveled and could not explain why he was even there. On May 30th, Eveland was intoxicated, consuming marijuana and making strange comments that a normal person would not make. During his interrogation, Eveland told police he was delusional because of his consumption of methamphetamine. And, in Zolman's stolen truck that Eveland was driving, police found pipes used for smoking marijuana and methamphetamine.

Coupled with this was Dr. Dixon's evaluation. Dr. Dixon reviewed the above events, and the observations regarding Eveland's behavior that were made by the witnesses to those events. From that, and from what he learned from Eveland and the results of his forensic tests, Dr. Dixon surmised that Eveland was toxic due to his abuse of methamphetamine in about the time of the incident. Dr. Dixon explained how Eveland's toxicity would have affected him. CP 10-11.

The court, however, did not allow Eveland to present this evidence. The court mistakenly ruled the evidence was irrelevant. Eveland's proffered lay testimony regarding his behavior and drug use mere days before the incident, and the probable influence on his mental state of his drug use, was relevant circumstantial evidence that supported

his theory of the case that he was unable to form the necessary intent to commit the crimes. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Jurors are entitled to choose what evidence to believe and draw reasonable inferences from that evidence. Safeco Ins. Co. of Am. v. JMG Restaurants, Inc., 37 Wn. App. 1, 14, 680 P.2d 409 (1984). The proffered testimony that in the days leading up to May 31st Eveland was consuming drugs and exhibiting uncharacteristically strange behavior was relevant circumstantial evidence that Eveland was intoxicated on May 31st due to his use of drugs.

That was not the only evidence that supported Eveland's defense. Dr. Dixon's report, based on the tests he administered to Eveland, his interview with Eveland, and review of the information regarding Eveland's drug use and behavior, including the hospital records that showed Eveland was admitted just few days before May 31st and diagnosed with amphetamine psychosis, was relevant to help jurors understand how Eveland's drugs might have affected his mental state. CP 10-23; see ER 702 ("If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of

an opinion or otherwise.”). The evidence was admissible because it was relevant under ER 401 and helpful to the jury under ER 702.

The court's exclusion of Eveland's evidence denied Eveland his right to present his defense that he could not form the intent to commit the crimes because of his voluntary drug use. That evidence supported Eveland's request for an involuntary intoxication instruction, which was consistent with his defense. The exclusion of the evidence and failure to instruct the jury on involuntary intoxication was not harmless. An evidentiary ruling that violates a defendant's constitutional right, like the right to present a defense, is presumed prejudicial. State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). Instructional error is also presumed prejudicial. State v. Walters, 162 Wn. App. 74, 82, 255 P.3d 835 (2011). The erroneously excluded evidence supported a voluntary intoxication instruction, and the instruction would have allowed Eveland to advance his theory that due to his intoxication he could not have formed the premeditated intent to kill or that he knowingly committed arson. Eveland was stripped of his defense because he was left without the means to articulate this theory to the jury.

D. CONCLUSION

Eveland was denied his right to present a defense and right to a voluntary intoxication instruction because the court excluded relevant

evidence that supported the instruction. Eveland's convictions should be reversed and the case remanded for a new trial.

DATED this 17th day of September, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Eric J. Nielsen", written over a horizontal line.

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