

FILED

SEP 20 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 288421

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ALEJANDRO OLIVAREZ BARRON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY
The Honorable Michael E. Schwab

APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR1

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR1

C. STATEMENT OF THE CASE.....2

D. ARGUMENT7

TRIAL COUNSEL’S FAILURE TO SEEK A VOLUNTARY
INTOXICATION INSTRUCTION AMOUNTED TO INEFFECTIVE
ASSISTANCE OF COUNSEL.....7

a. A voluntary intoxication jury instruction was necessary for the
defendant to argue his theory of the case...... .7

b. Counsel rendered ineffective assistance when he neglected to
seek the voluntary intoxication instruction...... .9

1. Counsel’s failure to seek a voluntary intoxication jury
instruction was such serious error that it fell below
conduct guaranteed by the sixth amendment......11

2. There was reasonable probability the jury would have
found the defendant not guilty had counsel sought the
voluntary intoxication instruction......14

E. CONCLUSION 15

TABLE OF AUTHORITIES

United States Constitution

<u>U.S. Const. amend. VI</u>	9
------------------------------------	---

Washington State Constitution

<u>Wash. Const. art. I § 22</u>	9
---------------------------------------	---

United States Supreme Court Decisions

<u>Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)</u>	10
---	----

United States Circuit Court Decisions

<u>Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir.), cert. denied, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 249 (1988)</u>	10
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Washington State Supreme Court Decisions

<u>Bering v. Share, 106 Wash.2d 212, 220, 721 P.2d 918 (1986)</u>	8
<u>In re Pers. Rest. of Pirtle, 136 Wash.2d 467, 487, 965 P.2d 593 (1998)</u> ...	15
<u>In re Welfare of Snyder, 85 Wash.2d 182, 185-86, 532 P.2d 278 (1975), cert. dismissed, 479 U.S. 1050 (1987)</u>	8
<u>State v. Adams, 91 Wash.2d 86, 90, 586 P.2d 1168 (1978)</u>	11
<u>State v. Barnes, 153 Wash.2d 378, 382, 103 P.3d 1219 (2005)</u>	7
<u>State v. Brown, 132 Wash.2d 529, 605, 940 P.2d 546 (1997) cert.denied, 127 S.Ct. 559 (2006)</u>	7
<u>State v. Coates, 107 Wash.2d 882, 890, 735 P.2d 64 (1987)</u>	8, 9
<u>State v. Cross, 156 Wash.2d 580, 617, 132 P.3d 80 (2006)</u>	7
<u>State v. Ermert, 94 Wash.2d 839, 849, 621 P.2d 121 (1980)</u>	9
<u>State v. Everybodytalksabout, 145 Wash.2d 456, 479, 39 P.3d 294 (2002)</u>	7
<u>State v. McFarland, 127 Wash.2d 332, 336, 899 P.2d 1251 (1995)</u>	11
<u>State v. McNeal, 145 Wash.2d 352, 362, 37 P.3d 280 (2002)</u>	11
<u>State v. Osborne, 102 Wash.2d 87, 99, 684 P.2d 683 (1984)</u>	9
<u>State v. Rice, 102 Wash.2d 120, 123, 683 P.2d 199 (1984)</u>	14, 15
<u>State v. Thomas, 109 Wash.2d 222, 225, 743 P.2d 816 (1984))</u>	9, 10
<u>State v. Wanrow, 88 Wash.2d 221, 234, 559 P.2d 548 (1977)</u>	15

Washington State Court of Appeals Decisions

Safeco Ins. Co. of Am. v. McGrath, 63 Wash. App. 170, 179,
817 P.2d 861 (1991).....8
State v. Finley, 97 Wash. App. 129, 134-35, 982 P.2d 681 (1999).....9
State v. Gabryschak, 83 Wash. App. 249, 253, 921 P.2d 549 (1996).....8
State v. Gallegos, 65 Wash. App. 230, 238, 828 P.2d 37,
review denied, 119 Wash.2d 1024 (1992).....7
State v. Krueger, 116 Wash. App. 685, 691,
67 P.3d 1147 (2003).....8, 12, 13
State v. Meckelson, 133 Wash. App. 431, 438,
135 P.3d 991 (2006).....11, 12
State v. Washington, 36 Wash. App. 792, 793, 677 P.2d 786,
review denied, 101 Wash.2d 1015 (1984).....7

Washington State Statutes

RCW 9A.16.090.....8
RCW 9A.46.020 (1)(a)(i)(b) and (2) (b).....9

Washington Pattern Jury Instruction Criminal

WPIC 18.10.....9

A. ASSIGNMENT OF ERROR

Defense counsel rendered ineffective assistance when he neglected to seek a voluntary intoxication jury instruction

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

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. Voluntary intoxication instructions are proper when a particular mental state is an element of the crime charged and when substantial evidence shows that the defendant consumed alcohol and that the drinking affected his ability to form the required mental state.

Evidence of drinking alone is insufficient; there must be substantial evidence of the effects of the alcohol on the defendant's mind or body. Moreover, evidence of intoxication does not make an act less criminal. But intoxication may be taken into consideration by the jury to determine whether the defendant acted with a particular degree of mental culpability. Therefore, when there is substantial evidence of intoxication, the proper thing to do is to instruct the jury that it may consider evidence of the defendant's intoxication to decide whether the defendant acted with the requisite mental state.

Here, the defendant was charged with one count harassment-threat to kill. In order to be convicted of that crime, the jury had to find the defendant knowingly threatened another. There was substantial evidence to show the defendant was highly intoxicated when someone construed his declarations as

threats. There was also substantial evidence to show that intoxication may have affected the defendant's ability to knowingly threaten another. Despite overwhelming evidence of intoxication, the defendant's attorney neglected to seek a voluntary intoxication instruction and a jury found him guilty. Did counsel render effective assistance when he failed to seek the voluntary intoxication instruction?

C. STATEMENT OF THE CASE

1. Substantive Facts

For Alejandro Olivarez Barron (Mr. Barron), Toppenish, Washington evoked grief stricken memories. Some years ago, Mr. Barron's younger brother was murdered there and the case remained unsolved. 1/27/10 RP 63.

Years before his brother's murder, Mr. Barron left Toppenish for Tempe, Arizona. There, he ran a small auto-glass business with an older brother. He also worked 6 months out of the year on a fishing boat in Alaska. 1/27/10 RP 58. He even managed to maintain sobriety. But grief over the death of his brother caused him to relapse. 1/27/10 RP 59.

Mr. Barron hated the feelings Toppenish conjured in him. 1/27/10 RP 63. But when he learned about his mother's declining health, he returned to Toppenish to help care for her. 1/27/10 RP 60.

When Mr. Barron arrived in Toppenish, he checked into a motel. Overcome with emotions, he drank alcohol well into the night. 1/27/10 RP 59. Early the next morning, Mr. Barron visited his brother's grave. 1/27/10

RP 63. From there, he went to a friend's apartment. 1/27/10 RP 61. The friend was at work, so Mr. Barron waited for her to return. 1/27/10 RP 40.

The friend returned home from work and noticed Mr. Barron sitting outside with a bottle. 1/27/10 RP 40. He was drinking. 1/27/10 RP 47. They talked for some time before she asked Mr. Barron if he would ride with her to the grocery store. 1/27/10 RP 40. Mr. Barron said yes and they left. 1/27/10 RP 40-41.

The friend drove while Mr. Barron listened to music. A song that reminded Mr. Barron of his brother came on the radio. Mr. Barron became silent and his friend noticed tears roll down Mr. Barron's face. 1/27/10 RP 41. Then, without warning, Mr. Barron jumped out of the car, stood in the middle of on-coming traffic, looked at the sky, and declared to his brother in heaven that he would find out who killed him before their mother died. 1/27/10 RP 49; 1/27/10 RP 65.

Unbeknownst to Mr. Barron, the father of the person who Mr. Barron suspected was involved in his brother's murder, lived in the area where Mr. Barron stood and made these declarations. 1/27/10 RP 70-71. Mr. Barron did not notice the man and his wife outside, but the man heard Mr. Barron's cries, ran inside his house, and telephoned police. 1/27/10 RP 72; 1/26/10 RP 34.

The man told police Mr. Barron threatened to kill him. 1/26/10 RP 134. The man also claimed Mr. Barron opened the trunk of the car; but did

not see what Mr. Barron took out. 1/26/10 RP 135. The man's daughter, who was inside the house, claimed she heard a gun cock back. 1/27/10 RP 14.

A Toppenish officer responded to the dispatch call. The officer was told that Mr. Barron had a weapon. So, the officer observed Mr. Barron from a distance. 1/26/10 RP 147. The officer testified that he noticed Mr. Barron standing in the middle of the street, flailing his arms, and yelling, as on-coming cars tried to avoid him. 1/26/10 RP 146. At some point, Mr. Barron noticed the officer and began to walk away. 1/26/10 RP 147.

The officer drew his weapon and ordered Mr. Barron to stop and to get on the ground. 1/26/10 RP 148. Mr. Barron flipped the officer off and continued on. 1/26/10 RP 148. The officer again ordered Mr. Barron to get on the ground. 1/26/10 RP 149. Mr. Barron continued on. 1/26/10 RP 148-149.

The officer remembered Mr. Barron from when he lived in Toppenish, and called out to him by name. After a few more verbal commands, Mr. Barron finally got down on the ground in a prone position with his arms and feet spread apart. The officer searched Mr. Barron for weapons; but no weapons were recovered. 1/26/10 RP 151. Then, the officer handcuffed Mr. Barron and took him into custody. 1/26/10 RP 149. Mr. Barron was ultimately charged with one count felony harassment. CP 53.

2. Procedural Facts

At trial, the officer testified that during his encounter with Mr. Barron, he could smell the odor of intoxicants coming from Barron's body. He described Mr. Barron's demeanor as upset and agitated. He also testified that Mr. Barron's eyes were watery and his speech was slurred. 1/26/10 RP 149. On cross exam, the officer further confirmed that Mr. Barron was in fact highly intoxicated. 1/26/10 RP 151.

Mr. Barron's attorney theorized that when Mr. Barron jumped out of the car, he had been drinking so heavily and was so overcome with emotions that he did not knowingly direct his declarations at anyone in particular. 1/27/10 RP 102. In fact, Mr. Barron had neither met the man nor his wife before that day. 1/27/10 RP 68; 1/27/10 RP 02. He knew the man's daughter and the man's son who Mr. Barron suspected was involved in his brother's death. 1/27/10 RP 68. But he did not know the man or his wife and he certainly did not blame them for what their son may have done. 1/27/10 RP 71.

Despite the defense's theory, the State, rather than Mr. Barron's attorney, raised the issue of intoxication. 1/27/10 RP 32. The State maintained that it did not intend to propose an intoxication instruction, because Mr. Barron did not raise intoxication as a defense. 1/27/10 RP 32.

Mr. Barron's attorney explained that although intoxication was not a defense, it was an issue. 1/27/10 RP 32. The court then asked Mr. Barron's

attorney if the jury should consider whether intoxication reduced Mr. Barron's level of knowledge. 1/27/10 RP 32. Mr. Barron's attorney responded, "We're not saying that the alcohol made him do it. But we don't care if they know he was intoxicated." 1/27/10 RP 32-33.

In an attempt to discern counsel's response, the court asked counsel again whether the jury should consider intoxication to reduce Mr. Barron's level of knowledge. 1/27/10 RP 33. Counsel replied, "I don't believe he's going to be saying he did it because he was intoxicated but the officer--." 1/27/10 RP 33. Before counsel could finish his statement, the court said, "Well, we'll have to wait and hear what he says." 1/27/10 RP 33.

After Mr. Barron testified, the trial court directed counsels' attentions to the current voluntary intoxication jury instruction. 1/27/10 RP 77. Mr. Barron's attorney still refused to offer the instruction. 1/27/10 RP 77.

The trial court read the proposed instructions to the jury. The jury was instructed to consider a number of factors, but it was not instructed to consider voluntary intoxication. 1/27/10 RP 89-97; CP 18-31.

The jury deliberated and found Mr. Barron guilty of felony harassment. 1/27/10 RP 109; CP 17. The trial court sentenced Mr. Barron to 33 months incarceration and ordered him to pay a number court imposed fees. 2/12/10 RP 14; CP 10-16. This appeal followed. CP 7.

D. ARGUMENT

TRIAL COUNSEL'S FAILURE TO SEEK A VOLUNTARY INTOXICATION INSTRUCTION AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

a. A voluntary intoxication jury instruction was necessary for the defendant to argue his theory of the case. Jury instructions are adequate if they allow a party to argue its theory of the case and do not mislead the jury or misstate the law. State v. Barnes, 153 Wash.2d 378, 382, 103 P.3d 1219 (2005). The adequacy of jury instructions is reviewed de novo as a question of law. State v. Cross, 156 Wash.2d 580, 617, 132 P.3d 80 (citing State v. Brown, 132 Wash.2d 529, 605, 940 P.2d 546 (1997)), cert. denied, 127 S.Ct. 559 (2006).

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. Washington, 36 Wash. App. 792, 793, 677 P.2d 786, review denied, 101 Wash.2d 1015 (1984). Voluntary intoxication instructions are proper when (1) a particular mental state is an element of the crime charged and when substantial evidence shows that (2) the defendant consumed alcohol and (3) that the drinking affected his ability to form the required mental state. State v. Everybodytalksabout, 145 Wash.2d 456, 479, 39 P.3d 294 (2002) (quoting State v. Gallegos, 65 Wash. App. 230, 238, 828 P.2d 37, review denied, 119 Wash.2d 1024 (1992)).

Evidence of drinking alone is insufficient; there must be “substantial evidence of the effects of the alcohol on the defendant’s mind or body.” State v. Gabryschak, 83 Wash. App. 249, 253, 921 P.2d 549 (1996) (quoting Safeco Ins. Co. of Am. v. McGrath, 63 Wash. App. 170, 179, 817 P.2d 861 (1991)). Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise. Bering v. Share, 106 Wash.2d 212, 220, 721 P.2d 918 (1986) (citing In re Welfare of Snyder, 85 Wash.2d 182, 185-86, 532 P.2d 278 (1975)), cert. dismissed, 479 U.S. 1050 (1987).

Also, evidence of intoxication does not make an act “less criminal”. In other words, intoxication cannot form the basis of an affirmative defense that essentially admits the crime but attempts to excuse or mitigate the actor’s criminality. State v. Krueger, 116 Wash. App. 685, 691, 67 P.3d 1147 (2003) citing, RCW 9A.16.090; State v. Coates, 107 Wash.2d 882, 735 P.2d 64 (1987). On the other hand, intoxication may be taken into consideration by the jury to determine whether the defendant acted with a particular degree of mental culpability. State v. Krueger, 116 Wash. App. 691 citing RCW 9A.16.090; State v. Coates, 107 Wash.2d 882, 890, 735 P.2d 64 (1987).

Because, “evidence of intoxication may bear upon whether the defendant acted with the requisite mental state, 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.” Id. citing WPIC 18.10.

Here, Mr. Barron was charged with one count harassment-threat to kill. CP 53. Knowledge is an element of that crime. RCW 9A.46.020 (1)(a)(i)(b) and (2)(b); State v. Finley, 97 Wash. App. 129, 134-35, 982 P.2d 681 (1999); cf. Coates, 107 Wash.2d at 892-93, 735 P.2d 64. There was substantial evidence to show Mr. Barron was highly intoxicated. There was also substantial evidence to show that intoxication may have affected Mr. Barron’s ability to have knowingly threatened another. Therefore, it was necessary to instruct the jury that it could have considered Mr. Barron’s intoxication in order to decide whether he acted with knowledge.

b. Counsel rendered ineffective assistance when he neglected to seek the voluntary intoxication instruction. The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel to ensure a fair and impartial trial. U.S. Const. amend. VI; Wash. Const., art. I, § 22; State v. Thomas, 109 Wash.2d 222, 225, 743 P.2d 816 (1987); see also State v. Osborne, 102 Wash.2d 87, 99, 684 P.2d 683 (1984); State v. Ermert, 94 Wash.2d 839, 849, 621 P.2d 121 (1980). Effective assistance of counsel includes a request for pertinent instructions which the evidence supports. State v. Finley, 97 Wash. App. 129, 134, 982 P.2d 681 (1999). A challenge to ineffective assistance of counsel is a mixed question of law and fact that

appellate courts review de novo. Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir.), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 249 (1988); State v. Meckelson, 133 Wash. App. 431, 135 P.3d 991 (2006).

In order to prove ineffective assistance of counsel, a defendant must satisfy the two-prong test set out by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Under the first prong, the defendant must show that counsel made errors so serious that counsel failed to function as guaranteed by the Sixth Amendment. Id. To satisfy this part of the test, the representation must have fallen “below an objective standard of reasonableness based on consideration of all of the circumstances.” State v. Thomas, 109 Wash.2d 222, 226, 743 P.2d 816 (1987). This part is “highly deferential and courts will indulge in a strong presumption of reasonableness.” Thomas, 109 Wash.2d at 226, 743 P.2d 816.

Under the second prong, the defendant must show that counsel’s errors were so serious that they deprived him of a fair trial and the outcome is unreliable. Strickland v. Washington, 466 U.S. 668, 693-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To satisfy this part of the test, there must be “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. The defendant does not need to show that counsel’s deficient conduct more likely than not altered the outcome in the case. Strickland v. Washington, 466 U.S. at 693-94.

1. Counsel's failure to seek a voluntary intoxication jury instruction was such serious error that it fell below conduct guaranteed by the sixth amendment. Trial conduct that can be characterized as legitimate trial strategy or tactics cannot form the basis for a claim of ineffective assistance of counsel. State v. McNeal, 145 Wash.2d 352, 362, 37 P.3d 280 (2002) (citing State v. Adams, 91 Wash.2d 86, 90, 586 P.2d 1168 (1978)). However, when no legitimate strategic or tactical reason for a particular trial decision can be determined, appellate courts have found ineffective assistance of counsel. State v. Rainey, 107 Wash.App. 129, 135-36, 28 P.3d 10 (2001); State v. McFarland, 127 Wash.2d 332, 336, 899 P.2d 1251 (1995).

For example, in State v. Meckelson, 133 Wash.App. 431, 438, 135 P.3d 991 (2006), this Court found counsel rendered ineffective assistance when he failed to bring a plausible motion to suppress. In that case, an officer pulled behind the defendant's car and followed him. The officer surmised from the look the defendant gave that the defendant was nervous because the car was stolen. So, when the defendant failed to signal before he made a right turn, the officer pulled him over.

The officer approached the car and saw the defendant reach toward the floor. He instructed the defendant to put his hands up and ordered him out of the car. When the defendant got out of the car, the officer noticed baggies with a white crystalline substance on the car floor. The officer also found what he believed to be components of a methamphetamine laboratory and

arrested the defendant for possession of methamphetamine. State v. Meckelson, 133 Wash.App. at 435.

At trial, defense counsel moved for suppression on the basis evidence was obtained as a result of a pre-textual stop. However, counsel failed to challenge the reasons the officer gave to justify the stop and the defendant was ultimately found guilty. State v. Meckelson, 133 Wash.App. at 435.

On appeal, this Court concluded it was counsel's job to challenge the officer's subjective reason for the stop and to argue that the stop was pre-textual. Because counsel failed to challenge the officer's subjective reason for the stop, this Court reversed the defendant's conviction and remanded the matter for an evidentiary hearing. Id.

Likewise, in State v. Kruger, 116 Wash.App. 685, 690, 67 P.3d 1147 (2003), this Court found an attorney's performance ineffective when he failed to request an instruction on voluntary intoxication for an assault charge against a police officer.

In that case, the defendant showed up a friend's house drunk. He was obnoxious and rude, so his friend asked him to leave. When he refused to leave, his friend telephoned police. State v. Kruger, 116 Wash.App. at 689.

An officer responded to the call and tried to talk to the defendant. But the defendant just walked away. The officer followed and asked the defendant to stop. The defendant continued on and tried to open a side door. When the officer tapped him on the shoulder, the defendant attempted to

strike the officer with a beer bottle. A struggle ensued and the officer used various techniques to subdue the defendant. State v. Kruger, 116 Wash.App. at 689.

During the struggle, the defendant took a wrestling-type stance and “head butted” the officer. Another officer arrived at the house. And both officers tried to subdue the defendant with pepper spray. The pepper spray had little effect on the defendant. But the officers eventually gained control and handcuffed the defendant. Id.

At the county jail, the defendant vomited and an officer transported him to the local hospital to have an evaluation or to see if he could sober up. The defendant was eventually charged with third degree assault. Id.

During deliberations, the jury asked the court to clarify intent and resisting. The court told the jury to consider the testimony of the witnesses, the exhibits admitted into evidence, and the instructions of the court. The jury ultimately convicted the defendant as charged. Id.

Like the evidence in Kruger, the evidence here established that Mr. Barron was highly intoxicated. Mr. Barron jumped out of a moving car, stood in the middle on on-coming traffic, and screamed at the sky. 1/27/10 RP 49; 1/27/10 RP 65. When he finally noticed the police officer, Mr. Barron flipped him off and refused to comply with his commands. 1/26/10 RP 148-149. Mr. Barron smelled of alcohol, his eyes were watery, and his speech was slurred.

1/26/10 RP 149. All of which was ample evidence of Mr. Barron's level of intoxication and its affect on both his mind and his body.

Even though, the defense theorized that Mr. Barron had been drinking so heavily and was so overcome with emotions that when he jumped out of the car, he did not knowingly direct his declarations at anyone in particular.

1/27/10 RP 102. Mr. Barron's attorney seemed confused about how to further that theory for the jury in an appropriate instruction. In fact, counsel did not seem to understand the difference between using intoxication as a defense and instructing the jury to consider intoxication to reduce his client's intent.

1/27/10 RP 32-33.

Given the facts, Mr. Barron was entitled to have the jury consider the defense's theory of the case under in the voluntary intoxication instruction. And counsel should have sought the instruction. 1/27/10 RP 32. Had Mr. Barron's attorney proposed the voluntary intoxication instruction and the court rejected the proffered instruction, a reversal would have certainly been in order. State v. Rice, 102 Wash.2d 120, 123, 683 P.2d 199 (1984).

Based on of all of the circumstances, counsel's failure to seek the voluntary intoxication instruction, fell below an objective standard of reasonable attorney conduct.

2. There was a reasonable probability the jury would have found the defendant not guilty had counsel sought the voluntary intoxication instruction. To show prejudice, a defendant must prove that, but for the

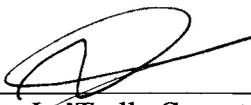
deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wash.2d 467, 487, 965 P.2d 593 (1998).

Here, the trial court's instructions informed the jury of the elements of harassment-threat to kill and the element of knowledge as the requisite mental state. However, the jury was not instructed that intoxication could be considered to determine whether Mr. Barron acted with knowledge. Consequently, without the voluntary intoxication instruction, the jury was not correctly apprised of the law, and Mr. Barron's attorney was not able to effectively argue the defense's theory of the case. See State v. Wanrow, 88 Wash.2d 221, 559 P.2d 548 (1977); State v. Rice 102 Wash.2d 120, 123, 683 P.2d 199 (1984). Had the jury been correctly apprised of the law, there is a reasonable probability the outcome of the trial would have been different.

E. CONCLUSION

For the reasons set forth above, Mr. Barron respectfully asks this Court to reverse his conviction.

Respectfully submitted this 16th day of September, 2010.



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