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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

322718-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

COREY DEAN FAWVER,

Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT

APPELLANT'S REPLY BRIEF

Respectfully submitted:



EREK R. PUCCIO – WSBA #40137
Attorney for Appellant

910 W. Garland Ave.
Spokane, Washington 99205
(509) 326-2613

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I. ARGUMENT

1. MR. FAWVER MAINTAINS HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OFFER OR REQUEST A JURY INSTRUCTION ON VOLUNTARY INTOXICATION.

In its Response Brief, the State claims Mr. Fawver's trial counsel was not ineffective because there was no independent evidence to show Mr. Fawver was intoxicated. (Brief of Respondent, p. 5). The State argues the only evidence of Mr. Fawver's intoxication is self-serving and consists of "what he provided to law enforcement over three months after the fact." *Ibid.* In so arguing, the State implies that Mr. Fawver was not entitled to a voluntary intoxication instruction because he chose not to testify or present evidence of his own intoxication.

Mr. Fawver enjoys the right to testify or not testify. *State v. Barry*, 179 Wn.App. 175, 178-79, 317 P.3d 528 (2014). The Fifth Amendment of the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." *Id.* Further, Article I, Section 9 of the Washington State Constitution provides that [n]o person shall be compelled in any criminal case to give evidence against himself." *Id.* at 179. A person accused of a crime has no obligation to present evidence. *State v. Fleming*, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996). The State has the burden of proving each element of its case beyond a reasonable doubt. *Id.*

In *State v. Kruger*, 116 Wn.App. 685, 67 P.3d 1147 (2003), this Court decided that trial counsel was ineffective for failing to request a voluntary intoxication instruction. *Kruger*, 116 Wn.App. at 694-95. There, the State unsuccessfully argued the defendant needed to present expert testimony on the issue of whether the defendant's drinking affected his ability to form intent. *Id.* at 692-93. This Court explained that, where the issue is one of common knowledge about which experienced persons are capable of forming a correct judgment, an expert's opinion is not needed. *Id.*

The State's argument in this case is similar to the State's losing argument in *Kruger*, namely, that the defendant present more evidence. Here, as in *Kruger*, the State claims the defense was responsible for presenting evidence on whether Mr. Fawver's drinking affected his ability to form intent. A defendant is entitled to the 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 mental state. *Id.* at 691.

Mr. Fawver consumed alcohol earlier in the evening at the bowling alley. (01/15/2014 RP 347). He also consumed alcohol at Mr. Pierce's New Year's Eve party. (01/15/2014 RP 358). There was substantial evidence of drinking. Mr. Fawver did not need to present his own

evidence of how his drinking affected his mental state because the State had already established that fact in its own case-in-chief. The State chose to proffer evidence of Mr. Fawver's intoxication when the prosecutor asked Detective Drapeau on direct examination, "Did you ask Mr. Fawver how much he drank that night?" (01/14/2014 RP 295). The detective answered in the affirmative and testified that Mr. Fawver said, "[H]e was really, really drunk." (01/14/2014 RP 295). The prosecutor then asked, "And did he say something about stupidity and drinking?" (01/14/2014 RP 295). The detective answered again in the affirmative and testified that Mr. Fawver said, "You do stupid shit when you get drunk." (01/14/2014 RP 295). The prosecutor then asked, "And can you finish that sentence – the rest of the sentences?" (01/14/2014 RP 295). The detective then testified that he asked Mr. Fawver to describe how drunk he was. (01/14/2014 RP 295). Mr. Fawver responded it was "probably the drunkest he'd been; [s]pecifically, yeah, maybe as drunk as he's ever been." (01/14/2014 RP 295-296). The detective testified he interpreted that to mean as drunk as Mr. Fawver has ever been in his life. (01/14/2014 RP 296).

The prosecutor next asked the detective, "Did he indicate how good his memory was that evening?" (01/14/2014 RP 296). The detective then gave the following answer, which was largely non-responsive:

“Part of the reason I asked him how intoxicated he was is to get a sense of how well they remember events. Sometimes intoxication and drug use can change your memory, or at least impair it, so you don’t remember exactly what it was. So your memory may not be accurate, that’s the reason I ask them. I then asked him is it possible that you did break the windows out or that you did have a shovel or a bat and don’t remember it because you were intoxicated?”

(01/14/2014 RP 296). Mr. Fawver responded that some details were not clear. (01/14/2014 RP 296). At one point he said he generally remembered what happened, but later on he told the detective he could only remember pieces of the night in question. (01/14/2014 RP 296).

This line of testimony, which was elicited by the State, establishes that Mr. Fawver’s drinking did in fact affect his ability to form the requisite intent for burglary and assault. Mr. Fawver did not need to bolster his own statements by taking the witness stand, as the State seems to suggest. Evidence of both his state-of-mind and his level of intoxication was already part of the record. Further, Mr. Fawver has the right under the state and federal constitutions to not be a witness against himself. In a case such as this, where the State has essentially laid the foundation for a voluntary intoxication instruction, the accused need not testify. Mr. Fawver asks this Court to reject the State’s argument that an

accused present independent corroborating evidence of intoxication in order to obtain the instruction.

The State further suggests that Mr. Fawver's defense was not that he was intoxicated, but that he did not participate in the crimes. (Brief of Respondent, p. 4). However, the defense of general denial is not inconsistent with the defense of voluntary intoxication. In both *State v. Mannering*, 150 Wn.2d 277, 286-87, 75 P.3d 961 (2003) and *State v. Harris*, 122 Wn.App. 547, 552-53, 90 P.3d 1133 (2004), the Court rejected ineffective assistance of counsel claims where the proposed defenses were antagonistic to the affirmative defenses raised at trial. Here, Mr. Fawver's trial counsel did not raise an affirmative defense and raised a theory of general denial at the beginning of trial. (CP 33). At that point, Mr. Fawver's trial counsel could not have predicted that the State would lay the foundation in its case-in-chief for a voluntary intoxication instruction. But once the State did just that, trial counsel should have requested the instruction. It was ineffective to not request the instruction. Trial counsel could have then argued that the State failed to prove Mr. Fawver participated in the crimes, but even if he did participate, his intoxication prevented him from forming intent. As such, Mr. Fawver requests that this Court reverse his convictions and remand for a new trial.

2. MR. FAWVER MAINTAINS HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE ADMISSION OF A FACEBOOK POST ALLEGEDLY MADE BY MR. FAWVER.

The State claims the Facebook post was properly authenticated and, as such, Mr. Fawver's trial counsel was not ineffective for failing to object to it. The State contends the Facebook page clearly belonged to Mr. Fawver and therefore he was the only person who could be responsible for publishing the post. The State says it is "reasonable to infer that none of [Mr. Fawver's] friends would have posted such an incriminating message absent being given [Mr. Fawver's] password or permission to access his Facebook account." (Brief of Respondent, p. 8).

The State ignores the fact that a third party need not possess Mr. Fawver's password in order to publish a post or message on his Facebook page. A post can be published on a user's Facebook page even without his or her knowledge. A third party can even "tag" the user in a message or post without ever accessing the user's Facebook page. This results in the message or post being published on both parties' respective Facebook pages.

The State incorrectly believes that Facebook technology is similar to e-mail technology. With e-mail technology, the user/owner of the account is presumed to be exclusively responsible for sending and

receiving messages from the account, unless of course the account has been hacked or the user/owner has given a third party access to the account. The State faces fewer obstacles when it comes to laying the foundation for authenticating e-mail messages.

In the context of Facebook posts, it is not enough for the State to simply show ownership of the Facebook *page*. The State must prove the authenticity of the Facebook *post*. The State failed to do that in this case. The State presented no evidence or testimony to confirm that the post was created by Mr. Fawver and not some third party.¹ As such, Mr. Fawver's trial counsel was ineffective for not objecting to the admission of the post on authenticity grounds. Mr. Fawver therefore requests that this Court reverse his convictions and remand for a new trial.

3. MR. FAWVER MAINTAINS THE STATE'S EVIDENCE FAILED TO ESTABLISH EACH OF THE ELEMENTS OF SECOND DEGREE ASSAULT BEYOND A REASONABLE DOUBT.

The State claims Mr. Fawver's conviction for Second Degree Assault is supported by ample evidence.² (Brief of Respondent, p. 12). In

¹ Because a third party has the unfettered ability to publish a post on another's Facebook page, Mr. Fawver requests that this Court apply a more rigorous standard for authentication of a Facebook post.

² The State grossly mischaracterizes Mr. Fawver's sufficiency of the evidence argument in the captions of its Response Brief by claiming "the evidence amply supported the jury finding the *firearm enhancements* and the trial court imposing same upon defendant." (Brief of Respondent, p. 9) (emphasis added). Firearm enhancements were never alleged in this case.

support of that claim, the State argues that Mr. Fawver and his associates burst into Mr. Pierce's home armed with baseball bats and assaulted the occupants. *Ibid* at 10. The fight carried outside and Mr. Pierce was found to be incapacitated. *Ibid* at 11. He was later diagnosed as having a skull fracture. *Ibid*. The State does not and cannot cite to any evidence or testimony proving that Mr. Pierce was in fact assaulted with a baseball bat.

The State elected to use specific "to-wit" language in the charging document. As a result, the State was required to prove Mr. Pierce was assaulted *with a baseball bat*. In its Response Brief, the State embarks on a lengthy and unnecessary discussion as to whether or not a baseball bat is a deadly weapon. (Brief of Respondent, p. 9-10). Mr. Fawver does not dispute the jury's finding that a baseball bat is a deadly weapon. Rather, Mr. Fawver argues the State failed to prove that either he or an accomplice assaulted Mr. Pierce *with a baseball bat*. Mr. Pierce did not testify to being hit with a baseball bat. (01/14/2014 RP 269). None of the witnesses testified to seeing Mr. Pierce being hit with a baseball bat. (01/14/2014 RP 178-179, 197, 230). There was no testimony whatsoever that a baseball bat ever made contact with Mr. Pierce's head or body. It is possible from this record that Mr. Pierce was assaulted with a bare fist or with some other object. It is also possible from this record that Mr. Pierce fell and struck his head, thereby causing his head injury.

It is important to note that the State also elected not to charge the substantial bodily injury prong of Second Degree Assault. *See* RCW 9A.36.021(1)(a); (CP 1-2). The evidence presented at trial arguably would have supported the elements of that alternative means. The State instead decided to prosecute Mr. Fawver solely on the deadly weapon prong of Second Degree Assault. Although baseball bats were present during the fight, it is not enough for the State to simply prove that Mr. Pierce was assaulted and that Mr. Fawver and/or some of his accomplices were in possession of baseball bats at the time of the fight. There must be more of a connection or nexus between the two. The State has failed to prove that Mr. Pierce was in fact assaulted with a baseball bat. As such, Mr. Fawver requests that this Court dismiss the charge of Second Degree Assault and vacate the related deadly weapon enhancement.

II. CONCLUSION

Based upon the foregoing, Mr. Fawver respectfully asks that this Court grant him the requested relief and reverse his convictions.

DATED: Sept. 3, 2014.

Respectfully submitted:



EREK R. PUCCIO – WSBA #40137
Attorney for Appellant