

FILED  
Court of Appeals  
Division III  
State of Washington  
5/6/2020 3:47 PM

No. 37196-4-III

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

---

STATE OF WASHINGTON,

Respondent,

v.

ANDREY N. ROMASHEVSKIY,

Appellant.

---

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

The Honorable Judge Jessica T. Reeves

---

APPELLANT'S OPENING BRIEF

---

Laura M. Chuang, Of Counsel, #36707  
Jill S. Reuter, WSBA #38374  
Eastern Washington Appellate Law  
PO Box 8302  
Spokane, WA 99203  
Phone: (509) 242-3910  
admin@ewalaw.com

**TABLE OF CONTENTS**

A. SUMMARY OF ARGUMENT .....1

B. ASSIGNMENTS OF ERROR .....1

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .....1

D. STATEMENT OF THE CASE.....2

E. ARGUMENT.....5

Issue 1: Whether the defendant received ineffective assistance of counsel where no voluntary intoxication instruction was requested, and the instruction would have supported the defense theory of the case.....5

F. CONCLUSION.....11

**TABLE OF AUTHORITIES**

United States Supreme Court

*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052,  
80 L. Ed. 2d 674 (1984) .....6

Washington Supreme Court

*State v. Everybodytalksabout*, 145 Wn.2d 456, 39 P.3d 294 (2002) .....8

*State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) .....7

*State v. Hicks*, 163 Wn.2d 477, 181 P.3d 831 (2008) .....7, 10

*State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009) .....6

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) .....6

*State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009) .....6

*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) .....6

Washington Courts of Appeal

*State v. Hackett*, 64 Wn. App. 780, 827 P.2d 1013 (1992) .....7, 9

*State v. Walters*, 162 Wn. App. 74, 255 P.3d 835 (2011) .....8, 9, 10

*State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003) .....6, 8, 10, 11

Washington Constitutional Provisions and Statutes

RCW 9A.16.090 .....7

RCW 9A.52.030(1) .....8

Washington Court Rules

RAP 2.5(a)(3) .....6

Other Authorities

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10  
(4<sup>th</sup> Ed. 2016) .....7, 9

### **A. SUMMARY OF ARGUMENT**

A jury found Andrey Romashevskiy guilty of burglary in the second degree.

The State presented evidence that Mr. Romashevskiy stole items from Walmart while being previously trespassed from the store. The defense presented evidence Mr. Romashevskiy was under the influence of drugs, and therefore could not form the requisite intent to commit a crime while inside Walmart. Despite arguing this defense theory to the jury during closing argument, trial counsel never requested a voluntary intoxication instruction. Defense counsel was ineffective for failing to do so when both the State's witness and Mr. Romashevskiy testified he was under the influence of drugs, and the failure to request the instruction prejudiced the trial's outcome. Remand for a new trial is appropriate.

### **B. ASSIGNMENTS OF ERROR**

1. The defendant did not receive effective assistance of counsel where counsel failed to request a voluntary intoxication jury instruction which supported the defense theory of the case.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether the defendant received effective assistance of counsel where no voluntary intoxication instruction was requested, and the instruction would have supported the defense theory of the case.

#### **D. STATEMENT OF THE CASE**

On June 18, 2019, Andrey Romashevskiy entered a Walmart in Colville, Washington. (RP<sup>1</sup> 76-81, 91-93, 103). Mr. Romashevskiy took some items from the store without paying for them and left. (RP 86-87, 95, 110). A local police officer later found Mr. Romashevskiy and arrested him. (RP 92-94).

The State charged Mr. Romashevskiy with burglary in the second degree. (CP 7-8).

The case proceeded to a jury trial. (RP 72-113).

During opening statement, defense counsel indicated Mr. Romashevskiy was a drug addict. (RP 71). The defense stated the evidence would show Mr. Romashevskiy did not remember the events on June 18, 2019, because he was under the influence of drugs, and therefore the State could not prove he intended to commit a crime. (RP 71).

Christopher Stemen testified first. (RP 72-88). Mr. Stemen was a Walmart employee at the time of the incident, and he accused Mr. Romashevskiy of stealing keys from the automotive section of the store,

---

<sup>1</sup> Two volumes were transcribed in this case. Only one volume, transcribed by Ken Beck and containing pages 1-143, will be referred to in this appeal.

two sets of headphones, makeup, and breast enhancements.<sup>2</sup> (RP 72-81, 83-84, 86-87; State's Ex. 3).

The State's second witness was an officer with the Colville Police Department. (RP 90-99). The officer testified he responded to the scene due to the call from Walmart. (RP 91-92). After consulting with Mr. Stemen, the officer searched the surrounding area for Mr. Romashevskiy and found and arrested him. (RP 92-94). The officer testified he searched Mr. Romashevskiy and found headphones, makeup, and breast enhancements, on his person. (RP 95). While being transported to jail, Mr. Romashevskiy asked the officer "let him go so he could get some rehab." (RP 95). Upon further clarification, the officer added Mr. Romashevskiy asked the officer to write him a ticket for theft and he could go to treatment. (RP 96).

On cross-examination, the officer also testified Mr. Romashevskiy was argumentative when he was arrested. (RP 97). He also acknowledged he was experienced in having contact with individuals who are under the influence of drugs, and that Mr. Romashevskiy was acting as though he was under the influence:

[Defense Counsel]: Now, you have a lot of experience with contact with people who are under the influence of narcotics or stimulants or depressants, or things like that?  
[Officer]: I do.

---

<sup>2</sup> The breast enhancements are referred to as "lift bra" on State's Exhibit 3. State's Ex. 3.

[Defense Counsel]: Was he acting in a manner consistent with someone who may have been under the influence of (inaudible)?

[Officer]: I would agree.

(RP 98).

The State rested its case. (RP 99).

Mr. Romashevskiy testified as well. (RP 103-110). Mr.

Romashevskiy testified he did not really remember being in Walmart on

June 18, 2019, because he was under the influence of heroine and meth.

(RP 103). He admitted he had relapsed approximately one month prior to

this date. (RP 103). He recognized he had been trespassed from Walmart

in the past but did not think he was trespassed at the time of the incident.

(RP 105). Mr. Romashevskiy did not remember taking any items, and

stated the makeup and breast enhancements were someone else's items.

(RP 106).

During closing argument, defense counsel argued Mr.

Romashevskiy did not have the requisite intent to commit theft as he was

under the influence of drugs. (RP 129-131). Defense counsel pointed out

to the jury that people under the influence do not think logically and act

strangely, which is exactly what happened to Mr. Romashevskiy. (RP

130). For example, counsel argued the items Mr. Romashevskiy took

from Walmart—headphones, makeup and a support bra—showed the

“complete lack of focus of this individual.” (RP 130).

The jury was presented with standard to-convict instructions on burglary in the second degree. (CP 68-82). No “voluntary intoxication” instruction was provided, however. (CP 68-82).

The jury found Mr. Romashevskiy guilty of burglary in the second degree. (CP 84; RP 138).

Mr. Romashevskiy appeals based upon the permission granted by this Court’s commissioner. (*See* Commissioner’s Ruling, filed 01/24/2020).

#### **E. ARGUMENT**

**Issue 1: Whether the defendant received effective assistance of counsel where no voluntary intoxication instruction was requested, and the instruction would have supported the defense theory of the case.**

From beginning to end, the theory of defense at trial was that Mr. Romashevskiy was so under the influence of drugs when he entered Walmart and took items from the store that he could not form the requisite intent to commit a crime. Yet defense counsel did not request the trial court provide a voluntary intoxication instruction to the jury, which would have aided in the defense. No tactical reason for failure to do so exists. The case should be remanded for a new trial on the basis of ineffective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668,

685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

“Effective assistance of counsel includes a request for pertinent instructions which the evidence supports.” *State v. Kruger*, 116 Wn. App. 685, 688, 67 P.3d 1147 (2003) (citation omitted). When determining whether a voluntary intoxication instruction should have been requested, the court considers: (1) whether the defendant was entitled to the instruction, (2) whether it was appropriate for defense counsel *not* to request the instruction, and (3) whether the defendant was prejudiced. *Id.* at 691 (citations omitted); *also State v. Hackett*, 64 Wn. App. 780, 785,

827 P.2d 1013 (1992) (a general instruction regarding the element of intent is not sufficient to allow a defendant to satisfactorily argue his intoxication theory of defense; voluntary intoxication instruction should have been given as requested by defendant).

Prejudice can be established by showing that “counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

By Washington statute, whenever a crime has a “particular mental state” then voluntary intoxication “may be taken into consideration in determining such a mental state.” RCW 9A.16.090. This statute is recognized as a pattern jury instruction. 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10 (4<sup>th</sup> Ed. 2016). The instruction states:

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].

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10 (4<sup>th</sup> Ed. 2016).

“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). A voluntary intoxication instruction is warranted when (1) the crime charged includes a mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence that the intoxication affected the defendant's ability to form the requisite intent or mental state. *Kruger*, 116 Wn. App. at 691 (citation omitted); *Walters*, 162 Wn. App. at 82 (citing *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002)). 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." *Kruger*, 116 Wn. App. at 691-692 (citation & internal quotations omitted).

Here, the first element for obtaining a voluntary intoxication instruction is met, as burglary in the second degree requires a showing of intent. *See Walters*, 162 Wn. App. at 82; RCW 9A.52.030(1). For the State to prove the elements of burglary in the second degree, it must present evidence that a person "enters or remains unlawfully in a building" and does so "with *intent* to commit a crime against a person or property therein." RCW 9A.52.030(1) (emphasis added); (CP 77, 79).

The second element was also met at trial: that the defendant was intoxicated or impaired from drug usage. *Walters*, 162 Wn. App. at 82. Here, the arresting officer agreed Mr. Romashevskiy was acting

consistently with someone who was under the influence of drugs. (RP 98). When Mr. Romashevskiy was arrested, he asked the officer to let him go so he could get into “rehab.” (RP 95-96). Though he admitted to trading stolen items in the past for drugs, some of the items he took from the store were bizarre and uncharacteristic of items that may be traded—such as the bra lifter and makeup. (RP 83-84, 86-87, 110; State’s Ex. 3). And Mr. Romashevskiy testified he did not recall the incident because he was under the influence of heroin and methamphetamines. (RP 103, 106). The defendant was under the influence of drugs. *Hackett*, 64 Wn. App. 780 (voluntary intoxication instruction includes intoxication due to drugs); 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10 (4<sup>th</sup> Ed. 2016).

Third and finally, evidence was presented at trial that Mr. Romashevskiy’s drug-induced state affected his ability to form the intent to commit a crime. *Walters*, 162 Wn. App. at 82. As noted above, Mr. Romashevskiy testified he did not recall the incident in Walmart, stating “it was kind of a blur, to be honest” because “I was under the influence—of drugs.” (RP 103, 106). He admitted to being under the influence of heroin and methamphetamines. (RP 103). He did not know what he was planning to do with the headphones he took, was high, and was not in the “right state of mind.” (RP 106, 110). The third factor of whether a voluntary intoxication instruction is warranted is also met.

The jury should have been instructed as to voluntary intoxication. The sole defense in the case was lack of intent to commit a crime against property while in Walmart because Mr. Romashevskiy was under the influence of drugs. (RP 71, 129-131). Testimony by two witnesses supported the defense. (RP 98, 103, 106). The instruction should have been given. *Kruger*, 116 Wn. App. 691. And, it was not appropriate for defense counsel not to request the instruction. No other jury instructions presented to the jury spoke to the issue of intoxication and intent. *Id.*; (CP 68-82). Moreover, a defendant has a right to have the jury instructed on a defense supported by the evidence. *Kruger*, 116 Wn. App. at 693. Defense counsel's performance was deficient, and no strategic or tactical reason exists for failing to request an instruction which supported the theory of defense.

Mr. Romashevskiy was prejudiced by defense counsel's performance. *Walters*, 162 Wn. App. at 82. Mr. Romashevskiy did not receive a fair and reliable trial because the jury was not properly instructed. *Hicks*, 163 Wn2d at 488; *Walters*, 162 Wn. App. at 84 (instructional error is presumed to be prejudicial). There is a reasonable probability that, but for counsel's deficient representation, the result of the proceeding would have been different. *Kruger*, 116 Wn. App. at 685.

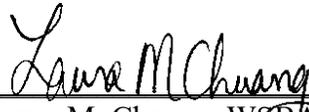
The jury was instructed on the elements of burglary in the second degree, including intent. (CP 68-82). Evidence was presented that Mr. Romashevskiy was under the influence of drugs, which affected his decision-making capabilities, and this was the *only* theory of defense at trial. (RP 71, 129-131). Yet the jury was not instructed it could consider Mr. Romashevskiy's drug-influenced mental state when determining whether Mr. Romashevskiy acted with intent to commit a crime. *See Kruger*, 116 Wn. App. at 694. The jury was not correctly informed of the law, and defense counsel could not effectively argue the defense theory without it. *Kruger*, 116 Wn. App. at 694 (reversal warranted where defense counsel did not request voluntary intoxication instruction despite supporting evidence). Mr. Romashevskiy's right to a fair trial was prejudiced.

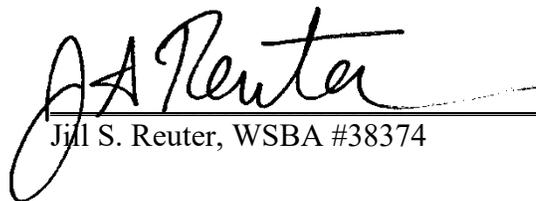
The case should be remanded for retrial on the basis of ineffective assistance of counsel for failure to request a voluntary intoxication instruction.

#### **F. CONCLUSION**

Defense counsel's performance was deficient and there is a reasonable probability the result of the case would have been different but for counsel's deficiency. Mr. Romashevskiy respectfully requests this Court reverse and remand for a new trial.

Respectfully submitted the 6th day of May, 2020.

  
\_\_\_\_\_  
Laura M. Chuang, WSBA #36707  
Of Counsel

  
\_\_\_\_\_  
Jill S. Reuter, WSBA #38374

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 37196-4-III  
vs. ) Stevens County No. 19-1-00198-33  
)  
ANDREY N. ROMASHEVSKIY ) PROOF OF SERVICE  
)  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Laura M. Chuang, of counsel to the firm of assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 6, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Andrey N. Romashevskiy, DOC No. 333302  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

Having obtained prior permission, I also served a copy on the Respondent at [trasmussen@co.stevens.wa.us](mailto:trasmussen@co.stevens.wa.us) using the Washington State Appellate Courts' Portal.

Dated this 6th day of May, 2020.

/s/ Laura M. Chuang  
Laura M. Chuang  
Of Counsel  
Eastern Washington Appellate Law  
PO Box 8302  
Spokane, WA 99203  
Phone: (509) 242-3910  
admin@ewalaw.com

**OF COUNSEL NICHOLS LAW FIRM PLLC**

**May 06, 2020 - 3:47 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 37196-4  
**Appellate Court Case Title:** State of Washington v. Andrey N. Romashevskiy  
**Superior Court Case Number:** 19-1-00198-9

**The following documents have been uploaded:**

- 371964\_Briefs\_20200506154337D3595329\_5438.pdf  
This File Contains:  
Briefs - Appellants  
*The Original File Name was Opening Brief filed 5.6.20.pdf*
- 371964\_Motion\_20200506154337D3595329\_8605.pdf  
This File Contains:  
Motion 1 - Accelerated Review  
*The Original File Name was Motion for Accelerated Review filed 5.6.20.pdf*

**A copy of the uploaded files will be sent to:**

- admin@ewalaw.com
- jill@ewalaw.com
- tdenning@stevenscountywa.gov
- trasmussen@stevenscountywa.gov

**Comments:**

---

Sender Name: Laura Chuang - Email: laura@ewalaw.com  
Address:  
PO BOX 8302  
SPOKANE, WA, 99203-0302  
Phone: 509-242-3910

**Note: The Filing Id is 20200506154337D3595329**