

No. 37196-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANDREY ROMASHEVSKIY,

Appellant.

BRIEF OF RESPONDENT

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III. STATEMENT OF THE CASE

On June 18, 2019, Appellant Andrey Romashevskiy (hereinafter “Mr. Romashevskiy”) decided to steal keys, two sets of headphones, breast enhancements, and makeup from the Colville, Washington Walmart. RP 86-87. On several occasions, Mr. Romashevskiy had been told not to come back to Walmart and he had received two formal Walmart trespasses and one formal trespass from Federal Way Police Department. RP 87-88.

After walking through the front doors of Walmart, Mr. Romashevskiy proceeded to make his way through the store, selecting items to steal. RP 77-80. Mr. Romashevskiy removed headphones from packaging in the electronics department and dumped the packaging in the book aisle. RP 85-86. Mr. Romashevskiy also removed security devices from some of the items he stole. RP 110, lines 8-9.

Mr. Romashevskiy, after exiting Walmart, was arrested by Colville Police Officer Adam Kowal. RP 92, lines 8-25. Mr. Romashevskiy, when placed in custody by Officer Kowal, specifically mentioned his “theft” and how Officer Kowal should write him a ticket for “theft”. RP 96. Mr. Romashevskiy was argumentative and did not want to be taken into custody by Officer Kowal. RP 97, lines 21-25.

Mr. Romashevskiy was charged with one count of Burglary in the Second Degree. CP 7-8.

Trial commenced on August 16, 2019. RP 13. The jury was shown the video surveillance footage from Walmart. RP 78-80. At trial, Mr. Romashevskiy admitted to having been convicted twice in ten years for stealing from Wal-Mart. RP 109, lines 7-9. Mr. Romashevskiy admitted he had previously traded stolen property for drugs. RP 110, lines 2-4.

Later that day, the jury voted unanimously to convict Mr. Romashevskiy of Burglary in the Second Degree. CP 84. Mr. Romashevskiy now appeals, claiming that he received ineffective assistance of counsel because his trial attorney did not request a voluntary intoxication instruction. Opening Brief of Appellant at 11.

IV. STATEMENT OF THE ISSUES

- I. Did Mr. Romashevskiy receive ineffective assistance of counsel when there was insufficient evidence to warrant giving a voluntary intoxication instruction, Mr. Romashevskiy tactically benefitted from not requesting the instruction, and overwhelming evidence demonstrates Mr. Romashevskiy suffered no prejudice from the lack of instruction?

V. STANDARDS OF REVIEW

1. “The question of whether an attorney renders ineffective assistance is a mixed question of law and fact, reviewed de novo.” Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir., 1988); see also State v. White, 80 Wash.App. 406, 410, 907 P.2d 310 (Div. II, 1995). “Courts engage in a strong presumption counsel’s representation was effective.” State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d

1251, 1257 (1995), as amended (Sept. 13, 1995). When such claims are “...brought on direct appeal, the reviewing court will not consider matters outside the trial record. Id. “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. Id.

VI. ARGUMENT

- A. **Mr. Romashevskiy did not receive ineffective assistance of counsel because he was not entitled to a voluntary intoxication instruction, the lack of trial counsel’s request for a voluntary intoxication instruction was a legitimate trial tactic, and Mr. Romashevskiy was not prejudiced by the lack of an instruction.**

Mr. Romashevskiy argues that he received ineffective assistance of counsel because his trial attorney did not request a voluntary intoxication instruction. Opening Brief of Appellant at 11.

“Courts engage in a strong presumption counsel's representation was effective.” State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995). When such claims are “...brought on direct appeal, the reviewing court will not consider matters outside the trial record. Id. “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” Id. “The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for

counsel's deficient representation.” Id. at 337. The standard for ineffective assistance has been summarized as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.”

State v. Grier, 171 Wash.2d 17, 32–33, 246 P.3d 1260 (2011) (quoting State v. Thomas, 109 Wash.2d 222, 225–26, 743 P.2d 816 (1987)).

“Under this standard, performance is deficient if it falls below an objective standard of reasonableness.” Id. at 33 (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984)). “The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.” Id.

“Finally, ‘[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.’” Id. at 34 (quoting Strickland, 466 U.S. at 689).

“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 (Div. III, 2003) (emphasis added). The court looks at three elements when determining whether the voluntary intoxication instruction should have been requested. These three elements are: (1) Whether the defendant was entitled to the instruction; (2) whether it was appropriate **not** to ask for the instruction; and (3) whether the defendant was prejudiced. Id. at 691 (emphasis in original).

1. Mr. Romashevskiy did not receive ineffective assistance when his trial counsel did not request a voluntary intoxication instruction because Mr. Romashevskiy was not entitled to a voluntary intoxication instruction.

Three conditions must be met before a voluntary intoxication instruction can be given. These elements are: (1) the charged offense has a particular *mens rea*; (2) there is substantial evidence the defendant was drinking and/or using drugs; and (3) **there is evidence** the drinking or drug use affected the defendant’s ability to acquire the required mental state. State v. Webb, 162 Wash.App. 195, 209, 252 P.3d 424, 431 (2011) (emphasis added).” 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.” Webb, 162 Wash.App at

210 (citing State v. Gabryschak, 83 Wash.App. 249, 252–53, 921 P.2d 549 (Div. I, 1996)).

Voluntary intoxication is not an affirmative defense. Instead, it is linked with the *mens rea*, or mental state, of a specific crime. RCW 9A.16.090, states:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

Section 090 is also recognized as a Pattern Jury Instruction, WPIC 18.10, which 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] [or] [failed to act] with (fill in requisite mental state).

WPIC 18.10.

The State concedes that there is a *mens rea* element to Burglary in the Second Degree. The State also concedes that there is substantial evidence that Mr. Romashevskiy used drugs.

However, there is no evidence that Mr. Romashevskiy's use of drugs affected his ability to form the requisite *mens rea*. In Gabryschak, the court found that the rejection of the voluntary intoxication instruction was not

error, due to the fact that the defendant was responding consistently with officers' requests to come out of the apartment and speak with them. Id. at 254.

In Webb, the defendant took his nine-year-old daughter with him to rob a minimart with a toy gun and was convicted of Reckless Endangerment and First Degree Robbery with an aggravating factor that the offense involved a destructive and foreseeable impact on a person other than the victim. Id. at 198. At trial, there was some varying testimony regarding whether the defendant was intoxicated from alcohol or not. Id. at 200. The defendant appealed that case in part due to the failure of the court in giving a voluntary intoxication instruction. Id.

In that case, the court found that the defendant met both the first and second parts of the test, but stated that the evidence presented at trial was insufficient to meet the third prong of the test: that his drinking affected his ability to acquire the required mental state. Id. at 209-10. The Court in Webb stated that although the defendant showed unacceptably bad judgment on the night in question, some of his actions showed that he was capable of forming intent to steal from the minimart, including entering with an altered toy gun, telling the clerk he was stealing the money for himself and his daughter, and telling the clerk he was out of work. Id. at 210.

In Classen, the defendant argued that he suffered from amphetamine use disorder and that his counsel rendered ineffective assistance by failing to request a voluntary intoxication instruction. State v. Classen, 4 Wash.App.2d 520, 536, 422 P.3d 489 (Div. II, 2018).

Division II of this Court disagreed with Mr. Classen because he produced insufficient evidence at trial to demonstrate how that the drugs affected his ability to acquire the required mental state to commit the crimes. Id.

“To obtain a voluntary intoxication instruction, the defendant must show (1) one of the elements of the crime charged is a particular mental state, (2) there is substantial evidence that the defendant ingested an intoxicant, and (3) evidence that his ingestion of an intoxicant affected his ability to acquire the required mental state for the crime.” Id.

“To satisfy the third element, there must be substantial evidence of the effects of the intoxicants on the defendant’s mind or body.” Id. “The evidence must reasonably and logically connect a defendant’s intoxication with his inability to form the requisite mental state.” Id. at 537. “A person can be intoxicated and still be able to form the requisite mental state to commit certain crimes.” Id. “It is not necessary to present expert testimony to support an involuntary intoxication defense based on **alcohol intoxication.**” Id. (citing State v. Thomas, 123 Wash.App. 771, 782, 98

P.3d 1258 (Div. I, 2004) (emphasis added)). “This is because “[t]he effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use.” Id. (quoting Thomas, 123 Wash.App. at 782). “The case law does not say the same about methamphetamine or heroin intoxication. Id. “Thus, competent evidence that methamphetamine or heroin affected Classen’s ability to form the requisite mental state was required in this case.” Id. Classen’s only evidence at trial was that he “...appeared to be under the influence....” Id. “[The arresting officer] did not testify as to what type of drug or intoxicant he suspected Classen to be under the influence of.” Id. “[The arresting officer] also did not testify as to whether methamphetamine or heroin affects a person’s ability to form the requisite intent to commit the crimes of kidnapping or assault.” Id. at 537-38. “Because it is not common knowledge that methamphetamine or heroin can affect a person’s ability to form the requisite intent, Classen needed to provide competent evidence to show how his ability to form intent was affected. But here Classen failed to introduce any evidence about the effect methamphetamine had on his ability to form the requisite intent.” Id. at 538.

This Court has agreed with Division I on the necessity for a defendant to present evidence that reasonably and logically connects the intoxicant(s) with the defendant’s ability to form the requisite mental state. State v. Finley, 97 Wash.App. 129, 135, 982 P.2d 681, 685 (Div. III, 1999)

(“Gabryschak requires substantial evidence of the effects of the alcohol on the defendant's mind or body. We agree with that holding.” (internal citations omitted)). “Evidence of drinking alone is not enough to warrant an intoxication instruction. Id. at 135 (citing Gabryschak, 83 Wash.App. at 253) (error in original). “The evidence must reasonably and logically connect [a defendant’s] intoxication with his inability to form the requisite mental state. Id. at 135 (citing Gabyryschak, 83 Wash.App. at 252–53).

“Many criminal acts follow the use of alcohol or drugs.” Id. at 135 (citing Montana v. Egelhoff, 518 U.S. 37, 49, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (“A large number of crimes, especially violent crimes, are committed by intoxicated offenders; modern studies put the numbers as high as half of all homicides, for example.”)). “However, the court is required to give a voluntary intoxication instruction only in those cases in which the level of mental impairment caused by alcohol or drugs **clearly affected** the defendant's criminal responsibility by eliminating the necessary mens rea.” Id. (emphasis added).

In Finley, there was “... ample evidence that Mr. Finley had been drinking”, but there was no evidence that logically connected Mr. Finley’s drinking with his ability to form the requisite *mens rea*. Id. at 135-36.

By Mr. Romashevskiy's own admission, he was a user of methamphetamine and heroin. RP 103, lines 17-19. Mr. Romashevskiy testified that his theft was a "blur". RP 103, lines 13-14.

The critical inquiry is not whether there is substantial evidence of Mr. Romashevskiy's use of drugs. The critical inquiry here is also not whether Mr. Romashevskiy could recall his crime at Walmart.

Instead, the critical inquiry is whether Mr. Romashevskiy's use of drugs eliminated the *mens rea* element of intent. There is zero evidence that Mr. Romashevskiy's ability to form the requisite intent was impaired. In fact, the evidence is overwhelming that he knew exactly what he was doing and intended to commit a crime in Walmart.

Intent is not whether Mr. Romashevskiy could remember what he did. Mr. Romashevskiy testified about his inability to recall what he stole at Walmart. But whether or not he could recall the details of his theft, at the time of trial, is not the relevant inquiry on appeal.

Intent, as it relates to burglary, is intent to commit a crime inside Walmart. Overwhelming evidence was produced by the State at trial that Mr. Romashevskiy intended to steal Walmart merchandise. Furthermore, Mr. Romashevskiy did not express any confusion about why he was in custody. He didn't ask Officer Kowal what was going on. He didn't demand to know why he was being taken to jail. He knew exactly why he was going

to jail: he stole from Walmart. Mr. Romashevskiy's counsel on appeal treat his failure of recollection (which is entirely self-serving) as evidence of inability to form the mental state of intent.

On appeal, Mr. Romashevskiy asks this Court to overturn the verdict of the jury. Mr. Romashevskiy expects this Court to conclude that Mr. Romashevskiy could not form the requisite intent to steal, despite making attempts to conceal his criminal behavior in Walmart and telling Officer Kowal that Officer Kowal should write him a ticket for “theft”. RP 96.

Mr. Romashevskiy obviously had the mental wherewithal to not want to be arrested by Officer Kowal. RP 97. Mr. Romashevskiy admitted to having been convicted twice in ten years for stealing from Walmart. RP 109.

Mr. Romashevskiy clearly, and obvious to the jury, knew exactly what he was doing in Walmart. There was no evidence that his use of drugs prevented him from forming the requisite intent to steal.

2. Mr. Romashevskiy did not receive ineffective assistance of counsel because the lack of requesting an instruction was a legitimate tactical maneuver.

“When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” State v. Carson, 184 Wash.2d 207, 218, 357 P.3d 1064, 1070 (2015). “This presumption can be

overcome if the defendant can establish that “ ‘there is no conceivable legitimate tactic explaining counsel's performance.’” Id.

The presumption of effective representation imposes on the defendant the burden on appeal to ‘show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.’” Id. (quoting State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995)).

“We must resist the temptation to substitute our own personal judgment for that of [the defendant]'s attorney because “it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.” Id. at 220 (quoting Strickland, 466 U.S. at 689, 104 S.Ct. 2052). “Thus, the deficient performance inquiry does not permit us to decide what we believe would have been the ideal strategy and then declare an attorney's performance deficient for failing to follow that strategy.” Id.

Mr. Romashevskiy obtained a strategic advantage by not requesting a voluntary intoxication instruction. Voluntary intoxication is not an affirmative defense and WPIC 18.10 would have told the jury that voluntary intoxication does not make any act less criminal. Not requesting the instruction permitted Mr. Romashevskiy’s trial counsel to treat voluntary

intoxication as an affirmative defense. In other words, by not requesting the instruction, Mr. Romashevskiy could have his cake and eat it too.

By not requesting the instruction, Mr. Romashevskiy's trial counsel picked up a bonus for his client: he could either persuade a juror or several jurors to find that Mr. Romashevskiy couldn't form the requisite intent to commit a crime in Walmart **or** he could persuade a juror or several jurors to find that Mr. Romashevskiy couldn't be held accountable for any his actions because voluntary intoxication absolved him of any criminal liability because it was an affirmative defense.

3. Mr. Romashevskiy did not receive ineffective assistance because he cannot demonstrate that he was prejudiced by his trial counsel's lack of a request for a voluntary intoxication instruction.

Even if Mr. Romashevskiy was entitled to a voluntary intoxication instruction and even if there was no tactical advantage to not requesting the instruction, Mr. Romashevskiy cannot establish prejudice. "To show prejudice, a defendant must show a reasonable possibility that, but for counsel's purportedly deficient conduct, the outcome of the proceeding would have differed. Classen, 4 Wash.App.2d at 535 (citing Grier, 171 Wash.2d at 34).

Mr. Romashevskiy, given the sheer weight of evidence of his crime, was not prejudiced by the lack of instruction. Whether or not the instruction

had been given to the jury, Mr. Romashevskiy's behavior was put on display. The jury had a front-row seat to evidence of Mr. Romashevskiy's criminal behavior and, more importantly, to video evidence of his intent. Designation of Clerk's Papers and Exhibits, Exhibit No. 1.

There was overwhelming evidence of Mr. Romashevskiy's guilt and there was no evidence that Mr. Romashevskiy didn't know what he was doing. Mr. Romashevskiy's only testimony was of the self-serving kind, that he had ingested drugs and that he couldn't recall what he did. But none of the evidence supported a finding that he couldn't form the requisite intent or that he did not commit a crime in Walmart. All of the objective evidence indicates that he knew exactly why he entered Walmart, what he was doing, and that he was trying to conceal his criminal activity.

Defendants are guaranteed a constitutionally adequate defense, not a perfect defense. Under [the effective assistance of counsel standard], the defendant is not guaranteed successful assistance of counsel. State v. Alires, 92 Wash. App. 931, 938, 966 P.2d 935, 938 (Div. III, 1998) (citing State v. Adams, 91 Wash.2d 86, 90, 586 P.2d 1168 (1978)). There is only so much that a defense attorney can do when the overwhelming evidence is that his client removed security devices from items, removed packaging from items, and hid the packaging.

VII. CONCLUSION

For the reasons stated above, the State respectfully requests that Mr. Romashevskiy's conviction be upheld and that Mr. Romashevskiy's appeal be denied.

DATED this 6th day of July, 2020.



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