90722-6

NO: 43440-7-II

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

VS.

ADRIAN KRAMER
petitioner.

PETITION FOR REVIEW

ADRIAN KRAMER, petitioner
coyote Ridge correction center
P.O. BOX 769
connell, WA. 99326

1)

A. IDENTITY OF PETITIONER

ADRIAN KRAMER, ASKS this court to Accept review of the decision designated in part B of this motion.

B. DECISION

petitioner seeks review of the entire decision OF the court of Appeals affirming petitioner's conviction and sentence entered in the superior court of Washington for COWLITZ COUNTY. A copy of the court of Appeals decision is attached to this motion.

C. ISSUES PRESENTED FOR REVIEW AND
D. STATEMENT OF THE CASE

My First Issue is the trespass notice that was signed by me in 2009. I was Extremly high on meth when I was caught shoplifting and signed the trespass notice. I was not given a copy of the notice or were the fred meyers imployees willing to give me a copy of the notice. I believed I was not allowed back for a while. I did not re-enter fred myers for 15 months. Shortly Before my current case, I was Frequently in fred myers doing Regular grocery shopping with my Girlfriend Lagena Crawford, during these trips to the store I was never approached by fred myers staff which left me with the Impression

that I was no longer trespassed from the store, or that I had served whatever amount of time That I was supose to stay away. When the Assault happend I was under the Influence of an extreme amount of meth (Trial Attorney Josh Baldwin refused to mention during my trial) The two Loss prevention officers that approched me I had never seen before, nor did either one of them Identify himself as a fred myers employee. Conveniently there is no video footage of the Incident, If there were, The court would have seen two men in normal plain cloths Run up Behind me and attempt to gomb ahold of me. Fred myer policy, is to come around the front of a shoplifter, Identify themselves as loss-prevention and try to recover the merchandis no hands are to be placed on the person. Living in the drug world I was living in at the time, and being under the Influence as I was, I had no Idea weather these men were guys I had made angery on the streets, or if they were coming to do me physical harm. The Hatchet was in the shopping cart I had stolen it for the purpose it was intended for (cutting wood) we had a fire pit in the back yard of 3507 oak street. not far from fred myers my

3)

family and I would sit back there and roast marshmellows for smores, under the Influence I apparently thought this was worth stealing, like everything else in the shopping cart. The Items seemed important do to the drugs but in reality it was all stupid and completly unnecicary. the Hatchet was a coleman Hatchet the only Brand they sell at the store. David morrison Lied on the stand saying they did not sell that Kind of hatchet at the store, to make it seem that I had Brought the hatchet with me, which is totaly false, despite the facts that my pupils were so Large there was no color left in my eyes, that I was shaking and pouring Sweat in the middle of an air conditioned Building, David morrison lied Saying he Believed me to be completly Sober, to make it seem that in my right state of mind theft and violence are a normal thing for me. WELL I am not a violent person, and matter of Factly on other occasions at fred myers, I had a couple of run in's with Michael Stewart who I Knew to be Fred myers loss prevention I never threatened the man, I never Attempted to cause him harm I Just ran away!

E. WHY REVIEW SHOULD BE ACCEPTED

Yes David Morrison is a loss prevention officer for fred myers, that does not make him an outstanding citizen, it does not mean that he wouldnt lie to get me convicted the way he saugh fit.

Before 2009 I was clean sober working for Swanson Bark & wood products INC for 5 years supporting a family. Legally I stayed off of the radar for almost 10 years. my past convictions almost all washed from my record. Some How I was sentenced to 34½ years. I did not kill any one, I did not even cause life threatening harm.

I was Born raised and spent the majority of my life in longvie Washington where the crimes took place, and with the serious amount of news, and newspaper coverage I never had a chance to be Judged fairly.

5)

F. CONCLUSION

For the reasons set out in this motion, this court should Accept review of this case and reverse petitioner's conviction.

DATED THIS 12TH DAY of AUGUST 2014

adrian Kramer

Adrian Kramer, petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON, Respondent, v. ADRIAN JESS KRAMER, Appellant.	No. 43440-7-II RULING GRANTING MOTION ON THE MERTIS TO AFFIRM

Adrian Jess Kramer appeals his burglary convictions. Pursuant to RAP 18.14(a)[1] and RAP 18.14(e)(1),[2] this court affirms his convictions.

FACTS

On December 12, 2009, a Fred Meyer security guard apprehended Kramer for shoplifting. The guard informed Kramer that he was "being trespassed" from the store. Report of Proceedings (RP) at 162. The guard reviewed a written trespass notice with

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[1] RAP 18.14(a) provides, in relevant part:
> The appellate court may, on its own motion or on motion of a party, affirm or reverse a decision or any part thereof on the merits in accordance with the procedures defined in this rule.

[2] RAP 18.14(e)(1) provides:
> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

Kramer and advised him that "if he came back to Fred Meyer, he could be arrested for just being there . . . [and] if he had shoplifted during any time, he would be charged with a burglary charge." RP at 162. Kramer reviewed the notice and initialed four provisions, which stated:

> You are prohibited from coming on the property or premises of any Fred Meyer store, office, or warehouse for any reason, at any time.
> You are denied permission to shop in any Fred Meyer store.
> No employee of a Fred Meyer store has the authority to grant permission to you to be on any Fred Meyer store or property.
> To enter such store or property may result in your arrest for criminal trespass.

Exhibit (Ex.) 13, (trespass notice). Kramer also signed a second section acknowledging that he received the notice and that the trespass notice could be rescinded "only by a written notification" from a loss prevention manager or director. Ex. 13 (trespass notice). The guard also told Kramer that he would not be allowed back "indefinitely." RP at 167.

After an incident on December 12, 2011, in which Kramer injured a Fred Meyer security guard with an axe while the guard was trying to stop Kramer from taking store items without paying for them, the State charged Kramer, in relevant part, with one count of first degree burglary for the December 12 event, and three counts of second degree burglary for prior shoplifting incidents on March 18, May 24, and June 21, 2011.[3] Kramer appeals the burglary convictions, arguing that insufficient evidence supports the convictions.

[3] The State additionally charged Kramer with first degree assault and first degree robbery. Each of the first degree crimes included a deadly weapon enhancement.

ANALYSIS

Burglary Convictions

"The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas,* 119 Wn.2d at 201. All "reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas,* 119 Wn.2d at 201. Circumstantial evidence and direct evidence are deemed equally reliable. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Kramer argues that the State presented insufficient evidence to demonstrate that he was unlawfully in the store when he "entered the Longview Fred Meyer store during regular business hours and on each occasion stayed within those areas specifically open to the public." Br. of Appellant at 12. He relies on *State v. Kutch,* 90 Wn. App. 244, 951 P.2d 1139 (1998), to argue that the trespass notice did not properly inform him that he was excluded from the store. Specifically, he contends that the "indefinite" ban did not have a duration because it "neither banned the defendant forever or a specified time period." Br. of Appellant at 14. Thus, the notice did not clearly advise Kramer that

he was not allowed on the property nearly 15 months after the store issued the trespass notice.

Both first and second degree burglary require the State to prove that the defendant entered or remained unlawfully in a building. RCW 9A.52.020 and .030. Entry into a building is unlawful if made without invitation, license, or privilege. RCW 9A.52.010(3); *State v. Thomson*, 71 Wn. App. 634, 638, 861 P.2d 492 (1993). A property owner may exclude an individual from entering his or her property using a trespass notice. *Kutch*, 90 Wn. App. at 247-49.

In *Kutch*, a mall issued a trespass notice to the defendant to preclude him from entering mall property for one year. Kutch argued that the trespass notice was insufficient because he did not receive a copy of the written notice and because he did not understand what he was signing when he signed the notice. *Kutch*, 90 Wn. App. at 248. The *Kutch* court held:

> The express revocation here included both time and place—one full year from mall premises. This was a valid limitation. *State v. Thomson,* 71 Wn. App. 634, 638, 861 P.2d 492 (1993). The written revocation clearly informed Mr. Kutch he was not licensed, privileged, or otherwise invited to be on the premises. RCW 9A.52.010(3). We conclude Mr. Kutch was sufficiently notified that he was no longer invited into the mall as a member of the general public.

90 Wn. App. at 248-49. Even assuming that the term "indefinite" standing alone did not clearly advise Kramer of the notice's term, a review of the trespass notice shows that the store advised Kramer that he was not permitted to enter a Fred Meyer store until he received a written revocation of the trespass notice from a manager or director. Kramer acknowledged reading the notice and he initialed this specific provision. In addition,

under *Kutch*, it is irrelevant whether the store provided Kramer with his own copy of this notice. 90 Wn. App. at 247-49.

Statement of Additional Grounds

Kramer also filed a Statement of Additional Grounds (SAG). He argues that when he committed the crimes on December 12 he was "complet[e]ly out of my mind loaded on meth" and that his attorney "refused to mention this during my trial." SAG at 1. He says he only intended to shoplift that day and had no intent to hurt anyone but "reacted poorly" because he was "in a crazy state of mind." SAG at 2.

The federal and state constitutions guarantee effective assistance of counsel. U.S. CONST. AMEND. VI; WASH. CONST. ART. I, § 22. An appellant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). To prove deficient performance, the defendant must show that counsel's performance "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688. "There is a strong presumption that counsel's performance was reasonable." *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *Kyllo,* 166 Wn.2d at 863. To satisfy the prejudice prong, the defendant must show that the outcome of the proceedings would have differed but for counsel's deficient performance. *State v. Grier,* 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Strickland,* 466 U.S. at 687.

Failure of defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy the ineffective assistance of counsel test. *State v. Tilton,* 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *State v. Thomas,* 109 Wn.2d 222, 226–29, 743 P.2d 816 (1987). A diminished capacity defense requires evidence of a mental condition that prevents the defendant from forming the requisite intent necessary to commit the crime charged. *Tilton,* 149 Wn.2d at 784. Similarly, an intoxication defense allows a jury to consider the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the requisite mental state. *Tilton,* 149 Wn.2d at 784; *State v. Kruger,* 116 Wn. App. 685, 693, 67 P.3d 1147 (2003), *review denied,* 150 Wn.2d 1024 (2003). (counsel's failure to request an instruction on voluntary intoxication amounted to ineffective assistance of counsel).

A jury may be instructed on voluntary intoxication[4] only if there is substantial evidence that the defendant's intoxication affected his ability to form the necessary mental state to commit the charged crime.[5] *State v. Gabryschak,* 83 Wn. App. 249, 252–53, 921 P.2d 549 (1996). Consequently, a defendant is entitled to an instruction on voluntary intoxication only if (1) a particular mental state is an element of the crime, (2) there is substantial evidence the defendant was intoxicated, and (3) there is

[4] This includes not only alcohol intoxication but impairment from drug use. *State v. Hackett*, 64 Wn. App. 780, 785, 827 P.2d 1013 (1992).

[5] RCW 9A.16.090 provides, "[n]o act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her 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 or her intoxication may be taken into consideration in determining such mental state."

substantial evidence that the intoxication affected the defendant's ability to form the required mental state. *State v. Gallegos,* 65 Wn. App. 230, 238, 828 P.2d 37 (1992), *review denied,* 119 Wn.2d 1024 (1992). Evidence of drinking or drug use alone is insufficient. There must be substantial evidence of the effects on the defendant's mind or body. *Gabryschak,* 83 Wn. App. at 253. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Share,* 106 Wn.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed,* 479 U.S. 1050 (1987).

Here, Kramer fails to identify facts in the record that would have supported a request for a voluntary intoxication instruction. In fact, the victim of his attack, David Morrison, testified that Kramer acted calmly while he was in the store. Morrison also testified that Kramer did not appear to be under the influence at the time of the attack and, although Kramer appeared angry, there did not appear to be anything "wrong" with him. RP at 8. (Kramer looked shocked after the attack and yelled to bystanders to get away from him). In contrast, in *Kruger,* this court reversed the defendant's conviction for assaulting an officer when his attorney failed to request a voluntary intoxication instruction. 116 Wn. App. at 695. In that case and unlike here, however, there was substantial evidence that the defendant was "highly intoxicated" and that his extreme level of intoxication affected his mind and body. *Kruger,* 116 Wn. App. at 689, 692. For example, he slurred his speech, swung a beer bottle at a police officer, head butted the officer, vomited, and experienced a "blackout." *Kruger,* 116 Wn. App. at 689, 692. Every witness testified to his level of intoxication. *Kruger,* 116 Wn. App. at 693.

To the extent that Kramer's argument regarding the intoxication defense depends on private conversations with his attorney or on other facts outside the record, this court will not consider it on direct appeal.[6] Accordingly, it is hereby

ORDERED that this court's motion on the merits to affirm is granted.

DATED this 20th day of June, 2014.

Aurora R. Bearse
Court Commissioner

cc: John Hays
James Smith
Hon. Michael Evans

[6] "If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." *State v. MacFarland,* 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "[R]emanding for expansion of the record is not an appropriate remedy." *MacFarland,* 127 Wn.2d at 338.

TO: The court

Coyote Ridge correction center no long offers the privilage of typeing Legal work. So please accept this petition for review, paper and pen are my only optdon

adrian Kearney