72168-2

FILED
April 1, 2015
Court of Appeals
Division I
State of Washington

NO. 72168-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW DEMPSEY,

Appellant.

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

The Honorable LeRoy McCullough, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ASSIGNMENT OF ERROR

1. Counsel was ineffective for failing to request a jury instruction supporting the defense of lack of intent due to intoxication.

Issue Pertaining to Supplemental Assignment of Error

1. Appellant's defense at trial was that he lacked the requisite intent to commit the charged crime because he was high on methamphetamine. Was counsel constitutionally ineffective for failing to request a voluntary intoxication instruction?

B. SUPPLEMENTAL STATEMENT OF THE CASE

Defense counsel did not request a voluntary intoxication instruction. See CP 18-39; 6RP 182-95.

In closing, the State argued, "But, you know, also if he was using on that day, so what? So what? There are lots of people who mix intoxicants and sexual intercourse, lots of people." 7RP 29. The State continued, "When you go back and you look at the instructions again; and you go read through them, look for the place where it says it's a defense to be under the influence of methamphetamine. You will not find it, because it is not a defense." 7RP 29.

However, one of Dempsey's primary defenses was that he lacked intent to rape J.M. because he was high on methamphetamine. For instance, Dempsey's counsel began closing argument by stating, "on

September 29th, 2012, Mr. Dempsey was not a child rapist. He was not a sex offender. He was a homeless person in the throws of a serious addiction to methamphetamines." 7RP 32.

Counsel repeatedly emphasized the State had to prove Dempsey intended to have sexual intercourse with J.M. 7RP 44-45. But counsel pointed out that all the State "can offer is [J.M.'s] testimony about a semi-erect penis . . . That's it." 7RP 45. Counsel continued, "the fact that Mr. Dempsey's pants are down is just as consistent with the idea that he was startled from some sort of drug stupor, slammed open the door, and came at [J.M.] because of some sort of hyper-vigilance or paranoia." 7RP 46.

Then, in response to the State's closing, defense counsel explained,

> The State says, so what if Mr. Dempsey was using. Show me where in the jury instructions it says that being high on methamphetamines is a defense to this kind of crime.
>
> Well, it's a defense to this kind of crime because the State bears the burden of proving what was going on inside Mr. Dempsey's head at the time of this incident. And we all know, from the testimony that we heard from the witnesses, that a person on methamphetamines experiences certain symptoms that Mr. Dempsey was demonstrating at the time of his arrest in this case. And we all know, from Deputy Ostrum, that that includes hyper vigilance and paranoia.
>
> And we know from [J.M.] that what Mr. Dempsey was saying to him doesn't make sense in the context of an attempt to rape the child. But does make sense in the

> context of someone who's having some kind of paranoid moment at that moment in time.
>
> The bottom line is, it does affect what's going on inside someone's head. It is relevant to the question of what was going on inside Mr. Dempsey's head. And the State has to prove what was going on inside Mr. Dempsey's head at the time of this incident. And we don't know what was going on inside Mr. Dempsey's head. But we certainly have a reasonable explanation that fits more consistently with the evidence before you, than the State's effort to turn this into a sexual offense.

7RP 47-48. Counsel again emphasized Dempsey did not intend to rape J.M. because he was "high" and "[c]learly not functioning properly." 7RP 56. Based on this theory, counsel asked the jury to convict on the drug possession charge and acquit on the attempted rape charge. 7RP 57.

C. SUPPLEMENTAL ARGUMENT

COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO REQUEST A VOLUNTARY INTOXICATION INSTRUCTION.

Dempsey was entitled to jury instructions on the law supporting his defense that he lacked intent to rape J.M. because he was high on methamphetamine. By relying on this defense without proposing instructions to inform the jury of the supporting law, counsel performed deficiently, and that deficient performance prejudiced Dempsey. This Court should reverse Dempsey's conviction because he was deprived his constitutional right to effective assistance of counsel.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

1. Dempsey Was Entitled to the Voluntary Intoxication Instruction.

The defense is entitled to a jury instruction on its theory of the case when that theory is supported by substantial evidence. State v. Kruger, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003). Evidence of intoxication and its effect may be used to negate the element of intent. RCW 9A.16.090; State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982). The standard voluntary intoxication instruction provides:

> 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).

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.10, at 282 (3d ed. 2008). "Intoxication" means "an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug." State v. Dana, 73 Wn.2d 533, 535, 439 P.2d 403 (1968) (emphasis added).

The trial court must instruct on voluntary intoxication when (1) the charged crime includes a mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence the intoxication affected the individual's ability to form the requisite intent or mental state. Kruger, 116 Wn. App. at 691. A trial court's refusal to give a proffered voluntary intoxication instruction is reversible error when these three elements are met. State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

In evaluating whether substantial evidence supports a defense-proposed instruction, the court must interpret the evidence "most strongly" in the defendant's favor and "must not weigh the proof, which is an exclusive jury function." State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005).

The first element is met here. Second degree child rape does not require a particular mental state. RCW 9A.44.076. However, "[a] person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward

the commission of that crime." RCW 9A.28.020(1) (emphasis added). Thus, attempted child rape requires intent. State v. Wilson, 158 Wn. App. 305, 317, 242 P.3d 19 (2010).

The second element is also met here. Numerous witnesses testified that Dempsey was high on methamphetamine. J.M. thought Dempsey looked like he was on drugs. 6RP 55, 142. Carlson said Dempsey looked "higher than a kite," with dilated eyes, despite the bright lights in the store. 5RP 179, 183-84. Miller thought Dempsey was high, due to his disorganized, undressed state, as well as thrashing around as several men held him to the ground. 2RP 196. Detective Ostrum said the same. 3RP 191-92; 4RP 23. Detective Elias testified Dempsey's wet clothes were consistent with methamphetamine use, because the drug can cause profuse sweating. 4RP 44-47; 6RP 55. Detective Preibe-Olson said Dempsey appeared high on methamphetamine, because he was agitated and twitchy, with sores on his body. 6RP 54-55. Dempsey was also in possession of methamphetamine and several hypodermic needles. 2RP 58-61; 3RP 157-58, 193-95; 4RP 138. A store employee recalled one of the needles was missing a cap as though it had been used. 3RP 58-59, 73. Viewing all this in Dempsey's favor, there is substantial evidence of his intoxication from methamphetamine.

Lastly, the third element is met. The case law is inconsistent on this factor. State v. Walters, 162 Wn. App. 74, 283, 55 P.3d 835 (2011). For instance, an intoxication instruction was necessary where the defendants drank beer all day, ingested several Quaaludes, spilled beer and were uncoordinated while playing ping pong, and one of them felt no pain when he was hit by a car. Rice, 102 Wn.2d at 122-23. By contrast, Gabryschak was not entitled to an instruction where he was obviously intoxicated and angry, but there was no sign of the alcohol's impact on his reasoning abilities. State v. Gabryschak, 83 Wn. App. 249, 253-55, 921 P.2d 549 (1996). Similarly, Priest's intoxication did not affect his mental state where he was able to operate a motor vehicle, communicate with a state trooper, purposefully provide false information, and attempt to reduce his charges by becoming an informant. State v. Priest, 100 Wn. App. 451, 455, 997 P.2d 452 (2000).

Comparing these cases, the Walters court concluded that "physical manifestations of intoxication provide sufficient evidence from which to infer that mental processing also was affected, thus entitling the defendant to an intoxication instruction." 162 Wn. App. at 283.

Several facts recited above are physical manifestations of Dempsey's intoxication, such as his disorganization, thrashing, dilated eyes, sweating, and twitchiness. In addition, Ward said Dempsey just

stared at her and looked confused when she stormed into the bathroom and asked him what he was doing with J.M. 4RP 91. When Dempsey exited the restroom, he moved slowly, as if in a stupor. 3RP 129-31. Kallstrom thought it was odd he was moving so slowly instead of running out of the store. 3RP 131. Carlson described Dempsey as being "off in another world." 5RP 183-84. Several witnesses also said Dempsey's genitals were still exposed after he left the bathroom, suggesting he did not have the wherewithal to cover himself. 2RP 81, 196; 5RP 87.

It also took several store employees to wrestle Dempsey to the ground. 2RP 125-26, 3RP 55-59. Even with all the people holding him down, Dempsey struggled and thrashed, and even bit one of them. 2RP 78, 135; 3RP 31-32; 5RP 195. Dempsey showed no sign of pain while being pinned to the ground, another indication of intoxication. Nor did he attempt to explain his actions or attempt to communicate with anyone. All of these are physical manifestations of intoxication, rather than fear of being arrested for attempted rape.

The record reflects substantial evidence of Dempsey's intoxication. And there is ample evidence of the methamphetamine's effect on his mind and body. He was entitled to the voluntary intoxication instruction.

2. Counsel's Deficiency in Failing to Request the Instruction Prejudiced the Outcome of Dempsey's Trial.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. If counsel's conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

Counsel is constitutionally ineffective for failing to request jury instructions on the law supporting the defense theory. See, e.g., Thomas, 109 Wn.2d at 229 (failure to request voluntary intoxication instruction); State v. Kruger, 116 Wn. App. at 688 (same); see also State v. Powell, 150 Wn. App. 139, 155-57, 206 P.3d 703 (2009) (failure to request reasonable belief instruction). For instance, in Kruger, the court held counsel to be ineffective for failing to request a voluntary intoxication instruction where there was substantial evidence of Kruger's intoxication. 116 Wn. App. at 692-93. Because the defense theory was lack of intent, the court concluded there was no strategic reason for not requesting the instruction.

Id. at 693-94. Prejudice resulted because "[e]ven if the issue of Mr. Kruger's intoxication was before the jury, without the instruction, the defense was impotent." Id. at 694-95. Reversal was required. Id. at 695.

Similarly, the Walters court held lack of a voluntary intoxication instruction to be prejudicial: "[d]espite the absence of the instruction, the parties in closing argued whether or not Mr. Walters was too drunk to act intentionally. This strongly suggests that the error was not harmless because the jury lacked direction on how to apply the intoxication information to the law." 162 Wn. App. at 84.

In Rice, the jury was not instructed that intoxication could be considered in determining whether the defendants acted with the mental state essential to commit felony murder. 102 Wn.2d at 123. "Consequently, the jury, without the requested instruction, was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory of an intoxication defense." Id. The court concluded that a properly instructed jury "could well have returned a different verdict." Id.

In Powell, the court also reversed for ineffective assistance where counsel failed to request instructions on a "reasonable belief" defense. 150 Wn. App. at 142. Powell was charged with rape of a woman who was incapable of consent by reason of being physically helpless or mentally

incapacitated. Id. The defense argued Powell reasonably believed the young woman was neither incapacitated nor helpless. Id. at 142, 149. Because several witnesses testified the young woman did not appear intoxicated, the court held that a reasonable belief instruction would likely have been given if requested. Id. at 154-55.

The Powell court rejected the idea that there might be a tactical reason for failing to request an instruction supporting this defense:

> [W]e are aware of no objectively reasonable tactical basis for failing to request a "reasonable belief" instruction when (1) the evidence supported such an instruction; (2) defense counsel, in effect, argued the statutory defense; and (3) the statutory defense was entirely consistent with the defendant's theory of the case.

Id. at 155. The court therefore held the failure to request the instruction was deficient performance. Id.; see also In re Pers. Restraint of Hubert, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007) (same).

At Dempsey's trial, there was no real dispute that Dempsey grabbed J.M. in the bathroom, that his penis was visible and partially erect, and that he possessed methamphetamine. As such, the focus of the defense was Dempsey's lack of intent due to his intoxication. This is clear from defense counsel's closing and the repeated emphasis on Dempsey's altered state of mind. 7RP 47-48. Numerous witnesses testified Dempsey was high on methamphetamine, and his actions demonstrated his

substantially impaired judgment. Furthermore, Dempsey admitted to methamphetamine possession—his counsel asked the jury to find him guilty on that count, but acquit on attempted rape. 7RP 57. A voluntary intoxication instruction would be entirely consistent with this approach. There was no legitimate strategic or tactical reason for counsel's failure to request a voluntary intoxication instruction.

This is not a case like State v. Perez, where the court held it was not ineffective to fail to request instruction on an affirmative defense because the defense bears the burden of proof on affirmative defenses. 166 Wn. App. 55, 62, 269 P.3d 372 (2012). By contrast, voluntary intoxication negates the element of intent. Carter, 31 Wn. App. at 575. When a defense negates an element of an offense, due process requires the State bear the burden of disproving the defense beyond a reasonable doubt. State v. Deer, 175 Wn.2d 725, 734, 287 P.3d 539 (2012). Thus, there was no legitimate tactical reason to rely on an intoxication defense without requesting a jury instruction, because there would have been no additional burden of proof.

Considering the State's and defense counsel's closing arguments, the prejudice from lack of instruction is plain. The State argued it was no defense that Dempsey was high on methamphetamine. 7RP 29. The State even encouraged jurors to reread their instructions and "look for the place

where it says it's a defense to be under the influence of methamphetamine." 7RP 29. The State asserted, "You will not find it, because it is not a defense." 7RP 29.

Defense counsel was then left attempting to rebut this argument: "Well, it's a defense to this kind of crime because the State bears the burden of proving what was going on inside Mr. Dempsey's head at the time of this incident." 7RP 47-48. Likewise, counsel asserted, "The bottom line is, it does affect what's going on inside someone's head. It is relevant to the question of what was going on inside Mr. Dempsey's head. And the State has to prove what was going on inside Mr. Dempsey's head at the time of this incident." 7RP 48.

Without the intoxication instruction, the jurors were not correctly apprised of the law. They may well have believed the prosecutor that intoxication was not a defense. However, the defense "is entitled to a correct statement of the law and should not have to convince the jury what the law is." Thomas, 109 Wn.2d at 228. With the instruction, the jurors would have known they could consider Dempsey's intoxication in determining whether he acted with intent to rape J.M. They would have had direction on how to apply the intoxication evidence to the law. Defense counsel also would have been able to effectively argue the lack of

intent theory by pointing to the intoxication instruction. This would have soundly rebutted the State's assertion that intoxication was not a defense.

The lack of instruction was further prejudicial given the minimal evidence regarding Dempsey's intent to rape J.M. The evidence showed his penis was partially erect when he grabbed J.M. and told him he would kill him. However, the evidence also showed Dempsey never made any sexual demands of J.M. or touched J.M.'s private parts. Dempsey was also missing the button on his pants, suggesting his pants may simply have been falling down, rather than implying his sexual motivation. 4RP 41. Given this conflicting evidence, the jurors may well have acquitted had they been properly instructed on voluntary intoxication.

Counsel's deficiency in failing to request a voluntary intoxication prejudiced the outcome of Dempsey's trial. Reversal is required. Kruger, 116 Wn. App. at 695.

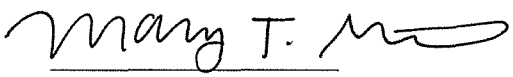
D. CONCLUSION

Dempsey asks this Court to reverse his convictions and remand for a new trial because his counsel was constitutionally ineffective for failing to request a voluntary intoxication instruction.

DATED this 1st day of April, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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

STATE OF WASHINGTON	)	
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Respondent,	)	
	)	
vs.	)	COA NO. 72168-1-I
	)	
ANDREW DEMPSEY,	)	
	)	
Appellant.	)	

CORRECTED DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1ST DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] ANDREW DEMPSEY
DOC NO. 373553
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA,WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF APRIL 2015.

X Patrick Mayovsky