

63767-3

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No. 63767-3-1

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

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STATE OF WASHINGTON,

Respondent,

v.

TINEIMALO V. TAUA,

Appellant.

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COURT OF APPEALS  
DIVISION ONE  
CLERK

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

The Honorable Jay V. White

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE FOR FAILING TO PROPOSE AN INSTRUCTION ON VOLUNTARY INTOXICATION, WHEN THE UNCONTROVERTED TESTIMONY ESTABLISHED MR. TAUA WAS EXTREMELY INTOXICATED AT THE TIME OF THE ROBBERY.

“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). Here, defense counsel did not request a voluntary intoxication instruction even though Mr. Taua testified he was drinking heavily immediately prior to the second robbery and was so intoxicated that he did not realize he was at the same store as the previous evening, he had no intention to rob the store, and his intoxication significantly clouded his awareness of the events around him. 5/18/09 RP 329-30, 346-48, 352. In light of Mr. Taua’s acknowledgement that he was present during the incident and took beer, there was no conceivable strategic or tactical reason not to request the instruction. The only issue at trial was his mental state. Without the instruction, however, the jury had no guidance for evaluating the effect of his intoxication on his ability to form the requisite intent. Therefore, defense counsel’s failure to propose a jury instruction on

voluntary intoxication was deficient and prejudicial, in violation of Mr. Taua's constitutional right to effective assistance of counsel, and requires reversal of Count I. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (reversal due to ineffective assistance required when counsel's performance was deficient and the deficient performance was prejudicial to the defense).

The State's argument that Mr. Taua's testimony was either uncorroborated or refuted is contrary to the video evidence. See Br. of Resp. at 10. The store's surveillance video showed Mr. Taua wandering around the store while two other men took cash and cigarettes from behind the cashier's counter. Ex. 2 (Surveillance video "b"). After several minutes, he grabbed a case of beer from a cooler and left the store, followed shortly thereafter by the other men. 5/18/09 RP 360; Ex. 2 (Surveillance video "b"). Mr. Taua's oddly detached behavior is entirely consistent with his testimony regarding his extreme intoxication.

The State's argument that Mr. Taua did not testify that he was impaired or that his conduct was the result of intoxication is simply incorrect. See Br. of Resp. at 13-14. Mr. Taua testified:

Q. Were you intoxicated that night?

A. I was intoxicated.  
Q. Did you know that the store that you were in on November 7<sup>th</sup> was the same one that you had been in the night before?  
A. I was not aware that was – it was the same store. I wasn't aware of.

5/18/09 RP 330.

Further, Mr. Taua testified:

Q. So, now, on November 7<sup>th</sup>, you came back to the same store?  
A. That time, when they picked me up from the house, I was intoxicated. I was –  
Q. Who picked you up?  
A. The codefendant.  
Q. And what is his name?  
A. That is Mr. \*mom ma a Kay lay a POO [sic].  
Q. Ma may a?  
A. Yes.  
Q. Okay. So, when his picked you up on November 7<sup>th</sup>, you were drunk?  
A. Yes.  
Q. How much had you had to drink?  
A. I had a bottle of Jack Daniels. Six to 11, I think.  
Q. Six to 11?  
A. Yes.  
Q. And that's four to five beers?  
A. Yes.  
Q. And how do you know that you were intoxicated?  
A. Because I'm an alcoholic.  
Q. Okay. But how do you know that you were intoxicated?  
A. Because I was drinking that day.  
Q. Okay. So every time you drink, you're intoxicated?  
A. Well, I – I get intoxicated if I drink, when I drink.

Q. Okay. After Mr. \*ma may a [sic] picked you up, did you drink anything else before you got to the 7-Eleven?

A. Yes. They had a bottle of whiskey with them in the car.

Q. And how much of that did you drink?

A. A half a bottle.

5/18/09 RP 346-48.

Finally, Mr. Taua testified:

A. And, at that time, I was really intoxicated. I was not in my right mind.

5/18/09 RP 352.

Contrary to the State's argument, the absence of evidence that Mr. Taua exhibited a lack of coordination or was in an alcohol-induced blackout does not refute his testimony regarding intoxication. See Br. of Resp. at 11, 12, 14.

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

*State v. Gabryschak*, 83 Wn. App. 249, 254, 921 P.2d 549 (1996).

The State seems to misunderstand the voluntary intoxication defense when it asserts that the evidence that Mr. Taua grabbed the store clerk and took the beer established that he was "very

oriented to his task at hand.” See Br. of Resp. at 11. Voluntary intoxication is relevant only to assess whether a defendant had the requisite *mens rea*, not to whether the defendant committed the *actus reus* for a given offense. See *State v. Coates*, 102 Wn.2d 882, 889-90, 735 P.2d 64 (1987) (“[E]vidence of intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability.”).

In closing argument, defense counsel argued that Mr. Taua was too intoxicated to form the requisite mental state.

[T]he focus of my closing argument is really on intent, and that’s basically because you have to listen very carefully to what the defendant said, and what the defendant was this, essentially. “Yes, I was there. Yes, I went into the store. On November 7<sup>th</sup>,” meaning the second night, “I was extremely intoxicated.”

5/18/09 RP 404. He further argued:

But I would ask you to remember what was in the videotape during this time and what Mr. Taua is doing, particularly on the second night. What he does make any sense? He’s sort of wandering around the store aimlessly. That is someone I would suggest who is not thinking in his right mind.

5/18/09 RP 405. Yet, without an instruction on voluntary intoxication, the jury had no way to understand the legal

significance of that intoxication. As the Washington Supreme Court has noted:

The jury was not instructed that intoxication could be considered in determining whether the defendants acted with the mental state required to commit the crime of felony murder. Consequently, the jury, without the requested instruction, was not correctly apprised of the law, and the defendant's attorneys were unable to effectively argue their theory of an intoxication defense.

*State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

The State concedes that the failure to request a voluntary intoxication instruction "may be considered a manifest error affecting a constitutional right." Br. of Resp. at 15. Constitutional errors are presumed prejudicial and the State bears the burden of affirmatively proving the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *Rice*, 102 Wn.2d at 123. The State cannot meet its burden in this case. Mr. Taua testified that he was extremely intoxicated and not in his right mind. 5/18/09 RP 330, 346-48, 352. Defense counsel relied on that testimony in arguing to the jury that Mr. Taua did not have the requisite mental state to commit the second robbery. 5/18/09 RP 404, 405. If the jury had been properly instructed, it might well have returned a different verdict.

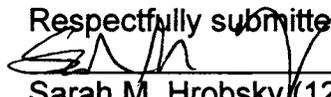
Mr. Taua's diminished capacity due to voluntary intoxication was a central part of the defense theory of the case that was critically undermined by the lack of a pertinent jury instruction. Defense counsel's failure to request the instruction was deficient and extremely prejudicial. Reversal is required.

B. CONCLUSION

"Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial." *State v. Hubert*, 138 Wn. App. 924, 932, 159 P.3d 1282 (2007). Defense counsel's failure to request a voluntary intoxication instruction was a manifest error of constitutional magnitude. The State cannot prove that the error was harmless. For the foregoing reasons and for the reasons set forth in the Brief of Appellant, Mr. Taua respectfully requests this Court reverse his conviction for robbery in the first degree, as charged in Count I, and remand for a new trial.

DATED this 18<sup>th</sup> day of May 2010.

Respectfully submitted,

  
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19<sup>TH</sup> DAY OF MAY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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KING COUNTY PROSECUTOR'S OFFICE  
APPELLATE UNIT  
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U.S. MAIL  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 19<sup>TH</sup> DAY OF MAY, 2010.

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