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Court of Appeals
Division I
State of Washington

NO. 73923-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

LEROY C. RUSSELL,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUE

(1) Did defense counsel have valid tactical reasons for foregoing a defense of involuntary intoxication, where such defense was unlikely to be successful and would have led to the introduction of damaging evidence?

(2) If that decision is considered deficient, has the defendant shown that raising such a defense would have changed the result of the trial?

II. STATEMENT OF THE CASE

The defendant, Leroy Russell, was originally charged with one count of felony harassment. CP 75. The State accused the defendant of approaching two separate groups of people in quick succession and making threats to shoot and kill someone from both groups. When two police officers responded to investigate, the defendant threatened to kill the officers and their families as well. CP 72-73.

A. CrR 3.5 HEARING.

The Court held a CrR 3.5 hearing to determine the admissibility of the defendant's statements. 7/24/15 RP 3. The defendant testified at the 3.5 hearing. He explained that he initially refused to comply with the officer's demand that he tie up his dog

because the officer did not give him a reason. He then complied by wrapping the dog's leash around a telephone pole. 7/24/15 RP 20-21, 26. He remembered being very concerned about what would happen to his dog after his arrest, and that Officer Olsen could not give him a definite answer on the subject – only that the animal shelter might come and get it. 7/24/15 RP 24. The defendant never claimed that he consumed any intoxicating substances on the date of the incident, that intoxication affected his memory of the incident, or that he was intoxicated at all. 7/24/15 RP 18-28.

Officer Olsen testified that the defendant appeared “fairly heavily intoxicated,” yet he rejected the defense attorney’s suggestion that the defendant was confused about what was happening. 7/24/15 RP 14.

The court found that the defendant was “very intoxicated,” and discounted the credibility of his testimony in part because of that fact. 7/24/15 RP 48, 52. However, the court also found that all of the statements the defendant made to Officer Olsen were voluntary and therefore admissible at trial. The court noted that nothing “...would compel the defendant to have said any of those things or otherwise overcome his voluntariness.” 7/24/15 RP 58.

B. PRETRIAL MOTIONS.

On the first day of trial, July 27, 2015, the State filed a second amended information charging the defendant with one count of felony harassment (against the first victim Adrian Hammond), and two gross misdemeanor counts of attempted felony harassment for the threats made to Officers Olsen and Everett. CP 50.

Both parties briefed the viability of a voluntary intoxication defense. CP 68; __ CP __ (sub #21, State's Trial Memorandum at 5-9). Because the stated defense was general denial, the State moved to exclude argument that intoxication impacted the defendant's ability to form "the requisite mental state." __ CP __ (sub #21, State's Trial Memorandum at 9). The defense attorney clarified that voluntary intoxication was not her client's defense. RP 13. She explained:

The effects of alcohol are common sense and generally known. You don't need an instruction unless you are raising it as a defense that he was incapable of forming intent. Now, that is certainly not something I intend to argue. Whether it potentially affected his behavior, I think that is fair game, and the fact that all of the witnesses are in agreement that there were signs of impairment is something I am actually surprised that the State appears to be moving to suppress, because certainly alcohol can affect someone in a negative way in terms of their temper.

RP 13-14. The court essentially granted the State's motion in limine to prevent argument about whether alcohol affected the defendant's mental state. But the court also said,

To the extent that the defense seeks to cross examine witnesses about their ability to recall or perceive information based on intoxication, you are well within your right to do that. But with regard to arguing the effect of alcohol on your client, in my view if you're not seeking a voluntary intoxication instruction, you are not allowed to argue that somehow there is a mitigation for his behavior based upon alcohol intoxication.

RP 14-15. In response to this ruling the defense attorney moved to "exclude testimony from any witness in the absent of [the defendant] testifying that they felt in any way, shape, or form he was impaired or under the influence of any substance, including drugs or alcohol..."

RP 17. To alleviate the concerns of both the court and the State that the defendant would "sandbag" this ruling by testifying about his own impairment after the State's witnesses had been told to avoid the subject, defense counsel consulted with her client before agreeing not to ask the defendant about intoxication if he chose to testify. The defendant and his attorney agreed to this ruling, but first convinced the court to exclude any reference to the open alcohol container (a can of "Four Loko") in the defendant's truck. RP 18-19.

C. EVIDENCE PRESENTED AT TRIAL.

Adrian Hammond, and four or five of his friends were barbecuing and enjoying a fire outside his Everett home on May 8, 2015. One of his roommates had a large dog at the barbecue as well. RP 53-54. Mr. Hammond first noticed the defendant driving a black truck in front of his house. The truck was stopped in a turn lane, and in the back of the truck was a large dog. Instead of driving through to complete his turn, the defendant looked at the victim's group of friends and "sat there like he was in a daze." The two dogs began barking at each other, and Mr. Hammond became concerned that something was going to happen. The defendant then pulled his truck into the defendant's driveway while Mr. Hammond's roommate took his dog into the house and shut the door. Mr. Hammond remained on the porch, yelling at the defendant to leave. RP 56-59. The defendant stepped out of his vehicle and told the victim, "He was going to shed our blood. He was going to come back and kill us all." RP 62-63.

Mr. Hammond was afraid the defendant might kill him. He pushed his girlfriend inside the house because he didn't know what the defendant (who was unknown to them) was capable of. RP 64. He called 911. RP 66.

At some point Mr. Hammond saw the defendant again; this time he was on foot and walking towards Mr. Hammond's house. The defendant had his dog with him and intruded onto Mr. Hammond's property, coming to within 10 or 15 feet of him. The defendant's dog was barking and pulling at his chain. Mr. Hammond heard the defendant mumble some words that sounded like "sic 'em." The defendant again threatened to shoot and kill Mr. Hammond, causing him to fear for his safety. RP 66-70. After remaining on the victim's property for four or five minutes the defendant left on foot when he heard Mr. Hammond yell that he was calling the police. RP 71.¹

Officer Chris Olsen was the first officer to respond to Mr. Hammond's 911 calls. When he arrived he spoke with Mr. Hammond for 20-30 seconds to get a description of what happened. Mr. Hammond also pointed out the defendant, who was walking on the sidewalk about 100 feet south of Mr. Hammond's house. RP 222-223. Officer Olsen approached the defendant, who was

¹ As the defendant points out, Mr. Hammond's memory was inconsistent as to the order of events. See Br. App. 10, fn. 5. The prosecutor conceded this in closing argument, asserting that the true order of events was more credibly established by the 911 calls and the testimony of Mr. Hammond's roommate, Mr. Stout. RP 294-297. The order of events asserted by the prosecutor during closing argument was: (1) Russell pulled into the driveway, took a step out of the car and made threats; (2) Russell idled on the street; (3) Russell parked at Glacier Lanes and walked up with his pit-bull but Hammond and his friends had gone inside at that point. RP 324. See RP 163-169.

accompanied by his dog on a leash, and asked to speak with him. At first the defendant was "defiant" and tried to keep walking away, but Officer Olsen then told the defendant he was not free to go. The defendant came back to speak with Officer Olsen, who asked him to tie up his dog. The defendant did not immediately comply, but instead told the Officer he just wanted to leave because somebody had threatened him with a rifle. Officer Olsen repeated his command to tie up the dog, and the defendant eventually complied without difficulty. RP 224-226. The defendant acknowledged having a confrontation at Mr. Hammond's house, but claimed without further elaboration that he was the one who had been threatened. RP 227.

At that point Officer Everett arrived, and stood by with the defendant as Officer Olsen returned to speak further with Mr. Hammond. Mr. Hammond was specific that the defendant had threatened to shoot him multiple times, and to "cover the property in their blood." RP 235. However, because Mr. Hammond was not interested in pressing charges, Officer Olsen simply told the defendant to leave the area on foot, not by driving. RP 236.

The Officers maintained visual contact with the defendant as he walked away with his dog. The defendant walked further south and soon came across another group of people having a barbecue

or block party in a parking lot. Officer Olsen saw (but could not hear) the defendant interact with this group. The people attending this second barbecue appeared shocked and waved at Officer Olsen for assistance. He spoke to a second victim, Dominique King,² who said the defendant had just threatened to shoot him. RP 237-238.

Officer Olsen re-contacted the defendant and asked him to tie up his dog again. This time the defendant complied, but became "irate" when he was placed under arrest. The defendant called Officer Olsen derogatory names and said "he doesn't care if he has to do the time, he'll come after me." The defendant said he would kill both Officer Olsen and Officer Everett. RP 240. At first these threats didn't particularly bother Officer Olsen because he gets threatened "all the time" as a policeman, but the defendant became more persistent and specific after he was placed inside the patrol car. He told Officer Olsen how easy it was to look somebody up on the internet and find out where they live. RP 241-243. The defendant said he had nothing to lose, so when he got out of jail he was going to kill Officer Olsen and his family. At this point Officer Olsen became concerned. RP 244. Although Officer Olsen testified that the threats were directed at Officer Everett as well, who was standing by Officer

² Dominique King was not available for trial and did not testify. RP 4.

Olsen's side for the first 3 or 4 minutes of the defendant's outbursts, Officer Everett did not testify. RP 241-242.

The defendant's attorney argued in closing that the State failed to prove that the defendant intended to place either Mr. Hammond or the two officers in fear that they would be killed. RP 323-324. In doing so she cited the defendant's cooperative decision to waive his Miranda rights and speak with the officers, his consensual agreement to allow the officers to search his truck, and how it was reasonable for the defendant to be concerned about the welfare of his dog as the defendant was brought to jail. This behavior, she argued, was inconsistent with a person who intends to place others in fear of their lives. She contrasted this reasonableness with what she argued was a highly unreasonable victim in Mr. Hammond, and critiqued the investigation for not following up on the defendant's claim that Mr. Hammond was the only one issuing threats. RP 317-321.

D. VERDICT AND SENTENCING.

The jury was unable to reach a unanimous verdict on count one – felony harassment of Adrian Hammond. Instead they found the defendant guilty of the lesser included offense of gross misdemeanor harassment of Adrian Hammond. The jury convicted the defendant

as charged in count two – attempted felony harassment of Officer Olsen. Finally, the jury acquitted the defendant of count three – attempted felony harassment of Officer Everett. RP 334; CP 22-25.

At sentencing the defendant, who did not testify during the trial, told the trial court his version of the incident. He explained that he was under the influence of alcohol, but not enough to cause the police to give him a Breathalyzer or field sobriety testing. He said his intoxication “wasn’t an issue” with the police, “because they didn’t ask about it.” 7/30/15 RP 9. The defendant had driven to Everett from his home on Mercer Island in an effort to retrieve an important cell phone which had been taken from his roommate. He had the address written down but was not familiar with the area, so he was peering at addresses as he first drove by the victims. The address he was looking for was right behind the victims’ house. When Adrian Hammond and his group of friends started yelling at the defendant before he even got out of his vehicle, he thought the best approach “was to take the vehicle and park it and walk up to them and say, hey, is there a – is there possibly a way I could talk to so and so.” According to the defendant, Mr. Hammond and friends called him “some racial epithets,” which hurt him. He acknowledged “open[ing]

[his] mouth," but denied threatening to shed anyone's blood. 7/30/15
RP 5, 9-11.

Had the jury convicted the defendant as charged, he would have faced a felony conviction with a standard sentencing range of 4 to 12 months on count 1. __ CP __ (sub #35, State's Sentencing Memorandum at 2). Having been convicted of only two gross misdemeanors, the court imposed two concurrent 3 month terms of confinement which resulted in Mr. Russell's release from custody on the same day he was sentenced. CP 16-17; __ CP __ (sub #40, Return on Commitment at 1).

III. ARGUMENT

To prevail on a claim of ineffective assistance, the defendant must show that his trial counsel's representation was deficient, and that the deficiency prejudiced him. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.3d 1239 (1997) cert. denied, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. In re Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Appellate scrutiny of defense

counsel's performance is highly deferential and begins with a strong presumption of reasonableness. State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, the defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. Id.

Here, defendant argues that he was denied effective assistance of counsel because his attorney did not seek a voluntary intoxication defense. Br. App. 14-19. To obtain a jury instruction on voluntary intoxication, there must be some credible evidence that the defendant's drinking affected his ability to form the necessary mental state to commit the charged crime. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); State v. Gabryschak, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996). Specifically, a defendant must show (1) the charged crime has a specific mental state, (2) there is substantial evidence the defendant was drinking, and (3) evidence that the defendant's drinking affected his or her ability to form the required mental state. Gabryschak, 83 Wn. App. at 252; State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002). Evidence of drinking alone is insufficient; there must be substantial evidence of the alcohol's 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). Here, defendant has not shown that counsel's representation was deficient nor has he shown that he was prejudiced by counsel's performance.

1. The Defendant Was Not Entitled to a Voluntary Intoxication Instruction Because There Was No Evidence That His Intoxication Prevented Him From Acting With Knowledge.

The defendant's burden of establishing deficient performance can only succeed if the facts in the record would have supported a voluntary intoxication defense, for even the most competent counsel is constrained to present only those defenses supported by the facts. The State concedes, as it did in trial, that the first two prongs of the voluntary intoxication test have been met; the charged crimes require proof of a specific mental state (knowledge), and there was substantial evidence that the defendant appeared intoxicated during the incident. See RP 10-11. However, evidence of the third factor is simply absent from the record, as there is nothing but speculation to conclude that the defendant's intoxication rendered him incapable of acting knowingly.

"Knowingly" is a less serious form of mental culpability than intent. City of Spokane v. White, 102 Wn. App. 955, 961, 10 P.3d

1095 (2000). While intent requires proof of an objective or purpose to accomplish a specific result, knowledge simply requires proof that a defendant has basic awareness of facts and circumstances as they unfold. Compare RCW 9A.08.010(1)(a)(“intent”), with RCW 9A.08.010(1)(b)(“knowledge”). As applied to the crime of harassment as charged in this case, the State had to prove that the defendant was aware that his own words constituted a threat to kill another person. See CP 50.

The record simply does not support the defendant’s current assertion that his intoxication was so thorough as to deprive him of basic awareness that threatening words were coming out of his mouth. Numerous witnesses, and then the defendant himself at sentencing, established that he had basic awareness of his words and conduct. For example, his cognitive abilities were sufficient to navigate in his truck from Mercer Island to Everett with the specific plan of retrieving his roommate’s cellphone. 7/30/15 RP 5. This drive brought the defendant to Mr. Hammond’s home, immediately adjacent to the address he had written down. 7/30/15 RP 9-11. The defendant was sensitive to the fact that Mr. Hammond and his friends did not want his truck on their property, so he formulated a plan for inquiring about the woman he was looking for by approaching the

group on foot. 7/30/15 RP 10. Even though the defendant never specified the exact words he used to confront Mr. Hammond, he admitted that his words were the product of his own emotions after hearing racial epithets used against him. Id. All of these facts indicate a continuing cognitive process replete with knowledge and awareness, effectively destroying the viability of a voluntary intoxication defense. Further, the defendant's ability to recall these details in a sentencing hearing occurring more than two months after the incident shows that intoxication did not completely impair his memory, as one might expect from someone whose faculties are so compromised by alcohol that they are incapable of acting with knowledge.

The defendant's actions, as explained throughout the trial testimony, also showed a mental capacity for knowledge. The defendant complied with Officer Olsen's command to tie up his dog on two separate occasions. RP 225-226, 240. Although his compliance was not immediate in the first instance, the defendant's hesitation wasn't because he didn't understand the command or how to comply – it was because he would rather keep walking in order to move away from the people he said were threatening him. When he finally decided to comply, he did so without difficulty. RP 225-226.

The moment of the defendant's arrest provides additional insight in to the defendant's mental faculties. Getting arrested is a negative experience for everyone, and in the defendant's case he became "irate" when it happened to him. But neither anger nor intoxication blinded his mental processes; the defendant fully understood that his threat to kill Officer Olsen could result in his incarceration, but in his judgment the punishment would have been worth it. RP 240 ("Calling me a bitch, saying that, you know, he doesn't care if he has to do the time, he'll come after me."). Sometime later the defendant elaborated on his plan to kill Officer Olsen – he would wait until he was out of jail, then he would use the internet to look up where Officer Olsen lived, and finally, he would kill not just Officer Olsen but his family as well. RP 243-244. The defendant's post-arrest behavior showed multiple layers of foresight, planning, and an ability to predict the logical consequences of his actions. He was more than capable of acting with knowledge.

This Court has already affirmed a trial court's denial of a voluntary intoxication instruction under remarkably similar facts. State v. Gabryschak, 83 Wn. App. 249, 921 P.2d 549 (1996). In Gabryschak the defendant was arrested for assaulting his elderly mother and damaging her apartment. The defendant tried but failed

to escape police custody after his arrest, then persistently threatened that he would kill the arresting officer once he was released from jail. Id. at 251-252. In evaluating whether the trial court should have allowed the defendant's proposed voluntary intoxication instruction, it considered the evidence introduced at trial: one officer smelled alcohol on the defendant's breath and thought he "appeared to be intoxicated," while another officer said the defendant was "highly intoxicated." The defendant's mother said he was "intoxicated" and in her opinion too drunk to drive. Id. at 253. Yet this was not enough to satisfy the third prong of the test for voluntary intoxication— a nexus between intoxication and the inability to form the requisite mental state:

Nevertheless, we find no evidence in the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged. At best, the evidence shows that Gabryschak can become angry, physically violent, and threatening when he is intoxicated.

Id. at 254. Instead, the evidence in Gabryschak showed the defendant's awareness of what police were asking of him (allow access to his mother's apartment), awareness of his circumstances (under arrest), and awareness of his destination (jail). Id. at 254-255.

The evidence in this case is very similar. Although Officer Olsen thought the defendant was “fairly highly intoxicated,” there was no evidence about the defendant smelling of alcohol or having classic symptoms of intoxication like bloodshot, watery eyes, flushed face, or slurred speech. Although the defendant cites to a description of the defendant speaking “gibberish,” the context shows that the witness simply could not hear the defendant at all. See Br. App. 19; RP 187.³

Even though Officer Olsen warned the defendant not to drive, there is no evidence that his driving ability was actually impaired. He was able to follow directions from Mercer Island to Everett in order to find an address he had never been to before. Although there was one open can of “Four Loko” in the defendant’s truck, there was no evidence about how much the defendant drank on the date in question. See RP 18.

The defendant was aware that his arrest could put his dog in a precarious situation, and he displayed appropriate concern when he asked the officer what was going to happen to his dog. RP 257-

³ Adrian Hammond’s roommate, Mr. Stout, testified as follows: “I think he was trying to say something either to Lindsay or Adrian, and it was inaudible. If it was, it was gibberish. I couldn’t make out much of anything if he was trying to say anything at all.” RP 187.

259. He showed the same ability to predict future outcomes when he described his plan to look up Officer Olsen's home address in order to carry out his stated plan of killing him and his family once he was released from jail. These mental abilities demonstrate the same sort of awareness, or knowledge, that the Gabryschak court relied on in rejecting a voluntary intoxication defense. See Gabryschak, 83 Wn. App. at 255-256.

The defendant relies heavily on State v. Walters, a case where Division Three found the third voluntary intoxication prong satisfied through "physical manifestations of intoxication ... sufficient ... to infer that mental processing also was affected." See Br. App. At 18-19; State v. Walters, 162 Wn. App. 74, 83, 255 P.3d 835 (2011). But the facts in Walters make a much stronger case than this defendant for inferring mental incapacity from physical symptoms. In Walters the defendant had consumed at least nine alcoholic drinks, he had bloodshot and watery eyes, slurred speech, swayed back and forth when speaking with the officer, and showed immunity to pain compliance techniques. Walters, 162 Wn. App. at 82-83. The Walters court relied on another case with even more extreme facts. Id. at 83, citing State v. Rice, 102 Wn.2d 120, 122-123, 683 P.2d 199 (1984) (defendants consumed "beer all day" plus two to five

Quaaludes, could not hit a ping pong ball, and one of them was hit by a car but "was so loaded he didn't feel it.").

In contrast, the record in this case is silent on how much the defendant had to drink; even inferring that the defendant drank all of the alcohol for which physical evidence exists would mean he consumed no more than half of one "Four Loko" drink. None of the other classic physical manifestations of intoxication are apparent from the record. In fact, when the subject came up during the 3.5 hearing Officer Olsen disputed the suggestion that the defendant's intoxication made him confused during their encounter. 7/24/15 RP 14. The totality of the evidence confirms that defense counsel did not have a factual basis to obtain a voluntary intoxication instruction. It was not ineffective for the defense attorney to decline a defense which was unsupported by the record.

2. Even If Voluntary Intoxication Was Technically Available As A Defense, It Was A Legitimate Trial Strategy To Avoid It.

A criminal defendant can rebut the presumption of reasonable performance by demonstrating that "there is no conceivable legitimate tactic explaining counsel's performance." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). The court employs a strong presumption that counsel's conduct constituted sound

strategy. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Here, the defendant does not offer any potential strategies or tactics in order to then dispel their presumed efficacy, as is his burden. See Br. App. at 20-21. Instead he simply assumes that the decision was not tactical, yet declines to address the dual-edged danger confronted by the defendant's trial counsel – as she mildly stated for the record, “certainly alcohol can impact someone in a negative way in terms of their temper.” RP 14. She further estimated that the effects of alcohol are known to “90 percent of the jury, if not more.” RP 15. In other words, defense counsel knew that presenting the jury with a voluntary intoxication defense was just as likely to backfire in a case where three separate groups of people (two groups of citizens, one group of police officers) accused the defendant of threatening to kill them for no obvious reason. Alcohol consumption would have supplied at least some reason to explain the unexplainable, but any level of consumption short of complete mental incapacity would surely have backfired by making it even *more* likely that the defendant issued these irrational and angry threats. The defendant's attorney was wise to avoid this risky approach, and in fact managed to get all references to the defendant's alcohol consumption suppressed from the entire trial.

RP 17-19. Despite this significant achievement the defendant accuses his trial counsel of "want[ing] to elicit evidence of [his] intoxication." Br. App. 21. This assertion could not find less support in the record, which demonstrates that defense counsel's tactical and strategic decisions were well within the boundaries of reasonable performance. Defendant has not shown that counsel's representation fell below an objective standard of reasonableness.

3. Defendant Has Not Shown That The Result Would Have Been Different But For Counsel's Performance.

The defendant also has the burden to demonstrate that there is a reasonable probability that, except for counsel's ineffective assistance, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The mere possibility of prejudice is not sufficient to meet the burden of showing actual prejudice. State v. Norby, 122 Wn.2d 258, 264, 858 P.2d 210 (1993). Here again, defendant does not demonstrate prejudice, but simply speculates that "defense counsel's unwarranted concession and last-minute change of strategy no doubt led to Russell's convictions." Br. App. 21.

This sweeping allegation gives no credit to the defendant's trial counsel for achieving a result that was, when compared to the

strength of the evidence and the defendant's overall legal exposure, unquestionably a favorable result. Mr. Russell faced two felonies and two gross misdemeanors, which together alleged that he threatened to kill four people he didn't even know. CP 69-70. Thanks in part to his attorney's efforts at trial he was convicted of zero felonies and two gross misdemeanors, representing just two of the four alleged victims. CP 16-17. Instead of a 4-12 month jail sentence on a felony conviction, he was sentenced to 90 days and released on the day he was sentenced.

The defendant's speculative hindsight about what might-have-been does more than just a disservice to the efforts of his very experienced trial attorney. The defendant's trial attorney likely considered how a voluntary intoxication defense (along with the implicit confession to DUI required by that approach) would have swayed the jury's view of the evidence overall. Again, any intoxication falling short of a complete inability to act with knowledge would have supported a prosecution argument that the defendant was even more angry and prone to poor judgment *because* he was drunk, thereby providing a more cohesive narrative for a truly strange situation.

The defendant offers no analysis of this dynamic on appeal, instead assuming that a voluntary intoxication defense would have been a complete success. For example, the defendant assumes that the jury would have doubted “whether he understood his threats would be perceived as true threats.” Br. App. 22. This argument fails to acknowledge that such evidence could only come from the defendant himself – anyone else would be speculating about what he understood at the time. But if the defendant testified the jury would have learned of his 2008 Forgery conviction, and potentially others as well. RP 33; CP 73; ER 609. Even if the jury did not hold his prior convictions against his credibility, the defendant’s potential testimony would have been limited by the truth; as he explained to the judge at sentencing, he not only remembered the entire incident, he acknowledged speaking out in anger after being insulted with racial epithets. 7/30/15 RP 10. Had the defendant testified consistent with those remarks, he would have confirmed (not destroyed) the State’s theory that he maintained an ability to act and speak with knowledge despite his intoxication.

Defendant’s ineffective assistance argument fails under both prongs. See Strickland v. Washington, 466 U.S. 668, 678, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Consequently, defendant has

not established ineffective assistance of counsel in violation of the Sixth Amendment or Article 1, § 22.

IV. CONCLUSION

For the reasons stated above, the State respectfully asks this Court to affirm the defendant's convictions.

Respectfully submitted on July 8, 2016.

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

THE STATE OF WASHINGTON,

Respondent,

v.

LEROY C. RUSSELL,

Appellant.

No. 73923-9-I

DECLARATION OF DOCUMENT
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 8th day of July, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Dana Nelson, Nielsen, Broman & Koch, nelsond@nwattorney.net; and Sloanej@nwattorney.net.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of July, 2016, at the Snohomish County Office.



Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office