

NO. 42010-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN DAVID WILES,

Appellant.

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STATE OF WASHINGTON  
BY                       
DEPUTY

FILED  
COURT OF APPEALS  
DIVISION II

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

The Honorable Linda CJ Lee

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BRIEF OF APPELLANT

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pm 12/2/11

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to effective assistance of counsel where defense counsel failed to request a jury instruction on voluntary intoxication.

2. The trial court abused its discretion in refusing to hear appellant's motion for arrest of judgment at sentencing.

Issues Pertaining to Assignments of Error

1. Was defense counsel ineffective in failing to request a jury instruction on voluntary intoxication where the evidence supported appellant's defense that he lacked the knowledge necessary to commit the crime due to intoxication?

2. Did the trial court abuse its discretion by refusing to hear appellant's motion for arrest of judgment in violation of his constitutional and statutory rights to be heard at sentencing?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

On November 9, 2010, the State charged appellant, John David Wiles, with one count of domestic violence court order violation. CP 1. The State amended the information on March 8, 2011, charging Wiles

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<sup>1</sup> There are six volumes of verbatim report of proceedings: 1RP - 02/17/11; 2RP - 03/08/11; 3RP - 03/09/11; 4RP - 03/10/11; 5RP - 03/14/11; 6RP - 04/15/11.

with one count of domestic violence court order violation, alleging that he was under community custody at the time of the violation and had two previous convictions for violating court orders. CP 7-8. Following a trial before the Honorable Linda CJ Lee, on March 14, 2011, a jury found Wiles guilty as charged. CP 60-61. The court sentenced Wiles to 40 months in confinement and 12 months of community custody. CP 75-88. Wiles filed a timely notice of appeal. CP 72.

2. Substantive Facts

a. Trial

On November 8, 2010, Marlon Hall was living with Jumapili Ikuscheghan at 5847 South Lawrence Street in Tacoma. 3RP 81. They came home about 6 p.m. and found the place in disarray which prompted Hall to call 911 because he thought someone had broken into the house. 3RP 83-84. As Hall got off the phone, Ikuscheghan came in from the backyard. 3RP 84. The 911 operator had instructed him to wait outside in case the intruder was still in the house so they waited in front of the house until the police arrived. 3RP 86.

Officer Jared Williams was dispatched to the house to investigate a report of a male inside the home or garage with a weapon. 3RP 94-96. Williams and several other officers searched the entire house but did not find anyone inside. A SWAT team arrived thereafter and they waited until

the SWAT team told them that a man in the garage was taken into custody. 3RP 96-97, 100-01. Then Williams inspected the garage where he found a BB gun and he saw a reclining chair and television amidst numerous empty beer cans, "so it looked like someone's area to go relax and watch TV." 3RP 101-02.

Officer Jared Tiffany, a member of the SWAT team, was directed to drive an armored truck to the scene. 3RP 106. After he arrived, another unit of the SWAT team drove the truck down an alley facing the door of the garage, turned on the spotlight, and used the PA system to identify themselves and order the suspect to come out. 3RP 110-11. Tiffany saw Wiles come out "kind of stumbling, hands up in the air. He appeared confused. Didn't really seem to know what was going on. He was compliant." 3RP 111. Officer Gary Roberts and another member of the SWAT team took Wiles into custody without incident and turned him over to patrol officers. 3RP 120, 122.

Jumapili Ikuscheghan, who was previously married to Wiles, acknowledged that she was aware of a no-contact order against Wiles. 3RP 72-73. On the day of the incident, she had been drinking and was intoxicated when the police arrived. 3RP 74-75. Ikuscheghan could not remember if she saw Wiles at her house but recalled that when the police

asked her about Wiles, she said if he was there, he would be in the garage. 3RP 75-77. She never talked to Wiles that day. 3RP 80.

Investigating Officers Steven O'Keefe and Teresa Antush were called as impeachment witnesses. O'Keefe testified that Ikuschegan told him, "He's in the back. Go get him," and when he asked her who was in the back, she said, "My ex, John." 4RP 161. Antush testified that Ikuschegan said she came home and found Wiles sitting in the garage in a chair and he told her, "I went crazy," and began to cry. 4RP 174-75.

John Wiles testified in his defense and acknowledged that he was aware of the no-contact that was in effect the day he was at Ikuschegan's house. 4RP 186-87. Wiles explained that he and Ikuschegan bought the house together and he made major renovations and improvements to the home but he was no longer a legal owner. 4RP 190, 193. Although the no-contact order prohibited him from having contact with Ikuschegan, when she was not at the house, he would go there for repairs and maintenance work which did not violate the order. 4RP 190-92.

Wiles admitted that he was an alcoholic. 4RP 189. On the day of the incident, he took a bus to Tacoma to meet a friend who was delayed so he stopped at a bar and started drinking. 4RP 195, 199. Wiles could not remember when he left the bar or how he ended up at Ikuschegan's house.

He could only recall waking up on the floor of the garage when he heard the police on the PA system then realized where he was. 4RP 199-201.

The court informed the jury that the parties stipulated and agreed that Wiles had two previous convictions for violating domestic violence court orders. 3RP 60-61.

b. Sentencing.

Prior to sentencing, the court acknowledged that defense counsel and Wiles had filed separate motions for arrest of judgment. 6RP 243-44. Then the court stated that it would not address the motion Wiles filed himself because “he is represented by counsel.” 6RP 246. The court proceeded to hear argument on defense counsel’s motion for arrest of judgment based on insufficient evidence and denied the motion. 6RP 247-53.

C. ARGUMENT

1. WILES WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL FAILED TO REQUEST A JURY INSTRUCTION ON VOLUNTARY INTOXICATION WHERE THE EVIDENCE SUPPORTED AN INSTRUCTION.

Reversal is required because Wiles was denied his right to effective assistance of counsel where counsel’s performance was deficient

in failing to request a voluntary intoxication instruction and Wiles was prejudiced by counsel's deficient performance.

- a. Wiles was entitled to a jury instruction on voluntary intoxication.

Washington recognizes by statute that whenever a crime has a "particular mental state," voluntary intoxication "may be taken into consideration in determining such mental state." RCW 9A.16.090. "[E]vidence of voluntary 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." State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987).

Any party is entitled to have the trial court instruct upon its theory of the case where there is evidence to support that theory. State v. Hackett, 64 Wn. App. 780, 785, 827 P.2d 1013 (1992). In determining whether a jury instruction should be given, evidence in support of the instruction is assumed to be true. State v. Rio, 38 Wn.2d 446, 454-55, 230 P.2d 308 (1951). Appellate courts view the evidence supporting the instruction in the light most favorable to its proponent. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000); State v. Wingate, 155 Wn.2d 817, 823 n.1, 122 P.3d 908 (2005).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. State v. Kruger, 116 Wn. App. 685, 691, 67 P.3d 1147, review denied, 150 Wn.2d 1024 (2003).<sup>2</sup> All three factors are met here.

First, the crime of violation of a court order requires the mental state of knowledge. As the jury instruction stated in relevant part, the State must prove beyond a reasonable doubt that Wiles "knowingly" violated a provision of the order. CP 54.

Second, there was substantial evidence of drinking. Wiles admitted that he was an alcoholic. 4RP 189. On the day of the incident, he took a bus to Tacoma to meet a friend who was delayed so he stopped at a bar and started drinking. 4RP 195, 199. He could not remember when he left the bar or how he ended up at Ikuschegan's house:

Q. So at what point did you black out? What point do you have a memory? What's the last thing you remember?

A. Being at the bar kitty corner to Fred Meyer.

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<sup>2</sup> WPIC 18.10 provides: "No act committed by a person 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 with \_\_\_\_\_."

Q. And the next thing you know you're -- you wake up in the detached shed or garage?

A. Yes, ma'am.

4RP 200.

Wiles could only recall waking up on the floor of the garage when he heard the police on the PA system then realized where he was. 4RP 199-201.

Officer Tiffany testified that after they used a PA system to order Wiles to come out, he came out of the garage "kind of stumbling, hands up in the air. He appeared confused. Didn't really seem to know what was going on." 3RP 111. They directed Wiles to come through the gate into the alley where the officers were waiting but he could not find his way through the gate, "The subject had trouble -- I don't know if he was trying to open the gate or whatever, but he just kind of leaned up against the gate with his hands over the fence." 3RP 111. Officer Williams noticed "numerous empty beer cans" when he inspected the garage after Wiles was arrested. 3RP 102.

Importantly, the officers' observations supported Wiles' testimony that he blacked out from intoxication and could only recall that he woke up in the garage. See State v. Hall, 104 Wn. App. 56, 61, 14 P.3d 884 (2000)(trial court properly declined to give a voluntary intoxication

instruction where two officers testified that they could smell alcohol on Hall but did not believe he was intoxicated).

Third, there was evidence from which a rational jury could infer that the drinking affected Wiles' ability to form the requisite mental state. "Certainly the effects of alcohol upon people are commonly known and all persons can be presumed to draw reasonable inferences therefrom." State v. Smissaert, 41 Wn. App. 813, 815, 706 P.2d 647 (1985). When viewing the evidence in the light most favorable to Wiles, a jury could have reasonably found that Wiles was too intoxicated to knowingly violate the court order.

b. Defense counsel was ineffective in failing to request a voluntary intoxication instruction.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. 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). "The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." Thomas, 109 Wn.2d at 225. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and the deficient performance resulted in prejudice. Strickland, 466 U.S. at 687.

Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239, cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). To show prejudice, the defendant must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

"Effective assistance of counsel includes a request for pertinent instructions which the evidence supports." Kruger, 116 Wn. App. at 688. The record substantiates that Wiles was entitled to a jury instruction on involuntary intoxication because the evidence supported an instruction. Consequently, defense counsel's failure to request an instruction fell below an objective standard of reasonableness. In light of the evidence, if the jury had been instructed on involuntary intoxication there is a reasonable probability that the result of the trial would have been different.

"Failure to instruct on a party's theory of the case, where there is evidence supporting the theory, is reversible error." State v. Stevens, 127 Wn. App. 269, 274, 110 P.3d 1179 (2005), aff'd, 158 Wn.2d 304 (2006)(citing Barrett v. Lucky Seven Saloon, Inc., 152 Wn.2d 259, 266-67, 96 P.3d 386 (2004)). Here, the failure to give the voluntary intoxication instruction stems from defense counsel's failure to request the

instruction when the evidence supported it. Reversal is required because defense counsel's performance was deficient where there is no conceivable legitimate tactic explaining counsel's performance and Wiles was clearly prejudiced by counsel's deficient performance. Thomas, 109 Wn.2d at 228-29.

2. THE TRIAL COURT ABUSED ITS DISCRETION  
IN REFUSING TO CONSIDER WILES'  
MOTIONS FOR ARREST OF JUDGMENT AT  
SENTENCING.

A remand for a resentencing is required because the trial court abused its discretion in refusing to consider Wiles' motions for arrest of judgment.

Where a trial court's decision violates a defendant's constitutional right, its decision is necessarily an abuse of discretion. State v. Petrina, 73 Wn. App. 779, 787, 871 P.2d 637 (1994). Where a trial court's decision is contrary to statutory mandates, its decision constitutes an abuse of discretion. Martinez v. City of Tacoma, 81 Wn. App. 228, 245, 914 P.2d 86 (1996).

The Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution guarantees the right to due process of law. The right to due process requires that a defendant at sentencing be given an opportunity to refute evidence. See State v.

Strauss, 119 Wn.2d 401, 418-19, 832 P.2d 78 (1992); State v. Russell, 31 Wn. App. 646, 648, 644 P.2d 704 (1982). RCW 9.94A.500 governs sentencing hearings and provides in relevant part that the court “shall” allow argument from the offender. “It is well settled that the word ‘shall’ in a statute is presumptively imperative and operates as a duty.” State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

At sentencing here, the court acknowledged that defense counsel and Wiles had filed separate motions for arrest of judgment. 6RP 243-44. Defense counsel explained that his motion and Wiles’ motions were based on different grounds, “My position in this, Your Honor, is I’m not filing either one these pro se motions by Mr. Wiles. If the Court wants to permit them, that is perfectly within the Court’s discretion, I think.” 6RP 245. The court responded that it would not address “the handwritten motions filed by Mr. Wiles himself as he is represented by counsel and counsel has filed a brief on the motion for arrest of judgment.” 6RP 246. The court proceeded to hear argument on defense counsel’s motion for arrest of judgment and denied the motion. 6RP 247-253.

A remand is for resentencing is required because the record clearly substantiates that the trial abused its discretion by refusing to address Wiles’ motions, violating his constitutional and statutory right to be heard at sentencing.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Wiles' convictions, or in the alternative, remand for resentencing.<sup>3</sup>

DATED this 2<sup>nd</sup> day of December, 2011.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, John David Wiles

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<sup>3</sup> It should be noted that the trial court erred in instructing the jury that it must unanimously have a reasonable doubt to answer no on the special verdict which asked the jury to decide whether Wiles and Ikusheghan were members of the same family or household. CP 58, 59, 61. However, the error was harmless beyond a reasonable doubt given that Wiles testified that he and Ikusheghan were living together. 4RP 184-85. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and John David Wiles, DOC # 892100, Cedar Creek Corrections Center, P.O. Box 37, Little Rock, Washington 98556.

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

DATED this 2<sup>nd</sup> day of December 2011, in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

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