

**FILED**

**JUN 30 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 288421

IN THE COURT OF APPEALS OF THE  
STATE OF WASHINGTON

DIVISION III

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STATE OF WASHINGTON,

Respondent,

vs.

ALEJANDRO OLIVAREZ BARRON,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF YAKIMA COUNTY, WASHINGTON

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THE HONORABLE MICHAEL SCHWAB, JUDGE

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BRIEF OF RESPONDENT

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JAMES P. HAGARTY  
Prosecuting Attorney

Kevin G. Eilmes  
Deputy Prosecuting Attorney  
WSBA #18364  
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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether defense counsel rendered ineffective assistance of counsel by not requesting a voluntary intoxication jury instruction?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The Appellant would not have been entitled to the instruction, as it was not warranted by the facts. Further, defense counsel outlined a deliberate trial strategy which did not rely upon showing that his client could not form the required mental state of knowledge. The Appellant has not met his burden of showing ineffective assistance of counsel.

II. STATEMENT OF THE CASE

While Appellant Alejandro Barron's Statement of the Case is generally accurate, the State supplements that narrative with the following.

At trial, Maurilio Martinez testified that on July 29, 2009, a black car stopped in his driveway, in front of his car. He stated that an individual, identified as the defendant Alejandro Barron, got out of the car and called Martinez "a son of a bitch", and further said "that he came to kill me." This statement frightened Martinez. (1-26-10 RP 132-33)

Martinez went into his house to call 911, but Barron continued to yell for him to come out, and that Barron had come to kill him. **(1-26-10 RP 134)**

Martinez believed that Barron took something out of the trunk of the car, but the car and its female driver drove off before police arrived. **(1-26-10 RP 135-36)** Martinez had never seen Barron before. **(1-26-10 RP 137)**

Maria Martinez, Maurilio's wife, testified that she was also present at their house on July 19, 2009. She witnessed the defendant arrive at her house, and heard him say to her husband: "don't go in you son of a bitch I come to kill you -you rotten dog." **(1-26-10 RP 139-40)** Barron continued to scream, calling out Mr. Martinez by name. **(1-26-10 RP 141-42)**

The Martinez' daughter, Esmeralda, also heard Barron calling her father out of the house, so he could shoot him because he had killed his (Barron's) younger brother. **(1-27-10 RP 11)**

Barron testified in his own defense. On both direct and cross examination, he testified in detail about his movements and action on July 29, 2009. **(1-27-10 RP 59-69)** When asked by the prosecutor whether he had a clear memory of the events of that day, he responded: "see, I have a

good little memory you know I'm not going to say I was on top of my feet you know a hundred percent. " (1-27-10 RP 75)

Barron was charged with a single count of harassment-threat to kill. (CP 53) A jury returned a verdict of guilty. (CP 17) The trial court sentenced Barron to 33 months in custody, and he timely appealed. (CP 10-16; 7)

### III. ARGUMENT

1. **As Barron would not have been entitled to the voluntary intoxication instruction, counsel was not ineffective for not requesting that it be given.**

Appellant Barron argues on appeal that his trial counsel provided ineffective assistance, specifically by failing to request a voluntary intoxication jury instruction. He has not overcome the presumption of effective representation, since his counsel's strategy was to pursue a defense centered on attacking the recollection of the State's witnesses, and, further, Barron would not have been entitled to the instruction given his actions, the level of his intoxication, and the mental state necessary to commit the offense of harassment-threat to kill.

In order to establish a claim of ineffective assistance of counsel, Barron must show that (1) defense counsel's representation was deficient, falling below an objective standard of reasonableness based on

consideration of all the circumstances; and (2) the defendant was prejudiced by his counsel's deficient representation, such that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Furthermore, the basis for the claim of ineffective assistance of counsel must be apparent from the record. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). The courts also engage in a strong presumption that counsel's representation was effective. Id., 127 Wn.2d at 335.

Additionally, deficient performance "is not shown by matters that go to trial strategy or tactics." State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), State v. Alires, 92 Wn. App. 931, 938, 966 P.2d 935 (1998).

A reviewing court looks to the facts of the individual case to see if the Strickland test has been met, resisting *per se* application of the holding in State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). State v. Cienfuegos, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001), *citing* State v. Robinson, 138 Wn.2d 753, 767-68, 982 P.2d 590 (1999).

It is well-settled that while voluntary intoxication is not a true defense, evidence of intoxication and its effect on the defendant may be

used to show that the defendant was unable to form the requisite mental state which is an essential element of the crime charged. RCW 9A.16.090; State v. Coates, 107 Wn.2d 882, 889, 891-92, 735 P.2d 64 (1987), *cited in* State v. Gallegos, 65 Wn. App. 230, 237-38, 828 P.2d 37 (1992).

However, “[i]t is well settled that to secure an intoxication instruction in a criminal case there must be substantial evidence of the effects of the alcohol on the defendant’s mind or body.” Safeco Ins. Co. of Am. V. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010 (1992). “Under RCW 9A.16.090, it is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state.” Coates, at 891. Therefore, a criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state. State v. Simmons, 30 Wn. App. 432, 435, 635 P.2d 745 (1981), *review denied*, 97 Wn.2d 1007 (1982); State v. Carter, 31 Wn. App. 572, 575, 643 P.2d 916 (1982) . . .

Id., at 237-38.

Stated another way, the evidence must “logically connect” the defendant’s intoxication to the required mental state:

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, 252-54, 921 P.2d 549 (1996).

In Gabryschak, the Court of Appeals held that the trial court did not err in declining to give the voluntary intoxication instruction, WPIC 18.10, as the defendant appeared to have understood he was under arrest, did not appear to be confused, or disoriented as to time and place. Therefore, he did not exhibit sufficient effects of the alcohol from which a rational juror could logically and reasonably conclude that the intoxication affected his ability to think and act with knowledge – the requisite mental state for felony harassment. Id., at 254-55.

Barron relies upon the decision in State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003). That reliance is misplaced, as the facts are quite different from the record here.

In Kruger, the Court of Appeals did hold that as there was ample evidence of the effects of the level of intoxication on both the defendant's mind and body, which included blacking out, vomiting, slurred speech, and a demonstrated imperviousness to pepper spray. On those facts, the court reasoned, he was entitled to the voluntary intoxication instruction. Id., at 692.

It cannot be emphasized enough that the requisite mental state at issue in Krueger was intent, an element of the offense of assault. Kruger, 116 Wn. App. at 692. Intent is a higher mental state than knowledge. RCW 9A.08.010(1) and (2).

Here it is undisputed that Barron was intoxicated and emotional, and that the State had the burden of proving the mental state of knowledge beyond a reasonable doubt. However, there is not sufficient evidence of the requisite effect on his mental state. He was able to testify with coherence and detail about his activities on July 29<sup>th</sup>. He remembered being arrested by Officer Radke. At the time of the incident, the officer observed that Barron began to walk away when he saw the officer. Barron had the presence of mind to flip the officer off, and disregarded the officer's instruction until he was called by his name. **(1-27-10 RP 148-51)** Generally, while there was testimony that Barron was highly intoxicated, there was indication that he was disoriented, or that he blacked out. The facts are closer to those in Gabryschak than those in Kruger. Barron was not entitled to the instruction, and the court's refusal to give it would not have been grounds for reversal. On these facts, it has not been shown that the verdict would have been different had the instruction been given. *See, State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

Defense counsel is not ineffective for failing to present a defense not warranted by the facts. State v. King, 24 Wn. App. 495, 501, 601 P.2d 982 (1979), *cited in* Kruger, 116 Wn. App. at 690-91.

Indeed, Barron has not met his burden sufficient to satisfy the Strickland test, or shown the absence of legitimate strategic or tactical rationale for the challenged conduct of his attorney. McFarland, 127 Wn.2d at 336. In fact, counsel's strategy was not to show that his client could not form the required mental state, it was to cast doubt on the recollection of the State's witnesses and demonstrate that Barron never directed a threat at Martinez at all. (1-27-10 RP 32-33, 38) The court raised the issue, but counsel articulated why the defense would not be raised.

#### IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm Barron's conviction.

Respectfully submitted this 29<sup>th</sup> day of June, 2011.

  
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