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Court of Appeals
Division III
State of Washington

NO. 30597-0-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

MANUEL RAMIREZ,

Defendant/Appellant.

APPELLANT'S BRIEF,

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, WA 99166
(509) 775-0777

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ASSIGNMENTS OF ERROR

1. The trial court's failure to give an intent instruction relieved the State of its burden of proof concerning the mental element of the offense of third degree assault.

2. Manuel Ramirez was denied effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22 when defense counsel:

- a. failed to object to the absence of an intent instruction; and/or
- b. failed to request a voluntary intoxication instruction after the trial court denied the self-defense instruction.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Is an intent instruction required in a prosecution for third degree assault of a law enforcement officer?

2. Did the absence of an intent instruction relieve the State of its burden of proof as to the mental element of third degree assault?

3. Did Mr. Ramirez receive effective assistance of counsel under the facts and circumstances of his case?

STATEMENT OF CASE

Mr. Ramirez was contacted by security personnel at the Anvaluz Nightclub in Quincy, Washington on August 13, 2011. The contact was based upon an alleged failure to pay the cover charge and the fact that he was highly intoxicated. (2/1/12 RP 20, ll. 1-7; 2/2/12 RP 28, ll. 8-10; ll. 13-17).

Maria Aceves was the lead security officer on duty. She noted the odor of alcohol and that Mr. Ramirez was wobbling and holding onto the wall. Armando Capetillo, another security officer, also noted that Mr. Ramirez was intoxicated. He was staggering a little as he walked. He was not allowed to enter the bar area. (2/1/12 RP 19, ll. 20-23; RP 21, ll. 1-11; 2/2/12 RP 8, ll. 12-18; RP 11, ll. 8-9; ll. 16-22).

Mr. Ramirez continued to try and enter the bar. After considerable discussion Ms. Aceves used pepper spray to control Mr. Ramirez. He went to the floor and banged his head. He was crying. (2/1/12 RP 21, ll. 15-22; RP 22, ll. 5-23; RP 22, l. 25 to RP 23 l. 3).

Ms. Aceves placed a handcuff on one of Mr. Ramirez's wrists. His other arm was beneath him. She could not get it out. She had the other two security officers stand-by while she contacted police. (2/1/12 RP 24, ll. 9-19; ll. 24-25; RP 47, ll. 1-6).

Mr. Ramirez knows very little in English. He is unable to carry on a conversation except in Spanish. Ms. Aceves was speaking to him in

both languages. Mr. Ramirez was not very conversational due to his high state of intoxication. (2/1/12 RP 40, ll. 18-19).

Mr. Capetillo and Miguel Romero, the other security officer, noted that Mr. Ramirez only conversed in Spanish. (2/2/12 RP 16, ll. 20-23; RP 25, ll. 1-2; RP 28, ll. 18-23; RP 153, ll. 2-4).

Officer Westby of the Quincy Police Department was the first officer to arrive. He knelt down next to Mr. Ramirez. He said the word “police” at least three times. Mr. Ramirez never verbally acknowledged the word “police”. The officer told Mr. Ramirez he wanted his arm. When he tried to pull Mr. Ramirez’s arm from underneath him Mr. Ramirez held it tighter to his body. (2/2/12 RP 43, ll. 6-9; RP 45, ll. 20-25; RP 46, ll. 9-15; ll. 21-23; RP 65, ll. 14-19).

Officer Westby’s commands/requests were all made in English. The officer later used an interpreter at the hospital in order to advise Mr. Ramirez of his *Miranda*¹ rights. (2/1/12 RP 55, ll. 7-15; 2/2/12 RP 56, ll. 1-23).

Since Mr. Ramirez was non-responsive to his commands Officer Westby began to use various pain compliance techniques. These included pain pressure points on the neck and across his face. During the application of the various techniques Mr. Ramirez shifted his body. He then bit

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694, 10 A.L.R.3d 974 (1966)

Officer Westby on the inner right thigh. (2/2/12 RP 47, l. 9 to RP 48, l. 3; RP 48, ll. 6-15; RP 49, ll. 4-14).

Officers Bakke and Senseney of the Quincy Police Department arrived shortly after Office Westby. They were also applying pain compliance techniques including a “gooseneck” wristhold, an ankle twist, the use of a police baton under Mr. Ramirez’s shin, striking the back of Mr. Ramirez’s left triceps with the baton on at least three occasions, and using the baton on his ribs. Officer Senseney also knelt on the back of Mr. Ramirez’s hamstrings in an attempt to exact compliance. (2/2/12 RP 73, ll. 10-24; RP 99, l. 23 to RP 100, l. 1; RP 103, ll. 1-5; RP 113, ll. 23-24; RP 115, ll. 22-25; RP 116, ll. 4-8; RP 116, l. 19 to RP 117, l. 7; RP 118, ll. 1-10; RP 131, ll. 7-9).

Eventually, Officer Senseney used his taser on Mr. Ramirez. Initially, Mr. Ramirez did not react. It was only on the third use of the taser, when it was applied directly to Mr. Ramirez’s body, that his arm came free. (2/2/12 RP 119, ll. 7-18; RP 120, ll. 1-12).

Officer Senseney testified that the music in the nightclub was on full blast. It was difficult to hear the other officers when they were talking. (2/2/12 RP 135, ll. 18-21).

After the officers got Mr. Ramirez to his feet he was fully compliant. The security personnel and the officers observed a puddle of blood on the floor where Mr. Ramirez’s head had been resting. (2/1/12 RP 23, ll. 24-25; 2/2/12 RP 76, ll. 13-16).

An Information was filed on August 15, 2011 charging Mr. Ramirez with third degree assault of Officer Westby. (CP 1).

Several continuances were granted. The trial commenced on February 1, 2012. (CP 10; CP 13; CP 14; CP 15).

Mr. Ramirez testified at trial. He indicated that after being sprayed with the pepper spray he could not see. He did not believe the person when he said the word "police". (2/2/12 RP 143, ll. 20-21; RP 145, ll. 5-10).

Mr. Ramirez believed that someone had kicked him in the mouth. He opened his eyes and saw lots of feet. He bit someone without thinking. Mr. Ramirez further admitted that he bit the person because of the pain that he was experiencing, even though he was not otherwise reacting to the pain compliance techniques. (2/2/12 RP 146, l. 15 to RP 147, l. 1; RP 154, ll. 1-9; RP 157, ll. 19-23).

Mr. Ramirez stated that he did not feel most of the pain compliance techniques. It was not until the cross-face maneuver was applied that he recognized that the police were there. (2/2/12 RP 148, ll. 6-23; RP 149, ll. 1-11; RP 150, ll. 12-17).

Defense counsel proposed a self-defense instruction based upon WPIC 17.02.01. After lengthy discussion with the attorneys the trial court denied the defense request for the instruction. (2/3/12 RP 3, ll. 15-21).

The trial court's instructions to the jury did not include an intent instruction. *See*: WPIC 10.01. Defense counsel did not object to the ab-

sence of that instruction. Defense counsel did not request a voluntary intoxication instruction after denial of the self-defense instruction. (CP 19).

The prosecuting attorney argued intoxication during his closing argument. He linked it to its affect on Mr. Ramirez's memory. Defense counsel also discussed intoxication in his closing argument. (2/3/12 RP 13, l. 22 to RP 14, l. 5; RP 26, ll. 13-14).

The jury found Mr. Ramirez guilty of third degree assault. During the sentencing hearing the trial court commented that intoxication had nothing to do with the law as far as the offense of third degree assault. The comment was made in response to Mr. Ramirez's allocution. (2/6/12 RP 8, l. 8 to RP 10, l. 20; RP 12, l. 24 to RP 13, l. 1).

Judgment and Sentence was entered on February 6, 2012. Mr. Ramirez filed his Notice of Appeal the same date. (CP 27; CP 31; 2/6/12 RP 1 *et seq.*).

SUMMARY OF ARGUMENT

The absence of an intent instruction relieved the State of its burden to prove each and every element of an offense beyond a reasonable doubt. The State was required to prove that Mr. Ramirez formed the intent to bite Officer Westby as opposed to a mere reaction to pain and/or out of a desire for self-preservation.

Defense counsel was ineffective in not requesting an intent instruction and/or failing to object to its absence. Defense counsel's failure to request a voluntary intoxication instruction deprived Mr. Ramirez of his only viable defense.

Mr. Ramirez was denied a fair and constitutional trial by his attorney's deficient representation.

ARGUMENT

I. ABSENCE OF INSTRUCTIONS

"...[T]he failure to instruct on the definition of intent constitutes a constitutional error that can be raised for the first time on appeal." *State v. Tyler*, 47 Wn. App. 648, 653, 736 P. 2d 1090 (1987).

WPIC 35.20 defines the offense of third degree assault. The Note On Use provides, in part:

Along with this instruction, use as applicable WPIC 2.03...WPIC 10.01(Intentionally-Definition), WPIC 10.04...and WPIC 35.50... .

The State is required to prove each and every element of an offense beyond a reasonable doubt. *See*: RCW 9A.04.100. Mr. Ramirez contends that the absence of an intent instruction relieved the State of its burden of proof concerning the mental element of the offense of third degree assault.

...[C]ulpable mental states, because they have been statutorily defined, have specific legal definitions aside from any common understanding or dictionary definitions which might be ascribed to them. ... Although...jurors may be able to hammer out a definition for intent...among themselves, it cannot be assumed that these definitions would match those established by the Legislature for use at trial.

State v. Allen, 101 Wn. 2d 355, 361-62, 678 P. 2d 798 (1984).

The failure to include an intent instruction essentially transformed the offense of third degree assault from one requiring a mental state of “intent” to a strict liability offense.

Assault has never been described as a strict liability offense in the State of Washington. “Intent is a non-statutory element of assault.” *State v. Finley*, 97 Wn. App. 129, 135, 98 P. 2d 681 (1999).

The absence of the intent instruction requires reversal of Mr. Ramirez’s conviction and remand for a new trial.

II. INEFFECTIVE ASSISTANCE

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel’s deficient representation prejudiced the defendant, *i.e.*, 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, 334-35, 899 P. 2d 1251 (1995).

Defense counsel's strategy for trial was to obtain a self-defense instruction in order to argue that Mr. Ramirez reacted appropriately to the amount of force being inflicted by the officers. When the trial court denied the self-defense instruction, defense counsel failed to recognize that the alternative was to request a voluntary intoxication instruction.

"An intoxication defense allows consideration of the effect of voluntary intoxication by alcohol ... on the defendant's ability to form the requisite mental state." *State v. Tilton*, 149 Wn. 2d 775, 784, 72 P. 3d 735 (2003).

Even though the *Tilton* case involved a situation where there was an incomplete record on appeal, the Court noted at 785:

Even on this incomplete record, it appears probable that the defenses should have been presented and that a reasonably competent attorney would have raised at least one of them. Confidence in the outcome of the trial is certainly compromised.

The outcome of Mr. Ramirez's trial is more than compromised. Defense counsel's initial strategy failed. Defense counsel did not recognize the availability of the alternative strategy.

What defense counsel ended up presenting to the jury was a sympathy argument rather than any type of defense. Since Mr. Ramirez admitted biting Officer Westby, in the absence of the self-defense

instruction, the only viable alternative was a voluntary intoxication defense.

Appellate courts are hesitant to find the assistance of counsel ineffective based solely on questionable trial tactics and strategies that fail to gain an acquittal. [Citations omitted.] Ineffective assistance may be found, however, if the tactics used would be considered incompetent by lawyers of ordinary training and skill in the criminal law. [Citation omitted.]

State v. Woo Won Choi, 55 Wn. App. 895, 905, 781 P. 2d 505 (1989).

Defense counsel was fully aware of the testimony that had been presented to the jury. The testimony was highly indicative of the availability and need for a voluntary intoxication instruction.

Mr. Ramirez was subjected to numerous pain compliance techniques. Other than the use of the taser, the pain compliance techniques had no affect upon Mr. Ramirez. The security officers all testified that Mr. Ramirez was highly intoxicated.

Mr. Ramirez's unresponsiveness to the officer's commands and the pain compliance techniques, along with his intoxicated state, clearly was overlooked by defense counsel.

In order to make the adversarial process meaningful defense counsel has a duty to investigate all reasonable lines of defense. Even if no viable defense theory is available, the Sixth Amendment still requires counsel to "hold the prosecution to its heavy burden of proof beyond a reasonable doubt."

Personal Restraint of Davis, 152 Wn. 2d 647, 744, 101 P. 3d 1 (2004), quoting *United States v. Cronin*, 466 U.S. 648, 656 n.19, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

Three conditions must be met to justify a voluntary intoxication instruction. *State v. Ager*, 128 Wn. 2d 85, 95, 904 P. 2d 715 (1995). Specifically, the court must provide a voluntary intoxication instruction when (1) the charged offense has a particular mens rea, (2) there is substantial evidence the defendant was drinking..., and (3) there is evidence the drinking...affected the defendant's ability to acquire the required mental state. *Id.* Evidence of alcohol consumption is relevant only if it tends to establish that the consumption occurred *before* the charged event. *State v. Priest*, 100 Wn. App. 451, 454-55, 997 P. 2d 452 (2000).

State v. Webb, 162 Wn. App. 195, 209 (2011).

As previously noted assault requires proof of the mental state of intent.

The evidence all indicated that Mr. Ramirez had been drinking before he had arrived at the nightclub.

The security officers described in detail Mr. Ramirez's intoxicated state.

Mr. Ramirez contends that the security officers observations, and his lack of reaction to various pain compliance techniques, further establishes the impact of his drinking upon his mental state.

No expert testimony was needed concerning the effect of his alcohol consumption on his mental state. *See: State v. Kruger*, 116 Wn. App. 685, 692-93, 67 P. 3d 1147 (2003).

As the *Kruger* Court recognized at 694-95: “Even if the issue of Mr. Kruger’s intoxication was before the jury, without the instruction, the defense was impotent.

Defense counsel was ineffective in not only failing to request the voluntary intoxication instruction, but also in not asking for an intent instruction as required by WPIC 10.01 and WPIC 35.20.

The issue of Mr. Ramirez’s intoxication was before the jury. The prosecuting attorney and defense counsel both argued intoxication during their closing arguments. The jury had no guidance as to either the mental state required for the commission of the offense of third degree assault or the affect that voluntary intoxication would have upon that mental state.

Mr. Ramirez contends that the record is replete with facts that support a voluntary intoxication instruction. Defense counsel was deficient in not requesting the instruction. The deficient performance prejudiced Mr. Ramirez.

CONCLUSION

The absence of an intent instruction combined with defense counsel’s failure to request a voluntary intoxication instruction, deprived Mr.

Ramirez of his constitutional right to a fair trial under the Sixth Amendment and Const. art. I, § 22.

Mr. Ramirez is entitled to have his conviction reversed and a new trial granted.

DATED this 27th day of June, 2012.

Respectfully submitted,

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) GRANT COUNTY
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 Respondent,)
) **CERTIFICATE OF**
) **SERVICE**
 v.)
)
 MANUEL RAMIREZ,)
)
 Defendant,)
 Appellant.)
 _____)

I certify under penalty of perjury under the laws of the State of Washington that on this 27th day of June 2012, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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Court of Appeals, Division III
500 North Cedar Street
Spokane, Washington 99201

E-FILE

MANUEL RAMIREZ
C/O Dennis W. Morgan Law Office
P.O. Box 1019
Republic, Washington 99166
CERTIFICATE OF SERVICE

U.S.MAIL

GRANT COUNTY PROSECUTOR'S OFFICE
Attn: Douglas Mitchell
PO BOX 37
Ephrata, Washington 98823

U.S.MAIL

S/ Connie Hille

Connie Hille, Administrative Assistant
DENNIS W. MORGAN LAW OFFICE
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
Fax: (509) 775-0776
conniehille@gmail.com

CERTIFICATE OF SERVICE