SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

ROBERT MCBRIDE,
Petitioner.

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 57686-4-II
Grays Harbor County No. 22-1-00119-14

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, ROBERT MCBRIDE, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

McBride seeks review of the June 11, 2024, unpublished decision of Division Two of the Court of Appeals affirming his conviction.

C. ISSUE PRESENTED FOR REVIEW

McBride was convicted of second degree arson. There was evidence which established that he was intoxicated at the time of the offense and that his intoxication impacted his ability to form the requisite mental state. Where the defense focused on McBride's mental state, did counsel's failure to request an instruction on voluntary intoxication constitute ineffective assistance of counsel?

D. STATEMENT OF THE CASE

Robert McBride was charged with second degree arson and second degree assault, based on the events of March 28, 2022. CP 103. The jury found him not guilty of assault but convicted him on the arson charge. CP 33, 35.

The evidence at trial showed that McBride's sister had dropped McBride off at the home of their stepfather, Loren Richards, sometime between 2:00 and 3:00 a.m. 2RP[1] 14-15. Richards agreed to take McBride in for the night, on the condition that he left the next day. 2RP 20.

Later that morning, Jeff Foster, Richards's landlord and boss, received a call informing him that a truck he kept on the property was on fire. 2RP 3-4. Foster drove out to the property, saw the fire, and woke Richards up to ask him about it. 2RP 23-25.

[1] The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—9/2/22 and 2RP—9/20/22, 9/21/22 and 10/24/22.

McBride was no longer at his stepfather's home when the fire was discovered. 2RP 24. At that time, he was on State Route 108, a short distance away. 2RP 118.

Two Coast Guard seamen were driving down the highway when they saw McBride in the road "acting crazy." 2RP 63-64, 74. He was waving his hands around and then hanging onto the side mirror of a semi-truck. RP 87, 101. Thinking he might need help, the men pulled along side the truck. When they did so, McBride jumped on the hood of their vehicle. He was shouting something and flailing around, hitting his head against the windshield and banging his heels and elbows against the hood. 2RP 64, 102. They pulled to the side of the road, asking McBride to get off their vehicle, but he did not. 2RP 64. One of the men started video-recording the incident on his phone, and that video was admitted in evidence. 2RP 65; Exhibit 24.

McBride was yelling at the men that he needed help, he needed to go to the hospital, he needed to get out of there. It was

difficult to understand everything he said, but he was continuously pleading for help. 2RP 90.

The seamen pleaded with McBride to get off the vehicle so they could help him. 2RP 65. McBride reached into the vehicle through the driver's window, holding a torch type lighter, which he tried unsuccessfully to ignite. 2RP 67-68, 94-95. The men continued pleading with McBride to get off their vehicle, while McBride pleaded with them to let him in. 2RP 69, 76. When the driver removed the lighter from McBride's hand, McBride dove through the rear passenger window into the back seat of the truck, where he curled up on the floor. 2RP 72-73, 83, 97, 104. He kept asking the men to take him to the hospital. 2RP 97, 103.

McBride showed signs of overdosing and kept fading in and out of consciousness. 2RP 73-74, 98. A sheriff's deputy arrived and took control of the scene, and the seamen helped the deputy remove McBride from the vehicle. 2RP 73-74, 98. McBride kept saying he took a large dose of Fentanyl and that he

was dying. When the deputy attempted to administer Narcan, however, McBride resisted. 2RP 77, 98. The deputy then tried to get McBride onto his stomach with his hands behind his back, but he was unable to handcuff McBride. 2RP 77-78. It took two deputies, a Coast Guard seaman, and a taser to finally subdue him. 2RP 78, 99.

Deputy Richard Ramirez testified that when he arrived at the scene, McBride appeared to be in distress. 2RP 111. He was hyperventilating, screaming, and crying, and he eventually passed out. 2RP 115. Ramirez realized he was needed in a community caretaking capacity, and he made sure that medical aid was on the way. 2RP 111, 113. Once McBride was pulled out of the vehicle, he said he had ingested an ounce of Fentanyl, and Ramirez administered Narcan. 2RP 112. When another officer arrived, McBride took off running into traffic, and he had to be taken to the ground. 2RP 116.

Deputy Edward Welter testified that was on his way to assist with the situation on the highway when he heard a call

about a vehicle on fire nearby. 2RP 31-32. Because the man on the highway, later identified as McBride, had reportedly jumped on a vehicle and tried to light it on fire, Welter thought the two incidents might be connected. Since the scene on the highway had calmed down, Welter responded to investigate the possible arson. 2RP 32. Foster's truck was still on fire, with the fire department actively engaged in putting it out, when Welter arrived. 2RP 34.

Welter found a baseball cap near the truck, which was identified as something McBride had been wearing the previous night. 2RP 17-18, 43. He testified that he believed the truck was intentionally set on fire, rather than spontaneously combusting, and that the person wearing the hat was responsible or had at least been present when the fire started. 2RP 43.

McBride was not at the scene of the truck fire when Welter was present, however, because he had already been taken into custody at the scene on SR 108. 2RP 44. Welter called in a canine unit to do an evidence track. 2RP 45. The dog tracked an odor

from the scene of the fire, through the woods toward SR 108. 2RP 45-46, 54, 56. The dog track ended less than a quarter mile from where McBride was taken into custody. 2RP 118.

Welter spoke to McBride in the jail the following day. 2RP 119. McBride made statements about burning the truck to get rid of entities, paying the toll, and atoning for sins. Exhibit 25; 2RP 146. He was arrested for arson. 2RP 121.

The jury was instructed on the elements of second degree arson and the lesser offense of reckless burning. CP 27-28, 30-31. The State argued in closing that McBride was guilty of arson because his statement to police that he burned the truck to get rid of the entities showed he intended to destroy the truck. 2RP 143.

Defense counsel argued that the State had not proved McBride intended to burn the truck. 2RP 153. He asked the jury to consider McBride's state of mind at the time, which was demonstrated in the video. He appeared to be very high on Fentanyl, and possibly having mental health issues, which did not support a conclusion that he had the ability to make a plan

and act with intentional disregard of anyone's rights. 2RP 154. He was acting in ways that made no sense, because of the condition he was in. 2RP 156. Counsel argued that reckless burning made more sense, because the State failed to prove McBride acted maliciously. 2RP 158.

In rebuttal, the State pointed out that the jury had not been instructed that being on drugs or mental health issues could be a defense to arson. 2RP 161. The jury returned a guilty verdict on the arson charge. CP 33.

McBride appealed, arguing that counsel's failure to request an instruction on voluntary intoxication denied him effective representation and a fair trial. The Court of Appeals affirmed the conviction.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals's opinion conflicts with previous decisions of the Court of Appeals and presents a significant constitutional question.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Where a criminal defendant has been denied effective assistance of counsel, the resulting conviction must be reversed and the case remanded for a new trial. *Id*.

To establish ineffective assistance of counsel, the defendant must show that trial counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Representation is deficient if, after consideration of all the circumstances, it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. Prejudice exists if there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*. at 34.

In this case, trial counsel's performance was deficient because he failed to request a jury instruction on voluntary intoxication, which would have allowed the jury to determine that McBride's drug use affected his ability to form the requisite intent for arson. *See* RCW 9A.16.090[2]. Evidence of intoxication may bear on whether the defendant acted with the requisite mental state for the charged offense, and the proper way to address the issue is to instruct the jury that it may consider the defendant's intoxication in making that determination. *State v. Kruger*, 116 Wn. App. 685, 691, 67 P.3d 1147 (citing *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987)), *review denied*, 150 Wn.2d 1024 (2003).

[2] "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state." RCW 9A.16.090.

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drug use or drinking, and (3) there is evidence that the drug use or drinking affected the defendant's ability to form the requisite mental state. *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002); *State v. Webb*, 162 Wn. App. 195, 209, 252 P.3d 424 (2011). In other words, the evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

The Court of Appeals acknowledged that the first element was established, it did not address the second element, and it puzzlingly decided that the third element was not satisfied. Opinion, at 4. The court concluded that there was no evidence that McBride's drug use was responsible for his behavior or could have negated his ability to form the required mental state

for arson in the second degree. Opinion, at 5. This conclusion conflicts with the decisions in *Kruger*, 116 Wn. App. at 688-89, and *State v. Walters*, 162 Wn.App. 74, 83, 255 P.3d 835 (2011).

In *Kruger*, the court found the defendant was denied effective representation when trial counsel failed to request an instruction on voluntary intoxication. In that case, the defendant was charged with assaulting a police officer. He had shown up at a house drunk, he was obnoxious and rude, and he refused to leave when asked. Police were called, but the defendant tried to walk away when they spoke to him. He then tried to strike an officer with a beer bottle, and during an ensuing struggle, the defendant head-butted the officer. Another officer arrived and joined the struggle. Pepper spray had little effect, but the officers eventually subdued and handcuffed the defendant. *Kruger*, 116 Wn. App. at 688-89.

On appeal, the court found all three requirements for a voluntary intoxication instruction were satisfied. First, the assault charge required proof of intent. Second, there was

substantial evidence of the defendant's drinking and level of intoxication. And third, evidence that the defendant had blacked out and vomited, had slurred speech, and was impervious to pepper spray amply demonstrated that his level of intoxication affected his mind and body. He was therefore entitled to an instruction on voluntary intoxication. *Id*. at 692.

Similarly here, McBride was entitled to a voluntary intoxication instruction. To convict McBride of second degree arson, the State had to prove that he knowingly and maliciously caused a fire or explosion that damaged a motor vehicle. CP 28 (Instruction No. 7); RCW 9A.48.030. Both "knowledge" and "malice" are elements of the crime charged. Thus, the first requirement for a voluntary intoxication instruction is satisfied.

There was also substantial evidence of McBride's drug use and level of intoxication. There is no need for expert testimony regarding intoxication. *Kruger*, 116 Wn. App. at 692-93. Here, while no one witnessed the start of the fire which resulted in the arson charge, witnesses who interacted with McBride shortly

after the fire started testified that he said he had taken a large dose of Fentanyl, and his actions were consistent with intoxication. 2RP 77, 112. He was acting crazy, running into traffic, jumping on moving vehicles, and screaming at times unintelligibly. 2RP 63-65, 87, 90, 101-02, 116. He was clearly in distress, he was in and out of consciousness, and he showed signs of overdosing. 2RP 73-74, 98, 111, 115.

This evidence also showed that McBride's intoxication impacted his mind and body such that it affected his ability to form the required mental state. He was pleading for help and to be taken to the hospital, but he seemed incapable of following directions and he resisted the administration of Narcan. 2RP 90, 98, 112. As in *Kruger*, it took several people and the use of a taser to subdue him. 2RP 78, 99. *See also State v. Walters*, 162 Wn.App. 74, 83, 255 P.3d 835 (2011) (third factor satisfied where defendant had slurred speech, droopy bloodshot eyes, was swaying back and forth, did not respond to pain compliance techniques, and required use of stun gun to restrain). Given this

evidence, McBride was entitled to have the jury instructed on voluntary intoxication. The Court of Appeals's conclusion to the contrary conflicts with these prior Court of Appeals decisions, and this Court should grant review. RAP 13.4(b)(2).

Because McBride was entitled to a voluntary intoxication instruction, and because McBride's mental state was a primary focus of the defense, a reasonable attorney would have requested the instruction. Counsel asked the jury to consider McBride's state of mind at the time of the charged offense, but he failed to ensure that the jury was properly instructed as to how it could consider that evidence. 2RP 154, 156. McBride was entitled to have his theory of the case presented to the jury under appropriate instructions, and counsel's failure to request an instruction on voluntary intoxication constitutes deficient performance. *See Kruger*, 116 Wn. App. at 693-94.

Moreover, counsel's deficient performance prejudiced the defense. While the jury heard evidence of McBride's intoxication and its impact on him and was instructed on the

elements of second degree arson, it was not instructed that intoxication could be considered in determining whether McBride had the necessary mental state to commit the offense. Without this necessary instruction, the jury was not correctly apprised of the law, and defense counsel could not effectively argue his theory of the case. *See Kruger*, 116 Wn. App. at 694-95. There is a reasonable likelihood the outcome of the trial would have been different if the jury had been properly instructed, and counsel's error amounts to ineffective assistance of counsel. The Court of Appeals's opinion failing to recognize this prejudice presents a significant constitutional question this Court should address. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse McBride's conviction.

I certify that this document contains 2695 words as calculated by Microsoft Word.

DATED this 9th day of July, 2024.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

June 11, 2024

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT BLAIN MCBRIDE, Appellant.	No. 57686-4-II UNPUBLISHED OPINION

VELJACIC, A.C.J. — Robert B. McBride appeals his arson in the second degree conviction. He contends that his defense counsel provided ineffective assistance of counsel by failing to request a voluntary intoxication jury instruction. He further contends that the victim penalty assessment (VPA) should be stricken from his judgment and sentence. We affirm McBride's conviction. However, we remand the matter to the trial court with instructions to strike the VPA.

FACTS

McBride's stepfather, Loren Richards, agreed to let McBride sleep at his home for the night. McBride's sister dropped him off in the early morning hours. The three visited for a bit before McBride's sister left. Neither McBride's sister nor his stepfather testified that McBride was intoxicated or acting strangely during this time.

Later that morning, Richards's landlord woke him up to inform him that a truck on his property was on fire. McBride was gone when Richards woke up.

Grays Harbor County Sheriff's Deputy Edward Welter responded to investigate the fire. Welter found a baseball cap near the truck that was identified as something McBride had been

wearing the night before. Welter used a canine unit to do an evidence track. The dog tracked an odor from the scene of the fire, through the woods toward State Route (SR) 108.

Two United States Coast Guard Seamen were traveling on SR 108 when they observed a man "acting crazy." Rep. of Proc. (RP) (Sept. 20, 2022) at 74. They reported that a man had jumped on the hood of their car and tried to light it on fire. Police arrived and found McBride inside the vehicle. The dog track ended approximately a quarter mile from the vehicle.

Police arrested McBride. Welter spoke to McBride at the jail the following day. McBride admitted to lighting the truck on fire, but claimed he did it because he saw "ghosts" and thought "Satan was coming." Ex. 25, at 3:58, 4:47. McBride also stated that he was "f***ed up on the fentanyl." Ex. 25, at 7:15.

The State charged McBride with arson in the second degree and assault in the second degree.

At trial, one of the Coast Guard Seaman testified that when officers arrived McBride was "coming in and out of consciousness." RP (Sept. 20, 2022) at 77. He said officers attempted to administer anti-overdose medication because McBride was claiming he had taken a large dose of fentanyl. The seaman testified that McBride continued to be agitated and that it ultimately took two deputies, a seaman, and a taser to finally subdue him.

Grays Harbor County Sheriff's Sergeant Richard Ramirez also testified for the State. He testified that when he arrived at the scene, McBride appeared to be in distress. He was hyperventilating, screaming, and crying. Ramirez thought he also passed out but then came back. Ramirez testified that McBride told him that he had ingested an ounce of fentanyl.

At trial, there was no evidence about the possible effects of fentanyl use on McBride's ability to form the requisite mens rea for arson. There was also no evidence of medical confirmation that McBride ingested fentanyl.

The jury found McBride not guilty of the assault charge but guilty of the arson in the second degree charge. The trial court found McBride indigent for the purposes of sentencing ,but imposed a $500 VPA.

McBride appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

McBride argues that he was denied effective assistance of counsel because defense counsel did not request a voluntary intoxication jury instruction. We disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Vazquez*, 198 Wn.2d 239, 249, 494 P.3d 424 (2021). To establish ineffective assistance of counsel, a defendant must show that their attorney's performance was deficient and prejudicial. *Id*. at 247-48. An ineffective assistance of counsel claim fails if the defendant fails to establish either deficient performance or prejudice. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

There is a strong presumption that counsel is effective. *Vazquez*, 198 Wn.2d at 247. "The defendant has the burden to show that defense counsel's performance was deficient based on the trial court record." *Id*. at 248. "Specifically, 'the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.'" *Id*. at 248 (quoting *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)). The relevant question is whether defense counsel's strategic choices were reasonable. *Id.* at 255. Where the claim of ineffective assistance of counsel is based on defense counsel's failure to request a

particular jury instruction, the defendant must first show he was entitled to the instruction. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

RCW 9A.16.090 provides:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

A defendant is entitled to a voluntary intoxication instruction when "(1) the charged offense has a particular mens rea, (2) there is substantial evidence the defendant was drinking and/or using drugs, and (3) there is evidence the drinking or drug use affected the defendant's ability to acquire the required mental state." *State v. Webb*, 162 Wn. App. 195, 209, 252 P.3d 424 (2011). To be guilty of arson in the second degree a person must "knowingly and maliciously causes a fire or explosion which damages [an] . . . automobile." RCW 9A.48.030(1). Because arson in the second degree requires a particular mental state, the first element is met so only the second and third elements are in dispute.

We begin with the third element because it is dispositive. The defendant must show more than he or she consumed alcohol or drugs; the defendant must establish the effect of the drugs or alcohol to establish the level of intoxication. *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003). There must be substantial evidence of the level of intoxication and its effect on the defendant's body and mind. *Id.* at 692. "'[T]he evidence 'must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged.'" *Id*. at 691-92 (quoting *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996)). A person can be intoxicated yet still be able to form the requisite mens rea to commit certain crimes. *State v. Classen*, 4 Wn. App. 2d 520, 537, 422 P.3d 489 (2018).

While there was testimony that McBride claimed to have burned the truck to stop imaginary beings, that he passed out, and that he was difficult to subdue, there was no evidence that fentanyl use causes this behavior or that fentanyl use would negate McBride's ability to form the required mental state for arson in the second degree. Therefore, there was not substantial evidence establishing a reasonable and logical connection between McBride's ingestion of fentanyl and the inability to form intent. Accordingly, he has not shown that he was entitled to a voluntary intoxication jury instruction, which is required to establish deficient performance. *Thompson*, 169 Wn. App. at 495.

Based on the above, McBride fails to show that his defense counsel was deficient for failing to request a voluntary intoxication jury instruction. Accordingly, his ineffective assistance of counsel claim fails. *Grier*, 171 Wn.2d at 33.

II. IMPOSITION OF VPA

McBride argues, and the State concedes, that the $500 VPA should be stricken under the recent statutory amendment. We agree.

Effective July 1, 2023, RCW 7.68.035(4) prohibits courts from imposing the VPA on indigent defendants as defined in RCW 10.01.160(3). *See State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). Although these amendments took effect after McBride's sentencing, it applies to cases pending on appeal. *Id*.

RCW 10.01.160(3) states that a defendant is indigent if they meet the criteria in RCW 10.101.010(3)(a) through (c). The trial court found that McBride was indigent as defined in RCW 10.101.010(3)(a)-(c). Therefore, the $500 VPA must be stricken from McBride's judgment and sentence.

CONCLUSION

Defense counsel did not render ineffective assistance of counsel when it did not request a voluntary intoxication jury instruction. Therefore, we affirm McBride's arson in the second degree conviction. But we remand for the trial court to strike the $500 VPA from McBride's judgment and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, A.C.J.

We concur:

Glasgow, J.

Che, J.

GLINSKI LAW FIRM PLLC

July 09, 2024 - 2:28 PM

Transmittal Information

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Appellate Court Case Title:	State of Washington, Respondent v. Robert Blain McBride, Appellant
Superior Court Case Number:	22-1-00119-7

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