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RENDERED: APRIL 30, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000135-MR

LARRY BRATCHER — APPELLANT

V.

ON APPEAL FROM MUHLENBERG CIRCUIT COURT
HONORABLE BRIAN WIGGINS, JUDGE
NO. 18-CR-00207

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A circuit court jury found Larry Bratcher guilty of first-degree bail jumping and of being a first-degree persistent felony offender.[1] The trial court entered judgment sentencing him to twenty-years' imprisonment, and he appealed that judgment to this Court as a matter-of-right.[2] We affirm the judgment, rejecting the single argument Bratcher raised in this appeal: whether the trial court erred by refusing to instruct the jury on his defense of voluntary intoxication.

I. BACKGROUND.

[1] In violation of Kentucky Revised Statute (KRS) 520.070 and KRS 532.080, respectively.

[2] Ky. Const. § 110(2)(b).

After pleading guilty to charges of receiving stolen property and being a persistent felony offender with a recommended sentence of five years' incarceration, Bratcher was released from jail on his own recognizance pending final sentencing in two weeks. Before entering into the plea agreement with the Commonwealth, Bratcher offered to work as an informant for the local drug task force pending final sentencing, to which the Commonwealth agreed. According to Bratcher, immediately upon his conditional release, he "left the jail parking lot, went to the dope man's house, and got some meth," and he remained high during the entirety of his release. He failed to appear for final sentencing. He was arrested and charged in the present case with bail jumping and of being a persistent felon. He was tried, convicted, and sentenced in the present case.

At trial, Bratcher testified on his own behalf that he began using methamphetamine when he was very young and had been in and out of prison throughout his adult life. In the first few days following his release, Bratcher spoke on the phone and met with drug task force officers about plans to set up a controlled drug buy with Bratcher's dealer. Bratcher made several attempts to contact the dealer, but the only drug buy he was able to schedule was unsuccessful. Bratcher testified that when he arrived at the dealer's house, the dealer told Bratcher to leave because the dealer knew why Bratcher was there as he had seen Drug Enforcement Agency (DEA) officers[3] drive by several times that day. Bratcher testified that at that point he became concerned for his own and his family's safety. The Commonwealth elicited testimony from one of the

[3] It is assumed that the drug dealer, if he made these statements to Bratcher, was referring to the local drug task force agents, not DEA agents.

drug task force agents, Agent Gibson, that Bratcher did not appear to be intoxicated while he was working with the agents on the controlled buy.

Six days before his scheduled sentencing hearing, Bratcher and the task force agents spoke by phone and discussed plans to set up another drug buy, but Bratcher expressed concerns about certain aspects of the plan proposed by the agents.[4] The agents and Bratcher also planned to meet later in the afternoon, but Bratcher failed to appear. Bratcher also failed to appear at his final sentencing hearing, resulting in the present bail jumping charge.

At trial, Bratcher tendered a jury instruction requesting the trial court to instruct the jury on the defense of voluntary intoxication to the bail jumping charge. The trial court declined to give that instruction, ruling that Bratcher had not presented enough evidence to justify presenting that issue to the jury.

II. ANALYSIS.

Bratcher argues that the trial court erred by refusing to instruct the jury on the defense of voluntary intoxication based on his testimony during trial. Bratcher points to the following statements he made during his testimony: he would "black out when using meth and not remember what he had done;" he "couldn't remember what city he was in" on the day he missed the final sentencing hearing; and he missed the court date because he was high. In response, the Commonwealth argues that the trial court did not err in denying Bratcher's tendered jury instruction because the only evidence of Bratcher's

[4] Bratcher informed the agents that his father's car, which he used as transportation to the drug dealer's house during the only attempted drug buy, was broken down and that he was attempting to secure alternative transportation. The agents offered to allow Bratcher to use of one of the task force's undercover SUVs, but Bratcher explained that the drug dealer would not interact with him if Bratcher showed up in an unknown vehicle, and that he was worried for his and his family's safety if the dealer found out that Bratcher was "snitching."

intoxication was presented via Bratcher's "self-serving" testimony, which did not present evidence that he was so intoxicated *on the day of the missed hearing* that the intoxication negated the intent required for conviction on the bail jumping charge. We agree with Bratcher that the fact that his testimony was "self-serving" is immaterial because credibility is a jury determination. But we also agree with the Commonwealth that the trial court did not abuse its discretion in denying Bratcher's request for a jury instruction on the defense of voluntary intoxication.

Trial courts have a duty "'to prepare and give instructions on the whole law of the case'" including "'instructions applicable to every state of the case deducible or supported to any extent by the testimony[.]'"[5] But a defendant is only entitled to such instruction "if the evidence would permit a juror reasonably to conclude that the defense exists."[6] In other words, if the evidence presented to the trial court does not warrant the requested instruction, it is within the trial court's discretion to decline to so instruct the jury.[7] This issue is preserved by Bratcher's tendered jury instruction; and we review this claimed error for abuse of discretion.[8] As emphasized in *Sargent v. Shaffer*, this standard of review is necessary because the trial court has a "superior review of . . . the factual and evidentiary subtleties of the case . . . ."[9]

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[5] *Rogers v. Commonwealth*, 86 S.W.3d 29, 43 (Ky. 2002), *as modified* (Oct. 3, 2002) (quoting *Taylor v. Commonwealth*, 995 S.W.2d 355, 360 (Ky. 1999)).

[6] *Conyers v. Commonwealth*, 530 S.W.3d 413, 431 (Ky. 2017) (citing *Fredline v. Commonwealth*, 241 S.W.3d 793 (Ky. 2007), and *Nichols v. Commonwealth*, 142 S.W.3d 683 (Ky. 2004)).

[7] *Id.* (citing *Payne v. Commonwealth*, 656 S.W.2d 719 (Ky. 1983)).

[8] *Sargent v. Shaffer*, 467 S.W.3d 198, 203 (Ky. 2015) ("[A] trial court abuses its discretion when its decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles." (citing *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999))).

[9] *Id.*

KRS 501.080 provides, in part, that "[i]ntoxication is a defense to a criminal charge only if such condition . . . [n]egatives the existence of an element of the offense." As Bratcher correctly notes, and the Commonwealth does not dispute, the necessary bail jumping element of intentionally failing to appear for a scheduled court appearance following release from custody "could conceivably be 'negatived' by intoxication."[10] But this Court has repeatedly interpreted KRS 501.080(1) to mean that the voluntary-intoxication defense is justified only where the evidence could lead a reasonable jury to find "'that the defendant was so [intoxicated] that he did not know what he was doing.'"[11] Evidence indicating "mere impairment of judgment and/or physical control that commonly leads intoxicated persons to do things they would not ordinarily do" is not a showing sufficient to entitle the defendant to an instruction on the defense of voluntary intoxication.[12]

In *Mishler v. Commonwealth*, three defendants were convicted of first-degree robbery and complicity to first-degree robbery.[13] This court found that one of the defendants, Skaggs, was entitled to a jury instruction on the defense

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[10] *See Conyers*, 530 S.W.3d at 431–32 (explaining that the intent element for the crime of burglary could require a trial court to instruct the jury on the defense of intoxication if the evidence warrants it). This court did indicate in *Wheeler v. Commonwealth* that it is conceivable that a defendant's testimony alone would be sufficient to justify a jury instruction on the defense of intoxication. 121 S.W.3d 173, 184 (Ky. 2003) ("The trial judge properly overruled a request for an intoxication instruction because there was insufficient evidence to allow such an instruction. There was no testimony, even from Wheeler himself, that he was intoxicated at the time of the murders. There was no evidence or even an inference that Wheeler was so intoxicated that he could not conform his conduct to the law at the time of the murders."). It is clear from our case law, however, that a defendant is only entitled to a voluntary-intoxication instruction when there is specific and corroborating evidence regarding the impact of defendant's intoxication *at the time of the underlying crime*.

[11] *Conyers*, 530 S.W.3d at 432 (quoting *Fredline*, 241 S.W.3d at 797).

[12] *Id.*

[13] *Mishler v. Commonwealth*, 556 S.W.2d 676, 678 (Ky. 1977).

of involuntary intoxication.[14] Various witnesses testified that Skaggs was intoxicated on the day of the robbery.[15] A police officer testified that Skaggs stated that he was high on drugs that day and that "he wouldn't have done it if it hadn't been for drugs." Defendant Henderson testified that Skaggs was "all doped up, under these drugs."[16] Defendant Mishler testified that Skaggs was taking unidentified pills.[17] And Skaggs himself testified that he took "speed" and smoked marijuana the day of the robbery; he only remembered going into the IGA store, which is where the robbery took place, to get something to eat, and going up to the register with a bag of chips; and that his memory went blank from the time he went to the cash register until he got back to the parking lot of the IGA.[18]

This court held that the defendants' testimonies regarding Skaggs's drug use would not have been sufficient, standing alone, to entitle him to an instruction on intoxication "in light of the evidence." The opinion does not specifically explain what other evidence it was relying on in making this declaration, but it was most likely the confession made by one of the defendants, which was later recanted, that all three of the defendants planned the robbery.[19] This Court, however, stated that Skaggs's argument that he was entitled to a voluntary intoxication defense instruction was "save[d]" by his own testimony that "at the very moment of the robbery he lost his memory and did

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[14] *Id.* at 680.

[15] *Id.* at 678–80

[16] *Id.* at 679 (internal quotations omitted).

[17] *Id.*

[18] *Id.*

[19] *Id.* at 680.

not know what he was doing."[20] This court ruled that "[n]o matter how preposterous Skaggs'[s] convenient loss of memory" may have appeared, the issue should have been left up to the jury.[21]

Similarly, in *Rogers v. Commonwealth*, this court found that the defendant was entitled to a jury instruction on the defense of involuntary intoxication.[22] The court relied on the following evidence to find that the jury could have reasonably concluded that the intent element of the underlying crimes was negated:

> [During the taped confession to police, Appellant] (1) told the investigating officers that he had consumed about twelve (12) beers the night that he attacked Buchter[, the victim]; and (2) described his state of intoxication in stating "I was real drunk." Additionally, Appellant demonstrated in his statement that he was unsure about many of the details of the crimes, e.g., where specifically they parked, how the group entered Buchter's home ("I ... I don't know how we got in, but I know we got in."), the race of the victim, and the number of times that Appellant struck Buchter with the weapon—an instrument that Appellant described at various times as a pipe, a tire tool, and a crowbar.[23]

It is clear from the cases described above, and many other cases decided by this court,[24] that a defendant's trial testimony about the

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[20] *Id.*

[21] *Id.*

[22] *Rogers*, 86 S.W.3d at 44.

[23] *Id.*

[24] *See, e.g., Hammond v. Commonwealth*, 504 S.W.3d 44, 57 (Ky. 2016) (defendant was not entitled to an instruction on the defense of voluntary intoxication because there was evidence that significant planning of the crime took place, despite evidence in the trial record that the defendant "was addicted to drugs; that on the day of the crimes he had snorted Percocet; that he had taken valium that day; that he was 'messed up' and 'high' that day; that he was intoxicated after the crimes; that he was 'toasted,' 'lit up,' and 'high' before, during, and after the crimes, and on into the next day; that he was "out of it" that day; that after the crimes he was slurring his words and had to be helped, or practically carried up a flight of stairs to [a co-perpetrator's] apartment; that he was too intoxicated to drive; and that he was swerving all over the road while driving that day[]"); *Nichols*, 142 S.W.3d at 688–89 (finding that the defendant was entitled to a jury instruction on the defense of voluntary intoxication based on testimony from various witnesses that on the night of the crime charged the

common effects he or she experiences as a result of drug or alcohol use, standing alone, is generally not enough to require a trial court to instruct the jury on the voluntary intoxication defense.[25]

In the present case, in support of his argument that he was entitled to a jury instruction on the voluntary intoxication defense, Bratcher relies solely on his testimony that he: would "black out when using meth and not remember what he had done;" "couldn't remember what city he was in" on the day he missed the final sentencing hearing; and missed the court date because he was high. Although this testimony is similar to the testimony presented by Skaggs in *Mishler* that this court found "save[d]" Skaggs's argument that he was entitled to the proposed jury instruction, the similarities stop there. Bratcher was not able to provide any evidence to corroborate his claim that he missed his court date because he was so high that he did not know where he was or what he was doing. Furthermore, Bratcher's testimony regarding where he was

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defendant had clearly consumed alcohol at some point that night; the defendant was "out of control," and "acting wild, like he was drunk or something;" and that the defendant told police that "he was 'f—ked up' as he had consumed several beers and a pint of vodka" shortly before he arrived at the crime scene); *Jewell v. Commonwealth*, 549 S.W.2d 807, 814 (Ky. 1977), *overruled on other grounds by Payne v. Commonwealth*, 623 S.W.2d 867 (Ky. 1981) ("All of the witnesses who observed James at the scene of the shooting described him as drunk. Between four and five hours later, without having consumed any more alcoholic beverages during the interim, he still had a blood-alcohol content of 0.11%. Though he insisted at the trial that he was not drunk, he insisted just as vigorously that he had no recollection of the occasion. There was, therefore, (1) evidence that he was drunk and (2) evidence that for some reason he was out of his mind. We think that this was enough to call for an instruction on intoxication under KRS 501.080.").

[25] This standard is not intended to establish a bright-line rule that, as the Commonwealth argues here, a defendant is never entitled to a jury instruction on the defense of voluntary intoxication based solely on his own testimony at trial. A case may come before a Kentucky court where a defendant provides such specific testimony regarding the effects of his or her drug or alcohol use during the time of the offense charged that it would be an abuse of discretion for a trial court to refuse to include a jury instruction on the defense of voluntary intoxication.

the day of his scheduled court day was inconsistent. Bratcher testified during direct that on or about the day of his final sentencing hearing, he was elsewhere because his father was hospitalized after suffering another heart attack. Bratcher then testified during cross-examination that he did not remember where he was on the day of his scheduled court appearance, nor what day he attended to his father who suffered a heart attack. While it is true that this lack of specific testimony could be because of Bratcher's loss of all memory from his drug use, Bratcher was able to recall the specifics of his meetings with the drug force task agents and with his drug dealer, as well as the specifics of being later arrested, despite his testimony that he remained high during the entirety of his release.

Unlike in *Mishler* and *Rogers*, Bratcher did not present any other evidence beyond his own testimony, which was at times inconsistent, to support his claim that he was so intoxicated that he did not know what he was doing, not just on the day of his final sentencing hearing, but on any day during his release. The Commonwealth, however, presented evidence that Bratcher did not appear intoxicated or altered when he interacted with police after his release. While it may not have been an error for the trial court to have granted Bratcher's request for the disputed jury instruction, it was not unreasonable or arbitrary for the trial court to decline to do so based on the lack of evidence presented by Bratcher in support.

III. CONCLUSION.

The trial court did not abuse its discretion in finding that Bratcher's general testimony regarding his drug use during the time he

missed his final sentencing hearing was not enough to justify a jury instruction on the defense of voluntary intoxication on the charge of bail jumping. Accordingly, we affirm the judgment.

All sitting. All concur.

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