

FILED: May 09, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,

v.

JAMES EDWARD MASSEY,
Defendant-Appellant.

Clackamas County Circuit Court
CR0911949

A145571

Ronald D. Thom, Judge.

Argued and submitted on August 19, 2011.

Ryan Scott argued the cause and filed the brief for appellant.

Jamie K. Contreras, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Armstrong, Presiding Judge, and Haselton, Chief Judge, and Duncan, Judge.

DUNCAN, J.

Reversed and remanded.

1 DUNCAN, J.

2 Defendant appeals his conviction for driving under the influence of
3 intoxicants (DUII). After defendant's trial to the court, the court read a jury instruction
4 based on *State v. Miles*, 8 Or App 189, 492 P2d 497, *rev den* (1972), (the *Miles*
5 instruction) to explain its reasoning in finding defendant guilty. Defendant appeals,
6 arguing that the court erred in relying on the instruction. We agree. Therefore, we
7 reverse and remand.

8 One evening around 8:00 p.m., a witness saw defendant, driving a pickup
9 truck, pull out of a driveway onto Highway 26 and begin driving very erratically. The
10 witness called 9-1-1 and followed defendant when he got off at the next exit. Defendant
11 parked at a store and went inside. While he was inside, police officers came to the scene.
12 When defendant came out of the store, an officer spoke with defendant and then arrested
13 him and charged him with DUII.

14 At trial, the arresting officer testified that defendant was wearing dirty,
15 disheveled clothing, his speech was thick and slurred, his eyes were glassy and bloodshot,
16 he was stumbling and had a strange gait, and he smelled strongly of alcohol. Although
17 the officer initially had difficulty communicating with defendant, whose hearing is
18 significantly impaired, defendant eventually said that he had had a few drinks.

19 Four witnesses, including defendant, testified for the defense. Their
20 testimony indicated that, at the time of the arrest, defendant, who was then 71 years old,
21 was suffering from low blood pressure and dizziness as a result of medication that he had
22 been prescribed. Defendant's daughter testified that defendant's doctors subsequently

1 decreased his dosage and, as a result, his condition had improved significantly.
2 Witnesses also testified that defendant's speech is sometimes slurred as a result of his
3 hearing loss, that he walks with an unsteady gait and has poor balance as a result of back
4 and leg injuries, and that physical exhaustion affects his mobility. Defendant testified
5 that, on the day of his arrest, he had been cutting brush all day, he had been feeling
6 progressively worse throughout the day, and he had one and one-half drinks before and
7 during his dinner.

8 In closing argument, the prosecutor speculated that a combination of
9 defendant's medical issues and alcohol caused his impairment:

10 "We also know that [defendant] was taking some medication that was
11 adversely affecting him in May [when he was arrested]. That, of course, is
12 problematic, and my suspicion is, is that whatever alcohol he consumed
13 that evening was only complicated by the medical issues that he was
14 already suffering from at that time."

15 In response, in his closing argument, defense counsel objected to that theory and referred
16 to the *Miles* instruction: "[T]he prosecutor seemed to be getting near *Miles*--and no pun
17 intended--I think we're miles away from a *Miles* instruction in this case." The court
18 rejected defendant's argument that the *Miles* instruction was inapplicable, read the
19 instruction, and explained its conclusion that defendant was guilty:

20 "*Now, contrary to what Counsel may have said, I think a Miles*
21 *instruction would have been appropriate in this case, and let me read that*
22 *to you so you understand where I'm going here. It says, 'If you find from*
23 *the evidence that the defendant was in such a physical condition that he was*
24 *more susceptible to the influence of intoxicants than he would otherwise be,*
25 *and as a result of being in that physical condition, because of the influence*
26 *of a lesser quantity of intoxicants than it would otherwise take, he is still,*
27 *nevertheless, under the influence of intoxicants.'*

1 "* * * Now, I have no doubt in my mind that you were working hard
2 on this occasion, but you, yourself, indicated that after you had been
3 drinking and you got back in that truck, that you were woozy, and you
4 shouldn't have been driving.

5 "And, my God, when we've got the testimony of an eyewitness, [that
6 defendant veered across two lanes and back, onto the shoulder, almost
7 hitting a pole], that's pretty bad driving, partner. That's pretty bad driving.

8 "Now, today * * *, I heard no mumbling. You may have been a
9 quiet talker, but you're not a mumblor. I didn't see you stumble. I didn't see
10 you--your speech was certainly not slurred; I understood every word that
11 you said to me. I didn't see you shuffling. * * *

12 "* * * And, you know, [the officer] described what he saw, and he
13 also described, you know, a really strong odor of alcohol, which indicates
14 that you'd just recently drank, which is kind of exactly what you're telling
15 us here.

16 "*Now, I think, given on any other occasions, you may have been able
17 to have had three or four and not had any problem driving, but you
18 certainly had a problem driving on this occasion.*"

19 (Emphasis added.)

20 Defendant appeals the resulting judgment, arguing that the trial court erred
21 in applying the *Miles* instruction. This court has repeatedly held that, in order for that
22 instruction to be proper, "there must be evidence that [the defendant's physical condition]
23 made [the] defendant more susceptible to the effects of alcohol than he otherwise would
24 have been[.]" *State v. Huck*, 100 Or App 193, 197, 785 P2d 785 (1990) (so holding with
25 respect to the defendant's use of Vicodin, a controlled substance); *see also State v. Gibbs*,
26 193 Or App 296, 297, 89 P3d 1215 (2004) ("Giving a *Miles* instruction in the absence of
27 [evidence that the defendant's physical condition, head trauma, made him more
28 susceptible to the influence of alcohol] is reversible error."); *State v. Curtis*, 182 Or App

1 166, 169-70, 47 P3d 929, *rev den*, 335 Or 104 (2002) (same where the defendant's
2 physical condition was fatigue); [State v. Roller](#), 181 Or App 542, 546, 47 P3d 52 (2002)
3 (reversing where trial court gave *Miles* instruction because "[t]here is a complete lack of
4 evidence that suffering from the flu made [the] defendant more susceptible to the effects
5 of alcohol"). Defendant correctly asserts that no such evidence is present in this case.
6 Specifically, there is no evidence that defendant's physical condition, attributable to either
7 his medication or his fatigue, rendered him more susceptible to the effects of alcohol.
8 We agree with defendant that the trial court erred in relying on the instruction.¹

9 The state does not dispute that, given that evidentiary void, the trial court's
10 use of the *Miles* instruction was inapposite. Instead, it asserts that any error was harmless
11 and, as a result, does not merit reversal. We disagree.

12 Insofar as the state argues that the trial court did not actually rely on the
13 *Miles* instruction in its analysis, the court's explanation of its verdict, quoted above,
14 demonstrates the opposite. The court began by saying, "let me read [the *Miles*
15 instruction] to you so you understand where I'm going here" and reading the instruction.
16 After summarizing the evidence, it concluded, "Now, I think, given on any other

¹ We note that, if defendant's medication was a controlled substance, the trial court's reliance on the *Miles* instruction in this case was also erroneous under [State v. McFeron](#), 166 Or App 110, 999 P2d 470 (2000). Where, as here, the state proceeds against a defendant on an alcohol-only theory of DUII, the *Miles* instruction is never appropriate if the defendant's "physical condition" involves a controlled substance. *Id.* at 118-19. That is so because, in order for the state to rely on a theory that a defendant's condition was caused in part by a controlled substance, it must comply with the pleading requirement of ORS 813.010(2) by alleging that the defendant was under the influence of a controlled substance (or substances). *Id.*

1 occasions, you may have been able to have had three or four and not had any problem
2 driving, but you certainly had a problem driving on this occasion." That statement
3 demonstrates that the court concluded--as instructed by *Miles*--that, on the day of the
4 alleged DUII, defendant's physical condition made him more susceptible to the influence
5 of alcohol than he normally was and, as a result, he was under the influence of alcohol at
6 the time that he drove, even though he had consumed less alcohol than it would normally
7 take to cause him to be under the influence of alcohol.

8 As we have explained in the context of a jury trial, in the absence of
9 evidence that a defendant's physical condition made him more susceptible to the effects
10 of alcohol, "the instruction [is] likely to mislead the jury to [the] defendant's prejudice
11 and, therefore, it should not [be] given." *Huck*, 100 Or App at 197. The same is true
12 where the trier of fact is the court. *See, e.g., Babler Bros. v. Pac. Intermountain*, 244 Or
13 459, 467, 415 P2d 735 (1966) ("When the record discloses that the jury applied the
14 wrong law to the problem, the verdict cannot stand. Where an error of law is shown to
15 have influenced the court in trying a case without a jury, reversal is equally necessary.").
16 That the state adduced legally sufficient evidence to support the same outcome under the
17 correct legal analysis is immaterial. *See id.*; [State v. Wilson](#), 240 Or App 475, 483, 248
18 P3d 10 (2011) (reversing where the trial court made a legal error in finding the defendant
19 guilty despite the fact that there was "sufficient evidence from which the trial court *could*
20 have found" that the defendant was guilty (emphasis in original)).

21 Finally, the state argues that, if we reverse this case, we should "remand the
22 case to the trial court for reconsideration to determine, based on the record already

1 adduced, whether defendant was guilty of DUII." As authority for that argument, it cites
2 *Wilson*, 240 Or App 475, and [*State v. Andrews*](#), 174 Or App 354, 356, 27 P3d 137 (2001),
3 *overruled in part on other grounds by* [*State v. Rutley*](#), 202 Or App 639, 645, 123 P3d 334
4 (2005). However, in both of those cases, we reversed and remanded for a new trial.
5 *Wilson*, 240 Or App at 484 ("[W]e reverse [the] defendant's conviction for second-degree
6 theft and remand for a new trial."); *Andrews*, 174 Or App at 356 ("We reverse and
7 remand for a new trial."). Therefore, in light of the trial court's erroneous reliance on the
8 *Miles* instruction, we reverse and remand for a new trial.

9 Reversed and remanded.