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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1054**

State of Minnesota,
Respondent,

vs.

Anthony Derek Donner,
Appellant.

**Filed June 10, 2019
Reversed and remanded
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-16-28878

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Susan L. Segal, Minneapolis City Attorney, Matthew Wilcox, Assistant City Attorney,
Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi L. Proulx, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hooten, Judge; and Stauber,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant argues that his convictions for driving while impaired and careless driving should be reversed because the district court erroneously refused to instruct the jury on his affirmative defense of involuntary intoxication. Because the record leads us to conclude that appellant made a prima facie showing of involuntary intoxication, we agree that the district court abused its discretion in failing to provide the jury with an involuntary intoxication instruction. We accordingly reverse and remand for a new trial.

FACTS

Shortly after midnight on August 7, 2016, while going home from a nightclub, appellant Anthony Derek Donner was arrested for driving while intoxicated. Earlier that evening, appellant drove to pick up a friend, parked in a parking garage in downtown Minneapolis, and went to a nightclub. He was familiar with the parking garage because he had previously worked in the attached building for three years.

Appellant testified that once at the club, he ordered a club soda to drink at the bar while his friend went to the dance floor. Appellant had been in a car accident roughly a week before the arrest, and so, following his doctor's recommendation, he did not have any alcoholic beverages to drink that night. He was also carrying about \$300 in cash because he had been paid earlier that day.

Appellant testified that after his friend went to dance, he was approached at the bar by a woman he did not know. He purchased a drink for this woman. After chatting with this woman, appellant left his club soda at the bar while he went to the bathroom, and then

came back and continued his conversation with the same woman at the bar for approximately 20 or 30 more minutes.

Appellant then ended this conversation and joined his friend on the dance floor. After a short time, appellant “started to feel funny,” so he went back to the bar to buy a bottle of water. At this point, appellant noticed that most of the \$300 in cash he had been carrying was gone. After looking and asking around for his missing money, appellant got upset and decided to leave the club.

On his way back to his car, appellant was “feeling groggy and kind of slow-paced,” but thought that he might be feeling that way as a side effect of his car accident the week before. Appellant testified that he did not remember getting back to his car, and that the next thing he did remember was waking up in jail, scared and confused about why he was there.

R.A., a security guard at the parking lot appellant parked at, testified that appellant walked to the garage around 2:00 a.m. on August 7, 2016. Appellant appeared drunk, and R.A. told him to take a nap before driving. A.S., a second security guard at the parking garage, testified that he saw appellant get into his car, sit without driving for four or five minutes, start driving, and almost immediately hit a parked car. R.A. then called 911 to summon the police.

Officer Ross Blair was one of the officers who responded to the call. When Officer Blair arrived, appellant was asleep in his car and had to be woken up. Officer Blair testified that appellant showed signs of intoxication and failed multiple field sobriety tests, but did not smell like alcohol. Appellant also took a preliminary breath test for the presence of

alcohol which did not detect any alcohol in appellant's system. Police arrested appellant based on his failed sobriety tests and took him to get tested for the presence of other chemicals in his system.

Police obtained a warrant for appellant's blood, had a sample taken at a nearby hospital, and sent it to the Bureau of Criminal Apprehension to be tested for the presence of intoxicants. The test revealed that appellant had a significant amount of alprazolam, more commonly known as Xanax, in his system. The therapeutic range for alprazolam is between .02 and .06 milligrams per liter, while the testing revealed appellant had a concentration of .074 milligrams per liter in his bloodstream. Appellant was eventually charged with second-degree driving while impaired in violation of Minn. Stat. § 169A.20, subd. 1(2) (2016), and careless driving in violation of Minn. Stat. § 169.13, subd. 2 (2016).

Before trial, the state filed a motion in limine to prevent appellant from arguing the affirmative defense of involuntary intoxication. The district court denied the state's motion, but concluded that it would revisit the issue at the close of evidence to determine if appellant had made a prima facie showing of involuntary intoxication.

At trial, appellant did not contest the fact that he drove while impaired, but testified that he did not knowingly consume any intoxicating substances the evening of his arrest. At the close of evidence, the district court considered whether to instruct the jury on the affirmative defense of involuntary intoxication. Though the district court noted that it was a "close call," it elected not to include this instruction, concluding that appellant had failed to establish a prima facie case.

During deliberations, the jury sent a note to the district court asking whether it was “allowed to consider the defendant’s intent, with regard to the question of whether he consumed a controlled substance, i.e., knowingly consumed it.” At this point, appellant’s attorney requested an instruction on general intent, essentially asking the district court to instruct the jury that to find appellant guilty would require them to find that he intended to drive while intoxicated. The district court denied appellant’s request and responded to the jury note as follows, “I have provided you with jury instructions in this case, and that contains the law that you should apply to the evidence and the facts that you heard during the course of this trial.” Just 17 minutes after the district court gave this instruction and the jury exited the courtroom, the jury came back to deliver a verdict of guilty on both counts. This appeal follows.

D E C I S I O N

We review a district court’s refusal to issue a requested instruction for an abuse of discretion. *State v. Torres*, 632 N.W.2d 609, 616 (Minn. 2001). “It is beyond dispute that a party is entitled to an instruction on his theory of the case if there is evidence to support it.” *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977). If an instruction is “warranted by the facts and relevant law” it must be given. *State v. McCuiston*, 514 N.W.2d 802, 804 (Minn. App. 1994), *review denied* (Minn. June 15, 1994); *see also State v. Moser*, 884 N.W.2d 890, 905 (Minn. App. 2016) (noting that once a defendant meets “a burden of production by making a prima facie showing that the defense applies,” the district court must give a jury instruction on an affirmative defense).

A prima facie showing is that which is “based on what seems to be true on first examination, even though it may later be proved to be untrue.” *Black’s Law Dictionary* 1382 (10th ed. 2014) (defining “prima facie”). “[T]he defendant’s burden of making a prima facie showing that would entitle him to a jury instruction and the defendant’s burden of proving to the trier of fact by a preponderance of the evidence each element of the defense proffered are two separate inquiries.” *State v. Voorhees*, 596 N.W.2d 241, 250 n.2 (Minn. 1999).

In determining whether the defendant has made the required prima facie showing so as to be entitled to an instruction on an affirmative defense, we, like the trial court, must view the evidence in the light most favorable to the defendant. *State v. Radke*, 821 N.W.2d 316, 328 (Minn. 2012). An error in the jury instructions requires reversal unless it was harmless, meaning that we can say beyond a reasonable doubt the error “had no significant impact on the verdict.” *State v. Kuhnau*, 622 N.W.2d 552, 558–59 (Minn. 2001).

I. The district court erred when it refused to instruct the jury on the affirmative defense of involuntary intoxication.

Appellant argues that the district court erred when it refused to instruct the jury on the affirmative defense of involuntary intoxication. “A defendant bears the burden of making a prima facie showing that he is entitled to a jury instruction on the defense of involuntary intoxication” *Voorhees*, 596 N.W.2d at 250. However, once a defendant makes such a prima facie showing he is “entitled to the instruction.” *State v. Jama*, 908 N.W.2d 372, 378 (Minn. App. 2018), *aff’d*, 923 N.W.2d 632 (Minn. 2019).

The affirmative defense of involuntary intoxication, first adopted by Minnesota in *City of Minneapolis v. Altimus*, has three elements. 238 N.W.2d 851, 855–58 (Minn. 1976). First, the intoxication must have been involuntary. *Voorhees*, 596 N.W.2d at 250. This can consist of intoxication that is: coerced, pathological, by innocent mistake, or that is unexpected from the ingestion of a medically prescribed drug. *Id.* Second, “the defendant must show that [his] intoxication was caused by the intoxicating substance in question and not by some other intoxicant.” *Id.* (quotation omitted). Third, the defendant must, due to the involuntary intoxication, be temporarily insane. *Id.* Minnesota law interprets this requirement as meaning that “at the time of committing the alleged criminal act the person was laboring under such a defect of reason . . . as not to know the nature of the act, or that it was wrong.” Minn. Stat. § 611.026 (2016); *see also Altimus*, 238 N.W.2d at 857.

Appellant argues that he established a *prima facie* case that he had become involuntarily intoxicated by innocent mistake. The district court concluded, and respondent now argues, that appellant did not.

Appellant argues that the following evidence is sufficient to at least establish a *prima facie* case for the first element, that he was involuntarily intoxicated by innocent mistake. Appellant testified that at the nightclub, he ordered a club soda to drink at the bar, while his friend went to the dance floor. He was carrying about \$300 in cash that night. After his friend went to dance, he was approached at the bar by a woman whom he did not know. He purchased a drink for this woman. After chatting for a while, appellant left his club

soda at the bar and went to the bathroom. He then came back and kept chatting with the same woman at the bar for approximately 20 or 30 minutes.¹

Appellant next testified that he stopped talking to this woman when his friend came back and asked appellant to join him on the dance floor. Appellant did, and the woman with whom he had been talking did not join them. Appellant testified that after some time, he got thirsty, so he went back to the bar to buy a bottle of water. At this point, appellant noticed that the \$300 in cash he had been carrying was gone. Appellant also testified that he did not knowingly consume any substances the evening of his arrest. And appellant also testified by affirmation that he “must have been slipped something because [he didn’t] remember the incident.” This chain of events, appellant argues, gave the unknown woman both motive and opportunity to drug appellant. Crucially, in our analysis, we must view this evidence in the light most favorable to appellant. *See Radke*, 821 N.W.2d at 328.

The district court concluded that because appellant did not directly testify that he drank from his club soda after he got back from the bathroom or that he “felt weird” shortly after drinking the water, and there was no direct testimony from someone who saw something get slipped in appellant’s drink, appellant had failed to establish even a prima facie case that he unintentionally consumed alprazolam. Respondent argues that the district court was correct and cites several cases which hold that speculation is insufficient to establish a prima facie case for each element of involuntary intoxication.

¹ The prosecution’s expert witness, forensic scientist Jody Nelson, testified that it was impossible for her to estimate when or in what form appellant ingested the alprazolam.

But while instructive, these cases actually cut against respondent's arguments. In *State v. Jama*, a defendant claimed on appeal that a district court erred in concluding that he had failed to establish a prima facie case for involuntary intoxication. 908 N.W.2d at 377–78. At trial, he had argued that he smoked a hookah he thought only contained tobacco, but actually contained some unknown substance, causing him to black out. *Id.* at 378. We affirmed, holding that the defendant had failed to make a prima facie case on each element of the defense. *Id.* at 378–79. As to the element of innocent mistake, we focused on the facts that Jama:

[D]id not identify what, if any, substance was the source of his intoxication. He presented evidence that he smoked what he believed to be flavored tobacco, he became dizzy and vomited, and woke up in jail. He testified that he never had a reaction like that to tobacco in the past. He did not present any evidence that there was any substance other than tobacco in the hookah and thus did not establish that he was “innocently mistaken as to the nature of the substance taken” because he did not establish that he innocently mistook the shisha that he voluntarily consumed for something other than the flavored tobacco he believed it to be.

Id. at 378. These facts are a far cry from the specific facts presented by appellant in this case that he did not knowingly consume alprazolam or any other intoxicating substances, that there was a reasonable explanation of how and why someone would have wanted to drug him, and that he tested positive for a high level of alprazolam on the night in question.

The other case cited by respondent is also supportive of appellant's arguments. In *State v. McClenton*, a defendant challenged his convictions for aggravated robbery and possession of a controlled substance. 781 N.W.2d 181, 183 (Minn. App. 2010), *review denied* (Minn. June 29, 2010). He challenged the district court's refusal to allow him to

argue to the jury the defense of involuntary intoxication. *Id.* at 189. The *only* showing McClenton made to the district court before trial was to proffer through his attorney, “that in addition to [McClenton’s] use of cocaine during the days leading up to the date of offense; [McClenton] also smoked marijuana which, [McClenton] believes, was ‘laced’ with an unknown substance.” *Id.* at 190. Again, this case involves the consumption of multiple substances, with a claim of some “unknown” substance being introduced at the time. *Id.* There was *no* evidence that McClenton had actually ingested any substance that he had not intended to consume. *Id.* Again, this is materially distinct from the facts of this case, where the evidence was far more specific. We therefore hold that the district court erred when it concluded that appellant had not established a prima face case for the innocent-mistake element.

The second element of the defense of involuntary intoxication is that the consumed drug, and not any “other intoxicant, is in fact the cause of defendant’s intoxication at the time of his alleged criminal conduct.” *Altimus*, 238 N.W.2d at 857. The state drew appellant’s blood and tested it for intoxicants. Alprazolam was the only drug that was present in appellant’s system. The state conceded at trial that this element was met and does not change its position on appeal. We agree with the parties that this element was met.

The third element of involuntary intoxication is that the defendant must meet the legal definition of temporary insanity in that he or she did not know the nature of the act or that it was wrong. *Id.*; Minn. Stat. § 611.026. The district court concluded that appellant did not establish a prima facie case for this element. While it again noted that this element

was a “close call,” the district court based its ruling primarily on the fact that no expert testified that appellant was legally insane at the time he was arrested. It also reasoned that if expert testimony were not required, “then that means anyone who ingests some substance unknowingly can simply testify, ‘I don’t remember anything,’ and it would generate this defense.”

Appellant argues that the evidence of his behavior while he was intoxicated, both from the security guards and the police, establishes that he did not know the nature of his act or that it was wrong. He notes that, as discussed in *Altimus*, his erratic behavior supports his claim that he was unable to understand what he was doing or that it was wrong and that his interactions with authority figures do not show that he believed that he had done anything wrong. In support of his claims, appellant also cites testimony from the prosecution’s expert about the effect that alprazolam can have on a person. Finally, appellant argues that his testimony regarding his inability to remember what happened that night leads to a reasonable inference that he did not understand the nature of his actions.

Respondent argues that appellant’s behavior shows that he knew right from wrong. It also adopts the district court’s reasoning that allowing appellant’s argument “would allow strategic memory loss advanced through testimony of a defendant to equate to involuntary intoxication in virtually every criminal case.”

We note the impact of appellant’s testimony, then discuss appellant’s behavior and the relevant caselaw, analyze the effect of requiring expert testimony, and conclude by addressing respondent’s argument that a ruling in appellant’s favor would open the proverbial floodgates for this defense.

First, appellant testified that he did not know that he was intoxicated when he left the club and thought that any odd feelings he was having were the result of the car accident that he had been in the week before. Appellant testified that as he was walking to his car he felt groggy, but explained that, “All I knew was I hadn’t taken anything that day for me to be feeling like this, you know.” After leaving the nightclub and starting to walk back to the car, appellant did not remember anything else until he woke up in a jail cell.

If the jury believed appellant, it could conclude that he did not understand that he was getting behind the wheel of his car while intoxicated because he did not know that he was intoxicated. This is corroborated by the prosecution’s expert, who testified that, among other symptoms, alprazolam could cause impairment of reasoning and judgment. This could explain why appellant might not have believed he was intoxicated even when he was feeling groggy.

Both parties argue that appellant’s behavior on the night of his arrest supports their differing conclusions regarding whether or not he understood the nature of what he was doing or whether it was right or wrong. Because appellant testified that he did not remember getting back to the parking garage, the evidence of appellant’s behavior comes in the form of testimony from the police officers and security guards who were at the scene where appellant was arrested. This uncontested testimony indicated that: after being directed to not drive right away by the security guard, appellant sat in his car for roughly five minutes before driving; after appellant immediately crashed his car into another car in the parking ramp and the security guards waved him down, appellant stopped his car and waited for police to arrive; and he complied with the police officers’ requests including

that he take field sobriety tests. In viewing this behavior in the light most favorable to appellant, along with appellant's testimony that he had no memory of what transpired after he left the bar, we conclude that the evidence was sufficient to meet the very low bar of a prima facie showing that appellant did not understand the nature of what he was doing, or that he did not know it was wrong.

Respondent argues that appellant took "coherent steps" indicating that he was not temporarily insane. Respondent cites to *Voorhees*, where the defendant read an owner's manual for a rifle, figured out how to load it, parked his car away from his intended victim, navigated a dark path to get to his victim, and shot the victim 11 times pulling the trigger after each shot. 596 N.W.2d at 250–51. But *Voorhees* is distinguishable on its facts because *Voorhees*'s actions required problem solving and concentration. *Id.* Appellant's actions that respondent points to, i.e., making his way back to his car, which was parked in a parking garage located in a building where appellant had previously worked for three years, and then complying with instructions from authority figures, simply did not require the same level of cognitive activity. Furthermore, the discussion in *Voorhees* that respondent cites to does not come from the court's analysis of the element of mental defect, it comes from the section where the court concluded that there was no evidence *Voorhees* was even intoxicated at all. *Id.*

Respondent also cites to *Jama*, but that case is equally unhelpful to its position. 908 N.W.2d at 379. In that case, the court found that the fact that *Jama*, who was charged with indecent exposure, tried to hide his exposed penis when police showed up contradicted his claim that he did not know that what he was doing was wrong. *Id.* Respondent claims that

this case supports its argument, but the case actually supports appellant's claim. *Jama* stands for the proposition that a suspect trying to hide his guilt might be indicative of an awareness that his behavior was wrong. But here, appellant did not try to hide his guilt. He complied with the security guards' requests, as well as those of the police. When police arrived, appellant offered to take a breath test. Respondent argues that these actions show an awareness that appellant knew what he was doing was wrong, but, again, the opposite is true. Appellant's offer to take a breath test does show that he knows that drinking and driving is wrong, but construing the evidence in the light most favorable to appellant, it also could show that he believed that he had done nothing wrong because he did not believe that he was intoxicated.

Next, the district court correctly noted that there was no direct expert testimony that appellant met the legal definition of insanity when he got in his car to drive home. But it is worth noting that neither the district court nor respondent point to any legal authority which requires expert testimony to establish a prima facie case of involuntary intoxication. Adopting the district court's reasoning would effectively create a new rule of law requiring expert testimony to make out even a prima facie case of involuntary intoxication, going beyond what this court is empowered to do. See *Lake George Park, L.L.C. v. IBM Mid-America Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998) ("This court, as an error correcting court, is without authority to change the law."), *review denied* (Minn. June 17, 1998).

And the prosecution's expert testified that alprazolam would be expected to cause symptoms of "drowsiness, tired, dizziness, you might have impairment of your cognition,

which is reasoning and judgment as well as psychomotor skills, which is taking your thought and putting that thought into motion.” Those are symptoms expected in any person who uses alprazolam, particularly here where appellant had a concentration of the drug in his bloodstream above the therapeutic range.

Finally, respondent reasons that allowing appellant’s argument here to prevail would allow the use of the involuntary intoxication defense in “virtually every criminal case.” This is clearly untrue. There are three elements that must be demonstrated before a defendant is entitled to an instruction on involuntary intoxication. Even if a defendant could establish a prima facie case on the third element through their own testimony, they still would have to establish involuntarily intoxication, and that the specific substance they involuntarily imbibed was the substance that caused them to become temporarily insane to even receive the instruction.

We conclude that, when viewing the evidence in the light most favorable to appellant, appellant did establish a prima facie case for the affirmative defense of involuntary intoxication. Therefore, the district court abused its discretion when it declined to instruct the jury on involuntary intoxication.²

² Appellant also argues that the district court erred when it refused to instruct the jury on general intent. But because we already reverse and remand on the district court’s failure to instruct the jury on voluntary intoxication, we need not consider appellant’s alternate argument about general intent.

II. The district court's error in failing to instruct the jury on involuntary intoxication cannot be said to be harmless beyond a reasonable doubt.

Appellant and respondent contest whether any error was harmless. The note that the jury sent to the district court during deliberations refutes the claim that any error was harmless beyond a reasonable doubt, as required by caselaw. *See Kuhnau*, 622 N.W.2d at 558–59 (requiring that error in instructing the jury must have “had no significant impact on the verdict” beyond a reasonable doubt to be considered harmless).

Here, after receiving instructions which did not include the defense of involuntary intoxication, the jury was sent to deliberate. After roughly one hour and fifteen minutes, the jury sent a note to the district court questioning whether it could consider whether appellant knowingly consumed a controlled substance. This note is an important indication that the jury was considering appellant's argument that he did not intend to become intoxicated, but did not know whether it was allowed to do so. The jury's return of a verdict within 17 minutes after the district court responded to the jury's question by indicating that it had already provided the jury with instructions also supports appellant's claim that the failure to include an involuntary intoxication instruction was not harmless beyond a reasonable doubt.

Respondent argues that any error in the failure to grant an instruction on involuntary intoxication was surely harmless because the evidence of that affirmative defense was weak, and because appellant's credibility was tarnished. But respondent conflates the law. Accepting respondent's argument here as true would require both that we, 1) not construe the evidence in the light most favorable to appellant, as we are required to do, *Radke*, 821

N.W.2d at 328; and 2) make a finding of what the jury would have found credible, which we are not permitted to do, *see State v. Blom*, 682 N.W.2d 578, 622 (Minn. 2004).

While the jury may or may not have ultimately believed appellant, the district court's error in failing to instruct the jury on the affirmative defense of involuntary intoxication cannot be said to have been harmless beyond a reasonable doubt. Because the district court abused its discretion in failing to instruct the jury on involuntary intoxication and the error cannot be said to be harmless beyond a reasonable doubt, we reverse appellant's conviction and remand to the district court for a new trial.

Reversed and remanded.