NO. 43871-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

SHANE AUSTIN STACY,

Appellant.

BRIEF OF RESPONDENT

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I. STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court properly instructed the jury a defendant must show the intoxicant negated intent, as involuntary intoxication requires the defendant to prove the absence of specific intent.

2. The instruction as to involuntary intoxication properly informed the jury of the applicable law, was not misleading, and allowed the defendant to present his theory of the case.

3. The trial court properly denied the elicitation of hearsay statements of the defendant from a police officer as they were hearsay, speculation and opinion testimony.

4. The defendant and public do not have a right to be present when a court answers a jury question during deliberation.

5. The Defendant is barred pursuant to WA RAP2.5(c) from raising the issue of specific instances of character for peacefulness as an essential element of involuntary intoxication in an insanity theory as he did not raise this argument to the trial court.

6. The trial court properly prohibited specific instances of the character trait for peacefulness under Evidence Rule 405(b) as peacefulness is not an essential element of the crime of assault or defense of involuntary intoxication.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENTS OF ERROR

1. Whether the trial court properly instructed the jury a defendant must prove he was given a substance by force or fraud and that the substance prevented the defendant from forming the intent to assault in order to prove involuntary intoxication?

2. Did the trial court's instruction that involuntary intoxication occurs when a defendant is given a substance by force or fraud allow the Defendant to present his theory of the case that "someone slipped him a micky."

3. If the court's instruction was error, was it harmless given the lack of evidence presented by the Defendant?

4. Was it improper hearsay, speculation and opinion testimony from an officer to say when the defendant asked him why he was in jail the defendant did not know why he was?

5. Are jury deliberation questions part of the public right to trial under the experience and logic test given they are not historically public and Criminal Rule 6.15 governs the procedure for putting the question, objections, and answer on the record to protect the public and defendant's right to an open court?

6. Is the Defendant prohibited from raising the issue of character as an essential element under involuntary intoxication because he did not argue to the trial court for admissibility other than under Rule 405(b)?

7. Is the character for peacefulness an essential element of the crime of assault or the defense of involuntary intoxication?

III. STATEMENT OF THE CASE

Factual History

On February 24 2012, the Defendant and his wife Mary Beth attended a longshoreman party at the Monticello hotel. RP 794.[1] The party started at 7:00 pm and went until approximately 11:15 pm. RP 247.

[1] The Report of Proceedings consists of seven volumes of continuously numbered verbatim reports referred herein as "RP (page #)."

There were about 200-250 people at the party with a full bar provided. RP 247-48, 261. Kyle Wharton, the bartender, testified a person could give their drink order to the cocktail server or order at the bar. RP 248. Additionally, anyone could order drinks for anyone else and there were bar tabs running. RP 248. Mr. Wharton remembered the Defendant had a tab between he and his wife consisting of beer and maybe shots. RP 249. Mary Beth was drinking rum and diet soda and Shane purchased beer. RP 249-50. Wharton recalled Mary Beth purchasing drinks for a lot of people. RP 251. He did not recall anyone acting suspicious around the bar or adding anything to anyone else's drink, but admitted there is always a high-flow of drinks at the longshore parties and it is difficult to keep track of how much a person drinks. RP 251-52. One of the reason for this difficulty is patrons will bring alcohol into the ballroom from other areas of the hotel, namely the rented motel rooms. RP 253, 261. When Wharton saw Stacy just before the assault, he estimated Stacy was a 5 or 6 on the buzz scale. RP 254.[2]

Andrea Holde, a member of the Women's Auxiliary for the longshoreman, came at the end of the party to assist in cleaning up. RP 157-60, 215. When she arrived she heard from her friend Karen Mitchell that Mary Beth was found kissing Heather's husband, Mike Robinson. RP

[2] The buzz scale is a scale where one is sober and ten denotes unconsciousness. RP 254.

160, 216. This upset Andrea as Heather was Andrea's friend. RP 160, 164, 195, 216.

Andrea confronted Mary Beth, asking Mary Beth if she liked being "a home-wrecking whore." RP 160-61, 195-96. Mary Beth denied kissing Mike. RP 161, 217. Andrea then went to Shane Stacy. RP 161. She told him about Mary Beth kissing Mike. Andrea asked Stacy if it was usual for he and Mary Beth to go outside their marriage and if they are swingers. RP 162-63, 217. Karen was with Andrea when she spoke to Stacy. RP 217. It dawned on Karen that Stacy was with Heather about 20 minutes earlier comforting Heather, telling her it was ok. RP 214-15, 514. When Karen realized this, she said to Stacy, "wait a minute you were just out talking to Heather not very long ago. Your wife was the one that was kissing her husband." RP 217-18. Stacy looked surprised and upset, said they were lying, and went directly to talk to Mary Beth. RP 163, 197, 218.

Afterwards, Stacy walked straight up to Holde, grabbed her by the throat and repeatedly asked why she was lying. RP 166, 168, 188, 199, 219, 235. Holde at first thought he was joking, but realized otherwise when he slammed her into the wall. RP 166-67. Stacy held Andrea against the wall and strangled her, cutting off her airflow for a couple of seconds. RP 167-68, 177, 200. Other people quickly came to her aid attempting to pull Stacy off Holde. RP 169, 201-02. Everyone ended up

in a pile on the ground and Holde was at the bottom of the pile. RP 169. Jimmy Meadows placed Stacy in a sleeper hold, telling Stacy to let go and tightening it until rendering Stacy unconscious. RP 204, 207, 236-37, 256, 522. Mitchell managed to pull Holde out of the pile limp and handed her off to another person. RP 203. When Stacy regained consciousness, he first had a blank stare, then became angry, wondering what was going on and screaming. RP 259, 522, 545.

The police were called and most of the party goers were mad the police were there. RP 257, 280, 313. Many of them were cursing and other fights began to break out. RP 257-58, 359. Officer Deisher was first on the scene. RP 272. When he arrived, he saw Stacy conscious with a couple of guys holding him down. RP 272. Officer Deisher noted Stacy had bloodshot and watery eyes and was yelling and cursing with slurred speech. RP 272-73. Officer Deisher did not detect any signs of drug usage in Stacy based upon his training and experience. RP 281.

Officer Deisher approached Stacy and identified himself as police. RP 274-75, 295. He tried to get Stacy to calm down, but the Defendant looked at Deisher, appeared to get more agitated, and said "Fuck you." RP 274-75, 295. He was also struggling against those people holding him. RP 259, 274, 276. Deisher bent to grab Stacy's legs and Stacy reared back and intentionally kicked Deisher in the face. RP 277-78. Officer Huycke

arrived and assisted in getting Stacy handcuffed. RP 279. Stacy calmed a little bit, but was still yelling and agitated. RP 279-80. Officer Huycke believed Stacy was under the influence of alcohol and noted he was very agitated, excited, smelled strongly of alcohol, and had slurred speech. RP 315. Officer Headly who was also assisting with the detention of Stacy noticed the odor of alcohol and slurred speech. RP 342.

The police escorted Stacy from the hotel to be seen by the ambulance for his intoxication, head wound, and unconsciousness. RP 205, 280-81.[3] Scott Mitchell saw Stacy outside and described Stacy as looking out of it. RP 205. During the escort and when he was outside with the police, Stacy was uncooperative, not wanting to walk in the direction of the escort, aggressive, yelling, and saying everybody was going to hell. RP 222, 317, 406. The ambulance medics checked out the Defendant and did not feel it necessary to transport via ambulance, but that Defendant needed treatment for his bleeding head. RP 290, 318-19, 342, 407. It was decided Officer Rocky Epperson would transport the Defendant to be medically cleared. RP 297-99, 318-20, 408.

Upon arriving at the hospital, the Defendant was uncooperative in getting out of the police vehicle. RP 412-13, 451, 495. He also stomped his feet down trying to prevent being wheeled into the hospital. RP 413-

[3] Officer Deisher noted an abrasion on Stacy's head. RP 273.

14, 452, 495. When he was inside the hospital, Stacy did not want to identify himself. RP 497. One of the security guards, Mike Derry, was actually an acquaintance of Stacy outside of the hospital context. RP 415, 493, 503-04. He was trying to calm Stacy and explaining he needed to allow medical staff to do their job. RP 415. Derry asked Stacy where Mary Beth was. RP 497. Stacy answered that his wife was fine, recognized who Mike was and called him by name, saying "Mike you know me." RP 497-98. Stacy became highly agitated when the hospital wanted to remove his cross necklace to take his blood pressure, attempting to jerk away even though in handcuffs. RP 414, 454, 498-99. Hospital security was trying to get him to be compliant, when Stacy laid back, looked at the other security guard, Mr. Roush, and deliberately kicked Mr. Roush in the face with one leg. RP 415-16, 454-56, 499. Officer Epperson had to restrain Stacy's legs when he tried to kick out again. RP 417. Almost immediately, even though restrained by multiple people and placed in four-point restraints, Stacy kept yelling, asking people if they were Christians and saying they were going to hell. RP 343-44, 414, 456. Epperson then punched and kneed Stacy to try to get compliance. RP 418. Afterwards, Stacy calmed down and allowed the staff to remove the necklace. RP 419.

Officer Epperson spent about 45-50 minutes with Stacy and he opined Stacy was very intoxicated. RP 420-21. He noted he was staggering, his eyes were bloodshot, movements were slow, and there was obvious odor of alcohol. RP 421. Officer Headly noted Stacy went through mood swings at the hospital and would go from yelling to calm to yelling again. RP 345. Mr. Roush noted the strong odor of alcohol, his defiant and obstinate nature and felt Stacy was quite intoxicated. RP 457. Neither Officer Headley nor Epperson noticed anything in the defendant's behavior to suspect drug ingestion. RP 348, 421. Moreover, Mike Rogan, the registered nurse who treated Stacy at the hospital did not see anything in his behavior or vital signs indicating drug influence. RP 477.

After released from the hospital, Officer Huycke transported Stacy to the jail. RP 321-22. During the transport, Stacy was cooperative and calm, but appeared to sway on his feet and stagger like he was under the influence of too much alcohol. RP 322. He still had red, watery eyes and slurred speech. RP 323. Based upon Officer Huycke's training and experience he did not see any indication Stacy was under the influence of a substance other than alcohol. RP 323. Over the half an hour Huycke was with Stacy, Stacy had mood swings; at times he was cooperative and others not. RP 323. During the booking process, in response to an action

of correctional staff, Stacy threatened to kill a correctional officer. RP 330-31.

Later, Officer Brian Price and Officer Chris Blanchard were at the jail on an unrelated matter. RP 362. As they were leaving, the Defendant came up to the window and asked why he was in jail. RP 362. The State objected to the Defendant's statement as hearsay during the testimony of Officer Blanchard. RP 362. The court sustained the objection. RP 362. However, after the witness' testimony concluded, the court sua sponte reversed its earlier ruling, finding the question was not offered for the truth of the matter, but for the fact of the question. RP 366. The court clarified it would not allow the Defendant's response that he didn't know anything about the assault. RP 366. The court invited defense counsel to call the witness back to the stand after the break. RP 366. Defense counsel did recall Officer Blanchard. RP 446. Blanchard then testified Stacy asked him "what he was doing there." RP 447.

The State next called Officer Brian Price. RP 392. In the midst of the State's questioning him about his part of the investigation, defense counsel asked to voir dire. RP 396. During voir dire, counsel had Officer Price agree he saw defendant in the jail later that night, but did not see him at the hotel. RP 396-97. Defense counsel then moved to strike all of Price's testimony that did not have to do with the Defendant. RP 397.

The court denied the motion and Officer Price testified to his interactions with other state's witnesses. RP 398.

Upon cross-examination, defense counsel inquired as to Price's contact with the Defendant later at the jail. RP 399. Officer Price said he and Blanchard were there for an unrelated case. Stacy was in a holding cell, looking out the cell window and asked them "what he was doing there, because he had no idea." RP 399-400. The State objected to the last part of the answer as hearsay. RP 399. The court sustained the objection as to the last comment about him not knowing why and instructed the jury to disregard. RP 399. In effort to clarify what the jury could consider, Defense counsel was allowed to ask Price what Stacy asked him. RP 400. Price testified "[Stacy] asked us why he was in jail." RP 400. Officer Price was not able to give an opinion as to Stacy's level of intoxication due to his limited interaction. RP 400. After several more questions, counsel ended cross-examination and informed the court Officer Price was excused from defense counsel's subpoena. RP 402.

The Defendant called a number of the defendant's co-workers and friends who were present at the party. These people testified the Defendant was not intoxicated. RP 591-92, 602. They said he did not have slurred speech nor watery or bloodshot eyes, nor any trouble walking. RP 592, 594, 602, 611, 776-77. Michelle Brister-Williams

testified she did not recognize the defendant when he was on the floor after regaining consciousness and afterwards he acted crazy. RP 612-13. Ms. Porter testified she was with the Defendant shortly before the assault. RP 778. She was outside talking to him and he called her Michelle, although her name is Shelly and believed she was talking about his wife, when she was talking about another woman. RP 780. She felt he was not making sense and was very focused on his wife. RP 781, 786.

Stacy also called a number of other friends and co-workers to testify to his character for peacefulness and honesty. They were Ted Aadland, Sarah Sheldon, Wendy Fleckenstein, and Marion Lee. RP 626-29, 640-41, 654, 825.

The Defendant also presented testimony from Dr. Raymond Grimsbo and Nicholas Rosello in an attempt to bolster his involuntary intoxication defense. Dr. Grimsbo is a forensic scientist and the director of Intermoutain Forensic Laboratories in Portland, Oregon. RP 657. Dr. Grimsbo was hired to look for any drug that could explain Stacy's behavior. RP 664, 690. He admitted that without more information, specifically a toxicology report, he could not say with a reasonable degree of medical certainty that the Defendant was on any sort of substance that night. RP 669. He had to admit that his opinion was based upon speculation and he could only say the behavior "could be" from drug

ingestion. RP 669, 691. He then opined the Defendant's behavior was like caused by a stimulant, but could not say if it was a natural stimulant such as adrenaline or artificial, such as methamphetamine or bath salts. RP 672-73. He could also not say how a specific drug would affect the defendant. RP 679-80, 693-94. Dr. Grimsbo did testify that even though alcohol is a central nervous system depressant, it can cause a drop in inhibitions, mood swings, and aggression. RP 680-81. Additionally that alcohol intoxication can cause stumbling, slurring of words, and odor of alcohol on the breath. RP 698. Dr. Grimsbo opined the defendant would be at a .03-.05 from five beers in four hours. RP 683-84. However this calculation would change depending on the number of drinks, how fast they were consumed, and if a person ate. RP 699. Grimbso could not say at what level Mr. Stacy would have to be to black out from alcohol. RP 687.

Dr. Grimsbo did say that methamphetamine, PCP and other related drugs are not associated with blackouts. RP 687. Additionally, Dr. Grimsbo admitted pupil dilation would be sign of drug ingestion, but the defendant did not exhibit this effect. RP 700. Grimsbo also indicated a hair shaft test was not done on the Defendant, even though that test could determine if a particular drug was ingested around the time of the offense. RP 703-04. However, more than 90 days after the event the sample

wouldn't likely tell much for a one-time event. RP 704. Lastly, he admitted there was no hard, physical evidence the defendant was under the influence of a substance. RP 706.

Mr. Rosello was a hired pharmacist called to give his opinion the defendant's behavior was caused by methamphetamine ingestion. RP 725, 743. He testified that methamphetamine can cause amnesia, in direct contradiction of Dr. Grimsbo, a forensic toxicologist. PR 735. Upon cross-examination, Mr. Rosello admitted he researched the "symptoms" of the defendant to see what drugs corresponded. RP 747. He also admitted that a person does not have to be a chronic alcoholic to have blackouts and someone who merely drank too much on one occasion could black out. RP 756.

The Defendant testified he ate that night and only consumed 5 beers. RP 795. However, on cross he admitted he only had a memory of drinking three beers and relied upon the bar tab to say he had five. RP 806. He was adamant he did not consume more than five beers. RP 807. He said he had no memory of the assaults and only remembered waking up strapped to a chair in a room with a window. RP 797. It was the defendant's opinion that someone slipped something into his drink. RP 813. However, he could not say that anyone had a motive to do so that night. RP 813.

In closing argument, counsel argued under the prong of involuntary intoxication by fraud, that someone slipped the defendant a drug and he did not voluntarily take it. RP 885, 893, 903. He did not opine any other method of ingestion of the substance by the defendant and no other suggestion was made during the trial. He also argued the defendant's reputation for peacefulness and honesty made it unlikely he would assault anyone without having been slipped a micky. RP 908-09.

Procedural History

In the present case, the Defendant moved to present evidence of specific instances of character under Evidence Rules 404(a) and 405(b). CP 21-25, CP 37-40, RP 116. The Defendant did not give a full recitation of what evidence of specific instances he would offer. CP 21-25, CP 37-40, RP 116. The state responded that should the court determine the character was central to the defense, the court give a limiting instruction to the jury. RP 117. The court, citing to *State v. Mercer-Drummer*, found character for peacefulness and peacefulness while under the influence were not an essential element of the defenses and while the Defendant could present testimony to these character traits, he was limited under Rule 405(a) to reputation evidence only. RP 120, 134-35. The Defendant did present a number of witnesses who testified the defendant had a

reputation for peacefulness in the community. RP 627-28, 641, 653-54, 825. The State did not present any rebuttal testimony. RP 829.

At the close of the evidence, the court instructed the jury in Instruction number 18 as to involuntary intoxication. The instruction read:

> Involuntary Intoxication is a defense to a charge of Assault if:
>
> (a) The defendant was given alcohol or drugs by force or fraud; and
> (b) The alcohol or drugs prevented the defendant from forming the intent to assault.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to a specific charge. Because a separate crime is charged in each count, you must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 177.

The defendant objected to instruction number 18 and proposed

> Involuntary intoxication is a defense to the crimes charged. "Involuntary intoxication" means intoxication brought about by force, or fraud, or some other means not within the control of the defendant. Involuntary intoxication absolves the defendant of any criminal responsibility."

CP 72. The Defendant argued the terms fraud and force were terms of art not commonly understood by the jury. RP 835-836.

After the jury retired for deliberation, there was a question posed by the jury. This question was recorded and made part of the record through the clerk's papers. CP 180. The question was "What date was the defense hired for the defendant?" CP 180. The record notes the court after affording all counsel/parties opportunity to be heard sent a response to the question. CP 180. The response was "You must rely on the evidence presented to you in the course of the trial." CP 180. This language was a summary of the first instruction to the jury. The court had previously instructed the jury:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial....You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case....The evidence that you are to consider during your deliberations consists of the testimony that you have heard from the witnesses, stipulations and the exhibits that I have admitted during the trial. If evidence was not admitted or stricken from the record, then you are not to consider it in reaching your verdict.

CP 158.

IV. ARGUMENT

1. THE INTOXICATION AS TO INVOLUNTARY INTOXICATION PROPERLY INFORMED THE JURY OF THE APPLICABLE LAW, WAS NOT MISLEADING, AND ALLOWED THE DEFENDANT TO PRESENT HIS THEORY OF THE CASE.

a. Standard of Review

The Defendant argues the trial court denied him the due process of a fair trial when it refused to give his proposed jury instruction on involuntary intoxication. *See* Def. Brf at 16. However, the defendant received a constitutionally fair trial as the trial court's instruction properly informed the jury of the applicable law, was not misleading, and allowed the defendant to present his theory of the case. *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2010) citing *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005); *State v. Walters*, 162 Wn.App. 74, 82, 255 P.3d 835 (Div 3, 2011).

The standard of review applicable to jury instructions depends on the decision under review. When a defendant argues the instructions were insufficient to allow him to argue his theory of the case, a court reviews this question of law de novo. *Cox v. Spongier*, 141 Wn.2d 431, 442, 5 P.3d 1265, 22 P.3d 791 (2000); *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994). Whether the court's instructions to

the jury are accurate statements of the law is also a question of law reviewed de novo. *State v. Becklin,* 163 Wn.2d 519, 525, 182 P.3d 944 (2008). However, a trial court's choice or wording of jury instructions is reviewed for abuse of discretion. *State v. Hathaway,* 161 Wn.App. 634, 647, 251 P.3d 253 (selection of more general, rather than specific, instruction; abuse of discretion standard applied), *review denied,* 172 Wn.2d 1021 (2011); *Anfinson v. FedEx Ground Package Sys., Inc.,* 159 Wn.App. 35, 244 P.3d 32 (2010) (abuse of discretion standard applies to number of instructions and specific wording), *aff'd,* 174 Wn.2d 851, 281 P.3d 289 (2012). A trial court has broad discretion in determining the wording of jury instructions and discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State v. Walters,* 162 Wn.App. 74, 82, 255 P.3d 835 (Div 2, 2011) citing *Petersen v. State,* 100 Wn.2d 421, 440, 671 P.2d 230 (1983); *see also, State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The Defendant puts forth two arguments claiming the court's instruction was deficient; one, the court limited the Defendant's ability to present his theory of the case, and two, the instruction failed to define the term fraud. *See* Def. Brf at 20. The court should review the first argument de novo and the second for abuse of discretion.

b. The court's instruction correctly stated the law and allowed the Defendant to argue his theory of the case.

The Defendant proposed several different jury instructions on voluntary and involuntary intoxication. CP 72-75. He assigns error only to the court's failure to give this proposed instruction:

> Involuntary intoxication is a defense to the crimes charged. "Involuntary intoxication" means intoxication brought about by force, or fraud, or some other means not within the control of the defendant. Involuntary intoxication absolves the defendant of any criminal responsibility."

CP 72. The Defendant objected to instruction 17 and 18 and argued he based his instruction on *State v. Corwin* and *State v. Murdlock* and the State had the burden of disproving involuntary intoxication beyond a reasonable doubt and for all purposes involuntary and voluntary intoxication were the same. RP 834-35. He also argued the term "fraud" was unclear and the case law implied a broader definition. RP 836. The court declined to give this instruction saying it disagreed with defense counsel's legal analysis of the burden of proof and fraud was in the common understanding of the jury and the term allowed counsel to argue his theory of the case. RP 836-37.

Number 17 of the court's instructions to the jury was the standard Washington Pattern Instruction number 18.02, stating: "No act committed

by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, the evidence of intoxication may be considered in determined whether the defendant acted with intent." CP 176.

Number 18 of the court's instructions stated:

> Involuntary Intoxication is a defense to a charge of Assault if:
>
> (c) The defendant was given alcohol or drugs by force or fraud; and
> (d) The alcohol or drugs prevented the defendant from forming the intent to assault.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to a specific charge. Because a separate crime is charged in each count, you must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 177.

There is no Washington Pattern Jury Instruction for the Involuntary Intoxication defense. The leading cases considering the defense state it is "disfavored for its potential for abuse," and must rise to the level of insanity because it excuses the criminality of an act. *State v. Mriglot*, 88 Wn.2d 573, 575, 564 P.2d 784 (1977). However, *Mriglot*

does not stand for the proposition defense cites: that involuntary intoxication is akin to insanity in every instance. *Mriglot* distinguishes the defense on the basis of the level of intent necessitated by the crime. In cases where the charge only requires general intent, the defendant must show the intoxication rises to the level that the defendant is unable to perceive the nature and quality of his act or to tell right from wrong as to the act charged. *Id.* at 576. In cases where the charge requires a specific intent, the degree of involuntary intoxication need only demonstrate the defendant lacked the specific intent. *Id.* at 576. Most important, the Washington Supreme Court found the ***practical effect of the intoxication defense is the same*** whether it is voluntary or involuntary for specific intent crimes. *Id.* at FN2.

In *State v. Gilchrist*, 25 Wn.App. 327, 328, 606 P.2d 716 (Div. 1, 1980), Gilchrist presented involuntary intoxication as a defense to the charge of Escape. Escape is a general intent crime. *Id.* *Gilchrist* did not consider whether there was a distinction between general intent or specific intent crimes. However, Division One followed the thread of *Mriglot*, determining if involuntary intoxication is akin to insanity, it is proper to require the defendant to prove the defense by a preponderance of the evidence. *See also State v. Riker*, 123 Wn.2d 351, 367-69, 869 P.2d 43 (1994); *State v. Carter*, 31 Wn.App. 572, 575, 643 P.2d 916 (Div 1, 1982).

The Court distinguished voluntary from involuntary intoxication, finding voluntary intoxication does not rise to the same level as insanity and so long as the defendant comes forward with initial evidence of intoxication, he does not bear the burden of persuasion. *State v. Carter*, 31 Wn.App. 572, 575. Thus, it is proper to instruct the jury as to voluntary intoxication under WPIC 18.10 without comment as to the burden. *Id.* at 575, 577; *State v. Corwin*, 32 Wn.App. 493, 649 P.2d 119 (Div 1, 1982).

In *State v. Hutsell*, 120 Wn.2d 913, 845 P.2d 1325 (1993), the Washington Supreme Court found the opportunity to clarify the definitions of voluntary versus involuntary intoxication when looking at mitigation factors for sentencing. The Court stated because involuntary intoxication absolves the defendant of criminal responsibility, the term "involuntary" is construed narrowly, whereas, the term "voluntary" has "a definition broader than its colloquial meaning." *Id.* at 920. Voluntary intoxication is "not caused by force or fraud." *Id.* Conversely, involuntary intoxication must be ***caused by*** force or fraud. *Id.*, citing *Seattle v. Hill*, 72 Wn.2d 786, 435 P.2d 692 (1967), *cert. denied*, 393 U.S. 872, 89 S.Ct 163, 21 L. Ed.2d 142 (1968).

The Defendant argues the court instruction that "the alcohol or drugs prevented the defendant from forming the intent to assault" was

erroneous as the court should have instructed using the insanity language. However, under the reading of *Mriglot*, since assault is a specific intent, the defenses of voluntary and involuntary are virtually the same and the substance must negate the intent of the crime. Only where the crime a general intent crime, must the instruction use the insanity test. Moreover, using *Hutsell*, the force or fraud must cause the involuntary intoxication. Hence the force or fraud equals the intoxication which negates intent.

The defendant alleges the instruction prohibited him from presenting his defense. However, gives no citation to what evidence or argument he was prevented in making under this instruction. As the instruction was correct under the cases cited above, there was no error.

c. The court did not abuse its discretion in the wording of the instruction.

The defendant also alleges the court incorrectly instructed the jury in instruction 18 by limiting involuntary intoxication to a "substance given by force or fraud" versus his instruction which added "some other means not within the control of the defendant. CP 177, 72. However, a court has great discretion in giving instructions to a jury that meet the evidence presented by the parties. *State v. Hathaway*, 161 Wn.App. 634, 647, 251 P.3d 253 (Div 2, 2011). "To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the

jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2010). The "constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define one of those elements is not within the ambit of the constitutional rule." *Id.*

In *State v. O'Hara*, the defendant raised self-defense to a charge of assault in the second degree. He proposed an instruction that a person is entitled to use force in preventing or attempting to prevent an offense against the person or a malicious trespass or other malicious interference with property. *Id.* at 96. The court sua sponte and without objection by defendant, instructed the jury that malice was an "evil intent, wish, or design to vex, annoy or injury another person." *Id.* On appeal, O'Hara argued the court's failure to completely instruct the jury as to malice violated his constitutional right to a fair trial. *Id.* at 97.

In reviewing a number of other cases, the court determined the failure to fully define a term, versus an essential element, is not error. *Id.* at 105. The court looked to *State v. Ng*, 110 Wn.2d 32, 44-45, 750 P.2d 632 (1988) where the trial court failed to define the term theft in a robbery instruction. The *Ng* court reasoned that theft was a commonly understood

term to allow the jury to convict for robbery. *Id.* Moreover, in *State v. Scott*, 110 Wn.2d 682, 691-92, 757 P.2d 492 (1989), the failure to define knowledge under an accomplice liability instruction was not constitutional error as there was no reason to believe the definition of knowledge required anything more than a common understanding. *Id.*

In *O'Hara*, the court reasoned even though the court did not fully define malice, the instruction did not prevent the jury from inferring malice from other circumstances not so defined, and the State was not relieved of its burden of proof. *O'Hara* at 107. The court particularly found helpful the instruction to the jury that "it could use circumstantial evidence, which is 'evidence of facts or circumstances from which the existence or nonexistence of other fact may be reasonably inferred from common experience.'" *Id.* The court could not find any practical and identifiable consequences from a failure to give the complete instruction. *Id.* at 108.

In the present case, the defendant argues by failing to give an additional meaning of when a defendant consumes substances by means not within the control of the defendant, he was prohibited from presenting a defense. However, the court was well within its discretion in the wording of the instruction as the defense was he was slipped something by

someone else. The definition of fraud is "deceit, trickery, sharp practice, or breach of confidence, perpetrated for profit or to gain some unfair or dishonest advantage." http://dictionary.reference.com/browse/fraud?s=t, visited June 16, 2013; http://www.merriam-webster.com/dictionary/fraud, visited June 16, 2013. Force is defined as physical power or strength possessed by a living being...strength or power exerted upon an object; physical coercion; violence, energy, power, intensity; power to influence, affect or control, efficacious power, unlawful violence threatened or committed against a person or property. http://dictionary.reference.com/browse/force?s=t&ld=1136, visited June16, 2013; http://www.merriam-webster.com/dictionary/force?show=0&t=1371410583, visited June 16, 2013. Given, the common understanding of force or fraud, the addition of the defendant's proposed language did not add any definition of consequence to how the defendant consumed the substance. Moreover, the wording presented did not preclude his defense that he was slipped something and the Defendant was clearly allowed to present this defense.

d. If there was error in the instruction, it was harmless.

Lastly, instructional error is presumed prejudicial, but can be shown to be harmless. *State v. Walters*, 162 Wn.App. 75, 255 P.3d 835 (Div 3, 2011). Should the court find the appropriate mental state for involuntary intoxication is one of insanity, Mr. Stacy still failed to prove it was involuntary. In order for Mr. Stacy to prove involuntary intoxication, he had to show two things by a preponderance of the evidence: 1) that he was given a substance by force or fraud, and 2) that it prevented him from understanding the nature and quality of his actions and rendered him incapable of conforming his conduct.

In the present case the defendant's evidence did not show by a preponderance of the evidence that he was slipped a substance by force or fraud or that it prevented him from understanding the nature and quality of his actions and rendered him incapable of conforming his conduct. The testimony showed Mr. Stacy was drinking that evening and had a motive for the attack. Ms. Holde insulted Mr. Stacy and his wife by accusing Mrs. Stacy of inappropriate sexual contact with another man and implying they were swingers. Mr. Stacy spoke to Mrs. Stacy about the accusation. Only after Mrs. Stacy denied the accusation did Mr. Stacy attack Ms. Holde after she insulted he and Mrs. Stacy. The testimony also showed

after Mr. Stacy regained consciousness, Stacy continued to fight the police. Once he was under control, he was able to walk out of the hotel and be placed into a patrol car. At the hospital he was obstinate and obstructing, but it was goal directed in not wanting to be in the hospital. Then when faced with the removal of his necklace, he struck out at the security guard. The defendant's testimony that he did not remember would not outweigh all the evidence he acted with directed purpose and motive that evening.

Additionally, the only evidence presented by the defendant that night was that his level of drinking would not equate to his assaultive behavior, there was a sudden change in behavior, and he would not have voluntarily taken any drug. He did not present any evidence by blood sample or testimony that someone slipped something to him. He only provided the jury with conjecture. Thus, even if the court gave the instruction with the insanity and other means language, the Defendant did not prove involuntary intoxication to the jury and any error was harmless.

V. THE TRIAL COURT PROPERLY DENIED THE ELICITATION OF HEARSAY STATEMENTS OF THE DEFENDANT FROM A POLICE OFFICER AS THEY WERE HEARSAY, SPECULATION, AND OPINION TESTIMONY.

The Defendant argues he was denied the ability to present exculpatory evidence when the court sustained an objection to the elicitation of a defendant's statements to a police officer. However, defense counsel was able to present the evidence to the jury, excused the witness from his own subpoena and did not call the witness after the Defendant testified.

During the State's case in chief the State called Officers Chris Blanchard and Brian Price to testify about their part in the investigation. Officer Blanchard testified the Defendant came up to the window and asked why he was in jail. RP 362. The State objected to the Defendant's statement as hearsay during the testimony of Officer Blanchard. RP 362. The court sustained the objection. RP 362. However, after the witness' testimony concluded, the court sua sponte reversed its earlier ruling, finding the question was not offered for the truth of the matter, but for the fact of the question. RP 366. The court clarified it would not allow the Defendant's response that he didn't know anything about the assault. RP 366. The court invited defense counsel to call the witness back to the

stand after the break. RP 366. Defense counsel did recall Officer Blanchard. RP 446. Blanchard then testified Stacy asked him "what he was doing there." RP 447.

The State then called Officer Price. Upon cross-examination, Defense counsel elicited Officer Price had contact with the Defendant later at the jail. RP 399. Officer Price testified Mr. Stacy was in one of the holding cells, and he had asked us what he was doing there, because he had no idea. RP 399. The State objected to the last part as hearsay. RP 399. The court sustained the last comment as to him not knowing why and instructed the jury to disregard. RP 399. Defense counsel asked for an opportunity to clarify to the jury what they could consider and the court allowed further questioning. RP 399-400. Defense counsel then was allowed to elicit from Officer Price the Defendant asked him "why he was in jail." RP 400. This question was asked while Defendant was standing with his face in the window of the cell door and because of the limited interaction with Mr. Stacy, Officer Price could not give an opinion as to his level of intoxication. RP 400-402.

After the cross-examination, Defense counsel informed the court and counsel that Officer Price was excused from defense counsel's subpoena. RP 402. Defense counsel does not attempt to recall Officers Price or Blanchard after the Defendant testified.

The Defendant argues the statements elicited from Officer Price were not hearsay because they fell within the exception under Evidence Rule (ER) 801(d)(1)(ii) as a prior consistent statements. Evidence Rule 801(d)(1)(ii) states that prior statements by a witness are not hearsay if the declarant testifies at trial, is subject to cross-examination concerning the statement and the statement is consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. WA ER 801(d)(1) (2013).

In the present case, defense counsel attempted to elicit the statements prior to the defendant's testimony and prior to his cross-examination. He also then excused the witness and did not attempt to recall him after the Defendant's testimony. Moreover, the Defendant does not cite from any part of the record to support his claim the State laid a charge of express or implied fabrication or improper motive against the Defendant at the point Officer Prices was called as a witness.

It is also clear from the record that even after the court sustained the State's objection, counsel was allowed to clarify the Defendant asked why he was jail. This was not objected to by the state. There is little difference between the first statement that "he asked what he was doing

there because he had no idea." and "he asked us why he was there." Thus, the Defendant did have the opportunity to elicit the testimony originally excluded and to argue that merely asking the question implied Defendant did not know.

Morevover, in Officer Price's testimony, it is arguable the Officer made a speculative conclusion from the Defendant's question of what he was doing in jail that defendant had no idea why he was there. This evidence was excludable under Evidence Rules 602 and 701.

It is well recognized that an appellate court may uphold the trial court's ruling on appeal on "any basis supported by the record." *Stieneke v. Russi* 145 Wn.App. 544, 559-560, 190 P.3d 60, 68 (Div. 2, 2008) citing *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997) An appellate court can sustain the trial court's judgment upon any theory established by the pleadings and supported by the proof, even if the trial court did not consider it. *Id.* Under Evidence Rule 602 a witness must have personal knowledge of a matter in order to testify to that matter. WA ER 602 (2013). Moreover, a lay witness may not testify to their opinion under Evidence Rule 701. WA EV 701 (2013). It is error to admit lay opinion testimony which goes to a core element of the crime charged unless it has a substantial factual basis. *State v. Farr-Lenzini*, 93

Wn.App. 435, 463, 970P.2d 313 (1999). A trial court's decision to admit lay opinion testimony is reviewed for abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992).

In the present case, Officer Price's testimony was opinion evidence of the core issue of whether the Defendant was cognizant of his actions and thus able to form intent to commit the charges. As such it was proper for the court to exclude the testimony.

Lastly, the Defendant argues the jury obviously needed this information given the jury question of when the Defendant hired counsel. However, this information of when defendant hired counsel was not resolved by the opinion of Officer Price and in light of the other evidence presented by the defendant was insignificant.

The court should deny the claim of improper exclusion as the Defendant was not prohibited from putting this evidence before the jury, the evidence is not a prior consistent statement under Evidence Rule 801(d)(1)(ii), and it was improper opinion evidence as to a core issue.

VI. THE DEFENDANT AND PUBLIC DO NOT HAVE A RIGHT TO BE PRESENT WHEN THE COURT REPLIES TO A JURY QUESTION DURING DELIBERATION.

In *State v. Sublett*, 176 Wn.2d 58, 292 P.3d 715 (2012), the Washington Supreme Court determined the public and defendant do not

have right to be present to answer jury questions during deliberation. The Defendant argues the holding in *Sublett* should be narrowly construed to only jury questions that involve legal questions. This argument is unsound as the Supreme Court's analysis does not revolve on the type of question, but whether under the experience and logic test, any question by the jury is historically open to the public and whether it would enhance both the basic fairness of the criminal trial and the appearance of fairness.

Whether a right to a public trial has been violated is a question of law reviewed de novo on direct appeal. *Sublett*, at 70; *State v. Wilson*, 298 P.3d 148, 151 (Div 2, 2013). Not every interaction between the court, counsel, and defendants implicates the right to a public trial, or constitute a closure if closed to the public. *Sublett* at 72. To determine if a specific proceeding implicates the public trial right, the Washington Supreme Court recently adopted the experience and logic test. *Sublett*, 72-73; see *also State v. Wilson*, 298 P.3d at 152-53. The experience prong asks "whether the place and process have historically been open to the press and general public." *Id.* at73. The logic prong asks "whether public access plays a significant role in the functioning of the particular process in question." *Id.*

In *Sublett*, a jury convicted Sublett of premeditated first degree murder and felony murder and the co-defendant Olsen of felony murder. *Id.* at 67. During jury deliberation, the jury submitted a question regarding the accomplice liability instruction. *Id.* The court met with counsel in chambers to consider the question, and in an agreed answer told the jury to reread the given instructions. *Id.* The written question and answer were placed in the record, but no other colloquy was in the report of proceedings. *Id.* The defendants argued the court violated their and the public's right to public trial since they were not present and the court did not consider the question in open court on the record. *Id.* at 70.

The Washington Supreme Court disagreed with the defendants and used the experience and logic test to determine jury questions were not public. The Court found under the experience prong there was no case indicating the press or public historically has been present for such questions. In applying the logic test, the court stated, "[b]ecause the jury asked a question concerning the instructions, we view this as similar in nature to proceedings regarding jury instructions in general. Historically, such proceedings have not necessarily been conducted in an open courtroom." *Id.* at 75. The court used both CrR 6.15(c) and 6.15(f) to determine the process advanced and protected the interests of the defendant and public in open courts. *Id.* at 77.

Criminal Rule 6.15(c) states that before the instructions go to the jury the court gives counsel the opportunity to object and the objection and grounds are to be on the record. WA CrR 6.15(c) (2013). Criminal Rule 6.15(f) also states that when a jury has a question,

> [t]he court shall notify the parties and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing....Any additional instruction upon any point of law shall be given in writing.

WA CrR 6.15(f) (2013). In *Sublett*, the court found the question stage of the process did not involve witnesses, testimony, and there was no risk of perjury. *Sublett*, at 77. Thus the appearance of fairness was satisfied by having the question, answer, and any objections placed on the record. *Id.*

The Defendant tries to distinguish *Sublett* on the basis of one sentence that since the question by the jury involved the instructions, the court reviewed it under Rule 6.15. However, this attempt to distinguish fails as neither subsection of rule 6.15 distinguishes between jury questions involving fact or law. The Supreme Court's analysis never once considered under the logic prong the type of question, but rather the process involved in answering the question and whether the public's rights were protected by the openness of the process.

The Defendant argues because the jury in the present case asked a factual question, somehow the openness of logic test changes. However, this makes the facts of each case determinative of whether the "public access plays a significant role in the functioning of the particular process in question." *Id.* at 73. Making particular facts control a particular process is to put the cart before the horse. This does not make sense and actually sounds more like the now-defunct appellate distinction of legal versus ministerial inquiry.

It is well understood that the evidence presented at trial cannot be changed by the parties after deliberation begins. When both parties rest their case, there is no more factual evidence to present to the jury. The jury must rely on the evidence presented and apply the law to that evidence. The judge may not comment on the evidence and neither party can present more evidence. Thus the discussion of a factual question can do no more than refer to the instructions and the evidence presented. This was precisely what happened in the present case as the answer given to the jury, "[y]ou must rely on the evidence presented to you in the course of the trial," actually quoted the first instruction given to the jury. The court instructed the jury:

> It is your duty to decide the facts in this case based upon the evidence presented to you during this trial....You

> must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case....The evidence that you are to consider during your deliberations consists of the testimony that you have heard from the witnesses, stipulations and the exhibits that I have admitted during the trial. If evidence was not admitted or stricken from the record, then you are not to consider it in reaching your verdict.

CP 158.

The Defendant alleges the answering of the factual question involves witnesses, involved testimony and evidence the court specifically instructed the jury to disregard. However, he does not have any evidence to substantiate this claim. As stated above the court may not comment on the evidence and there is no process for providing additional witness or testimony information in answer the question. In *State v. Bremer*, 98 Wn.App. 832, 991 P.2d 118 (Div 3, 2000), the court determined a defendant does not have a right to be present during the discussion of jury instructions as he has counsel present and it there is no opportunity to defend against the charge as it only deals with legal matters. The fact that a jury has a factual question does not change the process for answer to the question. As such the Defendant fails to show there is a public trial right involved in answering a jury question.

Lastly, a court will not presume a defendant's absence based solely on a lack of record to show his presence. *State v. Jasper*, 174 Wn.2d 96,

123-24, 271 P.3d 876 (2012). In *Jasper*, the defendant complained the court violated his right to a public trial by answering a jury question without consulting him or counsel. The court of appeals took Jasper's contention as true, despite the answer to the jury question stating the court had consulted the parties. The Washington Supreme Court reminded the court of appeals that:

> [o]n a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.

Id. at 123-124. Since the record did not support Jasper's claim, the court found he did not meet his burden of showing a constitution violation.

In the present case, exactly the same information is presented to this court as the reviewing court in Jaspers. The court's answer to the jury indicates it allowed all counsel/parties an opportunity to be heard. CP 180. There is no record of a conference on the inquiry. The rational of *Jaspers* applies and the court should not presume a violation of the right to be present.

VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY PROHIBITING SPECIFIC INSTANCES OF CHARACTER OF PEACEFULNESS UNDER 405(b) AS PEACEFULLNESS IS NOT AN ESSENTIAL ELEMENT OF INVOLUNTARY INTOXICATION.

The Defendant argues peacefulness is an essential element of the defense of involuntary intoxication and the trial court abused its discretion by prohibiting specific instances under Evidence Rule 405(b). An appellate court reviews a trial court's exclusion of evidence for abuse of discretion. *State v. Mercer-Drummer*, 128 Wn.App. 625, 629-630, 116 P.3d 454 (Div 2, 2005). An abuse of discretion occurs when the trial court bases its decision on untenable ground or exercises discretion in a manner that is manifestly unreasonable. *Id.*

Evidence Rule 404(a) states "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except evidence of a pertinent trait of character offered by an accused. WA ER 404(a) (2013). When character is allowed, Evidence Rule 405 states proof may be made by testimony as to reputation. WA ER 405(a) (2013). Only if character or trait of character is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct. WA ER 405(b) (2013).

In the present case, the Defendant moved to present evidence of specific instances of character under Evidence Rules 404(a) and 405(b). CP 21-25, CP 37-40, RP 116. The state responded that if the court determined the character was central to the defense, the court give a limiting instruction to the jury. RP 117. The court, citing to *State v. Mercer-Drummer*, found character for peacefulness and peacefulness while under the influence were not an essential element of the defenses and while the Defendant could present testimony to this character trait, he was limited under Rule 405(a) to reputation evidence only. RP 120, 134-35. The Defendant did present a number of witnesses who testified the defendant had a reputation for peacefulness in the community. RP 627-28, 641, 653-54, 825. The State did not present any rebuttal testimony. RP 829.

In *State v. Mercer-Drummer*, 128 Wn.App. 625, 629, 116 P.3d 454 (Div 2, 2005), the Defendant faced charges of assault in the third degree against an officer, obstructing a law enforcement officer, and resisting arrest. The State moved to exclude the defendant's testimony she had no criminal history. *Id.* The defendant argued this testimony was relevant to establish her good character and to support her defense she did not intend to strike the deputy. *Id.* at 630. The trial court excluded the testimony as

it did not show her character for peacefulness and did not meet the criteria for admissible character evidence under ER 405. *Id.* at 629.

Assuming without deciding that a defendant's criminal history would be admissible under ER 404(a), Division Two upheld the trial court's decision that Mercer-Drummer failed to meet the requirements of ER 405. *Id.* at 630. Division Two found that peacefulness is not an essential element of assault. *Id.* at 631.

The court of appeals looked to the Washington Supreme Court for guidance of when character is an essential element of a crime. In *State v. Kelly*, 102 Wn.2d 188, 196-97, 685 P.2d 564 (1984). the Washington Supreme court stated: "Character is an 'essential element' in comparatively few cases. For character to be an essential element, character must itself determine the rights and liabilities of the parties." In *Kelly*, the Washington Supreme court determined character was not an essential element of self-defense. It is also not an essential element of a Driving under the Influence charge. State v. O'Neill, 58 Wn.App. 367 (Div 1, 1990).

With this framework in mind, the appellate court in *Mercer-Drummer*, ruled because peacefulness is not an essential element of assault, a Defendant could not present testimony other than in the form of

reputation under ER 405(a). *Mercer-Drummer* at 632. Thus when Mercer-Drummer attempted to testify she was a law abiding citizen she was testifying to a lack of a specific instances in her criminal record. This was outside the parameters of Evidence rule 405. *Id.*

In the present case, the Defendant tries to distinguish *Mercer-Drummer* on the grounds Mercer-Drummer did not offer the evidence of lawfulness as to an essential element of assault. Def. Brf at 47. However, the court clearly outlined Mercer-Drummer offered the evidence to negate her intent to assault the officer. *Mercer-Drummer* at 630. Mr. Stacy's defenses of both voluntary and involuntary intoxication attempt to negate the intent element of the assault charge. Thus these offers of proof are exactly like those in *Mercer-Drummer*.

The Defendant cites to Washington Practice section 405.4 for the position when a defendant pleads insanity, acts of conduct are admissible to demonstrate sanity or insanity, but are generally not thought of as involving character. WA PRAC. 13b § 405.4 (2012). Stacy then tries to connect the dots to involuntary intoxication as akin in insanity under *State v. Mriglot*. However, the defendant cannot have the argument both ways on appeal. At trial, the Defendant argued under Rule 405(b) for admission of character evidence and the court ruled taking into consideration

Evidence Rule 405. The defendant did not raise the admissibility of prior instances of conduct to demonstrate insanity, nor cite to the case law accompanying it. As such, he is raising the matter for the first time on appeal.

Generally, appellate courts will not entertain issues raised for the first time on appeal. RAP 2.5(a); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 441, 191 P.3d 879 (2008); *State v. Scott,* 110 Wash.2d 682, 757 P.2d 492 (1988). The reason for this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials. *Smith v. Shannon,* 100 Wn.2d 26, 37, 666 P.2d 351 (1983). An exception to the rule is made when the appellant demonstrates that the error complained of constitutes manifest constitutional error. WA RAP 2.5(a)(3) (2013); *State v. Kirkman,* 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007). The application of RAP 2.5(a) is discretionary and the court may consider matters not raised below in order to render a proper decision. *Bennett v. Hardy,* 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). In the present instance, the Defendant has not alleged manifest constitution error and the trial court's admission of character evidence in this instance is a matter covered by the Rules of Evidence, not constitutional law.

Should the court consider whether the evidence was admissible, the line of cases cited by the State in its first argument do not support the admission of specific instances of conduct to negate the intent element because the defense is the same for both the voluntary and involuntary intoxication defenses to negate a specific intent crime. *See supra* State's argument I.

VIII. CONCLUSION

For the foregoing reasons and arguments, the trial court did not commit error, and the court should affirm the conviction.

Respectfully submitted this 21st day of June, 2013.

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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on June 21st, 2013.

Michelle Sasser

Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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