No. 98483-2

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JASON LEMAR DILLINGHAM JENKINS,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 52459-7-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 17-1-03500-1
The Honorable Bryan Chushcof, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Jason Lemar Dillingham Jenkins, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 52459-7-II, which was filed on April 7, 2020. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Where the evidence showed appellant had ingested a controlled substance that is known to cause aggressive behavior and uncontrolled movements, did the trial court err in refusing to give the defense's proposed voluntary intoxication jury instruction which and it affected his ability to form the requisite intent to commit an assault?

2. Did appellant receive ineffective assistance of counsel? (*Pro se* issue)

3. Did the prosecutor engaged in misconduct? (*Pro se* issue)

IV. STATEMENT OF THE CASE

On the morning of September 13, 2017, Tacoma firefighters and medical aid personnel responded to a report of a "man down," possibly as a result of a seizure or drug use. (08/15/18 RP 325, 328, 381, 398; 08/16/18 RP 467, 515) When they arrived at the

scene, they found a man later identified as Jason Jenkins laying in a grassy area next to a school. (08/15/18 RP 329; 08/16/18 RP 468) Jenkins was covered in leaves and dirt. (08/16/18 RP 506) He was semiconscious and did not respond coherently to questions about his condition. (08/15/18 RP 331, 332, 403, 418, 419; 08/16/18 RP 468, 507, 516) Jenkins had to be helped to his feet and placed on a gurney so that he could be assessed and treated by EMTs. (08/15/18 RP 332, 333, 403, 404, 08/16/18 RP 468, 516)

As is standard procedure, the EMTs placed safety restraints on Jenkins' legs and chest to protect him during transport to the hospital. (08/15/18 RP 333, 404) Then they loaded the gurney into the ambulance and began assessing his condition. (08/15/18 RP 333, 405; 08/16/18 RP 468) Jenkins was calm and compliant at first, but he became enraged when EMT John Correia attempted to take a blood sample from his finger. (08/15/18 RP 383, 406) He began yelling at the aid personnel, accusing them of trying to rob him of his belongings. (08/15/18 RP 336, 406, 407; 08/16/18 RP 513, 470) Jenkins thrashed about trying to free himself from the restraints, and demanded that he be allowed to leave. (08/15/18 RP 336, 337, 384, 407; 08/16/18 RP 470)

Correia stood up to exit the ambulance, and felt a kick to his

thigh. (08/15/18 RP 408) When he turned around, Jenkins kicked Correia in his chest and caused Correia to fall backwards out of the ambulance. (08/15/18 RP 408, 409; 08/16/18 RP 470, 509)

Jenkins then climbed out of the ambulance and approached firefighter Daniel O'Leary. (08/15/18 RP 338, 411) Jenkins assumed a boxer's stance and swung at O'Leary, making contact with his head and arm. (08/15/18 RP 338, 411; 08/16/18 RP 472, 474, 513)

The firefighters and EMTs moved away from Jenkins and called the police for assistance. (08/14/18 RP 08/15/18 RP 340) When police officers arrived they found Jenkins standing in the grassy area. He seemed unfocused and disoriented, and was noticeably sweating. (08/14/18 RP 293-94, 313-14; 08/15/18 RP 446) The officers assumed he was high on drugs. (08/14/18 RP 293; 08/15/18 RP 318, 458)

The officers ordered Jenkins to stand still and put his hands behind his back, but instead Jenkins lay face down on the ground. (08/14/18 RP 293, 316-17) But Jenkins was compliant, and the officers took him into custody without incident. (08/15/18 RP 300-01) During a pat-down search, the officers found a baggie containing a white powder substance. (08/15/18 RP 301, 434-35)

Someone also handed the offices a wallet, supposedly taken from Jenkins, containing credit cards in the name of a person other than Jenkins. (08/15/18 RP 307-08, 436-37) The EMTs then transported Jenkins to the hospital. (08/15/18 RP 312)

Jenkins was calmer at the hospital, but still moody and somewhat noncompliant. (08/15/18 RP 313 446; 08/20/18 RP 570, 571) A hospital security guard found a second baggie of a suspected controlled substance inside Jenkins' pants pocket. (08/15/18 RP 442; 08/16/18 RP 488, 491, 492) When asked about the drugs, Jenkins stated that it was "weed seed." (08/15/18 RP 444-45) Subsequent drug tests confirmed that one baggie contained methamphetamine and the other contained a combination of methamphetamine and heroin. (08/16/18 RP 532, 534)

Medical providers were eventually able to rule out a head injury or low blood pressure as the cause of Jenkins' symptoms and behavior, and results of testing were inconsistent with Jenkins having had a seizure. (08/15/18 RP 348, 406; 08/16/18 RP 515, 521, 522; 08/20/18 RP 575, 587-88) But a toxicology screen conducted at the hospital showed marijuana, methamphetamine, and opiates in Jenkins' system. 08/20/18 RP 576-77)

The State charged Jenkins with one count of third degree assault against Correia, one count of third degree assault against O'Leary, and two counts of unlawful possession of a controlled substance (methamphetamine and heroin). (CP 51-54)

After the State rested, defense counsel proposed the following jury instruction on voluntary intoxication based upon WPIC 18.10:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted intentionally.

(CP 74; 08/20/18 RP 591-92) The trial court refused to give Jenkins' requested instruction, ruling that there was insufficient evidence that drugs impacted Jenkins' ability to form intent. (08/20/18 RP 507-99)

In closing arguments, both parties discussed Jenkins' intoxication and whether it related to the offenses. The prosecutor acknowledged that Jenkins was on drugs but argued he intentionally assaulted Correia and O'Leary. (08/20/18 RP 615, 617-18, 639-40, 641) Defense counsel argued that Jenkins did not act with intent because he was in an "altered state" due to drug use. (08/20/18 RP 623-25, 628, 632, 636-37)

The jury found Jenkins guilty of both assault charges and both possession charges. (08/21/18 RP 657; CP 103-06) The trial court denied the State's request for an exceptional sentence above Jenkins' standard range, and denied the defense request for a drug offender alternative sentence. (CP 109-457, 458-61; 09/28/18 RP 10, 20) The court imposed a standard range sentence totaling 60 months. (09/28/18 RP 20; CP 474) The court found that Jenkins was indigent and waived all discretionary legal financial obligations. (08/21/18 RP 21; CP 472-73)

Jenkins timely appealed. (CP 485) The Court of Appeals agreed that the trial court erred by imposing an interest accrual provision regarding LFOs, but otherwise affirmed Jenkins' conviction and sentence.

V. ARGUMENT & AUTHORITIES

The issues raised by Jenkins' petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. THE COURT'S REFUSAL TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION DEPRIVED JENKINS OF HIS RIGHT TO PRESENT A DEFENSE AND TO A FAIR TRIAL.

The trial court erred in refusing to give the defense-

requested voluntary intoxication instruction. There was substantial evidence of Jenkins' intoxication, as well as its impact on his actions and state of mind. Without the supporting instruction, Jenkins was unable to effectively argue his intoxication defense, rendering the verdict unreliable.

1. Taking the evidence in the light most favorable to Jenkins, there was sufficient evidence to support the requested voluntary intoxication instruction.

The Sixth Amendment and the Due Process Clause of the Fourteenth Amendment require that criminal defendants be afforded a meaningful opportunity to present a complete defense. *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed .2d 413 (1984); U.S. Const. Amd 6; U.S. Const. Amd 14. A defendant has the right to have the jury accurately instructed. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Thus, as part of the constitutionally protected right to present a defense, the defendant is entitled to a jury instruction on his theory of the case when that theory is supported by substantial evidence. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003).

In evaluating whether substantial evidence supports a defense-proposed instruction, the trial court must interpret the

evidence "most strongly" in the defendant's favor and "must not weigh the proof, which is an exclusive jury function." *State v. Douglas*, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005). Refusal to give a proposed instruction is reviewed de novo. *Douglas*, 128 Wn. App. at 562.

Evidence of intoxication and its effect may be used to negate the element of intent. RCW 9A.16.090; *State v. Carter*, 31 Wn. App. 572, 575, 643 P.2d 916 (1982). "Intoxication" means "an impaired mental and bodily condition which may be produced either by alcohol, which is a drug, or by any other drug." *State v. Dana*, 73 Wn.2d 533, 535, 439 P.2d 403 (1968).

When requested, the trial court must instruct on voluntary intoxication when (1) the charged crime includes a mental state, (2) there is substantial evidence the defendant was drinking and/or using drugs, and (3) there is evidence the drinking or drug use affected the defendant's ability to acquire the required mental state. *Kruger*, 116 Wn. App. at 691; *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 715 (1995).

In this case, the first two requirements were not disputed. (08/20/18 RP 593) As to the first requirement, intent is an element of third degree assault. RCW 9A.36.031(1)(i); *State v. Finley*, 97

Wn. App. 129, 135, 982 P.2d 681 (1999).

The second requirement was satisfied as well. Intoxication or impairment from drug usage is a factual question that can be proved by lay testimony. *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985). There must be a showing of drug or alcohol consumption and the effect of the consumption on the defendant. *Dana*, 73 Wn.2d at 535; *State v. Zamora*, 6 Wn. App. 130, 132, 491 P.2d 1342 (1971).

There was such evidence in this case. Aid personnel received information that Jenkins had ingested the drug Spice, a synthetic marijuana laced with methamphetamine. (08/15/18 RP 458, 08/16/18 RP 515; 08/20/18 RP 573, 579) The toxicology screen showed marijuana, methamphetamine, and opiates in Jenkins' system. (08/20/18 RP 576-77) Spice can cause an individual's behavior to "range anywhere from being calm to being increasingly violent." (08/16/18 RP 521) A person effected by Spice may exhibit agitated or aggressive behavior, uncontrolled movements, rapid speech patterns, and excessive sweating. (08/20/18 RP 572-73) Jenkins exhibited these symptoms and behaviors. It was obvious to responding aid personnel and law enforcement that Jenkins was in an altered state and likely high on

drugs. (08/14/18 RP 293; 08/15/18 RP 318, 332, 346, 362, 392, 418, 458; 08/16/18 RP 478516-17) It would have been obvious to the jury as well.

Thus, the only question is whether there was evidence from which a jury could find that Jenkins' level of intoxication affected his ability to form the intent necessary to commit the assaults. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997). The trial court and the Court of Appeals both found that there was not. But the courts did not view the evidence in the proper light.

To satisfy the third requirement, there must be substantial evidence of the effects of the intoxicants on the defendant's mind or body. *State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996). The evidence must reasonably and logically connect a defendant's intoxication with his inability to form the requisite mental state. *Gabryschak*, 83 Wn. App. at 252.

A defendant generally is not required to present expert testimony to support an involuntary intoxication defense based on alcohol intoxication because the effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use. *State v. Thomas,* 109 Wn.2d 222, 231, 743 P.2d 816 (1987); *Kruger*, 116 Wn. App. at 692-93. However, the

effects of drugs like methamphetamine or heroin are less commonly known, so a defendant must "provide competent evidence to show how his ability to form intent was affected" by the use of these drugs. *State v. Classen*, 4 Wn. App. 2d 520, 538, 422 P.3d 489 (2018). Jenkins provided ample competent evidence in this case.

The physical manifestations of intoxication may provide sufficient evidence from which to infer that mental processing was affected, thus entitling the defendant to an intoxication instruction. *State v. Walters*, 162 Wn. App. 74, 83, 55 P.3d 835 (2011). In *Walters*, for example, the evidence was sufficient where the defendant had slurred speech and droopy and bloodshot eyes, he swayed back and forth, and he did not respond to pain compliance techniques. 162 Wn. App. at 83.

In *State v. Rice*, an intoxication instruction was necessary where the testimony established that the defendants, who earlier drank beer and ingested several Quaaludes, spilled beer and were uncoordinated while playing ping pong, and one defendant felt no pain when he was hit by a car. 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

And in *Kruger*, the court found that the defendant was

entitled to a voluntary intoxication instruction because there was "ample evidence of his level of intoxication on both his mind and body, e.g., his 'blackout,' vomiting at the station, slurred speech, and imperviousness to pepper spray." 116 Wn. App. at 692.

By contrast, in *Gabryschak*, the defendant was not entitled to an instruction where he was obviously intoxicated and angry, but there was no sign of the alcohol's impact on his reasoning abilities. 83 Wn. App. at 253-55. Similarly, in *State v. Priest*, the defendant's intoxication did not affect his mental state where he was able to operate a motor vehicle, communicate with a state trooper, purposefully provide false information, and attempt to reduce his charges by becoming an informant. 100 Wn. App. 451, 455, 997 P.2d 452 (2000).

Recently, in *Classen*, this Court addressed whether defense counsel was ineffective for failing to request a voluntary intoxication instruction. 4 Wn. App. 2d at 536-38. The testimony at trial showed only that Classen had a history of methamphetamine use, that he appeared agitated and was acting unusual on the day in question, and that the arresting officer testified Classen was making nonsensical statements and that he appeared to be under the influence of an unspecified drug. 4 Wn. App. 2d at 528-29, 537-38.

The Court concluded that, "[e]ven assuming substantial evidence of intoxication exists, there is insufficient evidence to show that intoxication affected Classen's ability to acquire the required mental state to commit the crimes." 4 Wn. App. 2d at 536.

Jenkins presented substantially more evidence than the defendant in *Classen*. The facts of this case more closely resemble *Walters*, *Rice* and *Kruger*. First, Jenkins elicited testimony about the known effects of methamphetamine and Spice use. The Tacoma General Hospital nurse who treated Jenkins testified that methamphetamine is a stimulant that causes sweating, uncontrolled movements, and rapid speech patterns. (08/20/18 RP 572-73) She testified that Spice is a synthetic marijuana with methamphetamine laced into it, and also causes agitated and aggressive behavior, involuntary movements, and pressured speech. (08/20/18 RP 572-73) Paramedic David Wagner testified that the behavior of a person high on Spice ranges from calm to increasingly violent. (08/16/18 RP 521)

Jenkins also elicited testimony that he exhibited these physical manifestations of intoxication from methamphetamine and Spice. The firefighters, EMTs and police officers all noted that Jenkins exhibited an "altered state of consciousness" and was "not

completely with it." (08/15/18 RP 332, 346, 362, 392, 403, 418; 08/16/18 RP 469, 478, 516-17) He was sweating profusely and was unsteady on his feet. (08/15/18 RP 332, 293-94, 403, 418, 446; 08/16/18 RP 506, 516-17) He was initially unable to respond appropriately to questions from aid personnel. (08/15/18 RP 331, 332, 418, 419; 08/16/18 RP 469-70, 507, 518-19) When he finally did communicate, he became irrationally angry, yelling at aid personnel and falsely accusing them of stealing his jewelry. (08/15/18 RP 330, 336-37, 406-07; 08/15/19 RP 470, 513) When the police arrived, he appeared high, seemed disoriented, and did not follow commands. (08/14/18 RP 293, 293-94; 08/15/18 RP 315-17, 446, 458)

In the ambulance, Jenkins told the aid personnel that they could not tie him down and he began squirming and kicking to break free from the restraints. (08/15/18 RP 337, 361) Normally, aid personnel will allow an individual to refuse treatment once personnel are able to determine that the individual has the "full mental capacity" to make that decision rationally. (08/15/18 RP 361-62; 08/16/18 RP 519) This generally involves asking specific questions of the individual to ensure that they are properly oriented and thinking clearly. But aid personnel decided not to bother with

that process in this case because Jenkins was being "irrational" and "not acting in his right state of mind." (08/15/18 RP 361-62; 08/16/18 RP 519) Clearly Jenkins' ability to make decisions and form intent was also impaired.

Given all of this evidence of Jenkins' intoxication and its impact on his physical and mental state, the trial court erred when it refused the voluntary intoxication instruction.

2. The error in failing to instruct the jury was not harmless error.

Instructional error is presumed prejudicial but can be harmless. Rice, 102 Wn.2d at 123. A nonconstitutional error is harmless if it did not, within reasonable probability, materially affect the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

However, the error here also infringed on Jenkins' constitutionally protected right to present a defense and right to a fair trial. Errors of constitutional magnitude are not harmless unless the State proves the errors are harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). An error is harmless if the court is "convinced beyond a reasonable doubt that any reasonable jury would have

reached the same result without the error." *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002).

The evidence of Jenkins' intoxication and its effect on his behavior was overwhelming. During closing arguments, defense counsel argued that Jenkins' ability to form the requisite intent was affected by his intoxication. (08/20/18 RP 623-25, 628, 632, 636-37) But, in the absence of the instruction, the jury lacked any direction on how to apply the intoxication information to the law. Rice, 102 Wn.2d at 123. The jury was instructed that the attorneys' arguments are not the law but only the court's instructions contained the law. (CP 80-81) Without Jenkins' requested instruction, the jury was not correctly apprised of the law and Jenkins was unable to effectively argue his theory of an intoxication defense.

Given the overwhelming evidence of Jenkins' intoxication and its effect on his behavior, the jury very well may have believed his intoxication hindered his ability to form the requisite intent. The error in failing to instruct the jury on voluntary intoxication was not harmless and this Court must reverse Jenkins' assault convictions and remand for a new trial.

B. *PRO SE* ISSUES

In his *pro se* Statement of Additional Grounds for Review (SAG), Jenkins argued that he received ineffective assistance of counsel and that the prosecutor engaged in misconduct. The arguments and authorities pertaining to these issues are contained in his SAG, which is hereby incorporated by reference. The Court of Appeals found that these challenges are without merit. (Opinion at 1-2, 11-13) This Court should review these *pro se* issue as well.

VI. CONCLUSION

Jenkins presented ample evidence to establish that he was intoxicated and that the effect of the drugs impacted his ability to form the intent required to support a conviction for third degree assault. The error in failing to instruct the jury was not harmless error. These convictions must be reversed and the case remanded for a new trial. This Court should accept review, reverse his conviction, and remand for a new trial.

DATED: April 29, 2020

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Jason L. D. Jenkins

CERTIFICATE OF MAILING

I certify that on 04/29/2020, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jason L. Dillingham Jenkins #957082, Monroe Correctional Complex – WSR, P.O. Box 777, Monroe, WA 98272-0777.

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in *State v. Jason Lemar Dillingham Jenkins*, No. 52459-7-II

Filed
Washington State
Court of Appeals
Division Two

April 7, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON LEMAR DILLINGHAM JENKINS, Appellant.	No. 52459-7-II UNPUBLISHED OPINION

SUTTON, J. — Jason Lemar Dillingham Jenkins appeals his jury conviction for two counts of third degree assault and two counts of unlawful possession of a controlled substance. He argues that the trial court erred by (1) declining his proposed jury instruction on voluntary intoxication and (2) imposing an interest accrual provision related to the legal financial obligations (LFOs) in his judgment and sentence. The State argues that the trial court properly denied Dillingham Jenkins's request to instruct the jury on voluntary intoxication and concedes that the trial court erred by imposing the interest accrual provision. In addition, Dillingham Jenkins raises two issues in a statement of additional grounds (SAG) for review.

We hold that the trial court did not err by denying Dillingham Jenkins's request to instruct the jury on voluntary intoxication, and any error in failing to give the instruction was harmless beyond a reasonable doubt. We also hold that the court did err by imposing an interest accrual provision regarding LFOs. Finally, we hold that Dillingham Jenkins raises no issues requiring

reversal in his SAG. Consequently, we affirm Dillingham Jenkins's conviction, but remand to the trial court to strike the interest accrual provision from his judgment and sentence.

FACTS

I. ASSAULT

In September 2017, Tacoma Firefighter Daniel O'Leary responded to a report of a "man down" who was possibly suffering from a seizure. Verbatim Report of Proceedings (VRP) at 329. When O'Leary arrived, he observed Dillingham Jenkins covered in leaves and dirt and laying in a large grassy area in front of a building that appeared to be a school. O'Leary approached Dillingham Jenkins and noticed he appeared "altered." VRP at 332. O'Leary attributed this to either drugs, alcohol, a seizure, or diabetes. O'Leary assisted Dillingham Jenkins to his feet and helped him into a waiting ambulance. Additional medical personnel placed Dillingham Jenkins on a gurney, secured his arms and legs with safety restraints, and loaded him into the ambulance.

Initially, Dillingham Jenkins was quiet and calm. When emergency medical technician (EMT) John Correia took Dillingham Jenkins's arm to start a blood draw, Dillingham Jenkins quickly "exploded," and began fighting and kicking all those around him and accusing the medical personnel of "stealing his jewelry." VRP at 3360. Dillingham Jenkins freed his legs from the safety restraints and kicked Correia squarely in the chest, knocking him out of the back door of the ambulance.

Dillingham Jenkins, appearing "angry and focused," stepped out of the ambulance once it was stopped and approached O'Leary and Correia with fists. VRP at 338. Dillingham Jenkins then "zeroed in" on O'Leary. VRP at 338. Dillingham Jenkins assumed a "boxing position" and began swinging and jabbing his fists, hitting O'Leary in the ear and arm. VRP at 338.

The first responders called the police and waited in their vehicles until police arrived. While they were waiting, O'Leary went up to the building and advised the individuals inside to lock the doors.

Tacoma Police Officer Ryan Hovey responded to the scene for a "Code Blue" emergency request for assistance from the fire department. VRP at 291. According to Officer Hovey, Dillingham Jenkins "appeared high." VRP at 293. He based his conclusion on the facts that Dillingham Jenkins was not paying attention to the police officers or firefighters when police arrived, he laid on the ground without being asked to, and he was "kind of sweaty and excited." VRP at 293-94. However, Dillingham Jenkins was compliant while police arrested him. He did not "flail around" or kick or punch the officers. VRP at 300-01.

While searching Dillingham Jenkins, officers found a white substance that appeared to be methamphetamine; they also discovered two credit cards belonging to people other than Dillingham Jenkins in his wallet. After the police officers had Dillingham Jenkins in custody, they restrained him on the gurney and put him back in the ambulance. Correia and his partner transported Dillingham Jenkins to the hospital.

A hospital security officer was advised that a "combative patient" was arriving at the hospital, so, per protocol, the security officer searched Dillingham Jenkins for weapons when he arrived. VRP at 490. During the search, the security officer discovered a plastic bag with a "black tar substance" inside and three "clear-type stones." VRP at 492. The security officer informed a police officer of what he found. Dillingham Jenkins claimed the drugs were "weed seed." VRP at 445. Subsequent testing confirmed that the bag contained methamphetamine and heroin.

Registered Nurse Brooke Carpenter observed Dillingham Jenkins as police and medics escorted him into the hospital. Carpenter described Dillingham Jenkins's demeanor as "calm." VRP at 570. But she explained that he would not answer questions from hospital staff and "kept saying that he got jumped over and over." VRP at 574. Carpenter was advised that Dillingham Jenkins may have been "smoking Spice[1] before he arrived" at the hospital. VRP at 574-75. Carpenter performed a drug screen on Dillingham Jenkins and concluded that he was positive for marijuana, methamphetamine, and opiates.

II. PROCEDURE

The State charged Dillingham Jenkins with one count of third degree assault, one count of second degree identity theft, two counts of second degree possession of stolen property, and two counts of unlawful possession of a controlled substance. The State amended the information and charged Dillingham Jenkins with an additional count of third degree assault. The case proceeded to a jury trial.

At trial, Correia testified that Dillingham Jenkins looked at him when he kicked him and described the kick as "intentional." VRP at 409. Correia's partner testified that Dillingham Jenkins's kick "appeared to be targeted." VRP at 510.

O'Leary and Correia testified that the punch to O'Leary's arm did not appear to be "random flailing" but rather a "directed punch." VRP at 339. O'Leary further testified that Dillingham Jenkins was "purposely coming after" him. VRP (Aug. 15, 2018) at 345. O'Leary contemplated

[1] "Spice" refers to "a synthetic marijuana or marijuana with methamphetamine laced in it." VRP at 573.

defending himself, but when he noticed someone in a FedEx vehicle filming the incident, he continued retreating.

Carpenter testified that behaviors associated with use of Spice are the same as those associated with methamphetamine: "agitated behavior, rapid pressured speech, increased heart rate, large pupils, involuntary movements, aggressive behavior." VRP at 573.

After the State rested, defense counsel proposed that the trial court instruct the jury on voluntary intoxication. Defense counsel cited testimony that Dillingham Jenkins had appeared to be under the influence of drugs during the incident and that drugs were detected in his system at the hospital. Defense counsel proposed the following jury instruction on voluntary intoxication:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Clerk's Papers (CP) at 74. The State opposed the instruction. After hearing argument from both sides, the trial court determined there was insufficient evidence to support the instruction and declined to give it. The court explained that while there was some evidence that Dillingham Jenkins was positive for marijuana, methamphetamine, and opiates, it was unknown,

> [T]o what extent that any of this would have affected the defendant's ability to form intent other than what was testified to by the medics a[t] the scene, which was that he was initially sort of out of it and then wasn't out of it anymore.
>
> . . . .
>
> There just isn't enough evidence to support all of that.

VRP at 597, 599.

The jury found Dillingham Jenkins guilty of two counts of third degree assault and two counts of unlawful possession of a controlled substance.[2]

The trial court sentenced Dillingham Jenkins to 60 months in prison, followed by 12 months of community custody. The court found Dillingham Jenkins indigent and waived all discretionary LFOs. The court imposed the mandatory $500 crime victim penalty assessment fee and included an interest accrual provision. Dillingham Jenkins appeals. CP at 485.

ANALYSIS

I. VOLUNTARY INTOXICATION INSTRUCTION

A. SUBSTANTIAL EVIDENCE DID NOT SUPPORT THE PROPOSED INSTRUCTION

Dillingham Jenkins argues that the trial court erred by declining his proposed jury instruction on voluntary intoxication. The State argues that the trial court properly denied counsel's request because there was not substantial evidence that the intoxicants affected Dillingham Jenkins's ability to form the requisite intent for the crime. We agree with the State.

We review de novo a trial court's refusal to give an instruction based on an issue of law. *State v. George*, 161 Wn. App. 86, 95, 249 P.3d 202 (2011). "'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" *State v. Aguirre*, 168 Wn.2d 350, 363-64, 229 P.3d 669 (2010) (emphasis and internal quotation marks omitted) (quoting *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). "To obtain a voluntary intoxication instruction, the defendant must show "(1) one of the elements of the crime charged is a particular

[2] The trial court granted defendant's motion to dismiss one count of identity theft and two counts of possession of stolen property.

mental state, (2) there is substantial evidence that the defendant ingested the intoxicant, and (3) evidence that his ingestion of an intoxicant affected his ability to acquire the required mental state for the crime." *State v. Classen*, 4 Wn. App. 2d 520, 536, 422 P.3d 489 (2018).

The first element is met because the parties agree that the crime of third degree assault required that Dillingham Jenkins intended to commit a crime. The second element is met because the parties further agree that there was substantial evidence that Dillingham Jenkins ingested marijuana, methamphetamine, and opiates. Thus, only the third element is in dispute.

"To satisfy the third element, there must be substantial evidence of the effects of the intoxicants on the defendant's mind or body." *Classen*, 4 Wn. App. 2d at 536. "Substantial evidence is 'evidence sufficient to persuade a fair-minded, rational person of the truth of the [matter].'" *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006) (quoting *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). "The evidence must reasonably and logically connect a defendant's intoxication with his inability to form the requisite mental state." *Classen*, 4 Wn. App. 2d at 536-37. "A person can be intoxicated and still be able to form the requisite mental state to commit certain crimes." *Classen*, 4 Wn. App. 2d at 537.

While it is not necessary to present expert testimony that alcohol intoxication affected a defendant's ability to form the required mental state to commit a crime, the same cannot be said about intoxication by drugs like methamphetamine and heroin. *Classen*, 4 Wn. App. 2d at 537. Because it is not common knowledge how methamphetamine and heroin affect a person's ability to form the requisite intent, a defendant is required to provide "competent evidence" showing how his ability to form intent was affected by the drugs. *Classen*, 4 Wn. App. 2d at 538.

Here, evidence was adduced at trial that would permit a jury to find that Dillingham Jenkins was intoxicated. O'Leary testified that Dillingham Jenkins appeared "altered," and he attributed it to either drugs, alcohol, a seizure, or diabetes. VRP at 332. Officer Hovey testified that Dillingham Jenkins was not paying attention to firefighters or medical responders when police arrived, he laid on the ground without being asked to, he was "kind of sweaty and excited," and he "appeared high." VRP at 293-94. A search of Dillingham Jenkins revealed bags of methamphetamine and heroin. Carpenter testified that at the hospital Dillingham Jenkins "kept saying that he got jumped over and over" and would not answer questions from hospital staff. VRP at 574. Moreover, Dillingham Jenkins tested positive for marijuana, methamphetamine, and opiates.

As the trial court ruled, the testimony did not show "to what extent that any of this would have affected the [Dillingham Jenkin]'s ability to form intent other than what was testified to by the medics [at] the scene, which was that he was initially sort of out of it and then wasn't out of it anymore." VRP at 597.

In fact, the evidence established the opposite. Correia testified that Dillingham Jenkins was looking at him when he kicked him square in the chest, and he described the kick as "intentional." VRP at 409. Correia's partner observed the incident and testified that the kick "appeared to be targeted." VRP at 510. Dillingham Jenkins did not damage anything else in the ambulance. O'Leary testified that once Dillingham Jenkins stepped outside the ambulance, he "zeroed in" on O'Leary. VRP at 338. Dillingham Jenkins assumed a "boxing position" and began swinging and jabbing his fists at O'Leary's ear and arm. VRP at 338-39. Correia also saw the blows to O'Leary, and both Correia and O'Leary testified that the punch to O'Leary did not appear

to be "random flailing," but rather a "directed punch." VRP at 339. O'Leary added that Dillingham Jenkins was "purposely coming after" him. VRP at 345-46.

Dillingham Jenkins attempts to liken his case to *State v. Walters*, 162 Wn. App. 74, 255 P.3d 835 (2011); *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984); and *State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003). While there was evidence that Dillingham Jenkins was under the influence of marijuana, methamphetamine, and opiates, unlike *Walters*, *Rice*, and *Kruger*, there was no evidence showing *how* his level of drug intoxication impacted his ability to form the requisite intent to assault Correia or O'Leary. Further, *Walters*, *Rice*, and *Kruger* all considered evidence showing that the defendants were intoxicated. *Walters*, 162 Wn. App. at 78; *Rice*, 102 Wn.2d at 122; *Kruger*, 116 Wn. App. at 689. As we held in *Classen*, alcohol intoxication is different than drug intoxication. 4 Wn. App. 2d at 537. Because the effects of methamphetamine and heroin are not "common knowledge," a showing of "competent evidence" is required to demonstrate how the defendant's inability to form intent was affected as a result of his drug intoxication. *Classen*, 4 Wn. App. 2d at 538. There was no such evidence presented in this case.

The testimony elicited at trial affirmatively showed that Dillingham Jenkins intended to assault Correia and O'Leary. Substantial evidence did not support the trial court giving a voluntary intoxication instruction. Because the evidence did not "reasonably and logically connect" Dillingham Jenkins's intoxication with his ability to form the requisite intent, we hold that the trial court did not err by rejecting his proposed jury instruction on voluntary intoxication. *Classen*, 4 Wn. App. 2d at 536-37.

B. HARMLESS ERROR

Dillingham Jenkins argues that the trial court erred and that the error was not harmless beyond a reasonable doubt. He claims that the failure to give a voluntary intoxication instruction deprived him of his constitutional right to present a defense. The State argues that any error was harmless beyond a reasonable doubt. We agree with the State and hold that any error was harmless beyond a reasonable doubt.

A defendant has a constitutional right to present a defense. *Aguirre*, 168 Wn.2d at 363. A constitutional error is harmless if we are "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002). "'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.'" *Aguirre*, 168 Wn.2d at 363-64 (emphasis and internal quotations marks omitted) (quoting *Keller*, 146 Wn.2d at 249).

Here, "assault" was defined in the jury instructions as, "an intentional, touching, striking, cutting, or shooting of another person . . . ." CP at 89. The jury was further instructed that "[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime." CP at 90.

Defense counsel argued at length through closing argument that Dillingham Jenkins could not form the requisite intent to commit assault based on his level of intoxication. Defense counsel specifically argued that the testimony that indicated that Dillingham Jenkins appeared "altered" created a reasonable doubt that he intended to assault Correia and O'Leary. VRP at 636-37. The jury rejected this theory by finding that Dillingham Jenkins intended to commit assault beyond a

reasonable doubt. The record supports the jury's verdict. Testimony from eye-witnesses to the assaults established that Dillingham Jenkins's kick to Correia's chest was targeted and intentional. Dillingham Jenkins was purposely coming after O'Leary when he assumed a boxing position and began hitting O'Leary. The punch to O'Leary did not appear to be random flailing, but rather a directed punch.

A voluntary intoxication instruction would not have changed the jury's rejection of defense counsel's theory because the jury instructions allowed defense counsel to argue Dillingham Jenkins's theory of the case. Therefore, we hold that any error in failing to give the instruction was harmless beyond a reasonable doubt.

II. INTEREST ACCRUAL PROVISION REGARDING THE LFOS

Dillingham Jenkins argues that the trial court erred by imposing an interest accrual provision related to the LFOs when this provision is no longer authorized under current LFO statutes. The State concedes that this provision is no longer statutorily authorized. We accept the State's concession and remand to the court to strike the interest accrual provision from Dillingham Jenkins's judgment and sentence.

The legislature amended former RCW 10.82.090(1) and as of June 7, 2018, no interest shall accrue on nonrestitution LFOs. LAWS OF 2018, ch. 269 § 1; *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). In *Ramirez*, our Supreme Court held that the LFO amendments apply prospectively and are applicable to cases pending on direct review. 191 Wn.2d at 748-49. The crime victim penalty assessment fee is a nonrestitution LFO. *See State v. Catling*, 193 Wn.2d 252, 258, 438 P.3d 1174 (2019) ("[N]o restitution was imposed; . . . the trial court imposed only

three LFOS: the criminal filing fee, the DNA collection fee, and the crime victim [penalty] assessment [fee].").

Here, the trial court imposed a mandatory $500 crime victim penalty assessment. This is a nonrestitution LFO. *See Catling*, 193 Wn.2d at 258. The court included an interest provision that states, "The financial obligations imposed in this judgment shall bear interest from the date of the judgment until paid in full." CP at 473. The trial court improperly included this provision because it only imposed a nonrestitution LFO. Accordingly, we remand for the court to strike this provision from Dillingham Jenkins's judgment and sentence.

III. STATEMENT OF ADDITIONAL GROUNDS

In his SAG, Dillingham Jenkins raises two additional issues to challenge his conviction and sentence. Dillingham Jenkins argues that he received ineffective assistance of counsel and the prosecutor engaged in misconduct. We disagree.

A. SAG PRINCIPLES

A SAG must adequately inform the court of the nature and occurrence of alleged errors. *State v. Calvin*, 176 Wn. App. 1, 26, 316 P.3d 496 (2013); RAP 10.10. We consider only arguments not already adequately addressed as raised by the defendant's appellate counsel. *State v. Thompson*, 169 Wn. App. 436, 493, 290 P.3d 996 (2012). We do not review matters outside the record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995). Issues involving facts outside of the record are properly raised in a personal restraint petition, rather than a SAG. *Calvin*, 176 Wn. App. at 26. And we are "not obligated to search the record in support of claims made in a [SAG]." RAP 10.10(c).

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Dillingham Jenkins claims that he received ineffective assistance of counsel because: "[n]o witnesses were subpoenaed, 911 tapes were not subpoenaed, [he has] prior mental health issues that were not addressed, [he has] also been acquitted by a jury for diminished capacity in the past and this was not investigated to be presented at trial by [his] attorney, [and] a professional defense witness was not solicited." SAG at 1. These issues all pertain to matters outside the record that we cannot address in direct appeal. *McFarland*, 127 Wn.2d at 338. Thus, we hold that his first SAG issue fails.

C. PROSECUTORIAL MISCONDUCT

Dillingham Jenkins next claims that the prosecutor engaged in misconduct because: "vindictive prosecution [and] discovery violations, [the] Paramedics never [e]ntered a report for [the] incident, [the] Prosecution [k]new of exculpatory evidence and[/]or information and did not act on it, [the] Prosecution waited nine [and] a half months before . . . recharging [because] they didn't have adequate evidence until they coached [the] firemen and paramedics." SAG at 1. Although RAP 10.10(c) does not require Dillingham Jenkins to refer to the record or cite authority, he is required to inform this court of the "nature and occurrence of [the] alleged errors." These assertions of error are too vague to allow us to identify the issues and we do not reach them.

CONCLUSION

We hold that the trial court did not err by denying Dillingham Jenkins's request to instruct the jury on voluntary intoxication, and any error in failing to give the instruction was harmless beyond a reasonable doubt. We also hold that the court did err by imposing an interest accrual provision regarding LFOs. Finally, we hold that Dillingham Jenkins raises no issues requiring

reversal in his SAG. Consequently, we affirm Dillingham Jenkins's conviction, but remand to the court to strike the interest accrual provision from his judgment and sentence.

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

Sutton, J.

SUTTON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Glasgow, J.

GLASGOW, J.

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