

No. 47989-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DUSTIN ROSE,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge  
Cause No. 14-1-01121-4

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

A. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> .....	1
1. Whether sufficient evidence was presented at trial to permit a reasonable jury to find Rose guilty beyond a reasonable doubt of attempted residential burglary.....	1
2. Whether defense counsel provided ineffective assistance by failing to propose a jury instruction for the lesser included offense of first degree criminal trespass or a jury instruction for voluntary intoxication.....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
C. <u>ARGUMENT</u> .....	1
1. <u>The evidence, taken in the light most favorable to the State, was sufficient to prove the charge of attempted residential burglary beyond a reasonable doubt</u> .....	1
2. <u>Defense counsel did not provide ineffective assistance by failing to propose jury instructions for a lesser included offense of attempted first degree criminal trespass or for the defense of voluntary intoxication</u> .....	7
a. <u>Lesser-included jury instruction</u> .....	9
b. <u>Voluntary intoxication instruction</u> .....	14
D. <u>CONCLUSION</u> .....	19

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

State v. Bencivenga,  
137 Wn.2d 703, 709, 974 P.2d 832 (1999) ..... 7

State v. Bergeron,  
105 Wn.2d 1, 19, 711 P.2d 1000 (1985) ..... 3, 4

State v. Brunson,  
128 Wn.2d 98, 905 P.2d 346 (1995) ..... 3

State v. Camarillo,  
115 Wn.2d 60, 71, 794 P.2d 850 (1990) ..... 2

State v. Coates,  
107 Wn.2d 882, 891, 735 P.2d 64 (1987) ..... 15

State v. Delmarter,  
94 Wn.2d 634, 638, 618 P.2d 99 (1980) ..... 2

State v. Fernandez-Medina,  
141 Wn.2d 448, 461, 6 P.3d 1150 (2000) ..... 10

State v. Fowler,  
114 Wn.2d 59, 67, 785 P.2d 808 (1990),  
*overruled on other grounds by State v. Blair*,  
117 Wn.2d 479, 816 P.2d 718 (1991) ..... 10

State v. Grier,  
171 Wn.2d 17, 38, 246 P.3d 1260 (2011) ..... 12, 13, 14

State v. Hendrickson,  
129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) ..... 8, 9, 12

State v. McFarland,  
127 Wn.2d 322, 335, 899 P.2d 1251 (1995) ..... 8, 9

<u>In re Pers. Restraint of Pirtle,</u> 136 Wn.2d 467, 487, 965 P.2d 593 (1996) .....	8
<u>State v. Salinas,</u> 119 Wn.2d 192, 201, 829 p.2d 1068 (1992).....	2
<u>State v. Stenson,</u> 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), <i>cert. denied</i> , 523 U.S. 1008 (1998) .....	8
<u>State v. Thomas,</u> 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) .....	8
<u>State v. Workman,</u> 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) .....	10

### **Decisions Of The Court Of Appeals**

<u>State v. Gabryschak,</u> 83 Wn. App. 249, 252, 921 P.2d 549 (1996).....	16, 18, 19
<u>State v. Galisia,</u> 63 Wn. App. 833, 838, 822 P.2d 303 (1992).....	2
<u>State v. Pittman,</u> 134 Wn. App. 376, 384-85, 166 P.3d 720 (2006) (citing <u>State v. West</u> , 18 Wn. App. 686, 691, 571 P.2d 237 (1977)) .....	10, 12
<u>State v. Walton,</u> 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).....	2
<u>State v. White,</u> 80 Wn. App. 406, 410, 907 P.2d 310 (1995).....	8
<u>United States v. Delgado,</u> 357 F.3d 1061, 1069 (9 <sup>th</sup> Cir. 2004) .....	6

## U.S. Supreme Court Decisions

County Court of Ulster County v. Allen,  
442 U.S. 140, 99 S. Ct. 2213,  
60 L. Ed. 2d 777 (1979) ..... 3

Kimmelman v. Morrison,  
477 U.S. 365, 384, 106 S. Ct. 2574,  
91 L. Ed. 2d 305 (1986) ..... 9

Strickland v. Washington,  
466 U.S. 668, 689, 104 S.Ct. 2052,  
80 L. Ed. 2d 674..... 8, 9, 14

## Statutes and Rules

RCW 9A.16.090 ..... 15

RCW 9A.20.021(2)..... 12

RCW 9A.52.025 ..... 11

RCW 9A.52.070(1)..... 11

WPIC 18.10..... 15

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence was presented at trial to permit a reasonable jury to find Rose guilty beyond a reasonable doubt of attempted residential burglary.

2. Whether defense counsel provided ineffective assistance by failing to propose a jury instruction for the lesser included offense of first degree criminal trespass or a jury instruction for voluntary intoxication.

B. STATEMENT OF THE CASE.

The State accepts Rose's statement of the case. Any additional facts will be included in the argument below.

C. ARGUMENT.

1. The evidence, taken in the light most favorable to the State, was sufficient to prove the charge of attempted residential burglary beyond a reasonable doubt.

Rose argues that the evidence against him was insufficient to support his conviction for attempted residential burglary. The jury was instructed that it must find that (1) Rose did an act which constituted a substantial step toward residential burglary and (2) that the act was done with the intent to commit residential burglary. Instruction No. 7; CP 44. Residential burglary was defined in several separate instructions. Instructions No. 6, 8, 9, 10, and 11; CP 44-45.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 p.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Id. Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Rose claims that the evidence was insufficient to prove attempted residential burglary, in part, he argues, because where

there is no actual entry, the State may not rely on an inference of intent. Appellant's Opening Brief at 10. He cites to County Court of Ulster County v. Allen, 442 U.S. 140, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979), and State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995), to support this claim. Those cases, however, only define the standard of proof required when relying on permissive inferences. Where the inference is only part of the State's proof supporting an element of the crime, the fact inferred must flow more likely than not from the proof. Brunson, 128 Wn.2d at 107. If there is no proof other than the inference, the trier of fact must find the inferred fact beyond a reasonable doubt. Id.

In Rose's case, there was no direct evidence that he intended to commit a crime inside the Miller's residence. However, even applying the standard of beyond a reasonable doubt, there was sufficient evidence to permit the jury to infer such intent.

Intent can be inferred from the circumstances surrounding the acts committed by the defendant. State v. Bergeron, 105 Wn.2d 1, 19, 711 P.2d 1000 (1985). That rule applies to attempted crimes as well as completed crimes. Id. at 20. "Although intent may not be inferred from conduct that is patently equivocal, it may

be inferred from conduct that plainly indicates such intent as a matter of logical probability.” Id.

While Rose argues that the evidence of intent in his case was “patently equivocal,” Appellant’s Opening Brief at 11-12, a review of that evidence shows otherwise. He was in his neighbor’s backyard around midnight, in his underwear, standing at the victim’s bedroom window. RP 83-84, 86, 91, 97. The screen was off the window, propped against the house. RP 86. There was a multi-tool, with the knife opened up, on the ground. RP 86. Miller did not own the tool and had never seen it before. RP 154. There was a cut in the screen at the same spot where the tab holding the screen into the window was located. RP 86. Moments before, the victim had been lying on her bed in the bedroom. The lights in the room were off, but the door was open and there was some light from the television in the living room. RP 28-29. There was a box fan in the window and the blinds came down only to the top of the fan. RP 29-30. Miller heard someone walking on the decorative rock in her backyard and saw the shadow of a person. RP 28-30. Frightened, she removed the fan, latched the window, and closed the blinds. RP 30. Instructing her son to turn off the TV to make her house totally dark, she and her son watched out the windows.

RP 32. She saw that the gate into her backyard was open and someone was in the backyard of the duplex behind hers. RP 32. She saw the person, later identified as Rose, walking around the back side of another duplex, smoking a cigarette, and returning to the garage of the duplex behind hers. RP 34. Rose dropped the cigarette and walked into Miller's backyard. RP 35. Miller took her phone and her son into the bathroom, locked the door, and called 911. While they were in the bathroom, Miller could hear someone at the window of either her bedroom or her son's bedroom. RP 35-36.

Rose testified at trial. He said that he had consumed an enormous amount of alcohol in a very short period of time, and, after retiring, felt ill, so he went to the back patio of his residence, which was the duplex behind the home of the Millers. RP 123-25. He was annoyed because a couple of days earlier, a Gatorade bottle had been thrown from the Millers' yard into his, and on this night there was another Gatorade bottle and a candy wrapper in his back yard. RP 126,128. He said he saw someone in the Miller duplex talking on a phone, and decided to speak to that person. RP 129-30. According to Rose, he said, "Excuse me," three times, apparently from his patio, but there was no response. RP 129-30.

Deciding against going to the front door, he approached Miller's window to talk to her "then and there." RP 131. He returned to his own residence to put on sandals after stepping on a thorn, and then returned to Miller's window and knocked three times. RP 131-33. The window was now closed, the fan removed, and the blinds closed. RP 133.

Failing to attract attention from Miller, Rose said he then decided to leave a note for her between the window and the screen so it would not blow away. RP 134. Unable to pry the screen off, he walked away, but stubbed his toe on a multi-tool on the ground. He used that windfall to make a slit in the screen so he could insert a finger and unlatch the screen. RP 134-36. Because he was so intoxicated, he stumbled and pulled the screen out. It apparently occurred to him for the first time that he had no pen or paper, so he began walking back toward his house to write a note when the police arrived. RP 136. The police testified that when they arrived, Rose was standing, facing Miller's residence, looking into the window. RP 83, 113.

The jury is the sole judge of credibility of the witnesses. Camarillo, 115 Wn.2d at 71; United States v. Delgado, 357 F.3d 1061, 1069 (9<sup>th</sup> Cir. 2004). An essential function of the jury is to

“discount theories which it determines unreasonable.” State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The jury must have found this explanation patently incredible rather than patently equivocal. Had the jury found that his explanation was a reasonable explanation for his actions, then the State would have failed to meet its burden of proving the element of intent. Id. at 708.

Just because there are hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances. Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved the intent beyond a reasonable doubt.

Id. at 708-09.

Disputed evidence is not insufficient evidence. Rose’s actions were not consistent with normal conduct. There was sufficient evidence presented that the jury could reasonably find beyond a reasonable doubt that Rose had the intent to commit residential burglary.

2. Defense counsel did not provide ineffective assistance by failing to propose jury instructions for a lesser included offense of attempted first degree criminal trespass or for the defense of voluntary intoxication.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70. A defendant must overcome the presumption of effective representation. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

“The reasonableness of counsel’s performance is to be evaluated from counsel’s perspective at the time of the alleged error and in light of all the circumstances.” Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

a. Lesser-included jury instruction.

Rose claims ineffective assistance of counsel because his attorney did not request a lesser-included instruction for first degree criminal trespass. First, the facts did not support the lesser-included instruction, and second, declining to seek such an instruction was a legitimate strategy.

A defendant is entitled to a lesser-included instruction if (1) each of the elements of the lesser crime is an element of the greater crime (the “legal prong”) and (2) the evidence supports an inference that the defendant committed the lesser crime to the

exclusion of the greater crime (the “factual prong”). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

The legal prong is met here. Attempted first degree criminal trespass is a lesser-included offense of attempted residential burglary. State v. Pittman, 134 Wn. App. 376, 384-85, 166 P.3d 720 (2006) (citing State v. West, 18 Wn. App. 686, 691, 571 P.2d 237 (1977)), *abrogated on other grounds by* State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). However, the factual prong is not. To meet the factual prong, the defendant must show that “substantial evidence in the record supports a rational inference that the defendant committed only the lesser included . . . . offense to the exclusion of the greater offense . . . .” Fernandez-Medina, 141 Wn.2d at 461. The evidence must do more than merely cast doubt on the State’s theory regarding the charged offense; instead, the evidence must affirmatively establish the defendant’s theory regarding the lesser offense. State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), *overruled on other grounds by* State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person

enters or remains unlawfully in a dwelling other than a vehicle. RCW 9A.52.025. A person is guilty of first degree criminal trespass if he or she knowingly enters or remains unlawfully in a building. RCW 9A.52.070(1). The relevant distinction is that for residential burglary, the defendant must possess the intent to commit a crime against a person or property in a dwelling.

In Rose's case, the State's evidence supported the inference that he intended to enter the residence to commit some kind of crime. There is no non-criminal explanation for whatever he intended to do once inside the house. He testified that he had no intention of entering the residence at all; he was merely trying to leave a note between the bedroom window and the screen. That is not first degree criminal trespass, which requires an entry into a building, or attempted first degree criminal trespass, which would be taking a substantial step toward entering a building with the intent to enter the building. There simply was no evidence whatsoever that he had the intent to enter the residence in order to do something that is not a crime. He was not entitled to an instruction for a crime that the evidence did not support and which he denied committing.

Even if the facts permitted Rose to seek a lesser included jury instruction, declining to do so was a legitimate strategic decision. Rose relies on Pittman, 134 Wn. App. 376, for the argument that the all or nothing strategy unreasonably put him at greater risk because residential burglary is a class B felony and first degree criminal trespass is a gross misdemeanor. Appellant's Opening Brief at 19-20. His standard range for attempted residential burglary was 4.5 to 9 months in custody, whereas the maximum he could have received for the gross misdemeanor was 364 days. RCW 9A.20.021(2).

Pittman was at least partly abrogated by the Supreme Court in State v. Grier, 171 Wn.2d 17, 38, 246 P.3d 1260 (2011). Pittman failed to give proper consideration to the strong presumption that counsel is effective. Id. As in Pittman, two of the considerations offered by Rose, a significant discrepancy in penalties between the two offenses and that the same defenses apply, weight the analysis in favor of finding deficient performance rather than applying the presumption of effectiveness. Id. at 38-39. The court in Grier also found "troubling" the lower court's objective evaluation of the all or nothing strategy. Id. at 39.

It overlooks the subjective nature of the decision to pursue an all or nothing approach. A defendant who opts to forgo instructions on lesser included offenses certainly has more to lose if the all or nothing strategy backfires, but she also has more to gain if the strategy results in acquittal.

Id.

Defense attorneys are entitled to significant latitude in making a decision about lesser included instructions. Grier, 171 Wn.2d at 39. “[T]he complex interplay between the attorney and the client in this arena leaves little room for judicial intervention.” Id. at 40. Even though it is risky, an all or nothing strategy is a legitimate one. Id. at 42.

In this case, the decision to forgo a lesser included instruction is reasonable. The State had no direct proof of Rose’s intent to commit a crime in the Miller residence. If the jury had believed his testimony, he would have been acquitted. In addition, the penalties were not significantly different. Rose actually faced less incarceration time on the felony. While he speculates that the court would have given him less time on the gross misdemeanor, banking on that is at least as much a risk as staking the outcome on the burglary charge alone.

Rose also argues that if criminal trespass had been offered to the jury “it was possible” that it could have convicted him only of that charge. Appellant’s Opening Brief at 19. But when a reviewing court assesses the possible prejudice to the defendant, it must assume that the jury followed its instructions and acted according to the law. That assumption excludes possible “arbitrariness, whimsy, caprice, ‘nullification’ and the like.” Grier, 171 Wn.2d at 34 (quoting Strickland, 466 U.S. at 694-95). Under that assumption, if the jury did not believe the State had met its burden of proof as to attempted residential burglary, it would have acquitted him. The availability of a compromise verdict would not have made any difference. This court should not accept Rose’s argument that without the option of first degree criminal trespass, the jury would convict him even if it had doubts about his guilt. Juries are presumed to do their job.

Rose’s argument relies heavily on speculation and gives virtually no deference to defense counsel. He has the burden to disprove the presumption of effective representation, and he has not done so. Nor has he shown prejudice.

b. Voluntary intoxication instruction.

Defense counsel was not ineffective for failing to request a voluntary intoxication jury instruction because there was insufficient evidence to entitle him to it.

Intoxication is not a defense to a crime, but it can be a consideration in determining whether an individual was able to form the intent to commit the crime charged. State v. Coates, 107 Wn.2d 882, 891, 735 P.2d 64 (1987). “A person can be intoxicated and yet still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious.” Id.

RCW 9A.16.090 provides:

No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his or her intoxication may be taken into consideration in determining such mental state.

Washington Pattern Jury Instruction 18.10 states:

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] [or] [failed to act with [fill in requisite mental state]].

To be entitled to the instruction, “the defendant must show

(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the drinking affected the defendant's ability to acquire the required mental state." State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996).

The crime of attempted residential burglary requires the intent to enter a residence and the intent to commit a crime therein. There was evidence at trial that Rose had consumed alcohol. He smelled strongly of intoxicants but neither of the responding police officers recalled the extent of his intoxication. RP 98, 118. Rose testified that between 10:15 to 10:30 p.m. and 11:30 to 11:45 p.m., he had consumed three shots of Jaeger, three Pale Ales, and three Sierra Nevada Torpedoes. RP 123-24. He said afterward he felt ill, RP 125, and that when he was in Miller's back yard he stumbled and pulled the screen off the window, leaving a handprint smear on the window in the process. RP 133, 136. Rose also testified that after his arrest he blacked out and was taken to the hospital. RP 123.

The State does not dispute that the first two conditions of the voluntary intoxication instruction test. Rose does not, however,

meet the third. The evidence did not show that his ability to form the requisite mental state was affected.

The victim testified that Rose made purposeful movements such as walking into her back yard, returning to his own back yard, smoking a cigarette, walk toward the garage of a third duplex, and walking back into her yard. RP 29, 34-35. It is Rose's own testimony, however, which demonstrates that he did have the ability to form the intent to commit the crime. He said that at about 11:30 p.m. he tried to attract the attention of a person he saw in the Miller duplex because he was annoyed about the candy wrapper and Gatorade bottle in his yard. RP 128, 130-31. He walked toward the Miller's front door, but, seeing the back gate open, "decided it would be easier for her and for me to talk to her just right then and there." RP 131. He stepped on a thorn, however, and returned to his house to put on his sandals. RP 131.

When he went back to the Miller's yard, he knocked on the bedroom window but received no response. He then decided to leave a note. RP 133. Because he could not find a place to leave the note on the window, he "decided to leave it between the screen and the window so it would not blow away." RP 134. He tried to pry the screen out far enough to slip a piece of paper behind it, but

could not get it off. RP 134. Stubbing his toe on the multi-tool, he “decided to use the multi-tool to move the screen enough to be able to put a note in and drunkenly stumbled and pull[ed] the entire screen off.” RP 134, 136. Rose used the multi-tool to cut a slit in the screen, inserted his finger, and unlatched the screen. RP 136. Since he had no paper, he was walking back to his own house to write the note when the police arrived. RP 136. He was able to understand and comply with the officer’s order to kneel on the ground. RP 85, 114.

Rose was able to make a series of decisions about what to do and take action to carry out those decisions. They were not good decisions, and they may have been influenced by the alcohol he had consumed, but he is not entitled to the voluntary intoxication instruction because he made bad decisions.

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. . . . Somewhere between these two extremes of intoxication is a point of the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

Gabryschak, 83 Wn. App. at 254 (internal cite omitted).

According to Rose, he blacked out after his arrest and had to be taken to the hospital. RP 123. He had consumed a large amount of alcohol in a short period of time, ending at 11:30 or 11:45 p.m. RP 124. Nicole Miller testified that she saw the shadow at her window a short time after 11:30 p.m. RP 28, 30. The police arrived after midnight. RP 77. It is likely that Rose became more intoxicated as time wore on and the alcohol got into his system, but at the time he was on the Miller's property, the evidence shows that he was capable of forming the intent to commit the crime. It does not "reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." Gabryschak, 83 Wn. App. at 252-53.

Because Rose was not entitled to the voluntary intoxication instruction, his attorney did not render ineffective assistance by failing to request it. The court would not have given the instruction even if counsel had asked, and so there is no prejudice. There was no ineffective assistance of counsel.

#### D. CONCLUSION.

There was sufficient evidence to prove intent to commit the crime, and defense counsel was not ineffective. The State respectfully asks this court to affirm Rose's conviction.

Respectfully submitted this 15<sup>th</sup> day of June, 2016.

A handwritten signature in cursive script, appearing to read "Carol La Verne".

---

Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of Brief of Respondent the date below as follows:

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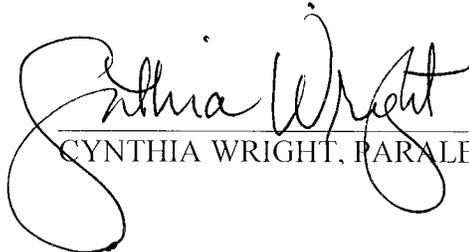
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 15<sup>th</sup> day of June, 2016, at Olympia, Washington.

  
CYNTHIA WRIGHT, PARALEGAL

# THURSTON COUNTY PROSECUTOR

**June 15, 2016 - 4:43 PM**

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