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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JONATHAN MAYSONET, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 16-1-01297-5

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly rejected defendant's voluntary intoxication instruction where there was insufficient evidence to show defendant's intoxication affected his ability to acquire the required mental state of the crimes charged?

B. STATEMENT OF THE CASE.

1. Procedure

On March 28, 2016, the Pierce County Prosecutor's Office charged JONATHAN MAYSONET (hereinafter "defendant") with Assault in the First Degree (Count I), Felony Harassment (Count II), Unlawful Imprisonment (Count III), and Interfering with the Reporting of Domestic Violence (Count IV), all involving domestic violence.¹ CP 3-6. The case proceeded to jury trial on October 27, 2016, before the Honorable Kathryn Nelson. RP² 7.

Multiple witnesses testified during trial that defendant and his companions consumed alcohol the night of the incident. *See, e.g.*, RP 418-26, 511-22, 602-07, 843-48, 1006-15. Defendant proposed a voluntary

¹ The State later filed an Amended Information which charged Count I in the alternative. CP 7-10.

² The verbatim report of proceedings is contained in 11 consecutively paginated volumes and will be referred to by page number.

intoxication jury instruction. RP 1151; CP 18-32. The State objected to the proposed instruction, arguing that although there was evidence that defendant consumed alcohol, there was insufficient evidence regarding the effects of alcohol on defendant's ability to act intentionally or knowingly. RP 1151-54. The court denied defendant's request to give the proposed instruction. RP 1158-59.

The jury found defendant guilty of Assault in the Second Degree and Unlawful Imprisonment. CP 33-36; RP 1221. The jury also found the crimes were aggravated domestic violence offenses and defendant and the victim were members of the same family or household. CP 37-39; RP 1221-22.

The court imposed an exceptional sentence above the standard range for both counts and sentenced defendant to a total of 36 months in the Department of Corrections. CP 198-201, 202-216; RP 1248-50. The court also imposed a period of community custody. CP 202-216; RP 1248. Defendant filed a timely notice of appeal. CP 217.

2. Facts

Defendant and Alexandria "Ally" Maysonet married in June of 2015. RP 407-08, 1000. Ms. Maysonet has a young son – A.P. – from a

previous relationship.³ RP 406-07, 1000-01. In March of 2016, the Maysonets lived at the Echelon Apartments in Lakewood, Washington. RP 409-10, 1001.

On March 24, 2016, defendant reenlisted in the Army. RP 1003. That night, defendant went out with friends to celebrate his reenlistment and to send off friend Deonte Leshore who was leaving for Texas. RP 418, 599-600, 838-39, 1003-05. Ms. Maysonet accompanied defendant and his friends as the designated driver. RP 604, 1005.

The group began the evening at Hooters, where they ordered food and drinks. RP 420-22, 599-602. Defendant consumed alcohol at Hooters and appeared “loose” but not intoxicated. RP 421-22, 512-13, 602, 843-44, 1008-11. After Hooters, the group went to a club – Cultura – in Tacoma, where they reserved a VIP booth with bottle service. RP 422-24, 599-605, 844, 1011-13. Defendant and his friends consumed more alcoholic drinks. RP 426, 517-19, 605-07, 844-48, 1012-15. Ms. Maysonet went to the club as well. RP 422-24. Defendant confronted another man in the club regarding the man’s contact with Ms. Maysonet. RP 427, 686-88, 1016-19. Defendant and his wife got into a verbal argument regarding the

³ A.P. was born on July 17, 2012, and was three years old at the time of the incident. RP 406-07.

other man. RP 427, 607, 1016-19. Others observed their argument. RP 607, 901.

The Maysonets left the club when it closed around 2:00 a.m., and Ms. Maysonet drove defendant and his friend Reniel Williams back to the Echelon Apartments. RP 428, 608-12, 1019. On the way home, defendant and Ms. Maysonet's argument became physical. RP 609. Ms. Maysonet hit defendant repeatedly in the face, and in response, defendant threw a cup of urine onto his wife. RP 430-32, 610, 1024-26. Ms. Maysonet hit defendant again, and again he threw urine on her. RP 431-32, 611.

When they arrived home, Ms. Maysonet stopped at the gate to the apartment complex, jumped out of the vehicle, and ran to their apartment. RP 612. Defendant got out of the car and beat her inside. RP 432-33, 612, 1028. Williams cleaned out his car, went out to Denny's, and then returned home around 3:00 a.m. RP 612-13. Williams also lived at the Echelon Apartment complex in Lakewood. RP 590. Shortly after he arrived home, Williams was contacted by Deonte Leshore, who was staying with Williams at the time. RP 613-14, 833. Leshore had received a phone call from defendant, and when he answered the phone, he heard screaming. RP 852-53. A female's voice yelled for help through the phone. RP 853, 893.

Williams, Leshore, and another individual named Asa Lockhart walked over to defendant's apartment. RP 614, 854, 903. When they arrived, the men observed defendant standing over Ms. Maysonet who was lying on the ground between defendant's legs. RP 615, 856, 903-04. Ms. Maysonet's bloody face was unrecognizable, and she asked the men to help her. RP 616, 856-58; Exhibit 3. Defendant had blood on his hands and looked "lost." RP 617-18, 858. The men also observed Ms. Maysonet's three-year-old son in the room, and he was shaking and scared. RP 616, 855, 903-04. Lockhart grabbed the boy and took him into another room to watch T.V. RP 904.

Williams and his wife took Ms. Maysonet to the hospital, while Leshore and Lockhart stayed with defendant in the apartment. RP 620, 859-60. Defendant indicated that he realized the situation was bad for him, and he said that his wife could just tell police that she was beat up at the club. RP 861-62. Police responded and observed blood throughout defendant's apartment. RP 569-76. Defendant was taken into custody. RP 575-77.

Ms. Maysonet arrived at Madigan Army Medical Center at 3:56 a.m. RP 930-31. When she walked into the emergency department, her face appeared severely beaten, her eyes were swollen and puffy, she had open lacerations, and she complained of severe pain. RP 931-33. When

asked to describe her level of pain on a scale of zero to ten, Ms. Maysonet stated she was a "ten." RP 933. She was immediately brought to a room to be triaged due to her clinical appearance. RP 943-44. Medical staff observed that she had diffuse swelling across her face, and both Ms. Maysonet's nose and ear were abnormal in appearance. RP 712, 716, 768; Exhibit 5. She was found to have complex nasal bone fractures, a fracture of her nasal septum, subconjunctival hemorrhaging in both eyes, extensive soft tissue swelling in her face, blood in her sinus, a laceration above her left eye, and a laceration inside her upper lip. RP 717-27, 803, 817-19, 821. The multiple fractures of her nose indicated that a great deal of force was used. RP 731-32. Doctors were also concerned about potential brain damage. RP 717-19, 774-76.

Ms. Maysonet told medical staff she was beaten repeatedly by her husband over a prolonged period of time. RP 768-69. She reported that she was hit in the face multiple times and lost consciousness. RP 715, 801. Police contacted Ms. Maysonet at the hospital. RP 682. Ms. Maysonet was crying, upset, and presented with severe facial injuries. RP 685. She reported that defendant dragged her by the hair, threw her onto the bed, and began assaulting her. RP 686. Defendant continued to punch her in the face with a closed fist, and she described how "there was so much blood at one point she thought she was going to drown in it." RP 686-87. Ms.

Maysonet's three-year-old son witnessed most of the incident. RP 687-88. Ms. Maysonet asked defendant to call 911. RP 687. Defendant told her to take a shower, because no one was going to see her in her condition. RP 687. Defendant also threatened to kill her and kill himself. RP 687. Ms. Maysonet reported that defendant had anger management and behavior issues, especially when he drank, and he had beaten her before. RP 686, 689, 769.

At trial, Ms. Maysonet minimized the incident and denied memory of much of what she reported to police. RP 457-62. She testified that she started yelling and throwing things at defendant and told him to leave the apartment. RP 434-35. After she threw an Xbox at defendant, she kind of "blacked out" and then realized that her nose was bleeding. RP 435-36. She laid down and defendant got on top of her and repeatedly punched her in the face. RP 439-40. However, Ms. Maysonet testified that defendant did not mean to punch her; rather, he was trying to calm her down. RP 440-41. "From the first punch to the last punch," defendant was trying to help her. RP 492, 509. Defendant placed himself in front of the door to "help" her because she was trying to leave. RP 447, 537. The bruises on her arms were from defendant trying to hold her and shake her back to normal. RP 538. She also testified that defendant had "accidentally" hit her before this incident. RP 551-52.

Defendant testified he felt intoxicated and “out of it” the night of the incident, yet he had a clear memory of what occurred throughout the night. RP 1021-22, 1041, 1044, 1060-62. He was able to recall specific details of the evening. *See, e.g.*, RP 1062-1130. Defendant admitted to repeatedly punching his wife in face and testified that he “was just trying to get her off” of him. RP 1032-34, 1086, 1096-97, 1138. Defendant testified that he threw over twenty punches over the course of approximately 30 seconds, and he stopped punching when he saw blood on his fist and blood running down his wife’s face. RP 1032-35, 1138-39. He later made the decision to call his friend Leshore for help. RP 1039, 1130.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S REQUEST FOR A VOLUNTARY INTOXICATION INSTRUCTION WHERE THERE WAS INSUFFICIENT EVIDENCE TO SHOW DEFENDANT’S INTOXICATION AFFECTED HIS ABILITY TO ACT INTENTIONALLY AND KNOWINGLY.

An act committed by a person who is voluntarily intoxicated is no less criminal due to the person’s intoxication. RCW 9A.16.090. Under this statute, voluntary intoxication is not a defense to the crime. *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987). However, RCW 9A.16.090 allows a jury to take a defendant’s intoxication into

consideration in determining whether the defendant acted with the required mental state.⁴

Defendant claims he presented sufficient evidence that his alcohol consumption affected his ability to form the requisite intent necessary to commit the crimes charged, and the trial court therefore erred in refusing to instruct the jury on voluntary intoxication. Brf. of App. at 16-21.

Defendant's claim fails, because the evidence instead established that although he consumed alcohol, defendant maintained the ability to act intentionally and knowingly. The trial court properly refused defendant's voluntary intoxication instruction.

Jury instructions are sufficient if they allow the parties to argue their theories of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (quoting *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996)); *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336 (1998). The court reviews alleged errors of law in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). If a jury instruction correctly states the law, the trial court's decision to give the instruction will not be disturbed absent an

⁴ “[W]henver the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of [the person’s] intoxication may be taken into consideration in determining such mental state.” RCW 9A.16.090.

abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010). Likewise, the trial court's refusal to give a jury instruction is also reviewed for an abuse of discretion. *State v. Buzzell*, 148 Wn. App. 592, 602, 200 P.3d 287 (2009); *Picard*, 90 Wn. App. at 902. *See also, State v. Walker*, 136 Wn.2d 767, 772-72, 966 P.2d 883 (1998) (court reviews trial court's determination that the facts of a case do not support a requested instruction for abuse of discretion). Thus, this Court reviews the trial court's decision to reject the jury instruction on voluntary intoxication for abuse of discretion. *State v. Priest*, 100 Wn. App. 451, 453-54, 997 P.2d 452 (2000).

Here, the trial court refused defendant's proposed voluntary intoxication instruction, ruling,

I believe that the substantial link that's required by the case law was not ever made present in this case, and I'm not going to give the instruction with respect to voluntary intoxication...I believe it's important what Mr. Maysonet himself said in answer to even the possibility that some of these actions had been done in a state of blackout, and he was very clear that none of what his wife testified to had happened.

RP 1158-59. As discussed below, the trial court's ruling is supported by the case law and the record. The trial court did not abuse its discretion in refusing to give defendant's voluntary intoxication instruction.

To obtain a voluntary intoxication instruction, a criminal defendant must show: (1) the crime charged has a particular mental state as an element; (2) there is substantial evidence of drinking; and (3) evidence that the drinking affected the defendant's ability to acquire the particular mental state at issue. *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002); *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). The evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime[s] charged." *Gabryschak*, 83 Wn. App. 252-53. "Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be 'substantial evidence of the effects of the alcohol on the defendant's mind or body.'" *Id.* at 253 (quoting *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991)). Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the declared premise. *State v. Vasquez*, 95 Wn. App. 12, 17, 972 P.2d 109 (1998).

Here, defendant was charged with Assault in the First Degree, Felony Harassment, and Unlawful Imprisonment.⁵ CP 3-6, 7-10. These crimes have a particular mental state as an element. *See* RCW 9A.36.011

⁵ The State moved to dismiss the count of Interfering with the Reporting of Domestic Violence prior to closing argument. RP 1173. *See* CP 195-97.

(intent); RCW 9A.46.020 (knowledge); RCW 9A.40.040 (knowledge).⁶

The State agrees there was substantial evidence that defendant consumed alcohol. *See* RP 418-26, 511-22, 602-07, 843-48, 1006-15. Defendant therefore satisfied the first two requirements for a voluntary intoxication instruction. *Everybodytalksabout*, 145 Wn.2d at 479; *Gabryschak*, 83 Wn. App. at 252. However, defendant failed to present sufficient evidence to show his drinking affected his ability to acquire the required mental state. *See Everybodytalksabout*, 145 Wn.2d at 479. Accordingly, defendant was not entitled to a voluntary intoxication instruction. *Id.*

A person can be intoxicated and still able to form the requisite mental state. *Gabryschak*, 83 Wn. App. at 254. “Many criminal acts follow the use of alcohol or drugs...However, the court is required to give a voluntary intoxication instruction *only* in those cases in which the level of mental impairment caused by alcohol or drugs *clearly* affected the defendant’s criminal responsibility by eliminating the necessary mens rea.” *State v. Finley*, 97 Wn. App. 129, 135, 982 P.2d 681 (1999) (emphasis added) (internal citations omitted). For example, a voluntary intoxication instruction was denied in *State v. Harris*, 122 Wn. App. 547, 552–53, 90 P.3d 1133 (2004), because the defendant testified,

⁶ *See also*, RCW 9A.36.021 (intent).

notwithstanding proof that he had used crack cocaine, that he shot his victim in self-defense. *See also, Everybodytalksabout*, 145 Wn.2d at 479 (defendant not entitled to voluntary intoxication instruction in murder prosecution where he did not present sufficient evidence to show his intoxication affected his ability to acquire the requisite mental state).

In *Gabryschak*, police were called to an apartment complex where they heard a loud male voice emanating from behind the broken front door of one of the apartments. 83 Wn. App. 249, 251. The officers also heard an elderly woman's voice arguing and whispering with the man, who was later identified as the defendant. *Id.* at 251. The tone of the elderly woman's voice sounded as if she needed help. *Id.* When officers entered the apartment, the defendant grabbed one of the officer's legs and was subdued with pepper spray. *Id.* Both the elderly woman and the defendant appeared to be intoxicated. *Id.* While being escorted to the police vehicle, the defendant attempted to escape, and while being transported to the jail, he persistently leaned forward against the driver's seat and threatened to kill one of the officers. *Id.* at 252. The defendant was subsequently charged and convicted of felony harassment and malicious mischief. *Id.*

On appeal, Gabryschak argued that the trial court erred in denying his request for a voluntary intoxication instruction. *Id.* at 252. Division I disagreed. *Id.* at 253-55. Although there was "ample evidence" that the

defendant was intoxicated, the court found “no evidence in the record from which a rational trier of fact could reasonably and logically infer that Gabryschak was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged.” *Id.* at 253-54.

The *Gabryschak* court noted that the defendant consistently refused the officers’ requests to see and speak with the occupants of the apartment, indicating that he fully understood the nature of the requests; the defendant tried to break and run while being escorted to the police car, indicating he was well aware that he was under arrest; and the defendant leaned up against the back of the officer’s car seat and spoke with conviction while threatening to kill her once released from jail, indicating he was aware of his destination. *Id.* at 254-55. There was no testimony that the defendant’s “speech was slurred, that he stumbled or appeared confused, that he was disoriented as to time and place, that he was unable to feel the pain of the pepper spray, or that he otherwise exhibited sufficient effects of the alcohol” to limit his ability to form the requisite mental state. *Id.* at 255. Rather, “[a]t best, the evidence show[ed] that Gabryschak can become angry, physically violent, and threatening when he is intoxicated.” *Id.* at 254.

Defendant in this case claims the evidence shows his alcohol consumption affected his behavior. Brf. of App. at 167-20. However, evidence in the record also shows that defendant remained capable of making volitional decisions and intentional acts. Months after the incident, defendant recalled with specificity the events leading up to and during the assault. *See* RP 1062 (defendant admits he has a “pretty clear memory” of what happened that night). *See also*, RP 1064-1130 (recalling specific details of the evening). Defendant was also able to explain his rationale for making his decisions that evening.

Defendant recounted his time at the club, where he saw his wife talking to another man. RP 1011-19. Defendant went into the bathroom and apparently told the man, “You know she’s married, right?” RP 1016. This shows defendant was aware of his surroundings and aware of who his wife was speaking with, and he reacted as a jealous husband based on his “hunch.” RP 427, 1016-17. Defendant also had the ability to perceive that the other man was upset, loud, and appeared drunk. RP 1016-17. When his wife tried to talk to him about the situation, defendant walked away and decided not to “have that conversation in the club...in front of people,” indicating defendant was aware that they were in a public setting and remained capable of exercising self-control. RP 1017-18.

Defendant recalled the specifics of the club closing down. *See* RP 1020 (bar was closed but lights were not yet turned on; people exited; bouncers came in and flagged people to leave); 1073 (defendant left the club because they were told to leave, and he understood the club was closing). Defendant recalled texting his wife asking her where she and the car were located. RP 1020. Defendant recalled where specifically the car was parked. RP 1021. Defendant walked to Williams' car intentionally. RP 1073-74. Again, defendant's testimony indicates that he was well aware of his surroundings upon leaving the club, and he was oriented as to time and place. He was also able to walk to the vehicle on his own and did not require assistance getting into and out of the vehicle. RP 653-54.

Defendant was able to explain why he had a cup of urine in the vehicle to throw at his wife. RP 1022-23. Upon leaving the club, defendant had to urinate but had the ability to recognize the impropriety of urinating outside with police in the area. RP 1022. He therefore decided to urinate in a cup in the vehicle (and was apparently coordinated enough to do so). RP 1023.

Defendant recalled the nature of their "disagreement" during the car ride home and remembered what specifically his wife said and what he said in response. RP 1024. He recalled his wife hitting him "for at least two to three blocks while she was driving," which again indicates that

defendant was well aware of his surroundings. RP 1024. After his wife repeatedly hit him while she was driving, defendant reacted by telling the other passenger in the vehicle, "Williams, do you see what's going on?", and then throwing the cup of urine onto his wife. RP 1025-26. *See also*, RP 610 (Williams testifies defendant said, "Williams, this is what I have to deal with"). Defendant recalled where the urine hit his wife and how his wife reacted. RP 1026-27.

This indicates that defendant understood the nature of their disagreement, was aware that he was being hit, could articulate a response to the other passenger in the vehicle, and made the conscious decision to throw the cup of urine to "get her to stop punching." RP 1026. *See also*, 428-32, 608-11. During cross-examination, the following exchange occurred:

[State:] So you did not hit her back, right?

[Defendant:] No, I did not.

[State:] And that's a decision you made, right?

[Defendant:] Yeah, I didn't do nothing.

...

[State:] So you decided not to hit her back?

[Defendant:] I guess I decided. I didn't want to hit her.

[State:] Then how did you decide to throw the cup of pee on her? Was that a decision that you made?

[Defendant:] Well, I don't know. I was intoxicated. I don't remember...It just happened.

[State:] Do you recall when you were being questioned by Mr. Quigley saying you...splashed the pee on her trying to get her to stop?

[Defendant:] Yeah. Yes, correct.

[State:] Okay. So to me, you're saying...I was drunk. I don't remember. But on direct, you were saying, I was trying to get her to stop hitting...me. That's why you did it.

[Defendant:] You're kind of asking me my thought process. I remember me doing those things, yeah.

[State:] Because you were trying to get her to stop, right?

[Defendant:] Yeah, at that point, when it kept – when it prolonged for that long.

...

[Defendant:] I threw the pee at her, yeah, to get her to stop.

...

[State:] ...[O]ne of the questions that was asked was, why did you throw the cup of pee on her, and you said you were trying to get her to stop hitting you, correct?

[Defendant:] That would be correct.

[State:] Okay. So that's why you decided to throw the pee on her, right?

[Defendant:] That's correct.

RP 1075-77. Thus, after leaving the club, defendant remained capable of making his own decisions and acting in response to others. He remained alert and neither passed out nor fell asleep on the way home. RP 649-50.

Defendant recalled that his wife pulled up to the gate of the apartment complex, pulled the emergency brake, and "stormed" out of the vehicle, "walking with attitude." RP 1028. Defendant exited the vehicle and walked past her to the apartment. RP 1028. There is no indication that defendant had difficulty walking or stumbled to the apartment. Rather, defendant made it inside the apartment first. RP 1028-29. *See also*, RP 612 (defendant seemed "buzzed" but was not stumbling).

Both defendant and his wife testified that she yelled at defendant in the apartment and threw things at him. RP 434-35, 1028-32. Ms. Maysonet yelled at defendant to get out, and he was able to articulate an appropriate response by asking why he had to leave. RP 433-35, 1030. Defendant was coordinated enough to catch the Xbox that Ms. Maysonet threw at him, and he jumped up in response. RP 435, 1031-32, 1080. Defendant responded by physically fighting his wife and repeatedly punching her in the face. RP 1032-35, 1080-86. He testified that he was "just trying to get her off." RP 1138. Defendant reacted to his wife and

therefore remained capable of intentional acts when he decided to punch her repeatedly.

Defendant was also coordinated enough to land multiple punches to his wife's face. RP 435-43, 493, 1032-34, 1096-97. *See also* RP 1139 (defendant was able connect with his wife's face during the fight despite his testimony that he was "sloppy"). He was able to outmaneuver his wife, who he said rushed him, by doing a leg sweep and knocking her to the ground. RP 1040, 1106.

By defendant's own testimony, he was lucid enough to stop the fight after seeing blood on his fist and blood running down his wife's face. RP 1034-35, 1107. He was aware enough of the situation to call his friend Leshore for assistance. RP 1039, 1104, 1130. Defendant gave his wife a shirt to stop the bleeding, indicating that he was aware of his wife's condition. RP 1036. Although witnesses testified that defendant looked "lost" and had a "blank stare" when standing over his unrecognizable wife, this is more indicative of defendant realizing the gravity of the situation, rather than a physical manifestation of intoxication. RP 616-17, 643-44, 856, 875. *See also*, RP 1114-15 (defendant testifies he was "shocked" at what he did). After the assault, defendant had the ability to recognize that he was in trouble, and he was clearheaded enough to concoct an alternative version of events (i.e., his wife was beat up at the

club). RP 858, 860-62. He also maintained the ability to text his wife after she left for the hospital. RP 978-79, 1044-45.

Here, like in *Gabryschak*, although there was “ample evidence” that defendant consumed alcohol, there was “no evidence in the record from which a rational trier of fact could reasonably and logically infer that [defendant] was too intoxicated to be able to form the required level of culpability to commit the crimes with which he was charged.” *See Gabryschak*, 83 Wn. App. at 253-54. Rather, there was substantial evidence of defendant’s intent to assault his wife and his ability to accomplish goal-directed behavior. Moreover, like in *Gabryschak*, “at best, the evidence shows that [defendant] can become angry, physically violent, and threatening when he is intoxicated.” *Id.* at 254.

Defendant relies on *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981), to support his argument that “[t]he evidence at trial provided ample support for the voluntary intoxication instruction.” *See* Brf of App. at 20. In *Jones*, the evidence supported the voluntary intoxication instruction where the 15-year-old defendant testified he drank “nine or eleven” beers prior to the killing, witnesses testified regarding the defendant’s inebriated appearance and actions around the time of the killing (including his red, glassy eyes and slurred speech), and the

defendant was placed in a “drunk tank” at the police station shortly after his arrest. 95 Wn.2d at 617, 622-23.

Here, in contrast, defendant was not so intoxicated that officers placed him in a “drunk tank” like the defendant in *Jones*. Officer Wulff testified that he contacted defendant inside the apartment. RP 574-75. Defendant did not appear to have difficulty understanding the officer’s questions. RP 575. Rather, defendant responded appropriately. RP 575. Defendant did not appear to have any balance issues, like stumbling. RP 575-76. Officer Wulff testified that based on his training and experience, defendant did not appear to be “overly intoxicated.” RP 579. The officer walked defendant out to his patrol vehicle and could not recall smelling the odor of alcohol on defendant’s person.⁷ RP 580-82. Moreover, defendant’s companions testified that they had observed defendant intoxicated before, and in this instance, defendant was “buzzed” but not “over the top drunk,” and defendant did not appear to drink an excessive amount.⁸ RP 595-97, 612-13, 836-37, 843-48, 865. Defendant himself had difficulty distinguishing his level of intoxication. *See* RP 1071-72, 1139-

⁷ Officer Wulff testified that if he had detected the odor of alcohol on defendant’s person, then he would have documented that observation in his report. RP 581. The officer did not document that observation, so he must not have smelled the odor of intoxicants. RP 581-82.

⁸ Defendant’s companions also testified that defendant typically becomes quieter and “chill” when intoxicated. RP 597, 836-37. *See also*, RP 519 (defendant gets “looser” and “fun” when intoxicated).

44 (defendant felt “black-out drunk” but could remember specific details of the night); 1137 (defendant unsure if he was simply falling asleep or losing consciousness).

The court in *Gabryschak* distinguished *Jones* factually based on Jones’ physical manifestations of intoxication. 83 Wn. App. at 254. Here, the evidence of defendant’s violent behavior does not rise to the level of physical manifestations of intoxication present in *Jones*. On the whole, the evidence here is more like the evidence in *Gabryschak* upon which the court concluded the third factor required for a voluntary intoxication instruction was not satisfied. *Gabryschak*, 83 Wn. App. at 254-55. As discussed above, the evidence in the record indicates that defendant acted in a deliberate manner when he assaulted and restrained his wife. That defendant’s hostile behavior might have been consistent with intoxication is insufficient as evidence of his inability to form the requisite mens rea for the crimes charged. Because defendant failed to satisfy the three factors necessary to obtain the voluntary intoxication jury instruction, the trial court did not abuse its discretion when it denied the instruction. This Court should affirm defendant’s convictions.

However, if the trial court did error in denying defendant’s voluntary intoxication instruction, any error was harmless. Instructional error is presumed prejudicial but can be shown to be harmless. *State v.*

Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). An instructional error is harmless if, beyond a reasonable doubt, the error did not contribute to the verdict obtained. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). “In deciding whether the error contributed to the verdict and whether it is harmless, the court must ‘thoroughly examine the record’ and may consider how the case is argued to the jury.” *State v. Johnson*, 116 Wn. App. 851, 857, 68 P.3d 290 (2003) (quoting *Brown*, 147 Wn.2d at 341).

Here, any error in not giving the voluntary intoxication instruction was harmless. Defendant testified that he swung at his wife and hit her repeatedly after she threw the Xbox at him. RP 1031-35. He therefore admitted that he acted intentionally. Moreover, defense counsel discussed defendant’s level of intoxication when arguing during closing that the evidence did not support that defendant intended to inflict great bodily harm. *See* RP 1199-1210. The jury was unable to reach a consensus on the charge of Assault in the First Degree and found defendant guilty of the lesser charge Assault in the Second Degree. CP 33-36. Defense counsel acknowledged during closing argument that Assault in the Second Degree “would be an appropriate charge to find [defendant] guilty of, given the damage that was done.” RP 1210. *See also*, RP 1199 (“I suspect that you will find that he assaulted her”). Thus, failure to instruct the jury on

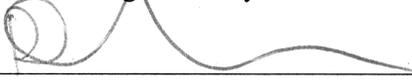
voluntary intoxication was harmless as to the Assault in the Second Degree charge given the jury's finding and defendant's concession. And, if defendant was able to act intentionally regarding the Assault in the Second Degree charge, then he was certainly able to act knowingly regarding the charge of Unlawful Imprisonment, as both charges concerned defendant's actions in the same location and during the same time frame. Failure to instruct the jury on voluntary intoxication was therefore harmless regarding the Unlawful Imprisonment charge. Accordingly, this Court should affirm defendant's convictions.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions.

DATED: November 27, 2017

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Prosecuting Attorney



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Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efile} U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1/27/17 Jefferson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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