

NO. 49762-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

DARRELL DUANE CLASSEN,

Appellant.

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

The Honorable David E. Gregerson, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. CLASSEN'S ACTIONS UPON WHICH HIS KIDNAPPING AND ATTEMPTED KIDNAPPING CONVICTIONS WERE PREDICATED CONSTITUTED ONE COURSE OF CONDUCT.

Double jeopardy bars Darrell Classen's convictions for kidnapping in the first degree and attempted kidnapping in the first degree when, based on the totality of the circumstances, Classen's acts from which these charges stem constituted one course of conduct. The state agrees that the proper analysis for the unit of prosecution for kidnapping is one for offenses that involve a continuing course of conduct. Br. of Resp't at 19. However, the state argues that under the totality of the circumstances, Classen's actions constituted two separate courses of conduct: kidnapping in the first degree and attempted kidnapping in the first degree. Br. of Resp't at 22.

The state argues that Classen's argument would give "free reign to those who kidnap to continue kidnapping the same victim repeatedly" with no additional penalty. Br. of Resp't at 19. In support of this argument, the state relies on State v. Boswell. Br. of Resp't at 19-21; 185 Wn. App. 321, 340 P.3d 971 (2014). In Boswell, the defendant was found guilty of two counts of attempted murder against the same victim after he first attempted to poison her with a noxious tea mixture early in the morning

and then, after a period of time, acquired a gun and shot her in the head. Id. at 324-25, 332. Boswell argued that double jeopardy barred the two convictions because the unit of prosecution for attempted murder was defined by the defendant's *intent* to commit murder. Id. at 328. The court noted that this interpretation would lead to absurd results—for instance, under this interpretation, a defendant could only ever be charged with one count of attempted murder against a victim, no matter how many attempts were made on the victim's life. Id. at 328, 330. The court instead engaged in a course of conduct analysis based on the facts of the case and held that because the two attempts were separated by a period of time, the second attempt began only after the first failed, and different methods of attempting to kill were employed, Boswell's two convictions properly represented two separate units of prosecution of attempted murder. Id. at 332.

Unlike Boswell, Classen does not argue that the unit of prosecution for kidnapping is defined by an individual's *intent* to kidnap which, as the state points out, would give free reign to those who kidnap to do so repeatedly without additional penalty. Br. of Resp't at 19. Instead, Classen argues that based on a course of conduct analysis as applied to the facts of this case his actions constituted one course of conduct. Unlike Boswell, the charged actions took place over an extremely short time period.

Kidnapping in the first degree requires that the state prove that Classen intentionally abducted Crista Cole to either inflict bodily injury or to inflict extreme mental distress *in the State of Washington*. CP 52. Classen and Cole entered Washington by highway and had only been in the state 2,666.65 feet before Cole ran from the vehicle. RP 114, 204. When Cole ran, Classen quickly made contact with her again—one witness testified that Classen was trying to grab Cole before he was able to assist and restrain him. RP 114-15. In contrast to the period of time in Boswell which allowed Boswell time to devise a separate and distinct plan and acquire a weapon with which to carry out that plan, the actions giving rise to the kidnapping in the first degree conviction and the attempted kidnapping in the first degree conviction occurred over an extremely short time period.

The state argues that the fact that Cole ran from the vehicle separates Classen's actions into two courses of conduct because she escaped and gained her freedom, and the interruption gave Classen an opportunity to reconsider his actions. Br. of Resp't at 22. An interruption or intervening act is one factor to be considered in the court's course of conduct analysis, though no one factor is dispositive. State v. Villanueva-Gonzalez, 180 Wn.2d 975, 985, 329 P.3d 78 (2014). And in this particular case, even after leaving the vehicle, Cole was not yet free or liberated from the

kidnapping: she ran into oncoming traffic before being contacted by Classen. RP 98-99. Rather than give Classen “an opportunity to reconsider” or “a space in time to renew his intent,” as the defendant in Boswell had, Classen’s course of conduct continued despite Cole’s actions until the point he was restrained.

Classen’s actions forming the basis for kidnapping in the first degree and attempted kidnapping in the first degree convictions consisted of a single course of conduct, and those two convictions therefore violate double jeopardy principles.

2. CLASSEN WAS ENTITLED TO A VOLUNTARY INTOXICATION INSTRUCTION

“Effective assistance of counsel includes a request for pertinent instructions which the evidence supports.” State v. Finley, 97 Wn. App. 129, 134, 982, P.2d 681 (1999). A defendant need not call witnesses or testify in order to meet the burden of showing evidence of intoxication and its effects. State v. Gabryschak, 83 Wn. App. 249, 250, 921 P.2d 549 (1996). Classen was entitled to a voluntary intoxication instruction for the reasons set out in his opening brief. Br. of Appellant at 13-18.

The state argues that there was not substantial evidence of intoxication because simply exhibiting behavior consistent with intoxication is not sufficient to “satisfy the factor of substantial evidence of drug use

required to instruct the jury on voluntary intoxication.” Br. of Resp’t at 30. However, in State v. Kruger, the court found “ample” evidence of intoxication based on the fact that multiple people were required to subdue the defendant, pepper spray had little effect on him, and he displayed symptoms and behavior consistent with alcohol use (he blacked out, he vomited, and his speech was slurred). 116 Wn. App. 685, 688, 689, 692, 67 P.3d 1147 (2003). That court did not require eyewitness testimony to consumption, evidence of intoxicants in the defendant’s blood, or the odor of alcohol,¹ as the state now claims Washington courts require. Br. of Resp’t at 31.

The state disregards Sergeant Gedry’s opinion that Classen was under the influence as based solely on Classen’s appearance. Br. of Resp’t at 31. In fact, not only did Sergeant Gedry testify in detail regarding his experience and various physical signs that people exhibit when they are under the influence which he observed in Classen (muscle twitching and smacking lips as if thirsty), but he also testified about Classen’s disorientation: Classen was nonresponsive to questions, was making “weird nonsensical statements,” and “odd types of noises.” RP 180. It was based upon these observations and his experience that Sergeant Gedry stated his

¹ At any rate, “odor of alcohol” is simply an observation commonly associated with alcohol intoxication. The fact that a defendant did not smell of alcohol—especially where drug intoxication is at issue and such an odor would not be expected to be present—is irrelevant.

opinion that Classen was intoxicated. Other witnesses' observations were consistent with these observations. See RP 82, 135, 234, 235. Like Kruger, multiple people were required to subdue Classen; in Classen's case, five people were actively restraining him until law enforcement arrived. RP 118. And, while not to be considered testimony or evidence presented, there was enough evidence of intoxication presented at trial such that the state took a very different position than it does so on appeal, arguing in closing that Classen was high. RP 289.

The state relies on Kruger in arguing that there is no evidence that Classen's intoxication affected his ability to form the requisite intent or mental state. Br. of Resp't at 32-33. In Kruger, the state reasons, the court found this third factor satisfied based on physical observations associated with alcohol intoxication (blackout, vomit, slurred speech, impervious to pepper spray). While Classen admittedly did not exhibit these specific signs of alcohol intoxication, alcohol intoxication is not at issue here; drug intoxication is. And, as discussed, Classen exhibited physical signs of drug intoxication.

In Gabryschak, the court found that no testimony reflected that the defendant's intoxication affected his ability to think and act where he responded consistently to officers' requests, he said he was well aware he was under arrest, and he threatened to kill an officer once they arrived at the

jail (indicating he was aware of their destination). 83 Wn. App. at 254-55. Classen's behavior stands in stark contrast to Gabryschak's: he was unresponsive to officers, muttering incomprehensively, and making noises. RP 180. There was evidence presented at trial that Classen's intoxication affected his ability to form the requisite intent or mental state. Classen was entitled to a voluntary intoxication instruction and it was ineffective of his lawyer not to request one.

B. CONCLUSION

Classen's actions underlying his kidnapping in the first degree and attempted kidnapping in the first degree convictions constituted one course of conduct, violating prohibitions on double jeopardy. Classen received ineffective assistance of counsel when his attorney failed to request a voluntary intoxication instruction.

DATED this 26th day of October, 2017.

Respectfully submitted,

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October 26, 2017 - 1:05 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49762-0
Appellate Court Case Title: State of Washington, Respondent v. Darrell D. Classen, Appellant
Superior Court Case Number: 15-1-01711-0

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