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Court of Appeals
Division II
State of Washington
3/15/2019 1:41 PM

No. 52459-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JASON LEMAR DILLINGHAM JENKINS,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 17-1-03500-1
The Honorable Bryan Chushcof, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to instruct the jury on voluntary intoxication.
2. Jason Jenkins' rights to present a defense and to a fair trial were denied when the trial court refused to instruct the jury on voluntary intoxication.
3. Jason Jenkins' Judgment and Sentence contains an interest accrual provision that is no longer authorized by the legal financial obligation statutes.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Where the evidence showed appellant was intoxicated and it affected his ability to form the requisite intent to commit an assault, did the trial court err in refusing to give the defense's proposed voluntary intoxication jury instruction? (Assignments of Error 1 & 2)
2. Should Jason Jenkins' case be remanded to the trial court to amend the Judgement and Sentence by striking an interest accrual provision that violates a recent amendment to the legal financial obligation statutes? (Assignment of Error 3)

III. 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)[1] 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

[1] The transcripts will be referred to by the date of the proceeding.

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).[2] (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.

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[2] The State also charged Jenkins with identify theft and possession of stolen property related to the credit cards found in the wallet. (CP 51-54) Jenkins moved to suppress the credit cards, arguing that the search of the wallet was improper. (CP 31-36) The trial court denied the motion. (CP 59-63; 06/26/18 RP 66-70) But the charges were dismissed after the State rested its case-in-chief due to lack of sufficient evidence that Jenkins ever possessed the wallet or credit cards. (08/20/18 RP 564; CP 472)

(CP 74; 08/20/18 RP 591-92)[3] 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.

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[3] See WPIC 18.10 Voluntary Intoxication, 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 18.10 (4th Ed 2016); RCW 9A.16.090.

(08/21/18 RP 21; CP 472-73) Jenkins filed a timely Notice of Appeal. (CP 485)

IV. ARGUMENT & AUTHORITIES

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 found that there was not, but the court 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. JENKINS' JUDGMENT AND SENTENCE CONTAINS AN INTEREST ACCRUAL PROVISION THAT IS NO LONGER AUTHORIZED BY THE LEGAL FINANCIAL OBLIGATION STATUTES.

Jenkins was sentenced on September 28, 2018. The trial court found that Jenkins did not have the financial resources to pay discretionary fees. (09/28/18 RP 21; CP 472-73) So the trial court imposed only the mandatory $500.00 crime victim assessment fee. (09/28/18 RP 21; CP 473) The Judgment and Sentence also includes a boilerplate provision stating that "[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full[.]" (CP 473)

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783) amended the legal financial obligation (LFO) system in Washington State. As part of those amendments, House Bill 1783 eliminated interest accrual on the nonrestitution portions of LFOs. Laws of 2018, ch. 269, § 1; *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

House Bill 1783's amendments were effective as of June 7, 2018.

The portion of the amendments pertaining to interest accrual amended RCW 10.82.090. That statute now provides, in relevant part, that "[a]s of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations." RCW 10.82.090(1). Jenkins was sentenced after June 7, 2018, but the trial court failed to strike the improper interest accrual language. (CP 473) Jenkins' case should be remanded to the trial court to strike the interest accrual provision from the Judgement and Sentence.

V. 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. And the trial court must strike the interest provision from the Judgment and Sentence.

DATED: March 15, 2019

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CERTIFICATE OF MAILING

I certify that on 03/15/2019, 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, Airway Heights Corrections Center, P.O. Box 1899, Airway Heights, WA 99001.

STEPHANIE C. CUNNINGHAM, WSBA #26436

March 15, 2019 - 1:41 PM

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Appellate Court Case Title:	State of Washington, Respondent v Jason Lemar Dillingham Jenkins, Appellant
Superior Court Case Number:	17-1-03500-1

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