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

STATE OF WASHINGTON, RESPONDENT

v.

JASON LEMAR DILLINGHAM JENKINS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcof

No. 17-1-03500-1

Brief of Respondent

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

1. Did the trial court properly deny defendant's request to instruct the jury on voluntary intoxication where the instruction was not supported by substantial evidence?
2. Should this Court remand the matter to the trial court directing it to strike the interest accrual provision in defendant's judgment and sentence in order to comply with RCW 10.82.090(1)?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 14, 2017, the State charged Jason Lemar Dillingham Jenkins ("defendant") with one count of third degree assault, one count of second degree identity theft, two counts of second degree possession of stolen property, and two counts of unlawful possession of a controlled substance. CP 1-3. The State filed an amended information on June 28, 2018, charging defendant with one additional count of third degree assault. CP 51-54. The case proceeded to jury trial on August 13, 2018. 8/13/18 RP 3.

After the State rested, defense counsel proposed the trial court instruct the jury on voluntary intoxication. 8/20/18 RP 591-92. The State opposed the instruction. 8/20/18 RP 592-94. After hearing argument from both sides, the trial court declined to give the instruction. 8/20/18 RP 599. The trial court granted defendant's half-time motion to dismiss one count of identity theft and two counts of possession of stolen property. 8/20/18 RP 552-64; CP 472. The jury returned guilty verdicts for the four remaining counts. CP 103-06.

On September 28, 2018, the court sentenced defendant to 60 months in prison, followed by 12 months of community custody. CP 474. The court found defendant indigent and waived all discretionary legal financial obligations. CP 472-73. This timely appeal follows. CP 485.

2. FACTS

On September 13, 2017, Tacoma Firefighter Daniel O'Leary was dispatched to an area near South 14th and L Street for a report of a "man down" with possible seizures. 8/14/18 RP 258, 289-91; 8/15/18 RP 325, 328-29. When O'Leary arrived, he observed defendant covered in leaves and dirt and laying in a large grassy area in front of a building that appeared to be a school. 8/15/18 RP 329; 8/16/18 RP 506. O'Leary approached defendant and noticed he appeared "altered." 8/15/18 RP 330-32. O'Leary attributed this to either drugs, alcohol, a seizure, or diabetes.

8/15/18 RP 332. O’Leary assisted defendant to his feet and escorted him to an ambulance. *Id.* Medical personnel placed defendant on a gurney, secured his arms and legs with seatbelts, and loaded him into the ambulance. 8/15/18 RP 334, 352; 8/16/18 RP 507.

At first, defendant was quiet and calm. 8/15/18 RP 336. But when emergency medical technician John Correia took defendant’s arm to begin a blood draw, he quickly “exploded” and began fighting and kicking, accusing the medics and firefighters of “stealing his jewelry.” 8/15/18 RP 336, 406-07; 8/16/18 RP 470. Defendant freed his legs from the seatbelt and then kicked Correia square in the chest, knocking him out of the back door of the ambulance. 8/15/18 RP 336, 408-09, 411; 8/16/18 RP 470-71, 509. O’Leary caught Correia as he fell out of the ambulance. 8/15/18 RP 336, 410. Correia testified that defendant looked at him when he kicked him and described the kick as “intentional.” 8/15/18 RP 409. Correia’s partner testified that defendant’s kick to Correia “appeared to be targeted.” 8/16/18 RP 510, 512. Defendant did not damage anything else in the ambulance during the incident. 8/16/18 RP 471-72.

Defendant, appearing “angry and focused,” stepped out of the ambulance and approached O’Leary and Correia with fists. 8/15/18 RP 338, 410. He then “zeroed in” on O’Leary. *Id.* Defendant assumed a “boxing position” and started swinging and jabbing his fists, hitting

O'Leary in the ear and arm. 8/15/18 RP 338-39, 411. O'Leary and Correia testified that the punch to O'Leary's arm did not appear to be "random flailing" but rather a "directed punch." 8/15/18 RP 339, 413. O'Leary further testified that defendant was "purposely coming after" him. 8/15/18 RP 345-46. O'Leary contemplated defending himself, but when he noticed someone in a FedEx vehicle filming the incident, O'Leary continued retreating. *Id.* The first responders called the police and waited in their vehicles until police arrived. 8/15/18 RP 340-41; 8/16/18 RP 473. While they were waiting, O'Leary went up to the building and advised the individuals inside to lock the doors. 8/15/18 RP 341.

Tacoma Police Officer Ryan Hovey responded to the scene for a "Code Blue" emergency request for assistance from the fire department. 8/14/18 RP 285, 289-91. According to Officer Hovey, defendant "appeared high." 8/14/18 RP 293-94. He based his conclusion on the facts that defendant was not paying attention to the police officers or firefighters when police arrived, he laid on the ground without being asked to, and he was "kind of sweaty and excited." *Id.* However, defendant was compliant while police arrested him. 8/15/18 RP 434. He did not "flail around" or kick or punch the officers. 8/15/18 RP 300-01.

During a search of defendant, officers found a white substance that appeared to be methamphetamine; they also discovered two credit cards

belonging to people other than defendant in defendant's wallet. 8/15/18 RP 301-03, 434-37. After the police officers had defendant in custody, they restrained him to a gurney and put him back in the ambulance. 8/15/18 RP 415. Correia and his partner transported defendant to Tacoma General Hospital. *Id.*

A hospital security officer was advised that a "combative patient" was arriving at the hospital, so, per protocol, the security officer searched defendant for weapons when he arrived. 8/16/18 RP 488, 491. During the search, the security officer discovered a Ziploc bag with a "black tar substance" inside and three "clear-type stones." 8/16/18 RP 492. The security officer informed a police officer of what he found. 8/16/18 RP 493. Defendant claimed the drugs were "weed seed." 8/15/18 RP 445. But subsequent testing confirmed that the bags contained methamphetamine and heroin. 8/16/18 RP 532-34.

Registered Nurse Brooke Carpenter observed defendant as police and medics escorted him into the hospital. 8/20/18 RP 570. Carpenter described defendant's demeanor as "calm." 8/20/18 RP 570-71. But he would not answer questions from hospital staff and "kept saying that he got jumped over and over." 8/20/18 RP 574. Carpenter was advised that

defendant may have been “smoking Spice before he arrived”¹ at the hospital. 8/20/18 RP 574-75. Carpenter testified that behaviors associated with use of Spice are the same as those associated with methamphetamine—“agitated behavior, rapid pressured speech, increased heart rate, large pupils, involuntary movements, aggressive behavior.” 8/20/18 RP 573. Carpenter performed a drug screen on defendant and concluded that he was positive for marijuana, methamphetamine, and opiates. 8/20/18 RP 577.

Defense counsel requested that the trial court instruct the jury on voluntary intoxication, citing testimony that defendant had appeared to be under the influence of drugs during the incident and that drugs were detected in defendant’s system at the hospital. 8/20/18 RP 591. The proposed instruction stated that “[n]o act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.” CP 74.

The trial court determined there was insufficient evidence to support the instruction and declined to give it. 8/20/18 RP 599. During a lengthy oral ruling, the court explained that while there was some

¹ “Spice” was defined as “a synthetic marijuana or a marijuana with methamphetamine laced in it”. 8/20/18 RP 573.

evidence that defendant was positive for marijuana, methamphetamine, and opiates, it was unknown

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

There just isn't enough evidence to support all of that.

8/20/18 RP 597, 599.

During closing argument, defense counsel argued extensively that the State failed to prove beyond a reasonable doubt that defendant *intentionally* assaulted anyone. 8/20/18 RP 623-32. Defendant argued that because there was testimony that defendant was in an altered state of consciousness when he committed the assaults, there was a reasonable doubt that defendant acted with the requisite intent to assault anyone.

8/20/18 RP 636-37. The State countered that the evidence showed that defendant did not "accidentally" kick or punch O'Leary and Correia, but rather acted with intent to accomplish the crime of assault. 8/20/18 RP 640-42. The jury agreed with the State and found defendant guilty beyond a reasonable doubt of both counts of assault, as well as both counts of possession of a controlled substance. CP 103-06.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S REQUEST TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION BECAUSE IT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The trial court did not err when it declined to give a voluntary intoxication instruction because it was not supported by substantial evidence. Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and properly inform the jury of the applicable law when read as a whole. *Bodin v. Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions only when the theory is supported by substantial evidence. *State v. Finley*, 97 Wn. App. 129, 134, 982 P.2d 681 (1999). A trial court's refusal to give an instruction is reviewed de novo. *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005).

The law with regard to voluntary intoxication does not provide a defense to the crime charged but allows the issue of intoxication to be considered solely on the issue of intent:

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.

RCW 9A.16.090.

In order to receive a voluntary intoxication instruction, the defense must show that “(1) one of the elements of the crime charged is a particular mental state, (2) there is substantial evidence that the defendant ingested the intoxicant, and (3) evidence that his ingestion of an intoxicant affected his ability to acquire the required mental state for the crime.”

State v. Everybodytalksabout, 145 Wn.2d 456, 479, 39 P.3d 294 (2002);

State v. Classen, 4 Wn. App.2d 520, 536, 422 P.3d 489 (2018).

- a. The trial court correctly held that substantial evidence did not support giving a voluntary intoxication instruction.

The State agrees that the crime of third degree assault required that defendant intended to commit the crime. RCW 9A.36.031; CP 89-90, 92-93. The State also agrees that there was substantial evidence that defendant ingested marijuana, methamphetamine, and opiates, as there was testimony that defendant tested positive for those drugs following a drug screen. 8/20/18 RP 577. Thus, only the third element is in dispute.

“To satisfy the third element, there must be substantial evidence of the effects of the intoxicants on the defendant’s mind or body.” *Classen*, 4 Wn. App.2d at 536 (citing *State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996)). Substantial evidence is evidence sufficient to

persuade a fair-minded person of the truth or correctness of the matter. *State v. Paul*, 64 Wn. App. 801, 806, 828 P.2d 594 (1992). “The evidence must reasonably and logically connect a defendant’s intoxication with his inability to form the requisite mental state.” *Classen*, 4 Wn. App.2d at 536 (citing *Gabryschak*, 83 Wn. App. at 252). A person can form the requisite mental state to commit a crime while intoxicated. *Classen*, 4 Wn. App.2d at 537.

While it is not necessary to present expert testimony that alcohol intoxication affected a defendant’s ability to form the required mental state to commit a crime, the same cannot be said about intoxication by drugs like methamphetamine and heroin. *Classen*, 4 Wn. App.2d at 537; *see also, State v. Thomas*, 123 Wn. App. 771, 782, 98 P.3d 1258 (2004). This is because “[t]he effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use.” *Id.* However, since it is not common knowledge how methamphetamine and heroin affect a person’s ability to form intent, a defendant is required to provide “competent evidence” showing how his ability to form intent was affected by the drugs. *Classen*, 4 Wn. App.2d at 538.

In *Classen*, this Court held that defense counsel did not provide ineffective assistance for failing to request a voluntary intoxication instruction where Classen could not meet the third element necessary to

obtain the instruction. 4 Wn. App.2d at 534-36. Assuming Classen could show substantial evidence of intoxication, the court held that Classen presented insufficient evidence that his intoxication affected his ability to acquire the required mental state to commit the crimes he was accused of. *Id.* at 536.

Classen was charged with felony harassment, first degree kidnapping, two counts of second degree assault, and one count of first degree attempted kidnapping. *Id.* at 528. It was undisputed that each of the five charges required a particular mental state. *Id.* at 536. Classen argued that the evidence at trial showed that he was intoxicated and therefore lacked the ability to form the required level of culpability to commit the crimes charged. *Id.* at 537. The trial evidence included testimony from various witnesses that (1) “Classen had never acted unusual around her but that on the day of the incident, Classen was ‘saying a bunch of stuff that didn’t really make sense at the time’ and called her a ‘cop’ and a ‘fed;”” (2) “Classen said ‘odd’ things like, ‘I’m going to live my life’ and would count to five and attempt to break free of restraints;” (3) “Classen was ‘talking and talking and talking’ and appeared agitated;” and (4) “Classen was making ‘weird nonsensical statements’ and odd noises and appeared to be under the influence.” *Id.* at 537. Assuming that substantial evidence showed Classen was indeed intoxicated, the court held that because he

failed to provide “competent evidence” about *how* his ability to form the requisite mental states for the crimes was affected by his intoxication, Classen was not entitled to a voluntary intoxication instruction. *Id.* at 537-38.

The same is true here. Evidence was adduced at trial that would permit a jury to find that defendant was intoxicated. O’Leary testified that defendant appeared “altered,” and he attributed it to either drugs, alcohol, a seizure, or diabetes. 8/15/18 RP 330-32. Officer Hovey testified that defendant was not paying attention to police or fire when police arrived, he laid on the ground without being asked to, he was “kind of sweaty and excited,” and he “appeared high.” 8/14/18 RP 293-94. A search of the defendant revealed bags of methamphetamine and heroin. 8/16/18 RP 532-34. At the hospital, Carpenter testified that defendant “kept saying that he got jumped over and over” and would not answer questions from hospital staff. 8/20/18 RP 574. Moreover, defendant tested positive for marijuana, methamphetamine, and opiates. 8/20/18 RP 577.

However, as the trial court correctly found, the testimony did not show “to what extent that any of this would have affected the defendant’s ability to form intent other than what was testified to by the medics at the scene, which was that he was initially sort of out of it and then wasn’t out

of it anymore.” 8/20/18 RP 599. The trial court concluded that there “just isn’t enough evidence to support all of that.” 8/20/18 RP 599.

In fact, the evidence established the opposite. Correia testified that defendant was looking at him when he kicked him square in the chest, and he described the kick as “intentional.” 8/15/18 RP 336, 408-09, 411. Correia’s partner observed the incident and testified that it “appeared to be targeted.” 8/16/18 RP 510, 512. Defendant did not damage anything else in the ambulance. 8/16/18 RP 471-72. O’Leary testified that once defendant stepped outside, he “zeroed in” on O’Leary. 8/15/18 RP 338, 410. Defendant assumed a “boxing position” and began swinging and jabbing his fists at O’Leary’s ear and arm. 8/15/18 RP 338-39, 411. Correia also saw the blows to O’Leary, and both Correia and O’Leary testified that the punch to O’Leary did not appear to be “random flailing” but rather a “directed punch.” 8/15/18 RP 339, 413. O’Leary added that defendant was “purposefully coming after” him. 8/15/18 RP 345-46.

These facts distinguish this case from *State v. Walters*, 162 Wn. App. 74, 84, 255 P.3d 835 (2011), where the appellate court held that failure to give a voluntary intoxication instruction on a charge of theft was harmful error. The intoxication at issue in that case was alcohol intoxication. *Walters*, 162 Wn. App. at 83. There was testimony that the defendant consumed at least seven beers and two shots of alcohol, three

witnesses described him as intoxicated, he was found sleeping under an air hockey table with keys to a bar that did not belong to him, and he testified that he did not remember leaving a bar and had little memory of interacting with police officers. *Id.* at 78-79, 82-83. The jury could make a reasonable determination based on this evidence that the defendant was drunk. *Id.* at 83.

Similarly, in *State v. Rice*, the court held the defendant was entitled to a voluntary intoxication instruction where there was evidence that the defendants had been drinking beer all day, were uncoordinated at hitting a ping pong ball, and spilled beer. 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984). The State's primary witness testified that he presumed the defendants were drunk, and one defendant testified he "was so loaded he didn't feel" being hit by a car. *Id.* In *State v. Kruger*, the defendant was also entitled to a voluntary intoxication instruction where the record reflected substantial evidence of the defendant's drinking and level of intoxication—"his 'blackout,' vomiting at the station, slurred speech, and imperviousness to pepper spray." 116 Wn. App. 685, 67 P.3d 1147 (2003).

While there was evidence here that defendant was under the influence of marijuana, methamphetamine, and opiates, 8/20/18 RP 577, unlike *Walters*, *Rice*, and *Kruger*, there was no evidence showing *how* his level of drug intoxication impacted his ability to form the requisite intent

to assault Correia or O’Leary. *Walters, Rice, and Kruger* all considered evidence showing the defendants were drunk. As this Court held in *Classen, supra*, alcohol intoxication is different than drug intoxication. 4 Wn. App.2d at 537. Because the effects of alcohol are commonly known, jurors can draw reasonable inferences about alcohol use from lay testimony. *Id.* By contrast, the effects of methamphetamine and heroin are not “common knowledge;” thus *Classen* requires “competent evidence” showing how defendant’s inability to form intent was affected as a result of his drug intoxication. *Id.* at 537-38. There was no such evidence in this case.

As explained above, the testimony elicited at trial affirmatively showed that defendant intended to assault Correia and O’Leary. 8/15/18 RP 335-39, 345-46, 408-11; 8/16/18 RP 471-72. Substantial evidence did not support a voluntary intoxication instruction. This Court should affirm the convictions.

- b. Even if it was error for the trial court to deny the voluntary intoxication instruction, any error was harmless beyond a reasonable doubt.

A constitutional error is harmless if the court “is convinced beyond a reasonable doubt that any reasonable juror would have reached the same result without the error.” *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002); see *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L.

Ed.2d 705 (1967). Even if this Court were to hold that the failure to give a voluntary intoxication instruction deprived defendant of his constitutional right to present a defense, as defendant claims, Brief of Appellant at 7-8, any error was harmless beyond a reasonable doubt.

Assault was defined in the jury instructions as “an intentional touching, striking, cutting, or shooting of another person...” CP 89. The jury was further instructed that “[a] person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.” CP 90. Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. *Bodin* 130 Wn.2d at 732.

Defense counsel argued at length during closing argument that defendant could not form the requisite intent to commit assault based on his level of intoxication. 8/20/18 RP 623-32. Specifically, defendant argued that testimony that he appeared “altered” created a reasonable doubt that he intended to assault Correia and O’Leary. 8/20/18 RP 636-37. The jury rejected defendant’s theory by finding that defendant intended to commit assault beyond a reasonable doubt. CP 103-04. And the record supports the jury’s verdict. As stated above, testimony from eye-witnesses to the assaults established that defendant’s kick to Correia’s chest was

“targeted” and “intentional;” 8/15/18 RP 336, 408-11; 8/16/18 RP 510-12; defendant was “purposefully coming after” O’Leary when he assumed a “boxing position” and started hitting him; 8/15/18 RP 338-39, 345-56, 411; and the punch to O’Leary did not appear to be “random flailing” but rather a “directed punch.” 8/15/18 RP 339, 413.

The jury instructions allowed the defense to argue its theory of the case. CP 89-90; *see Bodin*, 130 Wn.2d at 732. A voluntary intoxication instruction would not have changed the jury’s rejection of that theory. Accordingly, any error in failing to give the instruction was harmless beyond a reasonable doubt.

2. THIS COURT SHOULD REMAND THIS CASE TO THE TRIAL COURT TO STRIKE THE INTEREST ACCRUAL PROVISION IN DEFENDANT’S JUDGMENT AND SENTENCE.

The State agrees that defendant’s judgment and sentence contains an interest accrual provision that is no longer statutorily authorized. This Court should remand the case to the trial court directing it to strike the interest accrual provision in defendant’s judgment and sentence.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (House Bill 1783), effective June 7, 2018, eliminates any interest accrual on non-restitution legal financial obligations. *See* RCW 10.82.090(1). As the court held in *State v. Ramirez*, 191 Wn.2d 732,

747, 426 P.3d 714 (2018), House Bill 1783 applies to cases that are on appeal and not yet final.

Defendant was sentenced on September 28, 2018. CP 466-80. At sentencing, the trial court found that defendant did not have the financial resources to pay any discretionary legal financial obligations, so it imposed only the mandatory \$500 crime victim penalty assessment. CP 472-73. But the judgment and sentence included an interest provision stating that “[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until paid in full[.]” CP 473.

Because House Bill 1783 eliminates any interest accrual on non-restitution legal financial obligations, the State agrees that defendant’s judgment and sentence contains an interest accrual provision that is no longer statutorily authorized. RCW 10.82.090(1). Therefore, this Court should remand the case to the trial court directing it to strike the interest accrual provision from the judgment and sentence in order to comply with RCW 10.82.090(1).

D. CONCLUSION.

The trial court properly denied defendant’s request for a voluntary intoxication instruction where such an instruction was not supported by substantial evidence. Defendant failed to provide substantial evidence of the effects of any intoxicants on his mental state to support the instruction.

Even if the court erred in declining to give the instruction, any error was harmless beyond a reasonable doubt because the defense was able to argue its theory of the case, and the jury would have reached the same result even if it had received a voluntary intoxication instruction. The State agrees that defendant's judgment and sentence contains an interest accrual provision that is no longer statutorily authorized. The State respectfully requests this Court affirm defendant's conviction and sentence below and remand the case to the trial court directing it to strike the interest accrual provision in defendant's judgment and sentence.

DATED: May 22, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney

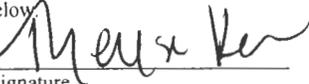
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Certificate of Service:

The undersigned certifies that on this day she delivered by 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.

5.22.19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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