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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN STEPHEN GANTT,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 18-1-01795-7

BRIEF OF RESPONDENT

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I. INTRODUCTION

After a tumultuous relationship between Brian Gantt and victim C.S. prompted two separate courts to issue domestic violence protection orders, Brian Gantt blatantly violated these orders on two separate occasions. On May 6, 2018, the police witnessed Gantt speaking with the victim on a corner lot of the victim's apartment complex. The second violation occurred in the early morning hours of May 7, when Gantt broke into the victim's home and threatened to commit suicide if she tried to call the police.

The State proved beyond a reasonable doubt that Brian Gantt committed malicious mischief in the third degree where the victim testified that Gantt used her sliding glass door to break into her apartment, she found the door's lock—which she recalled locking the prior evening—broken off the door after Gantt broke into the apartment, and she believed that Gantt had also broken her car's windshield wiper.

The trial court properly allowed the State to submit a permissive inference instruction where the State proved that Gantt was in violation of his protection order and broke into the victim's home, and a wealth of evidence indicated that he broke the lock off the door he used to get into the victim's apartment, and that he bent her windshield wiper.

Furthermore, the trial court properly denied the defense's motion to include a voluntary intoxication instruction because not only did Gantt fail

to inform the State that he would be pursuing a voluntary intoxication defense, there was insufficient evidence to allow an instruction regarding the effect of alcohol on Gantt's ability to possess the required mental state at the time he broke into the apartment. In addition, Gantt did not provide any expert testimony to establish whether or how his ability to acquire the required mental state may have been impacted by Benadryl ingested after he broke into the victim's apartment.

For the above stated reasons, the State respectfully asks that this Court affirm the superior court decision.

II. RESTATEMENT OF THE ISSUES

1. Did the trial court properly give the jury a permissible instruction allowing the jurors to infer that Gantt damaged C.S.'s property, based on a rational connection between the damage and C.S.'s presence in C.S.'s apartment in violation of court orders, and the timing and nature of the damage?
2. Did the trial court properly deny the defense motion for a voluntary intoxication instruction where the defense had not provided the State with notice of the defense until after conclusion of the trial, there was no evidence of impairment prior to the breaking of C.S.'s door and entry into the apartment, and there was no expert testimony provided regarding the impact of Benadryl?

III. STATEMENT OF THE CASE

A. Gantt Violated Two Court Orders Forbidding Him from Contact with C.S.

Brian Gantt and C.S. have a volatile history. Two courts have issued orders to protect C.S. from Gantt. In August 2017, Pierce County Superior

Court entered an order prohibiting Gantt from contacting C.S. or coming within 1,000 feet of C.S. RP 184-86¹; Ex. 1. Just two months later, the Puyallup Municipal Court entered a similar no-contact order, which allowed Gantt to text C.S. only for the limited purpose of arranging visitation with their child. RP 189-191.

At the end of April 2018, C.S. and her children moved to a newly constructed apartment. *See* RP 123-124; 135. Each night before going to sleep, C.S. was careful to protect herself and the children by locking each door, including the apartment's sliding glass door. *See* RP 136-137.

On the evening of May 6, after C.S. had been living in the apartment for about a week, the Pierce County Sheriff's Office responded to a neighborly dispute call at C.S.'s apartment. RP 144, 147. Upon arrival in their marked patrol vehicles, the sheriff's deputies spotted C.S. standing outside speaking with a man. After seeing the deputies, the man turned around and started walking away from C.S. RP 146-147. The deputies then responded to the reported location of the neighborly dispute call, knocked on the door, and were greeted by C.S.'s daughter who identified her mother as the woman on the corner. RP 148. The deputies proceeded to the corner and asked C.S. who she was, and who she was speaking to. *See* RP 149-

¹ The Verbatim Report of Proceedings (RP) are contained in 6 volumes and have consecutive pagination. They are referred to by page number.

150. She identified herself and told them that the man she was with was Brian Gantt. *See* RP 149-150.

Later that evening, C.S. prepared for bed by following her pattern of locking all of the doors. *See* RP 96-97, 137. In the early hours of May 7, 2018, she heard a noise in her apartment and found Gantt in her living room. RP 86. He was “upset, distraught, practically crying, mumbling stuff that [she] didn’t understand[.]” RP 86. She believed he got into the apartment through her sliding glass door because the door was now open, and she found that a piece of the door had been detached and was lying on the floor. RP 114. Because she had checked all of the doors earlier, she knew this piece of the door was not broken off when she went to bed. RP 114.

C.S. urged Gantt to leave “[b]ecause she didn’t want him to get in trouble.” RP 86. Rather than leaving, Gantt stayed in her living room, took a bottle of pills out of his pocket, and swallowed some of them. *See* RP 86. Gantt urged C.S. not to call 911 or an ambulance, and “let him die.” RP 93. Gantt threatened to kill himself by taking the rest of the pills if she called the police. RP 94; *see* RP 114. He took her phone and put it on the counter to prevent her from making the call. RP 94; *see* RP 114. Approximately thirty minutes later, C.S. “started to get worried because [Gantt] started to like pass out,” and went outside to call 911. *See* RP 89-90. While she was outside, she noticed that someone had bent her windshield wiper and that it

was sticking up. RP 89. She believed Gantt broke it, because it was not broken the day before. *See* RP 88-89.

C.S. told the 911 operator that Gantt broke into her apartment and swallowed a bottle of pills, that he was drinking, and that her windshield wiper was bent and broken. RP 88; *see* RP 96. C.S. said she believed Gantt came into the apartment through her sliding glass door:

The State: You informed 911 that the Defendant had broke in? [sic]

C.S.: I thought he had broken the back door.

The State: So why did you think that?

C.S.: Because it was locked, and then it no longer locked.

The State: What do you mean it no longer locked?

C.S.: Well, I always lock the doors before I go to bed, so it would have been locked, and the lock for the inside of the sliding glass door was on the floor.

The State: So you always lock the door before you go to bed. And when you came out and the Defendant was in the living room, the lock was on the floor?

C.S.: Then I noticed later, yes.

The State: But that was before the 911 call, correct?

C.S.: I don't recall if I ever saw the lock before that, but the sliding glass door had been cracked open, so I knew that's how he came in.

RP 96-97.

When responding Pierce County Deputies Pawlak and Olivarez arrived at C.S.'s apartment, Gantt was lying on the couch. RP 192, 209, 217. Although Gantt smelled of alcohol, the deputies were able to communicate with him without difficulty and he appeared to understand what was being asked of him. RP 208-09, 211. Gantt stood up from the couch and started making his way to the rear sliding-glass door, but sat back down after the deputies instructed him to do so. *See* RP 194, 218. In answer to the deputies' questions, he denied being Brian Gantt. RP 193, 218. The deputies were able to identify Gantt after C.S. confirmed his identity. *See* RP 193. When the deputies were momentarily distracted by C.S., Gantt stood up from the couch and ran out the front door. RP 194; *see* RP 218.

Although he was barefoot, Gantt ran at a fast pace without stumbling, as the deputies sprinted after him at top speed. RP 196. He kept running after the deputies ordered him to stop. RP 194, 220. When Gantt reached the entrance to the apartment complex, and neared a busy road, he put his hand toward his pocket. RP 196. Concerned that Gantt was

attempting to retrieve a weapon, or may run into the road, the deputies employed a taser to stop him. RP 197.

Upon searching Gantt, the deputies found a bottle of Benadryl pills and the statement "Do not resuscitate" written in pen on his arm. RP 198. Gantt told Deputy Pawlak that he had attempted to kill himself by taking 30 Benadryl pills with alcohol. RP 200. Deputy Pawlak observed that Gantt was lethargic and smelled like alcohol, and appeared to have "done what he had told me he had done." RP 201-02. But Gantt responded to what the deputies asked him, his words were not nonsensical, and the deputies were able to communicate with Gantt without difficulty. *See* RP 208-09. Gantt was taken to the hospital, but ultimately was not admitted. RP 200, 202.

After Gantt was out of her apartment, C.S. attempted to repair her sliding glass door by replacing the lock plate in the door frame. RP 130-131. However, she was unable to find one of the screws that secures this piece. RP 131. Although she was certain that she locked the door every night, and nothing had ever broken off of the door before, C.S. concluded that the lock may not have been constructed properly and may not have locked properly when she secured the apartment the prior evening. RP 131-32, 114.

The State charged Gantt by amended information with four domestic violence court order violations for the separate encounters on May

6 and May 7, 2018 (two for each day), with a special verdict enhancement attached to each charge because the victims were members of the same family or household (counts I-IV); residential burglary for breaking and entering into C.S.'s home on May 7 (count V); obstructing a law enforcement officer for the denial of his identity and eluding the deputies on May 7 (count VI); and malicious mischief in the third degree for damaging C.S.'s windshield wiper and breaking the lock on C.S.'s sliding-glass door (count VII). CP 4-6; CP 38-41. The trial court granted defense counsel's motion to dismiss counts II and IV, and allowed only one unit of prosecution for each day of contact. RP 279.

B. The Trial

During the trial, C.S. testified that she shared a child in common with Gantt, she still loved Gantt, and admitted that she had on at least one occasion hoped that he would violate the protective orders. RP 79, 40; *see* RP 85. After the State found it necessary to use the transcript of the victim's 911 call to refresh her memory of the events on May 7, the trial court allowed the State to treat C.S. as a hostile witness. RP 113.

C. Jury Instructions

Gantt was charged with one count of Malicious Mischief, based on evidence indicating two criminal acts (breaking the door and the windshield wiper). To convict Gantt of malicious mischief in the third degree, they had

to find that on May 7, 2018, Gantt knowingly and maliciously caused physical damage to C.S.'s property in an amount not exceeding \$750. *See* RCW 9A.48.090; *see also* RCW 9A.48.080; RCW 9A.48.070; CP 76-77.

The jury was given the following "to convict" instruction for malicious mischief in the third degree: "That on or about the 7th day of May, 2018, the defendant knowingly and maliciously caused damage to the property of another" CP 76. The jury was instructed that "malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person." CP 78. The jury was also given the instruction with the definition for physical damage, "physical damage, in addition to its ordinary meaning, includes any diminution in the value of any property as the consequence of any act." CP 79.

Consistent with *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), the trial court granted the State's motion to include jury instruction 26, informing the jury that they must determine whether one of the two alleged acts of malicious mischief was proved beyond a reasonable doubt, and unanimously agree on which of the two acts was proven. The jury was instructed that:

The state alleges that the defendant committed acts of malicious mischief in the third degree on multiple occasions. To convict the defendant of malicious mischief in the third degree, one particular act of malicious mischief in the third degree must be proved beyond a reasonable doubt, and you

must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of malicious mischief in the third degree.

CP 77.

The jury was also instructed with regard to direct and circumstantial evidence:

The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case. The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

CP. 52.

The trial court denied a defense motion to include a voluntary intoxication instruction. RP 257. The State objected to the instruction based on a discovery violation under CrR 4.7(b)(2)(xiv). RP 257-58. The State noted that the defense did not give notice that they would be pursuing a voluntary intoxication defense, and therefore the State's case would be prejudiced. *See* RP 258. As an example of the prejudice, the State noted that during direct examination of the sheriff's deputies, the trial court sustained the defense objection to testimony regarding the deputies' expertise and experience with the effects of Benadryl and alcohol, as well as their experience with individuals with mental health issues. RP 258. The

State further argued that the defense had not offered the evidence needed to justify such an instruction. RP 258-260. The State contended that pursuant to *State v. Gallegos*, a voluntary intoxication instruction is warranted only if “there is substantial evidence of drinking” and defendant presents evidence that the drinking affected his ability to acquire the required mental state. 65 Wn. App. 230, 238, 828 P.2d 37 (1994); RP 258-59.

The trial court denied the motion, stating:

I think that the level of evidence of intoxication in the record doesn't begin to rise to a level that this would be supported until perhaps after the pills were swallowed, but that's after the critical events had already occurred.

RP 257. The trial court further explained that:

[U]ltimately, there was the smell of alcohol and no other evidence of alcohol usage that would direct the State's attention to the fact that voluntary intoxication was going to be used as a defense.

RP 261-62. The trial court concluded that there was insufficient evidence to include an instruction of voluntary intoxication. RP 261.

D. Sentencing

Following the trial, the jury convicted Gantt on all charges. RP 345-46. After hearing mitigating evidence, the trial court sentenced Gantt to an

exceptional downward sentence of 48 months from the standard range of 53-78 months. 01/23/2019 RP 43.²

IV. ARGUMENT

A. Standard of Review

Sufficiency of the evidence is reviewed de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). The applicable standard of review for sufficiency of the evidence is whether, “after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of all of the State’s evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). And all reasonable inferences are drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party.” *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424, 431 (2011) (citing

² The verbatim report of proceedings for sentencing were not consecutively paginated with the trial proceedings, and will thus be referred to by date of proceeding.

State v. Hanson, 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990)). “Decisions rejecting jury instructions are reviewed for an abuse of discretion.” *State v. Priest*, 100 Wn. App. 451, 454, 997 P.2d 452, 453 (2000) (citing *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336, review denied, 136 Wn.2d 1021, 969 P.2d 1065 (1998)). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State v. Walters*, 162 Wn. App. 74, 82, 255 P.3d 835, 839 (2011) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

B. The Trial Court Followed Well-Settled Case Law in Allowing a Permissive Inference Instruction

The permissive inference instruction was entirely consistent with decisions of both the United States Supreme Court and the Washington Supreme Court. While the State must prove every element of the crime beyond a reasonable doubt, “[t]he State may . . . use evidentiary devices such as inferences and presumptions, to assist in meeting its burden of proof.” *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). “[W]hen an inference is only part of the prosecution’s proof supporting an element of the crime, due process requires the presumed fact to flow ‘more likely than not’ from proof of the basic fact.” *Id.* (quoting *Ulster*, 442 U.S. at 165, 99 S. Ct. at 2229). That is precisely the situation presented here. The uncontroverted testimony proved that C.S. locked the sliding-glass door before going to bed, the door was intact when she locked it, and after she

woke to find Gantt in her apartment in violation of two court orders the sliding-glass door was open with a piece broken off and lying on the carpet. RP 113-114. The inference that Gantt broke the door complies with due process because the presumption flows “more likely than not” from the proof of these basic facts. *Hanna*, 123 Wn.2d at 710.

Inferences like the one made in Gantt’s trial “are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an ‘ultimate’ or ‘elemental’ fact—from the existence of one or more ‘evidentiary’ or ‘basic’ facts.” *State v. Jackson*, 112 Wn.2d 867, 875, 774 P.2d 1211 (1989), quoting *County Court of Ulster v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777 (1979). When, as here, the inference is permissive, the jury may consider all of the evidence to determine whether an elemental fact can be inferred from the established facts, or reject the inference. *State v. Brunson*, 128 Wn.2d 98, 105-06, 905 P.2d 346 (1995). In *Brunson*, for example, the defendants were charged with residential burglary, a crime with two elements: (1) entering or remaining in a dwelling unlawfully, and (2) intent to commit a crime against a person or property. *Brunson*, 128 Wn.2d at 104-05 (citing RCW 9A.52.025-030). The Court held that the second element could be established through a permissive inference, based on proof that the defendants unlawfully entered dwellings. *See id.* at 109.

Because the inference was permissive, it “did not blind the [jury] to the other evidence presented.” *Id.* at 110; *see also County Court of Ulster Cy. v. Allen*, 442 U.S. 140, 157, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979) (upholding a permissive inference instruction that allowed the jury to infer an element based on proof of basic facts). Due process was satisfied because the inference flowed “more likely than not” from the established facts. *Brunson*, 128 Wn.2d 107; *Hanna*, 123 Wn.2d at 710; *Allen*, 442 U.S. at 166.

The standard applied in *Brunson* is also satisfied in Gantt’s case, because the inference that he physically damaged the sliding-glass door flows more likely than not from a wealth of facts established at trial: C.S. had a consistent habit of locking all of her doors prior to going to bed, she locked the sliding-glass door every night while living in her new apartment, she remembered locking the door prior to going to bed that night, at the time she locked the door nothing was broken off of the door, she awoke to find the sliding-glass door open and Gantt in her living room, and after Gantt entered the apartment C.S. found that a piece was broken away from the door and lying on the floor. RP 113-114, 136-37, 88-89, 96-97; *See also State v. Farnsworth*, 185 Wn.2d 768, 347 P.3d 1152 (2016) (circumstantial and direct evidence are equally reliable.)

Gantt’s contention that this permissible inference must follow beyond a reasonable doubt from the established facts has been soundly

rejected by the courts. Opening Br. at 8, citing *Jackson*, 112 Wn.2d 867. The reasonable doubt standard applies when the inference is the “sole and sufficient” proof of an element. *Brunson*, 128 Wn.2d 98, 107 (quoting *Allen*, 442 U.S. at 167). In *Jackson*, for example, the fact that the defendant had kicked a doorway was the sole evidence of his intent to commit a crime inside the building. *Jackson* 112 Wn.2d at 876. Because there was no evidence that he had entered the building or attempted to commit a crime in the building, the reasonable doubt standard applied. *Id.* at 876; 879.

But in Gantt’s case, as in *Brunson*, there was ample circumstantial evidence from which the jury could draw the inference. Because the inference was not the “sole and sufficient” proof that Gantt damaged the sliding-glass door, the higher standard of proof was not applicable. *Brunson*, 128 Wn.2d at 107.

Inexplicably, Gantt claims that “[t]he only evidence regarding damage the sliding door [sic] was exculpatory, where [C.S.] believed the door had been defective since she moved into the apartment.” Opening Br. at 12. Not so. C.S. testified that the door was intact when she went to bed on the evening of May 6, and that in the early morning hours of May 7, C.S. and the Pierce County Deputies found that a piece of the sliding-glass door had been broken off and was lying on the floor. RP 113-114, 136-37, 88-89, 96-97. C.S. also testified that she knew Gantt had come in through this

door because it was cracked open when she found Gantt. RP 96-97. While C.S. later testified that she was unable to find one of the screws needed to fully reattach the broken part to the door, that does not negate the rational inference that Gantt broke part of the lock off the door. RP 131-32, 114. Even if the door was not capable of being fully locked, there is a rational inference that the door was further damaged when a portion of it was broken off entirely. RP 96-97.

There was also a host of circumstantial evidence from which the jury could infer that Gantt damaged C.S.'s windshield wiper. She testified that the wiper was not broken the prior day. RP 88-89. She also testified that they had a considerable history together and that he entered her apartment without her permission. RP 79, 40; *see* RP 85. An inference that Gantt caused the damage flows "more likely than not" from the proof of these basic facts.

The permissive inference instruction was entirely proper, given the extensive evidence from which the conclusion rationally flowed. However, if the Court finds any error, it is harmless. "Instructional error is presumed prejudicial unless it affirmatively appears to be harmless." *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). In order to hold an error harmless, the Court must conclude that the jury verdict would have been the same absent the error. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

If a jury instruction tends to prove an element of the commission of a crime, that error is not harmless. *State v. Jackson*, 112 Wn.2d 867, 877, 774 P.2d 1211 (1989). The primary thrust of Gantt's argument is that the evidence regarding the windshield was insufficient to support the inference instruction. Even if that were correct, however, the error would be harmless because the evidence regarding the damage to the door is sufficient to support the charge of malicious mischief.

In addition, as in *Brunson*, defense offers no proof that the jury considered the inference instruction to the exclusion of all other evidence. *Brunson*, 128 Wn.2d at 106. As illustrated above, the State submitted significant circumstantial evidence supporting a finding that Gantt committed malicious mischief in the third degree.

In sum, the inference instruction was proper because the presumed fact to flowed 'more likely than not' from the proof that Gantt unlawfully broke into the victim's apartment, violated court orders, and damaged the victim's property.

C. The Trial Court Properly Denied Defendant's Request for a Voluntary Intoxication Instruction

Gantt's request for a voluntary intoxication instruction was properly denied for three reasons. First, he failed to give the State notice of an intent to pursue a voluntary intoxication instruction, as required by CrR 4.7(b)(2)(xiv). As a result, the State was denied any opportunity to offer

evidence that his ability to form intent not impaired. RP 258. Second, substantial evidence was not offered regarding the effects of alcohol on Gantt's mental state prior to his entry into C.S.'s apartment and the damage to her sliding-glass door. Finally, with respect to the time period after he had entered the apartment, Gantt did not offer any expert testimony regarding the impact of Benadryl on his mental state.

1. The State was not given notice of the voluntary intoxication defense

Gantt was not entitled to an instruction regarding a defense theory that he had withheld from the State. Criminal Rule 4.7(b)(2)(xiv) requires the general nature of the defense to be stated during discovery. The defense is obligated to disclose the nature of the defense "no later than the omnibus hearing." CrR 4.7(b)(2)(xiv). But Gantt did not indicate that he intended to raise a voluntary intoxication defense until the end of the trial. RP 256-57. Therefore, the newly raised defense was barred by CrR 4.7(b)(2)(xiv).

As this case illustrates, there is sound justification for the disclosure rule. If a voluntary intoxication defense had been raised in a timely manner, the State would have elicited testimony from the Sheriff's Deputies regarding the effects of alcohol and indications of mental illness. RP 258. Instead, because a voluntary intoxication defense had not been raised, the State was not permitted to pose questions to Deputy Pawlak regarding mental impairment. RP 258-59. The trial court sustained the defense

objection to this line of questioning, because “there hasn’t been a diminished capacity defense alleged.” RP 258-59. Allowing Gantt to withhold this theory and spring it at the end of the trial would have had a significant prejudicial impact on the State’s case.

Because a voluntary intoxication defense was not raised in a timely manner, the trial court properly denied Gantt’s motion to add the jury instruction.

2. There was insufficient evidence to support a voluntary intoxication instruction at the time Gantt committed the burglary, violated the no-contact orders, and engaged in malicious mischief

Even if Gantt had provided timely notice of a voluntary intoxication defense, he would not have been entitled to the instruction because there was not sufficient evidence to support his theory that he was voluntarily intoxicated prior to entering Ms. Gantt’s apartment. A voluntary intoxication defense requires the defense to establish three factors: (1) that a particular mental state is an element of the crime charged, (2) substantial evidence that the defendant ingested the intoxicant, and (3) evidence that the intoxicant affected his ability to acquire the required mental state. *State v. Classen*, 4 Wn. App. 2d 520, 536, 422 P.3d 489 (2018). Because he failed to satisfy the third factor, the trial court properly declined to give the instruction.

Although C.S. and the deputies testified that Gantt smelled of alcohol, and was “out of it,” there was insufficient evidence to warrant a voluntary intoxication instruction. “A person can be intoxicated and yet still be able to form the requisite mental state [.] *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987). Therefore, “[e]vidence of drinking alone is insufficient to warrant a voluntary intoxication instruction. Instead, there must be substantial evidence of the effect of alcohol on defendant’s mind or body.” *State v. Gabryschak*, 83 Wn. App. 249, 250, 921 P.2d 549 (1996); *see also Coates*, 107 Wn.2d at 891. Evidence of the effects of the intoxicant “must reasonably and logically connect the defendant’s intoxication with the asserted inability to form the required level of culpability to commit the crime charged.” *Gabryschak*, 83 Wn. App. at 252-53.

In determining whether a voluntary intoxication instruction is appropriate, the courts have required far more evidence than Gantt can point to. For example, the instruction was upheld where there was evidence that the defendant vomited, did not respond to pepper spray, and blacked out. *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003); *see also, State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982) (instruction proper where defendant drank beer, whiskey, and rum “almost constantly” for two days, ate a spider and washed it down with whiskey, and staggered and fell); *State v. Walters*, 162 Wn. App. 74, 83, 255 P.3d 835 (2011) (instruction

proper where defendant had consumed at least nine drinks, was swaying back and forth, did not respond to pain-compliance techniques, and was constrained only after the use of *two* stun guns). At the other end of the spectrum, the instruction was not warranted when the only evidence was that the defendant was drinking and intoxicated when committing the crime charged, because it was insufficient evidence to show that the defendant's ability to reach the required mental state was impacted by the alcohol. *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002); *see, e.g., State v. Gabryschak*, 83 Wn. App. 249, 921 P.2d 549 (1996) (holding that an officer's testimony that the defendant had alcohol on his breath, appeared to be very intoxicated, and was too drunk to drive, was not sufficient evidence for a voluntary intoxication instruction).

Gantt's evidence is even less robust than that offered in *Everybodytalksabout* and *Gabryschak*. The record is silent as to whether Gantt consumed alcohol before breaking into the apartment, how much he consumed, or the impact on his ability to form intent. The only testimony he relies on to show intoxication at the time he committed the residential burglary, malicious mischief, and violation of the no contact order is C.S.'s statement that he was "out of it" and "unstable." Opening Br. at 19, citing RP 129. Even when this evidence is examined in the light most favorable to Gantt, it does not begin to approach the level of evidence required for an

inference that he was so intoxicated that he was unable to form the requisite intent for the residential burglary, violation of the court orders, or malicious mischief.

As in *Everybodytalksabout* and *Gabryschak*, no juror could reasonably or logically have inferred from the scant evidence of intoxication that Gantt was too drunk to form intent to break the victim's door, enter the apartment, or violate the no-contact orders. Therefore, the trial court properly denied the motion for a voluntary intoxication instruction.

3. There was insufficient evidence to justify a voluntary intoxication instruction related to the obstruction charge

There was not sufficient evidence to support a voluntary intoxication instruction for the obstruction charge either. Unlike alcohol intoxication, drug-related impairment must be supported by expert testimony. *State v. Classen*, 4 Wn. App. 2d 520, 537, 422 P.3d 489 (2018). This difference exists because “[t]he effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use.” *State v. Thomas*, 123 Wn. App. 771, 782, 98 P.3d 1258 (2004). But there is no case law suggesting common knowledge regarding the timing and impact of drugs, such as Benadryl. *See Classen*, 4 Wn. App. 2d at 537. Gantt offered no expert testimony regarding the impact of Benadryl on his ability to form the required mens rea. Because the record is devoid

of evidence showing that the Benadryl impaired his ability to form the requisite mental state, the trial court properly denied the instruction.

The crime of obstructing a law enforcement officer has a mens rea element that the defendant must “willfully” delay, hinder, or obstruct any law enforcement officer. RCW 9A.76.020. Like the defendant in *Gabryschak*, Gantt responded to officer requests and was able to communicate with them without difficulty. *Id.* at 254; *see* RP 193-194; RP 218. Gantt had the presence of mind to run away from the police after he was identified by C.S. as her ex-boyfriend, indicating that he was aware of his violations. Despite the fact that he was barefoot, he ran quickly without stumbling. RP 194-196; RP 218-219. And Gantt reacted normally when the officers used a taser stun gun to stop him. RP 197.

In conclusion, the defense failed to provide notice of intent to pursue a voluntary intoxication defense, the record is devoid of any indication of whether or when Gantt’s ability to form the requisite intent could have been impacted by Benadryl, and the record demonstrates that he remained coherent and capable of forming intent. Therefore, the trial court properly denied the late request for a voluntary intoxication instruction.

V. CONCLUSION

For the above stated reasons, the State respectfully asks that this Court affirm the conviction.

RESPECTFULLY SUBMITTED this 21ST day of January, 2020.

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The undersigned certifies that on this day she delivered by E-file or US mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her 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

1/21/20
Date


Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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