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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36543-3-III

STATE OF WASHINGTON, Respondent,

v.

JASON RAY WEISKOP, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The State contends that the trial court did not err in excluding evidence of Scott Flory's blood alcohol concentration of .297 because it was irrelevant in the absence of expert testimony explaining its significance. *Respondent's Brief* at 4, 6, 9. In making this argument, the State overlooks both that the threshold for evidence to be relevant is low, and that jurors are allowed to apply their common sense and life experience in evaluating the evidence presented.

Evidence is relevant if it makes the existence of a fact of consequence more or less probable to be true than without the evidence. ER 401; *State v. Lough*, 125 Wn.2d 847, 861-62, 889 P.2d 487 (1995). Evidence is relevant if a logical nexus exists between the evidence and the fact to be established. *State v. Burkins*, 94 Wn. App. 677, 692, 973 P.2d 15, *review denied*, 138 Wn.2d 1014 (1999). Even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Multiple jurisdictions applying similar standards have concluded that evidence of consuming alcohol near the time of events is relevant to impeach the witness's credibility, perception and recollection. *See, e.g., Stewart v. Carron*, 938 S.W.2d 636 (Mo. Ct. App. 1997) (relevant to

witness's ability to see, hear, perceive, observe, and recall); *U.S. v. Reice*, 25 M.J. 93, 95 (U.S. Ct. Military App. 1987) (relevant to ability to perceive and remember events); *McCormick v. Suffolk County*, 53 A.D.2d 690, 691 (N.Y. Sup. Ct. 1976) (relevant to impeach credibility); *U.S. v. Franklin*, 415 F.3d 537, 553-54 (6th Cir. 2005) (discussing pattern instructions allowing jury to consider alcohol abuse in determining credibility); *Laws v. Webb*, 658 A.2d 1000, 1010 (Del. Sup. Ct. 1995), *overruled on other grounds by Lagola v. Thomas*, 867 A.2d 891 (Del. Sup. Ct. 2005) (relevant to assist jury's determination of perceptive abilities around the time in question); *People v. Smith*, 307 N.W.2d 441, 447 (Mich. Ct. App. 1981) (relevant to impeach credibility by attacking memory and perception of criminal episode).

Jurors are expected to bring their opinions, insights, common sense, and everyday life experiences into deliberations, although they may not introduce highly specialized knowledge into deliberations. *State v. Carlson*, 61 Wn. App. 865, 878, 812 P.2d 536 (1991), *review denied*, 120 Wn.2d 1022 (1993). It requires no specialized knowledge or expert testimony to recognize that alcohol impairs judgment and perception, or that a blood alcohol level more than three times the legal limit to drive a car is likely to reflect consumption of a large amount of alcohol in a short period of time, probably more than the four beers Flory admitted drinking.

Indeed, the effects of alcohol upon people are commonly known. *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985). A jury relying solely on its common sense could reasonably and logically infer that an elevated blood alcohol level reflects elevated impairment of perception and recall.

When defense evidence is relevant, it is not enough to justify exclusion that the evidence have some prejudicial effect; rather, the State must show “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Here, it is rather the exclusion of the evidence that likely undermined the fairness of the fact-finding process because it allowed Flory’s testimony that he had only consumed a small amount of alcohol beforehand to go unchallenged. This substantially misled the jury about Flory’s credibility as a witness because it created an incorrect impression about the extent to which alcohol was a factor in his impressions.

VI. CONCLUSION

For the foregoing reasons, Staggs respectfully requests that the court REVERSE his conviction for attempted robbery and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 13 day of January, 2020.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart". The signature is written in a cursive style with a large initial "A".

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals electronic filing portal to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 13 day of January, 2020 in Kennewick, Washington.



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