

62304-4

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NO. 62304-4-1

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

JOEY WAYLAND,

Appellant,

v.

STATE OF WASHINGTON,

Respondent.

2009/AUG 25 PM 4:43
STATE OF WASHINGTON
CLERK OF COURT

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

The Honorable Richard Eadie

CORRECTED APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

Joey Wayland was convicted by jury of assault in the fourth degree for swinging his fists at the back of a stranger, Paul Nordby, and brushing his jacket with one of those swings. On appeal, Joey Wayland argues that the trial court erred by refusing to grant the defense proposed voluntary intoxication instruction: "Evidence of intoxication may be considered in determining whether the defendant acted with the specific intent to commit the crime of attempted Robbery in the second degree."

In response, the State contends that without evidence of the effect of alcohol on Joey Wayland's ability to form the intent to assault Mr. Nordby, a voluntary intoxication instruction is improper.¹ However, when all reasonable inferences are drawn in favor of the defendant, the evidence shows the connection between Joey Wayland's intoxication and its effect on his mind and body.

Because of this error, the conviction must be reversed and remanded for a new trial.

¹ The State also contends that Joey Wayland failed to argue that the court's failure to give an instruction prevented him from presenting his theory of the case to the jury. Respondent's Brief at 6. However, this argument was effectively made in the Opening Brief: "[Counsel] could have properly, and successfully, argued that Mr. Wayland was unable to form the actual intent to rob or intentionally assault anyone. Without the voluntary intoxication instruction, the jury could not draw the appropriate inferences from the evidence." Appellant's Brief at 8.

A VOLUNTARY INTOXICATION INSTRUCTION WAS PROPER BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT JOEY WAYLAND WAS INTOXICATED AND THAT THE ALCOHOL HAD AN EFFECT ON HIS MIND AND BODY.

a. There was sufficient evidence in the trial record for the jury to infer that Joey Wayland could not form the intent to assault Mr. Nordby. The State contends that no evidence was presented to connect Joey Wayland's intoxication to the inability to form the intent to assault Mr. Nordby. Respondent's Brief at 7, 8.

When determining if the evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn. 2d 448, 455-56, 6 P.3d 1150 (2000).

In order for a voluntary instruction to be proper, the defendant need only show that: (1) the crime charged has an element of intent; (2) there is substantial evidence of drinking; and (3) there is evidence that the drinking affected the defendant's ability to form the required intent. State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). Essentially, there must be

“substantial evidence of the effects of the alcohol on the defendant’s mind or body.” Id. (quoting Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), review denied 118 Wn. 2d 1010, 824 P.2d 490 (1992)). The State does not contest that intent is an element of assault in the fourth degree, and does not contest that Joey Wayland was drinking. Respondent’s Brief at 7.

A defendant is not required to provide expert opinion on his intoxication at the time of an assault in order to be entitled to a voluntary intoxication instruction. State v. Kruger, 116 Wn. App. 685, 693-94, 67 P.3d 1147 (2003); WPIC 18.10. A defendant can rest after the State’s case without calling any witnesses of his own, and still be entitled to a voluntary intoxication instruction if the evidence presented by the State and elicited through cross-examination contains substantial evidence of intoxication and the effects of the alcohol on the defendant’s mind or body. Gabryschak, 83 Wn. App. at 253. Furthermore, courts presume that juries know the effects of alcohol upon people, and can draw reasonable inferences on how alcohol has affected a defendant’s state of mind. Kruger, 116 Wn. App. at 693.

There is substantial evidence in this case to show that Joey Wayland was affected both in mind and body because of his intoxication. Officer Brown testified that when Nordby reported the incident to him, Joey Wayland was described as being "extremely intoxicated." RP 78, 87, 207. Officer Brown, after interacting with Joey Wayland, also testified that he was intoxicated, and noted this in his police report. RP 79, 219. Officer Brown recalled that there was a strong odor of alcohol on Wayland's breath, that he was swaying, that his movements were sloppy, that he lacked coordination, and that he obviously slurred his words. RP 219-20. Officer Rees similarly testified that Joey Wayland had the odor of alcohol on his breath, red watery eyes, and obviously slurred speech. RP 229.

The above evidence shows the connection between Joey Wayland's drinking and how that drinking affected his mental and bodily faculties. Joey Wayland was clearly under the influence of alcohol. It was not simply the case that he drank alcohol and smelled of alcohol, rather, he was influenced by the alcohol to the point where he could not walk straight, lacked basic coordination skills, his eyes were watering, and he could not even properly enunciate the words he was speaking.

b. The State incorrectly contends that this case is analogous to Gabryschak, where a voluntary intoxication instruction was properly denied. Respondent's Brief at 7. In Gabryschak, there was evidence that the defendant had been drinking, had alcohol on his breath, and was falling over things. 83 Wn. App. at 254. However, in ruling that an instruction was not proper, the court reasoned:

[T]he evidence in Gabryschak's case shows that he responded consistently to the officers' requests to see and speak to the occupants of the apartment—he consistently refused, indicating that he fully understood the nature of the requests; he tried to break and run while being escorted to the police car, indicating that he was well aware that he was under arrest; he leaned up against the back of Officer Anderson's seat and spoke with conviction into her ear while threatening to kill her once released from jail, indicating that he was fully aware of his destination. No testimony reflects that Gabryschak's speech was slurred, that he stumbled or appeared confused, that he was disoriented as to time and place, that he was unable to feel the pain of the pepper spray, or that he otherwise exhibited sufficient effects from the alcohol from which a rational juror could logically and reasonably conclude that his intoxication affected his ability to think and act in accord with the requisite mental states...

83 Wn. App. at 254-55.

By contrast, there is no evidence in the trial record to show that Joey Wayland understood what was happening while he was

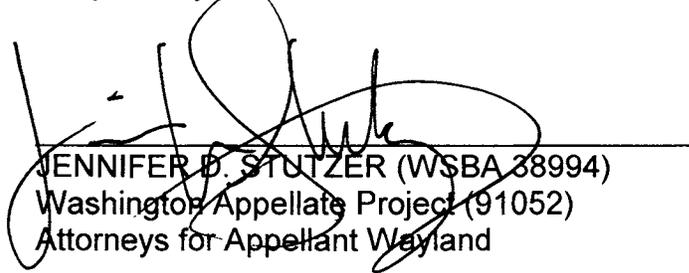
being put under arrest: he did not try to break and run, and there is no evidence to show that Joey understood any questions, or that he understood his Miranda warnings. RP 69, 227. Unlike Gabryschak, Joey Wayland did have slurred speech, he did sway, and his movements were sloppy. The trial record does not even support the contention that Joey Wayland understood he was going to jail. RP 227. Where in Gabryschak there is evidence that alcohol only impaired the defendant's body but not his mind, a rational juror could reasonably conclude from these facts that Joey Wayland's intoxication affected both his body and his mind. As such, a reasonable juror could draw the inference that Joey Wayland was too intoxicated to form the intent to assault Mr. Nordby.

B. CONCLUSION

For the foregoing reasons, and the reasons argued in Joey Wayland's opening brief, this court should reverse and remand his conviction of assault in the fourth degree, with the instruction that a voluntary intoxication instruction was proper.

DATED this 14th day of August, 2009.

Respectfully submitted:



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DIVISION I

STATE OF WASHINGTON,)	
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Respondent,)	
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Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 26TH DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF AUGUST, 2009

x 