

66728-9

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NO. 66728-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VENITA CHANDRA,

Appellant.

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COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

CHRISTINE W. KEATING
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES

1. A defendant has a right to be present during trial; that right extends to jury selection. A defendant may, however, explicitly or implicitly waive that right. Here, Chandra voluntarily absented herself from the second half of jury selection after telling the court that she would prefer to attend school during that portion of trial; she subsequently reappeared for the remainder of trial. Was the defendant's right to be present at trial honored?

2. A defendant is entitled to a voluntary intoxication instruction where there is substantial evidence of the effects of alcohol on her mind or body. Here, Chandra presented limited testimony that she was "drunk" on the night in question; no evidence was offered regarding any actual impairment nor any effect on her coordination, balance, behavior, or appearance. Did the trial court properly refuse her request to instruct the jury on voluntary intoxication?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Venita Chandra was charged by Amended Information with Assault in the Third Degree against Seattle Police

Officer Travis Loyd pursuant to RCW 9A.36.031(1)(g). CP 1. A jury trial on that charge commenced on November 29, 2010 before the Honorable Richard Eadie. 1RP 2.¹ On November 29, 2010, a jury was impaneled and jury selection began; voir dire concluded the following day and the testimonial portion of trial commenced. 3RP 64. Following the evidentiary portion of trial, Chandra asked the court to instruct the jury on voluntary intoxication; the court declined to do so finding that it was not appropriate given the facts elicited at trial. 6RP 450-51. On December 2, 2010, the jury returned a verdict of guilty. CP 19. At sentencing on January 7, 2011, the trial court imposed a standard range sentence of two months. CP 38-44; 7RP 12.

2. SUBSTANTIVE FACTS

On June 12, 2010 around 2 a.m., Seattle Police Officer Travis Loyd was on patrol in the Belltown area of Seattle. 4RP 167-70. As he drove by Club Aura, a local nightclub, he was

¹ The Verbatim Report of Proceedings consists of seven volumes, referred to in this brief as follows: 1RP (November 29, 2010, Volume I, p. 1-46); 2RP (November 29, 2010, Volume I "Jury Voir Dire," p. 1-26); 3RP (November 30, 2010, p. 49-129); 4RP (November 30, 2010, p. 130-221); 5RP (December 1, 2010); 6RP (December 2, 2010); and 7RP (January 7, 2011).

flagged down by a bystander seeking his assistance. 4RP 170. He was told that a man in the nightclub had touched a woman inappropriately and needed to be stopped. 4RP 170. He pulled over to the identified area and put on his patrol car lights and flashers so as to investigate. 4RP 170.

At that point, he saw a disturbance that he tried to stop by using his spotlight and siren to get the attention of the people involved. 4RP 178. He then got out of his car; once out, a man in a white shirt was repeatedly identified to him as the offending party by onlookers. 4RP 180. While he was approaching the group that appeared to contain the man being accused of the inappropriate touching, he saw a woman later identified as defendant Chandra involved in a small altercation with another woman. 4RP 183-84. Because she appeared to be attempting to get to someone behind the officer, he decided to keep an eye on her. 4RP 184. It was then that he saw her throw her purse at the other woman and charge toward him. 4RP 184. Officer Loyd immediately identified himself as an officer and told Chandra repeatedly to "stop." 4RP 184. She did not, instead asking the officer, "what are you going to do?" 4RP 185. She then tried to push past the officer to contact an individual, later identified as her brother, standing behind

the officer. 4RP 185. After she pushed the officer, he pushed her against his patrol car in an attempt to control her and prevent her from interfering with his investigation. 4RP 186. As he pushed Chandra against the car, he heard someone behind him ask, "Get your hands off my sister." 4RP 186. Officer Loyd turned to look and as he did so he was struck immediately in the left side of his face with a closed fist; the hit had come from Chandra. 4RP 187. Officer Loyd described the hit at trial as "solid" and noted that it caused pain. 4RP 187.

At that point, Officer Loyd immediately knew that Chandra would be arrested for assault; to facilitate the arrest, he placed her in a "hair-hold" and attempted to take her to the ground so she could be handcuffed. 4RP 188. While he struggled with her, however, he felt someone grabbing him from behind and telling him "you can't take her." 4RP 189. Officer Loyd told that individual (later identified as Chandra's brother) in no uncertain terms that he needed to back away in an attempt to deescalate the situation. 4RP 245. Meanwhile, Chandra continued to struggle and resist until a backup officer arrived and they were able to handcuff her. 4RP 194. During trial, a patrol-car video of the entire incident was played for jurors. 4RP 176.

During the defense case, Chandra had five witnesses testify on her behalf; all five testified that they had been with Chandra on the evening in question, and in the area of the incident. 5RP 271-72, 293-94, 324-25, 361-63, 395-97. However, none of them claimed to have seen any assault by Chandra, stating instead that Officer Loyd essentially came out of nowhere and attacked her. 5RP 326, 370.² All of them testified that the group had been drinking at Club Aura that night, but their testimony varied when describing how much. With respect to Chandra, one witness indicated he didn't know if she was drunk at all, whereas another indicated she was an 8-9 on a scale of 1-10 in terms of intoxication. 5RP 272, 363. None of them were able to recount what or how much the defendant had had to drink.

Chandra also elected to testify at trial, taking the stand last in the defense case. 5RP 411. During her testimony, she claimed that she had been "really drunk" but also claimed on cross-examination that she remembered all of the details from the evening and knew what she was doing. 5RP 412, 415, 420-21.

² Interestingly, one such witness, Ramsay Van, when confronted with the video of the incident, admitted on cross-examination that he told officers he had seen Chandra's assault on the officer and had apologized for it.

She further indicated that the officer had grabbed her from behind and that she had never struck or even swung at the officer.

5RP 416. She testified there had been no assault. 5RP 416.

After considering all the testimony and apparently discounting the credibility of the witnesses who claimed no assault had occurred, the jury convicted Chandra as charged of assault in the third degree. CP 19.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY CONTINUED WITH JURY SELECTION AFTER CHANDRA VOLUNTARILY ABSENTED HERSELF ON THE SECOND DAY OF TRIAL.

Chandra argues that she was denied the right to be present during trial in violation of her confrontation right under the Fourteenth Amendment and Article I, § 22. In so doing, Chandra claims that she did not waive her right to be present on the record, and asserts that she did not attend any portion of jury selection. Chandra has misstated the clear facts; Chandra did address her wish to absent herself on the record after having attended the first portion of jury selection. Her argument is wholly without merit.

As an initial matter, Chandra is correct that a criminal defendant has a constitutional right under the Fourteenth Amendment due process clause and Article I, § 22 of the Washington State Constitution to be present during trial; this right also arises out of the Sixth Amendment confrontation clause. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003); State v. Wilson, 141 Wn. App. 597, 603, 171 P.3d 501 (2007). This right to be present extends to the jury selection process. State v. Irby, 170 Wn.2d 874, 883, 246 P.3d 796 (2011); Wilson, 141 Wn. App. at 604. However, implicit in the right to be present is the corresponding right to waive one's presence. United States v. Gordon, 829 F.2d 119, 124, 264 U.S. App. D.C. 334 (1987); State v. Thomson, 70 Wn. App. 200, 206, 852 P.2d 1104 (1993). A waiver on the record is desirable. Gordon, 829 F.2d at 126. However, "[o]nce trial has begun in the defendant's presence, a subsequent *voluntary* absence operates as an implied waiver and the trial may continue without the defendant." Garza, 150 Wn.2d at 367; see also CrR 3.4(b) ("The defendant's voluntary absence after the trial has commenced in his or her presence shall not prevent continuing the trial to and including the return of the verdict.") For purposes of CrR 3.4, trial starts when the jury is impaneled.

Thomson, 70 Wn. App. at 210-11; State v. Crafton, 72 Wn. App. 98, 102-03, 863 P.2d 620 (1993).

Attempts to argue that mid-trial absences do not constitute implied waivers have been routinely rejected. For example, in United States v. Taylor, the defendant attended the morning session of his first day of trial and was notified at the lunch break of when court would resume in the afternoon. 414 U.S. 17, 94 S. Ct. 194, 38 L. Ed. 2d 174 (1973). He did not appear. Id. After giving the defendant until the next day to appear, the court eventually elected to proceed without the defendant. Id. The defendant was convicted; on appeal, he argued that his mere voluntary absence from trial could not be construed as an effective waiver. Id. at 19. In dismissing the defendant's argument, the United States Supreme Court wrote: "It is wholly incredible to suggest that petitioner, who was at liberty on bail, had attended the opening session of his trial, and had a duty to be present at trial, entertained any doubts about his right to be present at every stage of his trial." Id. at 20 (citations omitted); see also Crosby v. United States, 506 U.S. 255, 113 S. Ct. 748, 122 L. Ed. 2d 25 (1993).

In this case, the defendant appeared on November 29, 2010, the first day of trial. Supp. CP ____ (Clerk's Minutes, p.1); 1RP 2. On that day, she was present for pretrial motions, motions in limine, and most importantly, the start of jury selection, including their swearing in and initial questioning. Supp. CP ____ (Clerk's Minutes, p.1); 2RP 2-11. After the jury was dismissed for the day with instructions to return in the morning, defense counsel addressed the court regarding Chandra's obligations for the following day: "She is wondering—she has tomorrow class in the morning but she is wondering if she has to be here tomorrow morning, because our case will not start until afternoon." 2RP 26. In response to questioning by the Court, the State indicated that it had no objection, but requested that the jury not be notified of the reason for the defendant's absence. 2RP 27. Chandra agreed to that. 2RP 27.

The following morning, the issue was again raised by the court; defense counsel reiterated that Chandra had had classes she wanted to attend, but that she would be present for the afternoon session. 3RP 50. Chandra did reappear for the

afternoon session and was present for the remainder of the trial.

Supp. CP ____ (Clerk's Minutes)³; 4RP 179-80.

Based upon the above facts, Chandra's claim on appeal should fail. First, there was an in-court, on-the-record discussion of Chandra's wish to absent herself from trial. 2RP 26. Although there was not a detailed colloquy done, Chandra's counsel's statements clearly indicate a knowledge of the right to be present and an affirmative, intelligent decision to waive that right. Second, even if the discussion on the record was insufficient to constitute a formal waiver, by voluntarily absenting herself from trial *after* it had commenced, she impliedly waived her right to be present. Under those circumstances, the defendant cannot now circumvent the jury's verdict: "One cannot indiscriminately obstruct the course of justice and then rely on constitutional safeguards to shield [her] from the legitimate consequences of [her] own wrongful act." Thomson, 70 Wn. App. at 207.

Chandra was well aware of her right to be present at trial as demonstrated by her presence at the beginning and throughout the

³ There does appear to be an error on page 3 of the Clerk's Minutes; it indicates the defendant is absent but she then testifies during that same session, indicating she was indeed present.

trial; she was absent for only a small portion on the second day. That absence was knowing, intelligent and fully voluntary as clearly demonstrated by the facts of the case. Chandra is not entitled to a reversal of her conviction.

2. THE TRIAL COURT PROPERLY REFUSED CHANDRA'S REQUEST TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION.

Chandra next claims that the trial court erred by not providing the jury with an instruction on voluntary intoxication. The facts of the case and supporting case law do not support Chandra's contention.

When a trial court decision regarding jury instructions is based on the facts of the case, the Appellate Court reviews that decision for a clear showing of an abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996). Instructions are adequate if they allow a party to argue its theory of the case and do not mislead the jury or misstate the law. State v. Stevens, 127 Wn. App. 269, 110 P.3d 1179 (2005). A defendant is entitled to a voluntary intoxication instruction when she can show that (1) the crime charged has a mental state as an element, (2) there is substantial evidence of her drinking, and (3) there is evidence that

her drinking affected her ability to form the requisite intent or mental state. State v. Gallegos, 65 Wn. App. 230, 248, 828 P.2d 37 (1992). Evidence of intoxication and its effect on the defendant may be used to prove that the defendant was unable to form the particular mental state that is an essential element of a crime. State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). However, “it is well settled that to secure an intoxication instruction in a criminal case there must be substantial evidence of the effects of the alcohol on the defendant’s mind or body.” Gallegos, 65 Wn. App. at 238.

RCW 9A.16.090 provides “[n]o act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his 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 intoxication may be taken into consideration when considering his mental state.” It is not the fact of intoxication that is relevant, but the degree of intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state. Gallegos, 65 Wn. App. at 238 (quoting Coates, 107 Wn.2d at 889). Thus, evidence of drinking alone is insufficient to warrant the instruction;

instead there must be “substantial evidence of the effects of the alcohol on the defendant’s mind or body.” State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996).

Chandra argues that she was entitled to a voluntary intoxication instruction because she presented substantial evidence to satisfy all three of the factors outlined in State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003); and State v. Gallegos, 65 Wn. App. at 238. In support of her argument, she notes that three of her five witnesses testified she was “drunk” that evening. Brief of Appellant at 6. Chandra also reminds the Court that she herself testified that she was drunk and “not in her right mind.” Brief of Appellant at 6. However, absolutely no testimony was offered regarding *what* effect any alcohol may have had on Chandra’s mind or body; testimony about its effect on her balance, coordination, speech, behavior, or appearance that would support her claim that she was “not in her right mind” was conspicuously absent during the trial. Moreover, even Chandra herself testified on cross-examination that she knew exactly what she was doing that night. 5RP 421. The simple fact of the assault itself does not support her claim that she was impaired; in fact to the contrary—the jury heard testimony that Chandra had previously engaged in assaultive

behavior and that this was not necessarily an anomaly in her behavior. 5RP 430.

RCW 9A.36.031(1)(g) states that a person is guilty of assault in the third degree if, under circumstances not amounting to assault in the first or second degree, she intentionally assaults a law enforcement officer or other employee of a law enforcement agency who was performing official duties at the time of the assault. The term assault is not defined by statute, so Washington courts apply the common law definition. State v. Stevens, 158 Wn.2d 304, 308, 143 P.3d 817 (2006). "Washington recognizes three common law definitions of assault: (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm." Id. at 311. The definition of assault that applies here is an attempt to inflict bodily injury upon another; in other words, the State had to prove that Chandra *intentionally* assaulted Officer Loyd.

While there was some evidence that Chandra had been drinking, there was no evidence that Chandra's alcohol consumption affected her ability to form the intent to assault Officer Loyd. In Gabryschak, this Court held that the trial court acted

properly when it denied the defendant's proposed voluntary intoxication instruction where there was evidence that the defendant had been drinking, had alcohol on his breath, appeared intoxicated, was falling over things, but there was no evidence from which a rational trier of fact could find that the defendant was too intoxicated to form the intent to commit the crime of attempted rape in the second degree. Id. at 254. As in Gabryschak, there was no evidence in this case that Chandra's alcohol consumption impaired her ability to function whatsoever, let alone impaired her ability to form the requisite intent or act volitionally. Chandra has simply not established at trial or on appeal that she was factually entitled to a voluntary intoxication instruction. Moreover, Chandra has not established—or even argued—that the trial court's decision impeded her ability to argue her theory at trial. In fact, as noted in the Brief of Appellant, defense counsel told the jury in opening statement that Chandra had not intended to assault Officer Loyd because she was drunk; this was further argued at length in closing argument. 4RP 156-63. In the end, the only thing that impeded defense counsel's attempt to argue Chandra was too impaired to assault Officer Loyd was Chandra's own admission that she was lucid and her denial that any assault happened whatsoever.

Thus, based upon the evidence—or lack thereof—the trial court properly refused to instruct the jury on voluntary intoxication. There was no error.

D. CONCLUSION

For all the foregoing reasons, the State asks this Court to affirm Chandra's conviction for Assault in the Third Degree.

DATED this 6th day of October, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:  for

CHRISTINE W. KEATING, WSBA #30821
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Eric Nielsen, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing copies of the Brief of Respondent, in STATE V. VENITA CHANDRA, Cause No. 66728-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

U Brame
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