No. 31274-7-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JAMES J. LANDIS,

Defendant/Appellant.

Appellant's Brief

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2. The trial court erred in denying Mr. Landis' request for a jury instruction on voluntary intoxication.

3. The trial court erred in not allowing Mr. Landis to cross examine Detective Files about Mrs. Landis' recorded statement to explain how and why her husband's crazy behavior was due to PTSD.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was Mr. Landis denied his constitutional right to effective assistance of counsel, when his attorney failed to pursue a defense of diminished capacity?

2. Was Mr. Landis entitled to a voluntary intoxication jury instruction where the crime charged included a mental state and there was substantial evidence to support the giving of the instruction?

3. After the prosecutor elicited handpicked portions of a recorded statement from Detective Files where Mrs. Landis stated her husband was acting crazy, did the trial court abuse its discretion in not allowing Mr. Landis to elicit on cross examination the remainder of Mrs. Landis'

statement where she explained how and why the crazy behavior was due to PTSD?

C. STATEMENT OF THE CASE

James Landis is a Vietnam veteran who served from January 1968 until September 1969. RP 884-86. In October 1968, he was injured by a land mine and also from being shot. At the end of his deployment he suffered from post-traumatic stress disorder (PTSD). RP 885-86. When he returned to the United States he worked for Martin Marietta as a missile mechanic, then Rockwell International, and eventually the Boeing Company as a flight line mechanic, and later as a supervisor. RP 886. He left Boeing around 2000 due to his PTSD disability. At the time of this incident he was rated 70 percent PTSD disabled by the Veterans Administration. RP 888.

On August 7, 2010, Mr. Landis was taking two doses of time-release morphine daily for pain from his war injuries as well as Celexa for depression. On the morning of this particular day, in addition to his usual medications, he had gone to the tavern and consumed three beers. He continued to drink beer after he returned home around noon. RP 435-39, 889, 899.

Sometime that afternoon both Mr. Landis and his wife became upset with one another following an episode that started when he accidently tangled up a garden irrigation line in the brush hog he was using with his garden tractor and ran over some of his wife's perennials. RP 265-267, 440, 891-97. Mrs. Landis, who had also been drinking, tried to stop her husband from doing any more mowing. Mr. Landis somehow ran over his wife's ankle with the tractor during this disagreement and she ended up going to the hospital. RP 270-74, 440, 447.

Mrs. Landis told the neighbors that Mr. Landis had run over her leg with the tractor. The neighbors called the sheriff about 6:30 p.m. RP 355, 370-71. When the sheriff's deputies showed up at the hospital, she gave a similar story. RP 379. 440. At trial she testified it was an accident. RP 318-19.

Mr. Landis said Mr. Landis was upset due to PTSD. (RP 267, 786-88) Mrs Landis told the Sgt. Harrison she did not want them to go to the house because Mr. Landis had weapons and she was afraid someone might get hurt due to Mr. Landis' PTSD. RP 357, 381. She also told the police Mr. Landis was a marksman and an excellent shot. RP 358. Sgt. Harrison testified Mrs. Landis told him she was worried about a potential shoot out

with law enforcement as a result of the effects of Mr. Landis consuming alcohol along with his medication combined with his PTSD. RP 448.

Despite Mrs. Landis' pleadings, Deputy Newport and Sgt. Harrison decided to drive to the Landis residence. They traveled in separate cars. RP 385. After they arrived at the Landis residence around dusk they parked out of sight on the road. They could see lights on inside the house and Mr. Landis pacing back and forth. They had the dispatcher call Mr. Landis on the telephone and ask him to come outside and talk to them. RP 385-91, 451-54.

Patricia Stevens, a dispatcher at the sheriff's office, called Mr. Landis and asked him to come outside and talk to the sheriff deputies. RP 753-54. Mr. Landis declined to do that at first. He rambled on for some time that his wife has been getting in his face, that "she was living off of me from the day that I met her, and she has not worked a day and contributed ten cents to this relationship." RP 756-61. He then became abusive, calling her a bitch, as well as his wife, and threatening to kill both his wife and Ms. Stevens. RP 766-71.

Meanwhile, Deputy Newport had gotten out of his car and climbed up an embankment where he could watch the house but remain out of sight. RP 389-90. Eventually, Mr. Landis came outside and stood by the

garage with his hands up. Sgt. Harrison drove into the driveway, turned on his overhead "take-down" lights, and got out of his patrol car. Mr. Landis immediately became angry and yelled at Harrison to turn off the lights. Mr. Landis then walked back inside his garage. RP 394-98. Seeing this turn of events, Deputy Newport told Sgt. Harrison to get out of the driveway and that he (Newport) was leaving. RP 399.

Mr. Landis came back outside within about ten seconds with a rifle. Deputy Newport was already running back to his car and Sgt. Harrison was backing his car out the driveway. RP 400-01. Mr. Landis began firing shots at Harrison's patrol car. Harrison heard glass breaking. He stopped his car as soon as he was out of the line of fire, turned off his car and lights, got out and crawled up the embankment to a position where he could see the house. RP 457-60. Deputy Newport radioed dispatch to send more officers. RP 406. By now, it was completely dark outside. RP 408.

From where he was hiding in the field, Harrison could hear Mr. Landis yelling and crying. Mr. Landis was saying his wife's name and yelling, "Come take me out." A few minutes later Mr. Landis came walking straight from the house holding a rifle and muttering to himself. RP 464-66. Mr. Landis passed within 30-60 feet of where Harrison was

hiding. Mr. Landis walked to the top of the embankment and started shooting at Harrison's empty patrol car. RP 467. The numerous shots fired into the empty patrol car caused the headlights or wig-wag lights to start flashing on and off and the horn to start honking. RP 469.

Mr. Landis went back inside the house and turned off the lights. 470-74. After a period of quiet, Harrison heard sirens approaching and then footsteps quite close to his position. Harrison decided to shoot Mr. Landis. He shot Mr. Landis in the hip and ordered Mr. Landis to put his arms out away from his body. Mr. Landis complied and was handcuffed by Harrison. RP 475-78. Deputy Newport and other officers arrived a few minutes later. RP 411.

Deputy Newport testified that after Mr. Landis was shot he was delusional and not making sense. Newport thought he was possibly under the influence of drugs. RP 424-25. Mr. Landis was taken away in an ambulance. RP 414.

In preparation for trial, Mr. Landis' lawyer had begun laying the groundwork for presenting a diminished capacity defense. He had asked for and received several continuances to contact an expert witness to set up such a defense. RP 82. At some point Mr. Landis retained a different lawyer, Stephen Graham. Mr. Graham abandoned this diminished

capacity defense in favor of a “suicide by cop” defense. RP 80-82. In support of this defense Graham proposed calling Professor Gilbertson as a witness to testify as an expert on the theory of "suicide by cop." CP 106.

The State filed a motion in limine to exclude such expert testimony arguing that the theory of "suicide by cop" does not meet the Frye standard and that Professor Gilbertson does not qualify as an expert. CP 96-105. The Court agreed and excluded the testimony of Professor Gilbertson. RP 86-92. The Court noted that Professor Gilbertson had never met Mr. Landis and therefore knows nothing about Mr. Landis’ frame of mind. RP 90-92. Moreover, the trial court observed, as Professor Gilbertson had noted, that a defense of “suicide by cop” even if successful does not negate a person’s intent to kill law enforcement, even when the person wishes to be killed in the confrontation. RP 91.

During the trial Mrs. Landis testified on direct examination that her husband’s crazy behavior resulting in her being injured was due to his PTSD. RP 267. Following her testimony the State moved to prohibit the defense from inquiring further about Mrs. Landis’ PTSD. RP 307. The Court granted the motion and did not allow Mr. Landis to cross examination Mrs. Landis about her husband’s PTSD. RP 312-14.

Later the State elicited testimony from Detective Files on direct examination about portions of a recorded statement where Mrs. Landis stated her husband was "a crazy guy" during the garden tractor incident. RP 781. During cross-examination the State objected to any further inquiry about the remainder of Mrs. Landis' statement where she explained how and why the crazy behavior was due to PTSD. The trial court sustained the objection. RP 789-91.

Despite these attempts to bring in evidence of PTSD, defense counsel continually objected to evidence of Mr. Landis being under the influence of drugs and alcohol. RP 435-39.

The Court denied the defense request for a jury instruction on voluntary intoxication. The Court said it would not be fair to offer the instruction now, since the state would have the burden of proving the absence of the defense and the evidence was now closed. The Court also said voluntary intoxication was not Mr. Landis' defense, and there was no mention or evidence of intoxication affecting Mr. Landis' mental state. RP 1009-1011, 1019-20. Mr. Landis objected and took exception to not giving the instruction. RP 1026.

Mrs. Landis was convicted of attempted first degree murder, second degree assault, and harassment. RP 1152. This appeal followed. CP 1-2.

D. ARGUMENT

1. Mr. Landis was denied his constitutional right to effective assistance of counsel, when his attorney failed to pursue a defense of diminished capacity.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In *Strickland*, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this assessment, the appellate court will presume the defendant was properly represented. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic

explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

Second, the defendant must show prejudice--"that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Id., citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the

individual case to see if the *Strickland* test has been met. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

Appellate review on this issue is de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

The failure of defense counsel to present a diminished capacity defense where the facts support such a defense has been held to satisfy both prongs of the *Strickland* test. *Tilton*, 149 Wash. 2d at 784, 72 P.3d 735 (citing *Thomas*, 109 Wash. 2d at 226-29, 743 P.2d 816). A diminished capacity defense requires evidence of a mental condition, which prevents the defendant from forming the requisite intent necessary to commit the crime charged. *State v. Warden*, 133 Wn.2d 559, 564, 947 P.2d 708 (1997). An intoxication defense allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the requisite mental state. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987).

Here, there was sufficient evidence of diminished capacity by PTSD and voluntary intoxication for the jury to find that it prevented Mr. Landis from forming the requisite intent necessary to commit the crime charged. Attempted first degree murder requires "premeditated intent." RCW 9A.32.030(1)(a). The State bears the burden of proving beyond a

reasonable doubt that the defendant had this requisite mental state. *State v. Bottrell*, 103 Wash. App. 706, 712, 14 P.3d 164, (2000) (citing *State v. James*, 47 Wn. App. 605, 609, 736 P.2d 700 (1987). When specific intent or knowledge is an element of the crime, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge at the time of the crime. *Id*. (citing *State v. Edmon*, 28 Wn. App. 98, 102-04, 621 P.2d 1310, *review denied*, 95 Wn.2d 1019 (1981); *State v. Martin* 14 Wn. App. 74, 75, 538 P.2d 873 (1975), *review denied*, 86 Wn.2d 1009 (1976)).

The essence of PTSD.

According to the American Psychiatric Association:

> The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate.

American Psychiatric Association, diagnostic and Statistical Manual of Mental Disorders, 424 (4th ed.1994).

One hallmark of PTSD is flashback, a condition "during which components of the [traumatic] event are relived and the person behaves as

though experiencing the event at that moment. *Bottrell*, 103 Wash. App. 706, 714, 14 P.3d 164 (citing American Psychiatric Association, diagnostic and Statistical Manual of Mental Disorders, 424 (4th ed.1994)). When a person has a flashback, he or she undergoes an "alteration in the perception or experience of the self in which the usual sense of one's own reality is temporarily lost or changed." *Bottrell*, 103 Wash. App. 706, 715, 14 P.3d 164 (citing American Psychiatric Association, diagnostic and Statistical Manual of Mental Disorders, 275 (3rd ed. revised 1987)). While in this state, the person experiences "[v]arious types of sensory anesthesia and a sensation of not being in complete control of one's actions, including speech." *Id*. (citing American Psychiatric Association, diagnostic and Statistical Manual of Mental Disorders, 275 (3rd ed. revised 1987)). So, a person who truly suffers from PTSD could experience a flashback and during that flashback might be unable to control his or her actions. *Id*. As one commentator stated:

> Ordinarily, persons with PTSD are in contact with reality and do not display any symptoms of psychosis such as hallucinations or delusions. PTSD is essentially an anxiety disorder. However, some patients, especially those who are subsequently subjected to extreme stress, develop a transient dissociative reaction with episodes of depersonalization or derealization. Most of the time, these feelings of unreality pass without incident, but occasionally criminal behavior may erupt. The question of criminal responsibility, therefore, is pertinent since a person's cognitive or volitional state may be impaired during a dissociative reaction.

Chester B. Scrignar, M.D., post-Traumatic Stress Disorder: Diagnosis, Treatment, and Legal Issues, 245 (2d ed.1988).

Washington case law acknowledges that PTSD is recognized within the scientific and psychiatric communities and can affect the intent of the actor resulting in diminished capacity. *Id*. (citing *State v. Janes,* 121 Wn.2d 220, 233-36, 850 P.2d 495 (1993) (battered woman and battered child syndromes are a subset of PTSD and are admissible to show how severe abuse affects the battered person's perceptions and reactions)); see also, *State v. Riker,* 123 Wn.2d 351, 869 P.2d 43 (1994). Other cases that acknowledge the link and the defense are: *Warden,* 133 Wn.2d at 564, 947 P.2d 708; *State v. Hamlet,* 133 Wn.2d 314, 944 P.2d 1026 (1997).

Here, it was made clear at trial that Mr. Landis suffered from PTSD, despite erroneous rulings by the trial court trying to keep such evidence out (discussed *infra*). Mr. Landis testified he left Boeing around 2000 due to his PTSD disability and that he was rated 70 percent PTSD disabled by the Veterans Administration. RP 888. Mrs. Landis told the police Mr. Landis suffered from PTSD when she was interviewed in the hospital following the tractor incident. RP 786-88. She also mentioned it in her testimony. RP 267.

Likewise, there is ample evidence of diminished capacity due to the combination of the PTSD, the medications and the alcohol consumed that day. The testimony revealed Mr. Landis was taking two doses of time-release morphine daily for pain from his war injuries as well as Celexa for depression. On the morning of this incident he had gone to the tavern and consumed three beers and continued to drink beer after he returned home around noon. RP 435-39, 889, 899. Sgt. Harrison testified Mrs. Landis told him she was worried about a potential shoot out with law enforcement as a result of the effects of Mr. Landis consuming alcohol along with his medication combined with his PTSD. RP 448.

The actual behavior exhibited by Mr. Landis that day further substantiates this defense and is consistent with the various symptoms of PTSD discussed above. Mr. Landis is not a career criminal. He is an honorable war veteran with an impressive employment history. He worked for Martin Marietta as a missile mechanic, then Rockwell International, and eventually the Boeing Company as a flight line mechanic, and later as a supervisor. RP 886. His behavior on the date of this incident was entirely inconsistent with such a notable background absent some intervening mental condition.

Starting with the tractor episode and the way events escalated thereafter, it was evident that Mr. Landis' behavior was abnormal. This was first demonstrated by the confrontation with his wife over a seemingly trivial matter, his exaggerated reaction, her resulting injury and his apparent refusal to help her (see RP 354-57, 783). Mr. Landis later became further upset when the sheriff deputies arrived at the house and Sgt. Harrison turned on his "take-down" lights. Mr. Landis immediately became angry and yelled at Harrison to turn off the lights. Mr. Landis then went into his garage and came back outside in about ten seconds with a rifle. This type of extreme overreaction could only be categorized as abnormal and the result of some mental condition.

Mr. Landis also behaved strangely when the dispatcher, Patricia Stevens, called Mr. Landis and asked him to come outside and talk to the sheriff deputies. Mr. Landis declined to do that at first. He rambled on for some time that his wife has been getting in his face, that "she was living off of me from the day that I met her, and she has not worked a day and contributed ten cents to this relationship." RP 756-61. He then became abusive, calling her a bitch, as well as his wife, and threatening to kill both his wife and Ms. Stevens. RP 766-71.

Mr. Landis exhibited even more extreme abnormal behavior when he began firing shots at Harrison's patrol car as Harrison was trying to leave. Later, when Harrison was hiding in the field, he could hear Mr. Landis yelling and crying. Mr. Landis was saying his wife's name and yelling, "Come take me out." A few minutes later Mr. Landis came walking straight from the house holding a rifle and muttering to himself. RP 464-66. He then walked to the top of the embankment and fired enough rounds at Harrison's empty patrol car to cause the headlights or wig-wag lights to start flashing on and off and the horn to start honking. RP 469.

Finally, Deputy Newport testified that after Mr. Landis was shot he was delusional and not making sense. Newport thought he was possibly under the influence of drugs. RP 424-25.

Consequently, there was a plethora of evidence available for defense counsel to present and argue diminished capacity. Defense counsel's performance was clearly deficient in failing to pursue this defense.

"Suicide by cop" was not a viable defense in this case.

Even though Mr. Landis' former lawyer had begun laying the groundwork for presenting a diminished capacity defense, Mr. Graham

abandoned this defense in favor of a "suicide by cop" defense. At a pretrial hearing he told the Court, "[O]ur defense is that Mr. Landis *did* act with intent, just that his intent wasn't to kill, his intent was to -- his intent was to take his own life." RP 85 (emphasis added).

But as the trial court and Professor Gilbertson noted, a defense of "suicide by cop" even if successful does not negate a person's intent to kill law enforcement, even when the person wishes to be killed in the confrontation. RP 91, CP 102; James Garbarino, Lost Boys: Pathways from Childhood Aggression and Sadness to Youth Violence, 8 Va. J. Soc. Pol'y & L. 129, 137 (2000); Rahi Azizi, When Individuals Seek Death at the Hands of the Police: The Legal and Policy Implications of Suicide by Cop and Why Police Officers Should Use Nonlethal Force in Dealing with Suicidal Suspects, 41 Golden Gate U. L. Rev. 183, 211 (2011). In other words, a "suicide by cop" defense did not offer any defense at all to the charges against Mr. Landis, since it would not negate the requisite intent necessary to commit the crimes charged. There is no strategic objective in presenting a defense that is not a defense. Therefore, defense counsel's performance was clearly deficient in pursuing this defense.

In summation, there was an overabundance of evidence to support a diminished capacity defense in this case. If Mr. Landis suffered from

PTSD on the date of this incident, the disorder may have negated the intent necessary for the crime charged, attempted first degree murder. His attorney should have retained a doctor to examine Mr. Landis. The doctor could then testify as an expert that Mr. Landis suffered from PTSD, that the PTSD combined with the effects of his medications and alcohol caused flashbacks, and the flashbacks impaired Mr. Landis' ability to act with intent. Instead, defense counsel attempted, without success, to bring in evidence of PTSD through Mrs. Landis on cross-examination, even though she would hardly be qualified to testify on the subject.[1] See RP 307-14. This is yet another example of counsel's incompetence.

There is a reasonable likelihood that the jury would have agreed with a doctor's diagnosis of PTSD, thus creating a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Therefore, Mr. Landis was denied effective assistance of counsel by his attorney failing to pursue and present a defense of diminished capacity.

[1] It is difficult to track the strategy of defense counsel throughout this trial. At the outset he declared a defense of "suicide by cop" and objected throughout much of the trial to any evidence indicating Mr. Landis was under the influence of drugs and alcohol. See RP 435-39. On the other hand he tried to get in evidence of PTSD, albeit through an unqualified witness, and asked for a voluntary intoxication instruction.

2. Mr. Landis was entitled to a voluntary intoxication jury instruction because the crime charged included a mental state and there was substantial evidence to support the giving of the instruction.

At some point defense counsel apparently realized the futility of his "suicide by cop" defense and that diminished capacity was the only feasible defense. At the close of the evidence he requested a voluntary intoxication instruction. The Court denied the defense request for a jury instruction on voluntary intoxication. The Court said it would not be fair to offer the instruction now, since the state would have the burden of proving the absence of the defense and the evidence was now closed. The Court also said voluntary intoxication was not Mr. Landis' defense, and there was no mention or evidence of intoxication affecting Mr. Landis' mental state. RP 1009-1011, 1019-20. Mr. Landis objected and took exception to not giving the instruction. RP 1026.

RCW 9A.16.090 is the law at issue:

> No 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 in determining such mental state.
> Diminished capacity from intoxication is not a true "defense."

Coates, 107 Wn.2d at 891-92, 735 P.2d 64. Rather, "[e]vidence of

intoxication may bear upon whether the defendant acted with the requisite mental state; but the proper way to deal with the issue is to instruct the jury that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state." *Id*. (citing WPIC 18.10).

A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking [or drug use], and (3) there is evidence that the drinking [and/or drugs] affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). In other words, the evidence "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." *State v. Kruger*, 116 Wn.App. 685, 691-92, 67 P.3d 1147 (2003) (citing *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996)).

Simply showing that someone has been drinking or consuming drugs is not enough. The evidence must show the effects of the alcohol and/or drugs:

> Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale

> at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.
>
> *Gabryschak*, 83 Wn. App. at 254, 921 P.2d 549 (citation omitted).
>
> A typical voluntary intoxication instruction would read:
>
> > No 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].

WPIC 18.10, cited with approval in *Coates*, 107 Wn.2d at 892, 735 P.2d 64; *State v. Hackett*, 64 Wn. App. 780, 786, 827 P.2d 1013 (1992).

Attempted first degree murder requires "premeditated intent." RCW 9A.32.030(1)(a). When specific intent or knowledge is an element of the crime charged, a defendant is entitled to present evidence showing an inability to form the specific intent or knowledge at the time of the crime. *Bottrell*, 103 Wash. App. at 712, 14 P.3d 164. The record reflects substantial evidence of Mr. Landis' level of intoxication on the date of this incident. The testimony revealed Mr. Landis was taking two doses of time-release morphine daily for pain from his war injuries as well as Celexa for depression. On the morning of this incident he had gone to the tavern and consumed three beers and continued to drink beer after he returned home around noon. RP 435-39, 889, 899.

The actual behavior exhibited by Mr. Landis as set forth in the previous issue further substantiates this defense. Based on this evidence, Mr. Landis was entitled to the instruction. The trial court was incorrect in its finding that there was no mention or evidence of intoxication affecting Mr. Landis' mental state.

The Court was also incorrect in denying the instruction because voluntary intoxication was not Mr. Landis' defense. While it is true that defense counsel stated at a pretrial hearing that his defense would be "suicide by cop," there is no authority that prohibits him from abandoning that defense in favor of a better one. The only requirement is that the evidence supports the giving of the instruction. Clearly it did.

Similarly, the Court was incorrect in denying the instruction because it would not be fair to offer the instruction now, since the state would have the burden of proving the absence of the defense and the evidence was now closed. The State always has the burden of proving the defendant acted with the necessary culpable mental state. *Coates*, 107 Wash. 2d at 890, 735 P.2d 64. Generally, evidence of intoxication is relevant to this question, but it is inaccurate to think of intoxication as forming some element that the State must negate, just as it would be

erroneous to hold that the State has the burden of proving or disproving circumstantial evidence. *Id*.

An instruction on burden of proof similar to the one given on self-defense need not be given because the toxic effect of a drug upon a person's capability of acting knowingly is not a legally recognized defense. *Id*. A criminal act committed by a voluntarily intoxicated person is not justified or excused. *Id*.; RCW 9A.16.090. Intoxication may raise a reasonable doubt as to the mental state element of the offense, thus leading to acquittal or conviction of a lesser included offense, but evidence of intoxication does not add another element to the offense. *Coates*, 107 Wash. 2d at 890-91, 735 P.2d 64. Therefore, the trial court erred in failing to give the instruction.

3. After the prosecutor elicited handpicked portions of a recorded statement from Detective Files where Mrs. Landis stated her husband was acting crazy, the trial court abused its discretion in not allowing Mr. Landis to elicit on cross examination the remainder of Mrs. Landis' statement where she explained how and why the crazy behavior was due to PTSD.

The State elicited testimony from Detective Files on direct examination about portions of a recorded statement where Mrs. Landis stated her husband was "a crazy guy" during the garden tractor incident. RP 781. During cross-examination the State objected to any further inquiry about the remainder of Mrs. Landis' statement where she explained how and why the crazy behavior was due to PTSD. The trial court sustained the objection. RP 789-91.

ER 106 (Rule of Completeness) provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it." *State v. Larry,* 108 Wn. App. 894, 909-10, 34 P.3d 241 (2001).

Once the trial court determines that a statement is relevant, the court must determine whether the statement 1) explains the admitted evidence, 2) places the admitted evidence in context, 3) avoids misleading the trier of fact, and 4) ensures fair and impartial understanding of the evidence. *Larry,* 108 Wn. App. at 910, 34 P.3d 241.

Here, all four of these criteria are satisfied. The prosecutor clearly handpicked portions of the recorded statement out of context. Defense

counsel's attempted inquiry about the remainder of Mrs. Landis' statement would have explained how and why the crazy behavior she mentioned was due to PTSD. It was unfair and misleading to the jury to not allow Mr. Landis the opportunity to clarify the statement. Therefore, the trial court abused its discretion under ER 106.

E. CONCLUSION

For the reasons stated, the conviction for attempted first degree murder should be reversed.

Respectfully submitted September 3, 2013,

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David N. Gasch
Attorney for Appellant

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 3, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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