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NO. 62304-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOEY MICHAEL WAYLAND,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

A defendant is entitled to a voluntary intoxication instruction when he can show that (1) the crime charged has a mental state as an element, (2) there is substantial evidence of his drinking, and (3) there is evidence that the drinking affected his ability to form the requisite intent or mental state. Here, Wayland presented evidence that at the time of his arrest he had slurred speech, was unsteady on his feet, had watery eyes, smelled of intoxicants and had exhibited boisterous behavior earlier in the day after consuming alcohol. Was it error for the court to refuse to give a voluntary intoxication instruction where there was no evidence that Wayland's intoxication impaired his ability to form the requisite intent to commit assault in the fourth degree?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Joey Michael Wayland was charged by information with the crime of attempted robbery in the second degree. CP 1-3. At the close of the case the court instructed the jury on the crime of attempted robbery in the second degree and on the lesser included offenses of attempted theft in the first degree assault in the fourth degree. CP43-75. Wayland's trial counsel requested that the court

give a voluntary intoxication instruction. CP 26-33. The state objected to the voluntary intoxication instruction. 299-300. After hearing argument from counsel and considering the case law, the court refused to give the instruction. RP 322-332. The jury hung on the attempted robbery charge, but found Wayland guilty of the lesser included offense of assault in the fourth degree. CP 34. Wayland filed a timely appeal. CP 38-42.

2. SUBSTANTIVE FACTS

On the evening of March 28, 2008, Paul Nordby was walking to a meeting at the University Presbyterian Church in Seattle's University District. RP 150. Mr. Nordby was running late for his 6:00 pm meeting and so he took a shortcut down an alleyway. RP 150, 154. As Mr. Nordby entered the alleyway, he noticed appellant, Joey Wayland, urinating against a wall. RP 157. As Mr. Nordby walked by, Mr. Wayland commented on Nordby's lap top bag. RP 158, 171, 176. Mr. Nordby did not respond and continued walking. RP 158.

After Mr. Nordby passed by, Mr. Wayland said to him, "Give me your money, bitch." RP 158. Mr. Wayland repeated this phrase four or five times, each time louder and with increasing frustration. RP 158, 159. At the same time, Mr. Wayland was swinging at Mr.

Nordby attempting to hit him. RP 158, 161. Mr. Nordby continued walking but felt one of the swings brush his jacket. RP 158, 160, 161.

Mr. Nordby exited the alley and made contact with Officer Robert Brown and Officer Brian Rees. RP 162, 204. Mr. Nordby told the officers, "Someone just tried to rob me," and immediately gave a description of the suspect to Officer Brown. RP 162-63, 206. As he was providing additional details of the incident to Officer Brown, Mr. Nordby identified the suspect further down the street walking toward them. RP 209. Officer Rees apprehended Wayland, and Mr. Nordby positively identified him as the person who had attempted to rob him. RP 212. The officers then placed Mr. Wayland into custody. Id. Officer Brown testified that Wayland appeared intoxicated, had a strong odor of alcohol on his breath, lacked coordination, appeared to be swaying and slurred his words. RP 219-220. Officer Reese described Wayland as having red, watery eyes in addition to slurred speech and smelling of alcohol. RP 229. At trial Wayland's friend Matthew Born testified that he and Wayland had been drinking. RP 250. Born described Wayland as boisterous. RP 252. However, Mr. Nordby testified that during his encounter with Wayland, Wayland's speech was clear, and Mr.

Nordby did not smell liquor on Wayland's breath or on his clothing.

RP 181.

C. ARGUMENT

When a trial court decision regarding jury instructions is based on the facts of the case, we review 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 his drinking, and (3) there is evidence that the drinking affected his ability to form the requisite intent or mental state. State v. Gallegos, 65 Wn. App. 230, 238, 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.” State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992).

RCW 9A.16.090 provides “ 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 when considering his mental state.” RCW 9A.16.090. It is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state. Id. (quoting State v. Coates, 107 Wn.2d 882, 889, 735 P2d. 64 (1987)). 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).

Wayland argues that he was entitled to a voluntary intoxication instruction because he presented substantial evidence to satisfy all three of the factors outlined in State v. Kruger, 1116 Wn. App. 685, 67 P.3d 1147 (2003). Wayland asserts that his slurred words, lost balance, watery eyes, boisterous behaviors and

odor of intoxicants was sufficient to show that Wayland's level of intoxication impaired his ability to form the requisite intent for assault in the fourth degree. While Wayland argues that he was entitled to a voluntary intoxication instruction and the trial court's failure to give the instruction was reversible error. However, Wayland does not argue that the court's failure to give the instruction prevented him from presenting his theory of the case to the jury. Appellant's Brief at 11.

RCW 9A.36.031 states a person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another. The term assault is not defined under the statutes, 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 putting another in apprehension of harm, regardless of whether the actor intends to

inflict or is incapable of inflicting harm. In other words, the State had to prove that Wayland intentionally swung his arms at Mr. Nordby and thereby put Mr. Nordby in fear that he was going to be assaulted.

While there was evidence that Wayland was drinking, and that the drinking made him slur his words and impaired his balance, there was no evidence that Wayland's drinking impaired his ability to form the intent to assault Paul Nordby. In State v. Gabryschak, 83 Wn. App. 249, 921 P.2d 549 (1996), Division One held that the trial court did not err when it denied the defendant's proposed involuntary intoxication instruction where there was evidence 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. Like in State v. Gabryschak, 83 Wn. App. 249 (1996), in this case there was no evidence, that Wayland's intoxication impaired his ability to control his physical actions, form the requisite intent or to act volitionally. Wayland's own witness Matthew Born, testified that Wayland was using hand gestures in telling a story. RP 252. Born was clear in his testimony

that Wayland's movements were purposeful and not accidental or unintentional.

Had there been some evidence of the effect of the alcohol on Wayland's ability to form the requisite intent to assault Mr. Nordby an involuntary instruction would have been proper. However, based on the evidence in this case, the trial court properly refused to give the instruction because the evidence did not support Wayland's contention that his intoxication affected his ability to form the intent to assault Mr. Nordby.

D. CONCLUSION

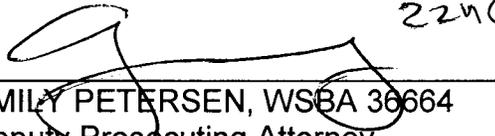
For the reasons set forth above, the State respectfully requests that the Court find that the trial court did not err in denying Wayland's proposed instruction.

DATED this 20 day of July, 2009.

RESPECTFULLY submitted,

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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 Jennifer Stutzer, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Respondent's Brief, in STATE V. WAYLAND, Cause No. 62304-4-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.

Sandra Atkusi

Name

Done in Seattle, Washington

7/20/09

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