

NO. 38378-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DARYL BURTON,

Appellant.

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STATE OF WASHINGTON  
BY [Signature]  
CLERK

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

The Honorable Bryan Chushcoff

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REPLY BRIEF OF APPELLANT

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VALERIE MARUSHIGE  
Attorney for Appellant

23619 55<sup>th</sup> Place South  
Kent, Washington 98032  
(253) 520-2637

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A. ARGUMENT IN REPLY

1. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN FAILING TO PROVIDE A JURY INSTRUCTION STATING THAT EVIDENCE OF A MENTAL ILLNESS OR DISORDER MAY BE CONSIDERED IN DETERMINING WHETHER BURTON HAD THE CAPACITY TO FORM THE REQUISITE MENTAL STATE.

The State argues that the trial court properly denied Burton's requested jury instruction because the instruction on voluntary intoxication sufficiently allowed "the jury to take into account defendant's level of intoxication in determining his level of intent in committing his crimes which is precisely defendant's theory of the case, that his level of intent was diminished by his intoxicated state." Brief of Respondent at 12-14. To the contrary, the record substantiates that the court denied Burton his due process right to have the jury fully instructed on his theory of the case.

The court merely instructed the jury that "evidence of intoxication may be considered in determining whether the defendant acted or failed to act with premeditation, intent, knowledge or recklessness." CP 93. Clearly, defense counsel did not call Dr. Trowbridge as an expert witness to simply testify that Burton was intoxicated at the time of the incident. Dr. Trowbridge diagnosed Burton with a mental disorder defined as alcohol dependence otherwise known as chronic alcoholism. 15RP 764-

65. Trowbridge explained that Burton's chronic alcoholism affected his state of mind:

He's a long-term alcoholic, who is sort of a binge drinker, who quits for a while, starts up again. Well, he'd started up again, and this was interfering with his job, so he'd been missing work or skipping work. Things were just going poorly for him all around. And he was drinking heavily for several days leading up to this incident.

15RP 762-63.

Defense counsel asked Trowbridge how he determined that Burton was a chronic alcoholic. Trowbridge elaborated that in speaking with Burton, he learned that Burton had undergone two different alcohol treatments but could not remain sober for more than five months. 15RP 763. Trowbridge concluded that due to Burton's depression and intoxication, his ability to form the requisite mental state was substantially diminished. 15RP 766-67, 793-94.

Burton was entitled to have the jury instructed that it could consider evidence of a mental illness or disorder in determining whether Burton had the capacity to form the requisite mental state because Trowbridge demonstrated that beyond Burton's intoxication, his mental disorder impaired his ability to form the culpable mental state to commit the crime. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). The court's refusal to provide the proposed jury instructions prevented

defense counsel from emphasizing that not only was Burton intoxicated but that he suffered from chronic alcoholism, a mental disorder that diminished his capacity to form the requisite mental state at the time of the incident. Consequently, the court denied defense counsel the opportunity to fully argue the defense theory of the case that Burton was in a state of intoxication and impaired as a result of his mental disorder.

Unlike in State v. Hansen, 46 Wn. App. 292, 730 P.2d 706 (1986), cited by the State, where Hansen was able to argue his theory of the case, reversal is required because the court's failure to provide Burton's proposed jury instructions constitutes prejudicial error. State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003).

2. THE TRIAL COURT ERRED IN COUNTING BURTON'S CONVICTIONS FOR ATTEMPTED MURDER IN THE FIRST DEGREE, ASSAULT IN THE FIRST DEGREE, AND VEHICULAR ASSAULT AS SEPARATE CONVICTIONS IN VIOLATION OF HIS CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY BECAUSE ALL THREE CONVICTIONS CONSTITUTE THE SAME CRIMINAL CONDUCT.

The State argues that Burton's convictions for first degree attempted murder, first degree assault, and vehicular assault do not violate double jeopardy because the swinging of the hammer, threatening Ms. Bones, and driving his car at her are "separate and distinct acts with different results. They are separate criminal acts." Brief of Respondent at

19-20. The record belies the State's assertion. At sentencing, stating that he would like to make it "clear" to the court, the prosecutor concluded that the three offenses "are the same criminal conduct." 19RP 4. The judgment and sentence indicates that the current offenses encompass the "same criminal conduct" and count "as one crime in determining the offender score." CP 216. The trial court properly found that the offenses constituted the same criminal conduct because they involved the same victim and occurred at the same time and place. State v. Womac, 160 Wn.2d 643, 654-56, 160 P.3d 40 (2007).

The State's argument that State v. Valentine, 108 Wn. App. 24, 29 P.3d 42 (2001) is distinguishable from this case also fails because the State misconstrues the facts. The State asserts that Valentine's convictions for attempted murder and first degree assault "stemmed from the same act of the defendant stabbing his girlfriend once." Brief of Respondent at 18, 22. To the contrary, the facts do not state that Valentine stabbed his girlfriend only once but that "Valentine attacked her with a knife and almost killed her." Valentine, 108 Wn. App. at 26. The Court vacated Valentine's assault conviction, concluding that the Legislature did not intend "to punish the same assaultive act both as assault and attempted murder." Id. at 28-29. As in Valentine, Burton was punished separately for the same assaultive act in violation of his right against double jeopardy.

Burton's convictions for first degree assault and vehicular assault must be vacated because the three convictions constitute same criminal conduct for purposes of double jeopardy and the proper remedy for double jeopardy violations is vacation of the lesser convictions. Womac, 160 Wn.2d at 656, Valentine, 108 Wn. App. at 29.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Burton's convictions, or in the alternative, vacate his convictions for assault in the first degree and vehicular assault.

DATED this 24<sup>th</sup> day of August, 2009.

Respectfully submitted,

  
VALERIE MARUSHIGE  
WSBA No. 25851  
Attorney for Appellant, Daryl Burton

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, Pierce County Superior Court, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 24<sup>th</sup> day of August, 2009 in Kent, Washington.

  
Valerie Marushige  
Attorney at Law  
WSBA No. 25851

09 AUG 27 PM 10:00  
STATE OF WASHINGTON  
BY   
COUNTY OF PIERCE