

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	
Assignments of Error	1
No.1- No. 5	1
Issues Pertaining to Assignments of Error	1
No. 1	1
No. 2- No. 4	2
B. STATEMENT OF THE CASE	2
<i>Selected Trial Testimony</i>	3
C. ARGUMENT	10
I. THE TRIAL COURT ERRED WHEN IT DECLINED TO GIVE THE DEFENDANT’S PROPOSED INSTRUCTION ON VOLUNTARY INTOXICATION.	10
<i>Evidence of Defendant’s State of Intoxication</i>	13
II. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.	17
III. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION IN ARREST OF JUDGMENT	22
D. CONCLUSION	26
E. APPENDIX	
Defendant’s Proposed Jury Instructions	A
WPIC 18.10	B
Court’s Instructions to the Jury	C

Findings of Fact and Conclusions of Law	
For Hearing on CrR 3.5	D
CrR 7.4	E
RCW 9A.04.110(4)(b)	F
RCW 9A.16.090	G
Sixth Amendment	H

TABLE OF AUTHORITIES

TABLE OF CASES

<i>In re Riley</i> , 122 Wn.2d 772, 863 P.2d 554 (1993)	21
<i>State v. Ager</i> , 128 Wn.2d 85, 904 P.2d 749 (1995)	13
<i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289 (1993)	21
<i>State v. Carter</i> , 31 Wn.App. 572, 643 P.2d 916 (1982)	16
<i>State v. Ceglowski</i> , 103 Wn.App. 346, 12 P.3d 160 (2000)	24
<i>State v. Cranmer</i> , 30 Wn.2d 576, 192 P.2d 331 (1948)	24
<i>State v. Coates</i> , 107 Wn.2d 882, 735 P.2d 64 (1987)	10,11,17,21,26
<i>State v. Gabryschak</i> , 83 Wn.App. 249, 921 P.2d 549 (1996)	13,14,18,10
<i>State v. Gallegos</i> , 65 Wn.App. 230, 828 P.2d 37, <i>review denied</i> , (1992)	12
<i>State v. Horton</i> , 136 Wn.App. 239, 146 P.3d 1227 (2006)	10

<i>State v. Jeffries</i> , 105 Wn.2d 398, 717 P.2d 722, <i>cert. denied</i> , 93 L.Ed.2d 301 (1986)	20,21
<i>State v. Johnson</i> , 128 Wn.2d 431, 909 P.2d 293 (1996)	14
<i>State v. Jones</i> , 95 Wn.2d 616, 628 P.2d 472 (1981)	17
<i>State v. Longshore</i> , 141 Wn.2d 414, 5 P.3d 1256 (2000)	24
<i>State v. Lucky</i> , 128 Wn.2d 727, 912 P.2d 483, <i>overruled on other grounds</i> <i>by State v. Berlin</i> , 133 Wn.2d 541, 947 P.2d 700 (1997)	12
<i>State v. Mendez</i> , 137 Wn.2d 208, 970 P.2d 722 (1999)	14
<i>State v. R.H.S.</i> , 94 Wn.App. 844, 974 P.2d 1253 (1999)	25
<i>State v. Rainey</i> , 107 Wn.App. 129, 28 P.3d 10 (2001), <i>review denied</i> , 145 Wn.2d 1028 (2002)	18
<i>State v. Randecker</i> , 79 Wn.2d 512, 487 P.2d 1295 (1971)	24
<i>State v. Sardinia</i> , 42 Wn.App. 533, 713 P.2d 122 (1986)	20
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	20,21
<i>State v. Walker</i> , 136 Wn.2d 767, 966 P.2d 883 (1998)	11

<i>Epstein v. Butera</i> , 155 A.D.2d 513, 257 N.Y.S.2d 374 (1989)	25
<i>McMann v. Richardson</i> , 397 U.S. 759, 25 L.Ed. 763, 90 S.Ct. 1441 (1970)	19
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	18,19,20,21

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment	1,17
Sixth Amendment	1,17

STATUTES

RCW 9A.040.110(4)(a)	25
RCW 9A.16.090	3,10,11,17
RCW 9A.36.021(1)(a)	3,23
RCW 10.99.020	3

RULES AND REGULATIONS

CrR 3.5	1
CrR 7.4	1,22

OTHER AUTHORITIES

WPIC 18.10---11 <i>Washington Practice</i> , Washington Pattern Jury Instructions (2008)	1,10,12,13
WPIC 2.3.01—11 <i>Washington Practice</i> , (3 rd ed. 2008)	23
WPIC 35.13	23

A. Assignments of Error

Assignments of Error

1. The trial court erred when it refused to give the defendant's proposed instruction on voluntary intoxication based on WPIC 18.10.
2. The defendant was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments.
3. The trial court erred when it denied the defendant's motion in Arrest of Judgment pursuant to CrR 7.4.
4. The trial court erred when it entered CrR 3.5 finding of fact III, which states:

“That the Defendant was not intoxicated to the point where he could not understand what was going on when he was contacted by Deputy Byers.”

5. The trial court erred when it entered CrR 3.5 Conclusions of Law V, which states:

“That the Defendant was not intoxicated to the point where he could not make a knowing, voluntary and intelligent waiver of his *Miranda* rights.”

Issues Pertaining to Assignments of Error

1. Whether the defense produced sufficient evidence of a voluntary intoxication defense to justify submission of an instruction setting forth their theory of the case based on WPIC 18.10?

That instruction stated:

“No crime 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 or knowledge as required to commit the crime of Assault.”

(Assignment of Error 1.)

2. Whether the defendant was denied effective assistance of counsel when the trial court denied the defendant’s proposed instruction on voluntary intoxication because there had not been sufficient proof produced during the trial of the effects of alcohol on the defendant’s mind or body? (Assignment of Error 2.)

3. Whether the prosecutor had produced sufficient evidence of a “fracture” to justify submission to the jury an instruction alleging the crime of Assault in the Second Degree? (Assignment of Error 3.)

4. Whether there was substantial evidence of a sufficient quantity to convince a reasonable person that the defendant was not intoxicated to the point where he could understand what was going on when he was contacted by Deputy Byers and that he was thereby able to make a knowing, voluntary and intelligent waiver of his *Miranda* rights?

(Assignments of Error 4 and 5.)

B. Statement of the Case

Andrew Edward Fryk, age 19, was charged with Assault in the

Second Degree, domestic violence in violation of RCW 9A.36.021(1)(a) and RCW 10.99.020. CP 1. He was charged in count II with Malicious Mischief in the Third Degree [Over \$50], domestic violence contrary to RCW 9A.48.090(1)(a) and RCW 10.99.020. CP 2-3. Both counts were alleged to have occurred between December 12-14, 2008 in Kitsap County, Washington. Id.

Selected Trial Testimony

According to the alleged victim, Jamie Marie Torgeson, age 18, she started dating Andrew in August 2008 after having first met him in the summer of 2007. III RP 67. “They talked on the telephone every day:” RP 68.

On December 13, 2008 she went to Andrew’s house in Pierce County. They and another couple, Kirsten Bethe. and Oleg Ross, eventually drove to a mutual friend’s house [Scott] in Kitsap County, Washington. RP 69. While at a party at Scott’s house Jamie consumed “Like three or four” beers.” RP 71. The group was playing cards and beer pong.¹ RP 72.

During the course of the evening- and about a half and hour after

¹ “Beer pong” was described as “It’s little red cups, or party cups, just six of them in bowling pin fashion, like pyramid. ...you throw the ball into the cup..your team wants to make all their drinks disappear. If you make it into a cup they have to drink that cup.” RP 216.

arriving- Scott made a statement that “got Andy mad.” RP 73. Andrew then called Jamie “A slut” and told her to leave. RP 73-4. Andrew was upset and told Jamie several times with other people present: ““What are you still doing here? Leave.”“ RP 74.

Jamie was in the process of calling a friend of hers on her cell phone to pick her up. RP 75. “Andy” came out onto the porch and grabbed took her phone from behind while she was talking on it. Id. Andy went back inside the house to the kitchen and threw the Blackberry cell phone straight to the floor. According to Jamie: “The back broke off and like snapped in half, and the battery fell out, and I lost the sim card.” RP 76-7.

After picking up some of the pieces of the broken cell phone², Jamie left with her girl friend- Kirsten - who had originally driven the group to Scott’s house. RP 77. The two girls returned to Andrew’s house in Pierce County. There, they talked to his mother, RP 78.

After about a half hour conversation, the two girls returned to Scott’s house in Kitsap County to pick up Kirsten’s boy friend. RP 80. Jamie accompanied Kirsten because she wanted to try to locate the sim card from her broken cell phone. They left Scott’s house originally about 10:30 p.m and returned about 11:15. RP 80.

² Jamie eventually bought a new phone, which was the same phone, for \$170.00. RP 78.

Jamie went into the kitchen when “Everyone was like outside.” RP 81. As she was looking around the floor for her sim card, “Then Andy walked into the kitchen.” RP 82. According to Jamie: “He said, “What are you doing here?” And threw a cup at my face.”³ Id. She was standing at the long end of a rectangular, island table and Andrew was on the opposite end. Id. A distance of about 6 or 7 feet separated them. RP 83, 105.

“He still seemed mad.” Id. According to Jamie’s testimony Andrew seemed more intoxicated than when she left originally. Id. She testified: “Well, it wasn’t like a lot. But he was – but it wasn’t – it was just like medium, I guess.” RP 83.

According to Jamie the glass cup hit her on the right side of her jaw. The record indicated that it struck her on the right side middle jaw area. RP 84. The bottom part of the glass impacted her. Id. Jamie testified that when it hit her: “It broke two of my teeth and knocked out my retainer.”⁴ RP 85. The retainer had been cemented to the bottom of her

³ The object was described as: “It was like a glass mug.” RP 83. It did not have a handle. RP 84. It was picked up off the island by Andrew and thrown overhand. Id.

⁴ Jamie was asked, “...what injuries did you notice?” She replied: “My retainer being knocked out, and it chipped two of my teeth.” RP 85. They were located “the farthest back on the bottom before my wisdom tooth, it took a chunk out of that. Then there’s like a chip on the top.” RP 86.

six front teeth. RP 85-6.

Jamie ran out of the house to Kirsten's car. She testified: "I told her that he had thrown a cup and it broke two of my teeth and knocked out my retainer...I was actually holding my teeth, like the chips of my teeth in my hand. And I showed her." RP 88.

Kirsten drove to Andrew's house and advised his mother what happened. RP 90. Jamie then drove in her own vehicle to her house with Kirsten following in her vehicle. RP 90. Jamie's mother called the sheriff.

The following morning Jamie went to the emergency room for x-rays and a CAT scan. Her face was swollen. She could only open her mouth about a half an inch. RP 93-4. There were no fractures. The diagnosis was a contusion. Id. Jamie testified with regard to her lower tooth: "It's like a fourth of my tooth is gone." RP 95. She described the upper tooth as: "It's just like a little chip, just like a shaving almost." Id. The retainer was re-cemented in place. RP 96.

On cross-examination Jamie testified that Andy drank some R & R when they first met at his house at 6:30 p.m. RP 97. The plan was to wait until Scott's parents left their residence so the group could party there. RP 97. A member of the group purchased about two to three 30-packs of beer. RP 98. When they arrived at Scott's house about 8:30-9:00 p.m. the guys mainly played beer pong. RP 99.

Todd Byers Kitsap County Deputy sheriff testified that he received a dispatched call at about 3:30 a.m. on the morning of December 14, 2008. III RP 110. After talking to the alleged victim in Pierce County by telephone he made contact at the residence located at 13022 Madrona Road S.W. in Kitsap County Washington. RP 115. He arrived at about four o'clock a.m. RP 160.

When Andrew approached him at the door "...he immediately turned around and placed his hands behind his back. I don't know how else, how to describe it in a position to be handcuffed. But he put his hands behind his back, put his head down." RP 119-20. The deputy handcuffed Andrew. Id.

During his examination the deputy described Andrew's motor skills as "everything seemed normal to me...Everything seemed fluid to me." RP 119-20. The deputy testified: "[I] could smell slight odor of intoxicants...eyes were red, watery, appeared bloodshot." RP 122. The deputy described Mr. Fryk's motor skills when he was led to the police vehicle as: "I noted in my – a slight stagger one time when he walked. I didn't know – but that's the only thing. Everything else was fluid and didn't have to assist him at all...But nothing noticeable." RP 139.

Officer Byers described Andrew as responding appropriately when questioned after being read his *Miranda* rights. RP 141. He testified:

There was no point where there needed to be clarification. I didn't feel like he didn't understand what was being asked and responded accordingly."

RP 145. He did make a statement "...about being under pressure, being under a lot of pressure, and that's affected his anger issues." RP 144.

Based on his contact with Andrew he rated him: "Two to three, maybe somewhere in that area." RP 148. He completed his investigation by taking photographs of the alleged victim later in the evening on December 14th. RP 151. The photographs depicted the swelling. RP 152, exs. 1, 2.

On cross-examination the deputy testified that he asked Andrew: "'Why did you hurt Jamie?'" His response was, "'I didn't mean to hurt her.'" RP 162. He further explained that he recorded in his written police report, written shortly after the incident: "'I could smell the odor of intoxicants about Andrew.'" RP 163-4.

Andrew Edward Fryk testified that he was 19 years old. RP 212. On December 13, 2008 he was at his home with Jamie at about 6:30 p.m. RP 213. He had "...half a fifth, which – but half of that was whiskey and half of it was Coca-cola." id. He was drinking the contents when Jamie, Kirsten, Oleg and he left his house and went to "Suzy and David's" apartment in Gig Harbor. RP 214. It was there that he "finished off the whiskey that I had." Id.

David purchased two 30 packs and then 18. Id. They arrived at Scott's house about 8:15 to 8:30 p.m. RP 215. Once there, they started "playing beer games, beer pong, some card games, and you know, that involved drinking." RP 215. When he wasn't playing "beer pong" Andrew testified: "...I'd be drinking beers on the side." Id.

Andrew testified that he also began consuming R & R whiskey when his friends Travis and Matt came to the party. RP 216. He rated his intoxication level at 7 on a 10 point scale. RP 217. Also he testified that the drank "...about 10, 12-ounce cans, maybe some more 16 ounces." RP 218.

He testified that he recalled taking the cell phone away from Jamie and throwing it on the floor. RP 219. Between the time she left the first time he could not remember her returning or seeing her at all. RP 220, 223. He did not remember throwing a glass at her. Id. He remembered walking to the police car but could not remember sitting in the police car or any conversations with the officer. RP 222

The jury returned guilty verdicts to Assault in the Second Degree-domestic violence and to Malicious Mischief in the Third Degree, Over \$50, domestic violence. CP 89-92. On April 3, 2009 the trial court denied the defendant's motion for arrest of judgment. CP 93. The defendant was sentenced to four months on count I and 120 days concurrent for count II.

CP 106. A notice of appeal was filed at sentencing. CP 116.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT DECLINED TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON VOLUNTARY INTOXICATION.

The defendant offered a proposed instruction on his theory of the case concerning voluntary intoxication. That instruction states:

“No crime 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 or knowledge as required to commit the crime of Assault.”

CP 50 (citing WPIC 18.10,⁵ RCW 9A.16.090, *State v. Coates*, 107

Wn.2d 882, 735 P.2d 64 (1987) (see appendix for proposed instruction.)

RCW 9A.16.090 states in pertinent part:

“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.”

⁵ WPIC 18.10 states: 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] [or] [failed to act] with (fill in requisite mental state). 11 *Washington Practice*, Washington Pattern Jury Instructions 282 (2008).

According to *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987) (“Under 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.”)⁶

The trial court erred when it denied the defendant’s proffered instruction.⁷ The standard of review is stated in *State v. Walker*, 136

⁶ In *State v. Coates*, a voluntary intoxication instruction was allowed where the defendant was charged with second degree assault for stabbing a police officer. According to the opinion: “Upon defense counsel’s request, the trial judge instructed the jury on the “intoxication defense” and on the State’s burden of proving that defendant’s intoxication did not prevent the defendant from forming the particular mental state.” *id.* at 886.

Coates was stopped in his vehicle for investigation of a hit and run incident observed by an off-duty police officer. Coates “...exited the driver’s side and walked toward the officer’s vehicle.” *id.* at 883. He identified himself as a Navy corpsman. Coates returned to his vehicle. He then walked back to the scene with the officer. Near the scene Coates decided not to go any further. He returned to his vehicle. On the way back, he stabbed the policeman near the officer’s vehicle.

At the police station, he was questioned. “Defendant, who was obviously intoxicated, said he could not believe anyone could have been stabbed.” *id.* at 884. He said that he and the officer who accompanied him fell. Coates refused a Breathalyzer. He stated he wanted to talk to an attorney. After speaking to an attorney Coates refused to answer any questions.

⁷ The trial court stated in part: “However, this evidence does not rise to the level of showing that the defendant was not able to acquire the required mental state of intent. There was no suggestion that he was so affected that he didn’t know, for example, where he was, what his location was, who he was, what he was doing or that he had, in fact, lost his mental faculties or his motor faculties.” RP 244.

Wn.2d 767, 771-72, 966 P.2d 883 (1998):

“The standard for review applied to this appeal depends on whether the trial court’s refusal to grant the jury instruction was based upon a matter of law or of fact. A trial court’s refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds* by *State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court’s refusal to give an instruction based on a ruling of law is reviewed de novo. *Id.*”

According to *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d

37, *review denied*, (1992):

“[A] criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state.”

The state conceded that the first two elements were met. RP 229.

The defense argued: The issue is whether the defendant presented evidence that the consumption of alcohol affected his ability to acquire the required mental state. RP 230 The trial court similarly stated the issue:

“...whether or not the use of alcohol affected the ability to form the requisite mental state?” RP 233.

According to the comments to WPIC 18.10:

“ Evidence of drinking alone is insufficient to warrant the instruction; instead, there must be ‘substantial

evidence of the effects of alcohol on the defendant's mind or body.” *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996) (citations omitted).”

11 Washington Practice 282. (compare with *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 749 (1995) (there must be “at least some evidentiary support for each element.”)

Evidence of Defendant's State of Intoxication

There was sufficient evidence of intoxication presented during the trial. The court was “pointed to” this evidence during examination of witnesses to show that the defendant's state of intoxication affected his ability to acquire the required mental state of intent. *State v. Gallegos*, 65 Wn.App. at 238 (three elements must be shown for entitlement to voluntary intoxication instruction, supra at 12.)

For instance, the alleged victim Jamie Torgeson testified that earlier in the evening- before she left the first time because the defendant broke her cell-phone- that his level of intoxication was a six or seven on a scale of ten. RP 99. She testified that her own rating was about a four and that Andrew was drinking more than she was. RP 100. When she returned to look for her sim card, Andrew's level of intoxication was now about an 8 or 9 compared to an earlier 6 or 7. RP 101.

This was not just an average level of intoxication for this teenager. 8 or 9 was a very high level of intoxication described by a person who

knew Andrew. There was no premeditation shown on Andrew's part. The inference is that he acted on reflex as show by the following testimony:

Jamie testified that the incident in the kitchen- when she was hit with the glass- happened really fast. She was asked: "Q. So it happened really fast. He walked in. He saw you. He picks up this glass, throws it, and you immediately left and walked out of there? A. Yes." RP 102.

When Andrew was questioned after being read his *Miranda* rights, he responded to the deputy that he did not remember. RP 143. When asked whether he wanted to give a statement or not his response was "I don't know what happened." ⁸ RP 143. The inference is that he did not know what happened based on his acute state of intoxication.

According to *State v. Gabryschak*, 83 Wn.App. 249, 253, 921 P.2d 549 (1996) it is not necessary for the defendant to testify in order to to be entitled to a voluntary intoxication instruction. All that is required is

⁸ Appellant has assigned error to CrR 3.5 Finding of Fact III and to Conclusions of Law V. These are set forth in the assignments of error and in the appendix. Each of and which states as follows: (FF III) "That the Defendant was not intoxicated to the point where he could not understand what was going on when he was contacted by Deputy Byers. (CL V) "That the Defendant was not intoxicated to the point where he could not make a knowing, voluntary and intelligent waiver of his *Miranda* rights."CP 117.

On a motion to suppress, the courts review disputed findings of fact under a substantial evidence standard. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

“...substantial evidence of the defendant’s drinking and of the effects of the alcohol on the defendant’s mind or body.”

But, Andrew did testify. He testified that before arriving at Scott’s residence, he consumed “...half a fifth... half of that was whiskey and half of it was Coca-cola.” RP 214. Once arriving- when he wasn’t playing “beer pong”- he stated “...I’d be drinking beers on the side.” RP 215.

Andrew testified that after Jamie left the first time he and four of his friends finished drinking the half gallon of R & R. RP 220. Then, after getting on the internet Andrew could not recall or remember the ensuing events of that evening. id. Andrew rated himself “maybe a 7 or an 8 at the time” when he could recall the events of the evening at Scott’s residence. RP 220-1. He stated: “I just was asleep, basically.” RP 221. He continued: “It was like for me, like my night ended around 11:30 or so as far as I remembered.” Id.

Andrew testified that by the time Officer Byer arrived: “Well, I remember my friend waking me up, or somehow I came to reality a little more, a little bit more, like snapped out of my psychosis or whatever, blackout.” RP 221. The inference is that after the huge amount of alcohol 19 year old Andrew consumed that he blacked out.⁹

⁹ The defendant testified during the CrR 3.5 hearing that he started drinking at about 6:30 p.m. He finished “...off a fifth of hard alcohol, R &

Basically, the testimony was that Andrew did not recall the incident involving throwing the glass at Jamie or before that when he was on the internet. His attorney argued during exceptions to the instructions: “He presented testimony that he does not recall the events, that he recalls vaguely something, but he clearly does not remember anything about that particular incident.” RP 231.

Andrew could not have acted intentionally because he was not aware of what he was doing. (see J. Goodloe concurring opinion in *Coates* at 896 (“Similarly, severe intoxication could render the accused incapable of forming the requisite mental state for knowledge and intent crimes.) Here, the evidence shows that Andrew was severely intoxicated to warrant the proposed voluntary intoxication instruction.

The trial court’s decision, after considering the extensive evidence of the defendant’s state of intoxication, relieved the state of the burden of disproving beyond a reasonable doubt the existence of the defendant’s intoxication defense. *State v. Carter*, 31 Wn. App.572, 643 P.2d 916

R.” II RP 47. Beginning at about 8:00 p.m. he consumed “probably 12 or 13” beers. II RP 48. He testified: “..later I drank, between four people, another half gallon of R&R, and another pint of – I want to say a brandy, maybe whiskey, I don’t recall.” *id.* All he remembered was being awakened, being handcuffed and walking to the police car. He did not recall any conversation with officer Beyers or being read his *Miranda* warnings. II RP 49.

(1982).

Compare the evidence of intoxication here with that produced in *State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981). Jones- tried as an adult at age 15- was entitled to an intoxication instruction based on RCW 9A.16.090 and based on the following testimony:

1) the defendant testified that he had been drinking beer. He drank “nine or eleven” beers in the afternoon before he stabbed a mentally retarded person to death;

2) witnesses noticed an hour before the incident “[t]he whites of his eyes were red and his eyes were very glassy. His speech was slurred.”

3) a witness spoke with Jones a few minutes after the stabbing and “thought possibly he had been drinking”.

4) after his arrest Jones was placed in the “drunk tank” at the police station.

The Supreme Court stated: “We think it plain the evidence was sufficient for the court to give the intoxication instruction.” 628 P.2d at 476.

Based on *State v. Jones*, on *State v. Coates* and on the testimony of the defendant’s state of intoxication, a voluntary intoxication instruction should have been allowed by the trial court.

II. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

The court stated during argument on entry of the defendant’s proposed instruction on voluntary intoxication:

“I’m still not quite seeing something specific that I can grab on to, to say that the mental state is somehow impeded, other than the fact that the person is intoxicated.

It’s not just intoxication, its’s intoxication to the form that there’s an effect on the ability to form the requisite mental state. And I’m having some difficulty with the evidence that you’re pointing to.”
RP 239.

According to *State v. Gabryschak*, 83 Wn.App. 249, 921 P.2d 549 (1996) there must be substantial evidence of the effects of alcohol on the defendant’s mind or body to justify an instruction on voluntary intoxication. The trial court held none of this evidence was presented. The court concluded:

“However, this evidence does not rise to the level of showing that the defendant was not able to acquire the required mental state of intent. There was no suggestion that he was so affected that he didn’t know, for example, where he was, what his location was, who he was, what he was doing or that he had, in fact, lost his mental faculties or his motor faculties. IV RP 244.

The claim of ineffective assistance of counsel is reviewed de novo. *State v. Rainey*, 107 Wn App. 129, 135, 28 P.3d 10 (2001), review denied, 145 Wn.2d 1028 (2002). The review is a mixed question of law and of fact. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). “The appellant must show both that counsel’s performance was defective and that the error changed the

outcome of the trial. *Strickland*, 466 U.S. at 687.” *State v. Horton*, 136 Wn.App. 239, 36, 146 P.3d 1227 (2006) .

According to *In re Riley*, 122 Wn.2d 772, 863 P.2d 554 (1993):

"The sixth amendment to the United States Constitution guarantees a criminal defendant the right "to have assistance of counsel for his defense." U.S. Const. amend. 6. The right to counsel means the right to the effective assistance of counsel."

Id. at 779-80, (citing *Strickland v. Washington*, 466 U.S. 668,686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 25 L.Ed. 763, 90 S.Ct. 1441 (1970))).

There was ineffective assistance of counsel during Andrew’s trial because his attorney could have been presented the omitted evidence through any one of the four other boys who were present at the “party” with Andrew. They were able to observe his movements and speech. Indeed, the prosecutor argued on the issue of the defendant’s proposed intoxication instruction:

“Clearly in this case there were other individuals there that could testify about, he could not stand up. He was having trouble holding cards. He was having trouble with motor function, things like that. Off the top of my head that’s one that I can think of. If he had heard any sort of evidence from that.” III RP 237.

Alternatively, evidence of the effects of alcohol on a person’s mental faculties could have been presented in the form of expert

testimony.¹⁰ In either case, Andrew's attorney should have known the strength of the intoxication evidence before presenting this theory of the case to the jury and then falling short. There was no evidence presented through cross-examination, direct examination or otherwise with regard to the third element i.e. presentation of evidence of the effects of alcohol on the defendant's mind or body to form the required mental state of the crime of assault in the second degree.¹¹ See *Gabryschak*, 83 Wn.App. at 252.

The *Strickland* test is set forth in *State v. Thomas*, 109 Wn.2d at 225-26:

"First, the defendant must show that counsel's performance was deficient. That requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense...See also, *State v. Jeffries*, 105 Wn.2d 398,418, 717 P.2d 722, cert. denied, 93 L.Ed.2d 301 (1986); *State v. Sardinia*, 42 Wn.App. 533, 713 P.2d 122 (1986)."

(citing *Strickland v. Washington*, 466 U.S. at 687).

¹⁰ cf. *State v. Thomas*, 109 Wn.2d 222, 231, 743 P.2d 816 (1987) (defense not required to present expert testimony to establish that the defendant was too intoxicated to form the necessary mental state.)

¹¹ See instruction No. 8: "A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm." CP 67, appendix.

According to *State v. Benn*, 120 Wn.2d 631,663, 845 P.2d 289 (1993):

"A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct. *Strickland v. Washington*, 466 U.S. 668,687-88, 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)."

Both prongs of the *Strickland* test have been described as:

"Under one prong-the performance prong-the defendant must show that counsel's performance was deficient. Under the other prong-the prejudice prong-the defendant must show that the deficient performance prejudiced the defense."

In re Riley, 122 Wn.2d at 780, citing *Strickland*, 466 S.Ct. at 687. The Supreme court adopted this test in *State v. Jeffries*, 105 Wn.2d at 418.

According to *Thomas*:

"To meet the requirement of the second prong defendant has the burden to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.*"

109 Wn.2d at 226 (citing *Strickland*, at 694) (court's italics.)

The defendant was denied effective assistance of counsel because his attorney's presentation of a voluntary intoxication "defense" was deficient. This deficient performance prejudiced the defendant because his theory of the case was never conveyed to the jury. It was stated in *Coates*:

...evidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability.” 107 Wn.2d at 889.

But for Andrew Fryk’s attorney’s failure to present sufficient proof, based on his level of intoxication, of the effects of alcohol on his mind or body- to the extent that he was unable to form the requisite intent to assault his girl friend- creates a reasonable probability that the results of this trial would have been different.

III. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION IN ARREST OF JUDGMENT.

The jury returned verdicts of guilty to both counts on March 3, 2009. CP 89-92. The defendant’s attorney filed a motion in arrest of judgment on March 20, 2009. CP 93. This was later than the 10 days CrR 7.4(b) authorizes.¹² The trial court noted the late filing and then addressed the issues in the motion. 4/03/09 RP 9.

CrR 7.4(a) entitled Arrest of Judgment states in part: “ Judgment may be arrested on motion of the defendant for the following causes

¹² CrR 7.4(b) states in part: “Time for Motion; Contents of Motion. A motion for arrest of judgment must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time until such time as judgment is entered.”

...(3) insufficiency of the proof of a material element of the crime.”

The defense argued “...that the State did not present sufficient evidence...for any reasonable juror to find proof beyond a reasonable doubt that Mr. Fryk caused substantial bodily harm.” CP 93. “Substantial bodily harm” is one of the elements necessary to prove the crime of assault in the second degree.¹³ It was defined by the trial court as: “Substantial bodily harm means bodily injury that causes a fracture of any bodily part.” Instr. 12; CP 71; WPIC 2.03.01; 11 *Washington Practice* 26 (3rd ed. 2008).

The defendant asserted further in the motion for arrest of judgment:

“The State did not present any evidence of medical records or of testimony concerning pain involving those teeth or the extent to which those teeth were damaged. The testimony was that the teeth that were chipped were back molars near the wisdom teeth. The State presented evidence from its own investigator that “he looked inside Ms. Torgenson’s mouth, and when she pointed to an area he was able to see one small chip in a tooth”. He was not able to see this chip without it being pointed out.

There was no other evidence admitted at trial concerning any fracture of a body part. A jury instruction was submitted to the jury defining substantial bodily harm as “Bodily injury which was a fracture of any body part.”

CP 93-4.

¹³ Instruction 21 stated as the second element of assault in the second degree: “(2) That the defendant thereby recklessly inflicted substantial bodily harm on Jamie Marie Torgeson;...” CP 80; WPIC 35.13; RCW 9A.36.021(1)(a).

The trial court denied the defendant's motion. The court stated that it was a question of fact for the jury to determine and denied the motion.

4/03/09 RP 10-11. The court stated:

“And so I do think that when we get to how it was described by a particular witness, if the witness said it was a chipped tooth or a broken tooth, a fractured tooth, or a splintered tooth, or if the witness said there was a break to my tooth, it is for the jury to determine well, was this actually a fracture.” RP 10.

The standard for review is as set forth in *State v. Ceglowski*, 103

Wn.App. 346, 349, 12 P.3d 160 (2000):

“Review of a trial court decision denying a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court. *State v. Longshore*, 141 Wn.2d 414, 5 P.3rd 1256 (2000).”

According to *State v. Randdecker*, 79 Wn.2d 512, 518, 487 P.2d 1295

(1971):

“...it is unnecessary for the court to be satisfied of the defendant's guilt beyond a reasonable doubt. It is only necessary for it to be satisfied that there is “substantial evidence” to support either the state's case, or the particular element in question. When the quantum of evidence has been presented, there is *some proof* of the element or crime in question and the motion in arrest of judgment must be denied.”

(citing *State v. Cranmer*, 30 Wn.2d 576, 192 P.2d 331 (1948) (court's italics.)

The prosecutor cited *State v. R.H.S.*, 94 Wn.App. 844, 847, 974 P.2d 1253 (1999) and argued: “ We had several people testify about the actual incident and what happened with pieces of teeth being spit out into the mouth, and then also with Mr. Barton noticing the area of broken teeth and the rear portion of the mouth.”¹⁴ 4/3/2009 RP 9.

The defense argued in its motion for arrest of judgment:

“Furthermore, a research of all state’s (sic) revealed no published or unpublished cases in which a chipped tooth was sufficient evidence of substantial bodily harm. However, New York addressed a chipped tooth in the context of serious injury in an insurance litigation. See Epstein v. Butera, 155 A.D. 2d 513, 547 N.Y.S. 2d 374 (1989). That court stated: We decline to characterize a chipped tooth as falling within the statutory definition of serious (sic) injury merely because the plaintiff’s dentist described the injury as a “fracture”. Moreover, a broad construction of the statutory term “fracture” to include a minor tooth injury of the type involved herein, would expand, rather than narrow the number of litigated automobile personal injury actions...Id. at 515.” CP 96.

The defense concluded that the legislature intended “...more than just a chipped tooth when referring to a fracture.”¹⁵ CP 97.

¹⁴ Barton, an investigator for the Kitsap County Prosecutor’s Office testified: “There was one area that she pointed to that showed a little imperfection, as a possible broken area.” III RP 196. He testified on cross- examination that Ms. Torgeson had to point out the area. III RP 197.

¹⁵ The defense also argued “RCW 9A.040.110(4)(a) states “bodily injury” “physical injury” or “bodily harm” means physical pain or injury,

In sum, there was not “substantial evidence” from which the jury could reasonably have concluded that there was *some proof* that Mr. Fryk caused substantial bodily harm because no fracture of any of the victim’s teeth was shown by the evidence.

D. Conclusion

Andrew Fryk’s proposed instruction on voluntary intoxication should have been given by the trial court. An instruction was warranted by the facts of this case. It was stated in *State v. Coates*:

“The voluntary intoxication statute allows the trier of fact to consider the defendant’s intoxication in assessing his mental state; the statute does not require that consideration lead to any particular result. In this sense the statute describes the manner in which a particular type of evidence is to be employed, in much the same way as neutral instructions describe use of inferences or circumstantial evidence.” *id.* at 889-90.

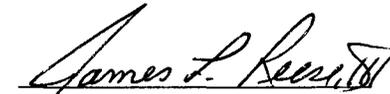
On the other hand, if such an instruction was not warranted based on the testimony that was elicited at the trial, then Mr. Andrews was denied effective assistance of counsel. If anyone would have testified to observing Mr. Fryk’s motor functions or if an expert would have testified to the effects of alcohol on his mental incapacibilities, there is a reasonable

illness or an impairment of physical condition. There was no evidence that the chipped tooth or teeth caused pain or injury, illness or any impairment.” CP 97.

probability that the outcome of the trial would have been different.

Dated this 13th day of September 2009.

Respectfully Submitted,

A handwritten signature in black ink, reading "James L. Reese, III". The signature is written in a cursive style with a horizontal line underneath the name.

James L. Reese, III

WSBA #7806

Court Appointed Attorney

For Appellant

ORIGINAL

RECEIVED AND FILED
IN OPEN COURT
MAR 03 2009
DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)
) No. 08-1-01469-8
Plaintiff)
) DEFENDANT'S PROPOSED JURY
v.) INSTRUCTIONS
)
ANDREW EDWARD FRYK,)
)
Defendant)

HONORABLE LEILA MILLS
Judge of the Kitsap County Superior Court

KATE T. SIGAFOOS, WSBA No. 37017
Attorney for Plaintiff

TINA R. ROBINSON, WSBA No. 37965
Attorney for Defendant

Tina Robinson

TINA R. ROBINSON, WSBA No. 37965

INSTRUCTION NO. _____

No crime 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 or knowledge as required to commit the crime of Assault.¹

¹ WPIC 18.20, RCW 9A.16.090, State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987)

INSTRUCTION NO. _____

You may give such weight and credibility to any alleged out of court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.¹

¹ WPIC 6.41

WPIC 18.10

VOLUNTARY INTOXICATION

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] [or] [failed to act] with (fill in requisite mental state).

NOTE ON USE

Use this instruction for voluntary intoxication cases only. It does not apply to a case in which involuntary intoxication is claimed.

Use bracketed material as applicable.

COMMENT

RCW 9A.16.090.

Approval of instruction. WPIC 18.10 is a correct statement of the law. *State v. Corwin*, 32 Wn.App. 493, 649 P.2d 119 (1982). WPIC 18.10 is also cited with approval in *State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987), and *State v. Hackett*, 64 Wn.App. 780, 827 P.2d 1013 (1992).

Basis for giving instruction. “[A] criminal defendant is entitled to a voluntary intoxication instruction only if: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state.” *State v. Gallegos*, 65 Wn.App. 230, 238, 828 P.2d 37 (1992) (cited in *State v. Ager*, 128 Wn.2d 85, 904 P.2d 715 (1995)). 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. . . . 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, 252–53, 921 P.2d 549 (1996) (citations omitted). See also *State v. Everybodytalksabout*, 145 Wn.2d 456, 479, 39 P.3d 294 (2002) (defendant not entitled to a voluntary intoxication instruction where he did not present sufficient evidence to show his intoxication affected his ability to acquire the required mental state); *State v. Harris*, 122 Wn.App. 547, 552–53, 90 P.3d 1133 (2004) (same); *State v. Hall*, 104 Wn.App. 56, 60–61, 14 P.3d 884 (2000) (same); *State v. Priest*, 100 Wn.App. 451, 455, 997 P.2d 452 (2000) (same).

Particular mental state at issue. Although the defense of voluntary intoxication is usually associated with crimes requiring proof of a specific intent, the defense is also appropriate when the defendant is charged with a crime for which a particular mental state, such as knowledge, is required. *State v. Lottie*, 31 Wn.App. 651, 644 P.2d 707 (1982) (arson). In a prosecution for first degree murder, premeditation and intent are two distinct elements, and the defendant is entitled to an instruction such as WPIC 18.10 upon a showing that intoxication affected either element. *State v. Brooks*, 97 Wn.2d 873, 651 P.2d 217 (1982).

When the crime charged (first degree assault) involved a particular mental state (intent to inflict great bodily harm), it was error to refuse defendant's request to give this instruction when there was "substantial evidence that the defendant was in fact intoxicated at the time the crime was committed and that the intoxication affected his ability to acquire the requisite mental state." *State v. Hackett*, 64 Wn.App. 780, 785 n. 2, 827 P.2d 1013 (1992) (defense applies to intoxication by drugs as well as alcohol, and diminished capacity instruction was not broad enough to cover voluntary intoxication falling short of mental illness or disorder). Cf. *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993) (a diminished capacity instruction may be adequate when based, in whole or in part, on defendant's voluntary consumption of drugs or alcohol).

In *State v. Swagerty*, 60 Wn.App. 830, 810 P.2d 1 (1991), the trial court did not err by refusing to give a voluntary intoxication instruction in a prosecution for statutory rape. The appellate court found that the defense of voluntary intoxication was not available to the defendant, because the Legislature's definition of statutory rape did not include specific intent or any other mental state.

Nature of defense. In a technical sense intoxication is not a "true defense," because a criminal act committed by a person who is voluntarily intoxicated is not justified or excused. Rather, intoxication may raise a reasonable doubt as to a mental state required for conviction of a certain crime. Therefore, in an appropriate case, the jury should be instructed that it may consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state. *State v. Coates*, supra.

In *State v. Guilliot*, 106 Wn.App. 355, 365-66, 22 P.3d 1266 (2001), the court held that a defense based upon hypoglycemia is similar to an intoxication defense. A jury instruction based upon hypoglycemia is proper only if the defendant produces substantial evidence of a link between an insulin reaction and the defendant's ability to form the culpable mental state at the time of the crime.

Voluntary intoxication is intoxication not caused by force or fraud,

WPIC 18.10

DEFENSES

State v. Hutsell, 120 Wn.2d 913, 845 P.2d 1325 (1993) (Sentencing Reform Act case, reaffirming prior holdings that an alcoholic or addict is not an “involuntary” intoxicante), or by medicinal use of drugs, State v. Gilcrist, 15 Wn.App. 892, 552 P.2d 690 (1976).

Burdens of proof and persuasion. It is constitutionally permissible to require the defendant to bear the initial burden of coming forward with evidence of intoxication and its effect upon the defendant’s mental state before giving an instruction on intoxication. However, the jury should not be instructed that the defendant has the burden of proving voluntary intoxication by a preponderance of the evidence. Such an instruction unconstitutionally relieves the prosecution of the burden of proving beyond a reasonable doubt the mental state that is the element of the crime charged. State v. Carter, 31 Wn.App. 572, 643 P.2d 916 (1982).

The State has no burden of disproving intoxication, and the jury should not be instructed that it does. State v. Coates, 107 Wn.2d 882, 735 P.2d 64 (1987). It is sufficient to instruct the jury that the State must prove the mental state that is an element of the crime charged. State v. James, 47 Wn.App. 605, 736 P.2d 700 (1987); State v. Sam, 42 Wn.App. 586, 711 P.2d 1114 (1986); State v. Fuller, 42 Wn.App. 53, 708 P.2d 413 (1985).

Comparison with involuntary intoxication. “[I]nvoluntary intoxication does constitute an allowable defense” which “may absolve the defendant of any criminal responsibility.” State v. Hutsell, 120 Wn.2d at 920; see also Fine & Ende, 13B Washington Practice, Criminal Law § 3204 (2007–08). An involuntary intoxication defense must be proved by the defendant by a preponderance of the evidence. State v. Riker, 123 Wn.2d 351, 367, 869 P.2d 43 (1994), citing State v. Gilcrist, 25 Wn.App. 327, 328–29, 606 P.2d 716 (1980) (temporary insanity caused by involuntary intoxication). Involuntary intoxication is not covered in these pattern instructions.

For a general discussion of the burden of proof on defenses, see Introduction to Part IV—Defenses.

As to the defense of diminished capacity due to a mental condition other than intoxication, see WPIC 18.20.

[Current as of July 2008.]

RECEIVED AND FILED
IN OPEN COURT

MAR 06 2009

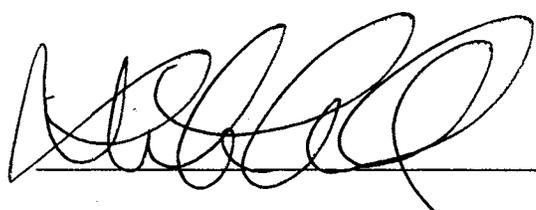
DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)
) No.08-1-01469-8
 Plaintiff,)
)
 v.)
)
 ANDREW EDWARD FRYK,)
)
 Defendant.)

COURT'S INSTRUCTIONS TO THE JURY

DATED 3/5/09

 , JUDGE

ORIGINAL

25 B

Instruction No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed

in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Instruction No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

Instruction No. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

Instruction No. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common practice. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

Instruction No. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 6

You may give such weight and credibility to any alleged out of court statements of the defendant as you see fit, taking into consideration the surrounding circumstances.

Instruction No. 7

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Instruction No. 8

A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm.

Instruction No. 9

A person acts with intent/~~or~~ intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 10

agree

An assault is an intentional touching or striking of another person that is harmful or offensive. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.

Instruction No. 11

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

Recklessness also is established if a person acts intentionally or knowingly.¹

Instruction No. 12

Substantial bodily harm means bodily injury that causes a fracture of any bodily part.

INSTRUCTION NO. 13

A person commits the gross misdemeanor of Malicious Mischief in the Third Degree when he or she knowingly and maliciously causes physical damage to the property of another in an amount exceeding \$50.

INSTRUCTION NO. 14

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

INSTRUCTION NO. 15

Malice and maliciously mean an evil intent, wish, or design to vex, annoy, or injure another person.

INSTRUCTION NO. 16

Physical damage, in addition to its ordinary meaning, includes any diminution in the value of any property as a consequence of any act.

INSTRUCTION NO. 17

“Property of another” means property in which the actor possesses anything less than exclusive ownership.

Instruction No. 18

For purposes of this case, “family or household members” means a person sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship.

“Dating relationship” means a social relationship of a romantic nature. In deciding whether two people had a “dating relationship,” you may consider all relevant factors, including (a) the nature of any relationship between them; (b) the length of time that any relationship existed; and (c) the frequency of any interaction between them.

INSTRUCTION NO. 19

The defendant is charged in Count I with Assault in the Second Degree. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Assault in the Fourth Degree.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of two or more degrees that person is guilty, he or she shall be convicted only of the lowest degree.

INSTRUCTION NO. 20

A person commits the crime of Assault in the Fourth Degree when he or she assaults another.

agrees ASSAULT

Instruction No. 21

To convict the defendant of the crime of assault in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

agree

(1) That on or between December 13, 2008 and December 14, 2008, the defendant intentionally assaulted Jamie Marie Torgeson;

agree

(2) That the defendant thereby recklessly inflicted substantial bodily harm on Jamie Marie Torgeson; and

agree

(3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

VOTE	
G	NB
10	2

INSTRUCTION NO. 22

To convict the defendant of the crime of the gross misdemeanor of Malicious Mischief in the Third Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt—

- (1) That on or between December 13, 2008 and December 14, 2008, the defendant knowingly and maliciously caused physical damage to the property of another in an amount exceeding \$50; and
- (2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 23

To convict the defendant of the crime of Assault in the Fourth Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt—

- (1) That on or between December 13, 2008 to December 14, 2008, the defendant assaulted Jamie Marie Torgeson;
- (2) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction No. 24

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given any exhibits admitted in evidence, these instructions, and 6 verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words “not guilty” or the word “guilty”, according to the decision you reach.

When completing the verdict forms, you will first consider the crime of Assault in the Second Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form A the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form A.

If you find the defendant guilty on verdict form A, do not use verdict form C. If you find the defendant not guilty of the crime of Assault in the Second Degree, or if after full and careful consideration of the evidence you cannot agree on that crime, you will consider the lesser crime of Assault in the Fourth Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form C the words “not guilty” or the word “guilty”, according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form C.

You will also be given a special verdict form B for the crime of Assault in the Second Degree. If you find the defendant not guilty of Assault in the Second Degree, do not use the special verdict form B. If you find the defendant guilty of Assault in the Second Degree, you will then use the special verdict form B and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer “no”.

You will also be given a special verdict form D for the lesser included crime of Assault in the Fourth Degree. If you find the defendant not guilty of Assault in the Fourth Degree, do not use the special verdict form D. If you find the defendant guilty of Assault in the Fourth Degree, you will then use the special verdict form D

and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer “no”

When completing the verdict forms, you will next consider the crime of Malicious Mischief in the Third Degree. If you unanimously agree on a verdict, you must fill in the blank provided in verdict form E the words “not guilty” or the word “guilty,” according to the decision you reach. If you cannot agree on a verdict, do not fill in the blank provided in verdict form E.

You will also be given a special verdict form F for the crime of Malicious Mischief in the Third Degree. If you find the defendant not guilty of Malicious Mischief in the Third Degree, do not use the special verdict form F. If you find the defendant guilty of Malicious Mischief in the Third Degree, you will then use the special verdict form F and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict form “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer “no”.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

FILED
KITSAP COUNTY CLERK
2009 APR 10 PM 4:14
DAVID W. PETERSON

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)	
)	No. 08-1-01469-8
Plaintiff,)	
)	FINDINGS OF FACT AND CONCLUSIONS
v.)	OF LAW FOR HEARING ON CRR 3.5
)	
ANDREW EDWARD FRYK,)	
Age: 19; DOB: 03/29/1989,)	
)	
Defendant.)	

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled Court pursuant to a hearing on CrR 3.5; the parties appearing by and through their attorneys of record below-named; and the Court having considered the motion, briefing, testimony of witnesses, if any, argument of counsel and the records and files herein, and being fully advised in the premises, now, therefore, makes the following--

FINDINGS OF FACT

I.

That the Defendant was aware that Deputy Byers was a law enforcement officer when the initial contact was made.

II.

That the Defendant was intoxicated at the time he was contacted by Deputy Byers.

III.

That the Defendant was not intoxicated to the point where he could not understand what



43

1 was going on when he was contacted by Deputy Byers.

2 **IV.**

3 That the Defendant was placed into custody by Deputy Byers when the initial contact was
4 made.

5 **V.**

6 That Deputy Byers properly informed the Defendant of his Miranda rights after he was
7 placed into custody.

8 **VI.**

9 That the Defendant understood the Miranda rights that were read to him.

10 **VII.**

11 That the Defendant knowingly and voluntarily waived his Miranda rights.

12 **VIII.**

13 That the Defendant made statements to Deputy Byers after he waived his Miranda rights.

14 **IX.**

15 That the statements the Defendant made to Deputy Byers after he waived his Miranda
16 rights are admissible in trial.

17 **CONCLUSIONS OF LAW**

18 **I.**

19 That the above-entitled Court has jurisdiction over the parties and the subject matter of
20 this action.

21 **II.**

22 That the Defendant was properly read his Miranda rights and understood them.

23 **III.**

24 That the Defendant knowingly, voluntarily and intelligently waived his Miranda rights.

25 **IV.**

26 That that the statements the Defendant made after he waived his Miranda rights are
27 admissible in trial.

28 **V.**

29 That the Defendant was not intoxicated to the point where he could not make a knowing,
30 voluntary and intelligent waiver of his Miranda rights.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31

SO ORDERED this 10 day of April, 2009.

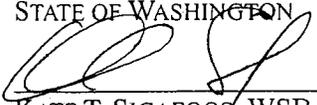


JUDGE

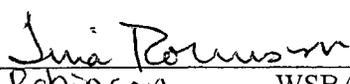
PRESENTED BY-

APPROVED FOR ENTRY-

STATE OF WASHINGTON



KATE T. SIGAFOOS, WSBA NO. 37017
Deputy Prosecuting Attorney



T. Robinson, WSBA NO. 31965
Attorney for Defendant

Prosecutor's File Number-08-168441-2



Guidelines Commission. The uniform judgment and sentence shall be a form prescribed by the Administrator for the Courts in conjunction with the Supreme Court Pattern Forms Committee. If the sentence imposed departs from the applicable standard sentence range, the court's written findings of fact and conclusions of law shall also be supplied to the Commission. [Formerly CrR 7.1, renumbered as CrR 7.2 and amended, eff. July 1, 1984. Amended, eff. September 1, 1986; September 1, 1991; September 17, 1993; September 1, 1995.]

Comment

The prior rule, CrR 7.1, is adopted as CrR 7.2.

In section (a), the added language is suggested by Minn.R.Crim.P. 27.03. The deleted language addressed matters that are now covered in more detail in RCW 9.94A.110.

Section (b) is the same as the corresponding section in the prior rule, except that subsections (1) and (2) are modified to reflect the provisions of RCW 9.94A.210.

Section (c), concerning the withdrawal of a guilty plea, is deleted. In the existing rules, the point is covered in both CrR 4.2 and CrR 7.1. (See rule 4.2.) The language of the two provisions differs, but they appear to be the same in substance. There is no apparent distinction between the two provisions in the cases that have interpreted them. No loss of substance occurs when the provision in CrR 7.1 is deleted, leaving the point governed by CrR 4.2.

Section (c) is suggested by Minn.R.Crim.P. 27.03.

Section (d) is suggested by Minn.R.Crim.P. 27.03.

RULE 7.3 JUDGMENT

A judgment of conviction shall set forth whether defendant was represented by counsel or made a valid waiver of counsel, the plea, the verdict or findings, and the adjudication and sentence. The court may order that its sentence include special conditions or requirements, including a specified schedule for the payment of a fine, restitution, or other costs, or the performance of community service. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk. [Amended effective July 1, 1984.]

Comment

The rule codifies the existing practice allowing the court to impose special conditions on its sentence. The rule makes it clear that special conditions, including a specified schedule, may likewise be imposed with respect to an order for community service, restitution, or costs. (See RCW 9.94A.200, referring to terms and conditions of restitution.)

The rule is, of course, subject to any statutory restrictions on the court's sentencing authority. For example, a statute requires that a sentence of confinement for more than 60 days must be served on consecutive days (RCW 9.94A.120). The rule would not permit the court to order that such a sentence be served on intermittent days.

RULE 7.4 ARREST OF JUDGMENT

(a) **Arrest of Judgments.** Judgment may be arrested on the motion of the defendant for the following causes: (1) Lack of jurisdiction of the person or offense; (2) the indictment or information does not charge a crime; or (3) insufficiency of the proof of a material element of the crime.

(b) **Time for Motion; Contents of Motion.** A motion for arrest of judgment must be served and filed within 10 days after the verdict or decision. The court on application of the defendant or on its own motion may in its discretion extend the time until such time as judgment is entered.

The motion for arrest of judgment shall identify the specific reasons in fact and law as to each ground on which the motion is based.

(c) **New Charges After Arrest of Judgments.** When judgment is arrested and there is reasonable ground to believe that the defendant can be convicted of an offense properly charged, the court may order the defendant to be recommitted or released to answer a new indictment or information. If judgment was arrested because there was no proof of a material element of the crime the defendant shall be dismissed.

(d) **Rulings on Alternative Motions in Arrest of Judgment or for a New Trial.** Whenever a motion in arrest of a judgment and, in the alternative, for a new trial is filed and submitted in any superior court in any criminal cause tried before a jury, and the superior court enters an order granting the motion in arrest of judgment, the court shall, at the same time, in the alternative, pass upon and decide in the same order the motion for a new trial. The ruling upon the motion for a new trial shall not become effective unless and until the order granting the motion in arrest of judgment is reversed, vacated, or set aside in the manner provided by law.

[Rule 7.4(d)(2) rescinded effective July 1, 1976; remainder of Rule 7.4(d) consolidated effective September 1, 1984; amended effective September 1, 1991.]

RULE 7.5 NEW TRIAL

(a) **Grounds for New Trial.** The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

- (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;
- (2) Misconduct of the prosecution or jury;
- (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial;
- (4) Accident or surprise;
- (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of

RCW 9A.04.110
Definitions.

In this title unless a different meaning plainly is required:

- (1) "Acted" includes, where relevant, omitted to act;
- (2) "Actor" includes, where relevant, a person failing to act;
- (3) "Benefit" is any gain or advantage to the beneficiary, including any gain or advantage to a third person pursuant to the desire or consent of the beneficiary;
- (4)(a) "Bodily injury," "physical injury," or "bodily harm" means physical pain or injury, illness, or an impairment of physical condition;
 - (b) "Substantial bodily harm" means bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part;
 - (c) "Great bodily harm" means bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ;
- (5) "Building", in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building;
- (6) "Deadly weapon" means any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a "vehicle" as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm;
- (7) "Dwelling" means any building or structure, though movable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging;
- (8) "Government" includes any branch, subdivision, or agency of the government of this state and any county, city, district, or other local governmental unit;
- (9) "Governmental function" includes any activity which a public servant is legally authorized or permitted to undertake on behalf of a government;
- (10) "Indicted" and "indictment" include "informed against" and "information", and "informed against" and "information" include "indicted" and "indictment";
- (11) "Judge" includes every judicial officer authorized alone or with others, to hold or preside over a court;
- (12) "Malice" and "maliciously" shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in wilful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a wilful disregard of social duty;
- (13) "Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions of a public officer;
- (14) "Omission" means a failure to act;
- (15) "Peace officer" means a duly appointed city, county, or state law enforcement officer;
- (16) "Pecuniary benefit" means any gain or advantage in the form of money, property, commercial interest, or anything else the primary significance of which is economic gain;
- (17) "Person", "he", and "actor" include any natural person and, where relevant, a corporation, joint stock association, or an unincorporated association;

RCW 9A.16.090
Intoxication.

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.

[1975 1st ex.s. c 260 § 9A.16.090.]

AMENDMENT VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

FILED
COURT OF APPEALS
DIVISION II

09 SEP 14 PM 3:06

STATE OF WASHINGTON
BY [Signature]
DEPUTY

PROOF OF SERVICE

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 14th day of September, 2009, he hand delivered for filing, the original and one(1) copy of Appellant's Brief in State of Washington v. Andrew Edward Fryk, No. 39150-3-II to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, Andrew Edward Fryk at his last known address: 1017 35th Street Ct. N.W., Gig Harbor, WA 98335.

[Signature]
James L. Reese, III

Signed and Attested to before me this 14th day of September, 2009 by James L. Reese, III.

[Signature]
Julia T. Reese

Notary Public in and for the State of Washington residing at Port Orchard.
My Appointment Expires: 4/4/13