

NO. 39150-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANDREW FRYK,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-1-01469-8

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court properly declined to give an instruction on voluntary intoxication where there was no evidence showing that Fryk's intoxication interfered with his ability to form the intent to assault Torgeson with a glass?

2. Whether Fryk has met his burden of supporting with record evidence his claim that trial counsel was ineffective in her presentation of his so-called intoxication defense?

3. Whether the evidence was sufficient to prove the "fracture of any bodily part" where Fryk threw a glass at Torgeson's face hard enough to chip one of her molars and break off one-quarter of a second one?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Andrew Fryk was charged by information filed in Kitsap County Superior Court with second-degree assault and third-degree malicious mischief. CP 1.

Fryk sought an instruction on involuntary intoxication. 3RP 228. The trial court denied the request, finding there was insufficient evidence to show that Fryk was unable to acquire the mental state of intent. 4RP 244. The court also noted that there was no suggestion in the record that he did not

know where he was, who he was, what he was doing or that he has lost his mental or motor faculties. 4RP 244.

The jury found Fryk guilty as charged. CP 89-92.

Fryk brought a motion to arrest judgment, arguing that there was insufficient evidence that his assault had resulted in the “fracture” of a bodily part. CP 93-97; RP (4/3) 2. The trial court denied the motion, finding that it was both untimely, RP (4/3) 9, and lacking in substantive merit. RP (4/3) 10-11.

B. FACTS

The assault victim, Jamie Torgeson, had met Fryk through a friend during the summer of 2007. 3RP 67. They began dating in August 2008. 3RP 67. They dated until the incident in December 2008. 3RP 68.

On the day of the incident, Torgeson went to Southcenter Mall with her mother. 3RP 69. Then she went to Fryk’s house, and Torgeson and Fryk went to visit Fryk’s friend Scott. 3RP 69. Torgeson’s friend Kirsten Bethke and Bethke’s boyfriend, Oleg Ross, were with them. 3RP 69. Bethke drove. 3RP 69.

They arrived around 9:00 p.m. 3RP 69. Before going to Scott’s the four of them had been hanging out at the home of Torgeson’s friend Suzy. 3RP 70.

They had not been drinking before they arrived at Scott's house. 3RP 71. At Scott's, Torgeson had three or four beers in about an hour and a half. Fryk, Ross, and Scott were also drinking. 3RP 71. Bethke had a bit to drink, but Torgeson did not note how much. 3RP 72. They mostly were playing cards. 3RP 72. They also played beer pong, which involved tossing ping-pong balls into little cups. 3RP 72. Torgeson characterized her own intoxication level after having three or four beers as four on a scale of one to ten. 3RP 72. Ten would be blacked out and one would be totally sober. 3RP 72. Torgeson was able to remember everything that happened. 3RP 72. She did not become sick at any point. 3RP 73.

Everyone was getting along fine. 3RP 73. Then Scott said something and Fryk became angry. 3RP 73. Fryk began to call Torgeson names and told her to leave. 3RP 73. He called her a slut. 3RP 74. He said, "What are you still doing here? Leave." 3RP 74. He said it twice and she went out on the porch and tried to call a friend to come get her. 3RP 75.

She called her friend Garrett from the porch and then when back inside to get directions for him. 3RP 75. After she went back out, Fryk came out and took her phone. 3RP 75. She was talking on it and Fryk came up from behind her and snatched the phone away. 3RP 76. After taking the phone, he went back into the kitchen with it, and she followed to try to get it back. 3RP 76. Fryk lifted his arm and hurled the phone to the floor. 3RP 76.

The back broke off the phone and it snapped in half. 3RP 76. The phone was not repairable. 77.

After they left, Bethke took her to Fryk's house to retrieve her car. 3RP 78. It was about 15 minutes from Scott's house to Fryk's house. 3RP 78. When they got there, they spoke with Fryk's mother. 3RP 78. Torgeson told Ms. Fryk about her phone, and then they chatted for about half an hour about other things. 3RP 79.

Ross had been calling Bethke, so they went back to Scott's house to pick up Ross. 3RP 80. Torgeson would have just gone home, but she wanted to try to retrieve her SIM card so she could get a replacement phone. 3RP 80. She was not concerned about going back into the house. 3RP 80. She knew Fryk was mad, but did not think anything of it. 3RP 80. She was just going to run in and grab the card and leave. 3RP 81.

When they got there she went into the kitchen to look for the card. 3RP 81. She saw Travis Fitzpatrick in the hallway, but everyone else was outside. 3RP 81. She went into the kitchen and began looking for it. 3RP 81. Fryk walked into the kitchen while she was looking. 3RP 82.

Fryk asked Torgeson, "What are you doing here?" and threw a cup at her face. 3RP 82. She was standing at one end of the center island. 3RP 82. Fryk was at the other. 3RP 82. He still seemed quite angry. 3RP 82.

Torgeson did not have time to respond before he threw the cup at her. 3RP 82. He seemed more intoxicated than he was when she left. 3RP 82. However, he was not “a lot” more intoxicated. 3RP 83. The island was about six or seven feet long. 3RP 83. She was about six feet from him when he threw the mug. 3RP 105. The cup was a glass mug. 3RP 83. She did not have time to duck and it hit her on the right side of her jaw. 3RP 84. When Fryk threw the glass she was standing upright. 3RP 104. She was 5’4”.

Fryk did not have the mug when he came into the room. 3RP 84. He picked it up off the island and threw it overhand at her. 3RP 84.

The bottom of the glass struck her face. 3RP 84. The impact broke two of Torgeson’s teeth and knocked out her retainer. 3RP 85. The retainer was the permanent kind that is cemented to the teeth. 3RP 85-86. It had never come out before. 3RP 86. The furthest back teeth on the top and bottom were each chipped. 3RP 86.

She ran from the house. 3RP 85. She was in shock and did not begin to cry until after she got into the car. 3RP 85. When she got to the car, she told Bethke that they needed to leave. 3RP 88. She became a bit hysterical and told Bethke that Fryk had thrown a cup at her and broken two of her teeth and knocked out her retainer. 3RP 88. After she got in the car, she spit two broken pieces of tooth out into her hand. 3RP 89.

They went back to the Fryk house to get Torgeson's car. 3RP 89. She and Bethke went inside and told Ms. Fryk what had happened. 3RP 90. Then she drove home and Bethke followed her because she was so upset. 3RP 90. It took her about 20 minutes to get home. 3RP 90. Bethke walked her inside and called Torgeson's mother. 3RP 90. After Torgeson talked to her mother, they called the sheriff. 3RP 90.

Torgeson felt sore and her jaw was swelling. 3RP 92. She woke up around 10:00 a.m. 3RP 92. When she got up, her mother was surprised at how swollen her face was, so they decided to go to the emergency room to get it x-rayed. 3RP 93. The swelling was bad enough that she could not open her mouth more than about half an inch. 3RP 93-94. The doctor could not look into her mouth as a result, and performed a test with a tongue depressor to see if she could grip anything with her jaw. 3RP 94. They did a CT scan of her jaw and determined that it was not broken. 3RP 93. They were concerned it might be, but it was just a contusion. 3RP 93.

They gave her some medication for the pain. 3RP 94. Torgeson returned home. 3RP 94. That night an officer came over and took pictures and her statement. 3RP 94. She was unable to open her mouth enough for the officer to take pictures of her teeth. 3RP 95. She had to wait a few days for the swelling to subside before she could go to the dentist. 3RP 95. Her teeth were not chipped or broken before Fryk threw the glass at her. 3RP 95.

On the bottom about a quarter of the tooth was gone. 3RP 95. The top chip was smaller. 3RP 95. She could not have them repaired until she got her wisdom teeth out. 3RP 96. She also had to have her retainer re-cemented. 3RP 96.

On cross-examination, defense counsel suggested that Torgeson told Fryk's mother that it was an accident. Torgeson rejected that interpretation of what she had said: "I said I didn't think that his intentions were for the outcome to be what it was. But obviously you don't just throw a cup at somebody without the intention to throw it." 3RP 103. "I don't think he expected it to do – I don't think he was thinking about the damages that could happen. But I believe the intentions were there." 3RP 103.

Deputy Todd Byers went to Scott's house after Torgeson called 911. He knocked on the front door. 3RP 117. There were lights on and appeared to be movement in the house. 3RP 117. Someone answered and Byers told him they were looking for Fryk. 3RP 117-18. The person said he was there and called for him. 3RP 118.

A few seconds later Fryk came around the corner. 3RP 118. The person who answered the door and a second man who joined him were both very "loose and cordial." 3RP 119. When Fryk appeared he was putting a shirt or jacket on. 3RP 119. When he saw Byers, Fryk acknowledged him

and then put his head down. 3RP 119. Fryk's motor skills seemed normal. 3RP 119. He had no problem walking or putting the jacket on. 3RP 119.

Fryk approached the deputy and immediately turned around and put his hands behind his back. 3RP 119. Byers could only describe it as "a position to be handcuffed." 3RP 120. Fryk put his head down and put his hands behind his back. 3RP 120. It was a quick fluid motion; there were no issues with his motor skills. 3RP 120. Byers had not told him to do it. 3RP 120. He had just identified himself and asked if Fryk was Andrew. 3RP 120.

Byers then handcuffed him, based on Torgeson's report and for officer safety, given the number of people present. 3RP 121. Byers informed him he was under arrest for domestic violence. 3RP 121. It appeared that there was a party at the house. 3RP 122.

Fryk had a slight odor of intoxicants about him. 3RP 122. His eyes were watery and bloodshot. 3RP 122. Byers asked him the usual questions before searching him about whether he had anything on him that could injure him. 3RP 123. Fryk's responses were quick and clear. 3RP 123. Other than one slight stagger, Fryk did not have any issues with his motor skills when they walked from the house to the car. 3RP 139. Everything else was fluid and Byers did not have to assist him at all. 3RP 139. By "stagger," Byers meant a slight stumble. 3RP 140.

When Byers read him his *Miranda* rights, Fryk was paying attention and clearly understood what was going on. 3RP 140. His responses were appropriate. 3RP 141. At no point did he fall asleep or lose consciousness. 3RP 141. Nor did he look like he was going to. 3RP 141.

After explaining the rights, Byers asked Fryk if he was willing to talk to him. 3RP 141. Fryk responded, "About what?" 3RP 141. Byers told Fryk he wanted to talk about what happened between him and Torgeson. 3RP 142. Fryk again asked, "About what?" 3RP 142. Byers asked him why he hurt her. 3RP 142. Fryk responded, "I didn't mean to hurt her." 3RP 142.

Byers then asked Fryk why he turned around to be handcuffed when he first appeared. 3RP 143. Fryk responded that he knew Byers was there for him. 3RP 143. During their conversation, Fryk indicated that he had been under a lot of pressure, which had affected his anger issues. 3RP 144.

Fryk was very cooperative and a bit subdued. 3RP 145. Fryk's responses were appropriate. 3RP 145. At no point did he require clarification. 3RP 145. Fryk never seemed to not understand his questions. 3RP 145. Nor did Byers ever have any difficulty understanding Fryk. 3RP 145.

Fryk never had any motor function issues. 3RP 145. Byers worked the "graveyard shift" and had a lot of experience with intoxicated individuals.

3RP 146. Based on his training and experience, Byers noted that tolerance to alcohol was highly individual. 3RP 148. It could vary based on body size and tolerance or conditioning. 3RP 148. Byers would have put Fryk's intoxication level on a one to ten scale (with one being sober) in the two to three range. 3RP 148.

Byers spoke with some of the others present, and while they acknowledged being aware of what happened, they did not want to discuss the details. 3RP 149.

After taking Fryk to jail, Byers arranged to meet Torgeson that. 3RP 151. He took photographs of her. 3RP 151. The swelling was greater in person than what showed in the photos, which were presented to the jury. 3RP 152. It was obvious Torgeson had been struck in the face. 3RP 153. She could not talk much and was in pain. 3RP 153. Her condition was consistent with her description of the assault. 3RP 153. He was unable to take any pictures of the inside of her mouth because she could not open it far enough. 3RP 154.

Kirsten Bethke was Torgeson's best friend. 3RP 167. She testified that they were at the party when Fryk and Torgeson began arguing. 3RP 172. One of Fryk's friends had said something that made Fryk angry. 3RP 172. Fryk grabbed Torgeson, and during the struggle as Torgeson was defending

herself, a picture frame got broken. 3RP 172. Torgeson asked Bethke to take her back to her car. 3RP 173. Bethke drove Torgeson back to her car, which was at Fryk's house. 3RP 173.

When they got there, Fryk's mother came out and asked them to come in. 3RP 173. They went in and talked for about an hour. 3RP 173. Bethke went out to her car and got her phone, and saw that he boyfriend, who was still at the party, had called a number of times. 3RP 174. So Bethke went back to get him. 3RP 174. Torgeson decided to go with her to see if she could find the battery for her phone. 3RP 174. Bethke was concerned about Torgeson returning, but she said she would just run in and look for her battery and avoid Fryk. 3RP 174.

Ross came out when they arrived. 3RP 175. Ross got in the car and Torgeson went in to look for her battery. 3RP 175. She was gone for about four minutes. 3RP 175.

Torgeson came running back out holding her mouth and screaming. 3RP 176. She was crying and said to lock the doors. 3RP 176. Fryk came out and banged on the car. 3RP 176. As she was pulling out, Fryk was grabbing the door handles and banging on the windows. 3RP 177. Torgeson has two tooth chips in her hand. 3RP 178. Her retainer bar had also come loose. 3RP 178.

They went back to Fryk's house. 3RP 179. His mother came out again, wondering where Fryk was. 3RP 179. They talked to her for a few minutes on the front porch. 3RP 180. They left, and Bethke followed Torgeson to make sure she got home okay. 3RP 180

Fryk testified that he drank half a fifth bottle of whiskey and Coke before they went to Scott's house. 3RP 213. They bought beer on the way to Scott's house. 3RP 214. He drank beer at Scott's house while they played cards and beer pong. 3RP 216. Before Torgeson left, two of his friends arrived with a half-gallon bottle of whiskey. 3RP 216. One of his friends make a comment about Torgeson, and Fryk, allegedly poking fun at her, called her a slut. 3RP 217. He did not remember asking her to leave. 3RP 217. On a scale of one to ten, his intoxication level was a seven. 3RP 217. He had had 10 to 12 beers. 3RP 218.

Fryk thought Torgeson called to male friend to come pick her up. 3RP 218. Fryk did not want her to see him, and he grabbed her phone to see who was calling her. 3RP 218. When Fryk saw it was him, he threw the phone on the floor. 3RP 219. He did not notice that it broke. 3RP 219.

Fryk testified that he did not see Torgeson leave. 3RP 219. After a few minutes, he asked Ross where Torgeson was, and Ross told Fryk that Bethke had taken her to get her car. 3RP 219. After she left, Fryk, Ross, and

two others finished the bottle of whiskey. 3RP 220. He did not recall anything after that. 3RP 220. He only recalled “bits and pieces” of his conversation with the police. 3RP 221. He did not recall telling them that he had an anger problem. 3RP 222. He did have a problem with anger, though. 3RP 222. He tended to break things when he was angry. 3RP 222. Throwing the phone to the floor was consistent with what he did when he was angry. 3RP 222.

Fryk admitted that he knew they were police when he saw them. 3RP 224. He also admitted that he could have thrown the glass at Torgeson. 3RP 225.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY DECLINED TO GIVE AN INSTRUCTION ON VOLUNTARY INTOXICATION WHERE THERE WAS NO EVIDENCE SHOWING THAT FRYK’S INTOXICATION INTERFERED WITH HIS ABILITY TO FORM THE INTENT TO ASSAULT TORGESON WITH A GLASS.

Fryk argues that the trial court abused its discretion in refusing to instruct the jury on voluntary intoxication. This claim is without merit because although there was clearly evidence that Fryk was intoxicated, there was no evidence that in any way related his intoxication to his ability to form the intent to assault Torgeson with a glass.

A voluntary intoxication instruction allows consideration of the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the required mental state. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). A defendant "is entitled to a voluntary intoxication instruction *only if*" (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence that the drinking affected the defendant's ability to form the requisite intent or mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37, *review denied*, 119 Wn.2d 1024 (1992) (emphasis supplied). The evidence "must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996). Moreover, "[e]vidence 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.'" *Id.* (quoting *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010 (1992)).¹

The State conceded there was sufficient evidence of the first two

¹ See also RCW 9A.16.090: "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."

required prongs. 3RP 229. It argued that the third was missing however, 3RP 229, and the trial court agreed. 4RP 244.

On appeal Fryk argues that the trial court abused its discretion in failing to give a voluntary intoxication instruction. While he spends several pages discussing the evidence that proved the undisputed fact that Fryk was intoxicated when he threw the glass at Torgeson's face, he fails to point to any evidence that Fryk's intoxication prevented him from forming the intent to throw the glass at her.

Fryk cites an excerpt from the police interview with him at the scene of the assault, where he alleges that Fryk told the police he did not know what happened. Brief of Appellant, at 14. A review of the deputy's entire testimony does not support contention that this was evidence of an inability to form the requisite mental intent. To the contrary, the deputy thought that Fryk was being evasive when he commented that he did not know what happened.

Further, Fryk subsequently told the deputy that he did not mean to hurt Torgeson. 3RP 142. However, an intent to injure is not an element of second degree assault. The State was only required to show that the defendant acted knowingly, *i.e.*, that he was aware of facts, circumstances, or a result described by a statute defining an offense. *State v. Fryer*, 36 Wn.

App. 312, 316, 673 P.2d 881 (1983) (citing *State v. Strand*, 20 Wn. App. 768, 779, 582 P.2d 874 (1978)). Nothing in the evidence suggests that Fryk did not act intentionally when he picked up a glass from the counter and hurled it overhand at the head of Torgeson, who was standing a mere six feet away. Thus, while the claim that he did not intend to injure Torgeson is somewhat disingenuous, it certainly suggests that the act of throwing the glass was intentional.

Further, the deputy's testimony was also quite clear that Fryk, although intoxicated, was not seriously incapacitated in any way. During their conversation, Fryk's responses were appropriate. There was no point at which Fryk did not appear to understand what the deputy was saying. There was nothing the deputy even had to clarify. There was nothing Fryk said that the deputy had any difficulty understanding. 3RP 145. Indeed, when the deputy arrived, Fryk presented himself, and turned around to be cuffed. 3RP 119-20. When asked why he did that, Fryk responded that he knew Byers was there for him. 3RP 143. This evidence all supports the denial of the instruction. See *Gabryshak*, 83 Wn. App. at 254-55.

This case is indistinguishable from *Gallegos*, 65 Wn. App. at 239:

Although Karns and Locke testified that Gallegos had been drinking, and that the drinking made him lose his balance, spill things, and knock things over, there was no evidence presented that the drinking impaired Gallegos's ability to acquire the intent to engage in sexual intercourse with T.G. by

forcible compulsion. Gallegos neither testified, nor offered expert testimony or other evidence indicating that his drinking prevented him from acquiring the requisite intent or that he lacked awareness of his actions at the time of the incident in question. We therefore conclude that Gallegos was not entitled to the proposed voluntary intoxication instruction.

Although Fryk testified that he had no recollection of the evening, that fact, accepting it as true for the purpose of argument, sheds no light on his state of mind at the time of the assault. All it means is that after the fact he could not recall what happened. The other evidence all suggests a volitional, intentional act by a drunk, angry, young man. That he was drunk and angry, did not, standing alone, entitle Fryk to a voluntary intoxication instruction.

On appeal, Fryk attempts to bootstrap his trial testimony that he did not recall what happened into a conclusion that “he was not aware of what he was doing.” There is no such testimony in the record, however. Nor is there any evidence from which such an inference can be drawn. Plainly a lack of memory, without more, cannot equate to a lack of intent at the time an act was committed.

Finally, Fryk asserts that the trial court’s decision “relieved the state of the burden of disproving beyond a reasonable doubt the existence of the defendant’s intoxication defense.” Brief of Appellant at 16 (*citing State v. Carter*, 31 Wn. App. 572, 643 P.2d 916 (1982)). Fryk misperceives the nature of evidence of voluntary intoxication. *Carter* itself notes that

voluntary intoxication is not a true affirmative defense. *Carter*, 31 Wn. App. at 575. In *Coates*, the Supreme Court explained that RCW 9A.16.090 is an evidentiary rule, not a defense. As such it permits (but does not require) a jury to “consider” evidence of voluntary intoxication. As such the so-called “defense” itself is not something that is proved or disproved by any standard:

The State always has the burden of proving the defendant acted with the necessary culpable mental state. Generally, evidence of intoxication is relevant to this question, but it is inaccurate to think of intoxication as forming some element that the State must negate, just as it would be erroneous to hold that the State has the burden of proving or disproving circumstantial evidence.

Coates, 107 Wn.2d at 890.

Fryk fails to point to any evidence that showed that his intoxication prevented him from forming the intent necessary to throw the glass at Torgeson. It follows that the trial court did not abuse its discretion in refusing a voluntary intoxication instruction.

B. THE RECORD DOES NOT SUPPORT FRYK’S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN HER PRESENTATION OF HIS SO-CALLED INTOXICATION DEFENSE.

Fryk next claims that counsel was ineffective for failing to present further evidence in support of his quest for a voluntary intoxication instruction. This claim is without merit because the record does not show that such further evidence was available.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Fryk asserts that his counsel should have presented expert testimony regarding the effects of intoxication on his ability to form the intent to assault Torgeson. The record utterly lacks any evidence that any expert would have testified to anything that would have been helpful to Fryk's case, however. He thus fails to show either deficient performance or prejudice.

Fryk also cites to the prosecutor's supposed statement that there were witnesses whose testimony would have supported the giving of the voluntary intoxication instruction. Brief of Appellant at 19. It seems apparent from the passage that the prosecutor was speaking hypothetically at the time. *See* 3RP 237. She was suggesting that if some other witness had come in to testify affirmatively about how Fryk's intoxication affected his mental state, the instruction might have been warranted. Her comment cannot be read as establishing that any of these other witnesses *would* have given testimony that would have entitled Fryk to an instruction. Absent such record evidence, Fryk fails to prove his claim.

C. THE EVIDENCE WAS SUFFICIENT TO PROVE THE “FACTURE OF ANY BODILY PART” WHERE FRYK THREW A GLASS AT TORGESON’S FACE HARD ENOUGH TO CHIP ONE OF HER MOLARS AND BREAK OFF ONE-QUARTER OF A SECOND ONE.

Fryk next claims that the trial court erred in denying his motion to arrest judgment on the assault count because the State failed to show that the assault on Torgeson resulted in a fracture. This claim is without merit because Torgeson and Bethke both testified that the assault broke her tooth in two places.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the

prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The same standards apply upon review of the denial a motion to arrest judgment under CrR 7.4. *See State v. Ceglowski*, 103 Wn. App. 346, 349, 12 P.3d 160 (2000) (*citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

As charged, *see* CP 1-9, the State had to prove that Fryk was guilty of second-degree assault:

A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:

- (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm;

RCW 9A.36.021(1). "Substantial bodily harm" is defined under the criminal code:

"Substantial bodily harm" means bodily injury ... which causes a fracture of any bodily part;

RCW 9A.04.110(4)(b). “Bodily injury” is also defined:

Bodily injury ... means physical ... injury ...

RCW 9A.04.110(4)(a)

Following these statutory definitions, the State thus had to prove that Fryk assaulted Torgeson and thereby recklessly inflicted a physical injury that caused the fracture of any bodily part. Fryk maintains only that the evidence was insufficient to show the “fracture” of a bodily part.

Fryk claims that the Legislature intended “more than just a chipped tooth” when it defined second-degree assault. However, if a statute's plain language and ordinary meaning is clear, this Court will look only to the statute's language to determine intent. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). Only if the statutory language is susceptible to more than one reasonable interpretation, may the Court resort to other indicators of legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

Here, Fryk suggests no other evidence of legislative intent with regard to the term “fracture.” In any event, such resort would be inappropriate since in context, the meaning is clear and unambiguous: substantial bodily harm is the fracture of *any* bodily part. Here a tooth is clearly a bodily part. Fracture is not susceptible of ambiguity, either. The term is defined by Merriam-

Webster:²

1: the result of fracturing: break;

2a: the act or process of breaking or the state of being broken;
especially: the breaking of hard tissue (as bone);

A broken tooth meets both of these definitions. Notably, a tooth is clearly “hard tissue.” *See also State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999) (noting in *dicta* that a broken tooth would meet the definition of a fracture to a bodily part).

Fryk would quibble that the two pieces of her teeth that Torgeson spit out were mere chips. Nothing in the statute indicates any intent to limit the size of the fracture in question. Following this logic, would a minor break of the little toe not be a fracture? How big do the pieces have to be before broken-off body parts may be deemed to be “fractured”?

Fryk offers no guidance on these questions. Nor is there any evidence that the legislature wished to wade into such hair-splitting. The evidence at trial shows that Fryk hurled a glass at Torgeson’s face with enough force to break off two pieces of her molars and to cause her glued-on retainer to come loose. She went to both the emergency room and her dentist. On the bottom tooth about a quarter of the tooth was gone. She would be unable to have it repaired until her wisdom teeth came out. The jury found this evidence was

² *See* Merriam-Webster OnLine Dictionary,
<http://www.merriam-webster.com/dictionary/fracture> (last accessed Dec. 14, 2009).

sufficient to prove a “fracture.” Fryk presents no basis for overturning its verdict. The trial court’s decision not to disturb that verdict should be affirmed.

Finally, Fryk’s citation to a New York insurance case sheds little light on the issue. That case, *Epstein v. Butera*, 155 A.D.2d 513, 547 N.Y.S.2d 374 (1989), is contrary to the holding of another department of the same court, *Kennedy v. Anthony*, 195 A.D.2d 942, 600 N.Y.S.2d 980 (1993). Applying the relevant Washington rules of statutory construction, *Kennedy* is more persuasive.

Epstein makes no effort to determine whether the term “fracture” is ambiguous. Instead, it proceeds directly to the legislative intent, which it found was to reduce the number of personal injury lawsuits. It therefore engrafted judicial gloss on the term, and without indicating any principled parameters, concluded that a “chipped” tooth did not come within the meaning of “fracture.” *Epstein*, 155 A.D.2d at 515.

The *Kennedy* court, on the other hand, engaged in the analysis required under our precedent: it first essentially determined whether the term was ambiguous:

[I]t is noteworthy that the Legislature did not ... choose to limit the scope of the provision in another way – such as by requiring that the fracture be of a bone, or of a major bone – although it could easily have done so. It is entirely

appropriate to refer to a tooth or any other bony, hard material as being fractured. Nothing brought to our attention indicates that a fractured tooth was not intended by the Legislature to come within the definition of “a fracture.”

Kennedy, 195 A.D.2d at 943.

Furthermore, even if the term could be deemed ambiguous, there is no evidence that our legislature was intending to limit criminal liability for assaults of the gravity of what Fryk did to Torgeson when it enacted the criminal code. Nor does Fryk identify any policy reason to reduce his significant assault to a misdemeanor crime. As such, even accepting *Epstein*'s questionable methods of statutory construction, nothing in that case would justify reaching the same conclusion in a very different area of the law. Fryk's conviction should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Fryk's conviction and sentence should be affirmed.

DATED December 15, 2009.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R. Hauge', written over the printed name of Russell D. Hauge.

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