

NO. 47193-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MISTY CROSSLAND

Appellant.

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

The Honorable James Lawler, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
Issues Presented on Appeal.....	1
B. <u>STATEMENT OF THE CASE</u>	2
C. <u>ARGUMENT</u>	5
1. MS. CROSSLAND WAS DENIED HER STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.....	5
a. <u>Standard of Review</u>	5
b. <u>Crossland was denied her state constitutional right to a unanimous verdict because the jury considered two distinct acts to establish assault in the third degree and the court did not provide a unanimity instruction.</u>	6
2. CROSSLAND WAS DENIED HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.....	10
a. <u>Standard of Review</u>	10
b. <u>Defense counsel unreasonably failed to request a jury unanimity instruction.</u>	11

TABLE OF CONTENTS

	Page
3. APPELLANT’S SIXTH AMENDMENT RIGHT TO A DEFENSE WAS VIOLATED WHEN THE TRIAL COURT REFUSED TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION.....	12
a. <u>Crossland had the Sixth Amendment right to have the jury instructed on her theory of defense.</u>	13
b. <u>Substantial evidence supported a voluntary intoxication instruction.</u>	15
c. <u>Crossland’s conviction must be reversed and remanded for a new trial.</u>	18
4. THE STATE FAILED TO PROVE CROSSLAND ASSAULTED A POLICE OFFICER.....	18
a. <u>Overview Burden of Proof</u>	18
b. <u>RCW 9A.36.031(1)(g), Assault in the third degree against a police officer</u>	19
c. <u>Insufficient evidence of intent to assault</u>	20
D. <u>CONCLUSION</u>	21

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>In re Personal Restraint Petition of Stockwell</i> , 179 Wn.2d 588, 316 P.3d 1007 (2014).....	7
<i>State v. Agers</i> , 128 Wn.2d 85, 904 P.2d 715 (1995).....	14
<i>State v. Brown</i> , 147 Wn.2d 330, 58 P.3d 889 (2002).....	20
<i>State v. Brown</i> , 140 Wn.2d 456, 998 P.2d 321(2000).....	20
<i>State v. Byrd</i> , 125 Wn.2d 707, 887 P.2d 396 (1995).....	20
<i>State v. Coleman</i> , 159 Wn.2d 509, 150 P.3d 1126 (2007).....	6-10, 12
<i>State v. Eastmond</i> , 129 Wn.2d 497, 919 P.2d 577 (1996).....	20
<i>State v. Elmore</i> , 155 Wn.2d 758, 123 P.3d 72 (2005).....	6
<i>State v. Gabryschak</i> , 83 Wn.App. 249, 921 P.2d 549 (1996).....	15
<i>State v. Gallegos</i> , 65 Wn.App. 230, 828 P.2d 37, <i>rev. denied</i> , 119 Wn.2d 1024 (1992).....	15
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Hackett,
64 Wn.App. 780, 827 P.2d 1013 (1992).....17

State v. Hanson,
59 Wn.App. 651, 800 P.2d 1124 (1990)..... 14

State v. Homan,
181 Wn.2d 102, 330 P.3d 182 (2014).....19

State v. King,
75 Wn. App. 899, 878 P.2d 466 (1994).....7

State v. Kirwin,
165 Wn.2d 818, 203 P.3d 1044 (2009).....5

State v. Kitchen,
110 Wn.2d 403, 409, 756 P.2d 105 (1988).....7

State v. Kruger,
116 Wn.App. 685, 67 P.3d 1147,
rev. denied, 150 Wn.2d 1024 (2003).....14, 17

State v. Kyllo,
166 Wn.2d 856, 215 P.3d 177 (2009).....10-12

State v. Nguyen,
165 Wn.2d 428, 197 P.3d 673 (2008).....6

State v. Powell,
150 Wn. App. 139, 206 P.3d 703 (2009).....11, 12

State v. Redmond,
150 Wn.2d 489, 78 P.3d 1001 (2003).....14

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<i>State v. Stevens</i> , 158 Wn.2d 304, 143 P.3d 817 (2006).....	15
<i>State v. Thomas</i> , 123 Wn.App. 771, 98 P.3d 1258 (2004), <i>rev. denied</i> , 154 Wn.2d 1026 (2005).....	14
<i>State v. Williams</i> , 132 Wn.2d 248, 937 P.2d 1062 (1997).....	14
<i>State v. Williams</i> , 159 Wn.App. 298, 244 P.3d 1018 (2011).....	20
<i>State v. Zillyette</i> , 178 Wn.2d 153, 307 P.3d 712 (2013).....	5

FEDERAL CASES

<i>Apodaca v. Oregon</i> , 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).....	6
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	18, 19
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	18
<i>Crane v. Kentucky</i> , 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986).....	13

TABLE OF AUTHORITIES

Page

FEDERAL CASES

<i>United States v. Gaudin</i> , 515 U.S. 506, 115 S. Ct. 2310, 132 L.Ed. 2d 444 (1995).....	18, 19
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S.Ct. 1727, 164L.Ed.2d 503 (2006).....	13
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	10
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	18

STATUTES, RULES AND OTHERS

RAP 2.5(a)(3).....	5, 10
U.S. Const. Amend VI.....	6, 11, 13
U.S. Const. amends. XIV.....	11, 13
Wash. Const. art. I, § 3.....	13
Wash. Const. art. I, § 21.....	6, 7
Wash. Const. art. I, § 22.....	6, 7, 13
RCW 9A.16.090.....	14
RCW 9A.36.031.....	19

A. ASSIGNMENTS OF ERROR

1. Appellant was denied her constitutional right to jury unanimity by the introduction of two separate assaults without an election or a jury unanimity instruction.
2. Appellant was denied her constitutional right to the effective assistance of counsel by counsel's failure to request a jury unanimity instruction where the jury was presented with two distinct acts of assault and no election by the prosecutor.
3. Appellant was denied her constitutional right to present a defense by the trial court's denying appellant her request for a voluntary intoxication jury instruction.
4. The state failed to prove beyond a reasonable doubt that appellant intended to assault an officer.

Issues Presented on Appeal

1. Was appellant denied her constitutional right to jury unanimity by the introduction of two separate assaults without an election or a jury unanimity instruction?
2. Was appellant denied her constitutional right to the effective assistance of counsel by counsel's failure to request a jury unanimity instruction where the jury was presented with two distinct acts of assault and no election by the prosecutor?
3. Was appellant denied her constitutional right to present a defense by the trial court's denial of her request for a voluntary intoxication jury instruction where there was overwhelming evidence of extreme intoxication?
4. Did the state fail to prove beyond a reasonable doubt that appellant intended to assault an officer where the evidence demonstrated appellant trying to free herself from officer

Phipps?

B. STATEMENT OF THE CASE

Officers Phipps and Lowrey responded to a call for assistance removing a woman, Misty Crossland, from the male caller's apartment. RP 17. When police arrived, the man informed the police that he was having a third date with Ms. Crossland whom he met online. RP 19-19. Ms. Crossland went to the man's house at his request, bringing him dinner at his request and also bringing Crossland's young son. RP 19, 56. The man offered Crossland four shots of Seagram's Seven and wanted to have sex with her. RP 19, 56-60. Crossland refused to have sex because the man did not have any protection. RP 60. Crossland wanted to stay the night on the floor while her son slept on the couch because she was too drunk to drive. RP 60-61. The man refused to permit Crossland to stay and offered to call a cab. When Crossland refused the cab, the man called the police. RP 17, 20.

Officer Phipps described Crossland as unsteady on her feet, highly intoxicated, angry and yelling RP 20, 33. Officer Lowrey described Crossland as hysterical, irrational and irate. RP 49, 51. Phipps offered to drive Crossland and her son home and Lowrey offered to pick

up the sleeping 7 year old child and carry him to the police car. RP 21. During the process of Lowrey trying to pick up the child in the small apartment, Phipps pulled Crossland out of the apartment to allow Lowrey space to carry the child. RP 22. Phipps grabbed or shoved Lowrey by the arm or elbow at least five times while removing her from the apartment and pushing her towards the police car. RP 22-25.

Phipps described the scene leaving the apartment with Crossland as follows: "I grabbed her by the arm or elbow and pulled her out of the living room...I ended up having to remove the defendant out of the front door, basically pull her out of the front door..." RP 22-23. While walking Crossland down the stairs, Phipps "got a hold of the back of her jacket. I know she's intoxicated going down the stairs. I felt like if she'd slip I'd be able to hold onto her." RP 24. Once Phipps and Crossland were on the sidewalk, Crossland turned and yelled at the police and man from the apartment, "So I pushed her right shoulder towards the car, turned her around and pushed her towards the car." RP 25 Several steps later, Crossland turned around again to yell at the man. Phipps, "grabbed her right shoulder again to move her forward or redirect her to the car." Phipps testified that at "that point I saw her right arm come in a wide arc towards my head and shoulder area....I was able to bring my left arm

up, kind of blocked the blow, and then I just grabbed her in a head lock and we spun down, kind of like a judo or wrestling move, spun down to the ground. Placed handcuffs at that point.” RP 25 RP 25.

Crossland felt like the police treated her like a criminal even though she did nothing wrong other than using poor judgment drinking with the man at the apartment. RP 74. Crossland described Phipps as condescending, belittling, and angry towards her. RP 74-75. Lowrey did not see Crossland strike Lowrey but described what he could hear and see in the dark from 20-30 feet away as “yanking, pulling, cussing, screaming” and a “wild swing, not a deliberate punch”. RP 55.

Crossland and the police have different versions of the events once on the street. Crossland testified that she had gathered a computer her son used to play Minecraft and a few other belongings and asked Phipps if she could put her computer in her car before being driven home. RP 62, 64. After Crossland put her computer in her car, she demonstrated to Phipps that the man in the apartment never struck her but had poked her in the chest. When Crossland demonstrated the chest poke on Phipps, he threw her to the ground and arrested her. RP 67. Meanwhile, the man from the apartment asked if it was really necessary to arrest Crossland. RP 64-65.

Phipps had no memory of Crossland retrieving her wallet and computer and denied that Crossland poked him in the chest, but admitted that at the hospital, Crossland asked Phipps if it hurt when she poked him in the chest. RP 35-36, 78, 83. Crossland never intended to strike Phipps. RP 69, 75-76.

C. ARGUMENTS

1. MS. CROSSLAND WAS DENIED HER STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT.

a. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 161, 307 P.3d 712 (2013). A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3)1; *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *Kirwin*, 165 Wn.2d at 823. An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and

¹ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see Russell*, 171 Wn.2d at 122. This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

- b. Crossland was denied her state constitutional right to a unanimous verdict because the jury considered two distinct acts to establish assault in the third degree and the court did not provide a unanimity instruction.

An accused person has a state constitutional right to a unanimous verdict. Wash. Const. art. I, §§ 21, 22;² *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

In cases in which the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity, necessitates (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt. *Id.*

This requirement “protect[s] a criminal defendant’s right to a

² The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184(1972).

unanimous verdict based on an act proved beyond a reasonable doubt.” *Id.* Failure to provide a unanimity instruction violates the state constitutional right to a unanimous jury. Wash. Const. art I, §§ 21, 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (*abrogated on other grounds*, *In re Personal Restraint Petition of Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014)).

Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice. *Coleman*, 159 Wn.2d at 512. The absence of a unanimity instruction creates “the possibility that some jurors relied on one act or incident and some relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Coleman*, 159 Wn.2d at 512. Such a possibility creates the risk that jurors will improperly aggregate evidence of multiple acts in convicting for a single count. *Id.*

Failure to provide a unanimity instruction requires reversal when the jury relies on multiple acts of to prove a single charge. *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994). The rationale for requiring a jury unanimity instruction “protections in multiple act cases stems from possible confusion as to which of the acts a jury has used to determine a

defendant's guilt, where the evidence tends to show two separate commissions of a crime.” *King*, 75 Wn. App. at 902.

In *King*, the court concluded that the defendant’s possession constituted multiple acts rather than an ongoing course of conduct. *Id.* In reaching this conclusion, the court noted that the acts occurred “at different times, in different places, and involv[ed] two different containers.” *King*, 75 Wn. App. at 903. Additionally, one of the alleged instances of possession was constructive and the other was actual. *Id.*

The presumption of prejudice is only overcome if no rational juror could have a reasonable doubt as to any incident for which evidence was presented. *Coleman*, 159 Wn.2d at 510, 512. Interestingly, in this case the state only presented evidence of a single act of assault- the swinging arm, but the defendant herself presented evidence of a second assault – poking finger in chest, against the same officer. RP 25-28, 56, 75-76. Thus, even though through no fault of the prosecutor, the jury, as in *King* (with possession), was presented with two distinct alleged acts of assault. *King*, 75 Wn. App. at 903. Even though the state did not present evidence of two assaults, to protect Crossland’s right to jury unanimity the court was required to provide a unanimity instruction.

After polling the jury, counsel for Crossland informed the court

that there were jurors who thought the poke was enough for an assault and others believed the swing was the assault. RP 132. Counsel did not move for a mistrial or mention the lack of jury unanimity issue. *Id.*

Regardless of the fact that the error in failing to obtain a jury instruction rested with the defense, the lack of instruction nonetheless, created “the possibility that some jurors relied on one act or incident and some relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Coleman*, 159 Wn.2d at 512. In this case, the possibility became a probability when the jurors informed counsel that they did in fact rely on different acts to find guilt. RP 132.

The jury returned a verdict that was not unanimous on all of the elements which prejudiced Crossland’s right to unanimity. *Id.*; CP 11-23.

The presumption of prejudice is not overcome in this case because a rational juror could have had reasonable doubt as to either alleged act of assault. *Coleman*, 159 Wn.2d at 510. The evidence of each act was roughly equivalent. In fact Lowrey testified that Crossland took a “wild swing, not a deliberate punch” RP 55. And Crossland denied swinging at Phipps., but admitted to poking Phipps in a demonstration of what occurred between herself and the man at the apartment. Accordingly a rational juror could have had reasonable doubt regarding either act.

The jury could have aggregated the evidence against Crossland, rather than unanimously finding that she had committed a single act of assault. *Coleman*, 159 Wn.2d at 512. The court's failure to provide a unanimity instruction denied Crossland her right to a unanimous verdict. Id.

The error in this case was not harmless. A conviction will not be upheld unless the error is harmless beyond a reasonable doubt. The presumption of error is only overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Coleman*, 159 Wn.2d at 512. Here, the jurors indicated they relied on separate acts of assault to find guilt, thus rational jurors did have reasonable doubt as to the incidents alleged. Accordingly, Crossland's assault conviction must be reversed. Id.

2. CROSSLAND WAS DENIED HER SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

a. Standard of Review

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person.

Kyllo, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668,687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend VI; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Id.*

b. Defense counsel unreasonably failed to request a jury unanimity instruction.

To be minimally competent, an attorney must research the relevant law. *Kyllo*, 166 Wn.2d at 862. Defense counsel provided prejudicial ineffective assistance of counsel when he fails to research relevant law and offers a flawed jury instruction (counsel argued too high an injury standard to justify self-defense). *Kyllo*, 166 Wn.2d at 868-70. Defense counsel provides ineffective assistance by failing to propose a jury instruction necessary to his/her client's defense. *State v. Powell*, 150 Wn. App. 139, 156-158, 206 P.3d 703 (2009) (failure to argue "reasonable belief was prejudicial not tactical, where defense presented evidence of

consent in rape case).

Here, the jury received evidence of two distinct instances of alleged assault. RP 25-28, 56, 75-76. Crossland's attorney failed to propose a unanimity instruction informing the jury that it must unanimously find that Crossland committed one act of assault beyond a reasonable doubt. Counsel's failure to propose a unanimity instruction constituted deficient performance. The failure fell below an objective standard of reasonableness and had no tactical justification. *Kyllo*, 166 Wn.2d at 862; *Powell*, 150 Wn. App. at 156-158. By not proposing a unanimity instruction, Crossland's attorney neglected to protect his client's constitutional right to a unanimous verdict. *Coleman*, 159 Wn.2d at 510.

Defense counsel's deficient performance prejudiced Crossland because absent a unanimity instruction, the jury likely aggregated the evidence of multiple alleged acts in finding Crossland guilty. *Id.* This permitted conviction upon less than proof beyond a reasonable doubt that Crossland had committed a single act of assault. There is a substantial likelihood that counsel's deficient performance affected the verdict. *Kyllo*, 166 Wn.2d at 862. Accordingly, Crossland's conviction assault must be reversed. *Id.*

3. APPELLANT'S SIXTH AMENDMENT
RIGHT TO A DEFENSE WAS VIOLATED
WHEN THE TRIAL COURT REFUSED
TO INSTRUCT THE JURY ON
VOLUNTARY INTOXICATION.

At trial, the jury heard testimony that Crossland had been drinking before the assault(s) - at least 4 shots of Seagram's Seven, that she was unsteady on her feet, highly intoxicated, screaming, unable to understand reason, and too drunk to drive. RP 20, 26-27, 49, 51, 59, 61. Despite adequate evidence, the trial court refused to instruct the jury on voluntary intoxication. Crossland's conviction must be reversed because the failure to instruct the jury on voluntary intoxication violated her constitutional right to present a defense.

- a. Crossland had the Sixth Amendment right to have the jury instructed on her theory of defense.

The federal and state constitutions provide the accused the right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). "Whether rooted in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes*, 547 U.S. at 324 (*quoting*

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)). As part of this constitutional right, the defendant is entitled to have the jury instructed on her theory of the case, and the trial court's failure to do so is reversible error. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1062 (1997); *State v. Agers*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

If supported by evidence, a proposed instruction should be given if it properly states the law, is not misleading, and allows the party to argue her theory of the case. *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw reasonable inferences in the light most favorable to the requesting party. *State v. Hanson*, 59 Wn.App. 651, 656-57, 800 P.2d 1124 (1990).

A "voluntary intoxication" instruction allows the jury to consider evidence of intoxication in deciding whether the State proved that the defendant acted with the requisite intent. *State v. Thomas*, 123 Wn.App. 771, 781, 98 P.3d 1258 (2004), *rev. denied*, 154 Wn.2d 1026 (2005); RCW 9A.16.090. Unlike diminished capacity, a voluntary intoxication defense does not necessitate expert testimony because the effects of alcohol are commonly known and the jurors can draw reasonable inferences from the evidence presented. *Thomas*, 123 Wn.App. at 781-82; *State v. Kruger*, 116

Wn.App. 685, 692-93, 67 P.3d 1147, *rev. denied*, 150 Wn.2d 1024(2003). Accordingly, where the charged crime contains crime a mens rea element and the defendant has offered evidence that she was intoxicated at the time of the crime's commission, the defendant is entitled to have the court instruct the jury on voluntary intoxication. *State v. Stevens*, 158 Wn.2d 304, 310, 143 P.3d 817(2006).

b. Substantial evidence supported a voluntary intoxication instruction.

At the conclusion of the case, Crossland requested a voluntary intoxication jury instruction citing the substantial evidence that she was under the influence of alcohol at the time of the alleged assaults and that the alcohol impacted her ability make decisions and form the required mental state for assault. RP 86-89. Relying on *State v. Gabryschak*, 83 Wn.App. 249, 921 P.2d 549 (1996), the trial court denied the jury instruction. The court stated that the instruction was not appropriate because Crossland knew her address, was coherent enough to decide she could not drive, knew that she was being arrested by officers, and she stated did not need help going down the stairs (even though she fell) and she left the apartment voluntarily. RP 88-89.

These reasons are both inadequate and incorrect. Under *State v.*

Gallegos, 65 Wn.App. 230, 237, 828 P.2d 37, *rev. denied*, 119 Wn.2d 1024 (1992), the court must provide a voluntary intoxication instruction when (1) the charged offense has a particular mental state as an element, (2) there is substantial evidence the defendant was drinking and/or using drugs, and (3) evidence the drinking or drug use affected the defendant's ability to acquire the required mental state.

First, Crossland rejected the officer's help to walk downstairs, but her feet slipped out from under her and she fell down the stairs, apparently too unsteady to safely navigate the stairs. RP 20-22, 24. Second, Phipps, forcibly escorted, Crossland out of the apartment and maintained a grasp on her at all times because Crossland did not want to leave and kept turning back toward the apartment. RP 22-27. Third, the officers testified that Crossland was incoherent, screaming, unreasonable, and swinging wildly. RP 23, 26-27, 49, 51, 55.

Crossland established the criteria for giving the voluntary intoxication instruction because: (1) assault contains a mens rea; (2) there is substantial evidence that Crossland was drinking heavily; and (3) there was substantial evidence that the drinking affected the Crossland's ability to acquire the required mental state. There was also evidence that Crossland was highly intoxicated during the entire interaction with the

police including the alleged assaults.

The court erred in concluding that there was insufficient evidence Crossland's intoxication impacted her ability to form an intent. Crossland was not in her right mind and was showing completely irrational, incoherent thought and behavior. The evidence of intoxication was more than ample and therefore the intoxication instruction should have been provided to the jury to decide, not the trial court, whether there was sufficient evidence to show Crossland's intoxication affected her ability to form the mental states at issue.

In similar circumstances, where the defendant presents sufficient evidence of intoxication to warrant a jury instruction, appellate courts in Washington have found the failure to issue or request a voluntary intoxication instruction to be reversible error. For example, in *Kruger*, the Court found counsel's failure to request a voluntary intoxication instruction was deficient performance requiring reversal because the jurors could have reasonably concluded the defendant's intoxication prevented him from forming the intent to "head butt" a police officer. *Kruger*, 116 Wn.App. at 693-95. Similarly, in *State v. Hackett*, 64 Wn.App. 780, 827 P.2d 1013 (1992), where the defendant was prosecuted for shooting a police officer, the court found evidence that he was intoxicated on cocaine

at the time of the shooting warranted the issuance of a voluntary intoxication instruction, and reversed the conviction. *Hackett*, 64 Wn.App. at 786-87.

c. Crossland's conviction must be reversed and remanded for a new trial.

Crossland could not argue one of her theories of the case without a voluntary intoxication instruction. If properly instructed, however, the jury could have concluded that Crossland's intoxication impaired her ability to form the requisite mental intent to commit assault. The trial court's failure to instruct the jury on voluntary intoxication was reversible error, and Crossland's conviction for assault must be reversed and remanded for a new trial.

4. THE STATE FAILED TO PROVE
CROSSLAND INTENDED TO ASSAULT
OFFICER PHIPPS.

The state failed to prove that Crossland intended to assault officer Phipps.

a. Overview Burden of Proof.

The Fourteenth Amendment provides a criminal defendant may only be convicted if the government proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *United*

States v. Gaudin, 515 U.S. 506, 510, 115 S. Ct. 2310, 132 L.Ed. 2d 444 (1995); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Due process “indisputably entitles[s] a criminal defendant to ‘a . . . determination that he is guilty of every element of the crime beyond a reasonable doubt.’” *Apprendi*, 530 U.S. at 476-77 (quoting *United States v. Gaudin*, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995)).

Evidence is sufficient if, when viewed in a light most favorable to the State, it permits any rational trier of fact to find the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). A claim of insufficient evidence admits the truth of the evidence and all reasonable inferences that can be drawn from that evidence. *Homan*, 181 Wn.2d at 106.

- b. RCW 9A.36.031(1)(g), Assault in the third degree against a police officer.

Under RCW 9A.36.031(1)(g), to prove assault in the third degree as charged and prosecuted in this case, the state was required to prove:

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

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault;

Id. Specific intent is an essential element to all forms of assault. *State v. Eastmond*, 129 Wn.2d 497, 500, 504, 919 P.2d 577 (1996), *overruled on other grounds by State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). To commit assault, a person must have intended to cause bodily harm or to create an apprehension of bodily harm. *State v. Williams*, 159 Wn.App. 298, 307, 244 P.3d 1018 (2011), (citing, *State v. Byrd*, 125 Wn.2d 707, 718, 887 P.2d 396 (1995); *State v. Brown*, 140 Wn.2d 456, 465-67, 998 P.2d 321(2000)). The issue in this case is the lack of sufficient evidence of intent to assault.

c. Insufficient evidence of intent to assault.

Here, the state presented evidence that Crossland was highly intoxicated and irrational and that she struggled, and tried to get Phipps to release her and in the process swung wildly. RP 23, 26-27, 49, 51, 55.

Lowrey saw Crossland miss hitting Phipps, but Phipps testified that even though Crossland's arm passed over him, he put up his arm and she made contact on his arm in the middle of the wild swing. RP 37-38, 55, Regardless of whether or not Crossland made contact, she was only trying to free herself from Phipps, not trying to assault him. RP 69. Reviewing

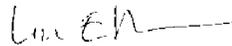
this evidence in the light most favorable to the state, it is insufficient to establish an intent to assault. The remedy is reversal and dismissal with prejudice.

D. CONCLUSION

Ms. Crossland respectfully requests this Court reverse her conviction and remand for a new trial.

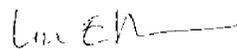
DATED this 28th day of April 2015

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov a true copy of the document to which this certificate is affixed, on April 28, 2015. Service was made by electronically to the prosecutor and Misty 1013 Scammon Creek Rd Apt # K6 Centralia, WA 98531 by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

ELLNER LAW OFFICE

April 28, 2015 - 9:32 AM

Transmittal Letter

Document Uploaded: 4-471931-Appellant's Brief.pdf

Case Name: State v. Crossland

Court of Appeals Case Number: 47193-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Lise Ellner - Email: liseellnerlaw@comcast.net

A copy of this document has been emailed to the following addresses:

appeals@lewiscountywa.gov

jespinoza@co.clallam.wa.us