

No. 47193-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**MISTY CHERIE CROSSLAND,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

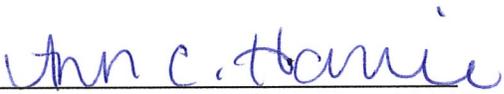
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**Respondent's Brief**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITES .....iii

I. ISSUES ..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT ..... 8

    A.  CROSSLAND CANNOT RAISE THE ISSUE OF BEING DENIED HER STATE CONSTITUTIONAL RIGHT OF A UNANIMITY INSTRUCTION BECAUSE A UNANIMITY INSTRUCTION WAS NOT APPROPRIATE ..... 8

        1.  Standard Of Review ..... 9

        2.  Crossland Has Not Shown That The Alleged Error Is Manifest..... 9

            a.  A unanimity instruction was not appropriate because the alleged poke and swing could have been construed as one continuing course of action ..... 11

    B.  CROSSLAND RECEIVED EFFECTIVE ASSISTANCE FROM HER ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS ..... 13

        1.  Standard Of Review ..... 13

        2.  Crossland's Attorney Was Not Ineffective During His Representation Of Crossland Throughout The Jury Trial ..... 14

    C.  APPELLANT'S SIXTH AMENDMENT RIGHT TO A DEFENSE WAS NOT VIOLATED BECAUSE THE TRIAL COURT PROPERLY DENIED THE JURY INSTRUCTION ON VOLUNTARY INTOXICATION..... 17

        1.  Standard Of Review ..... 17

2.	The Voluntary Intoxication Jury Instructions Were Not Appropriate In This Case .....	18
3.	Crossland's Mens Rea Was Not Effected By Her Intoxication .....	19
4.	The Trial Court Was Correct In Denying The Voluntary Intoxication Jury Instruction.....	20
D.	THERE IS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION FOR ASSAULT IN THE THIRD DEGREE.....	22
1.	Standard Of Review .....	22
2.	The State Is Required To Prove Each Element Beyond A Reasonable Doubt.....	23
IV.	CONCLUSION .....	26

## TABLE OF AUTHORITIES

<i>Safeco Ins. Co. v. McGrath</i> , 63 Wn. App. 170, 817 P.2d 861 (1991).....	7, 18
<i>State v. Ager</i> , 128 Wn.2d 85, 904 P.2d 715 (1995).....	18
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990) .....	23
<i>State v. Coleman</i> , 159 Wn.2d 509, 150 P.3d 1126 (2006) .....	16
<i>State v. Colquitt</i> , 133 Wn. App. 789, 137 P.3d 893 (2006).....	23
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	23, 24
<i>State v. Douglas</i> , 128 Wn. App. 555, 1116 P.3d 1012 (2005).....	17
<i>State v. Edwards</i> , 169 Wn. App. 561, 280 P.3d 1152 (2012) .....	9
<i>State v. Fiallo-Lopez</i> , 78 Wn. App. 717, 899 P.2d 1294 (1995).....	12
<i>State v. Gabryschak</i> , 83 Wn. App. 249, 921 P.2d 549 (1996)...	7, 18
<i>State v. Gallegos</i> , 65 Wn. App. 230, 828 P.2d 37 (1992).....	20, 21
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	23
<i>State v. Handran</i> , 113 Wn.2d 11, 775 P.2d 453 (1989).....	11
<i>State v. Hathaway</i> , 161 Wn. App. 634, 251 P.3d 253 (2011) .....	17
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003) .....	15
<i>State v. Hudson</i> , 150 Wn. App. 646, 208 P.3d 1236 (2009).....	10
<i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986) .....	19
<i>State v. Jensen</i> , 149 Wn. App. 393, 203 P.3d 393 (2009) .....	17
<i>State v. King</i> , 75 Wn. App. 899, 878 P.2d 466 (1994).....	11, 12

<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	9, 10, 14
<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	23
<i>State v. O'Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009) .....	9, 10
<i>State v. Olinger</i> , 130 Wn. App. 22, 121 P.3d 724 (2005) .....	24
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	11
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	14
<i>State v. Rice</i> , 102 Wn.2d 120, 683, P.2d 199 (1984) .....	20
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	22, 23
<i>State v. Thompson</i> , 169 Wn. App. 436, 290 P.3d 996 (2012) .....	15
<i>State v. Webb</i> , 162 Wn. App. 195, 252 P.3d 424 (2011).....	18

**Federal Cases**

<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970).....	23
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984) .....	14, 15

**Washington Statutes**

9A.08.010(1)(a) .....	24
RCW 9A.16.090 .....	19
RCW 9A.36.031(1)(g).....	24

**Constitutional Provisions**

Washington Constitution, Article I § 21.....	10
--	----

Washington Constitution, Article I § 22..... 10  
U.S. Constitution, Amendment VI..... 10, 17  
U.S. Constitution, Amendment XIV ..... 10, 23

**Other Rules or Authorities**

RAP 2.5(a)..... 9  
WPIC 10.01 ..... 25  
WPIC 35.50 ..... 24

## I. ISSUES

- A. Were Crossland's constitutional rights violated because a unanimous jury instruction was not given?
- B. Did Crossland receive ineffective assistance of counsel from her trial counsel?
- C. Was Crossland's Sixth Amendment right to a defense violated because the trial court refused to allow a voluntary intoxication jury instruction?
- D. Did the State fail to prove the offense of Assault in the Third Degree?

## II. STATEMENT OF THE CASE

On July 24, 2014, at approximately 11:30 at night, City of Centralia Officers William Phipps and Doug Lowrey were dispatched to 415 North Oak in Centralia, Lewis County, Washington. RP 17. The Officers were responding to a 911 call, in which a male reported that he and his girlfriend had a verbal argument and that she was refusing to leave his apartment. RP 17. The female, who identified herself as Misty Crossland, told Officer Phipps that she had met the male through an online dating site and that this was their third date. RP 19. She had brought her seven-year old son with her, who was sleeping on the couch. RP 19.

According to Crossland, she was asked to leave because she would not have sex with the man. RP 18-19. Regardless of why she was asked to leave, Crossland refused to leave the apartment

and the man called 911. RP 17. Crossland claimed that she had remained there because she had consumed four drinks that night and felt she should not have to leave because she was too impaired to drive. RP 19. Despite being told to leave, Crossland wanted to stay at the apartment until she could drive the next day and avoid waking her son. RP 19. The man offered Crossland a cab for that night, along with a return cab for the next morning to get her car, but she refused the offer. RP 19, 47. Officer Phipps instructed Crossland that since she was no longer welcome to stay at the apartment she had to leave. RP 20. The officers were merely trying to have her removed from the premises, as she was considered a trespasser at this point. RP 46. However, during this time Crossland was not going to be cited for any crime. RP 46.

Officer Phipps and Officer Lowrey tried to come up with solutions to get Crossland home. RP 47. Officer Phipps offered to call a cab for her or drive her home himself. RP 20-21, 47. She agreed to Officer Phipps giving her a ride home and was told to gather her belongings. RP 21.

As Crossland was collecting her belongings she continued to aggressively interact with the man in the apartment, flipping him off and making faces at him. RP 21. Officer Phipps stepped in between

them to try to distract Crossland from having any contact with the man. RP 21. Crossland's son was still sleeping on the couch, but when she tried to wake him up she was unable to do so. RP 21-22. Officer Lowrey offered to carry the sleeping child outside. RP 22. Crossland was cooperative at first, but then wanted to be right next to Officer Lowrey while he picked up her son. RP 23. As he attempted to pick up the sleeping child, Crossland was hovering around him, crowding him in, and "getting in his elbow room." RP 22. Crossland was agitated and became irate as Officer Lowrey attempted to safely pick up the child in the cramped area, where there was the fear of tripping over numerous items on the floor, including the coffee table. RP 48. To deescalate the situation, Officer Phipps stepped in and grabbed Crossland by the arm and pulled her out into the living room, allowing Officer Lowrey more space to pick up the child. RP 22-23. Meanwhile, Crossland continuously tried to verbally engage with the man in the house. RP 23. Officer Phipps turned her around and directed her down the stairs. RP 23. Crossland was irate, very upset and did not want to leave the apartment. RP 23, 49.

Although Crossland exhibited signs of intoxication, such as the smell of alcohol from her breath and body, she knew where she

was and told Officer Phipps where she lived. RP 20. She recalled being buzzed after taking four shots of Seagram's 7, but stated during her testimony that she remembered everything that happened that night. RP 59.

As they approached the stairs, Officer Phipps had concerns about her slipping due to the fact that she had been drinking and because she continuously tried to yank away from his grasp. RP 49 As they made their way down the stairs, Officer Phipps walked behind her and held onto her jacket, as she continued to make erratic jerking motions and he thought she might slip and fall down the stairs. RP 24, 49. Officer Lowrey was behind Officer Phipps, carrying the child in his arms down the stairs, and observing Crossland's behavior. RP 24. About halfway down the stairs, Crossland stopped on the stairs and turned around, either to yell at the officers or the man. RP 24 Officer Phipps told her to keep going. RP 24. Crossland took a step and her feet fell out from underneath and her bottom hit the steps, causing her to slide down about three steps. RP 24. Officer Phipps was still holding on to her jacket, which subsequently tore when she fell. RP 24. He caught back up with her and helped her to her feet. RP 24. Officer Lowrey witnessed the fall. RP 52-53. Crossland denied that the fall ever

happened, despite testimony from both officers regarding the fall. RP 72-73.

The officers and Crossland made their way to the patrol cars across the street. RP 24. Once they hit the sidewalk area, Crossland continued to yell at both the officers and the man, who was watching from the upstairs patio. RP 25. Again, Officer Phipps attempted to diffuse the situation and turned her around, pushing her towards the car. RP 25. Officer Phipps told her "let's go, get in my car, I'll give you a ride home, let's get out of here." RP 25.

About a step or two later Crossland turned around again to yell back at the man. RP 25. She was again grabbed by the shoulder to continue moving towards the patrol car. RP 25. At this time, Officer Phipps saw her right arm come in a wide arc towards his head and shoulder area, which, from Officer Phipps' training experience, was a move consistent with an intentional attempt to hit him. RP 25, 27. Officer Phipps was hit on the top of his shoulder and fortunately, was able to block the blow that appeared to be aimed towards his head RP 25, 39.

Although dark outside, the area was adequately lit with street lights, making the incident visible to Officer Lowrey from the stairs of the apartment. RP 50. Officer Lowrey observed Crossland yank

away from Officer Phipps grasp and use her right hand and turn to strike the officer. RP 50. Officer Lowrey concurred that the act was intentional, as he observed Crossland deliberately twist her body to throw the swing towards Officer Phipps. RP 49, 51, 55. Crossland's overall demeanor at this time was "hysterical, volatile, just very upset and irrational." RP 51. Nothing was good enough for Crossland and there was no reasoning with her. RP 51.

After the assault, Crossland was put in a head lock and placed down on the ground, where she was handcuffed to prevent further incident. RP 25. Officer Phipps testified he would not have taken her to the ground if she had not swung at him, as there would have been no need to do so. RP 43. Thus, the assault was the act of swinging her arm around and making contact with Officer Phipps' shoulder. RP 25-26, 39-40, 55. Neither of the officers observed or received a "poke" from Crossland. RP 28, 83.

The State charged Crossland with Assault in the Third Degree - Assault on a Peace Officer. CP 1.

At the day of the trial the Information was amended to reflect the language "assault of a police officer." RP 30-31; CP 9.

At a recess in the trial, Crossland's trial attorney, proposed defense jury instructions for voluntary intoxication. RP 86. The

State opposed on the ground that there was no substantial evidence to support that Crossland's ability to commit the act with the appropriate mens rea was affected by alcohol. RP 86. On both direct and cross-examination, Crossland stated that she remembered what had happened that night. RP 87. As stated by Judge Lawler, you don't get the instruction "simply by showing that someone's drunk. You get it by showing that they're drunk to the point where they can't form the mens rea. There's no doubt that Ms. Crossland was intoxicated but not sufficiently to give this instruction." RP 87. Judge Lawler cited *State v. Gabryschak*, in stating that "evidence of drinking alone is insufficient to warrant the instruction." *State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996) citing *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861, 862 (1991).<sup>1</sup>The judge did not allow the voluntary intoxication jury instruction because it was not appropriate for this case. RP 89.

During closing, the State focused the issue of the assault on one act: the swinging of the punch towards Officer Phipps. RP 104. The jury was never asked to consider the alleged poking

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<sup>1</sup> In *State v. Gabryschak*, the court held that to warrant a voluntary intoxication instruction there must be substantial evidence of the effects of the alcohol on the defendant's mind or body. *State v. Gabryschak*, 83 Wn. App. at 253.

demonstration by Crossland. See RP 103-105. Rather, the jury was asked to focus on the swing, and nothing more. RP 116-117. Likewise, Crossland's trial counsel closed with the discussion of the swing and whether Crossland intentionally swung at Officer Phipps. RP 112. Specifically, trial counsel stated that if the jury was not sure beyond a reasonable doubt that the swing at the officer occurred, a verdict of not guilty was appropriate. RP 112. No mention of the alleged poking was made in regard to the charge of an assault. RP 112.

Crossland was convicted as charged in the amended Information. CP 9-10. Crossland was sentenced to 15 days in jail. CP 27; RP 8. Crossland timely appeals her conviction. CP 38.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. CROSSLAND CANNOT RAISE THE ISSUE OF BEING DENIED HER STATE CONSTITUTIONAL RIGHT OF A UNANIMITY INSTRUCTION BECAUSE A UNANIMITY INSTRUCTION WAS NOT APPROPRIATE.**

Crossland argues, for the first time on appeal, that the jury should have been given a unanimity instruction because the jury considered two distinct acts to establish assault in the third degree and the court did not provide a unanimity instruction. Brief of

Appellant 6. Crossland argues that the failure to provide the instruction presents a constitutional issue that warrants a reversal of Crossland's conviction. Brief of Appellant 10. The alleged error is not manifest constitutional error and therefore, Crossland cannot raise this issue for the first time on appeal.

### **1. Standard Of Review.**

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

### **2. Crossland Has Not Shown That The Alleged Error Is Manifest.**

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is "when the claimed error is a manifest error affecting a constitutional right." *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, "an appellant must

demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O’Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

The alleged error does encompass a constitutional right, the right to a trial by jury, and therefore the only question is whether the alleged error is manifest. U.S. Const. amend. VI, XIV; Const. art. I, § 21, 22; *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Crossland does not explain how she is able to raise the

issue for the first time on appeal, nor does she show that she was prejudiced by the lack of a unanimity instruction.

**a. A unanimity instruction was not appropriate because the alleged poke and swing could have been construed as one continuing course of action.**

For a unanimity instruction to be appropriate, there must be more than one act and the acts must not be part of a continuing course of action. *State v. Petrich*, 101 Wn.2d 566, 571-572, 683 P.2d 173 (1984). When determining whether a continuing course of conduct constitutes a single charge count, an appellate court will consider the time elapsed between the criminal acts and whether the different acts involved the same parties, location and same ultimate purpose. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

Crossland relies on *State v. King* in her argument that the case-at-hand involves more than one act and that a reversal is required because a unanimity instruction was not provided. 75 Wn. App. 899, 878 P.2d 466 (1994). Crossland's reliance on this case is incorrect, as *King* clearly involved two separate acts rather than one ongoing course of conduct. *King*, 75 Wn. App. at 902. In *King*, a unanimity instruction was appropriate because the State's evidence showed two distinct instances of possession of drugs,

which occurred at two different times and in different places. One possession was constructive, whereas the other was actual. *Id.* At 903. The drugs in *King* were found in a pill bottle at one place and time and also in a fanny pack at another place and time. *Id.* at 93. At closing the State offered both the Tylenol bottle and the fanny pack as a basis for conviction. *Id.* Thus, a unanimity instruction would have been appropriate in *King*.

More analogous to the case-at-hand is *State v. Fiallo-Lopez*, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995). In *Fiallo-Lopez*, the State charged the defendant with one charge of possession, even though there were two separate and distinct quantities of cocaine that were delivered at two different locations. *Id.*, 78 Wn. App. at 726. The Court held that this was one continuous course of action because both deliveries were intended for the same ultimate purpose - the delivery of cocaine. *Id.* at 726.

Crossland's argument that the swing and the alleged poke were two separate acts and warranted a unanimity instruction fails under *State v. Fiallo-Lopez*. The jury was instructed to consider the swing as the assault. RP 104-106. If the jury actually considered both the swing and poke, as Crossland alleges, these would have been part of the same continuous course of action. Both acts would

have been intended for the same purpose; to assault Officer Phipps.

Crossland has not met her burden to show that she was prejudiced by the lack of unanimity instruction. Without prejudice the error is not manifest. There is no reasonable probability that the alleged error affected the outcome of the trial. Crossland cannot raise this issue for the first time on appeal and this court should affirm her conviction.

**B. CROSSLAND RECEIVED EFFECTIVE ASSISTANCE FROM HER ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.**

Crossland's attorney provided competent and effective legal counsel throughout the course of her representation. Crossland asserts her trial counsel was ineffective for failing to request a jury unanimity instruction. Brief of Appellant 9-10, 15-16. Crossland's attorney was not ineffective in any of the areas of his representation of Crossland. If Crossland's attorney was deficient in any way, Crossland cannot show she was prejudiced by her attorney's conduct and her ineffective assistance claim therefore fails.

**1. Standard Of Review.**

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal

and extrinsic evidence outside the trial record will not be considered. *McFarland*, 127 Wn.2d at 335 (citations omitted).

**2. Crossland's Attorney Was Not Ineffective During His Representation Of Crossland Throughout The Jury Trial.**

To prevail on an ineffective assistance of counsel claim Crossland must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the

defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

To prevail on an ineffective assistance claim, the defendant must show that he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice. *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012). In this case, Crossland was not entitled to the instruction, and she was certainly not prejudiced by the lack of instruction. The focus on the act for the assault was not the alleged “poke” that Crossland spoke of, but the swing that was witnessed by both Officer Phipps and Officer Lowrey. RP 25-28, 37-44, 49-50, 54-56, 79-80. Crossland’s attorney would have no reason to focus on the poke since it was not the reason for the underlying assault. In the event that he believed it to be worthy of mention, he probably would have mentioned it in his closing. Even if he had requested a unanimity instruction, it would not have been appropriate in this case.

Crossland argues that during the polling of the jury that there were jurors who thought that the poke was enough for an assault and that others believed the swing was the assault. Brief of Appellant 9; RP 132. However, this conversation was off the record and nothing more than hearsay testimony to Crossland's trial attorney. Brief of Appellant 8-10. There is no record to support these assertions. See RP 124-125. Crossland's assumption that the failure to provide the instructions created "the possibility that some jurors relied on one act or incident and some relied on another" is irrelevant in this case. *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 1126 (2006).

The State addressed the issue of whether a unanimity instruction was appropriate in the prior section of this Response. Arguendo, if it was deficient for Crossland's attorney to not request a jury unanimity instruction, Crossland suffered no prejudice from the error. As discussed above, a unanimity instruction was inappropriate in this case even if the alleged poking came into play. In order for a unanimity instruction to be appropriate, the acts would have to be separate. Here, even assuming that the poking occurred, it would still be a part of the continuous chain of events leading to the assault. Further there is no reasonable probability

that the unanimity instruction was appropriate or that it would have been allowed by the trial judge. Thus, Crossland cannot claim that the outcome of the trial would have been different. Trial counsel was not ineffective and this Court should affirm Crossland's conviction.

**C. APPELLANT'S SIXTH AMENDMENT RIGHT TO A DEFENSE WAS NOT VIOLATED BECAUSE THE TRIAL COURT PROPERLY DENIED THE JURY INSTRUCTION ON VOLUNTARY INTOXICATION.**

Crossland argues for the first time on appeal, that her right to a defense was violated because the trial court denied the jury instruction on voluntary intoxication. Brief of Appellant 13. Crossland argues that the failure to instruct the jury on the issue violated her sixth amendment constitutional right to present a defense. Brief of Appellant 13.

**1. Standard Of Review.**

In general, an appellate court reviews a trial court's choice of jury instructions for an abuse of discretion. *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011); *State v. Douglas*, 128 Wn. App. 555, 561, 1116 P.3d 1012 (2005). However, when the alleged error is a legal question, the reviewing court reviews the error under a de novo standard. *State v. Jensen*, 149 Wn. App. 393, 398, 203 P.3d 393 (2009).

## **2. The Voluntary Intoxication Jury Instructions Were Not Appropriate In This Case.**

The act of drinking itself does not entitle a defendant to a jury instruction for voluntary intoxication. *State v. Webb*, 162 Wn. App. 195, 210, 252 P.3d 424 (2011). Mere drinking is not sufficient; the evidence must be substantial enough so that the effects of the alcohol on the defendant's mind or body are evident. *State v. Gabryschak*, 83 Wn. App. 249, 253, 921 P.2d 549 (1996) citing *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861, 862 (1991).

A jury instruction on voluntary intoxication may be used as a defense when evidence of intoxication shows the defendant was incapable of forming the requisite mens rea for a crime. *State v. Ager*, 128 Wn.2d 85, 95, 904 P.2d 715 (1995). A jury instruction for voluntary intoxication is required when (1) the charged offense has a particular mens rea, such as intent, (2) where there is *substantial* evidence that the defendant was drinking and/or using drugs, and (3) there is *evidence that the drinking or drug use affected the defendant's ability to acquire the required mental state*. *Ager*, 128 Wn.2d at 95 (emphasis added). The evidence in the record itself must support the theory that the defendant was so intoxicated that

they could not form the mens rea. RCW 9A.16.090; *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

### **3. Crossland's Mens Rea Was Not Effected By Her Intoxication.**

Crossland argues now, after the fact, that she was too intoxicated to form the mens rea of intent to have assaulted Officer Phipps. Crossland herself admitted to drinking, but did not present any evidence whatsoever that her ability to form the requisite mens rea was substantially impaired by alcohol.

Crossland was not so inebriated that she did not know what was going on. She was angry at everything and everyone. RP 42. She did not like being kicked out of the apartment and told to leave, and she certainly did not like being escorted out by two officers. RP 42. As Crossland was being escorted down the stairs she continued to yank back and forth in an effort to escape Officer Phipps grasp. RP 49.

Crossland herself admitted under oath that she remembered everything that happened from that night. RP 59. She admitted to "buzzing pretty good," but stopped short of saying she was intoxicated. RP 59. She remembered exactly what happened that night with the man in the apartment, and where she was located when the officers arrived. RP 60. She remembered gathering up

her things, including specific items she had brought to the apartment. RP 62.

#### **4. The Trial Court Was Correct In Denying The Voluntary Intoxication Jury Instruction.**

Failure to provide a jury instruction on voluntary intoxication may be reversible error if there was a showing that a defendant did not possess the requisite mental state essential to commit a crime. *State v. Rice*, 102 Wn.2d 120, 123, 683, P.2d 199 (1984). However, this is a high standard, as shown in *Rice*. In *State v. Rice*, the defendants, both charged with second degree felony murder, testified they had been drinking beer all day and had ingested between two and five Quaaludes each. *Rice*, 102 Wn.2d at 123. However, unlike the case-at-hand, the defendants in *Rice* were so intoxicated that they were spilling their beer and when one of the defendants was struck by a car earlier in the day he stated that he “was so loaded he didn’t feel it.” *Id* at 123.

Merely showing signs of intoxication is not sufficient to overturn the trial court’s decision to omit voluntary intoxication instructions. *State v. Gallegos*, 65 Wn. App. 230, 239, 828 P.2d 37 (1992). In *State v. Gallegos*, the defendant was impaired by alcohol and drugs, falling over, and knocking things over. *Id* at 239. However, despite the fact that the defendant was highly intoxicated

and unable to stand up properly, there was not substantial evidence to show he lacked the mens rea for intent or that he lacked awareness of his actions at the time of the incident in question. *Id.* at 239. There was not a substantial showing that the alcohol and drugs impaired the defendant's ability to form the required mens rea for attempted second degree rape. *Id.* The Court affirmed the conviction and concluded that the defendant was not entitled to the proposed voluntary intoxication instruction. *Id.*

No one can deny that Crossland was intoxicated on the night of the assault. RP 19, 23. However, Crossland was merely intoxicated - not falling down drunk with alcohol; she had merely consumed more than she felt would be safe to drive home. RP 19. When Officers Phipps and Lowrey arrived at the scene she was able to tell them why she was there and give her full name and date of birth. RP 19. She admitted to having some drinks and was able to articulate a full explanation for why she still remained on the premises. RP 19. Crossland was able to tell the officers where she lived and to explain how she had refused the offer for a cab to take her home that night. RP 19-20. Crossland even expressed how it was not right that she had to leave the apartment. RP 23.

In sum, Crossland was intoxicated, but not to the point that she did not know what she was doing. Crossland cannot claim to remember everything that happened that night and still try to prevail on the voluntary intoxication defense. Crossland failed to show that she was substantially effected by her level of intoxication to such a point that she did not have the proper mens rea to assault Officer Phipps. This was not a reversible error and the conviction should be upheld.

**D. THERE IS SUFFICIENT EVIDENCE PRESENTED TO SUSTAIN A CONVICTION FOR ASSAULT IN THE THIRD DEGREE.**

Crossland argues the State did not present sufficient evidence to show that Crossland intended to assault Officer Phipps. Brief of Appellant 18. The State presented sufficient evidence to show that Crossland intended to assault Officer Phipps.

**1. Standard Of Review.**

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

## **2. The State Is Required To Prove Each Element Beyond A Reasonable Doubt.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact finder...is in the best position to evaluate

conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted). Further, “the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d at 638.

To convict Crossland of the crime of Assault in the Third Degree, as charged in the amended information, the State must prove the following:

(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.

RCW 9A.36.031(1)(g).

As provided in Jury Instruction 6, assault is defined as:

“an intentional touching or striking of another person, with unlawful force, that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking or cutting or shooting is offensive if the touching or striking or cutting or shooting would offend an ordinary person who is not unduly sensitive.

WPIC 35.50; CP 19.

For the element of intent, the State was required to prove:

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

WPIC 10.01; CP 18; 9A.08.010(1)(a).

In her appeal, Crossland claims that regardless of whether or not she made contact with Officer Phipps, she was only trying to free herself from the officer, not assault him, and the State lacked sufficient evidence of intent to assault. Brief of Appellant 20. Crossland’s theory contradicts what was stated on the record. At trial, Crossland adamantly denied taking a swing at Officer Phipps RP 69. Crossland never once mentioned she may have been trying to free herself from Officer Phipps. See RP 75-76. This hypothetical logic is not part of the record and is outside the realm of the appeal.

Officer Phipps testified in detail about the assault, identifying how Crossland hit him around the back, landing a blow on his shoulder. RP 50, 80. The fact that Officer Phipps had to put up his arm after Crossland made contact on his arm in the middle of the “wild swing” shows intent. RP 37-38, 55. Additionally, Officer Lowrey also testified to observing Crossland strike Officer Phipps with her hand. RP 49, 51, 55. When asked whether he believed Crossland intentionally swung at Officer Phipps, there was no hesitation when Officer Lowrey stated “yes.” RP 27.

Any rational jury could find that Crossland had the requisite intent to assault Officer Phipps beyond a reasonable doubt. Crossland was not trying to get away from Officer Phipps; she swung her arm around him with the intent to hit him. RP 43, 50-51. She physically twisted her body to make the contact with Officer Phipps. RP 55. Crossland was hysterical, volatile, irrational and irate. RP 42, 49, 51. She was yelling and angry that she had to be escorted off the property and wanted everyone to just leave her alone. RP 53. Even Crossland herself admitted to being pretty upset at the time of the incident. RP 74.

The State produced sufficient evidence through the testimony of both officers, and Crossland herself, to show that she intended to take a swing at Officer Phipps. The evidence, when taken in the light most favorable to the State, was such that any rational jury could find that all elements of Assault in the Third Degree, especially intent, were met beyond a reasonable doubt. This Court should affirm Crossland's conviction.

#### **IV. CONCLUSION**

Crossland's constitutional rights were not violated because a unanimity jury instruction was not appropriate for this case. Crossland received effective assistance of counsel from her trial

counsel throughout the trial. A voluntary intoxication instruction was properly denied by the trial court because Crossland herself admitted to remembering everything that night, and provided no substantial evidence to show that the jury instruction was warranted. Finally, the State proved all of the elements of the assault against Officer Phipps beyond a reasonable doubt. This court should affirm Crossland's convictions.

RESPECTFULLY submitted this 10<sup>th</sup> day of July, 2015.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney

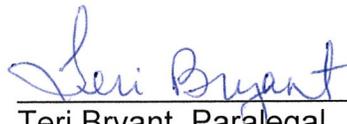
by: Ann C. Harrie  
ANN C. HARRIE, WSBA 49145  
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,  Respondent,  vs.  MISTY CHERIE CROSSLAND,  Appellant.	No. 47193-1-II  DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Ann C. Harrie, Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On July 10, 2015, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Lise Ellner, attorney for appellant, at the following email address: [Liseellnerlaw@comcast.net](mailto:Liseellnerlaw@comcast.net).

DATED this 10<sup>th</sup> day of July, 2015, at Chehalis, Washington.



\_\_\_\_\_  
Teri Bryant, Paralegal  
Lewis County Prosecuting Attorney Office

# LEWIS COUNTY PROSECUTOR

July 10, 2015 - 9:28 AM

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