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Court of Appeals
Division III
State of Washington

NO. 30597-0-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

MANUEL RAMIREZ,

APPELLANT.

**Appeal from the Superior Court of Grant County
The Honorable Evan E. Sperline**

No. 11-1-00428-0

BRIEF OF RESPONDENT

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I. INTRODUCTION

Manuel Ramirez was convicted at trial of Assault in the Third Degree for biting Officer Joseph Westby of the Quincy Police Department while Officer Westby was attempting to detain Ramirez. Ramirez now contends on appeal that he was entitled to a jury instruction on intent and that his attorney at trial was ineffective for not requesting a jury instruction defining intent. Ramirez also contends that his attorney at trial was ineffective for not requesting a jury instruction regarding the defense of voluntary intoxication. However, Ramirez is unable to show that defense counsel was ineffective because he cannot show he suffered any resulting prejudice from defense counsel not requesting these instructions. The evidence before the jury, including Ramirez's own testimony, clearly showed that Ramirez intended to bite Officer Westby. Therefore, Ramirez cannot show that including jury instructions on intent or voluntary intoxication would have likely affected the outcome of the trial. This Court should affirm Ramirez's conviction of Assault in the Third Degree.

II. ISSUES

- A. Is Ramirez Barred from Raising for the First Time on Appeal Alleged Errors Regarding the Trial Court's Failure to Provide a Jury Instruction Defining Intent Where Such an Issue Is Not Constitutional Error and Ramirez Did Not Preserve the Issue at the Trial Level?

- B. Was Defense Counsel Ineffective at the Trial Level for Not Requesting Jury Instructions on Voluntary Intoxication or Intent Where a) His Trial Strategy Was to Present a Self-Defense Claim That Is Incompatible with Voluntary Intoxication and Lack of Intent and b) Ramirez Did Not Suffer Any Prejudice as a Result?

III. STATEMENT OF THE CASE

A. **Procedural History**

On August 15, 2011, the Grant County Prosecutor's Office filed an information in Cause No. 11-1-00428-0, charging MANUEL RAMIREZ with one count of Assault in the Third Degree. CP 1-2. The matter proceeded to trial before the Honorable Evan E. Sperline on February 1, 2012. 2RP¹ 18.

Neither party raised any objections to the trial court's proposed jury instructions. 3RP 161-62. The trial court's jury instructions did not include either an instruction defining intent for the jury or an instruction on the defense of voluntary intoxication. CP 19-26. Ramirez did propose a jury instruction on self-defense. CP 16-18, 3RP 162. Following argument, the trial court rejected Ramirez's proposed instruction; Ramirez has not contested that decision on appeal. 3RP 162-89.

¹ There are six (6) volumes of the Verbatim Report of Proceedings: 1RP, 8/23/2011; 2RP, 2/1/2012; 3RP, 2/2/2012; 4RP, 2/3/2012 ; 5RP, 2/3/2012 (Jury Verdict); 6RP, 2/6/2012.

During closing argument, defense counsel argued throughout that the State's witnesses and their versions of events were not credible. 4RP 19-22, 25, 31-32. Defense counsel argued that the head of security's testimony that Ramirez had not paid admission to the bar was not credible. 4RP 19, 21-22. Defense counsel also argued that the head of security was not credible when she testified about how she pepper sprayed Ramirez or whether Ramirez purposefully hit his head on the ground. 4RP 20, 22, 25. Defense counsel challenged the timeline of events and when the police were called compared to when security began to wrestle with Ramirez. 4RP 21-22. Defense counsel also argued that the police were more focused on documenting Officer Westby's injuries than the injuries Ramirez suffered, even though Ramirez's injuries were much more severe. 4RP 31-32. Defense counsel did not argue either voluntary intoxication or lack of intent during closing argument, but did state during closing argument that Ramirez did bite Officer Westby. 4RP 29, 30.

After hearing the evidence, the jury found Ramirez guilty of Assault in the Third Degree. CP 27, 5RP 3-5. At sentencing, Ramirez told the trial court that he believed he did not have nearly as much alcohol in his system as the evidence suggested. 6RP 9. The trial court sentenced Ramirez to 90 days in jail and financial assessments totaling \$1,550. CP 33-51, 6RP 13. Ramirez filed a timely notice of appeal. CP 31-32.

B. Facts

Ramirez went to the Andaluz² nightclub in Quincy, Washington on August 13, 2011. 2RP 20-21, 3RP 139-40. Ramirez tried to go into the Andaluz club, claiming that he had already paid. 2RP 32. Security saw that Ramirez was drunk and asked him to leave. 3RP 11, 28. Ramirez tried to get back into the club multiple times, but security stopped him each time. 3RP 11. Ramirez then became aggressive with security, yelling at them that he had paid to get into the club. 3RP 12.

Maria Aceves, the head of security at Andaluz, told Ramirez that he could not come into the bar and if he did not leave, she would call the police. 2RP 20-21, 3RP 12. Aceves smelled alcohol on Ramirez and saw that he was having a hard time standing. 2RP 20-21, 39-40. After Aceves told him that he could not get into the club, Ramirez moved toward Aceves. 2RP 22. Aceves warned Ramirez that if he did not back away she would use pepper spray on him, but Ramirez refused. *Id.* Ramirez did not retreat, so Aceves sprayed him, causing Ramirez to drop to the ground. 2RP 22, 42; 3RP 13. Aceves then tried to handcuff Ramirez, but was only able to handcuff one wrist; Ramirez kept his other arm pinned underneath his stomach. 2RP 24, 42-44; 3RP 13-14. While Ramirez was on the

² The Andaluz nightclub is also referred to as the Anvaluz nightclub in the Verbatim Reports of Proceedings.

ground, Aceves was talking to him in both English and Spanish. 2RP 23. Ramirez understood Aceves in both languages and would reply to her in both English and Spanish. *Id.* Ramirez was crying and banging his head, causing Ramirez to bleed on the ground. 2RP 23-24, 49, 53-54. Security stayed with Ramirez while Aceves called police. 2RP 24-25.

Police officers arrived and tried to arrest Ramirez. 2RP 25, 51; 3RP 30-31, 100-01, 114-15. Ramirez did not comply, despite the officers wearing their uniforms, identifying themselves as police, and telling Ramirez, "Do not resist the law." 2RP 25-26, 55, 57; 3RP 15, 30-31, 114-116. The officers attempted several different techniques to get Ramirez to stop resisting, including pain compliance techniques and using a TASER on Ramirez. 2RP 56, 103-05, 115-19. Ramirez did not feel much as the officers applied the different techniques on him, which rendered them unsuccessful on Ramirez. 3RP 154. The officers took several minutes to finally detain Ramirez. 2RP 26; 3RP 104-05, 118-20.

Officer Joseph Westby of the Quincy Police Department was one of the officers who responded to the Andaluz nightclub. 3RP 43-44. Officer Westby was dressed in his police uniform and told Ramirez that he was a police officer. 3RP 46-47. Officer Westby asked Ramirez to give up his arm, but Ramirez just tucked his arm tighter underneath his body. 3RP 46-47, 103. After asking Ramirez several times to give up his arm to

no avail, Officer Westby then began applying pain compliance techniques. 3RP 47, 103. Ramirez then bit Officer Westby on the right thigh. 3RP 48, 52-55, 117. Officer Westby had to strike Ramirez multiple times on his lower back in order to get Ramirez to stop biting. 3RP 48, 104. Ramirez still would not comply with the officers' orders, so Officer Westby continued to apply additional pain compliance techniques. 3RP 48-49. Another officer was able to get Ramirez to comply when he used a TASER on Ramirez. 3RP 50, 104-05, 118-20.

Ramirez testified at trial. 3RP 137-160. Ramirez testified that he heard the officers telling him that they were police, that he understood what the word "police" meant, but he did not believe them. 3RP 144-45, 156-57. On cross-examination, Ramirez stated:

Q You say you lost two teeth that night. Is that what your testimony was? Am I remembering right?

A (Through the Interpreter) I did not actually lose them that night precisely.

Q Did your mouth hurt then?

A (Through the Interpreter) Yes.

Q Then how did you bite with that sore mouth?

A (Through the Interpreter) It was just my reaction to -- to stop this -- to stop this

assault. It was just a reaction, the only thing I could think to do.

Q Let me clarify the question. I didn't mean "why", but "how" physically if your mouth hurt that much?

A (Through the Interpreter) I just -- that was the decision I made at that time with the -- being desperate and being in anguish. Have you never been in anguish?

Q But in spite of that anguish you were able to bite?

A (Through the Interpreter) Yes.

3RP 157.

IV. ARGUMENT

A. RAMIREZ IS BARRED FROM RAISING FOR THE FIRST TIME ON APPEAL ALLEGED ERRORS REGARDING THE TRIAL COURT'S FAILURE TO PROVIDE A JURY INSTRUCTION DEFINING INTENT BECAUSE SUCH AN ISSUE IS NOT CONSTITUTIONAL ERROR AND RAMIREZ DID NOT PRESERVE THE ISSUE AT THE TRIAL LEVEL.

Ramirez has waived the issue of whether the trial court erred in not instructing the jury on the definition of intent because Ramirez neither made an objection to the lack of such an instruction, nor did Ramirez offer his own instruction defining intent. Washington courts have held in decisions subsequent to *State v. Allen*, 101 Wn.2d 355, 678 P.2d 798

(1984), and *State v. Tyler*, 46 Wn. App. 648, 736 P.2d 1090 (1987) that a trial court's failure to define a technical term does not rise to the level of an automatic constitutional error. In light of the evidence presented at trial, including Ramirez's own testimony that he intended to bite Officer Westby, and Ramirez's failure to preserve any potential error, he may not now raise potential errors regarding the trial court's failure to provide a jury instruction defining intent for the first time on appeal.

RAP 2.5(a) states, "The appellate court may refuse to review any claim of error which was not raised in the trial court." One of the exceptions to this rule is when a defendant raises an issue of "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order for a defendant to prevail on a manifest constitutional error claim, he "must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

"Jury instructions must 'properly inform the jury of the applicable law, not mislead the jury, and permit each party to argue its theory of the case.'" *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011) (quoting *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007)).

CrR 6.15(c) mandates that counsel for both sides make timely objections to jury instructions and state the basis for the objections. *State v. Grimes*, 165 Wn. App. 172, 179, 267 P.3d 454 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988)). If a defendant fails to object to a proposed jury instruction or to a jury instruction's absence, any claim of error on appeal is unpreserved absent a showing of manifest error affecting a constitutional right. *Grimes*, 165 Wn. App. at 179 (citing *State v. Powell* 166 Wn.2d 73, 83, 206 P.3d 321 (2009)). A trial court's failure to instruct the jury on all of the elements of the crime charged is constitutional error. *Allen*, 101 Wn.2d at 358 (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)).

A trial court's failure to define a technical term for the jury is not failure to instruct on an essential element. *Scott*, 110 Wn.2d at 690 (quoting *State v. Tarango*, 105 N.M. 592, 734 P.2d 1275, 1282 (Ct. App.), cert. denied, 105 N.M. 521, 734 P.2d 761 (1987)). Intent as defined by statute is a technical term. *Scott*, 110 Wn.2d at 689-90. RCW 9A.08.010(1)(a) defines intent as follows: "A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime." See WPIC 10.01. Assault in the Third Degree is an intent crime. *State v. Craven*, 67 Wn. App. 921, 926, 841 P.2d 774 (1992).

In *Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988), the Washington Supreme Court held that the rule regarding the trial court defining technical terms for the jury is not a constitutional rule. *Scott*, 110 Wn. 2d at 689-90. The Court in *Scott* was faced with the issue of whether or not the trial court's failure to define "knowledge" for the jury was constitutional error when Ferdinand Brown, the petitioner, did not offer his own instruction defining knowledge and did not object to its lack of inclusion. *Id.* at 683-84. Brown was convicted at trial of being an accomplice to burglary. *Id.* at 683. The Court took the opportunity to clarify its decision in *Allen* as it related to unchallenged jury instructions and RAP 2.5(a)(3), holding that the rule stated in *Allen* was not a constitutional one, but a technical term rule. *Id.* at 684-85, 689. "*Allen*," the Court held, "does not support [the] contention that the failure to define a technical term in an instruction is constitutional error that may be raised for the first time on appeal." *Id.* at 690. In fact, the *Scott* Court distinguished *Allen* from the case before it because *Allen* had properly preserved the error when he excepted to the trial court's instruction. *Id.* (citing *Allen*, 101 Wn.2d at 357).

The Washington Supreme Court explained its decision in *Scott* in *State v. O'Hara*, 167 Wn.2d 91, 106, 217 P.3d 756 (2009). O'Hara was convicted of second degree assault at trial, but argued on appeal that the

trial court had given the jury an incomplete instruction regarding the definition of “malice” as it pertained to O’Hara’s claim of self-defense. *O’Hara*, 167 Wn.2d at 96-97. In holding that O’Hara’s claimed error was not of constitutional magnitude, the Court reiterated that it had “held the failure to define a technical term in an instruction is not automatically constitutional error that may be raised for the first time on appeal” in *Scott*. *Id.* at 106, 108 (*citing Scott*, 110 Wn.2d at 689-90). This holding should also be applied in the present case because intent, like malice, is a technical term. *Scott*, 110 Wn.2d at 689-90.

The Court also rejected the same argument Ramirez raises in his brief, that failure to define a technical term “relieved the State of its burden to prove beyond a reasonable doubt an element of the crime.” *Id.* at 105; *See Br. of Appellant* at 7. Using the manifest constitutional error standard, the Court held that O’Hara had not identified a manifest constitutional error because the trial court’s failure to instruct on the full statutory definition of malice “did not create practical and identifiable consequences during the trial that should have been obvious to the trial court,” and did not relieve the State of its burden to prove every element of the crime charged beyond a reasonable doubt. *O’Hara*, 167 Wn.2d at 108. The Court’s reasoning was that nothing in the instructions precluded the jury from finding all of the necessary elements of the crime charged

and could fully contemplate O'Hara's claim of self-defense. *Id.* Therefore, O'Hara could not point to any "practical or identifiable consequences" that resulted from the trial court's failure to fully define "malice" for the jury and the Court held that O'Hara's claim of error was unpreserved under RAP 2.5(a). *Id.* at 108-09.

Ramirez is likewise unable to point to any practical or identifiable consequences from the trial court's failure to define "intent." Ramirez's argument that the trial court essentially changed his Assault in the Third Degree charge to a strict liability crime has no foundation in the record. The trial court instructed the jury that an assault is "an *intentional* touching or striking of another person that is harmful or offensive, regardless of whether any physical injury is done to the person." CP 24 (Jury Instruction 4) [Emphasis added]. Furthermore, Ramirez testified that he intended to bite Officer Westby and there is no argument from defense counsel apparent in the record that Ramirez did not intend to bite Officer Westby. Ramirez's strategy up to closing argument was, in fact, to argue the opposite, that he intended to bite Officer Westby and did so in self-defense. Ramirez cannot point to any practical and identifiable consequences that resulted from the trial court's failure to define "intent" for the jury and has therefore not preserved the issue for appeal under RAP 2.5(a).

The other case Ramirez cites to in his brief to support his argument, *Tyler*, is distinguishable from the present case and is called into question by *Scott*. Division One held in *Tyler* that the trial court erred when it refused to give an instruction defining “intent” and that this error was of a constitutional magnitude. *Tyler*, 47 Wn. App. at 653. Shortly thereafter, however, Division One reached the conclusion that, regardless of whether or not the error was constitutional, the issue could still not be raised for the first time on appeal. *State v. Stubsjoen*, 48 Wn. App 139, 148, 738 P.2d 206 (1987) (“[E]ven assuming the trial court’s omission of an intent instruction in this case was constitutional error, we hold the issue cannot be raised before this court for the first time). Citing *Tyler* specifically, the *Scott* Court rejected the argument that the rule in *Allen* was that a trial court’s failure to instruct the jury on the definition of a technical term was constitutional error. *Scott*, 110 Wn.2d at 684, 689-90. Ramirez does not cite to *Scott* or any case subsequent to *Tyler* that supports his contention that the trial court’s failure to instruct the jury in the present case on the definition of intent was constitutional error. Without such authority, Ramirez’s argument should be rejected.

B. DEFENSE COUNSEL WAS NOT INEFFECTIVE AT THE TRIAL LEVEL FOR NOT REQUESTING JURY INSTRUCTIONS ON VOLUNTARY INTOXICATION OR INTENT BECAUSE A) HIS TRIAL STRATEGY WAS TO PRESENT A SELF-DEFENSE CLAIM THAT IS INCOMPATIBLE WITH VOLUNTARY INTOXICATION AND LACK OF INTENT, AND B) RAMIREZ DID NOT SUFFER ANY PREJUDICE AS A RESULT

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To demonstrate ineffective assistance of counsel in Washington, a defendant must satisfy the two-prong test laid out in *Strickland*. *See also*, *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he was prejudiced by the deficient representation. *Id.* To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In determining the first prong, whether counsel's performance was deficient, there is a strong presumption of adequacy. *McFarland*, 127

Wn.2d at 335. Competency is not measured by the result. *State v. Early*, 70 Wn. App. 452, 461, 853 P.2d 964 (1993) (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), review denied, 123 Wn.2d 1004, 868 P.2d 872 (1994)). “[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel’s conduct constituted sound trial strategy.” *Personal Restraint Petition of Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (citing *Strickland*, 466 U.S. at 689). If defense counsel’s trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that a defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

To satisfy the second prong, prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. “This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. If either part of the test is not satisfied, the inquiry need go no further.” *Hendrickson*, 129 Wn.2d at 78.

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls

within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *Campbell v. Knicheloe*, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert. denied*, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, a defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. *United States v. Kimmelman*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

RCW 9A.16.090 states:

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.

See WPIC 18.10. A jury may be instructed on voluntary intoxication only if there is substantial evidence that the defendant's drinking affected his ability to form the necessary mental state to commit the charged crime. *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996). Consequently, a defendant is entitled to an instruction on

voluntary intoxication only if (1) a particular mental state is an element of the crime, (2) there is substantial evidence the defendant was drinking, and (3) there is substantial evidence that the drinking affected the defendant's ability to form the required mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). Evidence of drinking alone is insufficient; there must be substantial evidence of the alcohol's effects on the defendant's mind or body. *Gabryschak*, 83 Wn. App. at 253.

In the present case, Ramirez cannot establish prejudice because he is unable to meet the third prong of the *Gallegos* test, that his drinking “affected [his] ability to form the required mental state.” Ramirez’s own testimony shows that he formed the required mental state to commit an assault. Ramirez testified that he intended to bite Officer Westby because it was the only thing he could think to do to “stop the assault.” 3RP 157. Ramirez also testified that he heard the officers identify themselves as police and that he understood what they were saying, but he chose not to believe them. 3RP 144-45, 156-57. This testimony demonstrates that Ramirez did not suffer any prejudice as a result of defense counsel at trial not requesting either a voluntary intoxication instruction or an instruction on intent, because Ramirez’s rationale for biting Officer Westby was apparent and not contested.

State v. Walters, 162 Wn. App. 74, 255 P.3d 835 (2011) is additionally instructive on the issue of prejudice. Walters was charged with, among other crimes, Assault in the Third Degree for kicking a police officer. *Walters*, 162 Wn. App. at 79. There was substantial evidence that Walters had been drinking that night, including that he had consumed seven beers and two other shots of liquor while at a bar. *Id.* at 78. Walters had left the bar with the bar keys in his possession. *Id.* Police found Walters sleeping under an air hockey table at a video arcade he operated. *Id.* at 79. After Walters was transported to jail, he kicked one of the officers who was trying to book him. *Id.*

The trial court denied Walters's request for a voluntary intoxication instruction, a ruling this Court found was in error. *Id.* at 83. However, this Court held that the trial court's error was harmless because "there is direct evidence that [Walters's] mental state was not impaired." *Id.* at 84, 85. Walters had announced that he was going to kick the police officer. *Id.* "Failure to give the intoxication instruction was harmless because there was no question but that Mr. Walters was acting intentionally." *Id.*

The facts in *Walters* are similar enough that this Court's rationale from *Walters* should be applied to the present case. Ramirez's own testimony is direct evidence that Ramirez intended to bite Officer Westby.

If denial of an instruction on voluntary intoxication was harmless error under similar circumstances, then Ramirez is unable to establish prejudice when trial counsel did not request the instruction.

Ramirez's argument that his trial counsel should have raised either a voluntary intoxication defense or argued lack of intent also completely contradicts trial counsel's strategy to argue self-defense. Ramirez does not claim that this strategy itself was ineffective. Therefore, Ramirez's argument is that defense counsel, once the trial court denied to instruct the jury on self-defense, should have raised not just a different defense, but one that argues the exact opposite; instead of biting Officer Westby on purpose to "stop the assault," Ramirez did not know what he was doing because he was intoxicated. That trial counsel decided not to pursue this contradictory defense cannot be subsequently deemed ineffective.

There is also evidence that Ramirez would have resisted if defense counsel at trial had attempted to offer a voluntary intoxication defense. Ramirez stated during his sentencing hearing that he was not nearly as intoxicated as he believed he had been portrayed during the trial. 6RP 9. If defense counsel at trial had presented a voluntary intoxication defense, not only would it have not been supported by the evidence, but it likely would not have been supported by Ramirez himself. Defense counsel was

therefore not ineffective for deciding not to request either a voluntary intoxication instruction or an intent instruction.

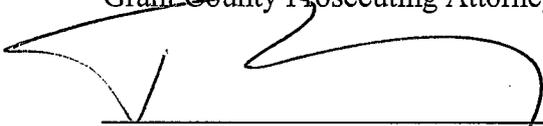
V. CONCLUSION

Ramirez failed to preserve any claimed error regarding the trial court's failure to define "intent" for the jury. Defense counsel was also not ineffective for failing to request either an "intent" or a "voluntary intoxication" jury instruction. Ramirez's conviction for Assault in the Third Degree should be affirmed.

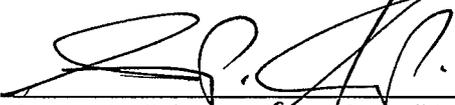
DATED this 27th day of August, 2012

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent.)	No. 30597-0-III
)	
v.)	
)	
MANUEL RAMIREZ,)	DECLARATION OF MAILING
)	
Appellant.)	
_____)	

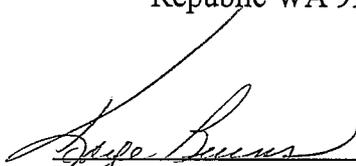
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and Dennis W. Morgan, his attorney, containing a copy of the Brief of Respondent in the above-entitled matter.

Manuel Ramirez
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Mr. Dennis W. Morgan
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Republic WA 99166-1019

Dated: August 27, 2012.



Kaye Burns

Declaration of Mailing.