

**FILED**  
**Feb 04, 2016**  
Court of Appeals  
Division III  
State of Washington

**NO. 33251-9-III**

**STATE OF WASHINGTON**

**COURT OF APPEALS - DIVISION III**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**RICHARD TIGNER**

**Appellant.**

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**APPEAL FROM THE SUPERIOR COURT FOR  
FRANKLIN COUNTY**

**BRIEF OF RESPONDENT**

**SHAWN P. SANT**  
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A. COUNTERSTATEMENT OF THE ISSUES

1. **DID THE TRIAL COURT PROPERLY DENY THE DEFENDANT'S REQUEST FOR A VOLUNTARY INTOXICATION INSTRUCTION?**
2. **IS WPIC 4.01 A CORRECT STATEMENT OF THE LAW?**

B. RESPONSE TO STATEMENT OF THE CASE

In 2014, Mark Huffman lived on 5<sup>th</sup> Street in Pasco, Washington, with his girlfriend Susan. Huffman was 54 years of age and had very little education. RP 59-60. Because Huffman did not have a driver's license, the bicycle he owned was his only mode of transportation. The bike was too important to him to lend out to others. RP 61.

On September 12, 2014, the Appellant, Richard Tigner, arrived at Huffman's home in a cab. The Appellant was an acquaintance of Huffman's girlfriend, Susan. He convinced Huffman to allow him to leave some of his belongings at Huffman's home for the night. RP 62-64. The Appellant asked to borrow Huffman's bike and Huffman told him he could not because he did not loan out his bike. RP 64.

The next morning Huffman woke up and discovered his bike was gone. RP 65. He asked around and could not discover where

the bike had gone. RP 66. Huffman than borrowed his girlfriend's bike and went searching for his bike. People told him the Appellant had taken it to the Thunderbird Motel. Huffman rode around town and eventually located the Appellant and his bike at the Pik-a-Pop convenient store. RP 67.

The Appellant initially appeared happy to see Huffman. RP 67. However, when Huffman told the Appellant he needed his bike back the Appellant began to mumble things and started punching Huffman. RP 68. Huffman broke free and tried to make it inside the store, but the Appellant chased him down, held him, and hit him again. RP 69. The Appellant told Huffman: [y]ou know what I'm gonna do to your wife? I gonna "F" your wife." Huffman than asked a bystander to call the police. RP 23. Eventually Huffman escaped, grabbed his bike and went home. RP 69-70. He later returned and contacted the police officers when they arrived at the scene. RP 70.

Following the assault of Huffman outside the convenient store, the Appellant came inside the store. The store clerk, Robert Urbina, attempted to reason with the Appellant and asked him to leave the store. RP 40. The Appellant than made derogatory

comments about Mexican people and began to strike Urbina. RP 27,42, & 51.

At 4:43 P.M. Pasco Police officers responded to the scene and made contact with the Appellant as he exited the store. RP 50. The Appellant was ordered, under threat of a Taser, to the ground. He complied by lying in the prone position. RP 50 & 81. He was then ordered to place his hands behind his back and he complied with that order and was handcuffed. RP 81. Once officers attempted to place him in a patrol vehicle he became combative and verbally abusive. RP 82. Once in custody, the Appellant exhibited bizarre behavior consistent with being under the influence of narcotics. RP 56-57.

After the officers completed the investigation Huffman found himself in pain and went to a nearby hospital. RP 70.

#### C. RESPONSE TO ARGUMENT

- 1. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S REQUEST FOR A VOLUNTARY INTOXICATION INSTRUCTION AS THERE WAS NO EVIDENCE IN THE RECORD WHICH SHOWED INTOXICATION AFFECTED HIS ABILITY TO ACQUIRE THE REQUIRED MENTAL STATE.**

The Appellant's decision to utilize narcotics, which affected his behavior and decision making, is not a defense to his criminal

activity. WPIC 18.10. The voluntary use of narcotics is only relevant to a deliberating jury if the use of those narcotics can be shown to affect the defendant's ability to acquire the relevant mental state required for the crime. *State v. Ager*, 128 Wash.2d 85, 95, 904 P.2d 715 (1995). In this case, the record did not support an instruction involving the Appellant's use of narcotics and his mental state.

The standard of review utilized for reviewing jury instructions depends on what the trial court based its decision on. *State v. Condon*, 182 Wash.2d 307, 315-16, 343 P.3d 357 (2015). If the trial court made a decision about jury instructions based on a factual conclusion, it should be reviewed for abuse of discretion. *Id.* at 316. If the court makes a legal conclusion, it is reviewed de novo. *Id.* In this instance, the trial court relied on a factual determination. Prior to closing arguments, the State requested the jury instruction for voluntary intoxication be withdrawn. The trial judge correctly identified the legal test for evaluating whether a voluntary intoxication instruction should be utilized, applied that test, and determined the facts did not support the instruction. RP 103. This is a factual ruling which should be analyzed under an abuse of discretion standard. Unlike de novo, the abuse of

discretion standard is a deferential standard. *State v. Anderson*, 92 Wash.App. 54, 62, 960 P.2d 975 (1998).

As the trial court stated, a voluntary intoxication instruction is appropriate when “(1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of drinking, and (3) the defendant presents evidence that the drinking affected his or her ability to acquire the required mental state.” WPIC 18.10, Comment, citing *State v. Gallegos*, 65 Wash.2d 230, 238, 828 P.2d 549 (1996). The first prong of the test is satisfied by the nature of the crimes charged, Robbery and Assault, both of which have a mens rea level of intentional.

The second prong, whether substantial evidence of drinking was offered, was not specifically addressed in the trial court’s ruling. The record had numerous references to the bizarre and violent behavior demonstrated by the Appellant. This included strange statements to law enforcement as well as violent mood shifts. Officers indicated that his behavior was consistent with someone under the influence of narcotics, but did not offer a dispositive opinion. The Appellant did not offer any expert testimony connecting the behavior to a specific drug or to methamphetamine in particular.

One thing which is absent from this record is any direct evidence the Appellant actually consumed any controlled substances. The Appellant asks the court to infer his use of drugs based on the officer's observations. It is within the discretion of the trial court to determine this lone inference is not sufficient to prove the use of narcotics. It is possible that the Appellant's behavior was the result of some sort of mental health disorder, personality defect, or some other unknown explanation. None of these other explanations are ruled out by the evidence. The Appellant cites in this brief that he "revealed at sentencing that he was under the influence of methamphetamine on the date of the incident." BOA 9. This later fact is not relevant because it was not information available to the trial judge at the time of his ruling. However, it is instructive that the Appellant had to produce information outside of the trial record to show drugs were the cause of his behavior.

In any event, even if one assumes sufficient evidence of the consumption of narcotics, there was no evidence that the Appellant's state of mind was altered such that he could not form the intent to commit a crime. The nature of the Appellant's argument is based on a commonly misunderstood notion of intoxication and intent. This notion is based on the idea that if a

person is heavily intoxicated, they simply don't know what they are doing and are not responsible for their actions. This thought process leads to misapplication of the rule in question, specifically the portion of prong which requires the ability "to acquire" the requisite mental state being impaired.

A hypothetical example sheds light on this misconception. In that hypothetical, an individual is walking down the street after consuming a large amount of alcohol. Assume that drunken person is stumbling and slurring their words and generally showing obvious signs of intoxication that any person would recognize. The drunken person sees another individual that they do not like, perhaps with a good reason, perhaps because they just don't like the look of them. They then grab that person and hurl them through an adjacent storefront window. While such an assault likely would not have occurred if the drunken person was sober, they still made a choice to assault someone for a specific reason. That reason being they did not like that individual. Under the law, the drunken person is still legally responsible for their actions. They exercised bad judgment, but they intended to commit the crime. The act they committed is not "less criminal by reason" of the voluntary intoxication. WPIC 18.10.

Take the same situation, and alter it slightly, and one can see where the second half of WPIC 18.10 can come into play: “[h]owever, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with (intent).” In this version of the hypothetical, the drunken person is again staggering down the street. This time, the drunken person stumbles into a bystander and sends the person flying through a storefront window. The bystander, a person whom the drunken person has no feeling for one way or another, is harmed by the drunken person’s action. However, the drunken person did not intend to do it, it was an accident based on their level of intoxication. If the drunken person was charged with assault based on this accident, one can see how it would be important for the jury to consider how the drunken person’s intoxication affected his or her ability to form the requisite intent.

In the present case, the Appellant took a series of criminal actions. His intoxication may have contributed to him utilizing bad judgment in taking these actions. It may have contributed to him acting on impulses which are better left contained. Despite this, the record does not indicate that the decision to act on these impulses

was something he did not intend. The actions were wrong, they were criminal, but they were not unintended or without reason.

The context in which the Appellant's actions occur, help explain his intent. The night before the incident, the Appellant asked to borrow the victim's, Mark Huffman's, bike. Mr. Huffman said no because the bike was important to him as his only means of getting around. Despite this, at some point that night or the next morning, the Appellant came and took the bike. The next day, the victim began searching around town for his bike and eventually found the Appellant at a convenient store. Initially, the Appellant seemed excited to see Huffman, but when told he needed to return the bike he became violent and began to assault the victim. The victim tried escape, but the Appellant chased him, held him, and beat on him. As he was holding him and beating him, the Appellant deliberately tormented Huffman by stating he would "F" his wife (Huffman testified his girlfriend was acquainted with the Appellant and had been present with them the night before at his home).

This is not the meeting of two strangers on the street. This is not a police officer tapping someone on the shoulder and that person losing control for no reason. *State v. Kruger*, 116 Wash.App. 685, 689, 67 P.3d 1147 (2003). The meeting involved a

person confronting the Appellant about property he had stolen. When confronted, there was deliberate assault. The aggression was not random. When Huffman tried to escape, he was pursued, held down, and hit repeatedly. Likewise, the statement regarding Huffman's wife only makes sense if the Appellant knows his wife or significant other. It was a deliberate punishment, just as the assault punished Huffman for daring to ask for his property back.

When the victim tried to get inside the nearby store, the incident forced the store clerk, to get involved. The store clerk, Urbina, testified he tried to calm the Appellant down and told him to leave. As gentle as this intervention is, the store clerk was still confronting the Appellant about his behavior, just as Huffman confronted him about taking his bike. The results were the same, Urbina was assaulted and verbally abused. This represents a pattern that is not random, but simple cause and effect which can only be explained by intentional actions.

The nature of verbal insult also shows intent. Urbina, is clearly a Hispanic name. The Appellant made comments which were derogatory about Hispanic people, possibly involving them being sex offenders. These racial comments, and the subsequent assault, only make sense if the target is Hispanic. While

reprehensible, the comments still represent a cause and effect which are explained by the Appellant attempting to accomplish something. Even if what the Appellant tried to accomplish was not something he would normally do when sober, it was still purposeful none the less.

The record indicates that most of the bizarre behavior exhibited by the Appellant was limited to verbal statements. The Appellant demonstrated on multiple occasions that he could understand and physically comply with commands. When Off. McClintock approached him and ordered him on the ground the Appellant complied. When Off. Caicedo told him to put his hands behind his back he complied. Following this, a few moments later, the Appellant changed began actively resisting police attempts to place him in a vehicle. These types of behaviors demonstrate the Appellant could listen to commands and choose to obey or disobey those commands.

Case law indicates that reviewing courts have been keen draw a distinction between someone simply being intoxicated, and someone actually having their mental state impaired to the point they cannot act knowing or with intent:

[a]lthough Karns and Locke testified that Gallegos had been drinking, and that the drinking made him lose his balance, spill things, and knock things over, there was no evidence presented that the drinking impaired Gallegos's ability to acquire the intent to engage in sexual intercourse with T.G. by forcible compulsion. Gallegos neither testified, nor offered expert testimony or other evidence indicating that his drinking prevented him from acquiring the requisite intent or that he lacked awareness of his actions at the time of the incident in question.

*Gallegos*, 65 Wash.App. at 239. The Appellant correctly argues an expert is not required to make a connection between his intoxication and his lack of intent. But there must be some testimony or evidence that makes a connection between the Appellant's intoxication and his mental ability to form intent. *Id.*

In *State v. Gabryschak* the defendant engaged in behavior similar to the Appellant's behavior in the present case. 83 Wash.App. 249, 250-53, 921 P.2d 549 (1996). There, the defendant kicked open his mother's door, slapped her, pushed her, and then, once arrested, he repeatedly threatened to kill the officers once released from jail. *Id.* The *Gabryschak* court pointed out that, "[a]t best, the evidence shows that Gabryschak can become angry, physically violent, and threatening when he is intoxicated." *Id.* at 254. The evidence in this case shows the Appellant, when confronted or told what to do, when intoxicated, reacts violently.

The trial court pointed out, in making their ruling, the Appellant did not present any testimony. The Appellant argues a defendant is not required to testify about their mental state to receive a voluntary intoxication instruction. BOA 12. This is only true if there is other evidence showing a defendant had the inability to form the necessary intent. If the other evidence of lack of intent is not present, then testimony, in the form of the Appellant taking the stand, or some other witness, is needed. The trial court was correct.

A proposed jury instruction should be given if it properly states the law and allows the party to argue his or her theory. *State v. Redmond*, 150 Wash.2d 489, 493, 78 P.3d 1001 (2003). A party is entitled to a jury instruction if there is sufficient evidence to support the theory that instruction puts forward. *State v. Williams*, 132 Wash.2d 248, 259, 937 P.2d 1052 (1997). In this case, because the record did not indicate the Appellant could not form the requisite intent, and the Appellant did not testify that he did not intend the actions he undertook that day, the trial court properly withheld the voluntary intoxication instruction.

**2. WPIC 4.01 IS A CORRECT STATEMENT OF THE LAW WHICH PROTECTS THE APPELLANT'S DUE PROCESS RIGHTS.**

- a. The standard WPIC 4.01 does not improperly focus the jury on a search for truth to the exclusion of evaluating the burden of proof.

In 2012, the *Emery* Court opined that “[t]he jury’s job is not to determine the truth of what happened; a jury therefore does not “speak” the “truth” or “declare the truth.” *State v. Emery*, 174 Wash.2d 741, 760, 278 P.3d 653 (2012). Some lawyers and jurists have taken this comment to mean that “truth” is a dirty word and can never be mentioned during a jury trial. This is actually a misinterpretation of the Court’s ruling in *Emery*.

The *Emery* Court made the above comments because the prosecutor in that case had used the term “truth” as a means of shifting the burden of proof and centering the jury on a search for truth, instead of evaluating the State’s evidence. *Emery* at 750-51.

The prosecutor in that case presented a slide and said

in order for you to find the defendant not guilty, you have to ask yourselves or you’d have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in the blank.

*Id.* at 750-51. The prosecutor then went on to talk about “verdictum” being Latin for “to speak the truth.” *Id.* at 751. Taken as a whole, the closing argument shifted the burden of proof to the

defendant improperly. *Id.* at 760-61. Despite this, the case was not overturned on those grounds, leaving the Court's comments on the improper argument as dicta. *Id.* at 766.

In making their holding, the *Emery* Court heavily relied on *State v. Warren*, 165 Wash.2d 17, 195 P.3d 940 (2008). In that case the prosecutor made the mistake, as in *Emery*, of using the idea of truth to shift the burden to the defendant.

Finally, in this case I want to point out that the entire trial has been a search for truth. And it is not a search for doubt. I talked to you about the fact that you must find the defendant guilty beyond a reasonable doubt. That is the standard to be applied in the defendant's case, the same as any other case. But reasonable doubt does not mean beyond all doubt and it doesn't mean, as the defense wants to you believe, that you give the defendant the benefit of the doubt.

*Id.* at 25. The Supreme Court pointed out that this is improper shifting of the burden of proof. *Id.* at 27. By stating this is not a search for doubt, it is a search for truth, the prosecutor implies the jury should not fully consider their doubts about the State's case. This is a misuse of the term truth.

While the use of the term "truth," should not be utilized to alter or shift the jury's focus, it is not, in and of itself, wrong. The Appellant argues that determining the "truth" of the charge puts

WPIC 4.01 in the same realm as the prosecutor's comments in *Warren* and *Emery*. This is not accurate. In asking them whether they have an abiding belief in the truth of the charges, it focuses the jury on whether the State has actually met its burden. In this manner, the use of the term clarifies and protects a defendant's rights, it does not harm them.

The language utilized in WPIC 4.01, or substantially similar language, has been challenged multiple times over the course the years on due process grounds. On each of these occasions the instruction has been upheld by the higher courts. See *State v. Harras*, 25 Wash. 416, 420, 65 P.2d 774 (1901) (stating "a doubt for which a good reason exists," was correct "according to the great weight of authority"); *State v. Tanzymore*, 54 Wash.2d 178, 178-79, 240 P.2d 290 (1959) (stating the Appellant's specific challenge focusing on the term "truth," does not change the constitutional validity of the instruction) *State v. Bennett*, 161 Wash.2d 303, 307, 165 P.3d 1241 (2007) (stating WPIC 4.01 permits both the government and the accused the ability to accurately argue their theories of the case).

The Appellant's focus on the term "truth" is not a reason to overturn more than 100 years of jurisprudence. Used properly, as used in the current instruction, the term truth encourages the jury to seriously consider the State burden of proof, not to diminish it.

- b. WPIC 4.01 does not require an the jury to articulate their reason for finding a defendant not guilty.

WPIC 4.01 helps provided a framework for which juries can apply the burden of proof to the evidence presented to them. The Appellant attempts to apply court holdings made regarding improper closing arguments to WPIC 4.01. The case law on point stands for the proposition that WPIC 4.01 upholds the burden of proof and does not require anything of the defendant.

As stated above, when before the Supreme Court, the language utilized by WPIC 4.01 has repeatedly passed muster. *State v. Pirtle*, 127 Wash.2d 628, 262, 127, 904 P.2d 245 (1995). The Court points out that WPIC 4.01 repeatedly directs the jury to consider the reasonable doubt standard in light of the evidence in the case. *Id.* at 262. This is the proper manner in which to utilize

the reasonable doubt standard. The use of phrasing which explains doubt in light of the evidence offered

does not infringe upon the constitutional right that a defendant is presumed innocent; but tell the jury when, and in what manner, they may validly conclude that the presumption of innocence has been overcome.

*State v. Thompson*, 13 Wash.App. 1, 5, 533 P.2d 395 (1975).

The Appellant cites *Emery* for the proposition that jurors need not articulate a reason for their doubt. BOA at 15. The *Emery* Court makes this comment in a situation where the prosecutor used a fill in the blank instruction in conjunction with an argument about searching for the truth to shift the burden of proof. *Id.* at This is not what WPIC 4.01 does. WPIC 4.01 asked the jury to have an abiding belief in the truth of the charges and to have good reason to doubt based on the evidence presented.

The Appellant also lifts words of the jury instruction, such as “reason” and defines them out of context with the surrounding language. This does not do justice to the instruction. The whole purpose in discussing “reason” in the context of evidence to insure the jury “fully, fairly, and carefully...” consider all the evidence in

deciding if the State has overcome their burden. WPIC 4.01. By taking issue with the word “reason,” and implying the word itself forces an untenable articulation requirement, the Appellant argues against the very use of the phrase reasonable doubt itself. How can one take the “reason” out of reasonable doubt?

The law is well settled in the matter. The doctrine of stare decisis requires a “clear showing that an established rule is incorrect and harmful” before a court can abandon it. *In re Stranger Creek*, 77 Wash.2d 649, 653, 466 P.2d 508 (1970). The Appellant’s dislike of the word “reason” and the connotations he draws from it are insufficient to justify a departure from long established precedent.

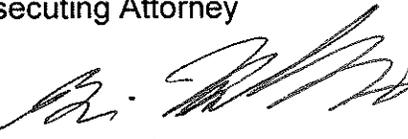
#### **D. CONCLUSION**

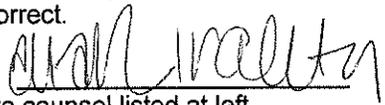
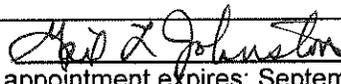
During closing argument, the Appellant did not argue he should not be held responsible because he could not form the intent to commit the crimes. If such an issue had really been in dispute, it could have been argued in context of the “to convict” instruction and the WPIC defining intentional conduct. The Appellant decision not to mention the issue is a strong indicator it was not a good argument for the defense.

Based on the foregoing, the State respectfully requests that the Franklin County Superior Court convictions for Richard Tigner be affirmed.

Dated this 4th day of February, 2016.

Respectfully submitted,  
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 Prosecuting Attorney

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Affidavit of Service	David Gasch PO Box 30339 Spokane, WA 99223-3005 gaschlaw@msn.com	A Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that a copy of the foregoing was delivered to opposing counsel by email per agreement of the parties pursuant to GR30(b)(4). I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  Dated 4th day of February 2015, Pasco WA  Original e-filed at the Court of Appeals; Copy to counsel listed at left
Signed and sworn to before me this 4th day of February, 2016  Notary Public and for the State of Washington residing at Pasco My appointment expires: September 9, 2018		