

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 66728-9-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
VENITA RESHMA CHANDRA,)	
)	
Appellant.)	FILED: June 11, 2012

Schindler, J. — A jury convicted Vernita Reshma Chandra of assault in the third degree. On appeal, Chandra claims she was denied her constitutional right to be present for a critical stage of trial. Chandra also claims the court erred in refusing to give a jury instruction on voluntary intoxication. Because Chandra waived her right to be present during a portion of jury selection and the court properly refused to instruct the jury on voluntary intoxication, we affirm.

FACTS

At approximately 2:00 a.m. on June 12, 2010, Seattle Police Officer Travis Loyd was on patrol in the Belltown area of Seattle. As Officer Loyd drove by Club Aura, a bystander flagged him down and asked for assistance. Pointing to a rowdy crowd in front of the club, the man told Officer Loyd that one of the men assaulted a woman and “needs to be stopped.” Officer Loyd briefly sounded the siren, turned on the spotlight

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and emergency lights, and called for backup before getting out of the patrol car to

investigate.

As Officer Loyd walked toward the crowd outside the entrance to the club, he saw a woman, later identified as Venita Reshma Chandra, fighting with another woman. Chandra threw her purse at the other woman and then charged toward Officer Loyd. Officer Loyd identified himself as a Seattle Police Officer and repeatedly told Chandra to “stop.” Chandra did not stop. Chandra asked Officer Loyd “what are you going to do?” and then pushed him. Officer Loyd tried to gain control by pushing Chandra back against a parked car. Officer Loyd heard someone behind him yell “get your hands off my sister.” When the officer turned around, Chandra hit him in the left side of his face with a closed fist.

While Chandra continued to struggle, Officer Loyd attempted to place her under arrest. Chandra’s brother grabbed her and tried to pull her away. Officer Loyd struggled with Chandra and her brother. Backup officers, including Officer Britt Sweeney, helped restrain and arrest Chandra.

The State charged Chandra with assault in the third degree in violation of RCW 9A.36.031(1)(g). Chandra pleaded not guilty.

On the first day of trial, Chandra appeared in court with her attorney. Following pretrial motions, the court swore the jury venire. The court then dismissed the jury venire for the day with instructions to return the next morning.

After the jury venire was excused, defense counsel said that Chandra had class the next morning and asked the judge to allow her to not attend jury selection the next morning. “She is wondering - she has tomorrow class in the morning, but she is

wondering if she has to be here tomorrow morning, because our case will not start until afternoon.” In response, the State indicated it did not object as long as the jurors were not informed of the reason Chandra was absent. The defense agreed to the State’s request and the court permitted Chandra to be absent the next morning.

The next morning, defense counsel confirmed that Chandra would attend trial in the afternoon. Jury selection was completed before the noon recess. Chandra was present when the trial reconvened after the noon recess.

Officer Loyd and Officer Sweeney testified in the State’s case in chief. Testifying on behalf of the defense, five witnesses testified that they were with Chandra the night of her arrest, but did not see Chandra hit Officer Loyd. None of the witnesses were able to testify about how much Chandra had to drink that night. Chandra testified that she did not “strike or swing at Officer Loyd” or “intentionally hit or push Officer Loyd.” Chandra said she was drunk, but that she “remember[ed] all the details of what happened” and “did know what [she] was doing.”

Defense counsel asked the court to instruct the jury on voluntary intoxication. The proposed jury instruction states that “[i]t is a defense to a charge of assault that the defendant was intoxicated therefore lacked the requisite intent to commit the crime of assault.” The trial court refused to give the proposed instruction because there was insufficient evidence that Chandra lacked the ability to form intent.

The jury convicted Chandra of assault in the third degree. The court imposed a standard-range sentence.

ANALYSIS

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Jury Selection

Chandra claims she was denied her constitutional right to be present for jury

selection, and she did not waive that right.

“A criminal defendant has a fundamental right to be present at all critical stages of a trial[,]” including voir dire and empanelling of the jury. State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011).

“Whether a defendant’s constitutional right to be present has been violated is a question of law, subject to de novo review.” Irby, 170 Wn.2d at 880. But in evaluating whether a defendant’s absence is voluntary, “abuse of discretion is the correct standard of review” because the determination “is dependent upon an inquiry into the facts and totality of the circumstances.” State v. Garza, 150 Wn.2d 360, 366, 77 P.3d 347 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. Garza, 150 Wn.2d at 366.

An express waiver is not required when a defendant is voluntarily absent after the trial has commenced. CrR 3.4; Garza, 150 Wn.2d at 367. Whether the absence of a defendant is voluntary is determined by looking at the totality of the circumstances. State v. Thomson, 123 Wn.2d 877, 881, 872 P.2d 1097 (1994). In evaluating the totality of the circumstances, the trial court should (1) make a sufficient inquiry into the circumstances to determine whether the absence is voluntary, and (2) afford the defendant an opportunity to explain the absence. Thomson, 123 Wn.2d at 881. “If the court finds a waiver of the right to be present after trial has begun, the court is free to exercise its discretion to continue the trial without further consideration.” Thomson, 123 Wn.2d at 881.

Here, there is no dispute that Chandra was present at the beginning of trial and

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jury voir dire. The record establishes that instead of participating in jury selection the

next morning, Chandra chose to go to class.

After the jury venire was excused and instructed to return the next day, Chandra asked if she could go to class the next morning rather than participate in jury selection.

THE COURT: If there is nothing else, I will see you tomorrow at 9:30.

THE DEFENDANT: I am actually attending school right now.

THE COURT: You should talk to your lawyer. I should hear from your lawyer.

[DEFENSE COUNSEL]: She is wondering – she has tomorrow class in the morning, but she is wondering if she has to be here tomorrow morning, because our case will not start until afternoon.

The court then asked the prosecutor if the State objected to Chandra's request.

THE COURT: [D]o you have any objection to her being absent, if she chooses to be absent?

[PROSECUTOR]: I think that is her option, Your Honor, I would ask that the jurors not be told why she is not here.

In response, the defense agreed, "All right. I think that we don't have an objection to that.

The next morning, the court confirmed with defense counsel that Chandra planned to attend trial that afternoon.

[PROSECUTOR]: In speaking with [defense counsel], it is my understanding that the defendant has classes this morning that she did not want to miss, that is why she is not present today. But she will be here at 12:30 for this afternoon session.

....

THE COURT: [H]ave you resolved an issue of your client being gone this morning? Is she going to be here?

[DEFENSE COUNSEL]: She is going to be here after 12 o'clock, Your Honor.

The totality of the circumstances establishes that Chandra voluntarily waived her right to be present during jury selection.

Voluntary Intoxication Jury Instruction

Chandra also claims the court erred in refusing to give a jury instruction on voluntary intoxication.

A trial court's refusal to give a jury instruction based on the evidence is reviewed for abuse of discretion; a trial court's refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). The defendant is entitled to have the court instruct the jury on its theory of the case if evidence supports the instruction. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). A defendant is not entitled to an instruction that is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

A defendant is entitled to a voluntary intoxication instruction if (1) the crime charged has as an element of a particular mental state, (2) there is substantial evidence of intoxication, and (3) there is evidence that the intoxication affected the defendant's ability to acquire the required mental state. See State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). As to the third prong, "[i]t is well settled that to secure an intoxication instruction . . . there must be substantial evidence of the effect[] of alcohol on the defendant's mind or body." State v. Gallegos, 65 Wn. App. 230, 237-38, 828 P.2d 37 (1992) (internal quotation marks omitted).

Here, the State charged Chandra with the crime of assault in the third degree in violation of RCW 9A.36.031(1)(g). RCW 9A.36.031(1)(g) states, in pertinent part,

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:

. . . .
. . . 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.

The trial court refused to instruct the jury on voluntary intoxication because it was not supported by the evidence. The court ruled, in pertinent part:

I don't think that there is sufficient evidence for a jury to find that she didn't or was unable, because of her intoxication to, form the intent to commit the crime of assault.

And then we have the second level that [the prosecutor] argues, how can there be an excuse from committing an act that the defendant claims never occurred?

Chandra asserts the evidence shows that her "intoxication affected her ability to form the required intent." The record does not support Chandra's argument. Chandra repeatedly testified that she "knew what [she] was doing." For example:

[PROSECUTOR]: So you are not too clear about what happened that night; is that right?

[CHANDRA]: I am clear on how somebody grabbed me from behind. I know that I was charging my brother.

After I threw my purse at Monica, I was charging my brother. I was, you know, my goal was to talk to [my brother].

. . . .
[PROSECUTOR]: So you remember all of the details of what happened to you. Is that right? Can you say yes or no?

[CHANDRA]: Yes.

. . . .
[PROSECUTOR]: Well, Ms. Chandra, you are saying that you had five shots that night. You are drunk, but you remember your friend, Monica, pulling you along. You remember pushing a girl, and you remember charging at your brother.

[CHANDRA]: Yes.

[PROSECUTOR]: But you are saying that you really were drunk that night?

[CHANDRA]: I was drunk, but I remember a little bit, what I was doing. Just because you are drunk doesn't mean that you don't know what you are doing all of the time.

[PROSECUTOR]: So you did know what you were doing?

[CHANDRA]: Ah-hum.

Because the record did not support the defense request to give a voluntary intoxication instruction, the court did not abuse its discretion in refusing to do so.

Statement of Additional Grounds

In her statement of additional grounds, Chandra challenges the sufficiency of the evidence. Chandra argues the evidence does not support the jury conviction of assault of Officer Loyd. In determining the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002). A challenge to the sufficiency of the evidence admits the truth of the evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. See State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Viewing the evidence in the light most favorable to the State, the testimony shows that Chandra pushed Officer Loyd and hit him in the face.

Chandra also argues the court erred in allowing the State to impeach her with a previous charge of domestic violence involving her brother. We will not disturb the trial court's rulings on a motion in limine or admissibility of evidence absent an abuse of discretion. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Evidentiary rulings "may be sustained on any proper basis within the record." State v. Markle, 118 Wn.2d 424, 438, 823 P.2d 1101 (1992). Because Chandra opened the door to admission of the prior charge during her testimony, the trial court did not abuse its

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discretion in allowing the State to cross examine her on the previous charge.

Affirmed.

WE CONCUR:

Leach, C. J.

Schiveller, J.

Cox, J.