

July 11, 2017

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

DEVIN RAY REED,

Appellant.

No. 49416-7-II

UNPUBLISHED OPINION

JOHANSON, J. — Devin R. Reed appeals his bench trial conviction for third degree assault. Specifically, he challenges the trial court’s denial of his motion for appointment of a defense expert. Reed argues that the trial court abused its discretion when it based its decision on an incorrect interpretation of the law. Accepting the State’s concession of error, we reverse Reed’s third degree assault conviction and remand for a new trial.

**FACTS**

In May 2016, Ocean Shores Police Sergeant David M. McManus responded to a report that Reed was on lysergic acid diethylamide (LSD) and threatening people with a gun. Witnesses reported that Reed had taken LSD, had become paranoid and delusional, and had armed himself with a rifle before he drove away in a black pickup truck.

Soon thereafter, Sergeant McManus learned there had been a traffic collision involving a black pickup. Suspecting Reed’s involvement, Sergeant McManus responded to the scene to

assist. Sergeant McManus found Reed close to the accident scene. Reed maintained an aggressive demeanor towards Sergeant McManus and screamed at him. Reed then attacked Sergeant McManus and eventually knocked him to the ground. Officer Tony Vierra arrived to assist, subdued Reed with a stun gun, and arrested Reed. Sergeant McManus was in uniform and performing his official duties when the assault occurred.

The State charged Reed with third degree assault. The trial court declared Reed indigent and appointed counsel at public expense. Before trial, defense counsel moved for a court order providing funds to pay for a defense expert to evaluate a diminished capacity defense pursuant to CrR 3.1(f). The trial court denied the request after a discussion with counsel about whether a voluntary intoxication defense was available for third degree assault. The trial court distinguished between “specific intent” and “general intent” crimes, concluding that “[a]ssault by battery does not require specific intent . . . and therefore diminished capacity is not available to [Reed].” Report of Proceedings at 5-6. Reed waived his right to a jury trial and the case proceeded to a bench trial on stipulated facts. The trial court found Reed guilty of third degree assault. Reed appeals his conviction.

#### ANALYSIS

Reed argues that the trial court violated his constitutional right to present a diminished capacity defense by refusing to authorize funding for expert evaluation. Specifically, Reed argues that the trial court abused its discretion in denying his motion for funding for a defense expert based on a misstatement of the law, thus violating his constitutional right to present a defense. Reed claims that the trial court erred when it used the distinction between general intent and specific intent crimes to determine when a voluntary intoxication defense can be brought. Reed

contends that a defendant may present a voluntary intoxication defense when the crime requires any culpable mental state. The State concedes that the trial court improperly limited the scope of the voluntary intoxication defense. We agree with Reed and accept the State's concession of error.

“Whether expert services are necessary for an indigent defendant's adequate defense is within the trial court's discretion, and its decision will not be overturned absent an abuse of discretion.” *State v. French*, 157 Wn.2d 593, 607, 141 P.3d 54 (2006) (citing *State v. Young*, 125 Wn.2d 688, 691, 888 P.2d 142 (1995)). “A trial court necessarily abuses its discretion if it bases its ruling on an erroneous view of the law.” *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (citing *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008)). “A trial court should not exclude expert testimony regarding a defendant's mental disorder based on the distinction between general and specific intent.” *State v. Atsbeha*, 96 Wn. App. 654, 660-61, 981 P.2d 883 (1999) (citing *State v. Edmon*, 28 Wn. App. 98, 104, 621 P.2d 1310 (1981)), *rev'd on other grounds*, 142 Wn.2d 904, 16 P.3d 626 (2001). “The State bears the burden of showing that the constitutional error was harmless.” *State v. DeLeon*, 185 Wn.2d 478, 488, 374 P.3d 95 (2016).

An indigent defendant's constitutional right to present a defense includes a right to expert testimony on his or her behalf. *State v. Poulsen*, 45 Wn. App. 706, 709, 726 P.2d 1036 (1986). CrR 3.1(f) governs the appointment of experts at public expense. *Young*, 125 Wn.2d at 691. “[CrR 3.1(f)] requires the State to provide funds for expert witnesses only where they are ‘necessary to an adequate defense.’” *Poulsen*, 45 Wn. App. at 709 (emphasis omitted) (quoting *State v. Kelly*, 102 Wn.2d 188, 200-01, 685 P.2d 564 (1984)).

“[E]vidence of voluntary intoxication may be used to negate a defendant’s mental state when the existence of a particular mental state is a necessary element of the crime charged, but not otherwise.” *State v. Swagerty*, 60 Wn. App. 830, 834, 810 P.2d 1 (1991) (citations omitted).

“A person is guilty of assault in the third degree if [he], under circumstances not amounting to assault in the first or second degree, . . . [a]ssaults a law enforcement officer . . . who was performing his or her official duties at the time of the assault.” RCW 9A.36.031(g). Intent is a court-implied essential element of assault. *State v. Davis*, 119 Wn.2d 657, 662, 835 P.2d 1039 (1992); *State v. Finley*, 97 Wn. App. 129, 135, 982 P.2d 681 (1999); *State v. Brown*, 94 Wn. App. 327, 342, 972 P.2d 112 (1999), *aff’d*, 140 Wn.2d 456, 998 P.2d 321 (2000). Although the defense of voluntary intoxication is usually associated with intent crimes, the defense is also appropriate when the defendant is charged with a crime for which a lesser mental state is required. *State v. Lottie*, 31 Wn. App. 651, 653, 644 P.2d 707 (1982) (holding that voluntary intoxication can negate the mental state of knowledge).

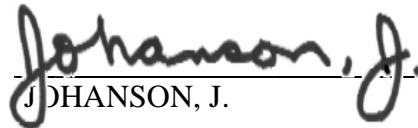
Here, the trial court denied Reed’s request for expert funds because it believed that a voluntary intoxication defense was precluded for general intent crimes. And the trial court concluded that, since the accepted common law definition for assault by battery would traditionally be categorized as a general intent crime, Reed could not raise a voluntary intoxication defense.

However, as set forth in *Atsbeha*, the trial court erred. 96 Wn. App. at 660-61. A defendant can raise a voluntary intoxication defense whenever a defendant is charged with a crime for which a culpable mental state is required. *Lottie*, 31 Wn. App. at 653-55. Evidence of voluntary intoxication can rebut the element of intent for any degree of assault. *Finley*, 97 Wn. App. at 134-35.

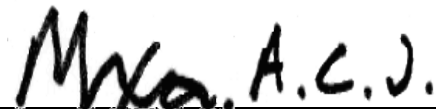
As discussed above, the trial court's denial of funding to evaluate Reed's voluntary intoxication defense was based upon an erroneous understanding of the law. Therefore, the trial court erred. *Harvill*, 169 Wn.2d at 259. The State has conceded error and has offered no argument to demonstrate the harmlessness of the trial court's error; therefore, the error is presumed to be harmful and necessitates a new trial. *DeLeon*, 185 Wn.2d at 488.


Accordingly, we reverse Reed's third degree assault conviction and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
\_\_\_\_\_  
JOHANSON, J.

We concur:

  
\_\_\_\_\_  
MAXA, A.C.J.

  
\_\_\_\_\_  
LEE, J.