

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

GARRICK CHRISTOPHER WALL,

Appellant.

No. 41419-8-II

UNPUBLISHED OPINION

Worswick, A.C.J. — Garrick Wall appeals his conviction for third-degree assault, arguing that the trial court erred by not instructing the jury on voluntary intoxication. We affirm.<sup>1</sup>

**FACTS**

On May 16, 2010, Wall was involved in a fight with Fred Johnson outside the Code Red, a bar and dance club. During the course of the fight, Wall’s head struck a curb. Officers Christopher Taylor, Troy Thornburg and Warren Ayers responded to the call at the club. They observed Wall and Fred Johnson fighting outside the club. Officers Taylor and Ayers picked up Johnson and held him against a nearby wall. Officer Taylor heard someone say “look out,” turned to look over his left shoulder and saw Wall approaching him with raised fists. Report of Proceedings (RP) (Sep. 21, 2010) at 38-39. Wall struck him on the back and right sides of his head. Wall tried to run but Officers Taylor and Ayers tackled him and handcuffed him.

The State charged Wall with third-degree assault. At trial, Johnson testified that he thought Wall was “probably pretty intoxicated,” but that Wall had been coherent in the bar and

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<sup>1</sup> A commissioner of this court initially considered Wall’s appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

had not fallen down, vomited or lost consciousness. RP (Sep. 21, 2010) at 64-66. Officer Taylor testified that Wall was intoxicated, that he slurred his words, and that his demeanor fluctuated from angry to apologetic, but that once he had Wall at the jail, Wall continuously apologized.

Wall testified that he had been drinking in the bar and had brought in a business card with his credit card number written on the back. He testified that he got upset because he left the card in the bar. He said that he and Gerraint Almanza were having an argument outside the club about the card when “[a]ll of a sudden I feel pressure and blacked out.” RP (Sep. 21, 2010) at 121. He said he fell and hit his head and didn’t remember anything until waking up in the back of Officer Taylor’s vehicle. When asked whether he had been intoxicated that night, Wall responded:

I wouldn’t drive. I was definitely over the limit for driving. I wasn’t unconscious. I felt like I had eight drinks and I felt like I was done for the night and that I needed to stop and that my coordination was off when I was walking. I noticed that my speech was slurred. I remember that I remember not being able to concentrate, as much, so I was impaired from drinking.

RP (Sep. 21, 2010) at 131.

On cross-examination, Wall testified that his blacking-out “definitely [had] to do with me striking my head, might be a little bit to do with the drinking.” RP Sep. 21, 2010 at 137.

Wall asked the trial court to instruct the jury on voluntary intoxication as a means of negating his criminal intent. The court declined to give the instruction, ruling that:

[I]t’s my understanding there has to be substantial evidence before the Court could properly give that instruction and the defendant did not claim that he was intoxicated to the point that he was substantially affected by what he had to drink. His defense was that he had blacked out, as a result of hitting the concrete. Consequently, I don’t think there’s a basis for the intoxication instruction.

RP Sep. 21, 2010 at 141. The jury found Wall guilty as charged.

Wall argues that the trial court erred in failing to give the intoxication instruction he

proposed, which is WPIC 18.10:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent.

Clerk's Papers at 39.

#### ANALYSIS

We review a trial court's refusal to give a voluntary intoxication instruction for abuse of discretion. *State v. Priest*, 100 Wn. App. 451, 454, 997 P.2d 452 (2000). To support the instruction, Wall was required to show (1) third-degree assault contains an element of a particular mental state, (2) there was substantial evidence of alcohol consumption, and (3) there was substantial evidence that the alcohol consumption affected his ability to possess the requisite mental state. *Priest*, 100 Wn. App. at 454; *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). This case turns on the third element.

Wall argues that his case is analogous to *State v. Kruger*, 116 Wn. App. 685, 692, 67 P.3d 1147 (2003), *review denied*, 150 Wn.2d 1024 (2003), in which the court held that Kruger was entitled to a voluntary intoxication instruction. But Kruger blacked out, vomited and was impervious to pepper spray, all as a result of his intoxication. 116 Wn. App. at 692. This case is analogous to *Gabryschak*, where the evidence showed that Gabryschak responded consistently to officers' requests, indicating that he understood the nature of the requests, and also showed that he tried to flee, indicating he was aware he was under arrest.

Wall did not present substantial evidence that the alcohol consumption affected his ability to form an intent to assault. He attributed his blacking-out to his fall, not his intoxication. He had been coherent in the bar and had not fallen down, vomited or lost consciousness, he attempted to

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flee immediately after the assault, and he was apologetic at the jail. The trial court did not abuse its discretion in refusing to give a voluntary intoxication instruction.

We affirm Wall's judgment and sentence.

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.

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Worswick, A.C.J.

We concur:

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Hunt, J.

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Quinn-Brintnall, J.