No. 28627-4-III

Sweeney, J. (dissenting) — Robert Webb was entitled to a voluntary intoxication instruction when the evidence here is viewed in a light most favorable to him.

A defendant is entitled to a voluntary intoxication instruction if the crime charged requires proof of a certain mental state and there is evidence that he was drinking and the alcohol affected his ability to form the requisite mental state. *State v. Gallegos*, 65 Wn. App. 230, 238, 828 P.2d 37 (1992).

The only question before us is whether Mr. Webb produced evidence from which a jury could find that he was too intoxicated to form the intent necessary to commit this robbery. When the evidence presented at trial is viewed in a light most favorable to Mr. Webb, it shows:

- Mr. Webb is an alcoholic and a member of Alcoholics Anonymous (AA).
- An hour before the robbery, he called his AA sponsor in Yakima. Mr. Webb was very upset and sounded intoxicated. The sponsor said Mr. Webb sounded rational at times and, at other times, he did not.
- Mr. Webb slurred and misused words at the time of the robbery.
- He robbed the store, with his nine-year-old daughter in tow, after a dispute over taking and then refusing to pay for a second coffee cup.

- After the robbery, Mr. Webb called the sponsor again. On the phone, he alternated between making sense and being incoherent.
- Mr. Webb then drove to the sponsor's home after the robbery. The sponsor reported that Mr. Webb seemed so drunk that he could hardly stand up. Mr. Webb was getting sick and was crying. The sponsor could not tell whether Mr. Webb could see through his tears. The sponsor said that Mr. Webb seemed so drunk or high that it seemed impossible that he had driven from Thorp to Yakima, but he did. Mr. Webb sat down and went in and out of consciousness.
- The sponsor tried to get Mr. Webb to leave the little girl with him. Mr. Webb said delirium tremens (a severe form of alcohol withdrawal) was bothering him and he was sick.
- When interviewed by police, Mr. Webb had no memory of the robbery.
- Detective Greg Bannister testified that Mr. Webb appeared to be intoxicated on the videotape.

I conclude that a jury could easily find from this evidence that Mr. Webb was too drunk to form the necessary intent to commit first degree robbery. No doubt there was also evidence from which the jury could find that he did have the mental wherewithal to

commit first degree robbery. But Mr. Webb was entitled to have a jury decide what was most persuasive. The test on appeal is whether Mr. Webb produced substantial evidence from which a jury could conclude that he could not form the requisite intent or, at least, that there is a reasonable doubt that he could form the requisite intent. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Douglas*, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005). Beyond a reasonable doubt implicates the burden of persuasion, and the jury, not this court or the trial judge, determines whether that burden has been met. *State v. Huff*, 64 Wn. App. 641, 655, 826 P.2d 698 (1992). Alcohol's effects are commonly known, and jurors are in the best position to draw reasonable inferences from testimony about the effects of alcohol on a defendant. *State v. Thomas*, 123 Wn. App. 771, 782, 98 P.3d 1258 (2004); *State v. Kruger*, 116 Wn. App. 685, 692-93, 67 P.3d 1147 (2003); *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985).

I am also not persuaded by the State's reliance on *State v. Gabryschak*, 83 Wn. App. 249, 921 P.2d 549 (1996). The *Gabryschak* court began its analysis with the observation that "[i]ntoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious." 83 Wn. App. at 254. I agree with these observations. But the opinion side-stepped an important question—who decides whether the defendant was too

intoxicated to form the necessary mens rea? The jury or a panel of appellate judges? In *Gabryschak*, the appellate court itself evaluated the evidence of the defendant's intoxication and found, as a matter of fact, that the defendant was not drunk enough to be unable to have the mental state required to commit the crime. *Id.* at 254-55.

Significantly, *Gabryschak* does not discuss or even mention what standard of review the court was applying. That is an important omission. Again, the question in *Gabryschak* and the question before us is whether the defendant has met his burden of production. *Huff*, 64 Wn. App. at 655. That is, the question is whether there was sufficient evidence presented to this jury to require the instruction. *Gallegos*, 65 Wn. App. at 237-38. As *Gabryschak* shows, anything more moves us into deciding just how persuasive this evidence is. 83 Wn. App. at 254-55. And that is the jury's function. *Douglas*, 128 Wn. App. at 561-62; *Huff*, 64 Wn. App. at 655.

In sum, Mr. Webb produced evidence that he was drunk during this robbery. It was for the jury to decide whether the effects of the alcohol on his mind and body prevented him from forming the necessary intent required to commit this crime. I would conclude that there is substantial evidence in this record to support a voluntary intoxication instruction and that the trial court erred as a matter of law by refusing to give it. I would, therefore, reverse and remand for trial with proper instructions.

I also disagree with the majority's conclusion that substantial evidence does not support the aggravating factor for an exceptional sentence. The test for substantial evidence is modest. We look for evidence that supports the fact finder's decision; it is not our function to weigh the evidence for and against it. *State v. Bunch*, 2 Wn. App. 189, 191, 467 P.2d 212 (1970). The evidence produced here goes both ways. But I would conclude that the expression on the face of Mr. Webb's daughter and the sponsor's later observations of the child are substantial evidence of the aggravating factor.

I respectfully dissent.

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Sweeney, J.