IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	No. 62304-4-I
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
	)	
JOEY WAYLAND,	)	
	)	
Appellant.	)	FILED: December 14, 2009
_____	)	

Schindler, C.J. — In order to give a voluntary intoxication jury instruction, the defendant must present evidence that intoxication is connected to the defendant's ability to form the mental state to commit the crime. Joey Wayland appeals his conviction of assault in the fourth degree on the grounds that the trial court erred in refusing to give a voluntary intoxication instruction. Because Wayland did not present evidence that intoxication affected his ability to form the requisite intent, we affirm.

FACTS

At approximately 6:00 p.m. on March 28, 2008, Paul Nordby was walking to a meeting in the University District. Nordby was carrying a black laptop shoulder bag with a Microsoft label. Because he was late for the meeting, Nordby decided to take a shortcut through an alley. Nordby said that as he entered the alley, he saw Wayland

urinating against a wall. Nordby assumed that Wayland was intoxicated. No one else was in the alley.

As Nordby walked past Wayland, Wayland said that he liked Nordby's laptop bag. Nordby continued walking without responding. Wayland followed Nordby and told him "'[g]ive me your money, bitch.'" Nordby said that he heard noises behind him that sounded like Wayland was "swinging at me." Nordby continued walking away, without turning around. Wayland yelled "'[g]ive me your money, bitch'" three or four more times and Nordby continued to hear "swinging" noises. One time he felt "[o]ne of the swings brushed my jacket, ..."

When Nordby left the alley, he contacted Seattle Police Officer Robert Brown and Officer Brian Rees. Nordby told Officer Brown that an extremely intoxicated man had tried to rob him.

Approximately fifteen minutes later, Officer Brown and Officer Rees arrested Wayland. Officer Brown's report notes that Wayland was "extremely intoxicated." Officer Brown testified that Wayland had a strong alcohol smell on his breath, lacked coordination, and was swaying. Officer Rees testified that Wayland had alcohol on his breath and red and watery eyes. Both officers testified that Wayland's speech was slurred.

The State charged Wayland with attempted robbery in the second degree. Wayland's defense was general denial. Nordby, Officer Brown, and Officer Rees testified at trial on behalf of the State. Wayland's longtime friend Matthew Born and

the defense investigator testified on behalf of the defense. Wayland did not testify.

Matthew Born testified that he was drinking with Wayland on March 28 in the alley. Born said that after he returned from the liquor store, Wayland told him what happened with Nordby. While Born said that Wayland told him that he used the phrase "'[g]ive me your money, bitch,'" Born testified that Wayland said that he did not try to rob Nordby. The defense investigator testified that Nordby said that Wayland did not say anything until after he walked past him, and that he never looked back at Wayland.

Wayland requested a jury instruction for the lesser included crime of assault in the fourth degree. The State did not oppose the request and asked for an additional lesser included instruction for attempted theft in the first degree. The court agreed to give instructions on both lesser included crimes.

Wayland then requested a jury instruction on voluntary intoxication. Because there was no evidence that Wayland's intoxication impaired his ability to form the intent to commit the charged crimes, the court denied the request to give a voluntary intoxication instruction.

In closing, the defense argued that Wayland did not attempt to either rob or assault Nordby and that Nordby was anxious and misinterpreted Wayland's behavior.

The jury could not reach a verdict on the charge of attempted robbery in the second degree or the lesser included offense of attempted theft in the first degree. However, the jury found Wayland guilty of the lesser included offense of assault in the

fourth degree. The court imposed a twelve month suspended sentence with credit for time served. Wayland appeals the conviction.

DECISION

Wayland argues the court erred in denying his request for a voluntary intoxication instruction because the undisputed evidence establishes that he was extremely intoxicated.[1] Wayland contends that without a voluntary intoxication instruction, he was denied the right to argue that he did not have the requisite intent to commit assault in the fourth degree. Where, as here, the trial court's decision to not give a jury instruction is based on the facts of the case, we review the decision for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998).

A voluntary intoxication instruction allows the jury to consider evidence of intoxication in deciding whether the defendant acted with the intent to commit the crime. State v. Thomas, 123 Wn. App. 771, 781, 98 P.3d 1258 (2004). To obtain a voluntary intoxication instruction, the defendant must show that: (1) the crime charged has as an element a particular mental state, (2) there is substantial evidence of intoxication, and (3) the defendant presents evidence that intoxication affected his or her ability to acquire the required mental state. State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992). Because a person can be intoxicated and still be able to form the requisite mental state, "[t]he evidence 'must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of

[1] Because the jury did not convict Wayland of attempted robbery in the second degree or the lesser included crimes, we need that address his argument as to those crimes on appeal.

culpability to commit the crime charged.'" State v. Gabryschak, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996).

There is no dispute that assault in the fourth degree requires a specific mental state. The instructions define assault as follows:

> An assault is an intentional touching or striking of another person, with unlawful force that is harmful or offensive regardless of whether any physical injury is done to the person. A touching or striking is offensive if the touching or striking would offend an ordinary person who is not unduly sensitive.
>
> An assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied with the apparent present ability to inflict the bodily injury if not prevented. It is not necessary that bodily injury be inflicted.
>
> An assault is also an act, with unlawful force, done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.[2]

Below and on appeal, Wayland relies on State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), to argue that intoxication affected his ability to form the requisite intent to commit the crime of assault in the fourth degree.

In Kruger, the defendant argued that he was denied effective assistance of counsel when his attorney failed to request an instruction on voluntary intoxication for assault in the third degree of a police officer. Kruger, 116 Wn. App. at 690. The evidence at trial established that the highly intoxicated defendant did not react to the use of pepper spray, swung a beer bottle at a police officer, and then head butted

[2] See 11 Washington Pattern Jury Instructions: Criminal, 35.50 (3d ed. Supp.2005) (WPIC).

him. Kruger, 116 Wn. App. at 688-89. The court concluded that the defendant was entitled to the instruction because "there is ample evidence of his level of intoxication on both his mind and body, e.g., his 'blackout,' vomiting at the station, slurred speech, and imperviousness to pepper spray." Kruger, 116 Wn. App. at 692.

Below, the trial court rejected Wayland's reliance on Kruger.

> Here, we don't have any testimony about the level of intoxication on his mind. Here, it talks about the blackouts, and his imperviousness to pepper spray. He clearly talks about his blackouts that goes to the ability to form intent here. There is no evidence that Mr. Wayland had experienced any sort of blackout or that his intoxication rose to the level that it affected the level to form intent.

We agree with the trial court.

While there is evidence of Wayland's intoxication and his slurred speech and impaired balance, unlike in Kruger, Wayland failed to present any evidence that his drinking affected his ability to form the intent to assault Nordby.

Because the trial court did not abuse its discretion in deciding not to give the requested instruction on voluntary intoxication, we affirm.

Schindler, C.J.

WE CONCUR:

Becker, J.

Grosse, J.