appeal. Requests to reopen the file in 2004 were properly ignored because the "substantial, credible, new evidence" was untimely and the file had been closed.

The appellant's 2004 enrollment application was properly denied because his parents did not reside on the reservation at the time it was filed or was it filed within six months of the appellant's birth.

A Court ordered blood correction for a family member is not "substantial, credible, new evidence" for the purpose of reopening an enrollment file more than one year after an application has been denied.

Accordingly, the Order of Dismissal is AFFIRMED.

IT IS SO ORDERED:

Dupris, CJ

I concur with the decision to affirm the Trial Court in this matter. I write this short concurrence to clarify one point. The majority writes "His father's blood quantum had not been changed and remained at seven-sixteenths on the official rolls. Accordingly, he was not eligible for enrollment under the provisions of the Enrollment Code." (Memorandum Opinion Affirming Trial Court, at page 5) I do not find this "fact" in the Trial Court's findings, so I see no need to refer to it. We do not know, for a fact, that Appellant's father's blood quantum was or was not changed on the base roll. It is not in the Trial Court's findings. The Trial Court did find that, in 2000, Appellant met the criteria for adoption under the Enrollment Code, Chapter 8-1, because he was born off the Reservation and was not enrolled within six (6) months of his birth. *See*, "Order Granting Respondent's Motion to Dismiss," at p6 (July 31, 2006).

In 1965 Appellant's parents did not pursue an appeal on the denial of his enrollment. In 2000 Appellant was notified he was adopted into the Tribes as a member; he did not appeal the adoption in a timely fashion. It is for these reasons the Trial Court should be affirmed. It is my opinion we do not need to go into the underlying facts which are not relevant to this ruling.

Denver BUCKMAN, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee.

Case No. AP05-004, 4 CTCR 35, 34 Indian L. Rep. 6002

8 CCAR 101

[Neil Porter, Office of Public Defender, brief for Appellant. Michael Larsen, Office of Public Defender, argued for Appellant.

Esther Payne, Office of Prosecuting Attorney, appeared for Appellee.

Trial Court Case No. CR-2004-27389]

Argued August 19, 2005. Decided December 14, 2006.

Before Presiding Justice Earl L. McGeoghegan, Justice Edythe Chenois and Justice Theresa M. Pouley

McGeoghegan, P.J. for the Panel.

INTRODUCTION

Denver Buckman, appeals his judgment and sentence after jury trial guilty verdicts for Aggravated Assault and for Battery. We affirm the convictions for Aggravated Assault and for Battery. We affirm the Judgment and Sentence in part and vacate probationary terms of the Judgment and Sentence.

SUMMARY

Appellant, Denver Buckman, was charged and convicted by a jury of one count of Attempted Criminal Homicide and one count of Battery. Arising from incidents occurring on or about December 12, 2004, the Appellant was accused of using a screwdriver to stab one person in the jaw area, and of biting another person's arm. The Appellant asserted he was acting in self-defense. The trial court gave a separate instruction on self-defense in its Jury Instruction No. 8, which includes a provision that the Tribe must prove beyond a reasonable doubt that the force used by the defendant was not lawful. Appellant properly took exception to the instruction.

Appellant also claimed, in his closing argument, that Appellant's intoxication should be considered by the jury. The Tribes objected to Appellant's argument, the trial court sustained the objection and stated to the jury that intoxication did not mitigate the defendant's accountability.

Appellant did not ask for a jury instruction on voluntary intoxication. The Appellee argued in closing argument that "reasonable people do not use drugs or get intoxicated" and Appellant objected. The trial court sustained the objection and Appellant claims error from both of the rulings and the comments of the trial judge and the prosecutor.

After conviction, the trial court sentenced Mr. Buckman on the one count of Attempted Criminal Homicide and one count of Battery. It is not disputed that the maximum sentence allowed by Colville Tribal law is 360 days for a Class A Offense. The trial court sentenced Appellant to 720 days, $20.00 in court costs, and 2 years of probation which included checking in with the probation officer, mental health and chemical dependency evaluations and other requirements. There was no suspended jail time, no credit allowed for time spent in jail awaiting trial, nor suspended fines or costs in the judgment.

DISCUSSION

1.*The trial court did not err in giving a jury instruction for self-defense which included the proper requirement that the Tribe bear the burden of proving a lack of self-defense beyond a reasonable doubt.*

Appellant's first claim of error is that the trial judge improperly instructed the jury on the issue of self-defense. Although the Appellant admits a jury instruction requiring the Tribes to prove an absence of self-defense beyond a reasonable doubt was given, he claims it was not specific enough. The court does not agree.

The court reviews de novo alleged errors of law in jury instructions. *Waters v. CCT,* 4 CTCR 14 (2004). When a defendant properly raises the issue of self-defense, he is entitled to a jury instruction regarding self-defense and failure to gives an instruction constitutes reversible error. *Waters, supra; Louie v CCT, 2 CCAR 47 (1994).* The instruction itself must properly outline that the "absence of self-dense must be proved beyond a reasonable doubt by the government". *Louie v. CCT, 2 CCAR 47 (1994).*

The trial court, in Jury Instruction No. 8 properly outlined that it is a defense that the force used was "lawful" and that "force used is lawful to prevent or attempt to prevent an offense against the person" and "[t]he Tribes have the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the Tribes have not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty". *Trial Court record, Jury Instruction No. 8.*

This instruction accurately meets the requirements of *Louie* of placing the burden on the Tribes to prove an absence of lawful force beyond a reasonable doubt and thus, the jury instruction was proper and the trial court did not err in not including the instruction in the "to convict" instruction.

2. *The defendant's claimed defense of "intoxication" was not improperly considered or commented on by the trial judge or prosecutor during the trial.*

Appellant claims three separate errors all related to defendant's claim of "intoxication". The first and second claims are that the trial judge erred in failing to give an instruction on voluntary intoxication and on improperly commenting that intoxication does not mitigate the accountability of the defendant. The third claim is that the prosecutor improperly commented on the intoxication claim in closing argument.

As an initial matter it must be noted that Appellant did not request a jury instruction on voluntary intoxication at any time during the trial. This makes the review particularly difficult because the record below was not properly developed for review on appeal. Nonetheless, Appellant did attempt to argue, in closing argument, that his intoxication mitigated his accountability for the crimes charged.

This court has not yet ruled on the availability of "voluntary intoxication" as a defense to a crime. The Tribal Code does not contain a provision allowing the defense. The Court is hesitant to create a defense not provided for in tribal law and declines to do so here.

However, intoxication may affect a defendant's ability to form the requisite intent to be convicted of a crime. Washington state law is instructive in this regard. To support an instruction on voluntary intoxication, a defendant must show that: 1)the crime charged has as an element a particular mental state; 2) there is substantial evidence of alcohol consumption and 3) there is substantial evidence in the record which shows that the alcohol consumption affected the defendant's ability to possess the required mental state. *State v. Hall,* 104 Wash.App.56, 62 (2000). In this case, the Appellant would not meet the criteria to support an instruction because he failed to show by substantial evidence that his consumption affected his ability to posses the required mental state. In fact, the record is directly to the contrary. The prosecutor specifically asked the defendant on cross-examination: Q: Is it your contention that because you abuse illegal drugs that you shouldn't be held accountable for your actions. A: It isn't because of that. It's because I reacted out of fear. . .". (Trial Record, 2:25:00). Despite the valiant efforts of defense counsel on re-direct examination, the record remains the same – Appellant himself believed his actions were as a result of his fear and not

his intoxication. The court agrees with Appellee in this case, if there were insufficient facts to justify an instruction on intoxication, it certainly was not error for the court to sustain the objection in closing argument.

Similarly, claims of misconduct by the judge in commenting on the objection are also unpersuasive. Appellant argues persuasively that when he raised the issue of intoxication in his closing argument that the judge sustained the prosecutor's objection and then improperly commented that the jury could not consider intoxication as relevant to the matter. Upon review of the record, however, the trial judge did not disallow Appellant from arguing he did not have the requisite intent but rather stated correctly that defendant's accountability was not mitigated. On this record, the statement was not in error.

Finally, Appellant claims the prosecutor engaged in prosecutorial misconduct in his closing argument. As with the other arguments on intoxication, the prosecutor's statements do not rise to a level of misconduct that would require reversal of the decision of the jury in this case. Thus, this Court affirms the verdict.

3. *The trial judge did not err by not granting defendant credit for time served but did err in sentencing Appellant to the maximum sentence and adding two years of probation.*

Appellant claims the trial court committed two errors in sentencing the defendant. First, the trial court erred in failing to give defendant credit for time served awaiting trial. Second, that the Court erred in imposing the maximum jail time allowed by the law and then imposing two additional years of probation. Each argument will be dealt with in turn.

Sentencing is within the "strict" discretion of the trial judge under the tribal code and caselaw. *St. Peter v. Colville Confederated Tribes,* 2 CCAR 2 (1993). A sentencing decision is subject to appeal only for a "manifest abuse of discretion". *Id. At 15*. It is clear that the discretion to impose jail time and or a fine is vested with the trial judge. *Waters. v. CCT,* 1 CCAR 18 (1985). This discretion includes a judge's discretion in providing for or not providing for credit for any detention prior to trial. *Coleman v. CCT,* 3 CCAR 58 (1996). The trial court's discretion is limited only by applicable statutes and the Constitution and only when it is shown that a trial judge manifestly abused his discretion will an appellate court intervene. *St. Peter v. CCT,* 2 CCAR 2 (1993).

The first issue raised is whether the trial court "manifestly abused her discretion" and violated the Colville Tribal Civil Right Act (CTCT 1-5) or the federal Indian Civil Rights Act (25 U.S.C. 1301 et. seq.) when she failed to give Appellant credit for time served while awaiting a trial

of the matter. After Appellant was found guilty of attempted homicide and assault, the trial judge issued a sentence in the case. Appellant was sentenced to "serve 720 day in jail with 0 days suspended. The defendant shall have credit for 0 days served. Remaining jail time shall be served by [X] straight jail time with no good time credit consecutive to other offenses." *Trial Court Judgment and Sentence, Page 2.* The tribal code and the tribal constitution are silent on the issue of credit for time served while awaiting a trial. Although Appellant argues that the trial judge exceeded the maximum sentence by not allowing credit for time served on a pre-trial basis while awaiting trial, this Court disagrees. All decisions of this Court have unwaveringly protected the discretion of the trial judge in sentencing unless it is restricted by tribal code or the constitution. *St. Peter v. CCT,* 2 CCAR 2 (1993); *Louie v. CCT,* 2 CCAR 47 (1994); *Brown v. CCT,* AP 94-029 (1997); *Waters v. CCT,* 1 CCAR 18 (1985). In this case, where the tribal legislature does not restrict the judges discretion to grant or deny credit for pre-trial time served, this Court declines to do so.

The second issue is whether Appellant may be required to remain on probation after he has served the maximum jail sentence allowed by law with no remaining suspended sentence or fine. Appellant argues this sentence exceeds the trial courts authority and violated both the Colville Tribal Civil Rights Act and the federal Indian Civil Rights Act. Appellant was sentenced to 720 and in paragraph 4 of the Judgment and Sentence it states: "4. The Conditions of the suspended portion of the jail time and fine are: a. [X] Obtain a Chemical Dependency Evaluation and file that with the Court by 1 year after release. . . c. [X] Obtain a Mental Health Evaluation from a certified agency and file that with the Court by 90 days after release. . . d. [X] Not commit any further offenses for 2 years after release. . . e. [X] notify the Court of any changes in physical mailing address, and telephone number for 2 years after release. . . . f. [X] Be on formal probation for 2 years after release . . . h. [X] No consumption of alcohol or illegal drug use for 2 years after release. " *Trial Court Judgment and Sentence page 2-3.* It is undisputed that conviction carries a maximum sentence of 360 days for each charge for a total of 720 days.

Although there is no tribal law directly on this issue, federal law is instructive. The Third Circuit has held that under the Federal Rules of Criminal Procedure, "a sentence of probation imposed without a suspended sentence is an illegal sentence." *U.S. v. Guervemont,* 829 F.2d 422 (1987). Similarly the Seventh Circuit has held that "Just as a court cannot suspend imposition of sentence without placing the defendant on probation, it cannot impose probation without suspending imposition or execution of at least part of the sentence." *U.S. V. Makres, 851 F. 3rd 1016, 1018 (1988).* Although federal law is not binding on this Court, we find the reasoning sound and adopt the rule. As the *Makres* court explained, probation contemplates an approach where an offender

may take an opportunity to be rehabilitated without institutional confinement. However, if the defendant abuses the opportunity then the court may impose some or all of the punishment suspended. The rule requires that probation must be accompanied by suspension of part of the defendant's sentence. In essence, the court reserves some of its sentencing power in case the defendant fails to comply. Having the reserved sentencing power is imperative because "illegal sentences are essentially only those which exceed the relevant statutory maximum limits." *Guervemont, supra at 427.*

This Court finds that the trial court erred by imposing probation without a suspended sentence. In so doing, the trial court exceeded the statutory maximum limits..

CONCLUSION

1. The verdict of the jury and the judgment of the trial court are AFFIRMED.

2. The Judgment and Sentence entered by the trial court is AFFIRMED in part and VACATED in part. A sentence of 720 with no credit for time served awaiting trial is AFFIRMED. Any sentence including probationary requirements after Appellant served the maximum sentence is error and is hereby VACATED.

3. This case is remanded to the trial court to enter a judgment and sentence consistent with this opinion.