

judgments, sentences, and disposition orders.

If an issue hasn't been sufficiently developed at the trial level, the Court of Appeals will not address the issue at the appellate level. *Gorr/Stensgar v. CCT*, 6 CCAR 39, 3 CTCR 47 (06-28-2002).

The issue of *ex parte* communication should be addressed at the Trial Court level to allow the Trial Court to fully investigate and determine if sanctions or any other remedy is appropriate. Only then will the Court of Appeals assume jurisdiction to determine if the Trial Court acted within the law.

#### DECISION

Based on the foregoing, the Writ for Mandamus is denied.

Palmer GUNSHOWS, Appellant,

vs.

COLVILLE CONFEDERATED TRIBES, Appellee,

Case No. AP07-003, 5 CTCR 13

**9 CCAR 48**

[Wayne Svaren, Attorney at Law, Grand Coulee, for Appellant.  
Joseph Caldwell, Office of Prosecuting Attorney, for Appellee.  
Trial Court Case No. CR-2005-28093]

Decided on June 30, 2008.

Before Dupris, C.J., Nelson, J., and Stewart, J.

Palmer Gunshows was convicted by a jury of Burglary and Attempted Rape. He appeals his conviction on the grounds that his trial attorney provided ineffective assistance by failing to offer a diminished capacity jury instruction; that substantial justice was not done because the trial court judge did not instruct the jury as to diminished capacity; and that the jury did not take enough time to deliberate. We affirm.

Nelson, J.

#### ISSUES ON APPEAL

The appellant's Amended Notice of Appeal contains three issues: 1) whether the jury deliberated an "appreciable" amount of time before returning its verdict; 2) whether the trial court erred by not offering the jury a diminished capacity instruction; and 3) whether the defendant's trial

attorney was ineffective for failure to present a diminished capacity instruction to the Court for the jury to consider.

The appellant did not address in his brief the issue whether the jury deliberated an appreciable amount of time . Accordingly, that issue is considered waived. COACR 13(e)(2), *CCT v. Muesy* , 2 CTCR 54, 24 ILR 6248, 4 CCAR 37 (1997).

### STANDARD OF REVIEW

The remaining issue is a question of law. Questions of law are reviewed under the non-deferential, *de novo* standard. *CTC v. Naff*, 2 CCAR 50, 2 CTCR 08, 22 ILR 6032.

### FACTS

The appellant was convicted of Burglary (CTC 3-1-41) and Attempted Rape (CTC 3-1-10 and CTC 3-1-233). There were five witnesses at trial: three for the prosecution and two for the defense, including the appellant.

None of the prosecution witnesses testified that, on the night in question, the appellant appeared to have been under the influence of alcohol. One officer thought he might have been “high” on something. Neither a field sobriety test or breathalyser test was given the appellant. The sole evidence of the use of alcohol playing a role in the crimes committed on the evening in question was the appellant’s testimony that he was intoxicated. The record contains no evidence of the extent of his intoxication.

### ARGUMENT

#### Whether the appellant was entitled to a diminished capacity instruction?

The appellant’s appellate counsel contends his trial counsel was ineffective because he failed to request the trial court judge to include a diminished capacity instruction to the jury. We first address whether the appellant was entitled to the instruction.<sup>40</sup>

A voluntary intoxication instruction “must be given, if requested, where the crime charged involved a particular mental state and there is substantial evidence that the defendant was in fact intoxicated at the time the crime was committed.” *State v. Sandomingo*, 39 Wash. App. 709, 712, 695 P.2d 592, 595 (1985).

Both Burglary and Attempted Rape require *mens rea*. Burglary occurs when a person

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<sup>40</sup> We look to Washington State common law in accordance with CTC 1-2-11 as there are no tribal laws or tribal case law applicable to the issues before us.

“enters or remains unlawfully in a building, structure, or vehicle with the purpose of committing an offense therein.” CTC 3-1-41. Attempt occurs when a person acts with the specific intent to commit a crime “engages in conduct constituting a substantial step toward committing the offense...” CTC 3-1-233. A person who has “sexual intercourse with a child under sixteen years is guilty of rape.” CTC 3-1-10. The victim in this case was fourteen years when the crimes occurred.

The fact that the appellant had been drinking at the time the offenses were committed is not enough to require a voluntary intoxication instruction. *State v. Gabryschak*, 83 Wn. App 243, 941 P.2d. 549 (1996). There must be substantial evidence of the effect of the alcohol on the defendant’s mind or body. *Id* at 253.

A “court is required to give a voluntary intoxication instruction only in those cases in which the level of mental impairment caused by alcohol or drugs clearly affected the defendant’s criminal responsibility by eliminating the necessary *mens rea*.” *State v. Finley*, 97 Wn. App. 129, 135, 932 P. 2d 681 (1999).

The trial record contains scant evidence of the extent of the appellant’s intoxication. No breathalyser test was administered nor was a field sobriety test conducted. Two of the five witnesses did not mention the appellant’s use of alcohol or drugs. One of the police officers testified he saw no evidence of intoxication nor did the appellant smell of having used intoxicants. The second police officer thought the appellant may have been high on something. The appellant testified he was intoxicated.

There is evidence showing the appellant had been drinking. There was no evidence showing how his drinking affected his mind or his body. Thus, a rational person could not conclude there was substantial evidence of intoxication that may have affected the appellant’s mind or body at the time the offenses were committed.

Accordingly, we hold the appellant was not entitled to a diminished capacity instruction.

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#### Moot Issues

Because the appellant was not entitled to a diminished capacity instruction, the issues of whether the appellant’s trial counsel was ineffective for failing to request a diminished instruction and whether the trial court erred by not giving a diminished instruction *sua sponte* are moot.

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#### CONCLUSION

\_\_\_\_\_ A criminal defendant, charged with crimes requiring specific intent who shows evidence of intoxication at the time the alleged crimes were committed, is not entitled to a diminished capacity jury instruction unless he can show substantial evidence of the extent of his intoxication and how it affected his mind or body.

Accordingly, the Order of Dismissal is AFFIRMED. This matter is remanded to the trial court for action consistent with this Order.

IT IS SO ORDERED.