STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY J. BILKOVSKY a/k/a ANTHONY J. BILKOWSKI,

Defendant-Appellant.

UNPUBLISHED
July 8, 1997

No. 191043
Oakland Circuit Court
LC No. 94-136611

Before: Cavanagh, P.J., and Reilly and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of domestic assault, MCL 750.81(2); MSA 28.276(2), and felonious assault, MCL 750.82; MSA 28.277. After his convictions, defendant pleaded guilty of being an habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to ninety-three days' imprisonment for the domestic assault conviction and two to four years' imprisonment for the felonious assault conviction. The trial court then vacated his felonious assault sentence and sentenced him to two to six years' imprisonment on the habitual offender conviction. Defendant now appeals as of right. We reverse and remand for a new trial.

Defendant argues that the trial court erred in refusing to give defendant's requested instruction on voluntary intoxication. We agree. A trial court must give a requested instruction where there is evidence to support it. *People v Mills*, 450 Mich 61, 81; 537 NW2d 909 (1995); *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). In this case, witnesses testified that defendant had been drinking beer and peppermint schnapps. Defendant's wife, one of the victims, described defendant as "very drunk" and "very intoxicated" at the time of the offense. Because there was evidence to support defendant's requested instruction, the trial court should have instructed the jury on voluntary intoxication.

The only remaining question is whether this error requires reversal. In *People v Moldenhauer*, 210 Mich App 158; 533 NW2d 9 (1996), this Court referred to a three-part test applied in the First Circuit Court of Appeals to determine whether the failure to give an

instruction requires reversal. Reversal is only required where the requested instruction (1) is substantially correct, (2) was not substantially covered in the charge given to the jury, and (3) concerns an important point in the trial so that the failure to give it seriously impaired the defendant's ability to effectively present a given defense. *Id.* at 159-160. Using this test, we conclude that the trial court's failure to give an instruction on voluntary intoxication requires reversal.

The first and third prongs of the *Moldenhauer* test are met. The requested instruction was "substantially correct," under the circumstances of this case. Defendant argued for an acquittal based on voluntary intoxication. Voluntary intoxication is a defense to specific intent crimes. *People v King*, 210 Mich App 425, 428; 534 NW2d 534 (1995). Both felonious assault and domestic assault are specific intent crimes. See *People v Korona*, 119 Mich App 369, 370-371; 326 NW2d 143 (1982); *People v Corbiere*, 220 Mich App 260, 266; ___ NW2d ___ (1996). Voluntary intoxication was "an important point in the trial," inasmuch as the defense admitted committing the acts that formed the basis of the charges, but denied criminal culpability because of his impaired mental condition.

The second prong of *Moldenhauer*, whether the requested instruction "was not substantially covered in the charge given to the jury" presents a closer question. The jury instructions mentioned intoxication in two places:

> You must judge the Defendant's mental state at the time of the alleged crime. You may consider evidence about his mental condition before and after the crime, but only to help you to judge his mental state at the time of the alleged crime.
>
> Legal insanity may be permanent or temporary, you must decide whether the Defendant was legally insane at the time of the alleged crime.
>
> **A person is not legally insane just because he was voluntarily intoxicated** by alcohol or drugs at the time of the crime. But a person can become legally insane by the voluntary continued use of mind altering substances like alcohol or drugs if their use actually results in a settled condition of insanity, before, during and after the alleged offense. Of course, a mentally ill or mentally retarded person can also be intoxicated and both conditions may influence by [sic] what he does.
>
> You should decide whether the Defendant was mentally ill or mental – mentally ill at the time of the crime. If he was, you should use the definitions I gave you to decide whether he was also legally insane.

> The question of diminished capacity is not whether the Defendant's capacity was simply diminished or limited for whatever reason, but whether his capacity was so diminished as to actually prevent the Defendant from forming the requisite intent. **Possible basis for diminished capacity considered** [sic] **include** mental illness, brain damage, mental retardation, **intoxication**, psychological, and/or environmental sources[,] the stress not amounting either to mental illness or mental retardation.

We conclude that the issue of voluntary intoxication was not substantially covered in the charge given to the jury. The first reference to intoxication was in the context of explaining an insanity defense. The following instruction regarding diminished capacity also mentioned intoxication, and indicated that "the question" was whether "his capacity was so diminished as to actually prevent the Defendant from forming the requisite intent." This is consistent with the instruction on intoxication approved by the Supreme Court in *People v Savoie*, 419 Mich 118, 134; 349 NW2d 139 (1984). However, the instructions obfuscated the distinctions between the defenses of insanity, diminished capacity and voluntary intoxication. Taking into consideration the manner in which the proofs were presented and the issues were argued to the jury, we are satisfied that the court's instructions on insanity and diminished capacity did not adequately present the defense of voluntary intoxication for the jury's consideration.

The remaining issues do not warrant extended discussion.

There was sufficient evidence of intent to support the convictions. Intent may be inferred from defendant's conduct and the circumstances surrounding the crime. *People v Lawton*, 196 Mich App 341, 349; 492 NW2d 810 (1992).

The trial court did not abuse its discretion by allowing the prosecutor to elicit evidence of defendant's prior drunk driving offenses from defendant's expert witness. Under MRE 705, an expert may testify as to his or her opinion without prior disclosure of the facts underlying that opinion. However, an opposing party may properly bring out those underlying facts on cross-examination. MRE 705; *Caulley*, *supra* at 194-195. The expert's knowledge of the drunk driving offenses was pertinent to his opinion. The probative value of the evidence in this case was not substantially outweighed by the danger of unfair prejudice. MRE 403.

The trial court did not err by allowing the prosecutor to question the defendant's expert witness regarding the legal definitions of insanity, mental illness, intoxication and diminished capacity. The prosecutor asked the expert to compare the assertion he made regarding the law in his report with the actual statute on point. This evidence aided the jury because the expert's opinion regarding defendant's insanity would carry little weight if it were not based on the correct definition of insanity. This is precisely the case here, where defendant's expert used an erroneous definition of insanity.[1] Thus, the cross-examination of defendant's expert was properly designed to attack the credibility of his opinions.

Defendant also argues that the prosecution's expert gave similar improper testimony. However, defendant did not object to this testimony, and the issue has thus been waived for appeal. *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996). In any event, the definitions provided by

the prosecution's expert were consistent with the instructions the court read to the jury and any error was harmless.

Finally, defendant argues that his sentence was disproportionate. Because we reverse defendant's convictions, it is unnecessary to address this issue.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] The expert's report indicated that "a person who is under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of the alleged offense, shall thereby be deemed to have been legally insane." As the expert later acknowledged, this definition is incorrect. In fact, the statute reads:

> An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances. [MCL 768.21a(2); MSA 28.1044(1)(2).]

Thus, the expert's definition was in direct conflict with the legal definition.