UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2777

September Term, 2014

WILLIAM KYLE DONOPHAN

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Raker, Irma S.
(Retired, Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: April 4, 2016

In the early morning hours of July 11, 2014, following a night of drinking and a domestic argument, William Kyle Donophan ("Appellant"), brutally and relentlessly assaulted Jennifer Jones in front of multiple witnesses, continuing to kick and beat Ms. Jones even after she lay unconscious. Wicomico County police officers responded promptly and found Appellant at the scene. A jury in the Circuit Court for Wicomico County convicted Appellant of first and second-degree assault, failure to obey a lawful order, and disorderly conduct. Appellant presents the following questions:

> 1. Is the evidence insufficient to sustain the conviction for first degree assault?
>
> 2. Did the trial court err in refusing to instruct the jury on voluntary intoxication?

For the reasons discussed below, we affirm.

BACKGROUND

Appellant stood trial before a jury in the circuit court on December 1, 2014, on charges of attempted first-degree murder, attempted second-degree murder, first-degree assault, second-degree assault, failure to obey a lawful order, disorderly conduct, and resisting arrest. The following testimony was presented at trial.

In 2014, Ms. Jones and her three children lived in the Parkwood Apartments in Salisbury, Maryland. She testified that Appellant was her boyfriend and lived there also. On the evening of July 10, Appellant started drinking vodka. According to his own testimony, he started drinking because he had recently had a conversation with his mother, who was undergoing treatment for cancer, and because he had anger and mental health issues.

Sometime between 9:00 and 10:00 p.m., Ms. Jones had a phone conversation with her ex-husband concerning visitation and custody of two of her children. After finishing the phone call, Ms. Jones joined Appellant and she drank two shots of vodka and half of a Four Loko.[1] Ms. Jones testified that Appellant continued to drink "quite a bit" and finished the bottle of vodka, a Four Loko, and a beer in a short amount of time. At trial, Appellant added that he had taken two Xanax pills for depression.

Sometime between 11:00 and 11:30 p.m., Ms. Jones asked Appellant to turn down the music he was playing because the children were sleeping. Appellant told Ms. Jones to "fuck off." In response, she unplugged the surge protector to turn off the music. Appellant reacted by punching three holes in the kitchen wall. The ensuing argument progressed into the hallway where Appellant punched Ms. Jones in the jaw, knocking her to the floor. Ms. Jones asked Appellant to leave the apartment. Instead of leaving, Appellant grabbed her, pinned her against the wall, and Ms. Jones kneed him in the gut. Thereafter, Appellant let her go, gathered his belongings, and left the apartment shortly after 11:30 p.m.

Ms. Jones called her ex-husband and asked him to come get the children. At trial Ms. Jones explained that at the time of the altercation she was upset and did not want the children to see her in that state. She was also afraid that Appellant might return. Around 1:00 a.m., Ms. Jones's ex-husband arrived, and he and Ms. Jones put the children in his vehicle. When Ms. Jones noticed Appellant walking through the parking lot towards them,

[1] Four Loko is an "adult malt beverage" that "comes in 23.5 oz. cans, with ABVs [(alcohol by volume)] that range from 5.9% to 12%." *About Four Loko*, FOUR LOKO, http://fourloko.com/us/about/ (last visited Nov. 2, 2015).

she told her ex-husband to leave. As he drove away with the children in the car, Appellant chased the ex-husband's truck and managed to grab the driver's door. Appellant lost his grip, however, when the truck accelerated, and he rolled off onto the pavement.

When Appellant stood up, he approached Ms. Jones screaming: "You just had to see him, didn't you?" Ms. Jones testified that he just started punching her. She sustained blows to her face and to the back of her head, and then, "after that, everything was a blur." Although Ms. Jones could not clearly recall the sequence of events, she did recall being punched and kicked in the abdomen, and she recalled Appellant dragging her by her hair across the parking lot. During the struggle, Appellant bit her left breast and that she responded by biting Appellant's shoulder. Additionally, she testified that at the time of the attack, she had a benign tumor in her abdomen and was advised not to place any pressure on her stomach. She testified that Appellant was aware of her condition. When the attack finally ended, Ms. Jones found herself on the ground on her back.

Charles Cohen also lived in the Parkwood Apartments in a ground floor unit. Mr. Cohen testified that on the night in question, he awoke to screams coming from the parking lot. From his bedroom window, he observed a woman on her hands and knees and a man, who he identified as Appellant, kicking her in the stomach and punching her repeatedly. As soon as he realized what was happening, Mr. Cohen called 911 and described the attack to the dispatcher.[2] Mr. Cohen described the kicks as "full" kicks, like "rearing back" to

[2] A recording of Mr. Cohen's call was played for the jury. Unfortunately, a transcription of the recording is not contained in the record.

"kick[] a football." Mr. Cohen stated that the woman was screaming for help and pleading with Appellant to stop kicking her. Mr. Cohen testified that Appellant would alternate between kicking the woman in the ribs and head and straddling her and punching her in the back of the head. Mr. Cohen stated that this went on for five minutes until "all of a sudden," the woman stopped screaming and rolled over onto her back. Still, Appellant continued to punch and kick the woman. At this point, Mr. Cohen thought the woman was dead because she was not making any noise.

When Appellant ultimately walked away from Ms. Jones, Mr. Cohen went outside to see if he could help. As he reached the bottom of the stairs leading to the parking lot, however, he observed Appellant returning. Mr. Cohen retreated back inside and told the 911 dispatcher that Appellant was returning for "round 2." Mr. Cohen then observed Appellant scream obscenities at the woman, who was still motionless on the ground, and then again punch and kick her repeatedly.

Cassidy Mills, another resident of the apartment complex, testified at trial that she observed the incident in the parking lot from her third floor window. She stated that she and her boyfriend were talking when they heard what sounded like tires squealing in the parking lot. From her window, Ms. Mills recognized Appellant and observed him walking toward a woman. Ms. Mills testified that the woman and Appellant were "getting in each other's faces" and then fought each other. Ms. Mills stated that the woman tried to run away, but Appellant stopped her. Ms. Mills called 911 and also recorded the fight with her

cell phone.[3] Ms. Mills heard the woman scream, "He's trying to kill me." Ms. Mills stated that the fight moved out of her field of vision, but it sounded like the fight had stopped. Soon thereafter, however, Ms. Mills heard the fight renew, and she again observed Appellant kicking the woman, who was by that time lying on the ground.

At this point, Corporal Lee Stevens of the the Wicomico County Police Department arrived in an unmarked black SUV.[4] Corporal Stevens had been dispatched for an assault in progress and been given a description of the attacker. He stopped his SUV within five feet of Ms. Jones, who lay motionless on the ground, and observed Appellant, who matched the description of the attacker, standing over her. As Corporal Stevens approached, Appellant crouched behind a nearby vehicle. Mr. Cohen, who was still watching from nearby, also observed Appellant hide behind a car directly outside his window. Mr. Cohen then heard Corporal Stevens identify himself as a police officer and order Appellant not to move. Instead, Appellant ran across the street toward the local high school.

Corporal Stevens pursued Appellant on foot and, after a short chase, apprehended Appellant in the parking lot of the high school with assistance from Deputy John Welch. Appellant did not much resist arrest, and told the arresting officers that he ran because he was scared of the police but he would not hurt anyone. Deputy Welch testified that after Appellant was apprehended he blurted out that "he did not assault his girlfriend," and told

[3] A recording of Ms. Mills's 911 call and the audio from her phone recording were played for the jury.

[4] All law enforcement officers in this case work for the Wicomico County Police Department, unless noted otherwise.

Welch that he was drunk and had crashed his car. While Appellant was in custody, officers brought Ms. Mills to the high school parking lot where she identified Appellant as the man who had attacked Ms. Jones.

Meanwhile, Deputy Bobby Jo Lewis arrived at the parking lot of the apartment building to assist Ms. Jones. Deputy Lewis testified that Ms. Jones was motionless on the ground, and there was a man—later identified as Mr. Cohen—standing over her. Ms. Jones recalled Mr. Cohen shining a light in her face, but does not remember speaking with police officers at the scene. Deputy Lewis stated that Ms. Jones cried and said she had been beaten. He observed that Ms. Jones had facial injuries, as well as blood all over her arms and head. Corporal Stevens also spoke with Ms. Jones and took pictures of her injuries before she was transported to the hospital.

Ms. Jones was treated at the hospital and released a few hours later. She testified that she had bruises everywhere, and that she was in severe pain. Some of her bruises remained for five weeks after the attack. She also testified that she had knots on the back of her head, two black eyes, and scars on her right arm and left breast.

Appellant testified in his defense and stated that he did not argue with Ms. Jones on July 10th. He recalled listening to music, drinking, and punching the kitchen wall. Appellant testified that he did not, however, remember hitting Ms. Jones. In fact, he testified that the next thing he remembered after the dispute over the loud music was waking up in jail. He stated that he remembered certain events from that night as "Kodak moments" or "spots." He contended that he never intended to kill or hurt Ms. Jones.

The court granted Appellant's motion for a judgment of acquittal as to reckless endangerment, but denied it as to all other charges. A jury then acquitted Appellant of the attempted murder charges and resisting arrest, but convicted him of the remaining offenses. For sentencing purposes, the court merged second-degree assault into first-degree assault and also disorderly conduct into failure to obey a lawful order. The court imposed a term of imprisonment of 25 years, with all but 10 suspended, and three-years probation for first-degree assault. The court did not impose a sentence for failure to obey a lawful order.

Additional facts will be introduced as the discussion requires.

DISCUSSION

I.

Sufficiency of the Evidence for First-Degree Assault

First–degree assault is defined in Maryland Code (2002, 2012 Repl. Vol.), Criminal Law Article ("C.L."), § 3-202(a)(1) as "intentionally caus[ing] or attempt[ing] to cause serious physical injury to another." *See also Snyder v. State*, 210 Md. App. 370, 385-86 (2013) (noting that to raise a second-degree assault charge to first-degree assault, the State must prove assault and the additional requirement "that the defendant committed the assault with a firearm or with the intent to cause serious physical injury"). "Serious physical injury" is defined as an injury that "creates a substantial risk of death" or "causes permanent or protracted serious disfigurement, loss of the function of any bodily member or organ, or impairment of the function of any bodily member or organ." C.L. § 3-201(d).

Appellant contends his first degree assault conviction must be reversed because the evidence presented at trial, even when viewed in the light most favorable to the State,

cannot support a finding, beyond a reasonable doubt, that Appellant acted with specific intent to cause serious physical injury to Ms. Jones. In support of his contention, Appellant argues that Ms. Jones's injuries were not serious physical injuries, as defined by C.L. § 3-201(d), because she was treated at the hospital and released within hours. Moreover, Appellant points out that Ms. Jones did not suffer any disfigurement or loss of any bodily organ or member. Thus, he posits that only where a defendant causes serious physical injury to another and that injury is a natural and probable consequence of the defendant's conduct, may the jury infer that the defendant intended the natural and probable consequence of his acts. He contrasts the injuries suffered by the victims in *Cathcart v. State*, 169 Md. App. 379 (2006), *vacated on other grounds*, 397 Md. 320 (2007), and *Chilcoat v. State*, 155 Md. App. 394 (2004), with those suffered by Ms. Jones and contends that her injuries pale in comparison.

In reviewing Appellant's contentions on appeal, we must decide "'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *McClurkin v. State*, 222 Md. App. 461, 486 (2015), *cert. denied*, 443 Md. 736 (2015) (internal citations omitted). In applying this standard, we give "'due regard to the [fact-finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.'" *Id*. Furthermore,

> [t]he Court's concern is not whether the verdict is in accord with what appears to be the weight of the evidence, but rather is only with whether the verdicts were supported with sufficient evidence – that is, evidence that either showed directly, or circumstantially, or supported a rational inference of facts which could fairly convince a trier of fact of the defendant's guilt of

> the offense charged beyond a reasonable doubt. We must give deference to all reasonable inferences [that] the fact-finder draws, regardless of whether [the appellate court] would have chosen a different reasonable inference. Further we do not distinguish between circumstantial and direct evidence because [a] conviction may be sustained on the basis of a single strand of direct evidence or successive links of circumstantial evidence.

DeGrange v. State, 221 Md. App. 415, 420-21 (2015) (quoting *Donati v. State*, 215 Md. App. 686, 718, *cert. denied*, 438 Md. 143 (2014)).

We compare the facts in *Cathcart*, upon which Appellant relies. There, Cathcart forced the victim to complete various sex acts, and, when the victim refused, Cathcart choked her and beat her into unconsciousness. 169 Md. App. at 382-83. The victim suffered two fractures to her jaw, a broken nose, a dislocated chin, multiple hematomas to the face, and a swollen hand. *Id.* at 383. This Court determined that the victim had suffered serious physical injury sufficient to sustain Cathcart's conviction for first-degree assault. *Id.* at 393-94. We noted that C.L. § 3-202 prohibits not only causing serious physical injury, but also attempting to cause serious physical injury, and "'a jury may infer the necessary intent from an individual's conduct and the surrounding circumstances, *whether or not the victim suffers such an injury*.'" *Id.* at 393 (quoting *Chilcoat*, *supra*, 155 Md. App. at 403) (emphasis added).

Chilcoat was convicted of first-degree assault following an incident in which he hit a man over the back of the head multiple times with a beer stein. *Chilcoat* 155 Md. App. at 398. Chilcoat then remarked that the victim looked dead. *Id.* The victim lost consciousness and suffered two skull fractures, which necessitated that doctors replace part of his skull with mesh. *Id.* at 400-01. The neurosurgeon who treated the victim testified

that the skull fractures would not normally lead to death, but abscesses were likely, if untreated, which could result in death. *Id.* at 401. This Court determined that the victim had suffered serious physical injury because his injuries may have led to death. *Id.* at 402-03. We noted that the jury "may 'infer that one intends the natural and probable consequences of his act.'" *Id.* at 403 (quoting *Ford v. State*, 330 Md. 682, 704 (1993)). Additionally, we concluded that the jury could have inferred that Chilcoat intended to cause serious physical injury to the victim. *Id.* at 404.

In this case, Ms. Jones suffered severe bruising, black eyes, and knots on the back of her head as a result of her beating by Appellant. Mr. Cohen, who witnessed Appellant repeatedly kick and punch Ms. Jones as she lay on the driveway, thought at one point that she was dead. The State admitted pictures of Ms. Jones's injuries, as well as her medical records, into evidence. Ms. Jones's medical records indicated that she had multiple contusions on her head—including to her left occipital, right occipital—and facial contusions to the right zygomatic bone and mandible, as well as controlled bleeding from the back of her head. In response to those injuries, Ms. Jones underwent a CT scan of her head that, luckily, showed no evidence of acute fracture or dislocation. Her medical records from that night also reveal the presence of additional bruising on Ms. Jones's abdomen, both thighs, right bicep, and left forearm, for which Ms. Jones received another CT scan of her abdomen and pelvis.

Viewing the evidence in the light most favorable to the State, we conclude that there was sufficient evidence to sustain Appellant's conviction for first-degree assault. As we held in *Cathcart* and *Chilcoat*, first-degree assault prohibits causing *or attempting to cause*

severe physical injury. A rational jury could have inferred from Appellant's repeated blows to Ms. Jones, including striking her abdomen knowing that she had been advised not to put pressure there, that he intended to cause her serious physical injury. Moreover, Appellant continued to punch and kick Ms. Jones after she stopped screaming and fell motionless to the ground. Appellant incorrectly focuses on Ms. Jones's response to medical treatment. *See Chilcoat*, *supra*, 155 Md. App. at 403 ("'The fortuity of prompt medical treatment and speedy recovery by the victim is not a primary consideration.'" (quoting *Konrad v. State*, 763 P.2d 1369, 1375 (Alaska Ct. App. 1988))).[5]

II.

Voluntary Intoxication Jury Instruction

At trial, at the conclusion of evidence, Appellant requested that the court instruct the jury as to the defense of voluntary intoxication.[6] In this case, Appellant requested that

[5] Ms. Jones also testified that, at the time of the trial, she still had scars on her right arm and left breast. Appellant contends that the record does not contain evidence that Ms. Jones suffered disfigurement. Ms. Jones testified, however, that she had scars on her right arm and left breast. "'Disfigurement is generally regarded as an externally visible blemish or scar that impairs one's appearance.'" *Thomas v. State*, 128 Md. App. 274, 303 (1999) (quoting *Scott v. State*, 61 Md. App. 599, 608 (1985)). Taking the evidence in the light most favorable to the State, we conclude that a rational jury could have determined that Ms. Jones had scars, meaning that she suffered disfigurement, which constitutes serious physical injury. *See Tracy v. State*, 423 Md. 1, 10-11 (2011) (noting that appellate court will not substitute its judgment for inferences rationally made by jury).

[6] The record does not include the text of Appellant's proposed instruction. We note that Maryland Criminal Pattern Jury Instruction 5:08 reads:

> You have heard evidence that the defendant acted while intoxicated by [drugs][alcohol]. Generally, voluntary intoxication is not a defense and does not excuse or justify criminal conduct. However, when (continued…)

the court instruct the jury on voluntary intoxication. The Court denied the request, citing *Bazzle v. State*, 426 Md. 541 (2012), and Appellant contends this was reversible error.

The colloquy that took place before the court regarding the requested instruction in this case is best understood following a review of the *Bazzle* case. Bazzle was convicted of attempted second-degree murder, attempted armed carjacking, and first-degree assault, which all require a specific intent. *Id.* at 545, 548. On appeal, he challenged the trial court's decision to deny his requested voluntary intoxication instruction. Bazzle argued that four pieces of evidence met the "some evidence" threshold required to generate the instruction: 1) a BAC level nearly twice the legal limit at 0.157;[7] 2) loss of memory of the night of the crime; 3) a witness's testimony that Bazzle was "almost about to pass out"; and 4) Bazzle's odd behavior during the attack. *Id.* at 552.

> charged with an offense requiring a specific intent, the defendant cannot be guilty if [he][she] was so intoxicated, at the time of the act, that [he][she] was unable to form the necessary intent.
>
> A specific intent is a state of mind in which the defendant intends that [his][her] act will cause a specific result. In this case, the defendant is charged with the offense of (offense requiring a specific intent), which requires the State to prove that the defendant acted with the specific intent to (specific intent). [Voluntary intoxication is not a defense to (list offenses not requiring a specific intent).]
>
> In order to convict the defendant, the State must prove, beyond a reasonable doubt, that the degree of the intoxication did not prevent the defendant from acting with that specific intent. A person can be [drinking alcoholic beverages][taking drugs] and can even be intoxicated, but still have the necessary mental faculties to act with a specific intent.

[7] *See* Maryland Code (1977, 2009 Repl. Vol.) Transportation Article § 11-174.1(a) (setting the legal limit at .08).

The Court of Appeals rejected these arguments. The Court noted that evidence of drunkenness was insufficient to generate the voluntary intoxication instruction:

> [T]he single fact that one has consumed what some may consider to be an inordinate amount of alcohol, standing alone, with no evidence as to the [effect] of that alcohol on the defendant, would not permit a jury reasonably to conclude that he had lost control of his mental faculties to such an extent as to render him unable to form the intent[.]

Id. at 553 (quoting *Lewis v. State*, 79 Md. App. 1, 12-13 (1989)). Rather, in order to generate the voluntary intoxication instruction, a defendant must do more than show that he or she was drunk:

> Evidence of drunkenness which falls short of a proven incapacity in the accused to form the intent necessary to constitute the crime merely establishes that that mind was affected by drink so that he more readily gave way to some violent passion and does not rebut the presumption that a man intends the natural consequence of his act.

Id. at 553-54 (emphasis omitted) (quoting *Hook v. State*, 315 Md. 25, 31 n.9 (1989)).

The Court determined that Bazzle's BAC level and memory loss were consistent with excessive alcohol consumption, but this "'some evidence' that he was drunk," was not also "'some evidence' that he was unable to form a specific intent." *Id.* at 556. Stated another way, "all [Bazzle] ha[d] shown [wa]s that he was drunk and exhibited the typical characteristics of being drunk." *Id.* Similarly, the witness testimony describing Bazzle as "almost about to pass out" did not generate the voluntary intoxication instruction because this witness was describing Bazzle after he had been stabbed and walked to the witness's house. *Id.* The Court concluded that without definite testimony, the jury would be left to speculate as to whether the witness's testimony referred to the loss of blood or intoxication. *Id.*

Finally, the Court determined that Bazzle's behavior on the night of the crime was inconsistent with the intoxication defense, noting that he was able to recognize the gender of his two attackers, escape by running away from them, and navigate to a woman's house in the middle of the night while severely injured. *Id.* The Court also noted that Bazzle's speech was intelligible, *i.e.*, not slurred, and he took steps to plan his attack in wearing a bandanna as a mask and wrapping a shirt around the weapon he used to stab his victim. *Id.* at 557-58. *See also Wood v. State*, 209 Md. App. 246, 313-15 (2012) (affirming denial of voluntary intoxication instruction where a witness testified that the defendant said he had been drinking, and another witness stated that the defendant looked "very drunk" and passed out after the crime had been committed), *aff'd*, 436 Md. 276 (2013).

Returning now to the proceedings in the case before us, when defense counsel was presenting argument to the court on the applicability of the voluntary intoxication instruction, the following colloquy ensued:

> THE COURT: Now, what about first degree assault?
>
> [APPELLANT'S COUNSEL]: Well, with first degree assault, the intent is to inflict the serious physical injury. And, here, the voluntary intoxication would negate that intent to inflict the serious physical injury. It's another specific intent crime. It's second degree assault, plus two things. It could be second degree assault and you use a gun, and with second degree assault and you use a gun, it would still be general intent, commit the second degree assault with a gun.
>
> Or it has the specific intent variety, which is second degree assault plus the specific intent, intend to inflict a serious physical injury.
>
> THE COURT: Now, how about the *Bazzle* case though? []
>
> [APPELLANT'S COUNSEL]: Yep.

THE COURT: And by a four three decision, the Court of Appeals said that there could not be a jury instruction on voluntary intoxication.

[APPELLANT'S COUNSEL]: No, it said that in this case, it wasn't generated.

THE COURT: Right.

[APPELLANT'S COUNSEL]: And what I submit is there is more than *Bazzle* here. There isn't just the consumption of alcohol. There is a blackout drunkenness, picturing of Kodak moments and then not knowing anything about what occurs until he wakes up in the hospital – not in the hospital, but in jail is what he said.

So what I submit is, I acknowledge *Bazzle*, but there is more here than there was in *Bazzle*. In *Bazzle*, you had a situation where someone drank a lot, but, here, you have testimony – you have corroborative testimony from the victim that says he drank a lot, but then you actually have the testimony of what its particular effects were on this occasion. That's he doesn't have any recollection of the events in question. And that's –

THE COURT: So any person can – has the *carte blanch*[*e*] right to just drink as he wants, take as much drugs as he wants, and then go out, beat somebody up, and there is no culpability for it.

[APPELLANT'S COUNSEL]: Well, he can be found guilty of second degree assault, which is what he should be found guilty of, and he should get whatever sentence the Court feels is appropriate.

* * *

[APPELLANT'S COUNSEL]: Well, all I will say, Your Honor, is that it's different from the *Bazzle* [sic]. I attempt to distinguish the *Bazzle* case because of the actual testimony that's been provided here, and the testimony from [Appellant] who took the stand is not just that he consumed a lot of alcohol but that it had a particularized effect on him. And if credited, that particularized effect on him is that he was unable to form the specific intent to commit the crime because he was so impaired that he did not have the ability to know what was going on in his brain while actions were taking place, actions that we know occurred –

THE COURT: But couldn't every defendant say that in every case?

I mean, you haven't produced any expert testimony –

[APPELLANT'S COUNSEL]: That's why we –

THE COURT: -- to testify what the effect would be on a man of his size, age and so forth.

[APPELLANT'S COUNSEL]: Well, but, actually the *Bazzle* [sic] says that wouldn't – that wouldn't help me. The *Bazzle* case requires the actual particularized information about how it did, in fact, impact this person, because they said in the *Bazzle* case, oh, you're a .15 [blood alcohol content ("BAC")]? Never mind. It matters not that you are a .15, and that's twice the legal limit.

We actually need to have what its actual effect was on you. Not what would a normal 35-year-old guy who is a .15, what would happen to him.

THE COURT: His testimony was he just doesn't remember.

[APPELLANT'S COUNSEL]: He doesn't have any recollection other than –

THE COURT: So how does it generate, how does that testimony generate the issue or the assertion that his specific intent was negated by the consumption of alcohol?

[APPELLANT'S COUNSEL]: He speaks to snapshot recollections of events. All I can do is attempt to distinguish the *Bazzle* case. I acknowledge that what it says is consumption is not enough.

THE COURT: All right.

* * *

[APPELLANT'S COUNSEL]: But I have to distinguish it, and the way I distinguish it is I say there is more here in a different way than there was in *Bazzle*. In *Bazzle*, there wasn't just some sort of generalized particularized memory loss, we have actual information that comes from Mr. Cohen that there is striking, hitting, of which there is absolutely no recollection from [Appellant]. But it's not just there is no recollection of that particular event, he doesn't recall any events other than leaving the house.

> The problem for me is I don't know these Judges on the Court of Appeals whether or not they have ever had life experience such that it's possible to interact with the world while being intoxicated to the point that you can't form a specific intent. They have said, apparently, it's not possible.
>
> THE COURT: Well, is the allegation of mere memory loss sufficient to generate the defense?
>
> [APPELLANT'S COUNSEL]: It's my argument, not the memory loss, but the memory loss – but the inability to have a recollection of undertaking these very intricate events that are indicated to have occurred.
>
> * * *
>
> THE COURT: I'm going to deny the proffered instruction with respect [to] voluntary intoxication.

We review a trial court's decision on a request for the giving of a particular jury instruction for abuse of discretion:

> A trial court must give a requested instruction where (1) the instruction is a correct statement of law; (2) the instruction is applicable to the facts of the case; and (3) the content of the instruction was not fairly covered elsewhere in instructions actually given. We review a trial court's decision to grant a jury instruction under an abuse of discretion standard. On review, jury instructions [m]ust be read together, and if, taken as a whole, they correctly state the law, are not misleading, and cover adequately the issues raised by the evidence, the defendant has not been prejudiced and reversal is inappropriate. Reversal is not required where the jury instructions, taken as a whole, sufficiently protected the defendant's rights and adequately covered the theory of the defense.

Derr v. State, 434 Md. 88, 133 (2013) (quoting *Cost v. State*, 417 Md. 360, 368-69 (2010)).

The Court of Appeals has advised:

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order [of the trial court] is a matter of discretion it will not be disturbed on review except on a

> clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

Bazzle, *supra*, 426 Md. at 549 (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)).

Appellant argues that the instruction was applicable under the facts, and the court should have permitted the jury to consider whether he was intoxicated to the point that he was incapable of forming the specific intent required for first-degree assault. The State contends that the facts of the case were insufficient to generate the instruction, pursuant to the Court of Appeals's decision in *Bazzle*.

We return to *Bazzle*, where the Court of Appeals noted:

> The threshold determination of whether the evidence is sufficient to generate the desired instruction is a question of law for the judge. The task of this Court on review is to determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.

Bazzle, *supra*, 426 Md. at 550 (quoting *Dishman v. State*, 352 Md. 279, 292 (1998)). That threshold is low, as a defendant need only produce "some evidence" to support the desired instruction. *Id.* at 551.

> Some evidence is not strictured by the test of a specific standard. It calls for no more than what it says – 'some,' as that word is understood in common everyday usage. It need not rise to the level of 'beyond reasonable doubt' or 'clear and convincing' or 'preponderance.' The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the self-defense claim is overwhelmed by evidence to the contrary. If there is any evidence relied on by the defendant which, if believed, would support his claim . . . the defendant has met his burden. Then the baton is passed to the State. It must shoulder the burden of proving beyond a reasonable doubt to the satisfaction of the jury [the specific facts stated in the instruction].

Id. (emphasis omitted) (quoting *Dykes v. State*, 319 Md. 206, 216-17 (1990)). We review this evidence in the light most favorable to the defendant. *Id.* (citing *General v. State*, 367 Md. 475, 487 (2002)).

The Court of Appeals instructed in *Bazzle* that "[a] defendant is not entitled to an instruction on voluntary intoxication unless he can point to 'some evidence' that 'would allow a jury to rationally conclude' that his intoxication made him incapable of 'form[ing] the intent necessary to constitute the crime.'" *Id.* at 555 (internal footnotes omitted). Appellant attempts to distinguish his case from the facts of *Bazzle*. He contends that, unlike Bazzle, he made no preparations prior to the crime. Indeed, he points out that, according to Ms. Jones, his reaction to the unplugging of the surge protector was "like a flip had switched [sic]." Appellant also argues that his attempt to crouch behind a vehicle to hide from police and the subsequent short pursuit was evidence that he was so intoxicated so as to render him incapable of forming a specific intent because his actions were simple compared to those completed by Bazzle. He also testified in detail as to the amount of alcohol consumed and the use of two Xanax pills. Lastly, Appellant points to the fact that Bazzle's memory loss was not complete, whereas Appellant claims he has no memory of the night in question.

We are not persuaded that the trial court abused its discretion in refusing to give the voluntary intoxication instruction. Like Bazzle, Appellant has shown some evidence that he consumed a significant amount of alcohol while at the apartment with Ms. Jones. But the record does not lead us to conclude that the trial court erred in deciding that there was not some evidence that Appellant's level of drunkenness robbed him of his capacity to form

a specific intent to cause or attempt to cause serious injury to Ms. Jones. Even if we assume that Appellant was so intoxicated so as to render him incapable of forming a specific intent at the time he punched holes in the kitchen wall, Appellant has not proffered how his intoxication affected his inability to form a specific intent approximately an hour and a half later, after Appellant had returned to the parking lot of the apartment building. Furthermore, Appellant recognized Ms. Jones's ex-husband's vehicle, managed to grab onto the door momentarily, and subsequently screamed "You just had to see him, didn't you?" at Ms. Jones. Like Bazzle, this behavior is inconsistent with the voluntary intoxication defense and indicates that, even if impaired, Appellant possessed the cognitive capacity necessary to form the specific intent to cause serious bodily harm to Ms. Jones through his brutal and unrelenting assault.

Similarly, we are not persuaded that Appellant's actions when confronted by police support the voluntary intoxication instruction. He attempted to hide from police by crouching down behind a car. When Corporal Stevens identified himself as a police officer, Appellant ran and attempted to elude the authorities. When apprehended, Appellant appeared to recognize why police were there because he blurted out, clearly and intelligibly, that he did not attack his girlfriend and would never hurt anybody. Again, these actions are inconsistent with the level and type of impairment necessary to generate a voluntary intoxication instruction. *See Bazzle*, *supra*, 426 Md. at 559.

Next, although Appellant testified in detail as to the amount of alcohol consumed and the Xanax pills, he did not offer any testimony as to the effect these substances had on his cognitive capacities. As this Court noted in *Lewis*, "[w]ithout knowing the level of one's

tolerance, no good correlation can be observed between the amount of alcohol consumed and the degree of drunkenness displayed. In short, it is not the amount consumed but the effect on the consumer that is important." *Lewis*, *supra*, 79 Md. App. at 13 n.4 (internal citation omitted).

Finally, Appellant professes no memory of the night in question. He remembers punching holes in the wall, but he does not recall an argument with Ms. Jones, hitting her, or his encounter with police. Although memory loss may be a symptom of excessive alcohol consumption, it alone does not generate the voluntary intoxication instruction. Put simply, "'the degree of intoxication which must be demonstrated to exonerate a defendant is great.'" *Bazzle*, 426 Md. at 559 (quoting *State v. Gover*, 267 Md. 602, 607 (1973)). Otherwise, any defendant could evade responsibility under the law simply by claiming they have no memory of what happened.

In *Smith v. State*, 69 Md. App. 115, 119-21 (1986), this Court determined that Smith was entitled to a jury instruction on voluntary intoxication. We noted that there was evidence of the quantity and type of alcohol and drugs consumed and the timeframe of consumption. *Id.* Additionally, there was witness testimony indicating that Smith was slurring his speech, unbalanced, falling, and "out of it." *Id.* at 120. Moreover, at the time of the events in the case, Smith walked, with "a great deal of difficulty," with a cane. *Id.* Yet, testimony indicated that when Smith approached his victim, he did not have his cane, and there was no "limp or anything unusual about Smith's gait[,]" indicating that he had consumed so much intoxicating substances that he was "'feeling no pain.'" *Id.*

Appellant did not introduce evidence that he was intoxicated to the point of being incapable of forming the specific intent to cause or attempt to cause serious physical injury to Ms. Jones. Stated another way, Appellant has not overcome the presumption that he intended the natural consequence of his acts. Accordingly, we conclude that the trial court did not abuse its discretion in refusing to give the instruction.

JUDGMENTS OF THE CIRCUIT COURT FOR WICOMICO COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.