IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
TERRENCE A. SNYDER,
Defendant-Appellant.

Lane County Circuit Court
201301966; A159784

Josephine H. Mooney, Judge.

Argued and submitted February 27, 2017.

Laura E. Coffin, Deputy Public Defender, argued the cause for appellant. With her on the brief was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Jacob Brown, Assistant Attorney General, argued the cause for respondent. With him on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Tookey, Presiding Judge, and Shorr, Judge, and Linder, Senior Judge.

SHORR, J.

Affirmed.

SHORR, J.

Defendant appeals a judgment of conviction for driving under the influence of intoxicants (DUII). ORS 813.010.[1] He assigns error to the trial court's refusal to instruct the jury on attempted DUII, based on a theory of attempted intoxication. We conclude that the trial court did not err when it refused to give the requested instruction. Therefore, we affirm.[2]

We state the facts in the light most favorable to the party that requested the instruction. *State v. Taylor*, 207 Or App 649, 666, 142 P3d 1093 (2006).

Oregon State Trooper Matthews pulled over defendant for failing to bring his vehicle to a full stop at a stop sign. After being pulled over, defendant told Matthews he had had five or six beers at a local tavern from 6:30 to 10:30 p.m. Matthews smelled a strong odor of alcohol from defendant, who had watery eyes and a flushed face. Defendant voluntarily submitted to field sobriety tests. Matthews observed six out of six clues of impairment on the horizontal gaze nystagmus test, three out of eight clues on the walk-and-turn test, and none on the one-leg stand test. Matthews ultimately arrested defendant for DUII and took him to the Lane County Jail. Approximately an hour and a half after his arrest, defendant had a .09 percent blood alcohol concentration (BAC) based on the results of two breath samples taken at that time. The first sample registered a .091 percent BAC. The second sample, provided approximately four minutes later, registered a .101 percent BAC.[3] A person commits DUII by, among other things, driving a vehicle with a BAC of .08 percent or higher or driving "under the influence of intoxicating liquor." ORS 813.010(1)(a), (b).

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[1] ORS 813.010 has been amended since defendant was stopped for DUII; however, because those amendments do not affect our analysis, we refer to the current version of the statute in this opinion.

[2] Defendant also assigns error to the trial court's decision not to give a special jury instruction requiring a unanimous verdict. We reject that assignment of error without further written discussion.

[3] Under OAR 257-030-0140, if the two breath samples "agree within plus or minus 10 percent of their mean," the lower measurement "shall be truncated to two decimal places and reported as the chemical test result."

The state charged defendant with DUII. At trial, defendant requested that the court instruct the jury on the lesser-included offense of attempted DUII. Defendant argued that, due to the fact that his BAC tests appeared to show that his BAC was gradually increasing, his BAC may not have been over the legal limit when he was actually stopped and arrested. As a result, he argued that he might have only attempted to be under the influence of intoxicants. In support, defendant cited *State v. Baty*, 243 Or App 77, 259 P3d 98 (2011), a DUII case in which we concluded that, where there was evidence from which the jury could find that the defendant had not begun to drive when stopped by the police, the trial court should have given the defendant's requested attempted-DUII instruction. In this case, the trial court rejected defendant's argument and refused to give defendant's requested instruction. The jury later found defendant guilty of DUII.

On appeal, defendant reiterates the arguments he made below as to why he was entitled to have the trial court give his requested attempted-DUII instruction. The state responds that the court did not err, because that instruction has no valid legal basis. The state argues that the intoxication element of DUII describes only a status that a driver either has or has not obtained, and that the elements describing a defendant's status are not susceptible to liability for attempt. Thus, in the state's view, defendant was not entitled to an attempted-DUII instruction.

We review the trial court's refusal to give a requested jury instruction for legal error. *See State v. Barnes*, 329 Or 327, 333, 986 P2d 1160 (1999). As a general rule, if there is evidence to support it, a defendant may offer, and the trial court must give, an instruction to the jury that "the defendant may be found guilty of *** an attempt to commit [the] crime" with which the defendant is charged. ORS 136.465.[4]

[4] ORS 136.465 provides:

> "In all cases, the defendant may be found guilty of any crime the commission of which is necessarily included in that with which the defendant is charged in the accusatory instrument or of an attempt to commit such crime."

We recognize that the statute begins with the phrase "[i]n all cases." In this case, defendant would have been entitled to an attempted-DUII instruction, if, as in *Baty*, 243 Or App at 86, there was evidence of an attempt to drive, which is

However, a trial court may refuse a requested jury instruction if the instruction does not accurately state the law as it applies to the case. *Barnes*, 329 Or at 334. We conclude that the requested instruction in this case does not rest on a valid interpretation of the law; therefore, the trial court did not err in refusing to give defendant's requested instruction.

"A person is guilty of an attempt to commit a crime when the person intentionally engages in conduct which constitutes a substantial step toward commission of the crime." ORS 161.405(1). Attempt requires intentional conduct. *State v. Walters*, 311 Or 80, 84, 804 P2d 1164 (1991). As noted, under ORS 813.010(1), a person "commits the offense of [DUII] if the person drives a vehicle while the person: (a) [h]as 0.08 percent or more [BAC] * * *; [or] (b) is under the influence of intoxicating liquor." Thus, to commit attempted DUII, a person must "intentionally engage in conduct which constitutes a substantial step toward" driving with a BAC at or above .08 percent, or otherwise while under the influence. We concluded in *Baty* that, when the evidence supports a theory that the defendant in a DUII case was at most attempting to drive, the trial court must allow an attempted-DUII jury instruction. 243 Or App at 86-87. But *Baty* did not address whether the jury must be instructed on attempted DUII if the evidence supports a theory that the defendant was at most attempting to be sufficiently intoxicated such that the defendant was not yet under the influence of intoxicants as required under ORS 813.010(1). We conclude that the answer to that question is no.

To prove the elements of DUII, the state must establish two things: first, that defendant was engaged in particular conduct, namely driving a vehicle; and, second, that defendant had a certain status while driving, namely that he was "under the influence of intoxicants." ORS 813.010(1). Attempted intoxication in DUII cases is not a viable legal theory, because intoxication is a binary status that is not dependent on intentional conduct—that is, a driver either is or is not intoxicated, regardless of conduct, intent, or

attempted conduct. As discussed below, defendant argues that the statute may also apply to his status, whether or not he was intoxicated, such that he could be convicted of attempted intoxication.

mental state. *See State v. Miller*, 309 Or 362, 364, 369, 788 P2d 974 (1990) ("[B]eing under the influence of an intoxicant is a strict liability element [of DUII]. *** Having a certain BAC or being under the influence is a status, and a person's mental state has nothing to do with whether that status exists."). *See also State v. Newman*, 353 Or 632, 644, 302 P3d 435 (2013) ("Although intoxication is an element of the DUII offense, it is not the proscribed conduct; it is a condition necessary to establish the offense."); *State v. Rainoldi*, 351 Or 486, 493-94, 268 P3d 568 (2011) (holding that those elements of an offense that pertain to a defendant's status generally do not require proof of a culpable mental state, and citing the intoxication element of DUII as an example).

As noted, liability for criminal attempt requires intentional conduct. ORS 161.405(1); *Walters*, 311 Or at 84. A DUII defendant's level of intoxication, by contrast, is a question of status that exists regardless of conduct or purpose. *Miller*, 309 Or at 369. Therefore, a nonintoxicated driver who has recently consumed alcohol is not attempting, in any legal sense of the word, to commit DUII simply because he *might* become intoxicated while still driving. Unless and until that driver is "adversely affected to a noticeable or perceptible degree" by the alcohol, *State v. Stroup*, 147 Or App 118, 122, 935 P2d 438 (1997), or his BAC rises above the legal limit, he has not committed a crime, nor has he attempted to do so; he is simply driving after having consumed alcohol. ORS 813.010(1). While perhaps inadvisable, such behavior is not proscribed by law, and does not constitute an attempt to commit a criminal act. Because a driver has not attempted to commit DUII by drinking alcohol and then driving while not intoxicated, it is not appropriate to instruct a jury that a nearly intoxicated driver might be guilty of attempted DUII.

Applying those principles to this case, we conclude that defendant's requested jury instruction was properly denied. While criminal defendants are typically entitled to jury instructions regarding lesser-included offenses, including attempt, the trial court cannot lawfully give instructions that rest on erroneous legal principles. *Barnes*, 329 Or at 334. Here, defendant's requested instruction would have permitted the jury to consider whether defendant committed attempted DUII under circumstances in which the concept

of an attempted commission of that crime does not apply. Defendant either was intoxicated when Matthews stopped and arrested him for DUII, or he was not. In either circumstance, defendant was not attempting to engage in a crime as a result of the possibility that he was only nearly intoxicated at the time he was stopped by the police. We hold, therefore, that the trial court did not err when it refused to give defendant's requested instruction.

Affirmed.