IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

TORREZ CEASAR,	)	
	)	
Appellant,	)	
v.	)	Case No. F-2010-558
	)	Not for Publication
	)	
THE STATE OF OKLAHOMA	)	
	)	
Appellee.	)	

SUMMARY OPINION

SMITH, JUDGE:

Torrez Ceasar, Appellant, was tried by jury and convicted of Possession of Controlled Dangerous Substance (PCP) with Intent to Distribute, AFCF, under 63 O.S.Supp.2007, § 2-401 (Count I), in the District Court of Oklahoma County, Case No. CF-2007-7188. In accord with the jury verdict, the Honorable Donald L. Deason, District Judge, sentenced Ceasar to imprisonment for twenty-five (25) years. Ceasar is before this Court on direct appeal.

Ceasar raises the following propositions of error:

I. THE STATE FAILED TO PROVE MR. CEASAR'S GUILT BEYOND A REASONABLE DOUBT BY FAILING TO PRESENT SUFFICIENT EVIDENCE OF KNOWLEDGE, CONTROL, AND INTENT TO DISTRIBUTE.

II. THE TRIAL COURT ERRED IN ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE OF MR. CEASAR'S GANG AFFILIATION.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO INSTRUCT THE JURY ON THE LESSER RELATED OFFENSE OF PUBLIC INTOXICATION.

In Proposition I, Ceasar challenges the sufficiency of the evidence presented at trial to establish, beyond a reasonable doubt, both (1) that he was actually in possession of the PCP, and (2) that he intended to distribute the PCP. This Court evaluates such claims by determining "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 charged beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319-20, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (emphasis in original); *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04 (quoting *Jackson*); *see also Easlick*, 2004 OK CR 21, ¶ 5, ¶15, 90 P.3d 556, 558, 559.

This Court finds that the evidence was sufficient for Ceasar's jury to conclude, beyond a reasonable doubt, that the vanilla extract bottle found in the back of D'Angelo Smith's car had just been thrown there by Ceasar, *i.e.*, that Ceasar was actually in possession of phencyclidine (PCP). Officer Padgett's observation of Ceasar apparently throwing something there, the "precarious" position of the bottle (containing PCP) on the black leather jacket, Smith's willingness to have his car searched, and the fact that Ceasar appeared to be intoxicated on PCP at the time all support the jury's factual finding in this regard. *See Jones v. State*, 1971 OK CR 529, 492 P.2d 1104 (affirming defendant's conviction for drug possession even though no officer actually saw him throw bag of pills out window, based upon circumstantial evidence of where he and four other occupants of trailer home were at the time pills were thrown).

Whether the evidence presented at trial was sufficient to support the jury's finding that Ceasar intended to distribute this PCP is a tougher question. In *Billey v. State*, 1990 OK CR 76, 800 P.2d 741, this Court clearly held that the amount of a drug, *by itself*, is not enough to support a finding that the possessor of that drug intended to distribute it: "[M]ore than mere possession is required

to support a finding of intent to distribute." *Id.* at ¶ 4, 800 P.2d at 742. The *Billey* Court noted that things like individual packaging, a large baggie containing a number of smaller baggies, separate bags of the same drug, a large amount of cash, evidence of an attempted drug sale by defendant, and evidence of an extended drug cultivation operation, along with the amount of the drug at issue, could support a finding of intent to distribute. *Id.* at ¶ 4, 800 P.2d at 742-43.

In *Billey*, we reversed the convictions of the three defendants, even though they were found in possession of approximately 13 pounds of just-harvested marijuana, *id.* at ¶ 3, 800 P.2d at 742, noting that there was "no evidence of selling, individual packaging, large amounts of cash or cultivation." *Id.* at ¶ 6, 800 P.2d at 743. We noted that while the amount of marijuana at issue was consistent with an intent to distribute, "since it was at least equally plausible to conclude that the marijuana was intended for personal use, there is no proof beyond a reasonable doubt of intent to distribute." *Id.* at ¶ 7, 800 P.2d at 743. We then ordered that the defendants' convictions be modified to simple possession of marijuana. *Id.* at ¶ 8, 800 P.2d at 743.

Although the State asserts that the quantity of drugs at issue *can* be enough, by itself, to proof intent to distribute, the single case invoked by the State in this regard, *Wilson v. State*, 1994 OK CR 5, 871 P.2d 46, does not support this claim.[1] In *Wilson*, this Court noted that the State's evidence established that a "nearly full" 8 oz. bottle of PCP was found "directly behind the passenger seat in which Appellant was sitting," along with "a sack containing

[1] The State fails to cite any published or unpublished cases in support of its claim of law.

eight vials and a paring knife." *Id.* at ¶ 6, 871 P.2d at 49. Hence the PCP in *Wilson* was found in close proximity to materials associated with drug distribution, giving the jury sufficient evidence to find intent to distribute. *Id.* The *Wilson* decision neither held nor implied that it was reversing *Billey* or that evidence of drug amount alone can support a finding of intent to distribute.

The State emphasizes that Ceasar was clearly intoxicated by PCP at the time he was arrested and that the bottle of PCP had evidence of "actual use," since it contained bits of tobacco leaves. In the current case, however, these two facts are at least equally consistent with a finding that Ceasar possessed the PCP because he was a *user* of PCP. While he may also have been a drug distributer, the only circumstantial evidence of an intent to distribute in the current record is the amount of PCP that Ceasar possessed.[2] There was no evidence of individual packaging, drug distribution materials, separate containers, an attempt to sell a "dip" or dose of PCP, or any evidence regarding how much cash Ceasar had at the time. Consequently, this Court finds that Ceasar's conviction for possession of PCP with intent to distribute must be reversed and modified to a judgment for simple possession of PCP.

In Proposition II, Ceasar challenges the trial court's decision allowing the State to admit irrelevant and unfairly prejudicial "gang evidence" at trial. Such decisions are reviewed only for an abuse of discretion. *See Pickens v. State*, 2001 OK CR 3, ¶ 21, 19 P.3d 866, 876. Ceasar properly preserved this issue at trial, by challenging the State's use of any evidence regarding his possible gang

[2] There was not even any evidence that the location at issue was known for drug distribution.

membership. After a hearing, the trial court ruled that the State could not make any reference to the fact that Ceasar had aliases, but that the State would be allowed to present the evidence that Ceasar threw up gang signs at Officer Padgett, after yelling a profanity at him, since this was "part and parcel of the actions that occurred in this case."

This Court finds that the "gang evidence" that came in at trial, namely, that Ceasar made gestures at Padgett that occurred to be gang signs (though Padgett was unsure of the meaning of the signs or what gang they signified) and that both Ceasar and Smith were wearing red (which might have indicated gang membership, but without any testimony linking this color to any specific gang), was actually quite limited. The State did not make any reference to gangs or gang membership in its opening statement or closing arguments, nor did the State emphasize the gang evidence that did come in at trial. In fact, most of the questions regarding possible gang evidence were asked by defense counsel. This Court notes that the throwing of "gang signs" by Ceasar was part of the *res gestae* of the key events in this case. *See Rogers v. State*, 1995 OK CR 8, ¶ 21, 890 P.2d 959, 971 (summarizing standard for determining whether evidence is *res gestae*). And we conclude that the trial court did not abuse its discretion in allowing the limited gang evidence that came in at trial, that the State did not improperly emphasize or rely upon this evidence, and that Ceasar was not unfairly prejudiced thereby. Proposition II is rejected accordingly.

In Proposition III, Ceasar challenges the trial court's refusal to instruct his jury on the "lesser related offense" of public intoxication. Ceasar requested this

instruction at trial, but the trial court declined to give it, concluding that public intoxication is not a lesser included (or lesser related) offense of drug possession with intent to distribute. The trial court was right. Although Ceasar certainly could have been charged with public intoxication *in addition to* being charged with possession of PCP, public intoxication is neither a lesser included nor a lesser related offense of drug possession (with or without an intent to distribute).

Where an offense is a lesser included or lesser related offense of another, the defendant cannot be ultimately convicted of both the greater and the lesser offense based upon the same act(s). Furthermore, the crime of public intoxication is not even in the same category of crime, nor is it directed at the same kind of activity, as are the laws against drug possession. Nor are the laws against these separate types of crimes clearly designed to protect "the same interest." *See Shrum v. State*, 1999 OK CR 41, ¶ 6 n.3, 991 P.2d 1032, 1034 n.3. ("Lesser related offenses are those which are 'inherently related' to the greater offense because they fall within the same category of crime and are designed to protect the same interest . . . ."). The fact that public intoxication laws and drug possession laws are both designed to protect "the public safety," as argued by Ceasar, is much too general to conclude that they are "related" crimes in this sense. Furthermore, it is not clear that public *safety* is the primary interest being protected by public intoxication laws, as opposed to public morals, the community's interest in not being exposed to intoxicated persons, *etc.*

The trial court was entirely correct to reject the proposed alternative offense instruction, and Proposition III is rejected accordingly.

After thoroughly considering the entire record before us on appeal, including the original record, transcripts, briefs, and exhibits of the parties, we find that Ceasar's conviction for Possession of Controlled Dangerous Substance (PCP) with Intent to Distribute, AFCF, under 63 O.S.Supp.2007, § 2-401, must be reversed and modified to a conviction for Possession of Controlled Dangerous Substance (PCP), AFCF, under 63 O.S.Supp.2007, § 2-402, with a sentence of imprisonment for 20 years, which is the maximum sentence for this crime. *See* 63 O.S.Supp.2007, § 2-402(B)(1).[3]

Decision

Ceasar's conviction for Possession of Controlled Dangerous Substance (PCP) with Intent to Distribute, AFCF is hereby **REVERSED**, and this case is **REMANDED** to the district court, in order for the district court to **MODIFY** Ceasar's **CONVICTION ON COUNT I** to Possession of Controlled Dangerous Substance (PCP), AFCF, with a sentence of imprisonment for twenty (20) years. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE DONALD L. DEASON, DISTRICT JUDGE

[3] Ceasar's jury was properly informed of the following prior convictions: three counts of possession of CDS in 2004, assault and battery upon a police officer in 2004, and possession of CDS with intent to distribute in 1999.

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OPINION BY: SMITH, J.

A. JOHNSON, P.J.:	CONCUR
LEWIS, V.P.J.:	CONCUR
LUMPKIN, J.:	CONCUR IN PART/DISSENT IN PART
C. JOHNSON, J.:	CONCUR

LUMPKIN, JUDGE: CONCUR IN PART/DISSENT IN PART

I concur in the results reached as to Propositions II and III, however, I must dissent to the modification of Appellant's conviction and sentence.

I note that syntax is important when dealing with matters on appeal and precedent. Altering the arrangement of the words in a sentence changes the meaning of the original sentence. Paraphrasing this Court's prior holdings dilutes the principle of law. In its discussion of Proposition I, the Opinion misconstrues this Court's holding in *Billey v. State*, 1990 OK CR 76, 800 P.2d 741. The Opinion paraphrases the holding in *Billey* so that it no longer accurately reflects the rule of law adopted in the original opinion.

The Opinion states that in *Billey*: "this Court clearly held that the amount of a drug, *by itself*, is not enough to support a finding that the possessor of that drug intended to distribute it." (emphasis in original). This paraphrasing of the Court's holding is not accurate. Instead, this Court held that "more than mere possession is required to support a finding of intent to distribute." *Id.*, 1990 OK CR 76, ¶ 4, 800 P.2d at 742.

The Opinion wholly overlooks *Scott v. State*, 1991 OK CR 31, 808 P.2d 73. In *Scott*, this Court discussed the nature of the evidence available to prove the intent to distribute, to wit:

> Intent is a state of mind that will be proven, if at all, by circumstantial evidence. *See Foster v. State*, 714 P.2d 1031 (Okl.Cr.1986), cert. denied 479 U.S. 873, 107 S.Ct. 249, 93 L.Ed.2d 173 (1986). Circumstantial evidence by its nature requires the jury to use it to draw reasonable inferences. On appellate

> review this Court accepts all reasonable inferences which tend to support the jury's verdict *Williams v. State*, 721 P.2d 1318 (Okl.Cr.1986)..

Id., 1991 OK CR 31, ¶ 4, 808 P.2d at 75-76.

In *Billey*, this Court listed some of the circumstances from which an intent to distribute could be inferred:

> In *Jones v. State*, 772 P.2d 922, 926 (Okl.Cr.1989), we found evidence of individual packaging, a large plastic baggie containing a number of smaller plastic zip lock baggies, a large amount of cash and the quantity of rock cocaine to be sufficient to support the jury's finding of intent to distribute. In *Gates v. State*, 754 P.2d 882, 885 (Okl.Cr.1988), we found evidence that the defendant had participated in an attempted sale of PCP to support the finding of intent to distribute. In *Fallon v. State*, 725 P.2d 603, 605 (Okl.Cr.1986), we found five baggies containing approximately 4,500 Diazepam pills to be sufficient evidence of intent to distribute. In *Champeau v. State*, 678 P.2d 1192, 1195 (Okl.Cr.1984), we found evidence of drying racks, cut marijuana, irrigated fields, water hoses, pump houses and a total of four (4) tons of marijuana to support an inference of intent to distribute. Finally, in *Rudd v. State*, 649 P.2d 791, 794 (Okl.Cr.1982), we found evidence of eight individual baggies containing a total of seven ounces of marijuana to be sufficient to support an inference of an intent to distribute. In that case, it is clear that the amount and its form would allow such a finding or inference.

Billey, 1990 OK CR 76, ¶ 4, 800 P.2d at 742-43. Thus, this Court in *Billey* determined that the amount of the drug and its form could be a circumstance from which an intent to distribute could reasonably be inferred.

In *Wilson v. State*, 1994 OK CR 5, ¶ 6, 871 P.2d 46, 48, this Court considered the amount of the drug possessed in its determination that the admission of improper evidence was harmless error. This Court found that a reasonable trier of fact could have found the appellant guilty of possession of the illegal substance with intent to distribute based upon discovery of a nearly

full eight (8) ounce bottle of PCP, a sack containing eight vials, and paring knife coupled with expert testimony that the quantity of the illegal substance was too large for personal use and was consistent with distribution. *Id.*

In *Scott*, this Court considered the amount of drugs possessed as a circumstance reasonably supporting the jury's verdict. *Scott*, 1991 OK CR 31, ¶¶ 4-5, 808 P.2d at 75-76. In *Scott*, this Court found evidence that the appellate threw out the window approximately thirty-five (35) doses of PCP with a street value of $175.00, as well as empty vials which are used in the trade for dipping cigarettes in single doses for sale sufficient to support the jury's finding of intent to distribute. *Scott*, 1991 OK CR 31, ¶ 5, 808 P.2d at 75. Therefore, the amount of the drugs possessed is a circumstance from which an intent to distribute may be reasonably inferred.

Applying this rule of law to the present case, I find that the jury's verdict is supported by sufficient evidence. Taking the evidence in this case in the light most favorable to the State, any rational trier of fact could have found that appellant had the intent to distribute the PCP beyond a reasonable doubt. *Easlick v. State*, 2004 OK CR 21, § 15, 90 P.3d 556, 559; *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-204.

As in both *Scott* and *Wilson*, Appellant possessed a large quantity of PCP.[1] Sergeant Yust testified that the bottle they found in the backseat of the

[1] Possession of one (1) ounce or more of PCP constitutes the offense of trafficking in PCP. 63 O.S.Supp.2007, § 2-415(C)(6)(a). Appellant possessed 10 milliliters of PCP or approximately 1/3 of an ounce. (Tr. 117, State's Ex. No. 3). Thus, the amount was approximately 1/3 of the amount necessary to constitute trafficking in PCP.

car contained approximately 40 to 50 doses of PCP with a street value of $450.00. (Tr. 75-77, 104).

Additional evidence was presented from which a rational trier of fact could have found an intent to distribute. As in *Wilson*, expert testimony established that the quantity of the PCP was too large for personal use and was consistent with distribution. Sergeant Yust held fifteen years experience in law enforcement. He had received narcotics training and experience while working with the Impact Unit. (Tr. 70-71). Yust testified that the quantity of PCP was sufficient to cause a fatal overdose if taken in a single dose by one use. (Tr. 76). It was uncommon for the individual user to purchase this quantity of the drug. (Tr. 104). Yust opined that the quantity was inconsistent with the amount that a person would ingest but instead was consistent with distribution. (Tr. 85). Detective Padgett held fifteen years of experience as a patrol officer. (Tr. 32). Although he had encountered PCP on other occasions, this was the most PCP he had ever seen on the streets. (Tr. 47-48, 68). He testified that the quantity of PCP indicated that it was not for personal use but for selling. (Tr. 48). Yust testified that PCP is used by dipping a cigar or cigarette into the liquid PCP. One dose constitutes the residue the liquid leaves on the cigarette. (Tr. 75-76). Yust observed pieces of tobacco floating in the bottle discovered in the backseat of the car. (Tr. 75). As the evidence was sufficient to support the jury's verdict, I would affirm Appellant's conviction and sentence.

I write further to address the analysis used in Proposition III to determine whether public intoxication is a lesser included offense of possession of a controlled dangerous substance with intent to distribute. I agree that this Court should use a two step analysis to determine whether instructions on a lesser included offense should be given. *Grissom v. State*, 2011 OK CR 3, ¶ 2, 253 P.3d 969, 996 (Lumpkin, J., specially concurring). The Opinion correctly determines whether public intoxication is a legally recognized lesser included offense of the charged offense before looking to the evidence in the particular case. *Id.*, 2011 OK CR 3, ¶¶ 2, 253 P.3d at 996 (Lumpkin, J., specially concurring) ("First, it must be determined whether the alleged lesser offense is a legally recognized lesser included offense of the charged offense."); *Shrum v. State*, 1999 OK CR 41, ¶¶ 10, 12, 991 P.2d 1032, 1036 ("This two part analysis first requires courts to make a legal determination about whether a crime constitutes a lesser included offense of the charged crime or whether it is legally possible for the charged crime to include a lesser included offense.") (citation and quotations omitted). Once the determination has been made that an offense is a lesser included offense, then we look to the evidence in the particular case to determine whether *prima facie*[2] evidence of the lesser

[2] This Court has defined *prima facie* evidence as:

included offense has been presented. *Bland v. State*, 2000 OK CR 11, ¶ 57, 4 P.3d 702, 720.

However, the Opinion uses the inherent relationship approach to determine whether public intoxication is a lesser included offense of the charged offense. That is not the test adopted by this Court. *Shrum*, 1999 OK CR 41, ¶ 10, 991 P.2d P.2d at 1036 ("We take this opportunity to formally adopt the test we intend to use in determining lesser included offenses. . . we find the better approach is the evidence test...."). Under the "evidence test" there is not any requirement that the lesser offense relate to the same category of crime or be directed at the same kind of activity as protected by the charged offense. *Id.*, 1999 OK CR 41, ¶ 9, 991 P.2d at 1036.

I cannot agree with the application of the inherent relationship analysis. The United States Supreme Court has found "[t]he inherent relationship approach..is rife with the potential for confusion." *Schmuck v. United States*, 489 U.S. 705, 720-21, 109 S.Ct. 1443, 1453, 103 L.Ed.2d 734 (1989). It lacks the "certainty and predictability" desired in the context of criminal procedure. *Id.*

> [E]vidence[,] which in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the defendant's claim or defense, and which if not rebutted or contradicted, will remain sufficient to sustain a judgment in favor of the issue which it supports. The issues of whether the evidence has been rebutted or contradicted are questions of fact for the jury to decide under proper instructions by the Court. The Court shall review the evidence presented to determine if the defendant has established prima facie proof of the defense which would warrant an instruction on the defense without speculating on whether the jury will find the evidence contradicted or rebutted.

Ball v. State, 2007 OK CR 42, ¶ 29 n.4, 173 P.3d 81, 90 n.4; *See Also Cuesta-Rodriguez v. State*, 2011 OK CR 4, ¶ 7, 247 P.3d 1192, 1195.

Appellate courts should be clear and consistent in establishing guidelines for the judges of the District Court. *Cuesta-Rodriguez v. State*, 2010 OK CR 23, ¶ 5, 241 P.3d, 214, 248 (Lumpkin, J., concurring in result); *Hampton v. State*, 2009 OK CR 4, ¶ 1, 203 P.3d 179, 189 (Lumpkin, J., concurring in part/dissenting in part). I maintain that a consistent, objective test for what constitutes a lesser included offense is needed.

Traditionally, this Court looked to the statutory elements of the lesser offense and the charged offense to determine whether the lesser offense constituted a lesser included offense. *Grissom*, 2011 OK CR 3, ¶ 2, 253 P.3d at 996 (Lumpkin, J., specially concurring); *Shrum*, 1999 OK CR 41, ¶ 7, 991 P.2d at 1035. That is the better approach. As the Supreme Court in *Schmuck* explained:

> Because the elements approach involves a textual comparison of criminal statutes and does not depend on inferences that may be drawn from evidence introduced at trial, the elements approach permits both sides to know in advance what jury instructions will be available and to plan their trial strategies accordingly. The objective elements approach, moreover, promotes judicial economy by providing a clearer rule of decision and by permitting appellate courts to decide whether jury instructions were wrongly refused without reviewing the entire evidentiary record for nuances of inference.

Id., 489 U.S. at 720-721, 109 S.Ct. at 1453.

This Court should adopt the statutory elements test as the first step of the two step analysis. Application of the elements test is supported by the language and history of 22 O.S.2001, § 916, provides for greater certainty in the application of the statute, and is consistent with the great majority of our

prior case law. *See Schmuck*, 489 U.S. at 716-717, 109 S.Ct. at 1451; *State v. Uriarite*, 1991 OK CR 80, 815 P.2d 193, 195; *Jennings v. State*, 1982 OK CR 42, 643 P.2d 643, 645.

Application of the elements test is not difficult. As the State cites in the present case:

> The lesser included offense doctrine "provides that a criminal defendant may be convicted at trial of any crime supported by the evidence which is less than, but included within, the offense charged by the prosecution.

Shrum, 1999 OK CR 41, ¶ 5 n.1, 991 P.2d at 1034 n.1, *quoting* James A. Shellenberger and James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq. L. Rev. 1, 6. "Stated another way, an offense is a lesser included one only where the greater offense cannot be committed without necessarily committing the lesser." *Uriarite*, 1991 OK CR 80, ¶ 8, 15 P.2d at 195. (citations omitted). If the elements of the lesser offense are "fairly embraced" within the charged offense, then the lesser offense is a legally recognized lesser included offense. *Jackson v. State*, 1998 OK CR 39, ¶¶ 8-9, 964 P.2d 875, 899-900 (Lumpkin, J., concurring in result).

Turning to the present case, the offense of public intoxication is not a legally recognized lesser included offense of the charged offense. The elements of the offense of public intoxication are: "First, that the defendant was drunk/intoxicated; Second, in a public place." Inst. No. 6-15, OUJI-CR(2d) (Supp.2010). Neither of these elements are fairly embraced within the elements

of the offense possession of a controlled dangerous substance with intent to distribute. See . No. 6-2, OUJI-CR(2d) (Supp.2010).

As public intoxication is not a legally recognized lesser included offense of the charge offense, we need not proceed to the second step or evidentiary step of the two part analysis. *Grissom*, 2011 OK CR 3, ¶¶ 2, 253 P.3d at 996 (Lumpkin, J., specially concurring) ("The second step of the analysis looks to the evidence to determine whether prima facie evidence of the legally recognized lesser included offense has been presented at trial."); *Gann v. State,* 1964 OK CR 122, ¶ 17, 397 P.2d 686, 690. ("The trial court has a duty to instruct on a lesser, included offense, not on *any* lesser offense, but on *ALL* lesser included offenses") (emphasis in original). An instruction upon public intoxication was not warranted.