

63767-3

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No. 63767-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

TINEIMALO V. TAUA,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 FEB -4 PM 4:50

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jay V. White

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A.	ASSIGNMENT OF ERROR .....	1
B.	ISSUE PERTAINING TO ASSIGNMENT OF ERROR .....	1
C.	STATEMENT OF THE CASE .....	1
D.	ARGUMENT .....	4
	MR. TAUUA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO PROPOSE A JURY INSTRUCTION NECESSARY TO THE DEFENSE THEORY OF VOLUNTARY INTOXICATION ....	4
	1. <u>A criminal defendant has a constitutional right to the effective assistance of counsel.</u> .....	4
	2. <u>Defense counsel’s performance was deficient and prejudicial for failure to propose a jury instruction regarding voluntary intoxication.</u> .....	6
	3. <u>The proper remedy is reversal and remand for a new trial.</u> .....	10
E.	CONCLUSION .....	11

**TABLE OF AUTHORITIES**

**United States Constitution**

Amend. VI ..... 4

**Washington Constitution**

Art. I, sec. 22 ..... 4

**United States Supreme Court Decisions**

*Roe v. Flores-Ortega*, 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) ..... 5

*Strickland v. Washington*, 466 U.S. 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ..... 4, 5

*Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ..... 5

**Washington Supreme Court Decisions**

*State v. Coates*, 107 Wn.2d 882, 735 P.2d 64 (1987) ..... 7

*State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991) ..... 7

*State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995) ..... 5

*State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984) ..... 8

*State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) ..... 4, 5, 10

*State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003) ..... 5, 6

**Washington Court of Appeals Decisions**

*In re Personal Restraint of Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007) ..... 9, 10

*State v. Corwin*, 32 Wn. App. 493, 649 P.2d 119 (1982) ..... 7

*State v. Kruger*, 116 Wn. App. 685, 67 P.3d 1147 (2003) ..... 7, 8-9

**Rules and Statutes**

RCW 9A.16.090 ..... 6

RCW 9A.56.190 ..... 3

RCW 9A.56.200 ..... 3

**Other Authority**

WPIC 18.10 ..... 6

A. ASSIGNMENT OF ERROR

Defense counsel's failure to propose a jury instruction on voluntary intoxication deprived Mr. Taua his constitutional right to effective assistance of counsel.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defendant is deprived of his or her constitutional right to effective assistance of counsel when counsel's performance is deficient and the deficiency is prejudicial to the defense. Here, defense counsel failed to propose a jury instruction on voluntary intoxication that was necessary to the defense. Was counsel's performance deficient and prejudicial so as to deprive Mr. Taua of his right to effective assistance of counsel?

C. STATEMENT OF THE CASE

On November 6, 2008, Timeimalo Taua and two other men robbed a convenience store in Kent, Washington. 5/14/09 RP 138-39. The following night, the men picked up Mr. Taua from his house to "cruise around." 5/18/09 RP 347. Mr. Taua had been drinking whiskey and beer and was extremely intoxicated. 5/18/09 RP 330, 347-48. He continued to drink whiskey while they drove around in the car. 5/18/09 RP 348.

At one point, Mr. Taua offered to buy beer for the group. 5/18/09 RP 348-49. He had \$20 to pay for the beer. 5/18/09 RP 349-50. They returned to the convenience store but Mr. Taua was so intoxicated he did not realize it was the same store he had been to the previous night. 5/18/09 RP 330.

Mr. Taua entered the store and was followed shortly by two of the other men. 5/18/09 RP 241, 244. According to Mr. Taua, the store clerk recognized him, cursed him, and told him to leave. 5/18/09 RP 351-52. Mr. Taua testified, "And, at that time, I was really intoxicated. I was not in my right mind." 5/18/09 RP 352.

Mr. Taua grabbed the clerk and put him on the floor by a cooler. 5/18/09 RP 351, 355. The other two men took cash and cigarettes from behind the counter while Mr. Taua wandered around the store. 5/18/09 RP 353; Ex. 2 (Surveillance video "b"). After several minutes, Mr. Taua grabbed a case of beer from a cooler and left the store. 5/18/09 RP 350, 354; Ex. 2 (Surveillance video "b"). The other men followed. Ex. 2 (Surveillance video "b").

Within minutes, the police located Mr. Taua and three other men in a car parked two blocks from the store. 5/14/09 RP 190. The car trunk was open and cash, cigarettes, and a case of beer were visible inside. 5/14/09 RP 194-95. Another case of beer was

visible on the rear seat next to Mr. Taua. 5/14/09 RP 195, 226.

The clerk identified Mr. Taua and one of the other men as involved in the robbery. 5/14/09 RP 196-98.

Mr. Taua was charged by a third amended information with two counts of robbery in the first degree, alleged to have occurred on November 7, 2008 (Count I) and November 6, 2008 (Count II), contrary to RCW 9A.56.200(1)(a)(iii) and RCW 9A.56.190.<sup>1</sup> The matter proceeded to jury trial at which Mr. Taua's primary theory of the case was lack of the requisite intent. 5/18/09 RP 404-05. The jury was instructed on accomplice liability, intent, and knowledge. CP 42, 44, 45, 46, 49, 50 (Instruction Nos. 5, 7, 8, 9, 12, 13). Yet, despite the evidence of intoxication as to Count I, Mr. Taua's attorney did not request a jury instruction on voluntary intoxication. Mr. Taua was convicted as charged. CP 57, 58.

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<sup>1</sup>Apparently, the third amended information was not filed with the court. However, all parties were aware of the amendment and proceeded on the assumption that it had been filed and a copy of the amended information is attached to the State's Trial Memorandum.

D. ARGUMENT

MR. TAUA WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO PROPOSE A JURY INSTRUCTION NECESSARY TO THE DEFENSE THEORY OF VOLUNTARY INTOXICATION.

1. A criminal defendant has a constitutional right to the effective assistance of counsel. The federal and state constitutions guarantee a criminal defendant the right to assistance of counsel. U.S. Const. amend. VI;<sup>2</sup> Wash. Const. art. I, sec. 22.<sup>3</sup> Inherent in the guarantee is the right to the effective assistance of counsel so as to ensure a fair and impartial trial. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

The right to effective assistance of counsel is violated when counsel's performance so undermines the adversarial process that the trial cannot be relied upon as producing a fair result. *Strickland*, 466 U.S. at 686. A determination of whether counsel's performance undermined the adversarial process involves a two-

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<sup>2</sup>The Sixth Amendment provides, in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right to ... the Assistance of Counsel for his defense.

<sup>3</sup>Article I, section 22 provides, in pertinent part:

In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel ....

part analysis. First, the defendant must establish that counsel's performance was deficient. *Id.* at 687. In this regard, a reviewing court is to consider the record as a whole and to presume that counsel provided effective assistance. *Wiggins v. Smith*, 539 U.S. 510, 533, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). An attorney provides constitutionally ineffective representation when his or her trial decisions serve no legitimate strategic or tactical purpose. *Id.* at 336-37. A decision is not tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

Second, the defendant must establish the deficient performance was prejudicial to the defense. *Strickland*, 466 U.S. at 687. In this regard, a reviewing court is to consider whether there is a reasonable probability that counsel's deficient performance altered the outcome of the case. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); *Thomas*, 109 Wn.2d at 225-26. A 'reasonable probability' is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 695. However, the defendant does not need to establish that counsel's deficient

performance actually altered the result of the case. *Tilton*, 149 Wn.2d at 784.

2. Defense counsel's performance was deficient and prejudicial for failure to propose a jury instruction regarding voluntary intoxication. Voluntary intoxication may affect a defendant's ability to form the requisite intent to commit a crime.

RCW 9A.16.090 provides:

No act committed by a person in the state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

The Washington Pattern Jury Instruction on voluntary intoxication provides:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant [acted] [or] [failed to act] with [fill in requisite mental state].

WPIC 18.10. Thus, although voluntary intoxication is not a complete defense, "[e]vidence of intoxication may bear upon whether the defendant acted with the requisite mental state, but the proper way to deal with the issue is to instruct the jury that it may

consider evidence of the defendant's intoxication in deciding whether the defendant acted with the requisite mental state." *State v. Coates*, 107 Wn.2d 882, 891-92, 735 P.2d 64 (1987). "A defendant is entitled to a voluntary intoxication instruction when (1) the crime charged includes a mental state, (2) there is substantial evidence of drinking, and (3) there is evidence the drinking affected the defendant's ability to form the requisite intent or mental state." *State v. Kruger*, 116 Wn. App. 685, 691, 67 P.3d 1147 (2003).

Here, as to Count I, these three criteria are satisfied. First, although the robbery statutes do not specify a mental state, case law has established that the intent to deprive the victim of property is a necessary element of the offense and the jury was so instructed. CP 42, 44, 50 (Instruction No. 5, 7, 13); *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991); *State v. Corwin*, 32 Wn. App. 493, 497, 649 P.2d 119 (1982). Second, Mr. Taua provided uncontroverted testimony that he was so intoxicated he did not realize he was at the same store as the previous evening. 5/18/09 RP 329-30. Third and finally, Mr. Taua provided additional uncontroverted testimony that he had no intention to rob the convenience store and his intoxication significantly clouded his awareness of the events around him. 5/18/09 RP 346-48, 352.

Therefore, he was entitled to an instruction on voluntary intoxication.

The failure of defense counsel to propose a voluntary intoxication instruction was deficient. In light of the evidence that Mr. Taua was present during the incident and took beer, there was no conceivable strategic or tactical reason not to request the instruction.

The lack of the instruction was prejudicial to Mr. Taua's defense. Mr. Taua did not deny that the incident occurred, that he was present, and that he took beer without paying for it. 5/18/09 RP 329, 350, 352-54. The only issue at trial was his mental state. Without the instruction, however, the jury had no guidance for evaluating the effect of his intoxication on his ability to form the requisite intent. As the Washington Supreme Court has noted, "the jury, without the requested instruction, was not correctly apprised of the law, and the defendant's attorneys were unable to effectively argue their theory of an intoxication." *State v. Rice*, 102 Wn.2d 120, 123, 683 P.2d 199 (1984).

In *Kruger, supra*, Division Three of this Court reversed the defendant's conviction for third degree assault on an officer on the grounds his attorney was ineffective for failure to request a

voluntary intoxication instruction. 116 Wn. App. at 688. The Court noted that the witnesses agreed the defendant was intoxicated and the jury made an inquiry requesting “clarification between intent & resisting.” *Id.* at 689, 693. The Court ruled:

Effective assistance of counsel includes a request for pertinent instructions which the evidence supports. Here, there was ample evidence that Daniel Kruger was drunk when he “head butted” a police officer. Nonetheless, his lawyer did not ask for a voluntary intoxication instruction. And since we cannot say that the result would have been the same with or without the instruction, we reverse and remand for a new trial.

*Id.* at 688. *Accord In re Personal Restraint of Hubert*, 138 Wn. App. 924, 932, 158 P.3d 1282 (2007) (defendant charged with rape in the second degree received ineffective assistance of counsel where counsel failed to request a “reasonable belief” instruction. “The jury was unaware that if Hubert reasonably believed Wood had capacity to consent, his belief constituted a defense to the charge. The jury thus had no way to understand to legal significance of the evidence supporting the reasonableness of Hubert’s belief that Wood was awake and capable of consenting to his advances.”). The lack of the instruction was accordingly extremely prejudicial to Mr. Taua’s defense.

“Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.” *Hubert*, 138 Wn. App. at 932. Here, uncontroverted evidence established that Mr. Taua was highly intoxicated during the second incident. Therefore, it cannot be said the result would have been the same if the jury had been fully apprised of the possible legal implications from his intoxication, that is, he did not have the requisite intent to commit robbery.

3. The proper remedy is reversal and remand for a new trial.

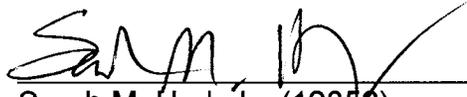
Reversal and remand for a new trial is required where a criminal defendant received ineffective assistance of counsel, in violation of the constitutional right to assistance of counsel. *Thomas*, 109 Wn.2d at 232. Here, because the evidence supported an involuntary intoxication instruction and there was no possible tactical reason not to request the instruction, Mr. Taua’s conviction for robbery in the first degree as charged in Count I must be reversed.

E. CONCLUSION

Mr. Taua was entitled to an instruction on voluntary intoxication, his attorney's failure to request the instruction was deficient, and the lack of the instruction was prejudicial to the defense. For the foregoing reasons, Mr. Taua respectfully requests this Court reverse his conviction for robbery in the first degree, as charged in Count I, and remand for a new trial.

DATED this 4<sup>th</sup> day of February 2010.

Respectfully submitted,



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DIVISION ONE**

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	)	
Appellant.	)	

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**FILED**  
COURT OF APPELLATION  
STATE OF WASHINGTON  
2010 FEB - 4 PM 4:30

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] TINEIMALO TAUA<br>894315<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326-0769                          | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF FEBRUARY, 2010.

X \_\_\_\_\_  


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