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COURT OF APPEALS
DIVISION II

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM HAGER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

No. 07-1-01841-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant receive effective assistance of counsel when defendant has failed to demonstrate deficient performance?
2. Did the State adduce sufficient evidence to support the jury verdict finding defendant guilty of attempted residential burglary?

B. STATEMENT OF THE CASE.

1. Procedure

On April 5, 2007, the Pierce County Prosecutor's Office charged WILLIAM VINSON HAGER, hereinafter "defendant," with the crime of attempted residential burglary. CP 1-2. The case proceeded to trial on October 8, 2007, in front of the Honorable Kitty-Ann van Doorninck. RP 3¹. A 3.5 hearing was held on October 9, 2007. RP 24. The court ruled the statements were admissible. RP 40. On October 12, 2007, the jury found defendant guilty of attempted residential burglary. CP 21.

A sentencing hearing was held on November 9, 2007. SRP 3. Defendant had an offender score of eight and his standard range was 39.75 to 52.50 months confinement with a statutory maximum of five years (60

¹ The verbatim record of proceedings shall be referred to as follows:
The five sequentially number volumes shall be referred to as RP.
The sentencing record of proceedings shall be referred to as SRP.

months). CP 98-109. On November 9, 2007, defendant was sentenced to 52.50 months with credit for 240 days time served. CP 98-109.

Defendant filed a timely notice of appeal. CP 110.

2. Facts

During the first week of April 2007, although typically homeless and living in a tent, defendant was visiting his girlfriend and staying at her daughter's house in Spanaway. RP 94. On April 4, 2007, defendant spent the day panhandling, drinking and hitchhiking around most of Tacoma. RP 98-103. He testified that he drank at least four beers. RP 136.

Around 10:20 p.m. on April 4, 2007, Doreen Bushnell was watching television and heard noises she assumed were from her cat. RP 80-81. She got up to check and realized it was not her cat. RP 81. She looked through her front window in her living room and saw defendant looking back at her holding the screen to her window in his hand. RP 82. Ms. Bushnell called her manager and spoke with his wife. RP 83. Ms. Bushnell then called the police and went to wait with her manager's wife at their house because she was scared. RP 84.

As she left her house, Ms. Bushnell noticed that the screens were off her windows. RP 85. She found two that night and one the next morning on the other side of the house. RP 85. She testified that the screens were on the windows and her doors and windows were locked

before she went to bed that night. RP 72. She also said that her house is in a secluded wooded area. RP 76.

When defendant left Ms. Bushnell's house, her manager followed him with a baseball bat. RP 144-145. Officer Jason Mills, who was dispatched to the scene, arrested defendant. RP 43. Defendant was then placed in the back of the police car. RP 44. Officer Jennifer Strain, also dispatched with Officer Mills, took Ms. Bushnell to identify defendant. RP 52.

After Ms. Bushnell identified defendant as the man she had seen in her window, Officer Strain took Ms. Bushnell back to her house. RP 52-53. Officer Strain then returned to defendant. RP 53. She asked him what he was doing and if he had removed the screens from the house. RP 54. Defendant stated that he was just in the backyard and could not remember. RP 54. When she asked him if he was trying to break into the house and if they would find his fingerprints on the windows, defendant looked away from Officer Strain, shrugged his shoulders and said that he did not think so. RP 54. Officer Mills then transported the defendant to the Pierce County Jail. RP 55.

C. ARGUMENT.

1. DEFENDANT RECEIVED SUFFICIENT COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the

trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel’s competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

In this case, defendant seeks to show ineffective assistance of his trial counsel. His argument is based upon the failure of defense counsel to request a jury instruction of voluntary intoxication where the only evidence that he was intoxicated was from defendant's own testimony. The record before this court does not demonstrate either deficient performance or resulting prejudice.

Not presenting a voluntary intoxication instruction to the jury was a decision based on trial strategy and therefore not deficient representation. An intoxication defense is a type of diminished capacity as

it allows the jury to consider the effect of voluntary intoxication by alcohol or drugs on the defendant's ability to form the requisite mental state. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). Most of the cases finding deficient performance for failure to present a voluntary intoxication defense include factual corroboration that the defendant was indeed intoxicated. *Thomas*, 109 Wn.2d at 226-29; *State v. Kruger*, 116 Wn. App. 685; 67 P.3d 1147 (2003); *see also State v. Tilton*, 149 Wn.2d 775, 72 P.3d 735 (2003).

There are three prerequisites that must be satisfied before a voluntary intoxication instruction can be given: (1) the crime charged must include a particular mental state as an element; (2) the defendant must present **substantial** evidence of intoxication; and (3) the defendant must present evidence that the intoxication affected his or her ability to form the requisite intent or mental state. *State v. Sandomingo*, 39 Wn. App. 709, 695 P.2d 592 (1985); *State v. Washington*, 34 Wn. App. 410, 661 P.2d 605 (1083), *on remand* 36 Wn. App. 792, 677 P.2d 786 (1984). (Emphasis added).

This case does not satisfy all three prerequisites. The first element was met as defendant was charged with attempted residential burglary which requires intent. But the second element was not met as there was insufficient evidence that defendant was intoxicated. Courts have determined that "simply showing that someone has been drinking is not enough. The evidence must show the effects of the alcohol." *Kruger* at

692. The only evidence of defendant's intoxication comes from his self serving testimony where he discusses drinking throughout the day and not knowing how many beers he had. RP 136. But, Officer Mills testified that after he had read defendant his *Miranda* rights, the defendant expressed no confusion. RP 37. Nothing in the officer's testimony indicates he observed any signs of intoxication. Based upon the officer's perception of the defendant, there was no evidence he was intoxicated. Thus, defendant's self serving testimony was not sufficient evidence to establish that he was in fact intoxicated at the time of the crime.

The third element requires the defense counsel to show that the defendant lacked the intent to commit attempted residential burglary based on a diminished capacity from voluntary intoxication. Because there was insufficient evidence that the defendant was intoxicated, proving this affected his mental state is irrelevant. Therefore, the three prerequisites were not met.

Moreover, defendant's comparison to *State v. Kruger* is misplaced. *Kruger* states that because of the lack of jury instruction on voluntary intoxication, "defendant's attorneys were unable to effectively argue their theory of an intoxication defense." *State v. Kruger*, 116 Wn. App. 685, 694, 67 P.3d 1147 (2003). In the present case, defense counsel did not argue intoxication as a defense as the defendant now claims, but rather chose to argue that the State failed to prove the required elements of the crime.

Throughout defense counsel's closing argument she discussed defendant drinking beer during the day and his lack of memory of the situation. Defense counsel stated in her closing argument "so you [the jury] have to look at the jury instructions carefully, and think about what it is that you really have to do as a juror, and that's to decide whether or not the State's proven the charge beyond a reasonable doubt." RP 187. She did not argue that the intoxication affected his mental state in committing the crime. Rather, she argued that he mistook Ms. Bushnell's house for his girlfriends and thus, the State has failed to meet their burden of proof that he was actually intent on committing a burglary. RP 154, 193, 196.

Consequently, because intoxication was not presented as the defense strategy, the present case cannot be compared to *Kruger*. In *Kruger*, the reason for the reversal of the lower court and new trial requiring a jury instruction on voluntary intoxication was based on the deficiency in the attorney's ability to effectively argue his strategy of intoxication as a defense. Whereas the voluntary intoxication was argued as affecting defendant's mental state in *Kruger*, it was not argued as affecting defendant's mental state in the present case. Therefore, the attorney's strategies were dissimilar and a comparison between the two has no merit.

Furthermore, even if the defense counsel had met the three elements, the decision not to instruct the jury on voluntary intoxication was a strategic decision. This does not fall under the first prong of the

Strickland test which states defendant must show his counsel was deficient and the deficiency did not relate to the defense strategy or tactic chosen. *Strickland*, 466 U.S. at 668; *Garrett*, 124 Wn.2d at 520. Choosing to pursue a voluntary intoxication defense places the burden on the defendant to provide evidence of intoxication and its effects on the defendant's mental state. *State v. Carter*, 31 Wn. App. 572, 643 P.2d 916 (1982).

Because there was insufficient evidence that defendant was intoxicated at the time of the crime, the defense counsel's decision not to pursue such a defense was a legitimate trial strategy to keep the burden of proof with the prosecution. In other words, rather than try to argue the defendant was intoxicated and prove the defendant lacked the requisite intent, the defense counsel's strategy was to prove the prosecution failed to prove all the elements of the crime beyond a reasonable doubt. A failed trial strategy viewed in hindsight does not equal deficient counsel. As such, defense counsel's representation was not deficient by pursuing an alternative trial strategy. There is no need to address prejudice resulting from defense counsel's actions when there was no deficiency in her actions.

In conclusion, defendant's failure to meet the prerequisites for a voluntary intoxication instruction to the jury led defense counsel to pursue an alternate defense strategy focused showing the State's failure to prove all the elements of the crime beyond a reasonable doubt. A failed decision

about the appropriate tactic and strategy of the defense does not make the defense attorney deficient. Therefore, defendant received constitutionally adequate defense counsel during his trial.

2. THE JURY HAD SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ATTEMPTED RESIDENTIAL BURGLARY.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, challenging the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Salinas*, 119 Wn.2d 192; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. Credibility determinations are necessary because witness testimony can conflict; these determinations should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, if the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

To prove a defendant guilty of attempted residential burglary, the State had to convince a jury of the following elements beyond a reasonable doubt:

(1) That on or about the 4th day of April, 2007, the defendant did an act which was a substantial step toward the commission of Residential Burglary; and

(2) That the act was done with the intent to commit residential burglary; and

(3) That the acts occurred in the State of Washington.

CP 3-20, Instruction No. 12.

The jury was also given the instruction that “a person acts with intent or intentionally when acting with the objective or purpose to accomplish a result, which constitutes a crime” and “a substantial step is conduct, which strongly indicates a criminal purpose and which is more than mere preparation.” CP 3-20, Instruction Nos. 6-7.

Courts have determined that “criminal intent may be inferred from the facts and circumstances surrounding the commission of an act or acts.” *State v. Bergeron*, 105 Wn.2d 1, 19-20, 711 P.2d 1000 (1985). Thus, “although intent may not be inferred from conduct that is patently equivocal, it may be inferred from conduct that plainly indicates such intent is a matter of logical probability.” *Id.* at 20. In a situation where “the finder of fact concludes an alternative reasonable explanation exists for the defendant’s actions, the State has failed to meet its burden of establishing guilt beyond a reasonable doubt.” *State v. Bencivenga*, 137 Wn.2d 703, 708, 974 P.2d 832 (1999). But “just because there are

hypothetically rational alternative conclusions to be drawn from the proven facts, the fact finder is not lawfully barred against discarding one possible inference when it concludes such inference unreasonable under the circumstances.” *Id.*

Here, the jury had sufficient evidence to conclude that the defendant intended to burglarize Ms. Bushnell’s house. First, Ms. Bushnell’s home is located in a secluded wooded area where there are little to no lights surrounding her property. RP 50-51, 76-78. Second, defendant removed three screens from different sides of her house when it was dark out around 10 p.m. in the evening. RP 85. Third, Ms. Bushnell identified the defendant as the man she had seen peering into her window. RP 52-53. Fourth, defendant had been panhandling all day long to try to get money. RP 94-98. Fifth, Ms. Bushnell’s house looked distinctly different from defendant’s girlfriend’s home which was located in a cul de sac and did not have a sloped driveway. RP 137-144. Finally, defendant did not mention anything to the officers about a mistaken residence. RP 151. Based on the facts, it was entirely reasonable for a jury to conclude that defendant was attempting to burglarize Ms. Bushnell’s home.

Defendant contends that there is no evidence that he attempted to open a window or break into the house. Brief of Appellant 8. Although alternative conclusions could be drawn, the jury concluded based on the

facts that defendant's intent in removing the screens from the windows was to commit residential burglary. Because there was sufficient evidence and the jury reached a conclusion based upon such evidence, the result of the trier of fact should not be overturned.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: July 1, 2008

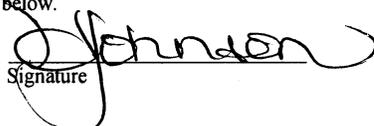
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STATE OF WASHINGTON
BY DEPUTY


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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7/1/08 
Date Signature