

NO. 39959-8-II

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

STATE OF WASHINGTON,
Respondent,
v.
ROBERT ARMBRUSTER, JR.,
Appellant.

BY 
STATE OF WASHINGTON

10 MAR 19 PM 1:57

FILED
COURT OF APPEALS
PACIFIC SEASIDE

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

The Honorable James Lawler, Judge

OPENING BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	1
3. <u>Instructions and Closing Arguments</u>	5
C. <u>ARGUMENT</u>	6
DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT AN INTOXICATION DEFENSE	6
a. <u>Counsel Was Deficient</u>	6
b. <u>Armbruster Suffered Prejudice</u>	10
D. <u>CONCLUSION</u>	13

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Aamhold
60 Wn. App. 175, 803 P.2d 20
review denied, 117 Wn.2d 1016 (1991) 11

State v. Benn
120 Wn.2d 631, 845 P.2d 289
cert. denied, 510 U.S. 944 (1993) 6

State v. Bergeson
64 Wn. App. 366, 824 P.2d 515 (1992)..... 8

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

State v. Hackett
64 Wn. App. 780, 827 P.2d 1013 (1992)..... 7

State v. Jones
95 Wn.2d 616, 628 P.2d 472 (1981) 8

State v. Rice
102 Wn.2d 120, 683 P.2d 199 (1984) 7

State v. Sandomingo
39 Wn. App. 709, 695 P.2d 592 (1985)..... 7

State v. Sherman
98 Wn.2d 53, 653 P.2d 612 (1982) 10, 11

State v. Thomas
109 Wn.2d 222, 743 P.2d 816 (1987) 7, 9, 11

FEDERAL CASES

Strickland v. Washington
466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)..... 6, 11

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
RCW 9A.16.090	7
U.S. Const. Amend. VI	6
Wash. Const. art. 1, § 22	6
WPIC 18.10.....	7

A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective representation when his attorney failed to present a voluntary intoxication defense.

Issue Pertaining to Assignment of Error

Appellant was charged with assault. The evidence revealed that he was in an alcohol blackout at the time of the crime. His attorney failed, however, to request an intoxication instruction, which would have permitted counsel to argue, and jurors to consider, whether alcohol interfered with his ability to form the requisite intent for the charged crime. Was appellant denied his constitutional right to effective representation?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Lewis County Prosecutor's Office charged appellant Robert Armbruster with one count of Assault in the Second Degree. CP 69-71. A jury found him guilty, the court imposed a standard range sentence, and Armbruster timely filed his Notice of Appeal. CP 3-16.

2. Substantive Facts

Teresa Mackey and Robert Armbruster dated for two and a half years, living together for most of that time. RP 116. Mackey

worked at "The Railroad," a restaurant and bar in Elbe. RP 116. She was working the afternoon of July 1, 2009 when Armbruster stopped by sometime after 4:00 p.m. RP 117. Armbruster frequently drinks to excess, and Mackey could see that he was drinking alcohol that afternoon. RP 117, 157.

Mackey's shift ended around 11:00 p.m. She called Armbruster, who was now at another bar. RP 117. It was evident he had been drinking; he was slurring his words. RP 118. Armbruster was upset. He was jealous of other men and did not feel that Mackey had been sufficiently attentive. The two had not been getting along for a few days. RP 118-19. Mackey told Armbruster she was going home and left work in her car. RP 119.

She and Armbruster arrived home at the same time, and Armbruster pulled his truck into the driveway just ahead of her. RP 119-120. The two spoke briefly and she could tell he was angry. She also could tell he was drunk. RP 120, 158, 163. She decided to walk to a neighbor's house, hoping Armbruster would go inside their home without her and simply fall asleep in bed. RP 120.

Mackey sat on her neighbor's porch for about an hour. RP 121. After she heard Armbruster leave in his truck, she returned to her own car to retrieve personal items she had left inside, including

her purse and cell phone. When she heard the truck approaching, she grabbed her cell phone and ran into some nearby woods. RP 121.

Mackey heard Armbruster yelling and asking where she was. RP 122. She also watched as Armbruster let her horse out of a barn and tried unsuccessfully to chase it toward the road before he went back inside the house. RP 124. After waiting in the woods about an hour, Mackey saw the lights go off inside the house and assumed Armbruster had finally gone to bed. RP 125. It was now about 2:00 a.m. RP 174.

Mackey approached the house and found the front door locked. When she tried to open it, Armbruster opened it from the inside. RP 125. He asked Mackey where she had been and who she had been with. When Mackey entered, Armbruster hit her in the eye with what felt like his fist. Mackey began to fall but was able to catch herself on a chair. RP 126-127, 162, 169.

While Mackey walked to the bathroom to get a cold washcloth to put on her eye, Armbruster yelled at her. RP 127. He did not believe her story about hiding in the woods. RP 128. Once in the bathroom, Armbruster pushed her against the wall. He grabbed her around the neck, looked at her eye, hugged her and

began to cry. RP 128-29, 162-63. Armbruster then followed Mackey to the kitchen, where he began yelling again and hit her in the side of the head five or six times, this time using an open hand. RP 128-130, 169.

Mackey convinced Armbruster to go outside, telling him she would show him where she had been hiding. RP 130. Once outside, however, Mackey ran away. RP 130. Armbruster did not try to catch her. RP 164. He called her on her cell phone and asked her to come back, but she refused. RP 131. Mackey then called her daughter, who came and picked her up. RP 132.

At the local hospital, a doctor noted that one of Mackey's eyes had "fairly severe" periorbital swelling (inflammation of the upper and lower eyelids) that extended into Mackey's cheek. RP 173. Her vision remained intact, although the lids did eventually swell sufficiently to temporarily impede use of that eye. RP 174, 179. There were no fractures, but the examining physician concluded Mackey had suffered a concussion. RP 176-77.

Lewis County Deputy Sheriff Robert Nelson interviewed Mackey and photographed her injuries. RP 205-206. Deputy Nelson then went to Armbruster's home around 10:20 a.m. on the morning of July 2, spoke with him, and placed him under arrest.

RP 207-08. Armbruster indicated he did not know what had happened to Mackey or where she was, but he had been drinking and must have blacked out. RP 208, 213.

3. Instructions and Closing Arguments

During closing argument, defense counsel encouraged jurors to acquit Armbruster of Assault in the Second Degree and convict him of the lesser offense of Assault in the Third Degree, contending the State had not proved that Mackey suffered “substantial bodily harm,” an element of Assault in the Second Degree.¹ RP 244-247.

There was no dispute that Armbruster was drunk. The prosecutor conceded this. RP 241. Defense counsel pointed out that although Armbruster clearly did hit Mackey, he had no memory whatsoever of doing so. RP 247. Yet, defense counsel failed to offer any jury instructions relevant to Armbruster’s intoxication and failed to object to the sufficiency of those given. CP 50-65; RP 221-22. Not surprisingly, the deputy prosecutor pointed out that Armbruster’s intoxication was not a defense:

¹ Jurors also were instructed on Assault in the Fourth Degree. CP 43-44.

Feel bad for him, he's sorry, he was drunk. Doesn't matter. Being drunk is not an excuse. He decided to drink that alcohol. No one held a gun to his head and said drink these beers. Did it on his own. Completely responsible for anything he did after he did that. . . .

RP 250.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT AN INTOXICATION DEFENSE.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

a. Counsel Was Deficient.

"[E]vidence of voluntary intoxication is relevant to the trier of fact in determining in the first instance whether the defendant acted with a particular degree of mental culpability." State v. Coates, 107

Wn.2d 882, 889, 735 P.2d 64 (1987). An attorney's failure to request a voluntary intoxication instruction when supported by the evidence constitutes deficient performance. State v. Thomas, 109 Wn.2d 222, 223, 226-29, 743 P.2d 816 (1987).

Based on the evidence at trial, Armbruster had a viable intoxication defense. WPIC 18.10 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 with _____.
(fill in requisite mental state)

11 Washington Pattern Jury Instructions, WPIC 18.10, at 282 (West 2008); see also RCW 9A.16.090 (statute on which instruction is based).

A defendant is entitled to this instruction where (1) the crime charged includes a particular mental state, (2) there is substantial evidence of intoxication, and (3) the defendant presents evidence that the intoxication affected his ability to form the requisite mental state. State v. Hackett, 64 Wn. App. 780, 785 n.2, 827 P.2d 1013 (1992); State v. Sandomingo, 39 Wn. App. 709, 713-14, 695 P.2d 592 (1985); see also State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984) (reversible error not to give instruction where evidence

indicates defendant under effect of alcohol when crimes committed); State v. Jones, 95 Wn.2d 616, 622, 628 P.2d 472 (1981) (instruction properly given where evidence established defendant had been drinking and he showed effects, including slurred speech).

Here, the charge against Armbruster included a particular mental state. To convict him of Assault in the Second Degree, the State had to prove that he *intentionally* assaulted another, thereby *recklessly* inflicting substantial bodily harm. CP 30, 34-35, 37. The definition of "assault" also included a particular mental state: "An assault is an *intentional* touching or striking of another person" CP 31 (emphasis added).

Moreover, there was substantial evidence of intoxication. The evidence supporting the instruction is viewed in the light most favorable to its proponent. State v. Bergeson, 64 Wn. App. 366, 367, 824 P.2d 515 (1992). Here, the evidence revealed that Armbruster had a history of drinking to excess and began drinking the afternoon of July 1. RP 117, 157. When Mackey's shift ended later that night, she located Armbruster at another bar. RP 117. Even over the telephone, it was evident he had been drinking because he slurred his words. RP 118. When she saw him in

person at the house, she confirmed he was drunk. RP 120, 158, 163. Consistent with this observation, the following morning Armbruster did not remember anything. RP 208, 213.

Finally, there was substantial evidence that intoxication affected Armbruster's ability to form the requisite mental states. In addition to his statements to the Deputy Sheriff that he had no memory of anything and must have blacked out from alcohol consumption, Armbruster's behavior was erratic and unpredictable – assaulting Mackey, hugging her and crying, and then assaulting her again. RP 126-130, 162-63, 169.

Trial counsel's failure to request a voluntary intoxication instruction in Armbruster's case is similar to defense counsel's failure in State v. Thomas. Thomas was tried for attempting to elude a pursuing police vehicle. At trial, she testified that she had imbibed several alcoholic drinks on the night in question, which resulted in an alcohol blackout. Because of this blackout, she had no memory of eluding police prior to her arrest. Thomas, 109 Wn.2d at 223-25.

Despite this evidence that Thomas was too intoxicated to form the requisite intent for the charge (a wanton and willful disregard for others' lives or property), her attorney failed to

propose a voluntary intoxication instruction or a so-called Sherman instruction,² which would have made the relevance of intoxication clear to jurors. The Thomas Court found defense counsel's performance deficient. Thomas, 109 Wn.2d at 227-28.

Similarly, because Armbruster was entitled to a voluntary intoxication instruction, his attorney was deficient for failing to request one. Without such an instruction, counsel could not and did not present an intoxication defense. This failure was particularly important because Armbruster did not dispute that he hit Mackey, making his intent (or lack thereof) a critical issue. Notably, such a defense would not have conflicted with counsel's attempts to convince jurors that Mackey's injuries did not rise to the level of Third Degree Assault. Thus, there was no legitimate reason not to ask for a voluntary intoxication instruction.

b. Armbruster Suffered Prejudice.

To establish prejudice, Armbruster need only show a "reasonable probability" that but for counsel's mistake, the result of

² State v. Sherman, 98 Wn.2d 53, 653 P.2d 612 (1982) (defendants must both subjectively and objectively act with wanton and willful disregard for lives or property; juries should be instructed that objective indications of wanton and willful disregard can be rebutted by subjective evidence pertaining to mental state).

the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 693-94).

Thomas is once again instructive. The Thomas Court recognized that without proper instructions explaining the relevancy of intoxication to intent, it could not be confident in the jury's verdict. Thomas, 109 Wn.2d at 228-29; compare State v. Aamhold, 60 Wn. App. 175, 180-81, 803 P.2d 20 (so long as jury instructed on voluntary intoxication, failure to give Sherman instruction harmless; intoxication instruction, by itself, sufficient to allow defense to challenge requisite mental state), review denied, 117 Wn.2d 1016 (1991).

There can be no confidence in the jury verdict here, either. As discussed above, the charge against Armbruster required proof of particular mental states. And although the evidence revealed that Armbruster was extremely intoxicated during commission of those crimes, nothing in the jury instructions made that fact relevant to the jury's decision. In the absence of an intoxication instruction, jurors could not consider Armbruster's inebriation to the

point of blacking out when deciding if the prosecution proved the requisite mental states for conviction.

The trial deputy took advantage of defense counsel's mistake. Defense counsel had repeatedly elicited evidence of Armbruster's intoxication from witnesses, and even emphasized during closing argument that Armbruster remembered nothing. RP 157, 158, 163, 212-13, 247. But the deputy prosecutor pointed out (correctly) that it made no difference whatsoever under the law of this case. RP 250. As instructed, the fact Armbruster had experienced an alcohol blackout was irrelevant to the charged assault.

Because counsel performed deficiently and, given Armbruster's drunken stupor, there is a reasonable probability jurors would not have found he possessed the requisite intent for assault had they been provided a voluntary intoxication instruction, Armbruster was denied his right to effective representation.

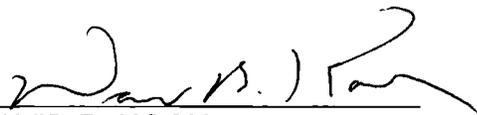
D. CONCLUSION

Armbruster's conviction should be reversed and the case remanded for a new trial.

DATED this 17th day of March, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39959-8-II
)	
ROBERT ARMBRUSTER,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] COLIN HAYES
LEWIS COUNTY PROSECUTOR'S OFFICE
345 W. MAIN STREET, FLOOR 2
CHEHALIS, WA 98532

- [X] ROBERT ARMBRUSTER
DOC NO. 891524
WASHINGTON STATE CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

FILED
COURT OF APPEALS
DIVISION II
10 MAR 19 PM 1:57
STATE OF WASHINGTON
BY 

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF MARCH, 2010.

x *Patrick Mayovsky*