

No. 39959-8-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT ARMBRUSTER

Appellant.

Appeal from the Superior Court of Washington for Lewis County

RESPONSE BRIEF

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TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....1

A. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION ON VOLUNTARY INTOXICATION BECAUSE THIS IS A MATTER OF TRIAL STRATEGY AND THUS CANNOT BE THE BASIS FOR SUCH A CLAIM.

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

<u>Christen v. Lee</u> , 113 Wash.2d 479, 780 P.2d 1307(1989).....	6
<u>In re Pers. Restraint of Fleming</u> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	1
<u>State v. Brooks</u> , 97 Wn.2d 873, 651 P.2d 217 (1982)	5, 7
<u>State v. Byrd</u> , 30 Wn.App. 794, 638 P.2d 601 (1981).....	10
<u>State v. Carpenter</u> , 52 Wn.App. 680, 763 P.2d 455 (1988).	2
<u>State v. Coates</u> , 107 Wn.2d 882, 735 P.2d 64 (1987)	3, 6
<u>State v. Gabryschak</u> , 83 Wn.App. 249, 921 P.2d 549 (1996)	4, 10
<u>State v. Israel</u> , 113 Wn.App. 243 (2002), <i>review denied</i> , 149 Wn.2d 1013(2003).....	2
<u>State v. Israel</u> , 113 Wn.App. 243, 270 (2002), <i>review denied</i> , 149 Wn.2d 1013 and 1015 (2003)	2, 3
<u>State v. Jones</u> , 95 Wn.2d 616, 628 P.2d 472 (1981).....	5, 7
<u>State v. King</u> , 24 Wn.App. 495, 601 P.2d 982 (1979).....	4
<u>State v. Kruger</u> , 116 Wn.App. 685, 91, 7 P.3d 1147 (2003)	1, 4
<u>State v. Lottie</u> , 31 Wn.App. 651, 644 P.2d 707 (1982)	4
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)..	1, 2, 4, 11
<u>State v. Rice</u> , 102 Wn.2d 120, 683 P.2d 199(1984)	5, 7
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	2

STATEMENT OF THE CASE

Except as otherwise cited below, the Appellant's statement of the case is adequate for purposes of this response.

ARGUMENT

A. TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO REQUEST AN INSTRUCTION ON VOLUNTARY INTOXICATION BECAUSE THIS IS A MATTER OF TRIAL STRATEGY AND THUS CANNOT BE THE BASIS FOR SUCH A CLAIM.

Armbruster's sole claim on appeal is that his trial counsel was ineffective for failing to request an instruction on voluntary intoxication. This argument is without merit because this is a matter of trial strategy and thus cannot be the basis for an ineffective assistance of counsel claim.

Claims of ineffective assistance of counsel present mixed questions of law and fact, and are reviewed *de novo*. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); State v. Kruger, 116 Wn.App. 685, 690-91, 7 P.3d 1147 (2003).

To prevail on an ineffective assistance of counsel claim, Armbruster must show both deficient performance and resulting prejudice. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Armbruster has the heavy burden of showing that his

trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Trial counsel is presumed to be effective, and a defendant must also show there was no legitimate strategic or tactical reason for the challenged conduct. McFarland, 127 Wn.2d at 335-36. Prejudice is established if it is reasonably probable that, if not for counsel's deficient performance, the outcome would have been different. Pirtle, 136 Wn.2d at 487.

Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). And counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. McFarland, 127 Wn.2d at 334 n.2. A valid tactical decision cannot provide the basis for an ineffective assistance claim. State v. Israel, 113 Wn.App. 243, 270 (2002), *review denied*, 149 Wn.2d 1013 and 1015 (2003). And, 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).

Here, defense counsel's failure to request an instruction on voluntary intoxication was a valid tactical decision, and thus cannot be the basis for an ineffective assistance claim. Israel, supra. Armbruster's theory of the case was that the injuries he inflicted on Mackey were not serious enough to classify his crime as assault in the second degree. 2RP 245. This is seen from his cross examination of Dr. Calderon, for example. 2RP 183-191. Then, in closing, defense counsel said, "there's a big difference between the assault two and an assault three." 2RP 245. Defense counsel continued:

You heard what the doctor said, no impairment of the eye, there was swelling of the lids but there was no injury to the eye. . . . He didn't see any intracranial bleeding, he didn't see any fractures of any of the orbital bones or any of the other bones in the skull. And what it comes down to is what he told you, bruising and swelling.

And I would ask you, does this bruising and swelling amount to the seriousness of an assault in the second degree like the prosecutor would have you put your mental blinders on and convict Robert of or does it rise to the level of an assault in the third degree.

2RP 246. Thus, Armbruster asked the jury to convict on the lesser crime of Assault in the Third Degree. This was a valid tactical decision. And, intoxication is not a defense to the forms of third degree assault that involve mental states of only criminal

negligence. State v. Coates, 107 Wn.2d 882, 892-93, 735 P.2d 64 (1987).

However, *even if* the decision to not request this instruction was not a valid tactical decision, this claim still fails because Armbruster cannot that the result of the trial would have been different had his counsel requested the instruction. Thus, it is appropriate to analyze whether it was appropriate for trial counsel not to ask for the instruction. Kruger, 116 Wn.App. at 690, *citing* McFarland, 127 Wn.2d at 336 (requiring defendant to show absence of legitimate strategic or tactical rationales for challenged attorney conduct). In the instant case, it was appropriate not to request the voluntary intoxication instruction because the evidence did not show that Armbruster was so intoxicated that he could not form the required mental state for assault in the second degree. State v. King, 24 Wn.App. 495, 501-02, 601 P.2d 982 (1979). Defense counsel is not ineffective for failing to present a defense that the facts do not support. State v. Lottie, 31 Wn.App. 651, 655, 644 P.2d 707 (1982).

A jury may be instructed on voluntary intoxication only if there is substantial evidence that the defendant's drinking affected his ability to form the necessary mental state to commit the charged

crime. State v. Gabryschak, 83 Wn.App. 249, 252, 921 P.2d 549 (1996). A defendant requesting a voluntary intoxication instruction must show "(1) the crime charged has an element a particular mental state, (2) there is substantial evidence of drinking, and (3) evidence that the *drinking affected the defendant's ability to acquire the required mental state.*" Id.(emphasis added). However, by itself, evidence of drinking is not enough to warrant the instruction; substantial evidence must show the alcohol affected the defendant's mind or body. Id. at 253. Simply put, to get an instruction on voluntary intoxication, a defendant has to have been so incredibly drunk at the time of the crime that he was *almost* comatose. See, e.g., State v. Brooks, 97 Wn.2d 873, 876-77, 651 P.2d 217 (1982) (defendant drank beer, whiskey, and rum for two days, staggered around drunk, slurred his speech, ate a spider, had "buggy red" eyes, trembled, carried a bottle of whisky around all day, and fell in the water); State v. Rice, 102 Wn.2d 120, 122-23, 683 P.2d 199(1984)(intoxication instruction necessary where there was evidence that defendant drank beer all day, ingested between two and five Quaaludes, spilled beer and were unable to hit ping-pong balls, and one defendant was so drunk that he did not feel it when he was struck by a car); State v. Jones, 95 Wn.2d 616, 623,

628 P.2d 472 (1981)(instruction required where evidence showed 15-year-old defendant drank between 9 and 15 beers before the incident, and had been put into the "drunk tank" after his arrest).

Indeed, if being "voluntarily intoxicated" were a "defense"¹ to all violent crimes, the conviction rate for such crimes would drop precipitously--given that alcohol is so often involved in such crimes. As one Court has put it:

There is no need for a detailed socio-psychological-pharmacological understanding of the alcohol-crime relationship. All that is necessary is to acknowledge that there is some relationship, a relationship recognized by laymen. Historically, laymen have recognized a relationship. The pre-prohibition era, an era not focused on alcohol-vehicle accidents, provides voluminous material. In denouncing intemperance as "the great source of crime," one criminal lawyer of the 1880's quoted numerous literati:

"Man, with raging drink inflamed,
Is far more savage and untamed;
Supplies his loss of wit and sense
With barbarousness and insolence."

A. Richmond, *Leaves from the Diary of an Old Lawyer: Intemperance, the Great Source of Crime* 28 (1880) (quoting Hudibras).

Christen v. Lee 113 Wash.2d 479, 517-520, 780 P.2d

¹ Respondent uses the word "defense" loosely--and recognizes that intoxication is not, technically, a "defense" to a crime. Instead, if the evidence warrants it, the jury is instructed that it may consider whether a defendant was so intoxicated that he could not form the intent to commit the crime. State v. Coates, 107 Wn.2d 882, 889-892, 735 P.2d 64 (1987).

1307(1989)(noting that courts have recognized a connection between alcohol and aggression). These quotes may be "ancient," but Respondent highly doubts that intoxication is any less of an issue in violent crime today.

While Armbruster's alcohol-fueled actions in the present case were indeed "savage and untamed," he nonetheless was not so intoxicated that he did not know what he was doing when he assaulted Ms. Mackey multiple times. Here--aside from the self-serving statements Armbruster made to the officer the morning after the crime, stating that he "must have blacked out" and didn't remember anything happening to Mackey (which still would not mean he was so drunk he could not form intent)--there is no other evidence that Armbruster was so intoxicated that he could not form the intent to assault Mackey. Although the facts showed that Armbruster had been drinking for several hours that day, he was nowhere near as drunk as the defendants were in the cases cited above. Jones, supra; Brooks, supra; Rice, supra. And Respondent is not aware of any Washington case that states that the mere fact of being in an alcoholic "blackout" *per se* requires a court to instruct the jury on voluntary intoxication.

In the present case, "blackout" or not, Armbruster was functioning well enough to drive², and to find his way home--and to then leave and return home again. 1RP 118.³ Armbruster also had his wits about him enough to play a mean prank on Mackey by going out to the barn, letting Mackey's horse out, and trying to chase the horse out onto the road. 1RP 124. Armbruster also was cognizant enough to lock Mackey out of the house (because he was angry). 1RP 125. Armbruster eventually came to the door and asked Mackey in a loud voice where she had been and who she'd been with. 1RP 126. This shows that Armbruster was "with it" enough to display his apparently-familiar, angry and accusatory tone towards Mackey--demeanor he had displayed in the past. 1RP 118,119.

Armbruster's anger and jealousy was then further expressed when he intentionally slugged Mackey in the face with his fist--nearly knocking her to the floor. 1RP 126,127. Mackey was nearly knocked out by the blow, and was dizzy and disoriented. 1RP 126.

² This is not to say that Armbruster could legally drive under the .08 BAC standard. Nor does Respondent intend to make light of the deadly problem of drunk driving. However, in general, the level of intoxication "allowed" for driving while intoxicated is far different than the extremely-high standard required to merit a jury instruction on voluntary intoxication, as set out in the cases cited in this brief. The point is, Armbruster was not "falling down drunk."

³ There are two volumes of trial transcripts of the jury trial held on two different days. The transcripts are cited as 1RP and 2RP.

Mackey then asked Armbruster if she could get some ice for her eye, and Armbruster comprehended this request and told her she could go get a cold washcloth. 1RP 127. Armbruster's response shows that he was well aware that he had injured Mackey, and that he was cognizant enough to correctly determine that putting something cold on the injury would help. 1RP 127.

Armbruster also managed to navigate through the house from room to room--apparently without falling down--as he followed Mackey from the doorway to the bathroom and then to the kitchen. 1RP 127,128. Armbruster's actions towards Mackey in the bathroom also showed that he was well aware of what he had done, because when he saw the injury to Mackey's eye, he hugged her. 1RP 128. In fact, when Armbruster saw what he had done to Mackey's eye, he began to cry. 2RP 163. Even then, Mackey pushed Mackey into the wall in the bathroom. 1RP 128.

Mackey then went into the kitchen, and Armbruster followed her. 1RP 128. In the kitchen, Armbruster hit Mackey again five or six times in the side of the head with an open hand. 1RP 128,129. While Armbruster was hitting her, he kept telling her to stop lying to him. 1RP 129,130. Mackey then offered to take Armbruster outside to show him where she had been hiding. 1RP 130. Further

evidence of Armbruster's mental awareness that evening is the fact that he agreed to go back outside with Mackey so that Mackey could show him where she had been (that she was in the woods--not with someone else). 1RP 130. Armbruster followed her outside, but Mackey used that opportunity to run away. 1RP 130. When Mackey ran off, Armbruster said, "so you're going to run away again--that's it, that's it." 1RP 131. Thus, Armbruster's actions show that he was walking, talking, thinking, and reacting--he was not staggering, falling down, throwing up or speaking incoherently. 2RP 163; Gabryschak, 83 Wn.App. at 254(evidence showed defendant fully understood his situation, he did not stumble or appear confused, nor was he disoriented as to time and place). Furthermore,. Armbruster was able to telephone Mackey when she ran away from him--so, he certainly was not so intoxicated that he could not remember her number or key-in a phone number into the phone. 1RP 131.

All of this is to say that "although there is evidence of considerable drinking, there is none that [Armbruster] was *out of control of himself* at any time." State v. Byrd, 30 Wn.App. 794, 798, 638 P.2d 601 (1981)(emphasis added). And what that means is that a reasonable defense attorney would realize, as Armbruster's

trial counsel obviously did, that requesting an instruction on voluntary intoxication under these facts would quite likely be futile. Counsel does not render ineffective assistance by refusing to pursue strategies that reasonably appear unlikely to succeed. McFarland, 127 Wn.2d at 334 n.2.

Because the facts here did not merit an instruction on voluntary intoxication in the first place, trial counsel was not ineffective for failing to request one, and Armbruster cannot show that the result of his trial would have been different had such an instruction been requested. Armbruster's trial counsel instead made a valid, tactical decision to ask the jury to convict on the lesser crime of assault in the third degree, arguing that the victim's injuries were not serious enough to merit a conviction on the greater crime. Trial counsel was not ineffective.

This Court should agree, and should find Armbruster's ineffective assistance claim meritless, and should affirm his conviction.

CONCLUSION

For the foregoing reasons, Armbruster has not shown that his trial counsel was ineffective. Accordingly, his conviction should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of May, 2010.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

BY:

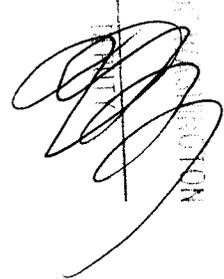

LORI SMITH, WSBA 27961
Deputy Prosecutor

Declaration of Service

The undersigned certifies that on this date a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows: David B. Koch, Nielsen, Broman & Koch, 1908 E. Madison St., Seattle, WA 98122.

Dated this 20 day of May, 2010, at Chehalis, Washington.




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