

FILED
COURT OF APPEALS

10 JUN 18 PM 12:32

STATE OF WASHINGTON

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.

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

The Honorable James Lawler, Judge

REPLY 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>ARGUMENT IN REPLY</u>	1
DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESENT AN INTOXICATION DEFENSE.	1
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Bergeson</u> 64 Wn. App. 366, 824 P.2d 515 (1992).....	2
<u>State v. Coates</u> 107 Wn.2d 882, 735 P.2d 64 (1987).....	1
<u>State v. Gabryschak</u> 83 Wn. App. 249, 921 P.2d 549 (1996).....	2, 3
<u>State v. Jones</u> 95 Wn.2d 616, 628 P.2d 472 (1981).....	4
<u>State v. Osborne</u> 102 Wn.2d 87, 684 P.2d 683 (1984).....	2
<u>State v. Rice</u> 102 Wn.2d 120, 683 P.2d 199 (1984).....	4
<u>State v. Thomas</u> 109 Wn.2d 222, 743 P.2d 816 (1987).....	2, 4

A. ARGUMENT IN REPLY

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

The State argues that defense counsel's failure to request a voluntary intoxication instruction was intentional and part of counsel's trial strategy. See Brief of Respondent, at 3-4. The record does not support any aspect of this claim.

Defense counsel's strategy was to convince jurors not to convict Armbruster of assault in the second degree. To that end, counsel argued that Mackey's injuries were insufficient and, at most, supported a conviction for assault in the third degree. RP 244-247. Nothing about an intoxication defense conflicted with this strategy. Indeed, given that Armbruster did not dispute hitting Mackey and causing her injuries, a voluntary intoxication instruction was likely Armbruster's best chance at acquittal on assault in the second degree.¹

It is true that legitimate tactical decisions can defeat a claim of

¹ The State notes that voluntary intoxication instructions are not proper where the charge is assault in the third degree based on negligence. Brief of Respondent, at 3-4 (citing State v. Coates, 107 Wn.2d 882, 892-893, 735 P.2d 64 (1987)). But counsel's goal in Armbruster's case was to obtain an acquittal on assault in the *second* degree, and the instruction is applicable to that charge.

ineffective assistance of counsel. But the decision must be just that -- legitimate. Whether strategic or not, a tactic that would be considered incompetent by lawyers of ordinary training and skill in criminal law may constitute deficient performance. State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). Therefore, even if Armbruster's counsel failed to ask for an intoxication instruction as a matter of tactics, that decision constituted deficient performance. See State v. Thomas, 109 Wn.2d 222, 223, 226-229, 743 P.2d 816 (1987) (failure to request a voluntary intoxication instruction when supported by the evidence constitutes deficient performance).

The State's second argument is that even if defense counsel had asked for an instruction, the court would have denied it. Brief of Respondent, at 4-11. The State does not dispute that the trial court would have been required to assess the evidence of intoxication in the light most favorable to Armbruster. See State v. Bergeson, 64 Wn. App. 366, 367, 824 P.2d 515 (1992). Yet, in its brief, the State assesses the evidence in the light most favorable to itself. Moreover, according to the State, the evidence had to show Armbruster was "almost comatose." Brief of Respondent, at 5. This is incorrect.

In State v. Gabryschak, 83 Wn. App. 249, 921 P.2d 549 (1996), this Court described the nature of intoxication in this context:

Intoxication is not an all-or-nothing proposition. A person can be intoxicated and still be able to form the requisite mental state, or he can be so intoxicated as to be unconscious. Somewhere between these two extremes of intoxication is a point on the scale at which a rational trier of fact can conclude that the State has failed to meet its burden of proof with respect to the required mental state.

Gabryschak, 83 Wn. App. at 254 (citations omitted). Rather than proof the defendant was almost comatose, to obtain an instruction the defense need only show substantial evidence of drinking and evidence the intoxication affected the defendant's ability to form the requisite mental states. Id. at 252. Armbruster met both these requirements.

First, it is apparent that, consistent with Armbruster's history of excessive drinking, he had been drinking all afternoon and evening before the assault. RP 117-118, 157. Second, there is no doubt the alcohol impacted him. He was slurring his words and visibly drunk when he arrived home. RP 118, 120, 158, 163. In fact, he was so inebriated, he had no memory of the events the following morning. RP 208, 213. In the light most favorable to Armbruster, a jury could have found that intoxication affected his ability to form the requisite mental states for assault in the second degree.

The State argues that "aside from the self-serving statements

Armbruster made . . . stating that he ‘must have blacked out’ and didn’t remember anything[.]” there is no other evidence that his level of intoxication impacted his ability to form intent. Brief of Respondent, at 7. Self-serving or not, Armbruster’s statement is part of the evidence. And it is not the only evidence. As discussed in the opening brief, Armbruster’s erratic, unpredictable, and inconsistent behavior also speaks to his level of impairment. See Brief of Appellant, at 9.

While Armbruster was able to drive, place a call, and engage in some other activities the night of the assault, these are simply facts to be considered by a jury in assessing his intent to commit the charged crime. They would not have denied Armbruster an intoxication instruction had his attorney asked. See Thomas, 109 Wn.2d at 223-224 (defendant able to drive self from one bar to a second bar and attempt to elude police, but claimed blackout; defendant entitled to instruction); State v. Rice, 102 Wn.2d 120, 121-123, 683 P.2d 199 (1984) (defendant able to follow victim out of tavern, fight with victim in parking lot, chase victim as he left parking lot, force victim to ground before beating and stabbing him, and flee in an automobile; defendant entitled to instruction); State v. Jones, 95 Wn.2d 616, 617-618, 628 P.2d 472 (1981) (defendant asks victim if he is gay, fends

off supposed attack with knife, stabs victim nine times, follows victim into another room to determine his condition, and leaves premises before police arrive; defendant entitled to instruction).

Similarly, Armbruster was entitled to a voluntary intoxication instruction. His attorney was deficient for failing to request one, and – with such an instruction – there is a reasonable probability one or more jurors would not have convicted him of assault in the second degree.

B. CONCLUSION

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

DATED this 17th day of June, 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.)	

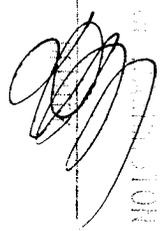
DECLARATION OF SERVICE

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 17TH DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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

- [X] ROBERT ARMBRUSTER
DOC NO. 891524
STAFFORD CREEL CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

FILED
COURT CLERK
10 JUN 18 PM 12:32
STATE OF WASHINGTON
BY 

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*