

FILED

DEC 14, 2011

Court of Appeals
Division III
State of Washington

No. 297446

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JAMES H. DRAINE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

OPENING BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 28459
Spokane, WA 99228
509.939.3038

TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR	1
II.	STATEMENT OF FACTS.....	1
III.	ARGUMENT.....	4
IV.	CONCLUSION	10

TABLE OF AUTHORITIES

Washington Cases

<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007)	7
<i>In re Personal Restraint of Brett</i> , 142 Wn.2d 868, 16 P.3d 601 (2001).....	4
<i>State v. Jones</i> , 95 Wn.2d 616, 628 P.2d 472 (1981).	8
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	7
<i>State v. Powell</i> , 150 Wn. App. 139, 206 P.3d 703 (2009)	7
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	9
<i>State v. Stenson</i> , 132 Wn.2d 668,940 P.2d 1239 (1997), <i>cert.</i> <i>denied</i> , 532 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998) 7	
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	7,8
<i>State v. Washington</i> , 36 Wn. App. 792, 677 P.2d 786 (1984)	5

U.S. Supreme Court Cases

<i>Strickland v. Washington</i> , 466 U.S. 668, 1104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	6,9
-------------------------------------------------------------------------------------------------	-----

Statutes

RCW 9A.16.090.....	6
--------------------	---

I. ASSIGNMENT OF ERROR

A. Mr. Draine received ineffective assistance of counsel when his attorney failed to offer a voluntary intoxication jury instruction.

ISSUE RELATED TO ASSIGNMENT OF ERROR

1. Was trial counsel ineffective for failing to offer a voluntary intoxication instruction when there was substantial evidence that Mr. Draine had a long history of alcohol addiction, was drinking heavily on the date in question, and testified he could not remember his whereabouts or actions between the hours of 1pm and midnight on the date of the alleged incident?

II. STATEMENT OF FACTS

James Draine has a long history of alcohol addiction and mental health issues. (CP 6-11, 18-28). On May 10, 2010, he was charged by information with assault second degree. (CP 4). On June 7, 2010, the court was advised that Mr. Draine may rely on the defense of insanity, and the prosecution moved for an evaluation of his mental state. There was also concern that Mr. Draine was not competent to stand trial. (CP 12-16). The

proceedings were stayed to allow Mr. Draine to be psychologically evaluated. (CP 16). On August 13, 2010, the case was stayed again to allow the evaluation to be completed. (CP 17). On September 17, 2010, the court found Mr. Draine competent to stand trial. (CP 29). The case proceeded to a jury trial and the following pertinent facts were presented. (CP 12-30).

On May 6, 2010, around 10 a.m, James Draine was drinking alcohol at a Spokane bar. (RP 91-92). He received a phone call from Tammy McIntosh, a woman he married in 2000, but he rarely lived with her in the same home. (RP 92). She invited him to go out to Northern Quest Casino with her and another man. (RP 92). He agreed and they picked him up from the bar sometime between 10 and 11 a.m. (RP 92-93). When they arrived at the casino, Mr. Draine drank more alcohol and was asked to leave. (RP 93). He left by himself. (RP 93). He took a bus to downtown Spokane and arrived at the plaza between 1 and 2 p.m. (RP 93-94).

After he arrived at the plaza, he remembered he was still drinking, but had no memory of where he had gone or what he did that afternoon and evening. (RP 94, 96). Shortly before midnight, Mr. Draine was sitting under the payphone outside of the 7-11 store on North Park in Spokane. (CP 3; RP 43, 53). He complained of

chest pains and the store clerk called 9-1-1. (RP 94). Emergency personnel arrived, placed him on a guernsey, and transported him to Valley Hospital. (CP3; RP 55,59). The EMT later testified Mr. Draine smelled of alcohol. (RP 46).

While he was in the emergency room, the EMR personnel spoke with Corporal Shannon McCrillis. Corporal McCrillis had earlier responded to a domestic violence disturbance at the home of Tammy McIntosh. She was not at the home when officers arrived and they were told by dispatch that she was at Valley Hospital. (RP 12). Corporal McCrillis found her in the ER. (RP 13). She was very intoxicated, with a blood alcohol level of .35. (RP 14, 75). She reported that Mr. Draine had been at her home drinking with her for several hours. (RP 20). She later testified Mr. Draine had begun to touch her in a sexual manner and she hit him. She reported he then punched her. (RP 79). She left the home and called for assistance.

The physical description Ms. McIntosh gave Corporal McCrillis seemed to match the description of Mr. Draine given by EMR personnel. (RP 22). The hospital staff “pushed” Mr. Draine “out in the hallway” and Ms. McIntosh identified him as the man who had physically assaulted her. (RP 34).

At trial, the court gave the following pertinent jury instructions:

Instruction No. 5: A person commits the crime of assault in the second degree when he or she intentionally assaults another and thereby recklessly inflicts substantial bodily harm. (CP 39)

Instruction No. 7: A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime. (CP 41)

Mr. Draine was convicted of assault in the second degree. (CP 46). He appeals. (CP 70).

III. ARGUMENT

Mr. Draine Received Ineffective Assistance Of Counsel When His Attorney Failed To Offer An Instruction On the Defense Of Voluntary Intoxication.

A claim of ineffective assistance of counsel is a mixed question of law and fact that is reviewed *de novo*. *In re Personal Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Mr. Draine argues on appeal that defense counsel's failure to propose a jury instruction on voluntary intoxication amounted to ineffective assistance of counsel.

Here, upon agreement by the parties the court ordered, pursuant to RCW 10.77.060, a report on Mr. Draine's mental health, very shortly after he was charged with the crime. It was evident that Mr. Draine had a life-long history of mental health issues, and as later observed also by the court, a very serious problem with alcohol abuse. (RP 2/17/2010, p. 9-10).

For an instruction on voluntary intoxication to be appropriate, three things must be established: (1) the crime charged must include a particular mental state as an element; (2) the defendant must present substantial evidence of drinking; and (3) the defendant must present some evidence that the drinking affected his ability to form the requisite intent. *State v. Washington*, 36 Wn. App. 792, 793, 677 P.2d 786 (1984).

Here, the first requirement is met, as the crime charged, second- degree assault, required the mental state of intentionality. Substantial evidence of drinking was presented: on the date of alleged event, Mr. Draine reported he had been drinking alcohol from at least 10 a.m. He consumed Long Island iced teas at the casino and was asked to leave because of his level of intoxication sometime before 2 p.m. Tammy McIntosh testified that Mr. Draine came to her home that evening and they drank Mad Dog together

for several hours. (RP 85). The emergency personnel testified he smelled alcohol on Mr. Draine's breath. (RP 46). Mr. Draine presented evidence that the drinking affected his ability to form intent, because he testified he suffered a complete blackout for the hours between 1 or 2 p.m. and almost midnight.

RCW 9A.16.090 provides:

No act committed by a person while in a 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.* (Emphasis added).

Here, Mr. Draine was entitled to a voluntary intoxication instruction, and counsel was deficient for not proposing such an instruction to the court. Further, Mr. Draine was prejudiced by counsel's deficient performance.

To establish ineffective assistance of counsel, Mr. Draine must demonstrate (1) counsel's performance was deficient, and (2) he was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687, 1104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251

(1995). To meet the first part of the test, the representation must have fallen below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, the reviewing court analyzes three factors: (1) whether the defendant was entitled to the instruction; (2) whether the failure to request the instruction was a strategy or tactic; (3) whether the failure to offer the instruction prejudiced the defendant. See *State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009).

Here, Mr. Draine met the necessary requirements for an instruction on voluntary intoxication. When there is sufficient evidence to support a jury instruction on a statutory affirmative defense, and counsel fails to request the instruction, counsel's performance is deficient, that is, it has fallen below an objective standard of reasonableness. *In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007); *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 532 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998).

In *State v. Thomas*, the defendant was charged with

attempting to elude a pursuing police vehicle. *Thomas*, 109 Wn.2d at 222. The defendant there testified she had been drinking heavily, and had suffered a blackout. *Id.* at 225. While the defense theory in *Thomas* was that she was too intoxicated to form the required mental state, counsel offered no instruction on the relevance of intoxication with regard to the mental element of the charged crime. *Id.* at 227-228. Such a failure was held to have deprived Thomas of a fair trial. *Id.* at 229.

In *State v. Jones*, the defendant was charged with second degree murder. *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981). At trial, evidence was presented that Jones had been drinking heavily, appeared to be intoxicated to witnesses, and was placed in the “drunk tank” at the police station after his arrest. *Id.* at 622. The court gave the voluntary intoxication instruction, and on appeal, the State contended there was no evidence to support the instruction. The reviewing court held there was sufficient evidence for an intoxication instruction and reversed the conviction based on other instructional issues. *Id.* at 623.

As to whether the failure to request the instruction was part of a strategy or tactic: the defense theory appeared to have been that Tammy McIntosh was so inebriated she “made up” the story

about Mr. Draine assaulting her. (RP 83-87). Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. *State v. Reichenbach*, 153 Wn.2d 126 130, 101 P.3d 80 (2004). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland* at 694. A defendant is *not required* to show that counsel's deficient conduct *more likely than not* altered the outcome in the case. *Strickland* at 693.

Here, failure to request the instruction put the jury in the position of deciding whether Ms. McIntosh had confabulated the story or be obligated to convict if they believed he hit her. Because both the state and defense presented substantial evidence of his intoxication and subsequent blackout, counsel should have also requested the instruction as an affirmative defense. That is, if the jury determined Mr. Draine physically harmed Ms. McIntosh, he still did not have the requisite state of mind for second degree assault. Failure to request the instruction was deficient performance and prejudiced Mr. Draine.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Draine respectfully requests this court to reverse his conviction.

Respectfully submitted this 14th day of December 2011.

/s/ Marie Trombley
WSBA 41410
PO Box 28459
Spokane, WA 99228
(509) 939-3038
Fax: None
Email: marietrombley@comcast.net

DECLARATION OF SERVICE

I, Marie Trombley, attorney for appellant James H. Draine, Court of Appeals No. 297446, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first-class mail, postage prepaid on December 14, 2011, to James H. Draine, 930 E. Sharp, Spokane, WA, 99210 and by email per agreement between the parties to Mark E. Lindsey Spokane County Prosecutor at kowens@spokanecounty.org.

s/ Marie Trombley
PO Box 28459
Spokane, WA 99228
509-939-3038
marietrombley@cocmast.net