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JAN 24. 2012
Court of Appeals
Division III
State of Washington

29744-6-III

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

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
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I.

APPELLANT'S ASSIGNMENT OF ERROR

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

II.

ISSUE PRESENTED

- A. WAS THE TRIAL ATTORNEY INEFFECTIVE FOR NOT REQUESTING A VOLUNTARY INTOXICATION INSTRUCTION THAT WOULD NOT HAVE BEEN PERMITTED BY THE TRIAL COURT?

III.

STATEMENT OF THE CASE

For the purposes of this appeal only, the State accepts the defendant's Statement of the Case.

IV.

ARGUMENT

The defense counsel could not have successfully submitted an instruction on voluntary intoxication because there was insufficient evidence to support the giving of such an instruction.

This court in *State v. Webb*, 162 Wn. App. 195, 252 P.3d 424 (2011) restated the elements required for the submission of a voluntary intoxication instruction. Quoting *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996) this court stated: “Put another way, the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged.” Quoting *State v. Griffin*, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983).

There is zero doubt that the defendant was a “hard” drinker and had been drinking on the date in question. However, “evidence of drinking alone is insufficient to warrant the instruction; instead, there must be ‘substantial evidence of the effects of the alcohol on the defendant's mind or body.’” *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 179, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010, 824 P.2d 490 (1992).

The defendant testified to chest pains on the day of the assault, but the defense put forth no evidence as to the source of the chest pains. More to the point, the defense did not present testimony from any witness as to the effects of alcohol on the defendant. Besides needing to tell the jury that the defendant struck the victim because of alcohol use, or some other connection between drinking and the assault on the victim, the defendant did not present any expert testimony, nor did the defendant himself state that alcohol affected any aspect of an assault charge.

The defendant remembered what he was drinking that day (Long Island Iced Tea). RP 93. The defendant remembered going downtown by bus. RP 93. The defendant testified that his memory was less than optimum and he could not remember everything. RP 94. He did remember continuing to drink. RP 94. The defendant recalled an employee of a 7-11 store had called emergency. RP 94. The defendant recalled going to the hospital with chest pains. RP 94.

The defendant testified that he did not believe he had any sort of physical encounter with the victim on the evening in question. RP 95. The defendant denied breaking Tammy McIntosh's [victim] jaw. RP 95.

The defense was a straightforward attack on the credibility of the victim. This case was a classic "she said/he said" except for the fact that the victim had numerous injuries. The defense did not address the

victim's injuries, instead, attacking the victim's credibility by pointing out inconsistencies in her testimony, her alcohol level, and alleged prior incidents where the victim transferred blame for incidents to the defendant. RP 120-23. The defense's summation on closing argument made the defendant's defense quite clear. RP 123-24.

At no point did the defense present evidence either by experts or lay witnesses that the defendant behaved differently when intoxicated, had blackouts, etc.

Quite aside from the lack of evidence upon which to request a voluntary intoxication instruction, if the defendant had submitted a voluntary intoxication instruction, he would have confused the jury as to his primary defense that he simply wasn't there, did not do it and the only person who says otherwise is a drunken lunatic.

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816

(1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, “but for the ineffective assistance, there is a reasonable probability that the outcome would have been different.” *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (*citing Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

Perhaps the most apropos ruling for the defendant’s claim on appeal comes from *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). A legitimate trial strategy cannot be the basis of an ineffective assistance of counsel claim. *Id.*

The defendant’s ineffective assistance of counsel claim fails on two bases: 1. There was little or no evidence to support the giving of a voluntary intoxication instruction and 2. the trial defense counsel was pursuing a defense which a voluntary instruction would not have helped.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant should be affirmed.

Dated this 17th day of January, 2012.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over the typed name and title of the Deputy Prosecuting Attorney.

Andrew J. Metts #19578
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Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)
)
 Respondent,) NO. 29744-6-III
 v.)
) CERTIFICATE OF MAILING
 JAMES H. DRAINE,)
)
 Appellant,)

I certify under penalty of perjury under the laws of the State of Washington, that on January 24, 2012, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

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1/24/2012
(Date)

Spokane, WA
(Place)


(Signature)