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NO. 63767-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TINEIMALO V. TAUA,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DANIEL J. SOUKUP
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I
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JAY WHITE

TABLE OF CONTENTS

| | Page |
|--|------|
| A. <u>ISSUES PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 1 |
| 1. PROCEDURAL FACTS | 1 |
| 2. SUBSTANTIVE FACTS | 3 |
| C. <u>ARGUMENT</u> | 8 |
| 1. UNDER THE APPLICABLE STANDARD OF REVIEW THE APPELLANT HAS NOT MET HIS BURDEN TO SHOW THAT HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT NOR THAT HIS PERFORMANCE PREJUDICED HIM | 8 |
| a. There Was Not Substantial Evidence Of Drinking By Mr. Taua To Support The Giving Of A Voluntary Intoxication Instruction | 9 |
| b. There Was No Evidence Presented That Mr. Taua's Self-reported Drinking Affected His Ability To Acquire The Required Mental State | 13 |
| c. Any Failure By Mr. Taua's Trial Attorney To Request A Voluntary Intoxication Instruction Constitutes Harmless Error..... | 14 |
| D. <u>CONCLUSION</u> | 17 |

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 8

Washington State:

In re Pers. Restraint of Hubert,
138 Wn. App. 924, 158 P.3d 1282 (2007) 9

State v. Brown, 147 Wn.2d 330,
58 P.3d 889 (2002)..... 15

State v. Gabryschak, 83 Wn. App. 249,
921 P.2d 549 (1996)..... 10, 14

State v. Gordon, 153 Wn. App. 518,
223 P.3d 519 (2009)..... 15

State v. Guloy, 104 Wn.2d 412,
705 P.2d 1182 (1985)..... 15

State v. Irons, 101 Wn. App. 544,
4 P.3d 174 (2000)..... 9

State v. Kjorsvik, 117 Wn.2d 93,
812 P.2d 86 (1991)..... 10

State v. Kruger, 116 Wn. App. 685,
67 P.3d 1147 (2003)..... 12

State v. McFarland, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 8

State v. Powell, 150 Wn. App. 139,
206 P.3d 703 (2009)..... 8, 9

State v. Stenson, 132 Wn.2d 668,
940 P.2d 1239 (1997)..... 8

State v. Thomas, 109 Wn.2d 222,
743 P.2d 816 (1987)..... 8

Other Authorities

WPIC 18.10..... 15

A. ISSUES PRESENTED

1. Did Mr. Taua's trial counsel provide ineffective assistance of counsel for failing to request a voluntary intoxication instruction when there was not substantial evidence that Mr. Taua had been drinking?

2. Did Mr. Taua's trial counsel provide ineffective assistance of counsel for failing to request a voluntary intoxication instruction when there was no evidence that Mr. Taua's drinking affected his ability to acquire the required mental state?

3. Was any error that Mr. Taua's trial counsel made harmless when it has been shown beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Tineimalo Taua (who is the appellant, and will hereinafter be referred to as Mr. Taua), was originally charged by information on November 24, 2008 with two counts of Robbery in the Second Degree. CP 10,11. On March 2, 2009, after the case was assigned to trial to the Honorable Judge Cayce, the

information was amended to charge Mr. Taua with two counts of Robbery in the First Degree. Supp.CP __ (sub # 33).¹

On March 5, 2009, during pretrial motions, and prior to jury selection, defense counsel for Mr. Taua made a motion to withdraw from representing Mr. Taua. RP 3-8 (3/05/09). The court conducted an extensive colloquy with defense counsel outside the presence of the State and Mr. Taua. RP 12-31 (3/05/09). This motion was ultimately granted by the court. RP 31 (3/05/09); CP 22, 23. Mr. Taua was appointed new counsel. RP 34 (3/05/09). A mistrial was declared and a new trial date was set to give new counsel time to prepare for trial. RP 35 (3/05/09).

The new trial commenced on May 11, 2009 before the Honorable Judge Jay White. RP 3 (5/11/09). Mr. Taua was found guilty after a jury trial of both counts of Robbery in the First Degree. RP 424 (5/18/2009). Mr. Taua was sentenced on those charges on June 19, 2009 to a standard range sentence. CP 63-71. This appeal followed.

¹ For some unknown reason, while the court signed the order allowing the amended information to be filed (Supp. CP __ [sub # 33], the prosecutor handed the original amended information to the court clerk for filing and the defendant acknowledged receiving a copy of the amended information; the original amended information was not filed in the court file. RP 4-6 (3/02/09).

2. SUBSTANTIVE FACTS

The 7-Eleven Store located on 511 South Central in Kent, Washington was robbed on successive nights, November 6th and 7th, 2008. RP 74-75 (5/14/2009). Both robberies were caught on the store's video camera system. A copy of those videos was given to the Kent Police department. RP 85-86 (5/14/09). That copy was admitted at trial and played for the jury on a number of occasions throughout the trial. RP 33-34 (5/12/2009); Ex. #2.

In addition to a number of other witnesses, Surjit Bhardwat, who was the sole 7-11 Store employee working on November 6, 2008, testified at trial. Mr. Bhardwat testified he was robbed that night, and identified Mr. Taua as being one of three men who committed that robbery. RP 138-39 (5/14/2009). Mr. Bhardwat said that Mr. Taua came up to him at the counter, pretending to buy store merchandise, when all of the sudden he grabbed Mr. Bhardwat by his clothing. As Mr. Bhardwat began to struggle, two other males ran into the store, jumped over the counter and started beating him. As this beating was going on Mr. Taua and his cohorts took money from the store's till and cigarettes from behind the counter. They left the store with the money and cigarettes. Mr. Bhardwat immediately called the police. RP 142-44

(5/14/2009). While Mr. Taua was not arrested that night, Mr. Bhardwat was later shown a photo montage by the police containing Mr. Taua's photo. Mr. Bhardwat was able to identify Mr. Taua from that montage as one of the persons who robbed him. RP 144-47 (5/14/2009); Ex. #9.

Amandeep Sandhu was the sole 7-11 Store employee working the night of November 7, 2008. He was working that night because his co-worker, Mr. Bhardwat, had been robbed the night before and was home recuperating. RP 239 (5/18/2009). Mr. Sandhu testified that while working that night he was robbed. Mr. Sandhu identified Mr. Taua as one of the persons who had robbed him. RP 240 (5/18/2009).

Mr. Sandhu testified that Mr. Taua came up to him at the counter and showed him a piece of paper, pretending to ask for directions. When Mr. Sandhu leaned over to look at the paper, Mr. Taua grabbed him by his shirt collar. As Mr. Taua attempted to pull Mr. Sandhu over the counter, Mr. Taua's cohort began to "smack" Mr. Sandhu on his face. RP 243 (5/18/2009).

Mr. Sandhu began pleading with the robbers saying he would open the register. Mr. Taua responded by saying, "Open, you son of a bitch." While Mr. Taua continued to beat Mr. Sandhu, the

other robber was behind the counter taking money from the till and cigarettes from behind the counter. RP 247 (5/18/2009). At one point Mr. Taua threatened to shoot Mr. Sandhu if he moved. RP 248 (5/18/2009). Mr. Sandhu said that Mr. Taua finally left the store and then almost immediately other customers came inside the store. RP 251 (5/18/2009). Mr. Sandhu was subsequently taken to the location of where Mr. Taua had been detained by police. Mr. Sandhu was able to identify Mr. Taua as one of the persons who had robbed him. RP 255 (5/18/2009).

On November 7, 2008, just after midnight, Kent Police Officers O'Reilly and Wheeler were flagged down by a person who was standing in the 7-11 Store's parking lot. RP 188 (5/14/2008). The officers were told that the 7-11 Store had just been robbed. Officer Wheeler went inside the store. Officer O'Reilly, after obtaining a description of the robbers, took the patrol car and began looking for the perpetrators. Less than two blocks away the officer spotted a vehicle parked with a person standing next to the car's open trunk. Officer O'Reilly pulled up to the vehicle and shined his spot light on the person and identified himself as a police officer. The male appeared startled and then threw a large wad of cash into the trunk. As the officer told the male to show him his

hands, the male continued to throw cigarette packs into the trunk. RP 192 (5/14/2009).

By this point other officers had responded to the arrest scene. The male and three others who were seated inside the car were all detained. One of the three males in the car was identified by Officer O'Reilly as Mr. Taua. RP 194 (5/14/2009). Also found in the car was a large amount of cash, separated by denominations, numerous packs of Kool brand cigarettes, and a case of Budweiser brand beer that was found in the back seat of the car where Mr. Taua had been sitting when he was pulled from the car by police. RP 194-95 (5/14/2009).

A show up identification was done with witnesses from the 7-11 Store and Mr. Taua was identified as one of the persons who had just robbed the store. At that point Officer O'Reilly advised Mr. Taua he was under arrest. RP 198 (5/14/2009). At no time did Officer O'Reilly testify that it appeared to him that Mr. Taua was intoxicated.

Mr. Taua testified in his own defense during the trial. During direct examination he testified to his version of the complete events of both nights. RP 327-29 (5/14/2009). He did not testify that he ever had lapses in memory about any of the events of either night.

Mr. Taua testified that he was completely sober on the night of the first robbery (charged as count II). RP 342 (5/18/09). When asked if he was intoxicated on the night of the second robbery Mr. Taua responded, "I was intoxicated." RP 330 (5/18/2009). When Mr. Taua was asked on cross examination how he knew he was intoxicated he responded, "Because I am an alcoholic." RP 347 (5/18/2009). Mr. Taua further opined at one point that he was "loaded" and "drunk." RP 348 (5/18/2009).

When asked why he grabbed the store clerk during the November 7th robbery, Mr. Taua responded, "I was really intoxicated. I was not in my right mind. I was mad at him for what he said." RP 352 (5/118/2009). Mr. Taua then acknowledged that the other person he was with attacked the clerk as well. Mr. Taua acknowledged telling Mr. Sandhu to get down on the ground while his cohort took money and cigarettes. Mr. Taua acknowledged that he stole an 18-pack of beer from the store before leaving. RP 352-54 (5/18/2009). Other than the somewhat equivocal statement that he was "not in his right mind," at no time did Mr. Taua testify that the alcohol that he says he drank affected his ability to form the intent to commit the crimes for which he was charged and convicted.

C. ARGUMENT

1. UNDER THE APPLICABLE STANDARD OF REVIEW THE APPELLANT HAS NOT MET HIS BURDEN TO SHOW THAT HIS TRIAL COUNSEL'S PERFORMANCE WAS DEFICIENT NOR THAT HIS PERFORMANCE PREJUDICED HIM.

The reviewing court reviews an ineffective assistance of counsel claim de novo. State v. Powell, 150 Wn. App. 139, 206 P.3d 703 (2009). To prove ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that his performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). There is a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The defendant has the burden of establishing that his attorney, "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland, *id.* at 687.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Legitimate trial strategy cannot serve as a basis for a claim of ineffective assistance of counsel.

In re Pers. Restraint of Hubert, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. State v. Powell, 150 Wn. App. 139, 153, 206 P.3d 703 (2009). When the court applies these standards to Mr. Taua's claim of ineffective assistance of his counsel for the failure of his trial attorney to request a voluntary intoxication instruction, it is clear that Mr. Taua has not met this high burden.

- a. There Was Not Substantial Evidence Of Drinking By Mr. Taua To Support The Giving Of A Voluntary Intoxication Instruction.

The reviewing court will uphold jury instructions "if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000). A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

A defendant requesting a voluntary intoxication instruction must show "(1) the crime charged has as 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." State v. Gabryschak, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). 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. Gabryschak, id. at 253, 921 P.2d 549.

The State would acknowledge that the crime of robbery contains the necessary element of the intent to deprive the victim of property, satisfying the first prong of this three-part test. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). However, it is the State's position that Mr. Taua has not satisfied the remaining two criteria, and therefore his trial attorney was not deficient and his claim on appeal must fail.

The only evidence presented at trial to support the second prong, "substantial evidence of drinking," was Mr. Taua's uncorroborated testimony that he was intoxicated the night of the second robbery. Not only was this testimony uncorroborated in any way, it was pretty thoroughly refuted through other evidence presented at trial.

At no time throughout the course of the store video (introduced into evidence as State's Exhibit #2), which captured Mr. Taua on camera during the course of the robbery, did Mr. Taua stumble, lose his balance or appear confused in a manner which would suggest he was intoxicated.

Amandeep Sandhu, the young man who was working at the 7-11 on the night of the second robbery, testified extensively about Mr. Taua's actions that night. At no time did he indicate that he thought Mr. Taua to be intoxicated, disoriented, confused, or in anyway physically impaired. RP 237-71 (5/18/09). Instead, from Mr. Sandhu's testimony at trial it was clear that Mr. Taua was very oriented to his task at hand, namely beating Mr. Sandhu and stealing money and property from him and his store.

Additionally, Mr. Taua was located and arrested by police just moments after the robbery. The three officers who testified at trial about their contact with Mr. Taua never testified that they made any observations that Mr. Taua appeared intoxicated, or otherwise exhibited any signs from which one could reasonably conclude that Mr. Taua could not form the requisite intent of the crime charged.

Mr. Taua cites to State v. Kruger, 116 Wn. App. 685, 67 P.3d 1147 (2003), where the court held that the failure of the defense counsel to request a voluntary intoxication instruction was reversible error. However, the Kruger case is easily distinguished from this case.

In Kruger, the court found there was “ample evidence of [Kruger’s] level of intoxication on both his mind and body, e.g., his ‘blackout,’ vomiting at the station, slurred speech, and imperviousness to pepper spray.” Kruger, 116 Wn. App. at 692. In Kruger, every witness testified to Mr. Kruger’s level of intoxication. Kruger, 116 Wn. App. at 693.

In this case however, there was absolutely no evidence of Mr. Taua’s level of intoxication on his mind and body. In this case not a single witness testified to Mr. Taua’s level of intoxication.

The bottom line is that Mr. Taua’s unsupported claim at trial that he was intoxicated while he committed the robbery charged in count I does not rise to the level of “substantial evidence of drinking” that is needed to satisfy the second prong of Mr. Taua’s burden.

b. There Was No Evidence Presented That Mr. Taua's Self-reported Drinking Affected His Ability To Acquire The Required Mental State.

Even, for sake of argument, if this court finds there was substantial evidence presented that Mr. Taua had been drinking, the third prong, evidence that the drinking affected the defendant's ability to acquire the required mental state, has not been met. In fact, no evidence whatsoever was presented in this regard, not even by the defendant when he testified at trial.

In his opening brief, Mr. Taua argues that he provided uncontroverted testimony that he was so intoxicated he did not realize he was at the same store as the previous evening. However, this in fact was not Mr. Taua's testimony. While he testified that he was intoxicated, he did not say that was the reason that he did not know he was in the same store that he had robbed one night earlier. RP 329-30 (5/18/09).²

² Mr. Taua's testimony in this regard is as follows:

Q. Were you intoxicated that night?

A. I was intoxicated.

Q. Did you know that the store that you were in on November 7th was the same one that you had been in the night before?

A. I was not aware that was – it was the same store. I wasn't aware of.

RP 329-30 (5/18/09).

Additionally, Mr. Taua was able to give a complete rendition of what he said happened that night. RP 348-57 (5/18/09). During this colloquy he never testified to lapses in memory, to being impaired by what he had to drink or to even attribute any of his actions to the fact that he had been drinking.

Evidence of drinking alone is insufficient to warrant [an instruction on intoxication]; instead, there must be substantial evidence of the effects of the alcohol on the defendant's mind or body. State v. Gabryschak, 83 Wn. App. 249, 253, 921 P.2d 549 (1996). In this case, there was absolutely no evidence presented, which can be considered evidence, substantial or otherwise, that the effects of the alcohol Mr. Taua said he consumed affected his ability to acquire the required mental state of the intent to take property of another. Accordingly, Mr. Taua's claim that his attorney was ineffective for failing to ask for an intoxication instruction should be denied.

- c. Any Failure By Mr. Taua's Trial Attorney To Request A Voluntary Intoxication Instruction Constitutes Harmless Error.

Assuming for the sake of argument that Mr. Taua is able to show both that the giving of a voluntary intoxication instruction was

supported by substantial evidence, and that Mr. Taua's trial counsel was deficient in not requesting one, this court should still find this to be harmless error. The State would concede that the lack of instruction may be considered a manifest error affecting a constitutional right. As such, the reviewing court examines the effect the error had on the defendant's trial according to harmless error standard. State v. Gordon, 153 Wn. App. 518, 535, 223 P.3d 519 (2009). A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Gordon, 153 Wn. App. at 535; State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The harmless error analysis ensures that criminal defendants may not obtain new trials whenever it is possible to identify a constitutional issue not raised below. Gordon, 153 Wn. App. at 535-36; Guloy, 104 Wn.2d at 425.

Even if the court had instructed the jury using the language of WPIC 18.10, the voluntary intoxication instruction, any reasonable jury would have reached the same result, that Mr. Taua was guilty of the November 7th robbery. The jury would have been instructed pursuant to WPIC 18.10 that "no act committed by a

person while in a state of intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with the requisite mental state” (in this case, the intent to deprive another of property). Mr. Taua never testified that he did not act intentionally because of what he had to drink. In fact, he stated the opposite.

The following colloquy took place during cross-examination:

Q. And after he was on the ground and you told him not to move, you went over and got an 18-pack of beer, that 18-pack of beer right here, and left the store didn't you?

A. That's the case of beer that I steal.

RP 354 (5/18/2009).

The only time Mr. Taua testified that the alcohol he said he had consumed had any influence on his thought process was when Mr. Taua testified that the reason why he initially grabbed the store clerk was because he was “really intoxicated,” was “not in his right mind” and was “mad for what the clerk had said.” RP 352 (5/18/2009). This testimony, while perhaps helping to explain Mr. Taua's motive for assaulting Mr. Sandhu, obviously does not go to the mental state at issue here, the intent to commit theft.

Additionally, Mr. Taua's testimony that Mr. Sandhu said something to upset Mr. Taua is directly refuted by Mr. Sandhu. The jury agreed with Mr. Sandhu's rendition of the facts, to the exclusion of Mr. Taua's version. Having a voluntary intoxication instruction when the only evidence of intoxication is Mr. Taua's unsupported testimony would most likely not change the jury's determination that Mr. Sandhu's testimony (supported by the store video) is a true account of what happened that night. Accordingly, any error in failing to give a voluntary intoxication instruction as proposed on appeal by Mr. Taua is harmless beyond a reasonable doubt because any reasonable jury would have reached the same result in the absence of the error.

D. CONCLUSION

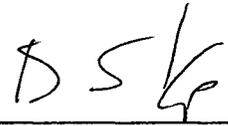
For the foregoing reasons, the State respectfully requests that this court find that Mr. Taua was not denied his right to the effective assistance of counsel when his trial attorney did not request a voluntary intoxication instruction because Mr. Taua has failed to show that there was substantial evidence that Mr. Taua had been drinking and there was no evidence to show that

Mr. Taua's drinking affected his ability to acquire the required mental state of intent to deprive the victim of property.

DATED this 26 day of April, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

DANIEL J. SOUKUP, WSBA #17322
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002