IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ANDREW EDWARD FRYK, Appellant.	No. 39150-3-II UNPUBLISHED OPINION

Hunt, J. — Andrew Edward Fryk appeals his jury conviction for second degree assault with domestic violence for throwing a glass mug at his girlfriend, Jamie M. Torgeson, breaking her teeth, and dislodging her permanent orthodontic retainer. He argues that (1) defense counsel provided ineffective assistance in failing to present evidence to support a voluntary intoxication defense; and (2) the trial court erred in declining his proposed jury instruction on voluntary intoxication, entering a finding of fact and a conclusion of law about his level of intoxication, and denying his motion for arrest of judgment. We affirm.

FACTS

I. Assault

On the night of December 13, 2008, Jamie M. Torgeson went to a house party with her boyfriend, Andrew Edward Fryk, where he drank beer and played drinking games. Around 10:30 pm, Fryk "started getting mad" when a friend made upsetting comments, after which Fryk started "calling [Torgeson] names" and "telling [her] to leave." III Verbatim Report of Proceedings (VRP) at 73. When Torgeson went outside to call a friend for a ride, Fryk came up behind her, grabbed her phone, walked back into the kitchen, and threw it on the ground, causing the back to "snap[] in half" and the phone to lose its battery and SIM card.[1] III VRP at 76. Torgeson and her friend Kirsten Bethke left the house party in Bethke's car. Approximately 45 minutes later, Torgeson decided to go back to look for her SIM card. When Torgeson went into the kitchen where her SIM card had fallen out of her phone, Fryk asked what she was doing there, picked up a glass mug from the kitchen counter, and threw it at her face from a distance of six to seven feet, striking the right side of her face and jaw, breaking two of her teeth,[2] and knocking out her permanent orthodontic retainer, which had been cemented to underside of her bottom teeth.

---

[1] A "SIM," or "Subscriber Identification Module," is "a plastic card inside a cell phone that stores information to identify the phone and the person using it." http://www.oxfordadvancedlearnersdictionary.com/dictionary/sim-card (last visited Aug. 26, 2010).

[2] The impact "took a chunk out of" Torgeson's bottom molar tooth and chipped the tooth above it. III VRP at 86.

Bethke drove Torgeson to her car; then Torgeson drove herself home. During the early morning hours of December 14th, Torgeson told her mother what had happened, and her mother called 911 and reported the incident. Responding to Torgeson's mother's 911 call at 3:23 am, Kitsap County Sheriff's Officer Todd Byers contacted Torgeson, who told him about Fryk's attack several hours earlier. Byers then went to the house party, found Fryk, and arrested him for assault with domestic violence.

Fryk's "eyes were red, watery, [and] appeared bloodshot," III VRP at 122; Clerk's Papers (CP) at 7, and Byers "smell[ed] a slight odor of intoxicants" on Fryk's person, III VRP at 122. Byers observed no problems with Fryk's motor skills but noted that Fryk "slight[ly] stagger[ed] one time when he walked." III VRP at 139. According to Byers, "It was kind of unique because [Fryk] immediately turned around and placed his hands behind his back." III VRP at 119.

When Byers advised Fryk of his *Miranda*[3] rights, Fryk said he understood and responded appropriately. When Byers asked Fryk why he had hurt Torgeson, Fryk replied, "I didn't mean to hurt her." III VRP at 142. Fryk was mostly "evasive" about the incident but said that he "[wa]s under a lot of pressure," which "affect[ed] his anger issues." CP at 7. According to Byers, Fryk's responses to questioning, "while evasive . . . did not appear to be affected by his consumption of intoxicants" and reflected a "clear," "consistent[,] and coherent" train of thought. CP at 7.

Also on December 14, Torgeson and her mother went to the emergency room for

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

an x-ray because her mother "was surprised at how swollen [her] face was." III VRP at 93. At that time, she could not open her mouth more than half an inch. Torgeson received pain medication for a contusion.

II. Procedure

The State charged Fryk with second degree assault, RCW 9A.36.021(1)(a), with a special allegation of domestic violence, RCW 10.99.020, Count I; and third degree malicious mischief over $50, RCW 9A.48.090(1)(a), with a special allegation of domestic violence, RCW 10.99.020, Count II.

A. Pre-Trial CrR Motion in Limine

Following a hearing on Fryk's pre-trial CrR 3.5 motion in limine to suppress his allegedly involuntary statements to Byers, the trial court determined that (1) Fryk's testimony about his intoxication and his vague recollection of the events were "independent from what was understood at the time in question," II VRP at 62; and (2) the preponderance of the evidence showed that Fryk understood his *Miranda* rights and had voluntarily waived them when he spoke to Byers.[4]

[4] Later, the trial court entered written findings of fact and conclusions of law, ruling that (1) Fryk "was intoxicated at the time he was contacted by Deputy Byers," Finding of Fact (FF) II, CP at 117; (2) but Fryk was "not intoxicated to the point where he could not understand what was going on when he was contacted by Deputy Byers," FF III, CP at 117-18, and "not intoxicated to the point where he could not make a knowing, voluntary and intelligent waiver," Conclusion of Law (CL) V, CP at 118; and (3) Fryk had waived his *Miranda* rights.

B. Jury Trial

1. Testimony

At Fryk's March 2009 jury trial, Torgeson testified to the facts described above. For example, she testified that the glass mug's striking her face "chipped two of [her] teeth," III VRP at 85, "t[aking] a chunk out of" one of her bottom teeth and "chip[ing]" the top tooth above it. III VRP at 86. She noted that "[she] was actually holding [her] teeth, like the chips of [her] teeth in [her] hand." II VRP at 88. In addition, she testified that the attack had "scared [her]," III VRP at 87, that Fryk seemed more intoxicated at the time of the attack than when she had first left the house party, and that Fryk's degree of intoxication "was just like medium, [she] guess[ed]." III VRP at 83. In response to defense counsel's cross-examination about the house party's drinking games and Fryk's consumption of whisky in addition to beer, Torgeson replied she did not know whether Fryk had been drinking more whisky than beer, but he was more intoxicated than she was at the party.

Byers testified as described above. On cross-examination, Byers acknowledged that Fryk's watery eyes and slight staggering "could be very indicative of somebody being intoxicated." III VRP at 165. Bethke testified that (1) when Torgeson returned to the house party to find her SIM card, she (Torgeson) "ran out" several minutes later "holding her mouth" and "screaming to get in the car" because "she [Torgeson] thought she broke her jaw, or something," III VRP at 176; (2) Torgeson "got into my car right away and told me to lock my doors, because he [Fryk] came out and he was hitting my car before I

left," II VRP at 176; (3) when they drove away, Bethke saw the chipped pieces of Torgeson's teeth in Torgeson's hand; and (4) although Bethke had seen Fryk drinking that evening, she was "not aware" of how much alcohol he had consumed and had not seen him consume any alcoholic beverage besides beer. III VRP at 194.

For the defense, Fryk's mother testified that Torgeson and Bethke had smelled of intoxicants on the night of the incident. And Fryk testified that (1) he had consumed half a bottle of whiskey and Coca-Cola before he went to the house party; (2) at the party, he had played drinking games and drank ten 12-ounce cans of beer; (3) on a scale of 1 to 10, he estimated his level of intoxication to have been, "Seven." III VRP at 217; (4) after throwing Torgeson's phone, he had fallen asleep; (5) he did not remember Torgeson's coming back or his throwing the glass mug at her face; and (6) he first "came to reality" when a friend told him, "The police are here for you." III VRP at 221.

2. Instructions

Fryk proposed the following jury instruction on voluntary intoxication:

> No crime committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with intent or knowledge as required to commit the crime of Assault.

CP at 51 (citation omitted). The trial court denied this motion, reasoning, "[T]here has to be sufficient evidence in the record to show that intoxication affected the defendant's ability to acquire the required mental state." IV VRP at 243. The trial court recognized that "there was, indeed, evidence of [Fryk's] consumption of [a] considerable amount of

alcohol" and that Fryk had testified that "he was affected by the alcohol" and "simply can't remember very much of that evening." IV VRP at 243. Nevertheless, the trial court determined:

> However, this evidence does not rise to the level of showing that the defendant was not able to acquire the required mental state of intent. There was no suggestion that he was so affected that he didn't know, for example, where he was, . . . who he was, what he was doing or that he had, in fact, lost his mental faculties or his motor faculties.
>
> So without that evidence, I'm not persuaded that this instruction can be presented to the jury. So I am disallowing the instruction.

IV VRP at 244.

The trial court's instructions to the jury included the following definition of "substantial bodily harm": "Substantial bodily harm means bodily injury that causes a fracture of any bodily part." CP at 71 (jury instruction no. 12).

3. Closing argument

Defense counsel argued in closing that Fryk "did a lot of drinking that night. A lot of beer . . . [and] some whiskey." IV VRP at 315-16. Counsel asserted, "[Y]ou can take into consideration his mental state at the time. Was he able to form that intent [to throw the glass mug at Torgeson]?" IV VRP at 316. Noting Byers' observation of Fryk's watery, bloodshot eyes and his smell of alcohol, defense counsel further argued that Fryk's intoxication had prevented him from forming the intent to throw the glass mug at Torgeson.

4. Jury verdict

On March 6, the jury found Fryk guilty of both counts—second degree assault,

Count I, and third degree malicious mischief, Count II. The jury also answered, "Yes," to the special verdict questions on domestic violence for both counts, finding that Fryk and Torgeson were "members of the same family or household." CP at 90, 92. The trial court sentenced Fryk and entered judgment against him on April 3.

C. Motion for Arrest of Judgment and Appeal

On March 20, Fryk filed a motion for arrest of judgment under CrR 7.4, asking the trial court to set aside the March 6 jury verdict on second degree assault and to enter judgment on the lesser included offense of fourth degree assault. Fryk claimed that the evidence was insufficient to support his conviction because the State had failed to show that Torgeson had suffered substantial bodily harm, namely, "a fracture of a body part," contending that the evidence showed only that "Torgeson's tooth was chipped, and no reasonable jury would have found that a chipped tooth constituted a fracture," as defined under RCW 9A.04.110(4)(b). CP at 97. The State countered that (1) Fryk's motion was untimely because he did not serve or file it until 14 days after the jury verdict and (2) "[t]here was more than enough evidence" for the jury to find beyond a reasonable doubt" that Fryk committed second degree assault. CP at 100. The trial court ruled, "I do make a determination that this is an untimely filing and, therefore, precluded under the rules so far as bringing this particular motion." VRP (April 3, 2009) at 9.

The trial court then noted, "Having said that, despite the fact that it is late filed, I'm still willing to get to the substance of the argument." VRP (April 3, 2009) at 9. The trial court concluded:

> That term "fracture" I believe is not one which is necessarily one subject to scientific definition. It is a general term used, and it is my opinion that the jurors would read that instruction and apply a common sense, every day definition of what a fracture is.

VRP (April 3, 2009) at 10. Ruling that sufficient evidence of substantial bodily harm supported the jury's verdict, the trial court denied Fryk's motion on the merits.

Fryk appeals.

ANALYSIS

I. Voluntary Intoxication

Fryk argues that the trial court erred in declining his proposed jury instruction on voluntary intoxication and that defense counsel provided ineffective assistance in failing to present omitted evidence to support a voluntary intoxication defense. Both arguments fail.

A. Jury Instruction

We agree with the State that the trial court properly denied defense counsel's request for a voluntary intoxication instruction because, "although there was clearly evidence that Fryk was intoxicated, there was no evidence that in any way related his intoxication to his ability to form the intent to assault Torgeson."[5] Br. of Resp't at 13.

[5] We also reject Fryk's related argument that the trial court erred at the CrR 3.5 hearing in (1) finding that he "was not intoxicated to the point where he could not understand what was going on when he was contacted by Deputy Byers," FF III, CP at 118; and (2) concluding that he (Fryk) "was not intoxicated to the point where he could not make a knowing, voluntary and intelligent waiver." CL V, CP at 118. As we discuss above, the evidence did not "reasonably and logically connect" Fryk's intoxication with his claimed inability to form the intent to throw the glass mug at Torgeson. *State v. Gabryschak*, 83 Wn. App. 249, 252-53, 921 P.2d 549 (1996). The record on appeal shows that the evidence below was sufficient to persuade a fair-minded, rational person of the truth of

"We review a trial court's decision to reject a party's jury instruction for an abuse of discretion." *State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998). "Jury instructions are sufficient if they permit each party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law." *Picard*, 90 Wn. App. at 902. To obtain a voluntary intoxication instruction, a defendant must show (1) the crime for which he faces conviction includes "an element [of] a particular mental state," (2) substantial evidence shows that he or she was drinking an intoxicating beverage, and (3) evidence that the intoxication affected his or her ability to acquire the particular mental state. *State v. Gabryschak*, 83 Wn. App. 249, 252, 921 P.2d 549 (1996). Thus, 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." *Gabryschak*, 83 Wn. App. at 252-53. "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.' " *Gabryschak*,[6] 83 Wn. App. at 253 (quoting *Safeco Ins. Co. v. McGrath*,

---

finding of fact number III; thus, we hold that substantial evidence supports this finding and conclusion of law number V. *See State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002).

[6] As Division One of our court has noted:

> [I]ntoxication 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. *State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987). 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. *See, e.g., State v. Rice*, 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984) (intoxication instruction necessary

63 Wn. App. 170, 179, 817 P.2d 861 (1991)).

Both the State and defense counsel elicited testimony about Fryk's level of intoxication—Byers' testimony that Fryk smelled like alcohol and had watery and bloodshot eyes and a slight stagger in his step, and Torgeson's and Bethke's testimonies that he had been drinking beer. But we find no evidence in the record from which a rational trier of fact could reasonably and logically infer that Fryk's intoxication prevented him from forming the required level of culpability to commit assault in the second degree. On the contrary, the evidence shows that (1) Fryk responded to Officer Byers' arrival at the house party by "immediately turn[ing] around and plac[ing] his hands behind his back," III VRP at 119, indicating that he was aware that Byers had come to arrest him; and (2) Fryk understood Byers' questions and *Miranda* warnings and responded appropriately, telling Byers that he "didn't mean to hurt [Torgeson]," III VRP at 142, and that he was "under a lot of pressure, and that's [sic] affected his anger issues." III VRP at 144.

We agree with the State that, although the evidence shows that Fryk was intoxicated, "ihe fails to point to any evidence that [his] intoxication prevented him from

---

> where there was evidence that the defendants drank beer all day, ingested between two and five Quaaludes, spilled beer and were unable to hit ping-pong balls, and one of the defendants was so drunk that he did not feel it when he was struck by a car); *State v. Brooks*, 97 Wn.2d 873, 876-77, 651 P.2d 217 (1982) (instruction proper where there was evidence that the defendant drank beer, whiskey, and rum for two days, ate a spider and washed it down with whiskey, and had glassy eyes and slurred speech); *State v. Jones*, 95 Wn.2d 616, 623, 628 P.2d 472 (1981) (instruction required where there was evidence that the 15-year old defendant drank between nine and eleven beers before the incident, had glassy eyes and slurred speech, and had been put into the "drunk tank" after his arrest).

Gabryshak, 83 Wn. App. at 254.

forming the intent to throw the glass at [Torgeson]." Br. of Resp't at 15. He presented no evidence to support his own testimony that he had fallen asleep before Torgeson returned for her SIM card. And although he testified that he had consumed significant amounts of alcohol, he did not testify that his intoxication caused him to feel disoriented or delirious, or otherwise affected his ability to control his speech or conduct. Because the evidence did not "reasonably and logically connect" Fryk's intoxication with his "asserted inability to form the required level of culpability," the trial court neither erred nor abused its discretion in rejecting his jury instruction on voluntary intoxication. *Gabryschak*, 83 Wn. App. at 252-53, 255.

B. Effective Assistance of Counsel

In the alternative, Fryk argues that if the trial court did not err in refusing his proposed voluntary intoxication instruction, defense counsel provided ineffective assistance in failing to present, "through cross-examination, direct examination or otherwise," evidence of the effects of alcohol on his (Fryk's) mind or body. Br of Appellant at 20. This argument also fails.

We presume that counsel provided proper representation. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). To establish ineffective assistance of counsel, Fryk must show that (1) defense counsel's performance was deficient and, (2) but for this deficient performance, there is a reasonable probability that the outcome of his case would have been different. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *Strickland v. Washington*, 466 U. S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674

(1984)). "[M]atters that go to trial strategy or tactics" do not serve as a basis for deficient performance. *Hendrickson*, 129 Wn.2d at 77-78. And in analyzing whether Fryk can show prejudice, we determine whether there is a reasonable probability that, but for defense counsel's purported errors, the outcome of his (Fryk's) trial would have been different. *Hendrickson*, 129 Wn.2d at 78.

Fryk fails to provide argument or legal authority to support his claim that defense counsel's performance was deficient. *See* Br. of Appellant at 21. Nor does he assert what evidence defense counsel should have presented to argue his intoxication defense more persuasively.[7] We agree with the State that Fryk's argument "is without merit because the record does not show that such further evidence was available." Br. of Resp't at 18. Fryk having failed to show that defense counsel's performance was deficient, we do not reach his argument on prejudice, the second prong of the ineffective assistance of counsel test.

II. Motion for Arrest of Judgment

Fryk next argues that the trial court erred in denying his untimely motion for arrest of judgment, specifically by rejecting his contention that the evidence was insufficient to support his conviction for second degree assault. This argument also fails.

A defendant may bring a motion for arrest of judgment for "insufficiency of the proof of a material element of the crime" under CrR 7.4(a)(3). This rule requires that a "motion for arrest of judgment must be served and filed within 10 days after the verdict or

[7] In contrast, we note that defense counsel did present evidence of voluntary intoxication by eliciting testimony from the State's witnesses about Fryk's intoxication and the effects of the intoxication on his body and mind.

decision." CrR 7.4(b). This rule also provides that the trial court "may in its discretion extend the time [of this 10-day deadline] until such time as judgment is entered." CrR 7.4(b).

A. Untimely Filing

Fryk does not dispute that he filed his motion for arrest of judgment on March 20, 14 days after the March 6 jury verdict and four days after the 10-day deadline had lapsed. Nor does he challenge the trial court's denial of his motion as untimely. Contrary to his argument, the trial court did not err in denying his motion for failing to file it "within 10 days after the verdict or decision," as required under CrR 7.4(b).

Fryk also argues that the trial court erred in denying his motion for arrest of judgment on its merits. *See* Br. of Appellant at 26. The trial court expressly ruled, "I do make a determination that this is an untimely filing and, therefore, precluded under the rules," VRP (April 3, 2009) at 9; but the record is unclear about whether the trial court intended its subsequent statement—that it was "still willing to get to the substance of the argument," VRP (April 3, 2009) at 9,—as an implied exercise of discretion to extend the time to consider the motion on the merits, as CrR 7.4(b) permits when judgment has not yet been filed. Thus, to the extent that the trial court addressed Fryk's motion on its merits, we assume that it impliedly intended to exercise its discretion to extend the 10-day period "until such time as [the] judgment [wa]s entered," which occurred later that same day on April 3. CrR 7.4(b). Assuming that the trial court exercised its discretion in this manner, it had authority under CrR 7.4(b) to consider Fryk's motion, which he filed before

the new extended deadline, April 13. Accordingly, we next review the trial court's denial of Fryk's motion on its merits.

B. Sufficient Evidence of Substantial Bodily Harm

Fryk argues that the trial court erred in rejecting his argument that no reasonable jury would have found that a chipped tooth constituted a fracture, as defined under RCW 9A.04.110(4)(b). He asserts that "there was not 'substantial evidence' from which the jury could reasonably have concluded that there was some proof that [he] caused substantial bodily harm" because the evidence showed "no fracture of any of the victim's teeth." Br. of Appellant at 26 (emphasis omitted). Because it is contrary to the evidence, this argument fails.

In reviewing a trial court's denial of a motion for arrest of judgment under CrR 7.4, we engage in the same inquiry as the trial court. *State v. Ceglowski*, 103 Wn. App. 346, 349, 12 P.3d 160 (2000) (citing *State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000)). We determine whether "[t]he evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the state, could find the essential elements of the charged crime beyond a reasonable doubt." *Longshore*, 141 Wn.2d at 420-21. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Ceglowski*, 103 Wn. App. at 349 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

In denying Fryk's motion for arrest of judgment on the merits, the trial court reasoned that (1) the word "fracture" is subject to a "common sense" interpretation, VRP (April 3, 2009) at 10; (2) regardless of whether "the witness said it was a chipped tooth or

a broken tooth, a fractured tooth, or a splintered tooth, or if the witness said there was a break to my tooth, it is for the jury to determine well, was this actually a fracture," VRP (April 3, 2009) at 10; (3) because the word "fracture" "is a general term used, [] it is [the trial court's] opinion that the jurors would read that instruction and apply a common sense, every day definition of what a fracture is," VRP (April 3, 2009) at 10; and (4) sufficient evidence of substantial bodily harm supports the jury's verdict. We agree.

RCW 9A.36.021(1)(a) provides that "[a] person is guilty of assault in the second degree if he or she, . . . [i]ntentionally assaults another and thereby recklessly inflicts substantial bodily harm." RCW 9A.04.110(4)(b) defines "[s]ubstantial bodily harm" as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part." Accordingly, the trial court instructed the jury, "Substantial bodily harm means bodily injury that causes a fracture of any bodily part," CP at 71 (jury instruction no. 12). Although the jury instructions did not include a definition for "fracture," the common definition of this word is "the act or process of breaking or the state of being broken: rupture by a break through the entire thickness of a material: breach; *specif*: the breaking of hard tissue (as a bone, tooth, or cartilage)." *See* Webster's II New College Dictionary 901 (1999).

Taken in the light most favorable to the State, the evidence supports the jury's verdict that the injury to Torgeson's teeth, whether "broken" or "chipped," constituted a "fracture," as described in jury instruction no. 12 and defined under RCW

9A.04.110(4)(b). This evidence includes (1) Torgeson's testimony that the glass mug Fryk threw "broke two of [her] teeth," III VRP at 85, "took a chunk out of" her wisdom tooth, and "chipped" her top tooth, III VRP at 85, 86; (2) Torgeson's testimony that "[she] was actually holding [her] teeth, like the chips of [her] teeth in [her] hand," III VRP at 88; (3) Bethke's testimony that Torgeson "was screaming" and "holding her mouth" because "she [Torgeson] thought she broke her jaw, or something," III VRP at 176; and (4) Bethke's testimony that Torgeson had shown her the "chips of her teeth in her hand." III VRP at 178. The foregoing testimony supports the jury's verdict that Fryk's throwing the glass mug at Torgeson fractured two of her teeth, constituting "substantial bodily harm" as defined under RCW 9A.04.110(4)(b). Accordingly, we hold that the trial court properly denied Fryk's motion for arrest of judgment.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, PJ.

Worswick, J.