IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT FREDRICK ARMBRUSTER, JR, Appellant.	No. 39959-8-II UNPUBLISHED OPINION

Van Deren, J. — Robert Fredrick Armbruster, Jr. appeals his conviction for second degree assault. He contends that his counsel was ineffective for not offering an instruction on voluntary intoxication. We affirm.

Facts

Teresa Mackey and Armbruster dated for two and one-half years, and lived together for most of that time. Mackey worked at a restaurant and bar in Elbe. She was working the afternoon of July 1, 2009, when Armbruster stopped by sometime after 4:00 p.m. and had a drink in the lounge.

When Mackey's shift ended around 11:00 p.m., she called Armbruster, who was at a different bar. Armbruster sounded upset on the telephone and it was evident to Mackey that he had been drinking because his speech was slurred. Mackey testified that they had not "been

getting along for a few days"; she believed Armbruster was jealous because "[she] didn't show him enough attention, [she] didn't love him enough." Report of Proceedings (RP) at 118. Mackey told Armbruster she was going drive home in her car.

She and Armbruster arrived home at the same time and Armbruster pulled his truck into the driveway just ahead of her. When the two spoke briefly, she could tell he was angry. She also thought he was intoxicated, but she could not tell how intoxicated he was. She decided to walk to a neighbor's house, hoping Armbruster would go inside their home without her and simply fall asleep.

Mackey sat on her neighbor's porch for about one hour. After she heard Armbruster leave in his truck, she returned to her car to retrieve her purse and cell phone. When she heard Armbruster's truck returning, she grabbed her cell phone and ran into the woods.

Mackey heard Armbruster yelling, asking where she was. She also watched Armbruster let her horse out of a barn and try unsuccessfully to chase it toward the road before he went back inside the house. After waiting in the woods for another hour, Mackey saw the lights go off and assumed Armbruster had finally gone to bed. She put her horse back in the barn, waited there a few minutes, and then made her way to the house around 2:00 a.m.

Mackey found the front door locked. As she tried to open it, Armbruster opened the door from the inside. He asked Mackey where she had been and who she had been with. When Mackey entered, Armbruster hit her in the eye with his fist. Mackey almost lost consciousness. She began to fall, but caught herself on a chair.

When Mackey walked to the bathroom to get a cold washcloth for her eye, Armbruster began yelling at her. He did not believe that she had hidden in the woods. He pushed Mackey

against the bathroom wall. He grabbed her around the neck, looked at her eye, then hugged her, and began to cry. He followed Mackey to the kitchen, where he began yelling again, and then he punched Mackey in the other eye and hit her on the side of head five or six times with his open hand.

Mackey convinced Armbruster to go outside, telling him she would show him where she had been hiding. But when they went outside, Mackey ran away. Armbruster did not try to catch her. He taunted her saying, "So you're going to run away again." RP at 131. He then called her on her cell phone and asked her to come back, but she refused. Mackey called her daughter, who responded and came to pick her up.

Mackey's daughter called 911. Lewis County Deputy Sheriff Robert Nelson responded to the call at 8:00 a.m. on July 2. Nelson interviewed Mackey and photographed her injuries. Mackey's daughter took her to the hospital.

At the hospital, a doctor noted that Mackey's left eye had "fairly severe" swelling of the upper and lower eyelids and bruising over the right eye. RP at 173. Her vision remained intact, although subsequent swelling temporarily closed her left eye. There was no evidence of head or facial fractures, but the examining physician concluded that Mackey had suffered a concussion.

Nelson went to Armbruster's home around 10:20 a.m. on July 2, spoke with Armbruster, and subsequently arrested him. Armbruster said he did not know what had happened to Mackey or where she was, but that he had been drinking and "must have blacked out." RP at 208.

The State charged Armbruster with one count of second degree assault. Mackey, Nelson, and Mackey's treating physician testified to events as above described. The trial court instructed the jury on second degree assault and the lesser included offenses of third and fourth degree

assault. Defense counsel did not offer any jury instructions regarding Armbruster's intoxication and did not object to the sufficiency of the court's instructions in that regard.

In closing argument, the State described Armbruster as "drunk and enraged." RP at 241. In response, defense counsel urged jurors to acquit Armbruster of second degree assault and convict him of the lesser included offense of third degree assault, contending the State had not proved that Mackey suffered substantial bodily harm, an element of second degree assault.[1] Defense counsel acknowledged that Armbruster hit Mackey. But when defense counsel said that Armbruster "didn't know he did it," the State objected and the trial court sustained the objection and struck the comment. RP at 247. In rebuttal, the State commented, "Being drunk is not an excuse." RP at 250.

The jury found Armbruster guilty of second degree assault as charged. The trial court imposed a standard range sentence. Armbruster appeals.

ANALYSIS

Armbruster contends that his trial counsel was deficient because he did not propose an instruction on voluntary intoxication.[2] We disagree.

To prove ineffective assistance, Armbruster must show both deficient performance and

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[1] RCW 9A.36.021(1)(a) provides, "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."

[2] The pattern voluntary intoxication instruction provides:

> No act 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] [or] [failed to act] with (fill in requisite mental state).

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 18.10, at 282 (3d ed. 2008) (boldface omitted); *see also* RCW 9A.16.090.

resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. *McFarland*, 127 Wn.2d at 335. Prejudice results if the outcome of the trial would have been different except for counsel's deficient representation. *McFarland*, 127 Wn.2d at 337. We give great deference to trial counsel's performance and begin our analysis with 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); *McFarland*, 127 Wn.2d at 335. A deficiency claim does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Armbruster relies primarily on *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987) in arguing that his counsel's failure to propose an intoxication instruction was deficient performance. But *Thomas* is distinguishable. Thomas, who was charged with attempting to elude a pursuing police vehicle,[3] testified at trial that she was "'blitzed' and incoherent" at the time of the incident. *Thomas*, 109 Wn.2d at 225. She testified that she "'had a blackout'" and that she had had such blackouts before while drinking. *Thomas*, 109 Wn.2d at 225 (citation omitted). The defense theory was that Thomas was too intoxicated to form the required mental state (willful and wanton disregard),[4] yet defense counsel offered no instruction "on the relevance of intoxication as to the

[3] Thomas was also charged with driving under the influence of intoxicating liquor, to which she pleaded guilty. *Thomas*, 109 Wn.2d at 225.

[4] *Thomas* was charged under former RCW 46.61.024 (1983), which defined felony flight as follows:

> Any driver of a motor vehicle who wil[l]fully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a manner indicating a wanton or wil[l]ful disregard for the lives or property of others while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

mental element of the crime charged." *Thomas*, 109 Wn.2d at 227-28. Because such an instruction "would have better enabled [defendant's] counsel to argue the defense's theory of the case," and because the lack of such instruction—in light of the defense theory—resulted in the State and defense arguing conflicting rules of law in closing, the *Thomas* court held that defense counsel's failure to offer a voluntary intoxication instruction was deficient performance. 109 Wn.2d at 227-28.

Here, there is no similar trial testimony from Armbuster, there is no evidence that he had a similar history of blackouts after consuming alcohol, and there is no assertion or argument that voluntary intoxication was a defense to the charge of second degree assault. The *Thomas* court held that the absence of an instruction regarding voluntary intoxication amounted to deficient performance *in light of* the defense theory asserting that Thomas's intoxication negated any guilty mental state. 109 Wn.2d at 227-28. No such theory was advanced here. Instead, the defense theory was that, while Armbruster was guilty of assault, the injury that he inflicted amounted to mere facial bruising and swelling and, thus, his conduct did not amount to second degree assault; and, therefore, the jury should find Armbruster guilty only of the lesser included offense of third degree assault.

In closing argument, defense counsel argued that the injury inflicted was "a hell of a shiner," but it was merely a black eye that included only bruising and swelling, which subsided within a few days. RP at 245. He argued that there was no injury to the eye or intracranial bleeding, and no fractures of the orbital bones around the eye socket. He said, "[W]hat we have here is an assault in the third degree, not an assault in the second degree, bodily harm sufficient to

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Laws of 1983, ch. 80, § 1; *Thomas*, 109 Wn.2d at 225, 226-27.

cause considerable suffering over a period of time. That's what it is."[5] RP at 247.

Defense counsel repeatedly argued in closing as follows:

> I'm not going to stand here and ask you to excuse Robert's conduct because he's sorry. He is sorry. I'm not going to ask you to excuse his conduct and he's not asking you to excuse his conduct. He knows what he did was wrong.
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> . . . .
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> . . . [T]here's no dispute about what happened. . . . Everybody agrees Robert hit her, probably hit her several times in the face. And what was the result of those hits? . . . [A]ccording to everybody that you heard from yesterday and today, bruising and swelling.
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> . . . .
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> . . . [W]e're not here to try and make any excuses for his conduct. Clearly his conduct was wrong. I would suggest to you what your job is is to determine the harm, that's what the difference is [between second degree assault and third degree assault].

RP at 244-46. Defense counsel concluded as follows:

> [Defense Counsel:] . . . I'm not asking you to feel sorry for Robert. He's not asking you to feel sorry for him. What he knows and what he's never disputed . . . is that this was done. He didn't know he did it when he had contact with . . . Nelson. When he came to my office he knew that—
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> [Prosecutor]: Objection. Move to strike.

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[5] Also, defense counsel noted in cross-examining the victim and the arresting officer that Armbruster was allegedly drunk at the time of the incident but he did not emphasize or focus on that fact and did not rely on it as part of the defense theory. And, except for the single thwarted reference to Armbruster's intoxication in closing argument, defense counsel did not otherwise mention intoxication in closing argument. On cross-examination, the victim acknowledged that Armbruster frequently "dr[a]nk to excess" but she could not assess Armbruster's level of intoxication when he hit her. RP at 157. In other words, she knew Armbruster was drunk, but she "just d[id]n't know how much." RP at 163. On cross-examination, the arresting officer acknowledged that Armbruster said he had been drinking and had said that he didn't remember anything about the incident, so he "must have blacked out." RP at 213. But the officer also acknowledged that some eight hours after the incident Armbruster readily met with him after the officer called Armbruster's cell phone; that Armbruster was not argumentative or belligerent and, in fact, he was cooperative; and that he was taken into custody without any resistance.

Also, defense counsel's cross-examination of the victim's treating physician focused on the effects of medication (blood thinners) on the victim's bruising and swelling injuries, and the absence of other injuries including fractures, intracranial bleeding, and lack of effect on her vision. Further, after the State rested, defense counsel called the victim to the stand to testify only about the medications (blood thinners) she was taking at the time of the incident.

> the Court: Sustained. Last comment's stricken. The jury will disregard.
> [Defense Counsel]: He's guilty. He's guilty of assault. I told you that yesterday.[6] And I would ask you to find him guilty of assault in the third degree.

RP at 247.

Defense counsel's trial strategy was to acknowledge that Armbruster's conduct was wrong, to emphasize his remorse for that conduct, and to seek appropriate punishment for third degree assault only (and at sentencing to seek treatment for Armbruster's anger and alcohol use issues). This is a legitimate tactical choice given the evidence.

While Armbruster told the police that he "must have blacked out," other evidence suggested that, although he had been drinking, he was not "incoherent" as was the defendant in *Thomas*. RP at 213; *Thomas*, 109 Wn.2d at 225. The evidence showed that Armbruster was able to drive to and from his residence; that he had focused, purposeful verbal exchanges with Mackey that night; and that, when Mackey walked to a neighbor's house and did not return for more than one hour, Armbruster let Mackey's horse out of the barn and chased it toward the road. He also waited for Mackey near the front door with the lights off and immediately confronted her when she unlocked the door. He also called after Mackey, taunting her, when she ran from him into the woods. A reasonable jury could conclude that Armbruster's conduct was purposeful and coherent and contrary to his assertion to Nelson that he "must have blacked out,",[7] making it highly unlikely that a jury would have found that Armbruster's intoxication

[6] Presumably, counsel was referring to his opening statement, which was not transcribed.

[7] This case does not contain a comparable type or quantum of evidence of intoxication that is present in other cases where an intoxication instruction was held to be warranted or approved. *Cf. State v. Rice*, 102 Wn.2d 120, 122-23, 683 P.2d 199 (1984) (where evidence included defendants' trial testimony that they had been drinking beer all day and ingesting drugs and arresting officers concluded defendants were intoxicated and administered breathalyzer tests that showed high alcohol concentrations, this and other evidence in totality was sufficient to warrant

affected his ability to form the requisite mental state for the charged crime of second degree assault (i.e., that he did not *intentionally* assault Mackey and thereby recklessly inflict substantial bodily harm). RP at 213.

The evidence clearly showed that Armbruster punched Mackey in the eye, and, a few minutes later, hit her several more times in the head. The weight of testimony could reasonably be interpreted to indicate that although Armbruster had been drinking, he was coherent and otherwise acting purposefully during the assault.

Defense counsel's strategic decision to focus on the injuries that Mackey sustained rather than attempt to raise questions concerning Armbruster's conduct and mental state was a legitimate tactical trade off in which Armbruster acknowledged his wrongful conduct but sought reduced punishment under a lesser included offense.[8] Such legitimate trial strategy cannot be the basis for a claim of ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 336. Under these circumstances, defense counsel's tactical decision to forego a voluntary intoxication instruction

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giving defense's proposed intoxication instruction; trial court's failure to give the defense's proffered intoxication instruction was reversible error); *see also State v. Hackett*, 64 Wn. App. 780, 784-85, 827 P.2d 1013 (1992) (trial court erred in not giving defense's proffered intoxication instruction where expert testified that defendant had ingested a lethal amount of cocaine plus other drugs and was unable to form intent); *see also State v. Coates*, 107 Wn.2d 882, 884-86, 735 P.2d 64 (1987) (intoxication instruction properly given at defense's request where defendant testified that he could not remember the accident and assault in question because he had consumed a great deal of alcohol that evening, the investigating detective on the night in question observed that the defendant was "obviously intoxicated," and a breathalyzer test taken some four hours after the incident in question indicated the defendant had high blood alcohol concentration).

[8] While defense counsel could have attempted to pursue both defense theories (i.e., by arguing absence of intent and offering a voluntary intoxication instruction as well as arguing that the injuries amounted only to third degree assault), his choice to offer a simpler, stronger, and more consistent defense theory was a tactical decision about how to best proceed at trial in light of the totality of the evidence. *McFarland*, 127 Wn.2d at 336 (presumption runs in favor of effective representation, thus defendant has the burden of showing in the record the absence of legitimate strategic or tactical reasons supporting counsel's challenged conduct).

was not deficient performance. *See State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (to rebut the strong presumption that counsel's performance was effective, defendant bears the heavy burden of establishing the absence of *any conceivable legitimate tactic* explaining counsel's performance). Accordingly, Armbruster has failed to show that his trial counsel was deficient.

Armbruster additionally cites *State v. Rice*, 102 Wn.2d 120, 683 P.2d 199 (1984); *State v. Jones*, 95 Wn.2d 616, 628 P.2d 472 (1981); *State v. Hackett*, 64 Wn. App. 780, 827 P.2d 1013 (1992); and *State v. Sandomingo*, 39 Wn. App. 709, 695 P.2d 592 (1985) to support his ineffective assistance of counsel claim, but those cases do not compel a different result. In *Sandomingo*, we held that the trial court did not err in refusing an intoxication instruction, stating:

> Such an instruction must be given, *if requested*, where the crime charged involves a particular mental state and there is *substantial evidence* that the defendant was in fact intoxicated at the time the crime was committed. The evidence is not sufficient unless it shows that the defendant was affected by the alcohol.

39 Wn. App. at 713 (emphasis added) (citation omitted). Despite Sandomingo's testimony that he drank seven or eight beers and a glass of wine near the time in question, no other evidence indicated that he was affected by the alcohol. *Sandomingo*, 39 Wn. App. at 713. No other witness knew how much he drank and no one saw him stagger or fall or noticed him slur his words; he had no trouble driving and aiming a gun. *Sandomingo*, 39 Wn. App. at 713. We held that the evidence did not support the requested instruction. *Sandomingo*, 39 Wn. App. at 714.

In *Jones*, our Supreme Court held that the trial court properly gave the defense's *proposed* voluntary intoxication instruction where substantial evidence was presented regarding Jones's intoxication at the time of the charged homicide. 95 Wn.2d at 619, 622-23. The evidence included Jones's testimony that he drank "'nine or eleven'" beers before the killing, other

witnesses' testimony regarding Jones's inebriated appearance and actions, and the fact that Jones was put in the "'drunk tank'" at the police station when he was arrested shortly after the killing.[9] *Jones*, 95 Wn.2d at 622.

In both *Rice* and *Hackett*, the trial courts erred in refusing to give the defenses' offered intoxication instructions in light of the substantial evidence indicating defendants' intoxication, including breathalyzer tests (*Rice*) and expert testimony on drug effects (*Hackett*).[10] *See Rice* 102 Wn.2d at 122-23; *Hackett*, 64 Wn. App. at 784-85.

To the extent that any of the four latter cases relied on by Armbruster can be used to support his argument, the evidence concerning Armbruster's intoxication is more akin to the facts in *Sandomingo* than to the facts in *Rice*, *Jones*, and *Hackett*. We are unconvinced that the absence of an instruction on voluntary intoxication here amounts to deficient performance of counsel as Armbruster asserts.

[9] The *Jones* court reversed defendant's second degree murder conviction based on a different instructional error. 95 Wn.2d at 617, 623.

[10] Each of the cases relied on by Armbruster (*Rice*, *Jones*, *Hackett*, and *Sandomingo*) addresses the defense's *offered* intoxication instruction. Here, the defense did not offer an intoxication instruction and none of the cited cases suggest that, in the absence of such offer, the trial court must nevertheless give an intoxication instruction.

Armbruster has failed to carry his burden of showing that his trial counsel was deficient. Accordingly, 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 in accordance with RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Hunt, J.

Quinn-Brintnall, J.