IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RALEIGH ELIJAH DIXON, Appellant.	No. 38106-1-II UNPUBLISHED OPINION

Hunt, J. — Raleigh Elijah Dixon appeals his bail jumping jury conviction. He argues that trial counsel did not provide effective representation because she failed to propose a jury instruction on the statutory affirmative defense of "uncontrollable circumstances." We affirm.

FACTS

The State charged Dixon with violation of a domestic violence protection order. He posted bail and was released with notice that he must appear for the omnibus hearing on September 5, 2007. He did not do so, and a bench warrant issued. Dixon appeared five days later, and the warrant was quashed. But the State amended the original information to add a bail jumping charge and, subsequently, another charge of violating a protection order.

In June 2008, a jury convicted Dixon of bail jumping. But it failed to reach a verdict on the protection order charges, and the State elected not to retry him. Dixon appeals.

ANALYSIS

Dixon asserts that if his trial counsel had proposed an instruction on "uncontrollable circumstances," the jury would not have convicted him of bail jumping. This argument fails.

Dixon is correct that it is an affirmative defense to a bail jumping charge that "uncontrollable circumstances prevented the [defendant] from appearing or surrendering" if the defendant later "appeared or surrendered as soon as such circumstances ceased to exist." RCW 9A.76.170(2). "Uncontrollable circumstances" include "a medical condition that requires immediate hospitalization or treatment." RCW 9A.76.010(4). Dixon is incorrect, however, that the record supports giving an "uncontrollable circumstances" instruction here.

Dixon testified that he knew he was required to appear in court on September 5, but that he did not do so because he "was sickly that day." When the State asked Dixon if he had any "doctor's notes or anything like that" to support his assertions, he responded that he did not go to a doctor because he had no medical insurance. Merely being ill, or "sickly" as Dixon asserts, is not an "uncontrollable circumstance" as contemplated by RCW 9A.76.010(4). *See State v. Fredrick,* 123 Wn. App. 347, 352-53, 97 P.3d 47 (2004). On the contrary, the defendant must demonstrate that his "sickliness" required "immediate hospitalization or treatment." RCW 9A.76.010(4). Dixon failed to make this showing; therefore, he was not entitled to assert an "uncontrollable circumstances" defense.

To prevail on his claim of ineffective assistance, Dixon must establish that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced him. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas,* 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The evidence Dixon provided was

insufficient to justify an instruction on the statutory defense of "uncontrollable circumstances." Therefore, defense counsel's failure to request such instruction was not deficient performance. Accordingly, we need not address the second prong of the test—prejudice. We hold, therefore, that Dixon has failed to establish ineffective assistance of counsel.

Affirmed.

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, P.J.

Quinn-Brintnall, J.