IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27617-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
JASON LYNNE MADSON,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	
	)	

Brown, J. ─ Jason L. Madson appeals his second degree assault conviction, contending he was denied effective assistance of counsel because defense counsel failed to request a voluntary intoxication jury instruction. We affirm.

FACTS

While at a Waterville bar, Mr. Madson noticed his former girl friend, Jessie Little, with her friend, John Hope. He joined them and some other friends at a table. At around 1:30 A.M., Ms. Little and Mr. Hope left the bar. Mr. Madson followed them to the parking lot. At some point, he became angry and hit Mr. Hope. Mr. Hope fell - face first - on the gravel parking lot. Mr. Hope was knocked unconscious, received wounds

that left scars on his face, and suffered nerve damage to his lip.

Mr. Madson testified he drank between five and six 16-ounce beers on the night in question. He felt he was "liquored up." Report of Proceedings (RP) at 90. Ms. Little, who knew Mr. Madson for over 14 years, testified Mr. Madson "probably had a buzz going, but he wasn't like drunk or falling down or anything." RP at 68.

The State charged Mr. Madson with second degree assault with an aggravating factor of excessive injury. Defense counsel did not propose a voluntary intoxication instruction. The jury found Mr. Madson guilty of second degree assault without the aggravating factor. Mr. Madson appealed.

ANALYSIS

The issue is whether Mr. Madson was denied effective assistance of counsel based on defense counsel's failure to request a voluntary intoxication defense. Mr. Madson contends he was entitled to an instruction because his alcohol consumption impaired his ability to form the required mental state for second degree assault.

To establish ineffective assistance of counsel, Mr. Madson must show both deficient performance and resulting prejudice. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If he fails to satisfy either part of the test, the court need not inquire further. *State v. Hendrickson,* 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Mr. Madson has the heavy burden of showing that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by

the Sixth Amendment." *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Because we strongly presume counsel provided effective assistance, Mr. Madson must show no legitimate strategic or tactical reason for the challenged conduct. *McFarland,* 127 Wn.2d at 335-36. Prejudice is established if it is reasonably probable that, if not for counsel's deficient performance, the outcome would have been different. *In re Pers. Restraint of Pirtle,* 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Mr. Madson has not established his defense counsel's performance was deficient because the record does not support a voluntary intoxication instruction. 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. *Id.* at 253. Second degree assault occurs when a person "intentionally" assaults another person. RCW 9A.36.021. "A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(a)

Although Mr. Madson was drinking the night of the incident, no evidence shows

his mind or body was so affected by alcohol that he could not form the intent for second degree assault. He did not stumble, appear confused, and was not disoriented as to time and place, or otherwise exhibit signs of intoxication sufficient to conclude that he could not form the requisite intent of the charged crime. *See Gabryschak,* 83 Wn. App. at 253-55 (trial court did not err by rejecting voluntary intoxication instruction because evidence was insufficient to show defendant was too intoxicated to form the required level of culpability to commit the charged crimes).

On the other hand, Ms. Little, who knew Mr. Madson for over 14 years, testified, "he wasn't like drunk or falling down or anything." RP at 68. Given these facts, Mr. Madson cannot establish deficient performance on the part of his attorney for failing to request a voluntary intoxication instruction. Therefore, his ineffective assistance of counsel claim fails.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Report, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

_____
Sweeney, J.

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Korsmo, J.