COA NO. 45103-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY CLARK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kathryn J. Nelson, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. CLARK'S COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO JURORS BEING TOLD THIS CASE DID NOT INVOLVE THE DEATH PENALTY.

The State does not argue trial counsel's failure to object to the jury being told this was a non-death penalty case was anything other than deficient performance. Brief of Respondent (BOR) at 34. The State has thereby conceded the point. See State v. Ward, 125 Wn. App. 138, 143-44, 104 P.3d 61 (2005) ("The State does not respond and thus, concedes this point.").

Instead, the State asserts Clark was not prejudiced by the deficiency. BOR at 34. Even then, the State makes no argument that the evidence was so strong on the felony murder count that the deficiency could not have affected its outcome. As a result, no further argument from Clark is called for on this point. See In re Pers. Restraint of Coats, 173 Wn.2d 123, 138, 267 P.3d 324 (2011) (appellate courts are "not in the business of inventing unbriefed arguments for parties sua sponte").

The State does broadly argue that there is no reasonable probability that the outcome was affected because jurors were instructed to "not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful." BOR at 37; CP 277 (Instruction 1). That argument fails for two reasons.

First, the Supreme Court assigns no significance to the presence of that instruction in determining whether prejudice results from jurors being told of the non-death penalty nature of the case. That instruction was given in Townsend, just like it is given in all criminal cases. State v. Townsend, 97 Wn. App. 25, 31, 979 P.2d 453 (1999), aff'd, 142 Wn.2d 838, 15 P.3d 145 (2001). The Supreme Court affirmed the first degree murder conviction, but only because the evidence overwhelmingly supported a finding of premeditation. State v. Townsend, 142 Wn.2d 838, 848-49, 15 P.3d 145 (2001). The presence of the boilerplate instruction played no role in its prejudice analysis. See also State v. Murphy, 86 Wn. App. 667, 668, 672, 937 P.2d 1173 (1997), review denied, 134 Wn.2d 1002 (1998) ("To hold that the erroneous instruction [about the death penalty not being involved] is never prejudicial when combined with the standard instruction would be equivalent to approving its use as long as it is so combined.").

The second reason why the State is wrong is that the wording of the instruction is actually consistent with allowing the jury to consider the fact that this was a not a death penalty case. The instruction allowed the jury to consider the fact that punishment may follow conviction "insofar as it may tend to make you careful." CP 277. Knowing the death penalty is

not involved may make jurors less careful than they otherwise would be, which is why the practice is forbidden. Townsend, 142 Wn.2d at 847.

The State further contends the deficiency did not prejudice the outcome for the first degree premeditated murder conviction. BOR at 35-36. But the State's lack of prejudice argument looks like a sufficiency of evidence argument, where all the evidence is taken in the light most favorable to the State and is presumed true. The issue here is not whether the evidence was sufficient to establish that Clark committed first degree murder by killing D.D. with premeditation but whether the error undermines confidence in the outcome.

Premeditation can be proved by direct or circumstantial evidence, but it cannot be inferred simply from the intent to kill. State v. Bingham, 105 Wn.2d 820, 823-24, 719 P.2d 109 (1986); State v. Commodore, 38 Wn. App. 244, 247, 684 P.2d 1364 (1984). Murders resulting from an impulsive or spontaneous act are not premeditated. State v. Luoma, 88 Wn.2d 28, 34, 558 P.2d 756 (1977). An accidental shooting is not a murder at all; it is manslaughter when accomplished through recklessness or negligence. State v. Guilliot, 106 Wn. App. 355, 367-68, 22 P.3d 1266 (2001).

The State points to testimony from witnesses that Clark admitted to shooting D.D. in the head. BOR at 35. Simply pointing the gun at

someone and shooting is not strong evidence of premeditation. One witness maintained that Clark said he had called the boy over to his house and told him to reach for something in the closet. 22RP 907. That gets the State closer to a stronger case on premeditation.

But Clark's testimony allowed for a different inference. According to Clark, his invitation for his long-time acquaintance D.D. to come over to his house flowed from a chance encounter on the street and D.D.'s interest in Clark's computer, not some sinister plot to lure D.D. to his death. 22RP 1622-23, 1630-34. Clark further testified that he sat down on the floor, "messing around with the gun," "[a]iming it toward the closet of the ceiling." 22RP 1594-95, 1649, 1651, 1683-84. The gun went off. 22RP 1595. D.D. fell to the ground. 22RP 1596. Clark attempted CPR by pushing on his chest and breathing into his mouth. 22RP 1596. Clark started crying and shaking, then went up to Eller's apartment and told her, Bassett and Woods that he had accidentally shot his friend with a "deuce deuce." 22RP 1666-69.

Which version of events is accurate? That was for the jury to decide, but its deliberation was tainted by the knowledge that this was not a death penalty case. "[If] jurors know that the death penalty is not involved, they may be less attentive during trial, less deliberative in their

assessment of the evidence, and less inclined to hold out if they know that execution is not a possibility." Townsend, 142 Wn.2d at 847.

Certainly the evidence of premeditation was much stronger and one-sided in Townsend, allowing the Court in that case to conclude counsel's failure had no effect on the outcome. See Townsend, 142 Wn.2d at 848-49 ("Townsend brought a gun and had spoken with Mike Brock about 'taking care of' Harkins. After shooting Harkins the first time, which may have been accidental, Jellison told Townsend that Harkins was still breathing and alive. Jellison recommended that they take Harkins to the hospital. Townsend declined, telling Jellison that no one would believe that the shooting was an accident since they both had criminal records. After that, Townsend went to the window of Harkin's truck, raised the pistol, said 'God forgive me,' and shot Harkins in the head, killing him."); see also State v. Brett, 126 Wn.2d 136, 147-49, 200, 892 P.2d 29 (1995) (evidence of premeditation overwhelming where defendant planned killing days in advance in minute detail); In re Pers. Restraint of Faircloth, 177 Wn. App. 161, 168, 311 P.3d 47 (2013) (evidence of premeditation overwhelming where defendant tortured another with multiple weapons for more than 20 minutes, stopping in the midst of the attack to smoke a cigarette).

The evidence here allowed for a reasonable inference that Clark did not act with premeditation, which is why the jury was instructed on the lesser offenses of second degree murder and first degree manslaughter. See State v. Griffith, 91 Wn.2d 572, 574, 589 P.2d 799 (1979) (criminal defendant entitled to jury instruction on his theory of the case if substantial evidence supports it). The circumstances surrounding the shooting allowed for competing inferences as to whether the shootings were carried out with a deliberately formed design to kill as opposed to an intentional but rash decision made without forethought or a reckless but accidental shooting. Confidence in the outcome is undermined by counsel's deficient decision to allow the jury to learn the death penalty was not involved.

2. THE COURT VIOLATED CLARK'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE IN EXCLUDING RELEVANT EVIDENCE ABOUT CLARK'S MENTAL RETARDATION.

The State argues the only way evidence of Clark's mental retardation could be relevant is if he presented a diminished capacity defense. BOR at 41-43. The State is mistaken. No Washington court has ever held evidence of mental abnormality is relevant *only* if a diminished capacity defense is established. The State's claim, like the trial court's ruling, betrays an unduly restrictive approach to relevancy and the right of

a defendant to present a complete and meaningful defense to the State's charges.

Cases addressing the diminished capacity defense measure the relevance of mental abnormality evidence in relation to what is needed to establish the diminished capacity defense because that was the defense proffered in those cases. See, e.g., State v. Atsbeha, 142 Wn.2d 904, 918-19, 921-22, 16 P.3d 626 (2001); State v. Ellis, 136 Wn.2d 498, 521-23, 963 P.2d 843 (1998); State v. Griffin, 100 Wn.2d 417, 419, 670 P.2d 265 (1983). Without being able to establish the common law requirements of a diminished capacity defense, the evidence of mental abnormality becomes irrelevant when offered for the purpose of establishing that defense. Atsbeha, 142 Wn.2d at 918-19, 921-22.

Those cases do not address whether evidence of mental abnormality, such as mental retardation, is relevant to show a defendant who possesses the capacity to form the requisite mens rea did not in fact act with the requisite mens rea at the time of the criminal act. The diminished capacity cases are therefore not controlling. See Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. 1, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) ("In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised."); In re Electric Lightwave, Inc., 123 Wn.2d 530,

541, 869 P.2d 1045 (1994) (cases that fail to specifically raise or decide an issue are not controlling authority and have no precedential value in relation to that issue). Cases addressing the defense of diminished capacity do not control the question of whether a defendant may use testimony, including expert testimony, of mental retardation to rebut the prosecution's attempt to demonstrate the presence of mens rea for the charged criminal act.

Clark's case presents a classic question of relevancy. Evidence is relevant if (1) it has a tendency to prove or disprove a fact (probative value) and (2) it is material in the context of the other facts and the applicable substantive law (materiality). State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). "The relevancy of evidence will depend upon the circumstances of each case and the relationship of the facts to the ultimate issue." Rice, 48 Wn. App. at 12. All facts tending to establish a party's theory are relevant. State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000).

The applicable substantive law, and the ultimate issue here, is whether the State proved the existence of the required state of mind as an element of its case. Clark's mental retardation, with its effect on reasoning skills, makes it less probable that he acted with the required state of mind at the time of the alleged criminal acts.

Because a defendant's state of mind is rarely provable by direct evidence, that state of mind may be inferred from all the circumstances surrounding the event. State v. Gallo, 20 Wn. App. 717, 729, 582 P.2d 558 (1978). The State is generally allowed to present all the circumstances to prove the accused has the requisite mens rea as an element of its case. Should not the accused be given at least the same consideration in an attempt to show he did not act with the requisite mens rea? Clark's mental retardation was another circumstance for the jury to consider in determining if he in fact possessed the required mental state and whether the State had proved that element of its case beyond a reasonable doubt. Clark's proffered defense was that he lacked this state of mind and evidence of his mental retardation supported that defense — the evidence made premeditation, intent or recklessness less probable than it would be without the evidence. That is why the evidence is relevant.

The State argues there is no difference between a diminished capacity defense and a defense theory that a defendant's mental deficiency made it less probable that he acted with the requisite mens rea at the time of the alleged criminal acts. The State cites no Washington case that actually holds this. See DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support

of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

The diminished capacity defense means the defendant lacked the capacity or ability to form the requisite mens rea. Griffin, 100 Wn.2d at 419; Atsbeha, 142 Wn.2d at 914; WPIC 18.20 ("Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form (fill in requisite mental state) _____."). Yet a defendant can have the capacity or ability to form a mens rea but not actually have the mens rea at the particular time an alleged offense occurred.

Other jurisdictions recognize the distinction in assessing when evidence of mental abnormality is admissible. For example, "[a]n abnormal mental condition may influence the probability that a defendant premeditated and deliberated — and so be taken into account by a jury in determining whether those states of mind existed in fact (beyond a reasonable doubt) — even though it did not eliminate the capacity for premeditation." United States v. Peterson, 509 F.2d 408, 417 (D.C. Cir. 1974).

In United States v. Pohlot, the Third Circuit addressed when evidence of a criminal defendant's mental abnormality is admissible to prove the defendant's lack of specific intent to commit an offense

following the passage of the federal Insanity Defense Reform Act (IDRA). United States v. Pohlot, 827 F.2d 889, 890 (3d Cir. 1987), cert. denied, 108 S. Ct. 710, 98 L. Ed. 2d 660 (1988). The court concluded that although Congress intended IDRA to prohibit the defense of diminished capacity, evidence of mental abnormality was still admissible to negate specific intent or any other mens rea element of an offense. Pohlot, 827 F.2d at 890. By referring to evidence that negates mens rea, the court meant evidence that "disproves an element of the crime itself;" i.e., "the use of evidence to prove that a defendant actually lacked mens rea." Id. at 897, 905. The permissible use of psychiatric evidence to disprove mens rea was expressly distinguished from a diminished capacity defense; i.e., a defense that relies on the proposition that the defendant lacked the capacity to form the mens rea. Id. at 898-99, 903-05.

Thus, under federal law, psychiatric evidence that a defendant "lacked the capacity" or was "incapable" of forming the intent necessary for the crime charged is inadmissible. United States v. Cameron, 907 F.2d 1051, 1066 (11th Cir. 1990). On the other hand, psychiatric evidence offered to negate specific intent is admissible when such evidence focuses on the defendant's specific state of mind at the time of the charged offense. Cameron, 907 F.2d at 1067. "Psychological evidence that aids the trier in determining the defendant's specific state of mind with regard to the

actions she took at the time the charged offense was committed . . . is evidence that goes specifically to whether the prosecution has carried its burden of proving each essential element of the crime — at least when specific intent is at issue." Id. at 1063.

Similarly, under California law, a defense that a defendant lacked the mental capacity to form a specific intent is unavailable as a matter of statutory law. People v. Larsen, 205 Cal. App.4th 810, 827, 140 Cal.Rptr.3d 762 (Cal. Ct. App. 2012). But evidence of mental abnormality remains relevant to "whether a defendant actually formed a mental state that is an element of a charged offense." Larsen, 205 Cal. App.4th at 827 (quoting People v. Vieira, 35 Cal.4th 264, 292, 25 Cal.Rptr.3d 337, 106 P.3d 990 (Cal. 2005)). At issue "is the actual formation of intent in light of the defendant's mental disorder, not the capability to do so." Larsen, 205 Cal. App.4th at 827.

Courts squarely faced with the issue thus recognize a distinction between a diminished capacity defense and a defense that challenges the mens rea element of the State's case. The question raised by Clark's excluded defense is not whether Clark lacked the capacity to form the requisite mens rea, but whether the criminal acts were committed with the requisite mens rea — premeditation for first degree murder; intent to steal for first degree robbery as the predicate to first degree felony murder;

intent to kill for second degree murder, and the subjective aspect of recklessness for first degree manslaughter.

Here, the proffered evidence on mental retardation was not to show lack of mental capacity to form a mens rea but rather to show the fact of mental retardation and its effect on his mental processes, which is relevant to the critical question of whether Clark's acts were done with premeditation, intent or some lesser mens rea. Clark suffered from a mental defect that made it less probable that he actually had the required mens rea of the crime for which he was convicted. At the same time, Clark has been convicted by a jury that did not have the opportunity to consider relevant evidence as to Clark's mental condition.

As a matter of due process, the State has the burden of proving every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363-64, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970). The defendant has the constitutional right to challenge whether the State has met its burden through the presentation of relevant evidence supporting the defense theory of the case. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

The exclusion of mental abnormality evidence relevant to show the lack of the requisite mens rea raises serious constitutional concerns, given that the State must prove every element of the crime and the accused has

the right to present a defense. Pohlot, 827 F.2d at 900-01. Pohlot recognized a rule barring evidence of mental abnormality on the issue of mens rea may be unconstitutional so long as criminal liability is determined in part through subjective states of mind. Id. at 901.[1]

When the law requires the State to prove the existence of a mental state beyond a reasonable doubt, evidence tending to make the existence of that mental state more or less probable is relevant. To hold otherwise would deprive the defendant of the means to challenge an essential element of the State's case. The State's proposed rule — that evidence of mental retardation is only relevant if a diminished capacity defense is raised — would be unconstitutional because it would deprive a mentally retarded defendant from challenging the mens rea element through the use of relevant evidence.

The State nonetheless claims evidence of Clark's mental retardation was inadmissible under ER 403 because jurors would be confused by evidence of mental deficiency without expert testimony as to the impact of that deficiency on the relevant mental states. BOR at 44-46.

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[1] Pohlot did not decide the constitutionality of any congressional attempt to bar evidence of mental abnormality from the issue of mens rea, but recognized "[t]he constitutional issues are sufficiently substantial, however, that we are unwilling to create a rule of evidence that would raise them in the absence of explicit Congressional direction." Pohlot, 827 F.2d at 903.

But Clark wanted to present that expert testimony. The trial court categorically excluded it because there was no diminished capacity defense. The main thrust of the State's ER 403 argument is actually a restatement of its relevancy argument: that evidence of Clark's mental retardation would confuse the jury because Clark did not advance the defense of diminished capacity. As argued, that contention is not well taken.

The State also contends evidence of Clark's mental retardation would have been more likely to evoke sympathy rather than a reasoned analysis of whether the elements of the crimes charged had been proven beyond a reasonable doubt. BOR at 46. But it offers no reasoned argument for why this would be so. The burden is on the State to show relevant defense evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Jones, 168 Wn.2d at 720. The State has not met that burden.

"Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest." State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000). For evidence of high probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). The State

does not identify a compelling interest to keep evidence of Clark's mental retardation from the jury. The truth-finding process is skewed by the absence of testimony on Clark's mental retardation, which left the jury with an incomplete picture of who Clark is and whether he actually acted with premeditation, intent or recklessness.

Hedging it bets, the State also argues there was no error because the trial court did not entirely exclude evidence of Clark's mental disability. BOR at 39-41. Testimony regarding Clark's background was limited to the fact that Clark had an Individual Education Plan (IEP), participated in special education classes, did not work, and received SSI benefits. BOR at 40-41. According to the State, such evidence "implied" Clark had a mental disability. BOR at 41.

But in the absence of testimony on its significance, this information was fairly useless. That evidence did not inform the jury that Clark was mentally retarded and even if it implied the presence of some kind of mental disability, the information was so vague as to be irrelevant without Clark's expert being allowed to testify what Clark's disability consisted of and how it affected his mental processes.[2] As it turned out,

[2] The trial court itself recognized "there are lots of people that have disabilities for lots of different combination of reasons," adding "and we don't need to go through that." 19RP 22.

the trial court excluded Dr. Oneal's expert testimony altogether and further ruled "[t]here shall be no mention or reference to developmental disability, mental retardation,[or] intelligent quotient." CP 227-28. It is implausible to suggest that Clark was allowed to present a defense that his mental limitations made it less likely he committed the crimes when the trial court excluded the evidence that would make such an argument possible.

Evidence of Clark's mental retardation was also relevant to Clark's credibility and demeanor while on the stand, testifying in his own defense. The State does not actually claim otherwise. Rather, the State contends information that Clark was in special education and had an IEP was sufficient to allow the jury to fairly evaluate his demeanor and credibility. BOR at 43-44. But in the absence of testimony from Dr. Oneal, Clark's mother or anyone else that Clark was mentally retarded, the jury was presented with the spectacle of a young man trying to persuade the jury of his version of events without any meaningful explanation for the way he presented himself, including his flat demeanor.

The State bears the burden of showing an error of constitutional magnitude is harmless beyond a reasonable doubt. State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); Jones, 168 Wn.2d at 724. The State does not argue the exclusion of mental retardation evidence was harmless. It has therefore not met its burden.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Clark requests that this Court reverse the convictions.

DATED this 6th day of October 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 45103-1-II
	)	
ANTHONY CLARK,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 8TH DAY OF OCTOBER 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTHONY CLARK
DOC NO. 365895
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF OCTOBER 2014.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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