

No. 45380-1-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

CHRISTOPHER D. THORSON, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Toni A. Sheldon, Judge

No. 12-1-00153-7

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**BRIEF OF RESPONDENT**

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A. STATE'S RESTATEMENT OF APPELLANT'S ASSIGNMENT OF ERROR

Thorson contends that the trial court erred because the court declined to give his proposed jury instruction No. 9 on diminished capacity.

B. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

At trial, Thorson's own expert testified that it was his opinion that Thorson was intoxicated by alcohol to the extent that Thorson was experiencing an alcoholic delirium when he murdered his wife. The trial court instructed the jury in regard to voluntary intoxication (WPIC 18.10) but declined to instruct the jury in regard to diminished capacity (WPIC 18.20). The State contends that on these facts the trial court did not err.

C. FACTS AND STATEMENT OF THE CASE

The State accepts Thorson's statement of facts, but the State supplements with additional facts, below, and where needed to develop the State's arguments. RAP 10.3(b).

D. ARGUMENT

Thorson was charged in this case with the offense of murder in the first degree. CP 113-14. The jury returned a guilty verdict on the charge of murder in the first degree. CP 24. As charged in the instant case, proof

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of murder in the first degree required proof of premeditated intent. *Id.*, RCW 9A.32.030.

During trial, Thorson presented expert testimony stating that, because he was extremely intoxicated by alcohol at the time of the murder, he did not have the required premeditated intent when he murdered his wife by shooting her twice with a shotgun. RP 293, 305. Thorson's expert testified as follows: "I believe he was intoxicated to the point of a delirium, a severe intoxication." RP 293. His expert agreed that "[i]t was a voluntary intoxication." RP 313. The expert concluded his testimony by stating that "the shooting and the action, I think that's where we look at the level of alcohol and then the possibility of a delirium affecting his judgment about that." RP 352.

Based on this testimony, Thorson proposed both a diminished capacity instruction (WPIC 18.20) and a voluntary intoxication instruction (WPIC 18.10). CP 82, 83 (Jury Instructions No. 9 and No. 10). Thorson's proposed jury instruction No. 9 (diminished capacity) read as follows: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form premeditation and/or intent." CP 82. Thorson's proposed jury instruction No. 10 (voluntary intoxication) read as follows: "No act committed by a person

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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 premeditation and/or intent.” CP 83.

Because the only evidence of a mental illness or disorder was from Thorson’s expert’s opinion that Thorson suffered from an alcohol induced delirium when he committed the murder, and because the voluntary intoxication instruction allowed Thorson to argue his defense that he lacked intent or premeditation, or both, the court refused to provide Thorson’s proposed diminished capacity instruction. RP 646. But, however, an instruction that was verbatim with Thorson’s proposed involuntary intoxication instruction was provided to the jury as the court’s instruction No. 7. CP 37.

Where, as here, the defendant’s “claim of diminished capacity is premised wholly or partly on the defendant’s voluntary consumption of drugs or alcohol, . . . one instruction can be adequate to permit the defendant to argue defendant’s theory of the case.” *State v. Furman*, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993), citing *State v. Hansen*, 46 Wn. App. 292, 730 P.2d 706, 737 P.2d 670 (1987). *Furman* involved facts where a diminished capacity instruction was given and the trial court

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declined to give a voluntary intoxication instruction; nevertheless, in *Furman* our Supreme Court cited *Hansen* with approval and noted that “[i]n *Hansen*, the Court of Appeals held that an instruction on voluntary intoxication was adequate to allow the defendant to argue the claim of diminished capacity based on drug intoxication.” *Furman* at 454.

In the instant case, Thorson was similarly able to argue his theory of the case. “[T]he court’s instructions are sufficient if they permit each party to argue his side of the case, are not misleading, and when read as a whole, properly inform the jury of the applicable law.” *Hansen* at 299, citing *State v. Mark*, 94 Wn.2d 520, 618 P.2d 73 (198). As in *Hansen*, the jury in the instant case was instructed that it could consider how Thorson’s alcohol impairment affected his ability to form the required premeditated intent. CP 37 (Jury Instruction No. 7).

E. CONCLUSION

On the authority of *State v. Furman*, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993), and *State v. Hansen*, 46 Wn. App. 292, 730 P.2d 706, 737 P.2d 670 (1987), the trial court’s voluntary intoxication instruction allowed Thorson to argue his theory of the case by arguing that he lacked

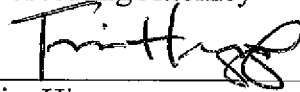
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the required premeditated intent to commit the crime of murder in the first degree in the instant case. Because the court's voluntary intoxication instruction allowed Thorson to argue his theory of the case, the trial court did not err by refusing to also provide a diminished capacity instruction.

DATED: August 26, 2014.

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# MASON COUNTY PROSECUTOR

**August 26, 2014 - 4:24 PM**

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