73813-5

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May 27, 2016
Court of Appeals
Division I
State of Washington

NO. 73813-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

SHAUN WEBB,

Appellant.

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# BRIEF OF RESPONDENT

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1. Did the trial court deny the defendant a complete defense when it denied testimony relevant to diminished capacity when the defendant had renounced that defense?

2. Did the trial court abuse its discretion when it denied testimony that was not relevant to the charge and the stated defense?

3. Has the defendant shown he was denied his constitutional right to effective assistance of counsel because of the tactical decision not pursue a diminished capacity defense?

## II. STATEMENT OF THE CASE

On November 12, 2014, the state charged the defendant by information with one count of custodial assault. CP 163. On June 9, 2015, a jury convicted the defendant as charged after a two day trial. CP 141.

On May 14, 2014, the defendant met with his prison mental health counselor, Ms. St. John and Sgt. Bennett in a glass front interview room. The room has a glass front so prison staff outside the room can observe what is taking place inside the meeting room. 1 RP 48-9, 74, 86, 100; 2 RP 113-4, 128-9, 139-40, 150.

The meeting was to address some issues the defendant had been having in the unit. During the meeting, the defendant began to escalate. Sgt. Bennett began giving the defendant directives to calm down. The defendant continued to escalate. Sgt. Bennett told the defendant to return to his cell. Sgt. Bennett explained that telling the defendant to return to their cell allows the inmate to leave the room without staff having to use force. Sgt. Bennett said most inmates comply. 1 RP 51-3; 75.

The defendant did not comply. He continued to escalate. The defendant asked Sgt. Bennett what he was going to do and made several statements about wanting to fight. The defendant told Sgt. Bennett he was going to have to fight him to get him to return to his cell. In an attempt to keep the incident from escalating further, Sgt. Bennett remained seated. He told Ms. St. John to leave the room. He also signaled for the Quick Response Strike team (QRS) to respond. The QRS is a team of four officers and one sergeant who respond to emergencies within the prison ranging from medical emergencies to riots or escapes. 1 RP 53-6, 76-7; 2 RP 141-2.

When the defendant saw the QRS members arriving, he jumped up and said, "Now we're going to fight." Sgt. Bennett

responded to the defendant jumping up by standing up and moving to the left, a few feet away. The defendant moved to the doorway, but was blocked by the QRS team members. Sgt. Bennett told him to kneel down so they could restrain him. The defendant did not comply. Instead he continued to make threats to the officers. 1 RP 57-9; 2 RP 131, 142, 151-2.

When the defendant announced that "Now it's on" and began moving towards an area of the room with furniture that could be used as a weapon, Sgt. Bennett attempted to grab the defendant by the arm. Sgt. Bennett testified the defendant balled up his fist and swing at him "square in the head". Sgt. Bennett said he was able to turn his head so the punch landed in his temple area. One of the responding officers described the punch as a haymaker, "kind of the momentum of him being spun around, striking Sergeant Bennett in the side of the head." 1 RP 61, 78, 102-3; 2 RP 116-7, 132, 142-3, 153.

Sgt. Bennett said he was dazed by the punch. He got his bell rung. He described himself as not being capable of normal thought process at that time. The officer testified that the defendant then loaded up to hit Sgt. Bennett a second time but the other officers were able to grab the defendant before he could complete

the swing. Sgt. Bennett testified that he ended up with a headache. 1 RP 62-3, 78, 90; 2 RP 118, 132.

The defendant was restrained in a figure-4 and then escorted off the unit and to segregation. 1 RP 64, 92-3, 102; 2 RP 118, 133-4, 143.

The defendant testified at trial. The defendant described a similar incident to that described by the corrections officers. He was able to recall the length of the meeting before the incident, who was present and corrected his trial counsel when she misstated the counselor's name. However, the defendant's description of the end of the meeting differed from Sgt. Bennett's. The defendant testified that he requested to return to his room but as he was walking towards the door, he saw the team of officers running up the stairs. 2 RP 160-1.

Sgt. Bennett took hold of the defendant. The officers in the response team started to enter the room. The defendant testified that when he tried to snatch his arm back, the back of his hand smacked Sgt. Bennett in the head. He later explained that when Sgt. Bennet grabbed his arm it hurt and caused him to spin around. His spinning around caused the back of his hand to accidentally contact Sgt. Bennett. The defendant denied making any threats to

Sgt. Bennett or intentionally striking him. The defendant testified that he just wanted to go back to his cell. The defendant testified that he was taken to segregation. 2 RP 161-3, 164-9.

At trial, the state moved in limine to keep out any mental health diagnoses of the defendant or mental conditions or physical conditions that affect mental abilities that the defendant may suffer from as they are not relevant to the charge or the defense. The defendant, through his attorney, stated his defense was 'general denial' and specifically stated, "We are not arguing any type of diminished capacity. I wouldn't be presenting or making arguments about that towards the jury." 1 RP 5. The defendant asked to be able to cross-examine the state's lay witnesses about their understanding of his behavioral management plan in terms of dealing with him and their understanding of his mental health diagnosis. The court denied this line of questioning as it was not relevant to either the offense or the stated defense. The court said, "I'm going to grant the motion in limine. At this point there is no demonstrative relevance. If something comes up in direct examination that makes it relevant, then that all may change." 1 RP 10. The defendant alleges the court excluded his expert witness. BOA at 5. That is not accurate. The judge excluded any

testimony from the DOC correctional mental health counselor, Ms. Alicia St. John regarding the defendant's diagnosis or mental health condition. 1 RP 7.

## III. ARGUMENT

### 1. THE TRIAL COURT DID NOT DENY THE DEFENDANT THE OPPORTUNITY TO PRESENT HIS DEFENSE.

The Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986) (citations omitted) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)). However, that right is not unlimited. "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." Greene v. Lambert, 288 F.3d 1081, 1090 (9th Cir. 2002). Admissibility of evidence generally is within the sound discretion of the trial court. Absent an abuse of discretion, this court will not reverse the trial court's decision to exclude expert testimony of a physician offered to establish a diminished capacity defense. State v. Atsbeha, 142 Wn.2d 904, 921, 16 P.3d 626, 635 (2001).

Like insanity, diminished capacity must also be declared pretrial. CrR 4.7(b)(1); CrR 4.7(b)(2)(xiv). With diminished capacity, the defense must obtain a corroborating expert opinion and disclose that evidence to the prosecution pretrial. CrR 4.7(b)(1); CrR 4.7(g). The State may or may not request its own evaluation. CrR 4.7(b)(2)(viii); State v. Harris, 122 Wn. App. 498, 506, 94 P.3d 379, 383 (2004).

"To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626, 631-32 (2001).

> Diminished capacity arises out of a mental disorder, usually not amounting to insanity, that is demonstrated to have a specific effect on one's capacity to achieve the level of culpability required for a given crime. Evidence of such a condition is admissible only if it tends logically and by reasonable inference to prove that a defendant was incapable of having the required level of culpability. Existence of a mental disorder is not enough, standing alone, to raise an inference that diminished capacity exists, nor is conclusory testimony that the disorder caused a diminution of capacity. The testimony must explain the connection between the disorder and the diminution of capacity.

State v. Gough, 53 Wn. App. 619, 622, 768 P.2d 1028, 1029 (1989).

Here, the defendant had not obtained a corroborating expert opinion or disclosed that evidence to the prosecution pretrial. On the contrary, the defendant specifically advised the trial court that his defense was a general denial and he was not pursuing a diminished capacity defense. Based on that representation, the trial court properly exercised its discretion and denied testimony regarding the defendant's mental health diagnoses as not relevant to the defense and confusing to the jury. The trial court did not deny the defendant a meaningful opportunity to present a complete defense.

**2. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED TESTIMONY ABOUT THE DEFENDANT'S MENTAL CONDITIONS.**

When the court asked about the relevance of the proffered testimony, the defendant responded that the state's witnesses' knowledge of the defendant's behavioral health plan and their knowledge of his special needs as a mentally ill person was relevant to whether or not an assault occurred. She argued that how they reacted to the defendant versus how they should have reacted was relevant to whether an assault took place. The trial court held that evidence was not admissible as it was not relevant to the question of whether an assault took place. The court then

qualified its ruling, stating that it might find some of the requested testimony relevant depending on the witnesses' testimony on direct. 1 RP 10.

In his brief on appeal, for the first time, the defendant refers to Ms. St. John as an expert witness. BOA at 5. The defendant did not endorse Ms. St. John as an expert witness and there is nothing in the record to support that claim. The record is void of any information regarding Ms. St. John's qualifications. There is also nothing in the record to support the claim that Ms. St. John was qualified to testify regarding the issue of diminished capacity. The only proffered testimony was that the defendant wished to ask Ms. St. John about her understanding of his mental health diagnoses. 1 RP 6. The defendant did not represent that Ms. St. John would then be able to tie those diagnoses to any diminution of his capacity to form intent. The defendant points to his sentencing memorandum to show the proffered testimony of Ms. St. John. BOA at 8 referencing CP 82. This was not before the court at the time the court prohibited the testimony. Furthermore, had it been provided to the court, the diagnoses referenced in the sentencing memorandum are unsupported statements about the defendant's mental conditions. Nothing in the memorandum connects his

mental conditions with diminished capacity. CP 82-3; 155-158; 1 RP 6. The court found the proffered testimony was not relevant to the issue of culpability based on the defendant's stated defense. That the defendant now regrets his choice of defenses does not change the situation facing that court when it declined to admit evidence regarding the defendant's mental health conditions as not relevant to a general denial defense.

**3. THERE IS NOTHING IN THE TRIAL RECORD TO OVERCOME THE PRESUMPTION THAT COUNSEL'S CONDUCT FELL WITHIN THE WIDE RANGE OF REASONABLE PROFESSIONAL ASSISTANCE.**

To prevail in a claim of ineffective assistance of counsel, the defendant must demonstrate that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) this deficient performance resulted in actual prejudice. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Both "prongs" must be established to prevail on the claim. Under the latter prong, the defendant must show a reasonable probability that, except for

counsel's unprofessional errors, the results of the proceedings would have been different. Hendrickson, 129 Wn.2d at 78.

Proving ineffective assistance of counsel, under the two-pronged Strickland rule of objectively poor performance and resulting actual prejudice, is not the same as second-guessing the acts or omissions of prior counsel with the luxury of hindsight. Strickland cautions reviewing courts not to succumb to the temptation of second-guessing defense counsel's particular acts or omissions:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.

Strickland, 466 U.S. at 689. Rather, a reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. A court may not sustain a claim of ineffective assistance if there was a legitimate tactical reason for the allegedly incompetent act. State v.

Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). An ineffective assistance claim on direct appeal must be based upon, and cannot go outside, the record before the appellate court. State v. McFarland, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

Choosing not to present a diminished capacity defense is a tactical decision. There are many reasons a defendant may choose not to present a diminished capacity defense despite having mental health issues. For example, if the evidence, like that in this case, appears to negate the claim of diminished capacity, or if a claim of diminished capacity conflicts with another more viable defense. "Absent bifurcation, such a choice may be a wise tactical maneuver where the insanity defense conflicts with some other defense the defendant wishes to interpose." State v. Jones, 99 Wn.2d 735, 743, 664 P.2d 1216, 1220 (1983).

One tactical reason for not pursuing a diminished capacity defense is retaining the potential of denying the state a full opportunity to respond. If the defendant had pursued a diminished capacity defense, he would have had to provide the state with pre-trial notice of that defense and identify an expert witness. The state then would have been able to seek their own evaluation which would likely have been adverse to the defendant's claim. By

proceeding as he did, the defendant maintained the potential of putting favorable or sympathetic testimony before the jury without giving the state the opportunity to respond.

The defendant asserts that this case resembles State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). However, in Thomas, the defendant's theory of defense was one of diminished capacity based on voluntary intoxication. This defense was furthered by Thomas' testimony at trial. Thomas's trial counsel was deficient in not obtaining an expert and not presenting jury instructions relevant to the stated defense.

Unlike in Thomas, here the defendant renounced the defense of diminished capacity asserting a general denial instead. Furthermore, in this case, there is no evidence in the record to support a claim of diminished capacity. Despite the defendant's assertion in his brief on appeal that there was substantial evidence of a mental health condition that logically and reasonably connected the defendant's mental health condition with his inability to form the required intent for custodial assault. BOA 13. This presumption plays on the derogatory stereotyping of people with

mental health issues. It ignores the fact that the majority of people with mental health conditions are functioning members of society.[1]

The defendant appears to argue that the court has previously found ineffective assistance of counsel for failure to assert a diminished capacity defense despite a limited record, citing State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003). BOA at 11-12. However, the court in Tilton was not able to reach the issue of ineffective assistance of counsel. The defendant's testimony in Tilton had not been recorded. The court found that testimony was necessary to determine if trial counsel had been ineffective in not pursuing a diminished capacity defense. "Without [the defendant's] testimony on the issue, it is impossible to say whether all the elements of an intoxication defense or a diminished capacity defense would have been met. The necessity of [the defendant's] testimony on these points highlights the insufficiency of the reconstructed record." Tilton, 149 Wn.2d at 785, 72 P.3d 735. The court ruled that "[u]nder the specific facts of this case,

[1] According to recent estimates, approximately 20 percent of Americans, or about one in five people over the age of 18, suffer from a diagnosable mental disorder in a given year... About 5 percent of adults are affected so seriously by mental illness that it interferes with their ability to function in society. NIH Curriculum

reconstruction of the record was not able to produce a record of sufficient completeness to permit effective appellate review. Therefore, we vacate the conviction and remand for a new trial. Id. At 786-87.

Here the record is complete and does not support any inference that the defendant suffered from diminished capacity. For example, the issue of competency to stand trial was never raised. The testimony of the witnesses was of a defendant who was aware of his surroundings and declared that he intended to fight. The defendant testified at trial as to the events of this incident. He reported a sequence of events very similarly to that of the corrections officers. He presented a clear memory of events and claimed a defense that would be contradictory to a claim of diminished capacity. There is no evidence in the record to support a claim that the defendant's mental condition had a specific effect on his capacity to achieve the intent necessary for assault or that trial counsel was deficient in not pursuing a diminished capacity defense.

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Supplement Series "Information about Mental Illness and the Brain" §2. 2007

## IV. CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted on May 27, 2016.

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DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of May, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Jan Trasen, Washington Appellate Project, jan@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of May, 2016, at the Snohomish County Office.

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