

No. 35340-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Ion Velcota,**

Appellant.

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AUG 1 2006  
COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY DEPUTY

Grays Harbor Superior Court

Cause No. 06-1-00230-2

The Honorable Judge David Foscue

**Appellant's Reply Brief**

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## ARGUMENT

### **I. DEFENSE COUNSEL'S LACK OF FAMILIARITY WITH DIMINISHED CAPACITY AND VOLUNTARY INTOXICATION DEPRIVED MR. VELCOTA OF THE EFFECTIVE ASSISTANCE OF COUNSEL.**

Although Mr. Velcota's lawyer pursued a mental health defense premised on diminished capacity, the words "diminished capacity" do not appear in the trial record. Instead, trial counsel told the court that he was unable to find any authority suggesting that PTSD could be relevant to a defense, but that the condition "minimized" the specific intent for assault. RP (8/22/06) 7, 9. Trial counsel's statement that he was unable to find any authority demonstrated his ignorance of the defense; it was not merely awkward phrasing as Respondent suggests. Brief of Respondent, pp. 9-10.

A reasonably competent defense attorney would have familiarized himself with the Supreme Court's standards for diminished capacity and the jury instructions pertaining to the defense. *See, e.g., State v. Tilton*, 149 Wn.2d 775 at 784, 72 P.3d 735 (2003); WPIC 18.20. He would also be familiar with those cases in which PTSD formed the basis for a diminished capacity defense. *See, e.g., State v. Janes*, 121 Wn.2d 220, 850 P.2d 495 (1993); *State v. Bottrell*, 103 Wn. App. 706, 14 P.3d 164 (2000). Even if defense counsel "had a correct understanding of the purpose of diminished capacity," that understanding is of little comfort to

Mr. Velcota where defense counsel was unfamiliar with the evidentiary foundations, the jury instructions, and the legal authority supporting the defense.

Because diminished capacity was Mr. Velcota's best defense, and because defense counsel's trial strategy consisted (in part) of pursuing that defense, defense counsel's failure to familiarize himself with the relevant legal standards prejudiced Mr. Velcota. *Tilton, supra*. If, as Respondent suggests, defense counsel abandoned the defense mid-trial,<sup>1</sup> the decision to abandon the defense was not a reasonable decision, given that it was based on counsel's demonstrated ignorance of the relevant legal principles. Respondent's suggestion (unsupported by authority) that "no real trial attorney" would argue contradictory defenses<sup>2</sup> misses the point: Mr. Velcota had the right to present inconsistent theories and have the jury instructed on those theories, even if his attorney chose to focus on only one in closing argument. *State v. Fernandez-Medina*, 141 Wn.2d 448, 6 P.3d 1150 (2000). Furthermore, there was a great deal of risk in relying solely on Mr. Velcota's version of events-- that there was no assault-- for an acquittal, given his intoxication, his erratic behavior, and the fact that

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<sup>1</sup> See Brief of Respondent, p. 10.

<sup>2</sup> See Brief of Respondent, p. 11.

his testimony was contradicted by all the other witnesses (including law enforcement.) RP (8/22/06) 21-134; RP (8/23/06) 149-183.

Contrary to Respondent's assertions,<sup>3</sup> the diminished capacity defense applied to both Count I and Count II. Both charges required proof of Mr. Velcota's specific intent to commit assault. His condition did not disappear in the absence of police officers, and Dr. Dutro's report detailed the many ways Mr. Velcota was affected. Furthermore, Mr. Velcota was not "fine" prior to police contact. Brief of Respondent, p. 10. Instead, the record is replete with examples of his erratic behavior. *See* Appellant's Opening Brief, pp. 2-3, 11-12. Had diminished capacity been properly presented, the jury may well have believed that Mr. Velcota lacked the intent to assault either Ms. Alexander or the police officer, and acquitted him on both counts.

The same arguments apply with respect to counsel's failure to request an instruction on intoxication. Although Mr. Velcota's testimony that he had only one drink might not have supported an intoxication argument, significant evidence in the record suggests that Mr. Velcota was quite intoxicated. RP (8/22/06) 25-38, 43-46, 67-69, 84, 128-131. A request for the instruction would have had no downside. An intoxication

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<sup>3</sup> *See* Brief of Respondent, pp. 9, 10.

instruction which would have dovetailed with an appropriate instruction on diminished capacity. Defense counsel need not have highlighted the instructions in closing, but without the instruction, the jury was unaware that Mr. Velcota's voluntary intoxication could be considered in evaluating his mental state at the time of the incidents.

Because defense counsel failed to familiarize himself with the relevant legal principles, failed to present available evidence, and failed to request appropriate instructions, Mr. Velcota was denied the effective assistance of counsel. His convictions must be reversed and the case remanded to the superior court for a new trial. *Tilton, supra*.

**II. THE ABSENCE OF A HIGHER DEGREE OF ASSAULT IS AN ESSENTIAL ELEMENT OF BOTH SECOND AND THIRD-DEGREE ASSAULT.**

Respondent misinterprets the Supreme Court's holding in *State v. Ward*, 148 Wn.2d 803, 64 P.3d 640 (2003). See Brief of Respondent, p. 14. In *Ward*, the Supreme Court held that the language "does not amount to assault in the first or second degree" is an essential element of Assault in Violation of a No Contact Order (VNCO), but only if the defendant is also charged with Assault in the First or Second Degree. In *Ward* and in its predecessor, *State v. Azpitarte*, 140 Wn.2d 138 at 141, 995 P.2d 31 (2000), Assault in the First or Second Degree were possible companion

charges to the felony VNCO charges. Here, by contrast, higher-degree assaults are not possible companion charges to the charged crimes

Moreover, the structure of RCW 9A.36.021 and RCW 9A.36.031 suggests that the absence of a higher degree of assault is an essential element of each offense: The first paragraph of both statutes reads: “A person is guilty of assault in the [second/third] degree if he or she, *under circumstances not amounting to [a higher degree of assault]...*” This structure is identical to the structure used in the first paragraph of RCW 9A.36.011, defining Assault in the First Degree: “A person is guilty of assault in the first degree if he or she, *with intent to inflict great bodily harm...*”

Because the three felony assault statutes are identically structured, and because the phrase “under circumstances not amounting to [a higher degree of assault]” occupies the same position as the phrase “with intent to inflict great bodily harm,” the absence of a higher degree of assault (in the second and third-degree statutes) should be treated the same as the intent to inflict great bodily harm (in the first-degree assault statute.)

Disregarding the phrase “under circumstances not amounting to [a higher degree of assault]” is equivalent to disregarding the requirement of proof of an accused’s “intent to inflict great bodily harm...” RCW 9A.36.011.

This court is not free to ignore the legislature’s choice of language and

read this element out of the statute. *State Owned Forests v. Sutherland*, 124 Wn. App. 400 at 409, 101 P.3d 880 (2004).

This court has recently decided that the absence of a higher degree of assault is not an element of the offense. *State v. Blatt*, \_\_\_ Wn.App. \_\_\_, 160 P.3d 1106 (2007); *see also State v. Feeser*, \_\_\_ Wn.App. \_\_\_, 158 P.3d 616 (2007). Petitions for review have been filed in both *Blatt* and *Feeser*, and the Supreme Court's determination of the issue will control the outcome of Mr. Velcota's case.

### **III. RCW 9A.36.021 (1)(C) VIOLATES THE SEPARATION OF POWERS.**

The Washington Supreme Court has accepted review of *State v. Chavez*, 134 Wn.App. 657, 142 P.3d 1110 (2006). The Supreme Court's decision in that case will control the outcome of Mr. Velcota's separation of powers argument. Accordingly, Mr. Velcota stands on the argument made in his Opening Brief.

**CONCLUSION**

Mr. Velcota's convictions must be reversed and the case dismissed with prejudice. In the alternative, the convictions must be reversed and the case dismissed without prejudice. If the case is not dismissed, it must be remanded to the trial court for a new trial.

Respectfully submitted on July 31, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on July 31, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 31, 2007.



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