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A. ASSIGNMENTS OF ERROR

1. Ms. Marchi's convictions for both attempted first degree murder and first degree assault of a child violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

2. The trial court denied Ms. Marchi the due process of law by failing to properly instruct the jury on the State's burden of proving each element of the offenses.

3. Because it relieves the State of its burden of proof, the trial court erred in giving the jury Instruction 13.

4. Because it relieves the State of its burden of proof, the trial court erred in giving the jury Instruction 15.

5. Because it relieves the State of its burden of proof, the trial court erred in giving the jury Instruction 27.

6. Because it relieves the State of its burden of proof, the trial court erred in giving the jury Instruction 34.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The double jeopardy clauses of the federal and state constitutions protect against multiple prosecutions and multiple punishments for the same offense; offenses which are the same in

law and fact. Where Ms. Marchi's convictions for first degree attempted murder and first degree assault of a child are the same in law and fact, do her convictions for both crimes violate the Double Jeopardy Clause of the Fifth Amendment?

2. The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. Where a defense negates an element of an offense, due process requires the State prove the absence of the defense beyond a reasonable doubt. A defendant's diminished capacity negates the mens rea element of an offense. Did the trial court relieve the State of its burden of proof when it failed to instruct the jury the State bore burden of proving the absence of the defense beyond a reasonable doubt?

C. STATEMENT OF THE CASE

Throughout the second-half of 2006, Ms. Marchi suffered from major depressive disorder. 3/16/09 RP 24. Ms. Marchi also suffered from Borderline Personality Disorder. Id. at 26-27. In addition, Ms Marchi had a long and complex history of anxiety disorders, documented over a period of about 10 years. Id. at 25.

Ms. Marchi's symptoms worsened markedly in the days and weeks leading to Christmas 2006. 3/16/09 RP 46, 53. After

several days marked by acrimonious telephone calls between her and her ex-husband regarding their daughter McKenna's visit with her father, Ms. Marchi crushed a variety of prescription medications and dissolved them in two glasses of juice. Ms. Marchi gave McKenna one glass to drink, while she drank the other. 3/10/09 RP 24. Sometime later, Ms. Marchi regained consciousness and was able to call for medical assistance. 3/10/09 RP 74-76. Medical personnel were able to revive both McKenna and Ms. Marchi. 3/10/09 RP 126-30. In a statement to police detectives while still in the emergency room, Ms. Marchi explained she "did it because [McKenna's] father is so abusive." 3/10/09 RP 163.

The State charged Ms. Marchi with one count each of attempted first degree murder and first degree assault of a child. CP 175-76. The State further alleged that the crimes were aggravated by Ms. Marchi's abuse of a position of trust and McKenna's particular vulnerability.

At trial, Ms. Marchi did not dispute that she had engaged in the acts underlying the State's charges. Ms. Marchi presented substantial evidence, however, that due to mental illness she

lacked the capacity to form the requisite intent to commit the crimes.<sup>1</sup>

A jury convicted Ms. Marchi of both the attempted murder and assault charges. CP 114-15. After she waived her right to a jury, CP 112, the court found the two charged aggravators had been proven beyond a reasonable doubt with respect to the attempted murder, but not the assault. 3/26/09 RP 19-22. The court, however concluded Ms. Marchi's crimes were mitigated by the fact that she had sought assistance for McKenna prior to detection of the crime, and more notably because Ms. Marchi's capacity to appreciate the wrongfulness of her acts was diminished by reason of her "significant and severe personality disorders, anxiety disorders and the like." 4/10/09 at 65. Thus, the court imposed a mitigated sentence of 144 months confinement. CP 13.

D. ARGUMENT

1. MS. MARCHI'S CONVICTIONS OF BOTH ATTEMPTED MURDER AND ASSAULT VIOLATE DOUBLE JEOPARDY

a. A single act cannot give rise to multiple punishments absent a clear statement of legislative intent. The double jeopardy clauses of the state and federal constitutions

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<sup>1</sup> The facts establishing Ms. Marchi's inability to form the intent to commit the crimes is set forth in detail below.

protect against multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993).

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of an additional fact which the other does not*.

Blockburger, 284 U.S. at 304 (emphasis added); In re the Personal Restraint Petition of Orange, 152 Wn.2d 795, 817, 100 P.3d 291 (2004).

Orange criticized a “misconception” in double jeopardy analysis; the insistence of courts to limit the analysis to a comparison of generic statutory language rather than “look at the facts used to prove the statutory elements.” 152 Wn.2d at 819. Applying this standard, Orange concluded a person could not be convicted of both attempted first degree murder and first degree assault because “the evidence required to support the conviction for first degree attempted murder was sufficient to convict Orange of first degree assault.” Id. at 820. This same factual analysis has

long been employed by Washington courts. In State v. Reiff, the Court explained two offenses were “identical in fact and in the law” if “the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other.” 14 Wash. 664, 667, 45 P. 318 (1896). Orange noted the test employed in Reiff is “indistinguishable from the Blockburger test.” Orange, 152 Wn.2d at 816. That conclusion is consistent with the United States Supreme Court’s application of Blockburger.

In Harris v. Oklahoma, the Court concluded convictions of both felony murder with the predicate crime of robbery and of the substantive crime of robbery violated the Double Jeopardy Clause even though the felony murder statute on its face did not require proof of robbery. 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977). In Illinois v. Vitale, the Court concluded the Double Jeopardy Clause would be violated if the state’s proof of manslaughter required proof of the misdemeanor crime of failure to slow to avoid an accident of which the defendant had already been convicted. 447 U.S. 410, 420-21, 100 S.Ct. 2267, 65 L.Ed.2d 228 (1980). In Dixon, the Court found that pursuant to the Blockburger test, a defendant could not be convicted of both contempt, for violating conditions of release by possessing drugs, and of the

substantive offense of possession of drugs even though the defendant could commit contempt without possessing drugs. 509 U.S. at 698. That it is possible, under different circumstances, to commit attempted murder without committing assault of a child is simply not relevant to the inquiry. Dixon, 509 U.S. at 698; Harris, 433 U.S. at 682-83.

b. Because proof of attempted murder necessarily proved first degree assault of a child, Ms. Marchi's convictions for both violate double jeopardy protections. Here the State told the jury Ms. Marchi committed attempted murder when she dissolved the pills and gave the glass of juice to McKenna to drink. 3/19/09 RP 13. The assault, the State urged, was committed when Ms. Marchi "caused her [McKenna] to take poison." 3/19/09 RP 14. The trial court recognized, although not completely, the overlap of the two charges, concluding they arose from the same criminal conduct, CP 11-12, and noting "they're sort of the same act." 3/26/09 RP 21. As in Orange, the same act established both offenses, the State's proof of the attempted first degree murder necessarily proved the assault.

In the absence of an expression of legislative intent to permit multiple punishments for the same offense, this Court must dismiss

Ms. Marchi's assault conviction. See Dixon, 509 U.S. at 699;  
Whalen v. United States, 445 U.S. 684, 692-94, 100 S.Ct. 1432, 63  
L.Ed.2d 715 (1980).

2. THE TRIAL COURT RELIEVED THE STATE  
OF ITS BURDEN OF PROVING EACH  
ELEMENT OF THE OFFENSES

a. Ms Marchi presented evidence that she lacked the capacity to commit the crimes charged. Several people testified that in the six months leading to Christmas Day 2006, Ms. Marchi had become abnormally withdrawn, markedly less reliable, and would often not leave her home or even get out of bed. 3/1/609 RP 137, 153, 182. During that period, Ms. Marchi often complained of illness, lost weight, and became less reliable. Id. at 137, 182. Ms. Marchi's family's increasing concerns led them to contact mental health professionals regarding Ms. Marchi's condition. Id. at 180. Medical records from that period confirmed what those close to Ms. Marchi observed, including losing 30 pounds, withdrawing from daily activities, and increased use of prescription medication. 3/16/09 RP 46, 53. In July 2006, Ms. Marchi was diagnosed with major depressive disorder. 3/16/09 RP 24. This, on top of long and complex history of anxiety disorders, documented over a period of about 10 years. Id. at 25.

The medical records demonstrated a worsening of symptoms in November and December 2006, with increased doctor's visits, increased time away from work, weight loss, and a generally low level of daily functioning. Id. at 52-53. This "progression of symptoms" made Ms. Marchi "more emotionally and psychologically fragile and reduced her ability to fully reason [and] in decision making and problem solving." Id. 60.

Dr. Stephen Melson testified his evaluation of Ms. Marchi and review of contemporaneous medical records led him to the additional diagnosis that Ms. Marchi suffered from Borderline Personality Disorder. Id. at 26-27. "Borderline Personality Disorder is a pattern of instability in interpersonal relationships, self-image and affects, and marked impulsivity. Diagnostic and Statistical Manual of Mental Disorders, p.629 (4<sup>th</sup> ed.1994) (hereafter "DSM IV"). Dr. Melson explained "borderline" refers to the area between psychosis and neurosis. 3/16/09 RP 27.

Dr. Melson explained Ms. Marchi's mental illness would lead her to form very tight bonds with those around her, such as her daughter, and would cause her to be unable to see such people as separate from herself. 3/16/09 RP 39. This in turn would cause "a lot of equivalence between instinct to rescue herself, preserve

herself, escape from threatening environments and the same kind of decisions and acts for her daughter. Id. 62.

Dr. Melson explained the increasing dosages of prescription medication would have reduced the “overwhelming levels of fear and anxiety Ms. Marchi suffered, but would have only modestly improved her depression.” 3/16/09 RP 22. However, this would be accompanied by a “general sedating affect on higher brain functions.” Id.

Because of Ms. Marchi’s

particular vulnerabilities to safety [and] security, and [her perception of] the outside world and particular individuals within that world as being threatening, the prospect of a conflict, a disagreement, a fight, a legal maneuver, telephone call where there’s conflict and numerous interactions with people who are highly valued, not necessarily all positively, by this sort of person at this moment would have much greater affect than on the average person.

3/16/09 RP 63. Ms. Marchi’s mental illness would lead her to view suicide as a survival mechanism, and because of her inability to view McKenna as separate, that conclusion would reach to her daughter as well. Id. 62.

Based upon his diagnosis of Ms. Marchi, and his review of the relevant facts, Dr. Melson formed the opinion to a reasonable degree of medical certainty that Ms. Marchi did not have the

capacity to premeditate the intent to commit murder or assault.

3/16/09 RP 67, 71.

In rebuttal, the State offered the testimony of Dr. Ken Muscatel that he diagnosed Ms. Marchi with Personality Disorder Not Otherwise Specified, meaning that while she suffered from a personality disorder Ms. Marchi's symptoms spanned the definition of several of the personality disorders in DSM IV. 3/18/09 RP 69. Dr. Muscatel agreed with Dr. Melson's opinion that Ms. Marchi's mental disorder would have made it difficult for her to see McKenna as separate from herself. Id. at 97-98. Nonetheless, Dr. Muscatel opined he did not see anything that indicated Ms. Marchi "couldn't form the intent" to commit the crimes.

After a jury convicted Ms. Marchi, the trial court, without a motion from Ms. Marchi, indicated to the parties its belief that mitigating factors were certainly present warranting an exceptional sentence below the standard range. 3/26/09 RP 22. Ultimately, despite having found the State had proved two aggravating factors, the trial court imposed an exceptional sentence below the standard range relying heavily upon the testimony of Dr. Melson. 4/30/09 RP 65-67. But even while relying mainly upon Dr. Melson's testimony,

the court noted even Dr. Muscatel agreed Ms. Marchi suffered from “significant and severe personality disorders.” Id. at 65.

b. Due process requires the State prove each element of the offense. In a criminal prosecution, the Fourteenth Amendment Due Process Clause requires the State prove each essential element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Mullaney [v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) ] . . . held that a State must prove every ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense. . . . Such shifting of the burden of persuasion with respect to a fact which the State deems so important that it must be either proved or presumed is impermissible under the Due Process Clause.

Patterson v. New York, 432 U.S. 197, 215, 97 S.Ct. 2319, 52 L.Ed.2d 281(1977). Thus, in addition to the statutory elements of an offense, the State must disprove a defense where (1) the statute indicates the Legislature’s intent to treat the absence of a defense as “one of the elements included in the definition of the offense of which the defendant is charged;” or (2) the defense negates an

essential ingredient of the crime the State bears the burden to disprove the defense beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983).

The Supreme Court has found “The Legislature's silence on the burden of proof of self-defense, in contrast to its specificity on . . . other defenses, is a strong indication that the Legislature did not intend to require a defendant to prove self-defense.” State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984) (contrasting various statutory defense which specifically place burden on defense). Similar to self-defense, the Legislature has not placed the burden of proving diminished capacity on the defense, and is thus a strong indication the burden is on the State. McCullum, 98 Wn.2d at 492; Acosta 101Wn.2d at 615-16.

That conclusion gains further support from the fact that diminished capacity negates the mens rea element of the offenses. Diminished capacity is a mental condition, not amounting to insanity, which prevents the defendant from possessing the requisite mental state to commit the crime charged. State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993). The defendant's burden of production requires her to provide the jury evidence of a diagnosis which is capable of forensic application in

order to help the trier of fact assess the defendant's mental state at the time of the crime, and which reasonably relates to the impairment of the ability to form the culpable mental state to commit the crime charged. State v. Atsbeha, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). "Diminished capacity . . . negates one of the elements of the alleged crime." State v. Nuss. 52 Wn.App. 735, 739, 763 P.2d 1249 (1988); see also, State v. Gough 52 Wn.App, 619, 622, 768 P.2d 1028 (1989) (diminished capacity differs from insanity because diminished capacity "allows a defendant to undermine a specific element of the offense). Thus, if a defendant meets her burden of production she has necessarily presented the jury evidence which negates the mens rea element of the offense. The legislative silence as to the burden of proof together with the fact that diminished capacity negates an essential element of the offense, requires the burden be on the State to disprove diminished capacity beyond a reasonable doubt.

c. The trial court relieved the State of its burden of proof. Here, the trial court instructed the jury on diminished capacity, implicitly finding Ms. Marchi had met her burden of production. But that instruction only provided:

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent.

CP 133.<sup>2</sup> Far from informing the jury the State had the burden to disprove the defense, the instruction allowed the jury to disregard the evidence altogether regardless of the nature of the proof offered.

First, “no reported decision has clearly addressed the burden of proof for diminished capacity outside the context of intoxication.” S. Fine and D. Ende, 13B Washington Practice, Criminal Law, §3205, n. 3 (1998). Several Washington cases have concluded such an instruction like those provided in this case properly inform the jury of the State’s burden of proof where the diminished capacity results from intoxication. See e.g., State v. James, 47 Wn.App. 605, 608-09, 736 P.2d 700 (1987). To the extent the these opinions apply to diminished capacity for reasons other than intoxication, they are incorrect.

These courts have erroneously reasoned that unlike self-defense diminished capacity or intoxication does not “add an additional element to the charged offense.” James 47 Wn.App. at 608-09; State v. Fuller, 42 Wn.App. 53, 55, 708 P.2d 413 (1985).

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<sup>2</sup> The court provided similar instructions for premeditation, recklessness, and negligence. CP 135, 147, 154.

Self-defense “adds an additional element” only because it negates another. Acosta 101 at 615-16. Self-defense is only “lawful” because it negates the mens rea of the crime. Id. Similarly diminished capacity negates an element. Nuss, 52 Wn.App. at 739. Therefore, diminished capacity must “add an additional element” in precisely the same manner as self-defense.

Further, the cases which have refused to apply McCullum’s reasoning to diminished capacity have rested their analysis on the incorrect premise that diminished capacity mirrors the defense of intoxication. See James at 607-08. A person’s diminished capacity based upon mental illness is not the same as voluntary intoxication because there is no volitional act. Second, the Supreme Court has observed that while diminished capacity is a defense “voluntary intoxication is not a defense, as such, but a factor the jury may consider in determining if the defendant acted with the specific mental state necessary to commit the crime charged.” Furman, 122 Wn.2d at 454. In State v. Hamlet, the Court noted in dicta that diminished capacity differs from insanity in part because unlike diminished capacity the State is not required to disprove insanity beyond a reasonable doubt. 133 Wn.2d 314, 320, 944 P.2d 1026 (1997)

The evidence here established Ms. Marchi's diminished capacity prevented her from premeditating the intent to kill her daughter or forming the requisite intent to assault her. Because it negates the mens rea element of the crimes in the same way self-defense does, the State was required to disprove Ms. Marchi's diminished capacity beyond a reasonable doubt.

The court's instruction to the jury did not inform the jury of either the standard of proof or the State's burden. Instead, the instruction allowed the jury to do whatever it wished with the evidence of diminished capacity regardless of its strength. The court's instruction relieved the State of its burden of proof.

d. Ms. Marchi's conviction must be reversed. An instruction which relieves the State of its burden of proof is harmless only if the court can conclude "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (citing Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The State cannot prove beyond a reasonable doubt, the error here was harmless.

Neder recognized the error in that case was harmless because the evidence of the missing materiality element was so

overwhelming the defendant had not argued otherwise to the jury or to the Supreme Court. 527 U.S. at 16. Here by contrast, the question of Ms. Marchi's capacity was the only element in dispute. The State's evidence disproving diminished capacity, i.e. proving Ms. Marchi's capacity, was far from overwhelming. The trial court's imposition of a mitigated sentence recognized the evidence presented by Ms. Marchi outweighed that offered by the State in rebuttal. 4/30/09 RP 65-67. In such circumstances the State cannot prove beyond a reasonable doubt that the jury would have reached the same verdict had the court properly instructed the jury.

E. CONCLUSION

This court must reverse Ms. Marchi's convictions.

Respectfully submitted this 30<sup>th</sup> day of November, 2009.



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GREGORY C. LINK -25228  
Washington Appellate Project  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 39254-2-II
	)	
RHONDA MARCHI,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF NOVEMBER, 2009, I CAUSED THE ORIGINAL **STATEMENT OF ARRANGEMENTS** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] DEBORAH KELLY CLALLAM COUNTY PROSECUTING ATTORNEY 223 E 4<sup>TH</sup> ST., STE 11 PORT ANGELES, WA 98362</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] RHONDA MARCHI 328980 WCC FOR WOMEN 9601 BUJACICH RD NW GIG HARBOR, WA 98332</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF NOVEMBER, 2009.

X \_\_\_\_\_ 

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