

FILED
COURT OF APPEALS
CLALLAM COUNTY

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STATE OF WASHINGTON

No. 39254-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CLALLAM COUNTY

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RHONDA MARCHI,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

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

The double jeopardy clauses of the state and federal constitutions 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).

The State concedes Orange found the Double Jeopardy Clause “is violated where a criminal defendant is convicted of both attempted murder and assault.” Brief of Respondent at 15. Indeed,

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; see also, State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896). 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

In her prior briefing, Ms. Marchi has addressed how due process requires the State disprove beyond a reasonable doubt the absence of fact if that fact negates an element of the offense. Thus, because it negates the unlawfulness of an act, the State must disprove self-defense. State v. McCullum, 98 Wn.2d 484, 491-93, 656 P.2d 1064 (1983); State v. Acosta, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984). By negating the *mens rea* of a crime, diminished capacity operates in precisely the same manner. See, State v. Furman, 122 Wn.2d 440, 454, 858 P.2d 1092 (1993)

(diminished capacity prevents defendant from possessing the requisite mental state to commit the crime charged); State v. Nuss, 52 Wn.App. 735, 739, 763 P.2d 1249 (1988) (“Diminished capacity . . . negates one of the elements of the alleged crime.”); 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).

In her initial brief Ms. Marchi has addressed those cases which have concluded an instruction like that 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). 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). These cases have simply assumed that diminished capacity simply mirrors intoxication. See James at 607-08.

But as Ms. Marchi has argued, 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. The same is true of Similarly diminished capacity negates an element. Nuss, 52 Wn.App. at 739. Further, 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.

Rather than argue how these decisions have properly applied the "negates-analysis" or the dictates of due process in reaching their conclusion, the State simply parrots the conclusions of those cases. Brief of Respondent at 19-21. But simply repeating these erroneous conclusions does nothing to demonstrate their correctness. Neither these cases nor State's brief properly addressed the inescapable parallel between self-defense and diminished capacity. Each defense negates the unlawfulness of the act. And in that way, each defense adds an additional element.

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.

B. CONCLUSION

This Court must reverse Ms. Marchi's convictions.

Respectfully submitted this 5th day of April, 2010.



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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 5TH DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** 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:

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

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF APRIL, 2010.

X _____ 

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