

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 39703-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

VALINDA REYNOLDS,

Appellant.

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

The Honorable Thomas Larkin, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the element of intent to steal in the robbery charge.
2. The state failed to prove beyond a reasonable doubt the element of force or threatened force to take or retain stolen property.
3. The state failed to prove beyond a reasonable doubt any taking of property.
4. The trial courts findings o facts numbers 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 16 were not supported by the record.
5. The trial court's conclusions of law 3 and 4 were not supported by the facts.
6. Counsel was ineffective for failing to raise a diminished capacity defense.
7. Ms. Reynolds suffered from diminished capacity and therefore could not formulate the intent to steal.

Issues Presented on Appeal

- 1 Did the state prove beyond a reasonable doubt the element of intent to steal in the robbery charge when Ms. Reynolds was likely in a psychotic confusion during the incident.

2. Did the state prove beyond a reasonable doubt the element of force or threatened force to take or retain stolen property when no stolen property was taken by Ms. Reynolds?
3. Did the state prove beyond a reasonable doubt taking of property?
4. Were the trial courts findings o facts numbers 2, 3, 4, 5, 6, 7, 9, 10, 11, 12, 14, 16 not supported by the record?
5. Were the trial court's conclusions of law 3 and 4 supported by the facts?
6. Was counsel ineffective for failing to raise a diminished capacity defense?
7. Did Ms. Reynolds suffer from diminished capacity and therefore could not formulate the intent to steal?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Valinda Reynolds was charged with robbery in the second degree. CP 1. A mistrial was declared during the middle of her first trial do to Ms. Reynolds inability to track the proceedings. RP 122 (October 24, 2008). Ms. Reynolds was declared incompetent, and after a period of medication management later declared competent. CP 4-15, 16-26, 27-28, 31-32, 36-40, 41-42, 43-52, 63-64, 65-75 . Following a second bench trial, the honorable

Thomas Larkin presiding, the trial court entered findings of fact and conclusions of law finding Ms. Reynolds guilty as charged. CP 77-79. This timely appeal follows. CP 93-106.

a. Competency

Ms. Reynolds was evaluated by Western State and found to be incompetent to stand trial. CP 4-15, 16-26, 27-28, 41-42, 43-52, 31-32, 36-40; RP 119 (October 24, 2008). Following a 90 day commitment and six month medication management, Ms. Reynolds regained her competency to stand trial. CP 63-64, 65-75; RP 2 (April 14, 2009).

2. SUBSTANTIVE FACTS

Valinda Reynolds is psychotic, bi-polar and takes medications to address her mental health issues. CP 43-52; RP 82, 108-109. When not on her medications, Ms. Reynolds becomes disassociated and confused. RP 101-102, 114. On January 22, 2008, Ms. Reynolds went to Fred Meyers to get prescriptions for herself but was unsuccessful. She then drove across the street to Rite Aid to buy pampers for her two year old daughter. RP 19-20, 85, 101-102, 116-120. Ms. Reynolds had not been on her medications for several days leading up to January 22, 2008 and had not eaten lunch or dinner that day. RP 101-102, 114.

The loss prevention person, Christopher Comstock, the responding

police officer Scott Stanley, and Ms. Reynolds each described the incident differently. RP 10, 19, 34, 37, 60, 75, 77. Comstock testified that he became suspicious of Ms. Reynolds because she entered the Rite Aid store with a large purse and picked up a Rite Aid ad flyer but did not look at it immediately. RP 20. Comstock testified that he saw Ms. Reynolds pick up 3 small tubes of cocoa butter and place them inside the ad. RP 21. Comstock testified that Ms. Reynolds looked at him so he left the aisle and went to a camera surveillance station. RP 21. Comstock evidently did not observe Ms. Reynolds during the time he left the store area and traveled to the surveillance area.

Comstock testified that Ms. Reynolds picked up a bag of diapers, opened the bag and took one out, kept it in her hand, and put the ad with the cocoa butter into her purse, then picked up some lotion and placed that in her purse as well. RP 23. Comstock testified that he next observed Ms. Reynolds pick up some baby bottle nipples, wrap those in the single diaper and replace the diaper with the nipples into the diaper bag and then proceed to the check out to purchase the diapers. RP 24. Ms. Reynolds used a J.C. Penny credit card to pay for the diapers but the card was declined at the cashier station. RP 25, 90-91. Ms. Reynolds' mother had informed her that Rite Aid took J. C. Penny cards. Id.

Ms. Reynolds left the diaper bag at the counter and told the clerk she would go out and get cash from her car to pay for the diapers. RP 28-29. Mr. Comstock followed Ms. Reynolds outside and testified that although in civilian clothing he did identify himself as the loss prevention officer for Rite Aid. RP 29, 44. Comstock told Ms. Reynolds to return to the store but Ms. Reynolds did not know that he was a security person and kept walking toward her car. 29 She opened the car with her keys and said she had to get money out pay for diapers. Comstock said it was too late for that and pushed on the door and Ms. Reynolds arms and grabbed her away from the car and threatened to break her fingers. RP 30, 31, 92-93, 96.

Afraid, Ms. Reynolds fought against Comstock who grabbed at her and caused her to fall to the ground and then grabbed her up to her feet and dragged her to the store where he threw her to the ground face down and held her with her hands behind her back. RP 69-71, 97-100. Comstock told the judge that Ms. Reynolds scratched and kicked him while he held her down, but he told the responding officer that she only tried to kick and scratch him but was unsuccessful. RP 34, 77.

Comstock told the judge that he dragged Ms. Reynolds 20-30 feet inside the store and held her down inside the store. RP 37. Officer Stanley arrived to the location where Comstock had dragged Ms. Reynolds and stated

that it was only 5-10 feet from the door. RP 75. Comstock never told Stanley that Ms. Reynolds stole baby bottle nipples. RP 75.

Officer Stanley advised Ms. Reynolds of her Miranda rights but she did not understand. RP 66. Officer Stanley advised Ms. Reynolds of her rights a second time and she indicated that she understood. RP 66. Ms. Reynolds said she did not do anything wrong but made a mistake and asked to be released. RP 66, 70-71, 77. Ms. Reynolds did not explain the nature of the mistake to officer Stanley. RP 79. Ms. Reynolds explained to the judge that her mistake was to go out to Rite Aid so late at night and rush. RP 105-106.

Officer Stanley asked Comstock what occurred in Ms. Reynolds presence. Comstock explained that he believed Ms. Reynolds stole merchandise from Rite Aid. RP 68. Officer Stanley asked Ms. Reynolds if Comstock would lie. RP 67. Ms. Reynolds stated "why would he lie". RP 104. Ms. Reynolds however could not hear or understand what Comstock was reporting to officer Stanley. RP 103. Officer Stanley arrested Ms. Reynolds and transported her to jail. RP 73.

The trial court acknowledged that no one found any stolen items in Ms. Reynolds' purse or anywhere else on her person. The state did not present any evidence of stolen merchandise removed from Rite Aid. RP 151.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT TOOK PROPERTY OF ANOTHER; AND USED FORCE TO OBTAIN OR RETIAN THAT PROPERTY.

Ms. Reynolds was accused of taking property out of Rite Aid without paying for it and fighting with a guard to retain the property. The loss prevention employee observed Ms. Reynolds for a time, but did not maintain visual contact for the entire time. RP 26 Ms. Reynolds was in the store. The loss prevention employee believed Ms. Reynolds secreted merchandise in her purse. However, there was never any evidence of stolen items to support the accusations. The State never introduced stolen merchandise, and never evidence that Ms. Reynolds was in possession of the allegedly stolen merchandise. RP 151.

Because Ms. Reynolds was tried by the bench, the Court of Appeals reviews trial court's decision to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions of law. State v. Carlson, 143 Wn. App. 507, 178 P.3d 371 (2008) Unchallenged findings of fact are verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

As charged in Ms. Reynolds case, a person commits robbery by: (1) with intent to steal; (2) unlawfully taking personal property from another; (3) against his will; (4) by the use or threatened use of force; (5) to take or retain the property. RCW 9A.56.190. “Such force or fear must be used *to obtain or retain possession of the property, or to prevent or overcome resistance to the taking*; in either of which cases the degree of force is immaterial.” State v. Johnson, 155 Wn.2d 609, 610-611, 121 P.3d 91 (2005), citing, RCW 9A.56.190 (emphasis added).

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d (1970); State v. Salinas, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). And, credibility determinations are for the trier of fact and are not subject to review. State v. Thomas, 150 Wash.2d 821, 874-75, 83 P.3d 970 (2004). The reviewing court defers to the jury on issues of conflicting testimony,

credibility of witnesses, and the persuasiveness of the evidence. Thomas, 150 Wash.2d at 874-75.

a. No Force or Threats to Take or Retain Merchandise.

In Johnson, the defendant walked out of a store with a television that he had not paid for. When confronted by store security, the defendant abandoned the television and ran. After running for a moment, the defendant turned back toward the store and was grabbed by a security guard. The defendant fought to escape from the guard. Johnson, 155 Wn.2d at 609. The Supreme Court reversed the trial court and the Court of Appeals and held that the force used by the defendant was not related to the taking or retention of the television. Rather the defendant used force to escape, which was not related to either the taking or retention of the television. Johnson, 155 Wn.2d at 610-11,

Johnson is on point for the legal issue that the force used must be directly related to the taking or retention of property. In Ms. Reynolds case, she left the pampers at the cashier and walked out of the store. RP 91. There was no evidence that she possessed any stolen merchandise after she exited the store. Ms. Reynolds did not use force at any time during her departure from the store and abandoned the pampers in the store. Ms. Reynolds resorted to force to protect herself against Mr. Comstock, however there was no evidence

that the physical altercation was related to the pampers, and there was no other merchandise located on Ms. Reynolds. Thus as in Johnson, the force was used to attempt to escape was not related to any alleged taking or retention of merchandise.

b. No Evidence of Taking Merchandise.

A single witness testimony that someone took property may not be sufficient without more to support a conviction for robbery. In State v. Jaquez, 105 Wn. App. 699, 711-712, 20 P.3d 1035 (2001), a store owner identified Jaquez as the robber who entered her store, brandished a knife and took \$10. Id. Jaquez was apprehended in the vicinity of the store minutes after the robbery but he did not have the store's money and did not have a knife. Moreover, he testified that he was elsewhere during the robbery. Id. Under these facts, the Court of Appeals deciding the issue of whether the fact that Jaquez was in shackled during trial was reversible error, held that "the other evidence was not so strong that we can say that within a reasonable probability, the verdict would have been the same had the error not been made." Jaquez, 105 Wn. App. at 712, 716.

Jaquez, while deciding a different legal point makes clear that the facts presented must establish beyond a reasonable doubt the crime charged even when the victim declares the accused guilty. Id. In Jaquez, the victim testified

that : (1) Jaquez was the robber” in a black coat escaped out the door of the store; (2) ran past a black car parked on the street in front of the store; (3) ran down the block and around a building; and then walked back to that car and drove away”. Jaquez, 105 Wn. App. at 711.

Rite Aid, the victim in Reynolds case, through Comstock testified similarly to the victim in Johnson that: (1) Ms. Reynolds secreted property in her purse inside Rite Aid; (2) that she was the robber who left the store without paying for merchandise; and (3) that she fought off Mr. Comstock to retain merchandise without paying. However as in Jaquez, there was no physical evidence connecting Ms. Reynolds to the crime.

As in Johnson, there was no evidence that Ms. Reynolds used force or threats to take or retain stolen merchandise; and as in Jaquez, there was no evidence that Ms. Reynolds took merchandise from Rite Aid without paying for it. Following the legal precedent in Winship, Johnson, Jaquez, and Carlson, this Court must reverse Ms. Reynolds conviction for robbery in the second degree for insufficient evidence and dismiss with prejudice because there is insufficient evidence to support the challenged findings and the findings do not support the conclusions of law.

2. MS. REYNOLDS LACKED THE MENTAL CAPACITY TO FORMULATE THE INTENT TO COMMIT THEFT.

Ms. Reynolds could not formulate the intent to steal on the date of this incident because she was suffering from untreated bi-polar disorder and psychosis. For several days leading up to this incident, Ms. Reynolds had not taken her medication to control her bi-polar disorder and she had not eaten all day. RP 82, 101-102, 108-109, 114. In short, because of Ms. Reynolds' diminished capacity, the state could not prove intent to steal prove beyond a reasonable doubt.

As charged, robbery in the second degree requires intent to steal. RCW 9A.56.190; 9A.56.210. RCW 9A.08.010 defines the intent which must be present for an act to be considered a crime as follows: “[a] person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010. The statute requires more than the ability to form ‘goal oriented intent’. The statute requires that the ‘goal’ towards which the intent is ‘oriented’ be a criminal act. Id.

“Diminished capacity” is a mental condition not amounting to insanity which prevents defendant from possessing requisite mental state necessary to commit crime charged. State v. Warden 133 Wn.2d 559, 564, 947 P.2d 708 (1997). Diminished capacity is an affirmative defense available to a

defendant who provides sufficient evidence of diminished capacity to put the defense in issue. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001) State v. Nuss, 52 Wn.App. 735, 739, 763 P.2d 1249 (1988). The diminished capacity defense is a rule of evidence that allows the defendant to introduce evidence relevant to subjective states of mind. State v. Stumpf, 64 Wn. App. 522, 525 n. 2, 827 P.2d 294 (1992). Diminished capacity negates one of the elements of the alleged crime. State v. Nuss, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988).

To mount a diminished capacity defense, the defendant ‘must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged.’ State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998). The expert testimony used in Ms. Reynolds case to determine competency should satisfy this requirement. Ms. Reynolds was evaluated after the incident at Rite Aid and determined to be not competent to stand trial. CP 16-26.

Dr. Finch performed an evaluation at Western State Hospital and determined that Ms. Reynolds suffered from a psychotic disorder and that during the evaluation she “presented with considerable psychotic functioning”. Id. Dr. Finch recommended psychotropic medications to address Ms. Reynolds’ “psychotic confusion”. Id. Moreover, Dr. Finch

determined that Ms. Reynolds had never been properly prescribed psychotropic medications. Id. Ms. Reynolds' "psychotic confusion" impaired her ability to behave and respond appropriately to stimuli. Id. Similar to the date of the Rite Aid incident, Ms. Reynolds had not eaten on the day of the evaluation. CP 16-26.

Following the evaluation, Ms. Reynolds was given for the first time, psychotropic medications. CP 16-26; 43-62. Six months after beginning psychotropic medications, Ms. Reynolds regained competency to stand trial. Id. While Dr. Finch was asked to address the issue of diminished capacity during her evaluation, Ms. Reynolds was unable to discuss the incident sufficiently to provide enough information for Dr. Finch to be able to render an specific opinion on this issue and defense counsel did not pursue obtaining a specific opinion on diminished capacity but invited counsel to request another evaluation for this purpose.. Id.

Notwithstanding the lack of specific opinion regarding diminished capacity, it is clear that until Ms. Reynolds was medicated for six months with psychotropic medication she was psychotic, in a state of "psychotic confusion" unable to understand the crimes and charges she faced, and unable to assist in pursuing any sort of defense strategies. CP 16-26.

It stands to reason, that at the time of the incident because Ms.

Reynolds was not properly medicated, she had not eaten all day, it was 9:00 at night and thus she had likely been over stimulated, that the combination of these factors made it impossible for her to formulate any sort of intent to commit theft. Dr. Finch determined that when un-medicated and over stimulated, Ms. Reynolds entered a state of “psychotic confusion”. RP 16-26. This “psychotic confusion” apparently persisted throughout the first trial which ended in a mistrial due to Ms. Reynolds mental incompetence to stand trial. RP 122 (October 24, 2008); CP 4-15, 16-26, 27-28, 41-42, 43-52, 31-32, 36-40; 63-64, 65-75; RP 2 (April 14, 2009).

Logic dictates that if Ms. Reynolds was not competent during her first trial because she was not properly medicated, then it stands to reason that at the time of the alleged robbery, without the benefit of the psychotropic medications, Ms. Reynolds could have had the ability to formulate intent to commit theft.

During the altercation with Mr. Comstock, Ms. Reynolds was confused, scared, not on any of her medications, she had not eaten that day, she did not understand that Mr. Comstock was a loss prevention officer, Ms. Reynolds had not stolen anything, she just wanted to get her money, she believed her mistake was in shopping so late at night and rushing and she appealed to Jesus to help her. RP 68, 76, 79, 86, 92, 95, 96, 101, 102, 104,

114, 115126-127. These combined facts indicate such a state of confusion as to undermine the probability that the state could have established beyond a reasonable doubt Ms. Reynolds' ability to formulate intent to steal. For these reasons, defense counsel should have raised the diminished capacity defense.

3. COUNSEL'S FAILURE TO ARGUE
DIMINSHED CAPCITY DEPRIVED
APPELLANT OF HER RIGHT TO
EFFECTIVE ASSISTANCE OF COUNSEL.

Washington applies the two-part Strickland test in determining whether a defendant had constitutionally sufficient representation. State v. Cienfuegos, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, the defendant must show that counsel's performance was deficient. Second, the defendant must show that the deficient performance prejudiced the defense.

Prejudice is established when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Strickland, 466 U.S. at 687, 104 S.Ct. 2052; State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case."

Strickland, 466 U.S. at 693, 104 S.Ct. 2052; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). To determine if the Strickland test has been met, the reviewing Court examines the issues on a on a case-by-case basis. Cienfuegos, 144 Wn.2d at 228-29.

To be eligible to raise a diminished capacity defense, the defendant must present evidence of a mental condition, which prevents the defendant from forming the requisite intent necessary to commit the crime charged. Warden, 133 Wn.2d at 564. In State v. Tilton, 149 Wn.2d 775, 72 P.3d 735 (2003), the defendant presented evidence that he smoked marijuana before and after committing the crime charged and that he had a history of blackouts from smoking marijuana. State v. Tilton, 149 Wn.2d at 784-785. Based on these facts, the Supreme Court held that Tilton was denied his right to the effective assistance of counsel for failing to argue diminished capacity. State v. Tilton, 149 Wn.2d at 784; citing, Thomas, 109 Wn.2d at 226-29. 882, 889, 735 P.2d 64 (1987).

As set forth in the preceding argument, Ms. Reynolds presented sufficient evidence of a mental condition that interfered with her ability to formulate the intent to steal. The facts in Ms., Reynolds case are more compelling than those determined to be sufficient for a diminished capacity defense in Tilton. In Ms. Reynolds case, there were no tactical reasons for

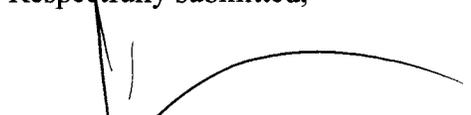
failing to follow through with a request for expert opinion and there was no reason to fail to argue the diminished capacity defense with the expert evidence available in the record, which established that Ms Reynolds suffered from a psychotic condition that rendered her incompetent without months of psychotropic medications. Had counsel pursued a diminished capacity defense, there was more than a reasonable probability that the outcome would have differed. Strickland, 466 U.S. at 694, 104 S.Ct. 2052. For these reasons counsel's performance was deficient and the deficiency prejudiced Ms. Reynolds right to a fair trial.

D. CONCLUSION

Valinda Reynolds respectfully requests this court reverse and dismiss with prejudice her second degree robbery conviction for insufficient evidence of: (1) theft; (2) intent to steal and; (3) force or threatened force used to obtain or retain property. In the alternative, Ms. Reynolds requests this Court grant a new trial based on denial of due process: ineffective assistance of counsel for failure to argue a diminished capacity defense.

DATED this 18th day of December 2009.

Respectfully submitted,



LISE ELMER

WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Valinda Reynolds 17608 79th Ct E Puyallup, WA 98371 a true copy of the document to which this certificate is affixed, on December 18, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature _____

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY SW
DEPUTY