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STATE OF WASHINGTON
BY *AC*

No. 41318-3-II
COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
vs.
JAY KELLY ANDERSON,
Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 09-1-04546-3
The Honorable Katherine Stolz, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Appellant's motion for acquittal by reason of insanity.
2. The trial court erred when it entered Findings of Fact III, IV, V, VI, and VII.
3. The trial court erred when it concluded that Appellant had not established, by a preponderance of the evidence, that he was insane at the time he committed the offense.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did Appellant establish insanity by a preponderance of the evidence, and did the trial court err in denying Appellant's motion for acquittal by reason of insanity, where Appellant's expert testified that he suffered from several mental disorders, that Appellant had a history of command hallucinations and believed that he was being controlled by outside forces through telekinesis, that Appellant felt a command hallucination earlier in the morning of the offense, that Appellant had a history of memory lapses, and that Appellant could not remember committing the offense?
2. Did the trial court err when it found that Appellant failed to establish insanity by a preponderance of the evidence,

where Appellant's expert testified that Appellant was legally insane when he committed the offense and the State presented no contradictory evidence or expert testimony? (Assignments of Error 1, 2, and 3)

III. STATEMENT OF THE CASE

On the morning of October 8, 2009, while using his home computer, Anderson felt "moved" to find his childhood home. (07/26/10 RP 25)¹ He rode the bus in the direction of the property, then got off the bus, bought a beer, and called his wife. (07/26/10 RP 24, 25) Anderson has no memory of events after that point, until he eventually became aware that he was being confronted by a group of people. (07/26/10 RP 25)

During the time that Anderson says he suffered a memory lapse, Anderson entered an unlocked car parked outside of a convenience store. (CP 3) The owner returned and confronted Anderson. (CP 3) Anderson then brandished a box cutter and said "I'm sorry." (CP 3; 07/26/10 RP 58) The owner backed away, and Anderson exited the car and fled, taking the owner's cellular phone with him. (CP 3) The owner and several bystanders pursued and

¹ Citations to the transcripts will be to the date of the proceeding followed by the page number.

caught Anderson, and held him until the police arrived. (CP 3)

The State charged Anderson with one count of first degree robbery while armed with a deadly weapon (RCW 9A.56.190, .200). (CP 1) Anderson entered a plea of not guilty by reason of insanity, and moved for an order of acquittal. CP 51-53, 46-50)

Psychologist Dr. Phyllis Knopp evaluated Anderson in order to determine whether he was legally insane and whether he could distinguish right from wrong at the time he committed the charged offense. (07/26/10 RP 12) In preparation for the evaluation, Dr. Knopp reviewed Anderson's mental health history. (07/26/10 RP 14-15) Anderson had twice been hospitalized at Western State Hospital, from October 4, 2002 until January 21, 2003, and from June 10, 2003 to November 3, 2003. (07/26/10 RP 14) Evaluations conducted during these periods resulted in diagnoses that Anderson suffers from a dissociative disorder and a psychotic disorder, with the result that Anderson experiences delusions and visual or auditory hallucinations. (07/26/10 RP 15-16, 18)

During those evaluations, Anderson reported that he was being controlled by messages or "nudges" from "Dan Rothstein." (07/26/10 RP 18, 19) He also explained that he was being controlled by "telekinesis." (07/26/10 RP 18) These sorts of

“internal stimuli” or command hallucinations are symptomatic of someone who is delusional or psychotic. (07/26/10 RP 19)

Anderson was also evaluated in 2001 because he claimed to have powers of mind control and telekinesis while serving a sentence at Airway Heights Correctional Center. (07/26/10 RP 26-27) A psychologist there diagnosed Anderson as suffering from a psychotic disorder, and Anderson was put on antipsychotic medications. (07/26/10 RP 26-27)

During his current evaluation with Dr. Knopp, Anderson reported that he still received some “nudges” from “Dan Rothstein,” but that he was primarily influenced at this time by what he referred to as “Samati Omega” or “Tech Omega.” (07/26/10 RP 75-76) Anderson did not specifically state that he was directed by these entities to commit a crime on October 8, 2009. (07/26/10 RP 59) However, he reported that he felt a nudge that morning to find his childhood home, and he subsequently suffered a memory lapse during the time period when he committed the offense. (07/26/10 RP 25) Both Anderson and his wife report that Anderson frequently suffers memory lapses. (07/26/10 RP 24, 72, 73)

Dr. Knopp concluded that Anderson suffers from a psychotic disorder and schizophrenia. (07/26/10 RP 28, 32) She believed

that he was in a delusional state when he entered the parked car and took the cellular phone. (07/26/10 RP 51) She also concluded that Anderson was not able to distinguish right from wrong, and was therefore not criminally responsible at the time he committed the offense. (07/26/10 RP 23)

The trial court found that Dr. Knopp's conclusion that Anderson was legally insane at the time of the offense was not credible because it was based on events and evaluations that occurred in the past, and because Anderson did not specifically state that he heard voices telling him to commit the offense. (07/27/10 RP 20-22; CP 81-83) The court denied Anderson's motion for acquittal. (07/27/10 RP 21-22; CP 83) (The trial court's written Findings of Fact and Conclusions of Law are attached in the Appendix.)

Anderson entered a guilty plea to a reduced charge of third degree assault while armed with a deadly weapon (RCW 9A.36.031). (CP 80; 07/28/10 RP 98-99, 109-10) The trial court sentenced Anderson to a standard range sentence totaling 44 months. (CP 87, 89; 10/08/10 RP 13) This appeal timely follows. (CP 96-97)

IV. ARGUMENT & AUTHORITIES

The standard to be applied in considering a motion for acquittal based on insanity is established by statute. RCW 10.77.080 provides in relevant part:

The defendant may move the court for a judgment of acquittal on the grounds of insanity At the hearing upon the motion the defendant shall have the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense or offenses with which he or she is charged.

Accordingly, in considering a motion for acquittal by reason of insanity, the trial court should weigh the evidence and decide whether the defendant has proven insanity by a preponderance. State v. Sommerville, 111 Wn.2d 524, 529, 533, 760 P.2d 932 (1988).

Washington follows the M'Naghten test for insanity, codified at RCW 9A.12.010:

To establish the defense of insanity, it must be shown that:

- (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
 - (a) He was unable to perceive the nature and quality of the act with which he is charged; or
 - (b) He was unable to tell right from wrong with reference to the particular act charged.

See also, M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng.Rep. 718

(H.L.1843); State v. Wheaton, 121 Wn.2d 347, 353, 850 P.2d 507 (1993).

Accordingly, to establish an insanity defense, Anderson must show by a preponderance of the evidence that, at the time he committed the offense, he was unable to perceive the nature and quality of the act or to tell right from wrong with reference to the act. RCW 9A.12.010.

The trial court's denial of a motion for acquittal is a determination of fact. Sommerville, 111 Wn.2d at 533. "A reviewing court is limited to considering only whether the lower court's conclusions of fact are supported by substantial evidence. Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." Sommerville, 111 Wn.2d at 534 (citing State v. Thetford, 109 Wn.2d 392, 396, 745 P.2d 496 (1987)). The trial court's conclusions in this case do not meet that standard.

The trial court found that Dr. Knopp cannot have reasonably reached her conclusion about Anderson because it was based on an "isolated incident in 2002," because the prior mental health evaluations do not support a conclusion that Anderson was acting

under compulsion to commit the offense, and because Dr. Knopp cannot credibly “fill in the gaps in the defendant’s memory of this incident with the conclusion that he was in fact acting under the direction of voices from ‘Tech Omega’ and/or ‘Mr. Rothstein’.” (CP 82, Findings of Fact III and IV) These findings do not accurately represent Dr. Knopp’s conclusions.

Dr. Knopp did note that Anderson reported being directed by Dan Rothstein to steal a car in 2002, and she found it informative that this 2002 incident bore some similarities to the incident charged in this case. (RP 59, 67) But Dr. Knopp based her conclusion that Anderson was acting “under the influence of his delusions” not on that incident alone, but rather on several factors: (1) that in 2001, 2002 and 2003, and in his evaluation with Dr. Knopp, Anderson reported that he is “controlled” by messages, nudges, and/or “telekinesis” from Dan Rothstein and/or Tech or Samati Omega; (2) that Anderson does not necessarily “hear voices,” but is rather compelled to act based on “internal stimuli;” (3) that Anderson reported feeling “moved” to act on the morning of October 8, 2009; (4) that Anderson has repeatedly been diagnosed by both Dr. Knopp and other psychologists as suffering from a psychotic disorder; and (5) that Anderson has reported suffering

from memory-lapse in the past as well as during the incident charged in this case. (07/26/10 RP 17, 18, 25, 51, 59, 72, 73, 75-76)

The trial court also found that: "Dr. Knopp admits that it is very unusual that a person who is hearing voices directing him to commit an act would not remember the details of the act. Further, it does not make sense that the person who is hearing voices directing him to commit an act would not remember that he was hearing those voices when asked why he committed the act" (CP 82, Finding of Fact V) This is also an inaccurate representation of the evidence presented at the hearing.

Anderson did not state, and Dr. Knopp did not conclude, that Anderson was specifically hearing voices which told him to commit the offense. (07/26/10 RP 59) Dr. Knopp testified that Anderson was compelled by his delusions, which in Anderson's mind sometimes come in the form of a message from Rothstein or Omega, and that his delusions prevented him from knowing right from wrong. (07/26/10 RP 51, 17, 18, 75-76, 94-95) Furthermore, while Dr. Knopp did testify that it is unusual for someone who is experiencing command hallucinations to forget the details of the act, it is not unheard of. (07/26/10 RP 93) Dr. Knopp testified that

she had evaluated individuals where this had occurred, and has seen situations where a person's psychosis does become so extreme that they do lose their memory of an event. (07/26/10 RP 93-94) Dr. Knopp found it unremarkable that Anderson felt compelled to act but does not remember the act itself. (07/26/10 RP 53, 94)

And finally, the trial court found that "[m]any of the defendant's actions during this incident, as described by the witnesses, suggest that defendant recognized that he was engaging in an act that was wrong." (CP 82, Finding of Fact VI) This finding is based purely on the prosecutor's interpretation of the facts, not on any specific evidence or testimony presented at the hearing.

According to the police reports and witness statements, when confronted by the owner of the car, Anderson said "I'm sorry" and ran away, then had to be held by witnesses until police came so that he could not escape. (07/26/10 RP 60, 63-64, 65) The prosecutor opined that Anderson's apology and attempt to flee showed that he understood he had committed a crime and that he felt guilt about it. (07/26/10 RP 60, 64, 65) Dr. Knopp disagreed, suggesting instead that Anderson said "I'm sorry" because he

believed he had no choice but to commit the offense or because he was unable to complete his mission, and that he fled because he was afraid and felt he was in danger, especially because one of the witnesses was pointing a gun at him. (07/26/10 RP 58, 60, 63-64, 65)

Anderson presented testimonial and documentary evidence that he suffers from a psychotic disorder, a dissociative disorder and schizophrenia. He presented evidence that he believes he is being controlled or moved by forces communicating with him through telekinesis. He presented evidence that he experiences frequent episodes of memory loss. And he presented evidence that, on the morning of the offense, he was moved to act based on something he saw on his computer, that he responded to this nudge, and that he subsequently suffered a loss of awareness during the commission of the offense. Anderson therefore established, by a preponderance of the evidence, that he was unable to determine right from wrong at the time of the offense because he was under the influence of his psychosis and unaware of his actions.

Moreover, because the judge considering a motion under RCW 10.77.080 is to weigh evidence and determine whether the

defendant has carried his burden of establishing insanity by a preponderance, the State must also produce evidence which is equal to or greater than the defendant's in probative value. See Sommerville, 111 Wn.2d at 530. But in this case the State did not produce **any** evidence. The State only proffered the deputy prosecutor's alternative interpretation of Anderson's evidence, unsupported by any expert testimony or evidence of its own.

Dr. Knopp concluded that Anderson was insane at the time he committed the offense because he was unable to distinguish right from wrong. The State presented no evidence to contradict Dr. Knopp's professional opinion. The trial court did not weigh competing evidence, it simply substituted the deputy prosecutor's and its own judgment for that of Dr. Knopp. The trial court's findings are not supported by substantial evidence in the record. Anderson met his burden of proof, and the trial court should have granted his motion to acquit by reason of insanity.

V. CONCLUSION

Anderson established, by a preponderance of the evidence, that he was insane at the time he committed the charged offense. The court's findings and ruling denying his motion to acquit by reason of insanity were not based on contradictory evidence

presented by the State, but on an unsupported alternative interpretation of Anderson's evidence. The trial court's findings are not supported by any evidence in the record, and Anderson met his burden of establishing legal insanity. This court should reverse the trial court's denial of Anderson's motion for acquittal, and remand for entry of an order dismissing Anderson's conviction.

DATED: April 15, 2011



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Appellant Jay K. Anderson

CERTIFICATE OF MAILING

I certify that on 04/15/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Jay K. Anderson, DOC# 953356, Cedar Creek Corrections Center, P.O. Box 37, Littlerock, WA 98556-0037.



STEPHANIE C. CUNNINGHAM, WSBA #26436

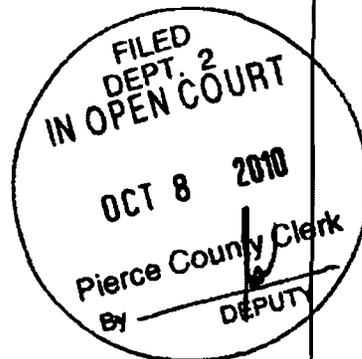
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1000 1ST AVE S
TACOMA WA 98402

APPENDIX

FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER MOTION FOR ACQUITTAL



09-1-04546-3 35174079 FNFL 10-11-10



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY OCT - 8 2010

STATE OF WASHINGTON,

Plaintiff, CAUSE NO. 09-1-04546-3

vs.

JAY KELLY ANDERSON,

Defendant. FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER MOTION FOR ACQUITTAL PURSUANT TO RCW 10.77

THIS MATTER came on for hearing beginning the 26th day of July, 2010, the Honorable Katherine M. Stolz, presiding. The court reviewed the materials that were submitted, heard the testimony of witnesses, and listened to the arguments of counsel. The court is familiar with the relevant statutes and case law on this issue. On July 27, 2010, the court entered an oral ruling denying the defendant's motion for acquittal by reason of insanity.

Now, under RCW 10.77.080, the court herein enters the following written Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I.

The court finds there were a number of blanks and/or gaps in the information provided to Dr. Phyllis Knopp by the defendant. For example, the defendant had a clear and detailed memory of the events that occurred the morning of this incident, then claimed he could not recall the details of the incident.

II.

1 The defendant did not claim he was hearing voices or getting commands to commit the
2 crime. The defendant described getting a “nudge” from his computer that morning, but the
3 “nudge” directed him to go look at some property from the defendant’s past and not to commit
4 the offense he committed.
5

III.

6
7 The court does not find Dr. Knopp is credible when she states she could reasonably reach
8 her conclusion in this incident in 2009 based on an isolated incident in 2002. There were records
9 and/or mental health evaluations between those dates that did not support a conclusion that the
10 defendant was acting under a compulsion to commit the crime he committed in this case.
11

IV.

12 The court does not find Dr. Knopp is credible when she states she can fill in the gaps in
13 the defendant’s memory of this incident with conclusions that he was in fact acting under the
14 direction of voices from “Tech Omega” and/or “Mr. Rothstein.”
15

V.

16
17 Dr. Knopp admits that it is very unusual that a person who is hearing voices directing him
18 to commit an act would not remember the details of the act. Further, it does not make sense that
19 the person who is hearing voices directing him to commit an act would not remember that he was
20 hearing those voices when asked why he committed the act.
21

VI.

22 Many of the defendant’s actions during this incident, as described by the witnesses,
23 suggest the defendant recognized that he was engaging in an act that was wrong.
24
25

VII.

Based on all of the information presented, and from the totality of the circumstances, the court finds Dr. Knopp's conclusion that the defendant was not able to distinguish right from wrong during this incident is not credible.

From the foregoing findings of fact, the court reaches the following conclusions of law:

CONCLUSIONS OF LAW

I.

The defendant has not met his burden of proving by a preponderance of the evidence that he was insane at the time of the commission on the crime charged in this case.

II.

The defendant's motion for acquittal by reason of insanity should be denied.

The court's oral ruling on the admissibility of the defendant's statements was given at the conclusion of the CrR 3.5 hearing, in open court in the presence of the defendant, on July 27, 2010.

These findings and conclusions of law were signed this 8th day of September, 2010.

FILED DEPT. 2 IN OPEN COURT OCT 8 2010 Pierce County Clerk By DEPUTY

JUDGE KATHERINE M. STOLZ

Presented by:

Approved as to form:

JOHN M. NEEB Deputy Prosecuting Attorney WSB# 21322

ED DECOSTA Attorney for Defendant WSB# 21673