

NO. 42314-6-II  
Cowlitz Co. Cause NO. 10-1-01133-9

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

**CHARLES W. DODD,**

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. PROCEDURAL HISTORY**

The appellant was charged by information with three counts of assault in the first degree. Each count carried a firearm enhancement as well. The appellant proceeded to jury trial on June 6, 2011 before the Honorable Judge Michael Evans. After a three day trial, the jury returned guilty verdicts for three counts of assault in the second degree, a lesser included offense, and three firearm enhancements. The appellant received a standard range sentence of 128 months. The instant appeal followed.

## **II. STATEMENT OF THE CASE**

On November 7, 2011, the appellant was residing in a travel trailer on the property of Barbara Nicholas on Rose Valley Road in Cowlitz County. The appellant had been upset for several days, as a neighbor was allowing his children to ride dirt bikes on the adjoining property and the noise was upsetting to the appellant. RP 52-55. Ms. Nicholas went into town to run some errands, when she returned the appellant was upset and demanded that she hand him some ammunition for a 10mm handgun he owned. *Id.* at 55-57. The appellant then loaded the handgun and shot the telephone in the travel trailer twice, then pointed the gun at his head while threatening to kill himself. RP 58-59. Ms. Nicholas noticed that the appellant appeared to be drunk, she observed him leave the travel trailer and enter a small outbuilding nearby. RP 60-61. Ms. Nicholas knew that a

number of firearms and a large amount of ammunition were stored in this shed. She then called 911 to report what was happening. RP 61.

A number of sheriff's deputies responded to the scene, where they observed the appellant firing a handgun through the door of the shed. Id. at 78-80. Though he appeared intoxicated, the appellant was able to repeatedly reload the revolver he was using to fire at the shed door and the surrounding hills. Id. at 80-81. After some time, the appellant walked back to his travel trailer and went inside. Id. at 79.

Due to the fact the appellant was armed with a firearm and was actively shooting, the Cowlitz County Sheriff's Office called out the local SWAT team. Id. at 88-89. The SWAT team and officers from other agencies began to arrive on the scene to contain the situation and evacuate civilians from the area, eventually around 23-30 officers were present. Id. As the incident progressed, the SWAT team sent an armored truck to approach the appellant's trailer and attempt to communicate with him over a loudspeaker. RP Vol. II at 151. The truck was occupied by Deputy Brad Bauman, Officer Tim Deisher, and Sgt. Marc Langlois. Id. at 149-152. After approaching the trailer, the police identified themselves and asked the appellant several times over the loudspeaker to exit the trailer with his hands up. There was no response from the trailer. Id. at 153-154.

As this was happening, one of the officers, Deputy Brent Harris, called the appellant on the telephone in an attempt to end the situation peacefully. RP 133. During a series of phone calls, Deputy Harris repeatedly asked the appellant to put down his guns and exit the travel trailer. The appellant was agitated and angry, and began to demand that the SWAT truck turn off a floodlight pointed at his trailer. *Id.* at 137. The appellant stated he was getting mad at the people near the SWAT truck, then hung up the phone. *Id.* at 138.

After hanging up the phone, the appellant fired three rounds from a handgun at the SWAT truck. This act was observed by Deputy Bauman, Officer Deisher, and Deputy Marc Johnson. Each of these witnesses testified that the appellant aimed a handgun from a window of the trailer at the SWAT truck and then fired three shots in rapid succession. *Id.* at 155-205, 270-271. Fortunately, none of the officers were struck by the bullets.

After the appellant had fired at the SWAT team, the police took further steps to disarm him and end the situation. A number of tear gas canisters were launched into the appellant's trailer. *Id.* at 186-189. The appellant eventually exited the trailer, but refused to comply with the police's commands that he show his hands and get on the ground. *Id.* at 160, 165. Instead, the appellant yelled obscenities at the police before being hit by bean bags and a taser. He was arrested thereafter. RP 229-

230. After his arrest, the police searched the travel trailer where the appellant had been barricaded during the incident. Inside, among other items, the police found a .32 caliber handgun and three spent .32 caliber cartridge cases near the window the appellant had fired the three shots from. RP 284-300.

Prior to trial, the appellant indicated he would pursue a defense of diminished capacity. To this end, the appellant retained the services of Dr. Brett Trowbridge, to conduct a psychological examination prior to trial. CP 75-76. The State requested, and the court ordered, that the appellant also be examined by Western State Hospital staff. CP 5-6. On March 31, 2011, the appellant moved to continue the trial date, as he had not yet received Dr. Trowbridge's report. RP 1-2. On April 27, 2011, the appellant appeared for pre-trial, at that time trial counsel had received Dr. Trowbridge's report, and stated that the experts concluded the appellant's capacity was not diminished and that the defense would not offer this theory at trial. RP Vol. I at 5. The appellant then proceed to trial on June 6, 2011, at the conclusion of which he was found guilty of three counts of assault in the second degree, along with three firearm enhancements.

### **III. ISSUES PRESENTED**

1. Was there Error Related to the Appellant's Potential Defense of Diminished Capacity?

2. Was Trial Counsel Ineffective for Failing to Request Reckless Endangerment as a Lesser Included Offense?

#### IV. SHORT ANSWERS

1. No.
2. No.

#### V. ARGUMENT

##### **I. The Appellant Received a Fair Trial, as There Was no Evidence to Support a Diminished Capacity Defense.**

The appellant argues, at great length, that a variety of errors occurred relating to his attempts, prior to trial, to pursue a diminished capacity defense. At the core of these arguments is an apparent misapprehension by appellant counsel of the requirements for a diminished capacity defense.<sup>1</sup> Notwithstanding this confusion, none of the appellant's claims are well-founded in fact or the law, and should be dismissed by this Court.

##### **a. The Trial Court Properly Ordered the Appellant Undergo an Examination for Diminished Capacity.**

The appellant claims that the trial court, sua sponte, ordered the

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<sup>1</sup> The appellant continually claims that trial counsel, the trial court, and the experts in this case incorrectly applied an insanity defense standard to a claim of diminished capacity. This claim, while remarkable, is unsupported by any actual facts in the record.

appellant be evaluated to determine his sanity at the time of the offense, and that this error somehow persisted and permeated the entire proceeding.<sup>2</sup> However, the actual order entered, CP 5-6, clearly stated that the State had moved for the defendant to be examined as to his capacity to commit the offenses charged. The appellant also argues that there is no statutory authority for the trial court to order a diminished capacity evaluation, and that what was actually ordered was an insanity evaluation thereby confusing and confounding his defense. Again, this claim is directly refuted by the Western State Hospital evaluation order, CP 5-6, which plainly states the appellant was to be examined for diminished capacity, citing RCW 10.77.060(3). Contrary to the appellant's claims, this statute states:

(3) The report of the examination shall include the following:

(e) When directed by the court, an opinion as to the capacity of the defendant to have a particular state of mind which is an element of the offense charged.

Thus, the trial court properly ordered Western State Hospital to evaluate the defendant for diminished capacity, not insanity. Such an evaluation is also proper under CrR 4.7(b)(2)(viii), which authorizes the trial court to require the defendant to submit to a psychiatric examination. Neither the Western State evaluator, Dr. Marilyn Ronnei, nor the defense

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<sup>2</sup> Appellant's brief at 14.

expert, Dr. Brett Trowbridge, expressed any confusion in their reports as to whether the examination was for insanity or diminished capacity. CP 8-21, 111-117.

It is difficult to determine what error, even in theory, the appellant is alleging, but a review of the record and the law reveals no impropriety. Even if the appellant's claims were correct, he fails to indicate how such an error would be a basis for any prejudice or a successful appeal. The Court should reject the appellant's nebulous claim that the trial court improperly ordered a diminished capacity evaluation.

**b. There Was Insufficient Evidence to Support a Diminished Capacity Defense at Trial.**

The appellant argues that trial counsel was ineffective by failing to present a diminished capacity defense and failing to request the diminished capacity jury instruction, WPIC 18.20. However, the appellant's argument ignores the legal requirements for presenting such a defense, and fails to understand that there was no basis in the record in this case for such a defense.

Diminished capacity, when asserted as a defense, allows the defense to introduce evidence relevant to subjective states of mind. State v. Stumpf, 64 Wn.App. 522, 524-25, 827 P.2d 294 (1992). Diminished capacity allows the defendant to "negate the culpable mental state element

of a crime by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished.” Stumpf, 64 Wn.App. at 525, State v. Marchi, 158 Wn.App. 823, 243 P.3d 556 (2010). However, the defense must offer expert testimony in order to advance a claim of diminished capacity and obtain the jury instruction. Stumpf, 64 Wn.App. at 526. The court in Stumpf held that:

Although lay testimony may be admitted to supplement expert testimony if the proper foundational requirements are met, the existence of an alleged mental disorder such as that asserted here and its connection with the diminished capacity constitute subject matter beyond lay expertise. Therefore, when a diminished capacity defense is asserted in a criminal action, expert testimony is required to establish the existence of the alleged mental disorder, as well as the *requisite causal connection between the disorder and the diminished capacity*. In so holding, we rely on the general rule that expert testimony is required “when an essential element in a case is best established by opinion but the subject matter is beyond the expertise of a lay witness.”

64 Wn.App. at 526-27 (emphasis added). In Stumpf, the court upheld the refusal to allow lay witnesses to testify to the defendant’s mental state, absent any expert testimony that (1) he suffered from a mental disease or disorder and (2) there was a connection between the disorder and an actual diminution of capacity. Id. at 527-28.

The Supreme Court reaffirmed the requirement of expert testimony to establish a connection between the mental disorder and the purported diminished capacity in State v. Atsbeha, 142 Wn.2d 904, 16 P.3d 626

(2001). There, the defendant was charged with delivery of a controlled substance, and sought to offer a diminished capacity defense. The defense offered the testimony of a medical doctor that the defendant suffered from brain damage, depression, and other maladies. Atsbeha, 142 Wn.2d at 908-10. However, while the defense expert would testify to the existence of these mental disorders, the expert expressly stated that the defendant's capacity was not diminished as a result. Id. at 910-11. Given this statement, the trial court excluded any testimony as to diminished capacity.

The Supreme Court upheld this decision, ruling that:

To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged.... *It is not enough that a defendant may be diagnosed as suffering from a particular mental disorder.* The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime. *The opinion concerning a defendant's mental disorder must reasonably relate to impairment of the ability to form the culpable mental state to commit the crime charged.*

Id. at 921. See also State v. Eakins, 127 Wn.2d 490, 502, 902 P.2d 1236 (1995) (Defendant must prove diminished capacity through expert testimony that he suffered from a mental condition that impaired his or her ability to form the requisite intent); State v. Davis, 64 Wn.App. 511, 517, 827 P.2d 298 (1992) (Expert testimony must show how the mental

condition impaired the defendant's ability to form the mental state at issue, not simply the existence of a mental condition); and State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998).

In the instant case, the appellant was examined by Dr. Marilyn Ronnei with Western State Hospital and Dr. Brett Trowbridge, a psychologist retained by the appellant. Dr. Ronnei's report, CP 8-21, diagnosed the appellant as suffering from posttraumatic stress disorder (PTSD), major depression, and alcohol dependence. However, Dr. Ronnei's opinion was that "none of the data suggested that Mr. Dodd lacked the capacity to form the requisite level of intent" for the charges at issue. CP 20. Dr. Trowbridge also examined the appellant and issued a report.<sup>3</sup> CP 111-117. Dr. Trowbridge diagnosed the appellant with PTSD and bi-polar disorder, currently in a depressive state. CP 117. Though he opined that the appellant's acts were "caused by [his] serious mental illness", Dr. Trowbridge ultimately concluded that the appellant's "behavior during the time of the alleged incident does not suggest an inability to form the requisite 'intent'" for the crimes at issue. Id.

Based on the conclusions of these two experts, one retained by the appellant, there was no expert evidence that could be offered at trial that

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<sup>3</sup> Dr. Trowbridge holds a doctorate in Psychology, and is also admitted to practice as an attorney in the State of Washington. See "The new diminished capacity defense in Washington." Brett C. Trowbridge, 36 Gonz.L.Rev. 497 (2000/2001).

would establish the appellant's mental disorders resulted in a diminished capacity to form the intent at issue. Such testimony is explicitly required by Stumpf, Atsbeha, and the other authorities cited above. In fact, the appellant's own expert unequivocally *rejected* the applicability of a diminished capacity to the appellant. The appellant's claims that the trial court and prosecutor acted improperly is specious in light of these facts and the controlling authority. Similarly, the appellant's current claim that his trial counsel was ineffective for failing to pursue such a meritless defense is incredible.

To prove his claim, the appellant must show that (1) trial counsel's performance was deficient and (2) this deficiency prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Importantly, while the law requires effective assistance of counsel, it does not, for obvious reasons, guarantee this assistance will be successful. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Counsel's performance becomes deficient when it falls below an "objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). There is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). The appellant bears the burden of meeting this high

standard, as the courts give great deference to the decisions of defense counsel. State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).

Even when trial counsel's performance was deficient, the appellant must still establish he was prejudiced by the deficiency. Prejudice is established only when "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Bearing this deference in mind, the courts have held that "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." Grier, 171 Wn.2d 17, quoting State v. Kyлло, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). In order to rebut the presumption of reasonable performance, the appellant must show that there was "no conceivable legitimate tactic explaining counsel's performance." State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). In Grier, the Supreme Court noted court further explained that "courts should be loath to second-guess the defendant's approach, risky or not." 171 Wn.2d at 40.

Here, given that there was expert testimony to advance the claim of diminished capacity, trial counsel wisely chose to abandon a fruitless endeavor and pursue more profitable theories. This is not mere

speculation, as at a pretrial hearing, trial counsel stated that given, the results of the evaluations, the defense was not offering diminished capacity. RP 5. Significantly, trial counsel obtained an acquittal on the first degree assault charges, thus saving the appellant a probable sentence that would have been two to three times longer than his current one. Based on this record, the claim of ineffective assistance is wholly without merit, and should be soundly rejected by this Court.

**c. The Trial Court Did Not Abuse Its Discretion By Excluding Evidence of the Appellant's Military Service.**

The appellant argues the trial court abused its discretion by excluding testimony that the appellant had served in the military during the Vietnam War, and that this military service was the cause of the PTSD, depression, and tinnitus that he suffered from. However, the exclusion of this evidence was within the trial court's discretion.

On appeal, this Court reviews the admission or exclusion of evidence under an abuse of discretion standard. State v. Baldwin, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs only when the trial court's decision is "manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001); quoting State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Regarding the abuse of discretion standard, the Supreme

Court has held that “[i]t is not this court's duty to supplant the trial court's discretion with our own.” State v. Cheatham, 150 Wn.2d 626, 645, 81 P.3d 830 (2003).

Here, the appellant argues that the trial court incorrectly excluded testimony that he had served in the military during the Vietnam War and that the conditions he exhibited, PTSD, tinnitus, and depression, were linked to his military service. However, the appellant fails to identify the relevance of these facts. Whether the appellant served in the Vietnam War or not does not make it any more or less probable that he intentionally fired at the SWAT team. Instead, this evidence is character evidence, and as such is inadmissible unless offered for a specific, pertinent, trait. ER 404(a). The appellant did not identify such a trait at trial, or on appeal. Neither of the two experts linked the appellant’s military service to a lack of capacity to commit the crime. Given this, the trial court cannot be said to have abused its discretion by excluding evidence when the proponent cannot explain its significance.

Even if this Court should find error on this issue, it would be harmless in light of the other evidence against the appellant. When the trial court commits an error, such an error only justifies reversal if it results in prejudice. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is without prejudice, or harmless, where the evidence is

of minor significance compared with the overwhelming evidence as a whole. State v. Yates, 161 Wn.2d 714, 766, 168 P.3d 359 (2007). Given the wealth of evidence that the appellant fired at three members of the SWAT team, the eyewitnesses, his statements of anger, and the physical evidence, the fact that he served in the military would not have swayed the jury's verdict.

**d. The Claim of a “Constructive Crawford Violation” is Meritless.**

The appellant's final claim related to the failed diminished capacity defense is that the consideration of the experts' reports by trial counsel and the prosecution somehow amounted to a “constructive” violation of his right to confront witnesses under the United States and Washington State constitutions and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Unsurprisingly, the appellant offers no authority or support for his theory that a confrontation clause violation may occur where the parties decide *not* to call certain witnesses, and the witnesses' statements are *not* admitted at trial.

Intriguingly, the appellant suggests that he should have “grilled under oath” Dr. Trowbridge and Dr. Ronnei regarding their “credentials and competency.”<sup>4</sup> Ultimately, this legal argument, to the extent it may be

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<sup>4</sup> Appellant's brief at 41.

considered such, amounts to the appellant being displeased with the findings of the experts. There is no appellate remedy for this. The Court should reject this argument, which verges on frivolity.

**II. Trial Counsel Was Not Ineffective for Failing to Request Reckless Endangerment as a Lesser Included Offense.**

Finally, the appellant argues trial counsel was ineffective by failing to propose reckless endangerment as a lesser included offense. To prove this claim, the appellant must show that (1) trial counsel's performance was deficient and (2) this deficiency prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). Importantly, while the law requires effective assistance of counsel, it does not, for obvious reasons, guarantee this assistance will be successful. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Counsel's performance becomes deficient when it falls below an "objective standard of reasonableness." State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). There is a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). The appellant bears the burden of meeting this high standard, as the courts give great deference to the decisions of defense counsel. State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).

Even when trial counsel's performance was deficient, the appellant must still establish he was prejudiced by the deficiency. Prejudice is established only when "there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different." State v. Kyлло, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The appellant argues that his trial counsel was ineffective for failing to propose reckless endangerment, RCW 9A.36.050, as a lesser included offense. The appellant claims, without any citation to authority, that reckless endangerment is a lesser included offense of assault. However, as will be seen, this claim is wholly without legal support.

A defendant is entitled to an instruction on a lesser included offense if the two-prong test articulated in State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) is satisfied. Under the legal prong of the test, "each of the elements of the lesser offense must be a necessary element of the offense charged." State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (quoting Workman 90 Wn.2d at 447-48.) Under the factual prong, evidence in the case must support an inference that solely the lesser crime was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455.

Applying the Workman test, the courts have repeatedly held that reckless endangerment is not a lesser included offense of assault. In State v. O'Neal, 23 Wn.App. 899, 903, 600 P.2d 570 (1979), the court held that reckless endangerment was not a lesser included offense of assault in the first degree or assault in the second degree. The O'Neal court noted that reckless endangerment, as defined in RCW 9A.36.050, requires proof of the "creation of a substantial risk of death or serious physical injury", which is not a necessary element of any degree of assault. 23 Wn.App. at 903. Thus, reckless endangerment fails the legal prong of the Workman test and is not a lesser included offense of assault. Similarly, in State v. Ferreira, 69 Wn.App. 465, 470, 850 P.2d 541 (1993), the court found that reckless endangerment was not a lesser included offense of assault in the first or second degree where the defendant had participated in firing several shots at an occupied residence. Again in State v. Rivera, 85 Wn.App. 296, 302, 932 P.2d 701 (1997), the court found reckless endangerment was not a lesser included offense of assault where the defendant had fired a gun at a gas station. Most recently in State v. Prado, 144 Wn.App. 227, 242, 181 P.3d 901 (2008), the court again held that reckless endangerment was not a lesser included offense of assault.

As reckless endangerment is not a lesser included offense of assault in the first or second degree, trial counsel was not ineffective for

failing to propose such an instruction. There can be no deficient performance for not proposing an erroneous jury instruction. Similarly, the appellant cannot show any prejudice, as the trial court would not have give a lesser included offense of reckless endangerment even if proposed. Thus, the appellant fails to satisfy either of the requirements to prove ineffective assistance under the test set forth in State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987). The Court should reject this argument as wholly lacking in merit.

## VI. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court deny the instant appeal. The issues asserted by the appellant are not well founded in either the record or the law. The appellant's convictions should stand.

Respectfully submitted this 15<sup>th</sup> day of March, 2012.

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By: \_\_\_\_\_

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**CERTIFICATE OF SERVICE**

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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

Signed at Kelso, Washington on March 1, 2012.

  
\_\_\_\_\_  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

## March 01, 2012 - 9:20 AM

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