

NO. 45380-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHRISTOPHER D. THORSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Toni A. Sheldon, Judge
Cause No. 12-1-00153-7

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in failing to give Thorson proposed instruction 9 on diminished capacity.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether the trial court committed reversible error in refusing to give Thorson's proposed instruction 9 on diminished capacity?

C. STATEMENT OF THE CASE

01. Procedural Facts

Christopher D. Thorson was charged by first amended information filed in Mason County Superior Court January 10, 2013, with premeditated murder in the first degree with firearm enhancement, contrary to RCWs 9A.32.030(1)(a) and 9A.94A.825. The information further alleged domestic violence as defined in RCW 10.99.020, and two aggravating circumstances: (1) that Thorson knew or should have known the victim was particularly vulnerable or incapable of resistance, contrary to RCW 9.94A.535(3)(b), and (2) that Thorson conduct manifested deliberate cruelty or intimidation of the victim, contrary to RCW 9.94A.535(3)(h)(iii). [CP 113-14].

No pretrial motions were heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 117; RP 32, 51]. Trial to a jury commenced August 15, the Honorable Toni A. Sheldon presiding.

Thorson was found guilty as charged, sans aggravating factors, sentenced within his standard range, and timely notice of this appeal followed. [CP 3-21, 24].

02. Substantive Facts

Near 3:45 in the late afternoon of April 14, 2012, an upset Christopher Thorson called 911 to report he had just shot his wife Vanessa, saying he “couldn’t put up with her any longer. She’s been really sick and she asked me to do it.” [State’s Exhibit 38 at 1]. Later, following advisement and waiver of rights, then 64-year-old Thorson explained that his marriage had all but collapsed after 37 years and that he and his wife had adopted a routine of constant argument and that this day was no different, except for how it ended. [RP 363-65; State’s Exhibit 38 at 3-5, 11-14]. They had argued since early morning, neither able to let it go, when his wife screamed at him to shoot her, that she just couldn’t go on like this. [State’s Exhibit 38 at 11, 15-16].

And she says we are fucking losing our ass and she says I’m losing everything. And I says Vanessa we can’t do we just and she says would you just kill me and get it over with. I can’t do this anymore. And I says what are you talking about. She says we’ve lost everything totally lost everything. She says just go get one of your guns and do, no she didn’t say get get (sic) a gun I I (sic) correct that, she says just kill me and get this over with. I says what are you talking about. She says I’m a crazy bitch, my son’s in prison, we’ve lost everything. And I guess fella’s what

came down to the bottom line I guess I just lost everything too....

[State's Exhibit 38 at 11].

Thorson said he suffers from depression and pulmonary issues and was on "every kind of God damn medicine that you could imagine. I have to take a pill at night to go to sleep because my brain's crazy." [State's Exhibit 38 at 11-12]. He went to the "hope chest" in the master bedroom, put together and loaded his son's shotgun stored therein, returned to the living room and shot his wife twice as she lay on the couch, returned to the master bedroom, disassembled the gun and put it back in the chest before having some wine and a cigarette on the back porch and then calling to report the incident. [RP 245-46, 391; State's Exhibit 38 at 32-35]. Ms. Thorson died as a result of two gunshot wounds fired from an estimated distance of between six to eight feet. [RP 425, 434].

At trial, evidence was presented that at the time of the shooting, Ms. Thorson's blood alcohol level was .45 [RP 436, 441]; Thorson tested at .144 six hours later, with an estimated ".234, around there, when the event occurred." [RP 302]. The two had been drinking heavily prior to the shooting. [RP 490]. A psychiatrist for defense testified that at the time of the shooting, Thorson's ability to premeditate or to form the requisite intent for murder was impaired because he was suffering from alcohol

induced delirium when he fired the weapon at his wife. [RP 305-06, 313]. The State's psychologist differed, opining that Thorson suffered from alcohol intoxication [RP 526], which did not prevent him from premeditating or forming the requisite intent for murder. [RP 529]. "It's my opinion he had the capacity." [RP 578]. "I do not disagree about intoxication. I disagree with (psychiatrist for defense) about the delirium." [RP 553].

D. ARGUMENT

THE TRIAL COURT COMMITTED
REVERSIBLE ERROR IN REFUSING
TO GIVE THORSON'S PROPOSED
INSTRUCTION 9 ON DIMINISHED
CAPACITY.

Thorson took exception to the trial court's failure to give his proposed instruction 9 on diminished capacity [RP 713], which states:

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

[Defendant's Proposed Instruction No. 9; CP 82; 11 Washington Practice: Washington Pattern Jury Instructions-Criminal 18.20 at 286 (3d ed. 2008).

In declining to give the instruction, the trial court summarily stated it was doing so "because the WPIC 18.10, which is voluntary intoxication,

does allow the defense to argue their theory of the case as explained in State v. Hanson.¹ Court's instruction 7 reads:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted with premeditation and/or intent.

[CP 37; 11 Washington Practice: Washington Pattern Jury Instructions-Criminal 18.10 at 282 (3d ed. 2008)].

A defendant in a criminal case is “entitled to have the trial court instruct upon [his or her] theory of the case if there is sufficient evidence to support the theory.” State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). “In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses’ credibility, which are exclusive functions of the jury.” State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000). Failure to give a defendant’s proposed instruction that is supported by the evidence constitutes reversible error where the absence of the instruction prevents the defendant from presenting his or her theory of the case. State v. Jones, 95 Wn.2d 616, 623, 628 P.2d 472 (1981).

¹ 46 Wn. App. 292, 730 P.2d 706 (1986), amended by 737 P.2d 670 (1987), concerning an unrelated issue.

In Hanson, the defendant suffered from schizophrenia brought on by his long history of drug abuse, and was under the influence of drugs at the time of the charged kidnapping and rape. Hanson, 46 Wn. App. at 294. In affirming his convictions, Division I of this court rejected the argument that the trial court had erred by giving a voluntary intoxication instruction instead of a diminished capacity instruction for the jury's consideration of Hanson's ability to form the requisite intent, holding:

[W]e find the instructions given by the trial court were sufficient to permit Hanson to argue, based on the evidence, his theory of the case. The court did not err, therefore, by refusing to give the additional instructions on diminished capacity that Hanson proposed.

Id. at 300.

A reasonable conclusion from the entire record is that Thorson was intoxicated, that the mental disorder of alcohol induced delirium is recognized by the Diagnostic and Statistical Manual of Mental Disorders (4th rev. ed. 2000) (DSM), and that there was sufficient evidence Thorson suffered from this disorder at the time of the shooting. [RP 261-62, 301, 304-05, 553].

Dr. Steven M. Juergens, a psychiatrist specializing in general and addiction psychiatry, testified in detail that to a reasonable medical certainty Thorson suffered from alcohol induced delirium, a psychiatric illness according to DSM. [RP 261-62, 301].

A delirium is a mental state that has to do with being confused. And it can go on and off. It can - - people have a lack of awareness on what's going on around them. They're not able to focus consistently. They may get an idea and over-react to it. They're very moody. And we talk about liability. Their moods can go from euphoria, to irritability, to anger, to being stuporous, and then come back again, appear normal for a time. And so it - - their moods can change, and their mental state can change.

[RP 304].

It's a mental disorder.²

[RP 305].

Court's instruction 7 on voluntary intoxication did not provide an adequate vehicle for guiding the jury's examination of the evidence vis-à-vis Thorson's theory of the case, and any argument to the contrary is mythic. While, as noted, the Hanson case appears to have rejected a similar argument, that case is difficult to parse, particularly given the court's total lack of discussion of the content of the rejected diminished capacity instruction. Here, proposed instruction 9 focused on whether a "mental illness or disorder" prevented Thorson from forming the requisite intent, as contrasted with court's instruction 7, which limited the focus to simply whether intoxication, standing alone, interfered with Thorson's

² Doctor Judith Kirkeby, a psychologist testifying for the State, conceded that alcohol induced delirium is a mental disorder recognized by DSM. [RP 553].

ability to premeditate and/or intend the offense. The Hanson court never addressed whether such dichotomy surfaced in its case.

Court's instruction 7 (voluntary intoxication) and Thorson's proposed instruction 9 (diminished capacity) are not the same in either words or focus. The former tells the jury that Thorson's shooting of his wife is not "less criminal" if he did it while voluntary intoxicated, though his intoxication—and only his intoxication—may be taken into account in determining his mental capacity. In contrast, the proposed diminished capacity instruction would have permitted the jury to consider Thorson's mental disorder (delirium), which was induced by alcohol, in deciding his mental state to commit the crime. It takes and requires an extra step: the alcohol caused the delirium that in turn prevented Thorson from intending the offense, with no focus or consideration allotted to whether this renders his actions "less criminal." The attention is brought to whether the delirium—and not just the alcohol—prohibited Thorson from forming the requisite intent. Succinctly, as applied to this case, diminished capacity is the result of a mental condition (delirium) that impaired Thorson from developing the requisite mental state (premeditation/intent) required to commit the charged offense. Voluntary intoxication, on the other hand, is not a defense, as such, but merely a factor that a jury may consider in

determining if a defendant acted with the specific mental intent required for the crime charged. RCW 9A.16.090.

Of note, in testifying for the State, Doctor Kirkeby acknowledged there was a difference between alcohol intoxication and delirium induced by alcohol [RP 525-27], commenting:

In my experience I've seen people who are in - - in delirium - - in a delirious state from intoxication - - from alcohol. And it's quite remarkable.

[RP 527].

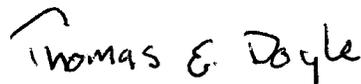
Division I, in Hanson, got it wrong, and the trial court's reliance on Hanson in declining to give Thorson's proposed instruction prevented him from presenting his theory of the case, and in the process infringed upon his Sixth Amendment right to decide, within limits, his own defense. See State v. Coristine, 177 Wn.2d 370, 374-75, 300 P.3d 400 (2013).

Thorson's conviction must be reversed and remanded for retrial.

E. CONCLUSION

Based on the above, Thorson respectfully requests this court to reverse his conviction and remand for retrial.

DATED this 27th day of June 2014.



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CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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