FILED
Court of Appeals
Division II
State of Washington
12/21/2018 3:33 PM

NO. 51777-9-II

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

STATE OF WASHINGTON, Appellant/Cross-Respondent

v.

CORY TAYLOR PRATT, Respondent/Cross-Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02135-2

BRIEF OF CROSS-RESPONDENT AND REPLY OF APPELLANT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. The trial court properly excluded irrelevant expert testimony.

SUPPLEMENTAL STATEMENT OF THE CASE

In addition to the statement of the case contained in the State's opening brief, the State submits the following brief summary of facts relevant to the defendant's claim:

Pratt asked the trial court to allow him to present an expert to testify about a sleep disorder called sexsomnia. RP 52-67. This expert would testify that the disorder exists, but could not indicate whether Pratt had the disorder, nor could he opine whether the disorder affected Pratt's ability to form the culpable mental state. *Id.* The trial court excluded the evidence finding there was insufficient proof to support a diminished capacity defense as Pratt did not suffer from a mental disease or defect, and the trial court found the evidence was otherwise irrelevant to a general denial defense. RP 52-82.

ARGUMENT

I. The trial court properly excluded irrelevant expert testimony

Pratt argues the trial court improperly excluded evidence of a sleep disorder called sexsomnia, despite the fact that there was no evidence Pratt

suffered from such a disorder, and no expert could opine that Pratt did have the disorder or that the disorder played any role in the crime. The trial court correctly excluded this irrelevant evidence and Pratt's conviction should be affirmed.

Admissibility of evidence is generally within the sound discretion of the trial court. *State v. Atsbeha*, 142 Wn.2d 904, 921, 16 P.3d 626 (2001). Absent an abuse of discretion, an appellate court will not reverse a trial court's decision to exclude expert testimony offered to establish a diminished capacity defense. *Id.* A trial court abuses its discretion when it makes a conclusion no reasonable person would reach. *Id.* at 922.

Pratt proffered evidence from an expert on the subject of sexsomnia for two purposes: 1) to support a defense of diminished capacity; and 2) to prove to the jury that a disorder exists in which people can perform sex acts while unconscious. RP 52-67. The trial court considered the admission of the evidence under both provisions – to support a potential diminished capacity defense, and as to relevance without a diminished capacity defense. *Id.*

Diminished capacity arises out of a mental disorder, one that does not usually amount to insanity and that has a specific effect on one capacity to achieve the level of culpability required for a given crime. *State v. Ferrick*, 81 Wn.2d 942, 944, 506 P.2d 860, *cert. denied*, 414 U.S.

1094, 94 S.Ct. 726, 39 L.Ed.2d 552 (1973). Evidence of the mental disorder is only admissible "if it tends logically and by reasonable inference to prove that a defendant was incapable of having the required level of culpability." *State v. Gough*, 53 Wn.App. 619, 622, 768 P.2d 1028 (1989). Not only does a defendant need to suffer from a mental disorder, but there must be evidence to connect the disorder and the diminution of capacity. *State v. Edmon*, 28 Wn.App. 98, 103, 621 P.2d 1310, *review denied*, 95 Wn.2d 1019 (1981). "Diminished capacity...allows a defendant to undermine a specific element of the offense, a culpable mental state, by showing that a given mental disorder had a specific effect by which his ability to entertain that mental state was diminished." *Gough*, 53 Wn.App. at 622. In order to present a diminished capacity defense, a defendant must produce expert testimony that demonstrates a mental disorder impaired his ability to form the culpable mental state to commit the crime charged. *Id.* The admissibility of evidence from an expert concerning a diminished capacity defense is governed by ERs 401, 402, and 702. *Atsbeha*, 142 Wn.2d at 916. A claim of sexsomnia is an argument that the defendant committed an act while in a state of unconsciousness; such claims do not amount to diminished capacity, and are not relevant in the context of establishing a diminished capacity defense. *See State v. Utter*, 4 Wn.App. 137, 479 P.2d 946 (1971) (holding that the theory of involuntary or

automatistic acts does not involve a claim of a mental disease or defect sufficient to establish a diminished capacity defense.). Thus, the type of mental disorder Pratt claimed was relevant to his case is not one that qualifies as diminished capacity. In addition, Pratt could produce no evidence that he even suffered from this sleep disorder and thus the evidence was properly excluded as irrelevant.

ER 401 defines "relevant evidence." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Atsbeha*, 142 Wn.2d at 921; ER 401. ER 402 provides that irrelevant evidence is not admissible. ER 402. ER 702 allows admission of scientific, technical or other specialized information if it will assist the trier of fact in understanding the evidence or in determining a fact in issue. ER 702. An expert's testimony under ER 702 is only admissible if it is relevant as required under ER 402 and 401.

In Pratt's case, his potential expert witness's testimony was neither relevant under ER 401 nor helpful to the trier of fact under ER 702 given the evidence presented at trial and the proffered evidence of the expert. Pratt argued general denial at trial; that was the defense he gave notice to the State he was producing, and in reality it was the only defense available to him. At trial, Pratt asked the Court to allow him to introduce evidence

regarding a diminished capacity defense of sexsomnia, a purported sleep disorder in which a person may engage in sex acts while asleep. RP 57-65. However, there was no medical opinion that Pratt suffered from sexsomnia, even from Pratt's own expert. And, there was no indication made to the court that Pratt himself was going to testify to any symptoms of the disorder, and in fact Pratt never testified in any way that would suggest he suffered from any sleep disorder or disturbance. *Id.* In fact, Pratt testified that at no time during the entire weekend did he have inappropriate contact with a child. RP 325. Pratt did not testify that he did not know if he had inappropriate contact with the victim because he was asleep and maybe he did it in his sleep. RP 325. Instead, Pratt testified that he never touched M.B. and had no reason to touch her. RP 341. Thus Pratt did nothing to establish he had a mental disease or defect which could be the basis for a diminished capacity defense. The trial court properly excluded the evidence and the defense of diminished capacity.

The trial court also addressed the general relevance of the evidence even absent a diminished capacity defense. Pratt wanted to argue that the child molestation did not occur at all, or if it did, it happened while he was asleep. Being asleep is an affirmative defense that the defendant bears the burden of proving. *State v. Deer*, 175 Wn.2d 725, 733, 297 P.3d 539 (2012). In *Deer*, the defendant argued that her acts of rape of a child were

not voluntary because she was asleep when they occurred. *Deer*, 175 Wn.2d at 728. Our Supreme Court addressed whether the State had the burden of proving the *actus reas* of the crime of rape of a child was volitional. *Id.* at 731-32. The Court found the State did not have a burden of proving the act was done while the defendant was conscious as consciousness, i.e., volition, was not an essential component of the crime. *Id.* Instead, the Court found that lack of conscious action is an affirmative defense like involuntary intoxication, insanity, or unwitting possession. *Id.* at 733. Thus, a defendant has a burden of making a showing that he is entitled to instructions and to present evidence in support of an affirmative defense. *State v. Utter, supra*, also supports the finding that being asleep while committing a crime may arise to an affirmative defense. *Utter*, 4 Wn.App. at 141. Thus, it is established that Pratt's potential, almost half-claim of sexsomnia was an affirmative defense that he had to prove by a preponderance of the evidence.

When a defendant has no evidence of a potential affirmative defense, the defendant is not entitled to present expert testimony to support that defense. A defendant has the right to present a defense, but he does not have the right to admit irrelevant evidence. *State v. Rafay*, 168 Wn.App. 734, 800, 285 P.3d 83 (2012). A defendant's constitutional right to present a defense "is not absolute and does not guarantee the admission

of irrelevant or otherwise inadmissible evidence." *Id.* (citations omitted). The fact that a sleep disorder exists without any tie to the case such that the defendant has the disorder is completely irrelevant. The defendant testified he never touched a child inappropriately, he never suggested he may have touched her but without the purpose of sexual gratification. Evidence that fewer than 100 cases have sexsomnia have ever been diagnosed in the entire world would not have helped the jury understand the facts of the case or decide a fact in issue. Extraneous information without any ties to the case is a classic example of irrelevant evidence. Here, the judge did not make a decision no other reasonable judge would have made. It was based on the law and on common sense. The trial court did not abuse its discretion in declining to admit the evidence either for purposes of a diminished capacity defense or in support of a general denial defense. Pratt's claim should be denied.

CONCLUSION

The trial court properly excluded evidence of sexsomnia as Pratt did not establish its relevance to a diminished capacity defense nor to his general denial defense. The trial court should be affirmed.

REPLY BRIEF OF APPELLANT

ARGUMENT

Pratt contends there is sufficient evidence to support the trial court's finding that the victim and defendant had a relationship prior to the molestation by indicating there was conflicting evidence regarding the relationship and the trial judge was the proper authority to determine the credibility of the evidence and to resolve disputes of fact. However, Pratt misunderstands the State's argument and the evidence presented to the court. There was no conflicting testimony regarding a relationship between the victim and the defendant. There was only testimony that supported a finding that there was no relationship. The State did not argue in its opening brief that because of conflicting testimony the trial court improperly weighed the testimony finding for one side versus the other. Instead, the State clearly argued that there was *not substantial evidence* presented that supported the trial court's conclusion. It was not a situation in which there was conflicting testimony or other evidence; this is a situation in which a judge made a factual finding based on an absence of evidence to support the finding.

Whether the defendant was once at the same party as the victim's parents does not equal a relationship with the victim. Pratt points to testimony from Sarah Jackson indicating that Pratt was at a party with the

victim or her parents before, yet she was unable to testify to any actual interaction between them: "I don't know if they were in – really talked to each other ever," she said, regarding the victim's parents and Pratt. RP 135. And Ms. Jackson also said she is not sure that Pratt ever spoke with the victim before. RP 135. In elaborating on that, Ms. Jackson noted she didn't think they ever had too much of a conversation with each other, possibly only ever saying hi or bye. RP 135-36. A lot of people say hi and bye to cashiers, waiters, unknown persons on the sidewalk and this does not make a relationship exist. Pratt's contention and the trial court's finding that this interaction, even if it occurred, created a relationship is an improper legal conclusion based on an improper definition of the word "relationship." Additionally "knowing of" someone does not establish a relationship. This author "knows of" many famous people with whom she does not enjoy a relationship, and certainly not an "established relationship." That Pratt was aware that his uncle's wife's step-sister had a daughter does not create a relationship between that child and Pratt.

For the remainder of Pratt's arguments, the State relies upon its arguments made in its opening brief.

CONCLUSION

The trial court improperly found that the victim and Pratt had an "established relationship" based on remote family ties without requiring any actual interaction or real-life connection. The SSOSA sentence should be reversed.

DATED this 21st day of December, 2018.

Respectfully submitted:

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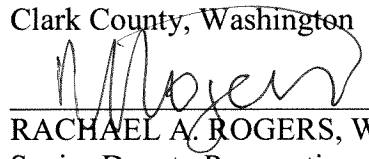
By: 

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December 21, 2018 - 3:33 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	51777-9
Appellate Court Case Title:	State of Washington, Appellant/Cross-Resp v. Cory Pratt, Resp./Cross-Appellant
Superior Court Case Number:	16-1-02135-2

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