73813-5

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Court of Appeals
Division I
State of Washington

No. 73813-5-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHAUN WEBB,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court denied Shaun Webb his state and federal constitutional rights to present a defense.

2. Trial counsel was ineffective for failing to pursue a diminished capacity defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments to the United States Constitution and Article 1, § 22 of the Washington Constitution protect a criminal defendant's right to present a defense, including the rights to call witnesses and present relevant evidence. A defense of diminished capacity allows consideration of whether a mental disorder impaired the defendant's ability to form the requisite mental state to commit the crime charged. The trial court excluded testimony of a defense witness that would have testified concerning Mr. Webb's mental illness, which was caused by a traumatic brain injury. Did the court's ruling deny Mr. Webb the right to present a defense?

2. Did trial counsel fail to provide the effective representation guaranteed under the state and federal constitutions, when counsel failed to raise the defense of diminished capacity, despite significant evidence of Mr. Webb's mental illness?

C. STATEMENT OF CASE

On May 14, 2014, Shaun Webb, an inmate at Monroe Correctional Center, attended a meeting with his mental health counselor, Alicia St. John. RP 47-48. Mr. Webb is confined to the Special Offender Unit (SOU) at Monroe, a unit reserved for inmates with diagnosed mental health conditions and other behavioral difficulties. RP 66.

Mr. Webb was accompanied to this meeting by two correctional officers, for security purposes. RP 75-76. In addition, Sergeant Dennis Bennett attended the meeting to assist the counselor with input about Mr. Webb's daily routine and to provide additional security. RP 47-48. The meeting took place in the program room, a location which is highly visible to Department of Corrections (DOC) staff, due to its glass walls. RP 49-50.

DOC staff members testified that as the meeting proceeded, Mr. Webb became upset as he spoke with Ms. St. John, his counselor. RP 75. As Mr. Webb's voice escalated, Sergeant Bennett told Mr. Webb repeatedly that the meeting was over and ordered Mr. Webb to return to his cell. RP 51-53. When Mr. Webb refused to do so, one of the DOC officers told Ms. St. John to leave the program room, and the sergeant

issued a distress signal for the Quick Response Strike (QRS) team to respond to the program room. RP 55-56.

The QRS team began to arrive within seconds. RP 57-58, 77, 86. Sergeant Bennett ordered Mr. Webb to kneel, so that he could be restrained. RP 59-61. When Mr. Webb refused, Sergeant Bennett grabbed Mr. Webb's arm. Id. Mr. Webb pulled his arm away, and his hand apparently came into contact with the sergeant's face. Id.; at 160-63.[1] Mr. Webb was then tackled by at least eight DOC officers, who restrained him and escorted him to segregation, where he remained. RP 167. Sergeant Bennett stated he had a headache following the incident, but required no medical attention and took no time off from work. RP 62-63, 65, 71. Mr. Webb, however, required hospitalization for several weeks following this incident. CP 83.[2]

Mr. Webb was charged with one count of custodial assault against Sergeant Bennett. CP 163-64.

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[1] The DOC witnesses, including Sergeant Bennett, described the contact as a "punch;" Mr. Webb denied punching Bennett, and described it a "smack," maintaining it was accidental. RP 160.

[2] DOC officers admitted that Mr. Webb sustained a number of blows and punches to the head while on the ground; Mr. Webb was hospitalized for several weeks following the incident in May 2014. RP 73, 85, 91(Officer Miller: "I struck him with my right hand several times in the head"); CP 83.

At trial, the State moved in limine to exclude evidence related to Mr. Webb's mental health diagnoses or conditions. RP 4-5. Mr. Webb argued that his mental health was relevant to his defense, to provide context for Mr. Webb's actions, and to show bias on the part of the corrections staff. RP 5. Mr. Webb argued his due process right to present a defense included the right to testify about his mental health condition, as well as to present evidence of his condition through Ms. St. John, and by cross-examination of the State's witnesses. RP 5-7. The court disagreed, granting the State's motion and excluding evidence of Mr. Webb's mental health condition. RP 6-7.

The jury convicted Mr. Webb of the sole count of custodial assault. CP 141.

D. ARGUMENT

THE TRIAL COURT DEPRIVED MR. WEBB OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY EXCLUDING RELEVANT TESTIMONY REGARDING HIS MENTAL ILLNESS.

1. The trial court excluded Mr. Webb's proffered evidence regarding his mental health condition.

Prior to trial, the trial court granted the State's motion in limine barring the testimony of DOC mental health counselor Alicia St. John

regarding Mr. Webb's mental health condition or any evidence of diminished capacity. RP 7.

The deputy prosecutor argued the evidence was inadmissible, as Mr. Webb had asserted a defense of general denial, purportedly making Mr. Webb's mental health condition "irrelevant and confusing," in light of the elements of custodial assault. RP 4.

The trial court excluded the proffered testimony concluding "none of that is relevant to an element of the crime or a claim of defense." RP 6. The court noted that "a claim of defense" might make the testimony concerning Mr. Webb's mental health relevant, "but only if there was a defense of diminished capacity being raised. Not in this case." RP 7.

Once the trial court excluded Mr. Webb's expert witness, Mr. Webb's ability to introduce evidence related to his mental health condition was hobbled. Unable to present evidence of traumatic brain injury – the source of his mental health condition – or of the potential impact upon his ability to form intent, Mr. Webb offered only his own testimony in his defense. RP 160-67, 209-10.

2. Mr. Webb was constitutionally entitled to present a defense.

The Sixth Amendment guarantees a defendant the right to present a defense. Davis v. Alaska, 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). "[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

So long as evidence is minimally relevant,

> ". . . the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need."

Jones, 168 Wn.2d at 720 (quoting State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)) (internal citations omitted).

A defense of diminished capacity allows consideration of whether a mental disorder, not amounting to insanity, impaired the defendant's ability to form the requisite mental state to commit the crime charged. State v. Ellis, 136 Wn.2d 498, 522-23, 963 P.2d 843 (1998).

The admission of expert testimony regarding a defense of diminished capacity, like expert testimony on other topics, is governed by ER 401, ER 402 and ER 702. ER 702 permits the admission of expert opinion if it is "helpful to the trier of fact under the particular facts of the specific case in which the evidence is sought to be admitted." State v. Green, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999). The opinion is helpful if it "explains how the mental disorder relates to the asserted impairment of capacity." State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000) (citing Green, 139 Wn.2d at 74). "It is not necessary that the expert be able to state an opinion that the mental disorder actually did produce the asserted impairment at the time in question - only that it could have." Mitchell, 102 Wn. App. at 27. The proffered testimony of Ms. St. John, Mr. Webb's mental health counselor, satisfied this standard.

Alicia St. John, as Mr. Webb's mental health counselor at the Special Offender Unit, could have testified to Mr. Webb's special needs as a result of a childhood traumatic brain injury. CP 82. Ms. St. John could have testified to Mr. Webb's seizure disorder and diagnosed cognitive disorder, which can affect his ability to make decisions and form intent. Id. Ms. St. John's experience with Mr. Webb as his counselor would have provided the jury with helpful information relevant to the issue of Mr. Webb's capacity to form the requisite mental state to commit the assault charged. See Mitchell, 102 Wn. App. at 27.

Mr. Webb was charged with violating the custodial assault statute. CP 141. The statute reads as follows:

> (1) A person is guilty of custodial assault if that person is not guilty of an assault in the first or second degree and where the person:
>
> (b) Assaults a full or part-time staff member or volunteer, any educational personnel, any personal service provider, or any vendor or agent thereof at any adult corrections institution or local adult detention facilities who was performing official duties at the time of the assault.

RCW 9A.36.100(1)(b).

Because the criminal code does not provide a definition for the term "assault," our courts utilize the common law definition. State v.

Wilson, 125 Wn.2d 212, 217-18, 883 P.2d 320 (1994); State v. Ratliff, 77 Wn. App. 522, 524, 892 P.2d 118, rev. denied, 127 Wn.2d 1012 (1995). "[S]pecific intent either to create apprehension of bodily harm or to cause bodily harm" is required to prove assault. State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); Wilson, 125 Wn.2d at 218.

The excluded evidence in Mr. Webb's case included a history of traumatic brain injury resulting in permanent brain damage, seizures, and a cognitive disorder. RP 5-10, 209; CP 82. Accordingly, the trial court erred when it excluded evidence relevant to the issue of Mr. Webb's capacity to form the requisite mental state to commit the assault charged.

3. To the degree Mr. Webb's trial counsel failed to pursue a diminished capacity defense, Mr. Webb was denied the effective assistance of counsel.

Although the trial court committed reversible error when it excluded the testimony of Ms. St. John, Mr. Webb's trial counsel also failed to provide constitutionally effective representation when she failed to pursue a diminished capacity defense.

A criminal defendant has the constitutional right to the assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22. Counsel's critical role in the adversarial system protects the

defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698.

Although the failure to request a diminished capacity instruction is not ineffective assistance of counsel per se, it is deficient representation when it is not based on sound trial strategy. State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001) (applying Strickland analysis to counsel's failure to request diminished capacity instruction, once it is determined defendant would have been entitled to

it); see also In re Personal Restraint of Hubert, 138 Wn. App. 924, 928, 158 P.3d 1282 (2007); State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009).

Mr. Webb's case resembles Thomas, where trial counsel failed to competently present a diminished capacity defense based on voluntary intoxication. 109 Wn.2d at 223. The Supreme Court concluded the failure to offer a critical jury instruction which would have "better enabled [defense] counsel to argue the defense's theory of the case" deprived the defendant of the effective assistance of counsel. Id. at 227. The Thomas Court found counsel ineffective because "[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases." Thomas, 109 Wn.2d at 229. The Court concluded in Thomas that "defense counsel's representation fell below an objective standard of reasonableness." Thomas, 109 Wn.2d at 232 (citing Strickland, 466 U.S. at 688).

In State v. Tilton, the Court acknowledged that the "[f]ailure of the defense counsel to present a diminished capacity defense where the facts support such a defense has been held to

satisfy both prongs of the Strickland test." 149 Wn.2d 775, 784, 72 P.3d 735 (2003) (citing Thomas, 109 Wn.2d at 226-29) (holding that despite a limited record, counsel was ineffective for failing to raise diminished capacity defense).

In Mr. Webb's case, there was substantial evidence to support a diminished capacity defense. RP 5-10, 209; CP 82. It is also apparent that Mr. Webb's trial counsel was well aware of Mr. Webb's mental health condition, as well as its potential effects on his behavior and ability to control his actions. RP 5, 209; CP 82 (stating that Mr. Webb's mental health and seizure disorders, as well as his cognitive disorder, were caused by permanent brain damage suffered as a child). If counsel had pursued a diminished capacity defense, she could have argued that Mr. Webb's mental state negated the mens rea required for the offense of custodial assault. See Thomas, 109 Wn.2d at 227.

As in Thomas, Hubert, and Powell, supra, counsel had no tactical basis for failing to pursue this defense. Here, trial counsel's defense was enfeebled – counsel raised Mr. Webb's mental health issues only briefly at sentencing, rather than following a proper investigation, with the support of expert witness testimony. RP 209 ("I don't think [Mr. Webb] quite processes at the level as maybe general

population. He has significant mental health conditions … which has resulted in permanent brain damage"). Although trial counsel for Mr. Webb objected to the State's motion in limine, the objection was not well-supported by counsel's investigation or a proffer of expert testimony. RP 5-9 ("I'm not asking for – to go in depth at all in terms of Mr. Webb's mental health. We are not arguing any type of diminished capacity").

There was substantial evidence of a mental health condition that logically and reasonably connected Mr. Webb's mental condition with his inability to form the required intent for custodial assault. Thus, "defense counsel's representation fell below an objective standard of reasonableness." Thomas, 109 Wn.2d at 232 (citing Strickland, 466 U.S. at 688). For this reason, Mr. Webb's conviction should be reversed and the matter remanded for a new trial with new counsel.

4. The exclusion of the mental health testimony was not harmless; therefore, reversal is required.

"[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt." Ritchie, 480 U.S. at 56. Mr. Webb had

> the right to present a defense, the right to present [his] version of the facts as well as the prosecution's to the jury so it may decide where the truth lies … he has the

> right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19. By improperly excluding otherwise admissible evidence, the court denied Mr. Webb the opportunity to put forward his "version of the facts," denied him the right to challenge the State's theory, and thus, denied him the right to present a defense.

A constitutional error may be deemed harmless only where the State proves beyond a reasonable doubt the error did not contribute to the verdict obtained. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Thus, the State must prove beyond a reasonable doubt that the jury would have reached the same verdict had it heard the excluded testimony of Ms. St. John that it was possible that Mr. Webb's capacity was diminished at the time he committed the offense.

Accordingly, because the State cannot show the court's denial of Mr. Webb's right to present a defense was harmless, reversal is required.

E. CONCLUSION

Because the trial court denied Mr. Webb his right to present a defense, this Court should reverse his conviction and remand for a new trial. In the alternative, because Mr. Webb was not provided with the effective assistance of counsel, and because this caused prejudice, this Court should reverse his conviction, so that he may be re-tried and appointed new counsel.

Dated this 12th day of February, 2016.

s/ Jan Trasen

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73813-5-I
	)	
	)	
SHAUN WEBB,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	SHAUN WEBB 877803 MONROE CORRECTIONAL COMPLEX PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 12TH DAY OF FEBRUARY, 2016.

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