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SUPREME COURT NO. 95539-5
COA NO. 74706-1-I

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE RYAN CHAMBERLAIN,

Petitioner.

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

The Honorable Julia Garratt, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Shane Chamberlain asks this Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Chamberlain requests review of the decision in State v. Shane Ryan Chamberlain, Court of Appeals No. 74706-1-I (slip op. filed Jan. 22, 2018), attached as appendix A.

C. ISSUE PRESENTED FOR REVIEW

Was defense counsel ineffective in failing to present a diminished capacity defense based on Chamberlain's mental condition, where expert testimony was available to support the defense but counsel mistakenly believed the legal standard for presenting the defense was unmet?

D. STATEMENT OF THE CASE

The State charged Chamberlain with first degree murder committed against Philip Hamlin and attempted first degree murder and first degree assault committed against Bethany Hamlin (Bethany). CP 24-25. The following evidence was produced at trial.

Hamlin was 96 years old and had several employees to manage his household. 1RP¹ 105, 110-11. In 2013, Chamberlain's wife, Adrena,

¹ The verbatim report of proceedings is cited as follows: 1RP - nine consecutively paginated volumes consisting of 11/2/15, 11/12/15,

became Hamlin's primary caretaker. 1RP 115-16, 278. Adrena and Chamberlain moved into an adjoining guesthouse on the property. 1RP 116. Chamberlain began working for Hamlin, doing property maintenance. 1RP 126, 196-98, 799-800. Hamlin's granddaughter, Bethany, also worked as a part-time housekeeper for Hamlin. 1RP 271, 274-75. Chamberlain and Bethany were on friendly terms. 1RP 280, 291-94, 322-24. In the weeks leading up to the events at issue, Chamberlain expressed frustration with his situation, telling Bethany and others that he felt trapped and stifled working at the house. 1RP 219-20, 298-99, 801-02. His relationship with Adrena was on the rocks; there was talk of divorce. 1RP 300-02, 806-07. He was tense, stressed, and unhappy. 1RP 805.

Chamberlain and Bethany were working at the Hamlin residence on January 25, 2014. 1RP 304. Chamberlain talked about his relationship problems, mentioning he had had moved out a week earlier. 1RP 317, 320-21, 333. His demeanor was friendly and calm. 1RP 329. He hugged Bethany. 1RP 399. After lunch, Hamlin took his customary nap in the family room. 1RP 305, 307, 312-13, 315-16. Bethany started vacuuming the home office. 1RP 342. Chamberlain attempted to remove a light fixture in the office. 1RP 342-44. Bethany suggested getting a tool. 1RP

11/16/15, 11/17/15, 11/18/15, 11/19/15, 11/30/15, 12/1/15, 12/2/15, 12/3/15, 2RP - 12/7/15, 1/15/16.

370, 426. Chamberlain left the office and came back holding a crowbar. 1RP 344-45. He went to work on the light fixture and Bethany resumed vacuuming. 1RP 345. When she turned around, she saw Chamberlain standing there, looking at the crowbar. 1RP 345-46. She asked if he needed help. 1RP 346. He said no. 1RP 346. She went back to vacuuming. 1RP 347.

The next thing she remembered was a bright light and feeling cold. 1RP 347. She was on the ground looking up. 1RP 347. Chamberlain hit her on the head with the crowbar. 1RP 347-48. She got up and tried to move away. 1RP 349-51. They struggled for control of the crowbar. 1RP 349, 352. She was hit twice more before going to the ground again. 1RP 352. Chamberlain hit her multiple times about the head with the crowbar. 1RP 349-50, 352, 355. During the attack, Bethany screamed his name and told him to stop. 1RP 397. Chamberlain did not say anything. 1RP 398. He looked angry. 1RP 398. When Bethany was next aware, she was lying on the floor, and Chamberlain was gone. 1RP 358-59. She fled to a neighbor's house. 1RP 359-61. She heard a loud, guttural scream coming from Hamlin's residence. 1RP 374-75. Bethany contacted neighbors and had them call 911. 1RP 377-78, 383-88.

Chamberlain himself called 911 and reported he murdered his boss, saying "I broke." 1RP 725; Ex. 41. Police entered the residence and

found Hamlin face down on the couch, dead from a gunshot wound to the head. 1RP 483, 497, 663. A crowbar and handgun were found next to the swimming pool outside the house. 1RP 520 554-55. A post on Chamberlain's Facebook page about half an hour before Chamberlain attacked Bethany and Hamlin stated, "Sometimes, good people do horrible things." 1RP 234-35, 722, 729-30. Several witnesses testified that Chamberlain and Hamlin were amicable to one another, with no sign of animosity or anger. 1RP 186, 200, 428, 821-23. 828. Chamberlain liked Hamlin and Bethany. 1RP 201.

Defense counsel argued to the jury that the State had failed to prove premeditation beyond a reasonable doubt. 2RP 47, 50, 56-61, 63. The jury found Chamberlain guilty as charged. CP 81, 83, 84, 86-88.

At sentencing, defense counsel requested an exceptional sentence downward on the basis of various mitigating circumstances, including mental health issues. CP 92-93. In support, the defense submitted a psychiatric evaluation from Dr. McClung, a board certified psychiatrist. CP 97-99. McClung interviewed Chamberlain in August 2015 and again in October 2015. CP 97. He reviewed the discovery, including police reports, witness statements and 911 call transcripts. CP 97. He also reviewed Chamberlain's medical records. CP 97. McClung's evaluation set forth "the psychological issues" that are "relevant to understanding his

mental state related to his alleged crime (the murder of Philip Hamlin and assault of Bethany Hamlin) and may be mitigating factors." CP 97.

Dr. McClung opined Chamberlain meets criteria for a psychiatric diagnosis of Borderline Personality Disorder. CP 97. He had harmed himself in the past, has mood swings and a poor sense of his own identity. CP 97. For example, some of his adult endeavors were structured or prompted by his wife, and she told police she taught him how to talk to others on the phone and how to vote. CP 97. Chamberlain also has poor control of anger. CP 97. He expresses it rarely, but when overwhelmed has a history of rages of screaming and throwing things, followed by uncontrollable crying. CP 97. "People with Borderline Personality Disorder often have frantic and impulsive behavior in the face of threatened abandonment." CP 97. His marriage was in crisis a week leading up to the crime. CP 97. He had recently moved in with a relative. CP 97. On the day of the crime, his wife warned him over the phone about an important talk they needed to have about their relationship, which he interpreted as divorce. CP 97. "This type of situation can trigger intense emotional storms in persons with Borderline Personality Disorder." CP 97. Chamberlain's comments to Adrena on the phone just after the crime indicate he may have connected his actions to his distress about their relationship. CP 97.

Chamberlain also has a longstanding history of depression. CP 97. His depression intensified when his relationship with Adrena was in crisis. CP 97-98. Chronic use of alcohol and marijuana contributed to depression. CP 98. "Depression makes rage episodes more common." CP 98.

Chamberlain reported drinking six bottles of alcoholic hard cider in quick succession within an hour or two of the crime. CP 98. He had not used alcohol for two weeks before this. CP 98. The timing and amount of alcohol likely caused him to be intoxicated at the time of the crime. CP 98. Intoxication could have intensified his emotional states, "enhanced impulsivity, and caused impaired judgment at the time of the crime." CP 98.

Chamberlain started taking an antidepressant (setraline) a month before the crime. CP 98. His doctor increased his dose two weeks before the crime. CP 98. In jail, shortly after the crime, Chamberlain stopped Zoloft because it made him "act dangerous and impulsive." CP 98. Antidepressants can sometimes have atypical effects, such as causing more intense mood swings, periods of excess energy, or manic symptoms. CP 98. Chamberlain described feeling like Superman just before the crime, feeling he could figure out how to replace bulbs in an antique light fixture, which was out of character for him. CP 98. Chamberlain "may

have been experiencing manic mood swings caused by the antidepressant, which could cause impulsivity and impair his judgment." CP 98.

Chamberlain reported impaired memory for parts of his alleged crime. CP 98. He did not recall starting to attack Bethany or having any conscious awareness of a reason for doing so. CP 98. He described feelings of emotional detachment and unreality during the attacks. CP 98. His former roommate related Chamberlain was normally not a violent person, but there were times when he became a different person and became violent during rage episodes. CP 98. When he calmed down, he would say he didn't know what was wrong with him. CP 98. These observations, taken together with report of a spotty memory and sense of unreality, suggest Chamberlain "may experience disassociation at times of high emotional distress." CP 98. "Dissociation is an emotional process causing detachment from reality, ranging from a feeling of detachment, to memory loss, to the phenomenon of multiple personalities. Dissociation is involuntary and not under the control of the person experiencing it. His diagnosis of Borderline Personality Disorder increases the chance of having dissociation." CP 98.

In the defense pre-sentence report, counsel wrote "While Dr. McClung did not find mental health issues that rose to the level of establishing a diminished capacity or insanity defense for the current

charges, his diagnosis and conclusions support the mitigating factor that Mr. Chamberlain's [sic] was acting under a compulsion, and with impulsivity which significantly affected his conduct." CP 92. At the sentencing hearing, counsel told the court that Dr. McClung's diagnosis "is not a diagnosis that, generally speaking, would rise to the level of creating any sort of a defense, whether it is diminished capacity or an insanity defense, but it is a diagnosis, and that is exactly what the court is asked to consider when considering mitigating circumstances. Had there been any belief that there was a complete defense, we would have presented that testimony but we didn't; that is why we are asking the court to consider it as sentencing." 2RP 90. The court considered but denied the request for an exceptional sentence downward. 2RP 104. It imposed a total standard range sentence of 504 months in confinement. CP 143.

On appeal, Chamberlain argued his counsel was ineffective in failing to present a diminished capacity defense. The Court of Appeals rejected the argument and affirmed. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO PRESENT A DIMINISHED CAPACITY DEFENSE.

Defense counsel did not raise a diminished capacity defense based on the mistaken belief that the psychiatrist's pre-trial evaluation of

Chamberlain did not meet the standard for presenting the defense. Counsel's decision was deficient because it is based on a misunderstanding of the law. Chamberlain's case involves a significant question of constitutional law warranting review under RAP 13.4(b)(3).

a. Defense counsel performed deficiently in failing to pursue a diminished capacity defense based on a mistaken belief that such a defense was unavailable under the law.

Every defendant is guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. "Failure of 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." State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003); see State v. Fedoruk, 184 Wn. App. 866, 871, 881-82, 339 P.3d 233 (2014) (counsel's decision not to seek an expert to evaluate client until day before jury selection fell below an objective standard of reasonableness and prejudiced the outcome in light of the client's extensive history of mental illness).

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 225-26. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Chamberlain's counsel did not present a diminished capacity defense based on the belief that the legal standard for presenting that defense was unmet. 2RP 90. Counsel's belief was inaccurate.

"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 specific intent to commit the crime charged." State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998) (quoting State v. Edmon, 28 Wn. App. '98, 107, 621 P.2d 1310 (1981)). There is no meaningful difference between "whether the defendant had the capacity to form intent versus whether the defendant had an impaired capacity to form intent." State v. Johnson, 150 Wn. App. 663, 671, 208 P.3d 1265 (2009) (assessing the propriety of jury instruction on the diminished capacity defense), review denied, 167 Wn.2d 1012, 220 P.3d 208 (2009). "The State must prove actual intent. The defendant is entitled to present evidence that he had a mental disorder that interfered with his ability to form intent. The rest is up to the jury." Id. Dr. McClung did not opine that Chamberlain lacked the capacity to act with

premeditation or intent in relation to the offenses. But his report shows Chamberlain's ability to form the culpable mental state may have been impaired at the time of the crimes.

The Court of Appeals, however, believed "the record before us is insufficient to show that a diminished capacity defense was available." Slip op. at 5. It said Dr. McClung's letter "lacks any opinion about Chamberlain's ability to form the culpable mental state" and Chamberlain failed to "identify some evidence showing that [dissociation] symptoms affected Chamberlain's ability to premeditate the crime." Id. at 7. It held defense counsel was not deficient because there was no available "expert testimony showing a causal connection to intent." Id. at 8. It cited State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001), where "Turner failed to show his counsel's performance was deficient because the court could not determine from the record on appeal that any expert would have testified about his ability to form the specific intent required." Id. at 8 n.22.

Contrary to the Court of Appeals' belief, Ellis supports Chamberlain's argument on appeal that he had evidence in hand to advance a diminished capacity defense. In Ellis, the Supreme Court held the trial court abused its discretion in excluding expert testimony to support a diminished capacity defense. Ellis, 136 Wn.2d at 523. The defendant Ellis was charged with premeditated first degree murder

committed against his mother and his two-year-old half-sister. Id. at 500. Defense expert Dr. Whitehill opined Ellis suffered from a borderline personality disorder and intermittent explosive disorder. Id. at 520. He explained these disorders underlay Ellis's killing of his mother because they related to his "emotional discontrol." Id. Ellis was "an individual whose perceptual process, whose interpreting process, his decision making capacity and his ability to properly regulate his behavior, was severely compromised as a direct result of this ongoing personality disturbance." Id. Dr. Whitehill further explained Ellis, in a "continuously deregulated state," killed his sister because he believed "this was a child who symbolized all of what he did not receive with respect to maternal attachment, all of what Jamie, his young sister received [s]he awakened as a stimulus, someone which reminded him, which triggered another intense exacerbation of an already existing level of emotional discontrol." Id.

Defense expert Dr. Cripe opined Ellis suffered from an antisocial personality disorder and impulse control disorder. Id. The mental disorder was causally connected to lack of intent in that "when he went over there in that situation with his mother, he walked in there with this history of problems, this history of mental disorder. . . . He is in a situation where certain stressors arise. And given the weaknesses in his

psychological makeup, the mind is overpowered basically by-there is a breakdown in the deliberation process, in forming judgments and decisions, and the person ends up acting from disarray and from confusion and emotional forces, rather than from a deliberate forming of intent." Id. at 520-21.

In holding it was error to exclude this expert testimony, the Supreme Court held the foundational criteria announced in Edmon were not controlling.² Id. at 521-22. Rather, admissibility of expert testimony concerning the diminished capacity defense must be determined under ER 401, ER 402 and ER 702. Id. at 521.

To satisfy ER 401 and ER 702, expert testimony "must have the tendency to make it more probable than not that defendant suffered a mental disorder, not amounting to insanity, that impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). Expert testimony, based on Dr. McClung's evaluation, would have been related to Chamberlain's mental functioning and was admissible under the rules of evidence.

² See Edmon, 28 Wn. App. at 102-03) (listing what came to be known as the "Edmon factors").

All facts tending to establish a party's theory are relevant. State v. Harris, 97 Wn. App. 865, 872, 989 P.2d 553 (1999), review denied, 140 Wn.2d 1017 (2000). Counsel's theory of the case was that the State did not prove premeditation or intent to premeditate in relation to the murder and attempted murder charges. 2RP 47, 50, 56-61, 63. Dr. McClung's expert opinion supports that theory. Dr. McClung's report expressly states that he is setting forth the psychological issues that are relevant to understanding Chamberlain's mental state in relation to the alleged crimes. CP 97.

At the top of the list is Chamberlain's Borderline Personality Disorder diagnosis, which is related to impulsive behavior and intense emotional storms when overwhelmed by the kind of stressors faced by Chamberlain. CP 97. McClung homed in on the crisis in Chamberlain's marriage and fear of divorce close in time to the shooting and attack. CP 97. McClung also cited Chamberlain's longstanding history of depression, exacerbated by chronic use of alcohol and marijuana, as a factor that makes rage episodes more common. CP 98. Chamberlain drank a copious amount of alcohol before the crimes. CP 98. McClung opined his intoxicated state could have intensified his emotional state and enhance impulsivity. CP 98. McClung further opined that Chamberlain's antidepressant medication may have caused impulsivity and impaired

judgment. CP 98. Further, Chamberlain's history showed he may experience disassociation at times of high emotional distress and his Borderline Personality Disorder increased the chance of having disassociation. CP 98.

Chamberlain's case is not a carbon copy of Ellis, but the salient facts and themes are similar. In Ellis, the defendant suffered from a personality disorder related to impulsive behavior and emotional dysregulation in reaction to stress. Ellis, 136 Wn.2d at 520-21. Chamberlain's case presents the same dynamic. To raise a diminished capacity defense, the opinion of an expert 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." Atsbeha, 142 Wn.2d at 918. Dr. McClung's evaluation meets this standard.

Chamberlain's mental condition was relevant to whether the State carried its burden of proving premeditation, and intent to commit a premeditated crime, beyond a reasonable doubt. Expert testimony that Chamberlain suffered from Borderline Personality Disorder with attendant impulse control problems exacerbated by stress is relevant because it tends to make the existence of Chamberlain's premeditation and intent less probable than it would be without the evidence. The jury was entitled to consider Chamberlain's actions on the day in question in light of his

mental issues. Chamberlain's mental problems made it less probable that he actually formed the premeditated intent to take Hamlin's life based on a deliberate design to kill, or that he intended to take Bethany's life based on a deliberate design to kill.

"In a diminished capacity case, the expert's opinion must be helpful to the trier of fact in assessing the defendant's mental state at the time of the crime." State v. Mitchell, 102 Wn. App. 21, 27, 997 P.2d 373 (2000). "An opinion is helpful if it explains how the mental disorder relates to the asserted impairment of capacity." Id.

The jury heard evidence of the stresses Chamberlain experienced leading up to the charged crimes, including his marital problems. What jurors lacked was an expert witness to inform them of the significance of Chamberlain's diagnosed mental condition in relation to those stressors. Dr. McClung's expert testimony would have assisted the trier of fact to understand the significance of Chamberlain's mental condition in relation to the mens rea elements of the State's case: whether Chamberlain acted with premeditation in killing Hamlin and had the requisite intent to murder Bethany based on a deliberate design. "[M]ental disorders are beyond the ordinary understanding of lay persons." Ellis, 136 Wn.2d at 517. An expert witness was necessary to explain the significance of Chamberlain's mental condition to the lay jury. The personality disorder diagnosis was

"capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." State v. Greene, 139 Wn.2d 64, 73, 984 P.2d 1024 (1999). Dr. McClung could have explained to the jury the effects of the personality disorder on Chamberlain's mental functioning. From that, the jury would have had a complete picture by which to judge whether Chamberlain actually acted with premeditation and intended to act with premeditation on the day in question.

Dr. McClung did not opine in his report whether Chamberlain's mental disorder actually produced the impaired mental state at the time of the crime. But such an opinion was not needed to advance a diminished capacity defense. "The jury, after hearing all the evidence, may find probability where the expert saw only possibility, and may thereby conclude that the defendant's capacity was diminished even if the expert did not so conclude." Mitchell, 102 Wn. App. at 28.

Showing counsel failed to conduct appropriate legal investigation to determine what matters of defense were available can overcome the presumption of reasonable performance. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978). The deficiency here is the failure to research and apply the relevant law. Kyllo, 166 Wn.2d at 862; see Thomas, 109 Wn.2d at 229 (holding counsel was deficient in failing to propose diminished capacity instruction based on voluntary intoxication: "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.").

In closing argument, defense counsel identified what was going on in Chamberlain's head as the fact in dispute. 2RP 47. Counsel argued the State did not prove premeditation or intent to premeditate. 2RP 47, 50, 56-61, 63. But without expert testimony on Chamberlain's mental condition, and faced with the otherwise grim facts of the case, the argument lacked persuasive force. A diminished capacity defense would have significantly strengthened the defense argument that the State did not prove Chamberlain harbored the culpable mental states in killing Hamlin and attacking Bethany.

As demonstrated above, the diminished capacity defense was available. Had defense counsel conducted the proper investigation into the law, counsel would have understood the defense was available. Counsel's decision to forego the diminished capacity defense was not a valid strategic choice. Rather, the only reason why the defense was not presented was based on counsel's misunderstanding of the law. Chamberlain has established deficient performance.

b. Defense counsel's failure to present evidence in support of a diminished capacity defense prejudiced the outcome.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Strickland, 466 U.S. at 693-94. The failure to present a diminished capacity defense undermines confidence in the outcome of both the first degree murder and attempted murder charges. When a diminished capacity defense is presented, "[t]he jury learns from the expert how the mental mechanism operates, and then applies what it has learned to all the facts introduced at trial." Mitchell, 102 Wn. App. at 27. The jury knew about the troubles and stressors that Chamberlain experienced in the months, weeks and days leading up to the actions in question. But it knew nothing of Chamberlain's mental disorder and how it, in conjunction with other circumstances, increased impulsivity and uncontrollable emotional reactions. The jury learned Chamberlain appeared to be a gentle soul. He got along with Hamlin and Bethany was his friend. In the absence of expert testimony, it made little sense that he would kill one and try to kill the other.

Without testimony from an expert explaining the significance of Chamberlain's mental condition in relation to the circumstances leading up to the crimes, the jury was left without the information it needed to render

a decision based on all relevant facts related to critical issue of Chamberlain's state of mind. The psychological context for Chamberlain's actions, informed by expert testimony, was missing. A diminished capacity defense may have made the difference. Without that defense being presented, the State's argument that Chamberlain deliberately went about killing Hamlin and trying to kill Bethany had a force that remained un rebutted. Had the defense been presented, the jury would have received a different lens through which to view Chamberlain's actions that day in relation to the state of mind he had when he did them. Given that Chamberlain's actions were bizarre and out of character on the day in question, there is a reasonable probability the outcome would have been different if counsel presented a diminished capacity defense.

F. CONCLUSION

For the reasons stated, Chamberlain requests that this Court grant review.

DATED this 20th day of February 2018.

Respectfully submitted,

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APPENDIX A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2018 JAN 22 AM 9:26

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHANE RYAN CHAMBERLAIN,

Appellant.

No. 74706-1-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 22, 2018

LEACH, J. — Shane Chamberlain appeals his conviction for first degree murder of Philip Hamlin and first degree attempted murder of Bethany Hamlin. He claims his counsel was ineffective for failing to pursue a diminished capacity defense. Because he cannot show from the record before us that a diminished capacity defense was available, this claim fails. We affirm.

Background

In 2013, Philip Hamlin was 96 years old and employed a number of people to manage his household. In spring of that year, Adrena Chamberlain began work as Philip Hamlin's primary caretaker. Adrena¹ and her husband, Shane Chamberlain, moved into a guesthouse adjoining the main house so she could be available to Hamlin. Around September 2013, Chamberlain began working for Hamlin, doing maintenance projects around the property. Hamlin's granddaughter, Bethany, also worked as a part-time housekeeper for Hamlin.

¹ To avoid confusion, we refer to Adrena Chamberlain and Bethany Hamlin by their first names. We intend no disrespect.

Chamberlain would follow Bethany as she did her housework, and they would talk. In December 2013, Chamberlain began expressing some frustration with his situation. He told Bethany that he felt trapped working at the house. He also told her about some relationship trouble with Adrena.

On January 25, 2014, Chamberlain attacked Bethany and shot and killed Hamlin. That morning, Chamberlain had followed Bethany as she cleaned and talked to her. Chamberlain talked about his relationship problems and told Bethany that he and Adrena had mentioned divorce. Chamberlain had moved out of the guesthouse a week earlier and was temporarily living with an aunt. Bethany observed that Chamberlain seemed calmer than she would have expected under the circumstances.

After Bethany prepared lunch for Hamlin, Hamlin took his customary nap. After lunch, Bethany was vacuuming the office. Chamberlain was repairing a light fixture nearby. Chamberlain left briefly and returned with a crowbar, which he used to work on the light fixture. When Bethany turned around, she saw Chamberlain standing behind her, holding the crowbar, and looking at it. She continued vacuuming. The next thing she remembers is seeing a "really bright light" and being cold on the ground. Chamberlain approached Bethany, swinging the crowbar toward her. He hit her repeatedly about the head with the crowbar.

When Bethany was next aware, she was lying on the floor, and Chamberlain was gone. Bethany fled to a neighbor's patio where she hid. Back at the house

she heard footsteps and a deep loud wordless scream. When the footsteps receded, Bethany continued to flee to a neighbor's house where she called 911.

Chamberlain also called 911. He reported that he had murdered his boss and stated, "I broke." He told the 911 operator that he did not want to harm himself and requested that the police take him in to custody as soon as possible. Chamberlain waited in the residence driveway for the police to arrive. Police found Hamlin inside, dead from a gunshot wound to the head. Police found a crowbar and a handgun next to the pool outside the house.

A post to Chamberlain's Facebook² page about half an hour before Chamberlain attacked Bethany stated, "Sometimes, good people do horrible things."

The State charged Chamberlain with first degree murder and attempted first degree murder. At trial, Chamberlain's counsel argued that the State had failed to prove premeditation beyond a reasonable doubt. A jury found Chamberlain guilty on both counts.³

At sentencing, defense counsel argued that the court should consider Chamberlain's mental health condition a mitigating factor when sentencing him. Counsel submitted a letter from Dr. Mark McClung, opining on Chamberlain's mental condition. Counsel stated,

While Dr. McClung did not find mental health issues that rose to the level of establishing a diminished capacity or insanity defense for the

² An online social media and social networking service.

³ Chamberlain was also charged with and convicted of first degree assault, but the conviction was dismissed to avoid a double jeopardy issue.

current charges, his diagnosis and conclusions support the mitigating factor that Mr. Chamberlain's [sic] was acting under a compulsion, and with impulsivity which significantly affected his conduct.

The trial court considered various mitigating circumstances but denied Chamberlain's request for an exceptional sentence downward.

Chamberlain appeals his conviction.

Analysis

Chamberlain claims that his counsel was ineffective because he did not pursue a diminished capacity defense. Claims of ineffective assistance present mixed questions of law and fact, which we review de novo.⁴ We examine the entire record to decide whether the appellant received effective representation and a fair trial.⁵ To succeed in an ineffective assistance claim, Chamberlain must show that his attorney's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him.⁶

Chamberlain specifically claims that his counsel decided not to present a diminished capacity defense under the mistaken belief that the defense was unavailable. "Reasonable conduct for an attorney includes carrying out the duty to research the relevant law."⁷ "Failure of 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."⁸ The record shows that defense counsel

⁴ In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

⁵ State v. Hicks, 163 Wn.2d 477, 486, 181 P.3d 831 (2008).

⁶ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

⁷ State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

⁸ State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

explored the diminished capacity defense. Counsel stated that the evidence did not support the defense. Chamberlain does not show that his counsel reached an incorrect conclusion about the defense.

Chamberlain's argument rests on the premise that the evidence available to his attorney supported a diminished capacity defense. But the record before us is insufficient to show that a diminished capacity defense was available.⁹ "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 specific intent to commit the crime charged."¹⁰ The defendant must present evidence that "logically and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged."¹¹

The required intent for first degree murder is premeditation.¹² The jury instructions explained premeditation as follows:

Premeditated means thought over beforehand. When a person, after any deliberation, forms an intent to take human life, the killing may follow immediately after the formation of the settled purpose and it will still be premeditated. Premeditation must involve more than a moment in point of time. The law requires some time, however long or short, in which a design to kill is deliberately formed.

⁹ Although the record available on direct appeal is not sufficient to show facts to support a diminished capacity defense, Chamberlain may obtain evidence that would support the defense and submit it in a personal restraint petition.

¹⁰ State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998).

¹¹ State v. Griffin, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983).

¹² A person commits first degree murder when, "[w]ith a premeditated intent to cause the death of another person, he or she causes the death of such person or of a third person." RCW 9A.32.030(1)(a).

Thus, to show that a diminished capacity defense was available, Chamberlain must show that he had a mental condition that prevented him from forming the purpose of killing Hamlin and Bethany.

To show evidence of this, Chamberlain mainly relies on Dr. McClung's letter. Dr. McClung interviewed Chamberlain twice. He was familiar with the facts of the case and with Chamberlain's medical history. Dr. McClung's letter states that he would have testified that Chamberlain meets the criteria for "Borderline Personality Disorder." The letter also states that Chamberlain said he stopped taking antidepressant medication because it makes him "act dangerous and impulsive." In addition, Dr. McClung opines that Chamberlain "may have experienced dissociation, causing some emotional and sensory detachment from the reality of the situation and his surroundings." He explains,

—Mr. Chamberlain reports impaired memory for parts of his alleged crime. He said that he did not recall starting to attack Bethany Hamlin, or having any conscious awareness of a reason for doing so. He describes feelings of emotional detachment and unreality during the attacks. His former roommate (David Goods) described Mr. Chamberlain's rage episodes as "he seemed to be at times two different people." When Mr. Chamberlain calmed down, he would say he didn't know what was wrong with him. Mr. Goods related that normally he wasn't a violent person, but there were times when he "just seemed not to be himself . . . he just was a totally different person and he could be violent." These observations, taken together with Mr. Chamberlain's report of spotty memory and a sense of unreality, suggest that Mr. Chamberlain may experience *dissociation* at times of high emotional distress. Dissociation is an emotional process causing detachment from reality, ranging from a feeling of detachment, to memory loss, to the phenomenon of multiple personalities. Dissociation is involuntary and not under the control of the person experiencing it. His diagnosis of Borderline Personality Disorder increases the chance of having dissociation.

(Alteration in original.)

Dr. McClung's letter shows the availability of ample evidence to prove that Chamberlain suffered from a serious mental disorder. But the letter lacks any opinion about Chamberlain's ability to form the culpable mental state. While symptoms of dissociation may support a theory of diminished capacity,¹³ Chamberlain must also identify some evidence showing that those symptoms affected Chamberlain's ability to premeditate the crime.¹⁴

Chamberlain claims that State v. Ellis¹⁵ and State v. Mitchell¹⁶ show that the information in Dr. McClung's letter is sufficient to support a diminished capacity defense. We disagree. In Ellis, our Supreme Court held that courts should use ER 702, 401, and 402 to determine the admissibility of expert testimony about diminished capacity.¹⁷ And in Mitchell, we held that "the admissibility of expert testimony under ER 702 does not require the expert to testify with certainty to the ultimate question of fact."¹⁸ These cases illustrate the standards for admissibility of expert testimony and relevance, not the standard for the prima facie showing required for the defense. Chamberlain confuses these tests. When determining the admissibility of the expert testimony, as noted in Ellis and Mitchell, the court

¹³ See State v. Martin, 169 Wn. App. 620, 625, 281 P.3d 315 (2012).

¹⁴ State v. Stumpf, 64 Wn. App. 522, 528, 827 P.2d 294 (1992) ("To support a diminished capacity instruction, there must not only be substantial evidence of the mental disorder, but the evidence must also explain *the connection between the disorder and the diminution of capacity.*" (citing Griffin, 100 Wn.2d at 418-19; State v. Edmon, 28 Wn. App. 98, 103-04, 621 P.2d 1310 (1981))).

¹⁵ 136 Wn.2d 498, 963 P.2d 843 (1998).

¹⁶ 102 Wn. App. 21, 997 P.2d 373 (2000).

¹⁷ Ellis, 136 Wn.2d at 521.

¹⁸ Mitchell, 102 Wn. App. at 22.

considers whether the opinion is relevant and would be helpful to the jury.¹⁹ In this case, however, we are asked to decide whether the record contains sufficient evidence to support each element of the defense. Contrary to Chamberlain's claim, Ellis and Mitchell do not hold that testimony about the defendant's mental disorder is enough to support a diminished capacity defense without some expert testimony showing a causal connection to intent.

We further distinguish Ellis and Mitchell based on their facts. In Ellis, the expert testimony explained the causal connection between Ellis's mental disorder and the lack of intent.²⁰ Similarly, Mitchell introduced expert testimony that he suffered from a mental disorder that could have interfered with his knowledge.²¹ Chamberlain has not introduced similar evidence of causation.

In sum, Chamberlain does not show that any expert would have testified that he had a mental disorder that impaired his ability to form a culpable intent. Because Chamberlain does not show that counsel could have presented any evidence on an essential element of a diminished capacity defense, Chamberlain fails to demonstrate that his counsel's performance was deficient for failing to pursue the defense.²² For this reason, his ineffective assistance claim fails and we need not consider the prejudice prong.

¹⁹ Ellis, 136 Wn.2d at 517; Mitchell, 102 Wn. App. at 26-27.

²⁰ Ellis, 136 Wn.2d at 520-21.

²¹ Mitchell, 102 Wn. App. at 24.

²² See State v. Turner, 143 Wn.2d 715, 730, 23 P.3d 499 (2001) (concluding that Turner failed to show his counsel's performance was deficient because the court could not determine from the record on appeal that any expert would have testified about his ability to form the specific intent required).

Chamberlain asks the court to deny the State appellate costs based on his indigency. We generally award appellate costs to the substantially prevailing party on review. But where, as here, a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."²³ If the State has evidence of significant improvement in Chamberlain's financial circumstances since the trial court's finding, it may file a motion for costs with the commissioner.

Conclusion

Because Chamberlain does not show that defense counsel reached an incorrect conclusion about the diminished capacity defense, he does not show that counsel's performance was deficient for failing to pursue that defense. We affirm.

Leach, J.

WE CONCUR:

Speerman, J.

Cox, J.

²³ RAP 14.2.

NIELSEN, BROMAN & KOCH P.L.L.C.

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