NO. 38309-8-II

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

STATE OF WASHINGTON,

Respondent

v.

SHERRY HAMM,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

RESPONDENT'S OPENING BRIEF

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A. STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court did not err in convicting the appellant of assault in the second degree as charged in count 1.

2. The trial court did not err in finding that the appellant did not suffer from acute stress disorder or post-traumatic stress disorder at the time of the assault alleged in count 1.

3. The trial court did not err in concluding that the appellant did not suffer from diminished capacity at the time of the assault alleged in count 1.

4. The trial court did not err in entering finding of fact #22.

5. The trial court did not err in entering finding of fact #23.

6. The trial court did not err in entering finding of fact #25.

7. The trial court did not err in entering finding of fact #27.

8. The trial court did not err in entering conclusion of law #3.

9. The trial court did not err in entering conclusion of law #4.

10. The trial court did not err in entering conclusion of law #5.

11. The trial court did not err in entering conclusion of law #6.

12. The trial court did not err in entering conclusion of law #7.

B. STATE'S REPONSE TO ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

The issue on appeal is whether the evidence, when viewed in the light most favorable to the state, was sufficient enough to permit a rational trier of fact to conclude that the state had met its burden of proof beyond a reasonable doubt; and whether the evidence, when viewed in a light most favorable to the state, was sufficient to permit a rational trier of fact to conclude that the defendant did not suffer from diminished capacity at the time of the offense. Assignment of Error 1-12.

C. STATE'S ASSIGNMENT OF ERROR

1. The state withdraws its assignment of error pertaining to the trial court's decision not to consider evidence of the prior incident with Karen Bailey in for purposes of establishing motive, intent, preparation, plan, and common scheme or plan. *See Conclusion of Law #2.* The state concedes that the court had discretion to reconsider its pretrial ruling on the admissibility of such evidence, notwithstanding the agreement of both parties that the evidence should be admitted for the above-mentioned purposes.

D. STATEMENT OF THE CASE

The state is in agreement with the appellant's statement of the case.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN FINDING THAT THERE WAS SUFFICIENT EVIDENCE TO CONVICT MS. HAMM OF ASSAULT IN THE SECOND DEGREE.

The state is in agreement with the appellant's statement of the law regarding sufficiency of the evidence and the law of diminished capacity. Appellant's Opening Brief at 20-24. The state maintains that the evidence in the case, when viewed in the light most favorable to the state, permitted a rational trier of fact to find that the defendant was guilty of assault in the second degree beyond a reasonable doubt. The state maintains that there was sufficient evidence to permit a rational trier of fact to reject Ms. Hamm's claim that she suffered from diminished capacity at the time of the assault.

Despite evidence that a person may or may not suffer from post traumatic stress disorder (PTSD) or acute stress disorder (ASD), a finding that a defendant acted with premeditation would logically overcome both a claim of diminished capacity and a claim that the defendant acted in self-defense.

Premeditation is "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *State v. Gentry* , 125 Wn.2d at 597-98, quoting *State v. Ollens,* 107 Wn.2d 848, 850, 733 P.2d 984 (1987).

Premeditation may be proved by circumstantial evidence, such as the existence of motive or the use of a weapon. *State v. Clark*, 143 Wn.2d 731, 769, 24 P.3d 1006, citing *Gentry*, 125 Wn 2d at 599, *cert. denied* 528 U.S. 1000 (2001). An inference of premeditation can be established by a wide range of proven facts. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967, cert denied, 528 U.S. 922 (1999). "Motive, procurement of a weapon, stealth, and method of killing" are factors relevant to establishing premeditation. *State v. Pirtle,* 127 Wn. 2d 628, 644, 904 P.2d 245 (1995), *cert. denied* 518 U.S. 1026 (1996). Multiple blows are strong evidence of premeditation. *State v. Cross,* 156 Wn.2d 580, 132 P.3d 80 (2006).

Here, Ms. Hamm lured her victim to storage shed and, when he had his back turned toward her, she proceeded to strike him in the back of the head three times with a hammer, according to the testimony of Mr. Hutchison. 3RP at 172-179. Both the use of the weapon and the repeated blows indicate that Ms. Hamm acted with premeditation and intentionality in attacking her victim.

The trial court found that Ms. Hamm's account that she acted in self defense lacked credibility. Credibility determinations may not be reviewed on appeal. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

2. THE TRIAL COURT DID NOT ERR IN FINDING THAT DEFENDANT DID NOT SUFFER FROM DIMINISHED CAPACITY.

In *State v. Edmon*, 28 Wash. App. 98, 621 P.2d 1310 (1981), the Court set forth nine factors that a trial court should use in deciding whether to admit expert evidence on Post-Traumatic Stress Disorder with respect to a diminished capacity defense. These are:

> 1. The defendant lacked the ability to form a specific intent to due to a mental disorder not amounting to insanity.
>
> 2. The expert is qualified to testify on the subject.
>
> 3. The expert personally examines and diagnoses the defendant and is able to testify to an opinion with reasonable medical certainty.
>
> 4. The expert's testimony is based on substantial supporting evidence in the record relating to the defendant and the case, or there must be an offer to prove such evidence. The supporting evidence must accurately reflect the record and cannot consist solely of uncertain estimates or speculation.
>
> 5. The cause of the inability to form a specific intent must be a mental disorder, not emotions like jealously, fear, anger, and hatred.
>
> 6. The mental disorder must be causally connected to a lack of specific intent, not just reduced perception, overreaction or other irrelevant mental states.
>
> 7. The inability to form a specific intent must occur at a time relevant to the offense.
>
> 8. The mental disorder must substantially reduce the probability that the defendant formed the alleged intent.

> 9. The lack of specific intent may not be inferred from evidence of the mental disorder, and it is insufficient to only give conclusory testimony that a mental disorder caused an inability to form specific intent. The opinion must contain an explanation of how the mental disorder had this effect.
>
> *State v. Edmon*, 28 Wash. App. 98, 621 P.2d 1310 (1981)*(citations omitted).*

In *State v. Ellis*, 136 Wash.2d 498, 963 P.2d 842 (1998), the Washington Supreme Court clarified that the so-called *Edmon* factors were not to be considered as absolute requirements for admission of expert testimony on post-traumatic stress disorder, but rather, were to be considered as guidelines. However, the Court certainly left open the ability of the trial court to use these factors in considering how much weight should be given to evidence of PTSD.

Here, the trial court obviously found that Ms. Hamm did not lack the ability to form specific intent pursuant to *Edmon* factor #1. Dr. Stanilus never personally met with Ms. Hamm, as provided in factor #3. The trial court may very well have concluded as well that factor #4 was not satisfied, insofar as the expert's testimony may not have been supported by substantial evidence. In the same vein, the court may have concluded that the expert's testimony was too speculative. The trial court may also have concluded, pursuant to factor #9, that the expert's opinion did not provide a sufficient explanation of how the disorder caused Ms.

Hamm to have an inability to form specific intent on the date and time in question.

a. There was no evidence that the appellant suffered from a classic "flashback."

In *State v. Bottrell*, 103 Wash.App. 706, 715, 14 P.3d 164 (2000), the court discussed a classic post-traumatic stress syndrome scenario, involving a so-called "flashback."

> One hallmark of PTSD is flashback, a condition "during which components of the [traumatic] event are relived and the person behaves as though experiencing the event at that moment. American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 424 (4th ed.1994). When a person has a flashback, he or she undergoes an "alteration in the perception or experience of the self in which the usual sense of one's own reality is temporarily lost or changed." American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 275 (3rd ed. revised 1987). While in this state, the person experiences "[v]arious types of sensory anesthesia and a sensation of not being in complete control of one's actions, including speech." American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 275 (3rd ed. revised 1987). So, a person who truly suffers from PTSD could experience a flashback and during that flashback might be unable to control his or her actions.

See *State v. Bottrell* at 715.

The evidence in the instant case presented absolutely no indication that Ms. Hamm was experiencing a flashback at the time of the assault in the shed with Jim Hutchison. 8RP at 278-282. She never mentioned to

Dr. Lush, to Officer Gailey, or to the Court, any experience of sensory amnesia or not being in complete control of her actions. 4RP at 106. She never described any feeling of reliving the so-called triggering event involving Karen Bailey at the moment prior to hitting Mr. Hutchison in the head with the hammer. Rather, her testimony was that the blows with the hammer were preceded by a rational thought process in which she thought "No. I'm not going to let it happen. I'm not going to be beaten again." 8RP at 282.

Furthermore, there was no description in Ms. Hamm's testimony of any "alteration in the perception or experience of the self in which the usual sense of one's own reality is temporarily lost or changed." There was no description of any "feeling of unreality."

The fact that Ms. Hamm's supposed sense of fear and danger dissipated so rapidly once she was outside of the shed, but still just a few feet away from her would-be attacker, further detracts from the any claim that she might have been experiencing a "flashback." Ms. Hamm testified that once Jim Hutchison turned to leave, her concern immediately shifted to a concern that he should not be driving immediately after having been hit in the head with a hammer. 8RP at 298.

It is not necessary to conclude, as appellant argues, that the trial court completely disregarded Dr. Stanulis' testimony. *See Appellant's*

Opening Brief at 26. The trier of fact is never required to accept the expert's opinion. See, e.g., WPIC 6.51. Credibility determinations may not be reviewed on appeal. *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

F. CONCLUSION

Based on the above, the state respectfully requests that the Court affirm the judgment below.

DATED this 23rd day of June, 2009.

Respectfully submitted,

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APPENDIX A

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

PROOF OF SERVICE

On the22nd day of June, 2009, I deposited in the mails of the United States of America, postage prepaid, two copies of the document to which this proof of service is attached in an envelope addressed to:

Peter B. Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct,

Signed this 22nd of June, 2009, at South Bend, Washington.

David Bustamante

David Bustamante