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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

NO. 38378-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DARYL BURTON,

Appellant.

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

The Honorable Bryan Chushcoff

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to provide a jury instruction stating that evidence of a mental illness or disorder may be considered in determining whether appellant had the capacity to form the requisite mental state.

2. The trial court erred in counting appellant's convictions for attempted murder in the first degree, assault in the first degree, and vehicular assault as separate convictions in violation of appellant's constitutional right against double jeopardy.

Issues Pertaining to the Assignments of Error

1. Did the trial court err in failing to provide a jury instruction stating that evidence of a mental illness or disorder may be considered in determining whether appellant had the capacity to form the requisite mental state where the instruction was necessary to appellant's theory of the case and appellant's evidence supported the instruction?

2. Did the trial court err in counting the crimes of attempted murder in the first degree, assault in the first degree, and vehicular assault as separate convictions in violation of double jeopardy where all three convictions constitute the same criminal conduct?

B. STATEMENT OF THE CASE[1]

1. Procedural Facts

On October 12, 2005, the State charged appellant, Daryl Burton, with two counts of attempted murder. CP 1 - 4. The State amended the information on November 29, 2009, adding count three, assault in the first degree; count four, assault in the first degree; count five, vehicular assault; count six, assault in the second degree; count seven, felony harassment with a deadly weapon enhancement; count eight, felony harassment with a deadly weapon enhancement. CP 5 - 10. Following a trial before the Honorable Bryan Chushcoff, the jury found Burton guilty on August 28, 2008, of all the charges except counts two, four, and eight which were dismissed by the State. CP 203-07. On September 26, 2008, finding that all the offenses constituted the same criminal conduct, the court imposed a concurrent sentence of 216 months in confinement and 24 to 48 months of community custody. CP 219-20.

2. Substantive Facts

On the morning of October 11, 2005, Lakewood Police were called to the scene of a domestic violence related car accident at the 8600 block of Custer Road. 13RP 461-62. Officers reported to the scene to contain

[1] In accordance with RAP 10.3(a)(4), the statement of the case contains facts and procedure relevant to the issues presented for review.

the area for a suspect described as fleeing from the accident. 13RP 463. The officers arrested Burton when he came walking out from the backyards of two houses onto the street. 13RP 463-66. Burton obeyed their commands and was placed into custody without incident. 13RP 466.

Jacqueline Marie Bones testified that she began dating Burton in 1995 and they lived together from 1997 to 2003. 12RP [2] 318-20. Bones and Burton had a son who was born in 1998. 12RP 320, 322. When Bones and Burton moved in together, she started noticing the extent of his drinking. 12RP 325. Burton became belligerent and boisterous when he drank and he drank to the point where he could not function. 12RP 327-28, 401. He would get off work on Friday and would drink straight through the weekend. 12RP 398. Bones constantly talked to Burton about undergoing treatment and he would try to stop drinking but started again. 12RP 329. Bones eventually moved out with their son but Burton continued to help take care of him. 12RP 331-32. Bones and Burton still saw each other and when Burton's mother became ill with cancer, Bones helped Burton care for his mother who was living with him. 12RP 334. When Burton's mother passed away, he stayed with Bones for a couple of

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[2] There are 19 volumes of verbatim report of proceedings: 1RP - 10/12/05; 2RP - 11/29/05; 3RP - 01/18/07; 4RP - 01/11/08; 5RP - 03/21/08; 6RP - 07/28/08; 7RP - 07/28/08; 8RP - 07/30/08; 9RP - 07/31/08; 10RP - 08/06/08; 11RP - 08/07/08; 12RP - 08/11/08; 13RP - 08/12/08; 14RP - 08/13/08; 15RP - 08/25/08; 16RP - 08/26/08; 17RP - 08/27/08; 18RP - 08/28/08; 19RP - 09/26/08.

months until he found another apartment. 12RP 336. Bones told Burton that she wanted to move on and meet other people and that he should do the same which got Burton upset. 12RP 337-38.

On the morning of October 11, 2005, Burton called Bones and asked her if she would take him to the hospital so that he could check into treatment. 12RP 353. Bones agreed to drive him to the hospital after she dropped their son off at school and she arrived at Burton's apartment around 10 o'clock. 12RP 353-54. Burton was waiting outside on the stairwell of the apartment and he got into the passenger seat of her car. 12RP 354. Burton smelled like he had been drinking but did not appear drunk even though he had been drinking the week before that morning. 12RP 355-56. Bones was concerned that Burton had not eaten breakfast so she stopped at a drive-through McDonalds for a muffin and coffee for Burton. 12RP 358-59. Bones was driving while Burton ate and then he suddenly pulled out a hammer from his coat pocket and said, "I'm going to kill you, bitch." 12RP 359. Bones tried to keep Burton from hitting her with the hammer while controlling her car and she managed to pull over and stop the car. 12RP 359-60.

Bones kept struggling with Burton over the hammer and when she tried to snatch the hammer away he bent her pinky finger back and disjointed it. 12RP 360-61. The hammer dropped to the floor and when

Bones reached to unclasp her seat belt to get out of the car, Burton threw coffee at her which burned her face. 12RP 362-63. Bones escaped and started running, but Burton got into the driver's seat and chased after her in the car. 12RP 363-64. The car hit her in the back of her legs, "he comes up behind me and hits me, and I kind of flew a distance and landed on my left hip." 12RP 364. When Bones got up and started running again, she was hit a second time and ended up wedged under the front tire of the car. 12RP 365. A man rescued her from under the car and they started running because the car came toward them but it hit the curb and flipped over. 12RP 369-70. Shortly thereafter, paramedics arrived and took her to the hospital. 12RP 370-71. Bones suffered from multiple injuries, including an orbital fracture to her eye, burns on the side of her face, and fractured ribs. 12RP 372.

In Burton's defense, he presented the expert testimony of Dr. Brett Trowbridge, a psychologist who reviewed the police reports, interviewed Burton, and administered five psychological tests. 15RP 754-55. Based upon his evaluation, Trowbridge concluded that Burton was intoxicated and seriously depressed at the time of the incident. 15RP 758-59. Trowbridge diagnosed Burton with a mental disorder defined as alcohol dependence otherwise known as chronic alcoholism. 15RP 762-65, 774-75. Trowbridge explained that Burton was a long-time alcoholic "who is

sort of a binge drinker, who quits for a while, starts up again" and that he was "drinking heavily for the several days leading up to this incident." 15RP 763. He concluded that due to Burton's depression and intoxication, his ability to form the requisite mental state was substantially diminished. 15RP 766-67, 793-94.

During discussion of the jury instructions, defense counsel objected to the court's refusal to provide proposed instructions that evidence of a mental illness or disorder could be considered to determine diminished capacity. 17RP 985-86.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO PROVIDE A JURY INSTRUCTION STATING THAT EVIDENCE OF A MENTAL ILLNESS OR DISORDER MAY BE CONSIDERED IN DETERMINING WHETHER BURTON HAD THE CAPACITY TO FORM THE REQUISITE MENTAL STATE.

Reversal is required because the trial court erred in failing to provide a jury instruction stating that evidence of a mental illness or disorder may be considered in determining whether Burton had the capacity to form the requisite mental state because the instruction was necessary to his theory of the case and he presented evidence to support the instruction.

Appellate courts review the adequacy of jury instructions *de novo* as a question of law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). The right to due process of law requires that the jury be fully instructed on the defense theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Jury instructions are sufficient if they allow the parties to argue their theories of the case and properly inform the jury of the applicable law. Barnes, 153 Wn.2d at 382. Each party is entitled to have the jury provided with instructions necessary to its theory of the case if there is evidence to support it. State v. Redmond, 150 Wn.2d 489, 495, 78 P.3d 1001 (2003)(citing State v. Riley, 137 Wn.2d 904, 908 n. 1, 976 P.2d 624 (1999)). Failure to provide such instruction constitutes prejudicial error and requires reversal. Id. 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 culpable mental state to commit the crime charged. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

Here, Dr. Trowbridge diagnosed Burton with a mental disorder defined as alcohol dependence otherwise known as chronic alcoholism:

> Q. Dr. Trowbridge, I believe we left off where we were talking about chronic alcoholism. Is that something that's in the DSM-IV?
>
> A. Well, it's -- the term is alcohol dependence.

Q. And what is the DSM-IV?

A. DSM stands for the Diagnostic and Statistical Manual, and it's Edition IV. It's basically the book that all psychologists and psychiatrists use to make diagnoses. Before we had the DSM way back when, everybody made up their own definitions of what were the symptoms of different mental illnesses, so people used all different terminology, and people weren't always talking about the same thing when they used the same words, so now we've got a book that tells us exactly what the diagnostic criteria are for each of the different mental disorders, and we're supposed to follow it.

Q. And after going through the criteria, did my client meet the criteria for alcohol dependence?

A. Yes.

Q. And that's chronic alcoholism.

A. Yes.

15RP 764-65.

In light of Dr. Trowbridge's expert testimony, defense counsel proposed two jury instructions:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form the mental state of premeditation, intent or knowledge.

CP 105; WPIC 18.20.

Chronic alcoholism is a mental illness or disorder.

CP 106; DSM-IV.

The trial court refused to provide the jury instructions, stating that "although Dr. Trowbridge did say something about his -- that is, Mr. Burton's capacity, formerly requisite intent, was substantially affected by alcohol and depression, it was clear from his -- from the testimony provided on recross that Dr. Trowbridge elaborated to say that if he was sober during this incident, there cannot be a diminished capacity defense because there would not have been an incapacitated condition, or words to the effect." 17RP 985-86. The record reflects that the court misconstrued Trowbridge's response to the State's question:

> Q. So if Mr. Burton were stone-cold sober during this incident, what would you infer?
>
> A. You know, if all of these behaviors happened when there's no incapacitating condition, then there can't be a diminished capacity defense, because there has to be an incapacitating condition.

15RP 830-31.

The record substantiates that Trowbridge never stated that if Burton were sober there would be no incapacitating condition and that he had previously rendered his opinion that Burton suffered from chronic alcoholism and that his depression and intoxication substantially diminished his capacity to form the requisite mental state. 15RP 764-67, 793-94. Consequently, the court erred in refusing to provide the instruction which prevented the defense from arguing its theory of the case

that not only was Burton intoxicated but his mental disorder diminished his capacity to form the requisite mental state at the time of the incident.

The jury was instructed that it was not bound by an opinion given by an expert. CP 163. The court therefore erred in failing to provide the proposed instructions and allowing the jury to decide what weight to give the testimony presented by Trowbridge, particularly when there was no objection from the State.

The trial court's error violated Burton's due process right to have the jury fully instructed on the defense theory of the case which consequently requires reversal and remand for a new trial. Staley, 123 Wn.2d at 803, Redmond, 150 Wn.2d at 495.

2. THE TRIAL COURT ERRED IN COUNTING BURTON'S CONVICTIONS FOR ATTEMPTED MURDER IN THE FIRST DEGREE, ASSAULT IN THE FIRST DEGREE, AND VEHICULAR ASSAULT AS SEPARATE CONVICTIONS IN VIOLATION OF HIS CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY.

The trial court erroneously counted Burton's convictions for attempted murder in the first degree, assault in the first degree, and vehicular assault as separate convictions in violation of double jeopardy because all three convictions constitute the same criminal conduct. Consequently, Burton's convictions for assault in the first degree and vehicular assault must be vacated.

The double jeopardy clauses of the Fifth Amendment and Const. art. 1, section 9 protect a defendant against multiple punishments for the same offense. State v. Calle, 124 Wn.2d 769, 772, 888 P.2d 155 (1995)(citing State v. Nolte, 116 Wn.2d 831, 848, 809 P.2d 190(1991); State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Double jeopardy may be implicated when multiple convictions arise out of the same act, even if concurrent sentences have been imposed. Calle, 124 at 775. The United States Supreme Court reasoned that multiple convictions whose sentences are served concurrently may still violate the rule against double jeopardy:

> The second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction*, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.

Ball v. United States, 470 U.S 856, 864-65, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985).

In State v. Valentine, 108 Wn. App. 24, 29 P.3d 42 (2001), Valentine and his girlfriend got into an argument and Valentine attacked her with a knife and almost killed her. A jury found him guilty of first

degree assault and second degree attempted murder and the court imposed concurrent sentences. Id. at 26. Division One of this Court vacated Valentine's conviction for assault, holding that it is a double jeopardy violation to punish an assault separately when it is also the substantial step used to prove attempted murder. Id. at 26, 29. The Court observed that in State v. Read, 100 Wn. App. 776, 791-92, 998 P.2d 897 (2000), Division Three of this Court held that an assault that ends in murder is punished only once, as murder. The Court determined that there is no reason to conclude that an assault should result in only one conviction if the victim dies, but should result in two convictions if the victim survives. Valentine, 108 Wn. App. at 28. The Courts in Read and Valentine reasoned that "the assault and murder statutes are directed at the same evil, assaultive conduct" and the "essential difference between them is the grievousness of the harm caused by the conduct." Thus, the Court concluded that when the harm is the same for both offenses, "it is inconceivable the Legislature intended the conduct to be a violation of both offenses." Read, 100 Wn. App. at 791-92; Valentine, 108 Wn. App. at 28.

In State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), Womac brought his four-month-old son who was suffering head injuries to the hospital where he died of his injuries. Id. at 647. A jury convicted Womac of homicide by abuse, felony murder in the second degree, and

assault of a child in the first degree. Id. at 647-48. The trial court found that all three counts constituted the same criminal conduct and sentencing Womac on all three counts would violate double jeopardy because Womac would receive multiple punishment for basically the same criminal conduct. Nonetheless, the court counted all three convictions as "valid convictions." Id. at 655. The Washington State Supreme Court vacated Womac's convictions for felony murder in the second degree and assault of a child in the first degree "[b]ecause all three convictions constitute the same criminal conduct" for purposes of double jeopardy. Id. 656.

Here, the trial court found that Burton's convictions for attempted murder in the first degree, assault in the first degree, and vehicular assault constituted same criminal conduct but counted the offenses as separate convictions and imposed concurrent sentences. 19RP 4-5; CP 215-20. The trial court erred because all three convictions involved the same victim and occurred at the same time and place for purposes of double jeopardy. The record reflects that during closing argument, the State explained that it had to prove beyond a reasonable doubt that Burton took a substantial step in the commission of an attempted murder. The State argued that Burton intended to kill Bones by driving right at her with the car and hitting her. 17RP 994-97.

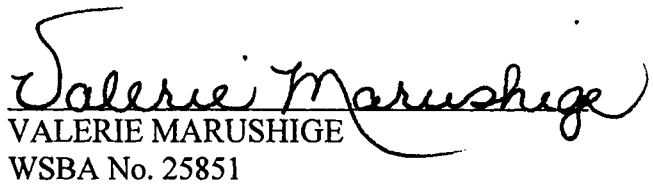
Separate punishments for the three convictions violated Burton's constitutional right against double jeopardy. Consequently, Burton's conviction for assault in the first degree and vehicular assault must be vacated. Valentine, 108 Wn. App. at 29; Womac, 160 Wn.2d at 656.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Burton's convictions and order a new trial, or in the alternative, vacate Mr. Burton's convictions for assault in the first degree and vehicular assault.

DATED this 18th day of May, 2009.

Respectfully submitted,



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DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue, Tacoma, Washington 98402 and Daryl Burton, DOC # 323556, Unit G East, Tier 2nd, Cell 202, Washington State Penitentiary, 1313 N 13th Avenue, Walla Walla, Washington 99362.

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

DATED this 18th day of May, 2009 in Kent, Washington.

Valerie Marushige

Valerie Marushige
Attorney at Law
WSBA No. 25851

COURT OF APPEALS
STATE OF WASHINGTON
2009 MAY 20 PM 12:47
BY
DIVISION ONE