

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW NORRIS,

Appellant.

FILED  
COURT OF APPEALS  
DIVISION TWO  
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STATE OF WASHINGTON  
BY [Signature]  
DROTT

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

The Honorable John R. Hickman, Judge (trial and motions) and  
The Honorables Lisa Worswick, Ronald Culpepper, Bryan Chuschcoff,  
Stephanie A. Arend, Kathryn J. Nelson and Rosanne Buckner (pretrial  
proceedings and motions)

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Matthew Norris' due process rights to have the prosecution carry its constitutionally mandated burden of proof were violated when the jury was not instructed that the state had the burden of disproving the defense of diminished capacity and in giving Jury Instruction 9A.

2. Appellant Matthew Norris was deprived of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the state and federal due process clauses, the prosecution is required to disprove any defense which negates an element of the crime. The defense of diminished capacity negates the mental element of intent by establishing that the defendant was incapable of forming that intent. Norris was charged with several crimes which required the state to prove intent, and his defense was that he suffered from diminished capacity.

Was the jury instruction on diminished capacity constitutionally deficient because it failed to inform the jury that the state had the burden of disproving the defense, beyond a reasonable doubt?

2. Further, was counsel ineffective in failing to propose an instruction which would have properly informed the jury of the state's constitutional burden of proof for the diminished capacity defense?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Matthew Norris was charged by amended information

with attempted first-degree murder, first-degree assault and first-degree unlawful possession of a firearm. CP 54-55; RCW 9.41.040(1)(a); RCW 9A.28.020; RCW 9A.32.030(1); RCW 9A.36.011(1). The attempted murder and assault charges were alleged to be “domestic violence” incidents and both were charged with firearm enhancements. CP 54-55; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530; RCW 10.99.020.

Pretrial and trial proceedings were held before the Honorables Lisa Worswick, Ronald Culpepper, John R. Hickman, Bryan Chuschcoff, Stephanie A. Arend, Kathryn J. Nelson and Rosanne Buckner on June 7, 14 and 25, August 11 and November 9, 2005, February 2, May 1, June 15, September 21, October 30, November 8, December 5 and 12, 2006, March 14 and 22, July 3 and September 4, 2007. 1RP 1, 2RP 1, 3RP 1, 4RP 1, 5RP 1, 6RP 1, 7RP 1, 8RP 1, 9RP 1, 10RP 1, 11RP 1, 12RP 1, 13RP 1, 14RP 1, 15RP 1, 16RP 1, 17RP 1;<sup>1</sup> CP 6-9, 14-16, 19-21, 26-27, 48, 51-53, 56, 84-90, 149-55, 163-71. Trial was begun before the Honorable Lisa Worswick on October 10, 11, 15 and 17, 2007, but a mistrial was declared when Norris had to be committed to a mental facility as incompetent to stand trial. 16RP 13, 17RP 92-93, 114-15; CP 149-55. After his competency was restored, trial was held before Judge Hickman on November 20, 24-25, December 1-4, 8-11 and 15, 2008, after which a jury found Norris guilty of the assault and firearm possession as charged and the lesser included offense of second-degree attempted murder. CP 156-

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<sup>1</sup>Reference to the verbatim report of proceedings is contained in Appendix A.

58, 305-314.

On February 27, 2009, Judge Hickman imposed standard-range sentences totaling 175.5 months in custody. CP 342-55; RP 1298. Norris appealed and this pleading follows. See CP 362.

2. Testimony at trial

On May 15, 2005, at about 12 in the morning, Matthew Norris called police to his home because his wife, Dianna Konik, had been shot. RP 686-90. The dispatcher told the responding units that Norris was “acting paranoid,” was “rambling,” and was saying he had been in contact with the FBI over the internet and had a live “webcast” going. RP 692-96. A firefighter who responded to give aid to Konik said Norris was “pinging” about the room and seemed incompetent, inept and highly excitable. RP 713-14.

Konik was found to have been shot in the neck. RP 700-701. She was taken to the hospital, but her injuries were not life threatening. RP 700-701, 854.

Both Konik and Norris said the shooting was an accident, but Norris was nevertheless arrested, handcuffed and taken to a patrol car. RP 602-604, 687, 950-51.

After his arrest, Norris’ mental condition became clear and, before trial, he was repeatedly found mentally incompetent to stand trial and was committed for competency restoration. RP 913-15; CP 6-9, 10-16, 19-21, 26-27, 149-55. Indeed, when trial first started, a mistrial had to be granted, because Norris’ incompetence to stand trial was clear. CP 149-55. Dr. Marcia Kent, a psychiatrist who was doing a fellowship at

Western State Hospital while Norris was first committed there, said that, only about 15 days after the incident, Norris was suffering delusions about being “electronically harassed,” thought someone was leaving notes at his home, thought people had broken into the family cars, and thought a cough by an evaluator was some kind of “signal or code.” RP 888-918. Kent explained that Norris was a paranoid schizophrenic. RP 904.

When Kent first saw him in August of 2005, Norris was rambling, thought she might have a “symbiot” controlling her and was worried that she might be trying to send a message to him when she scratched her neck. RP 898. He also thought people were trying to hurt him, or that some kind of aliens, symbiots or microorganisms were trying to do so. RP 899. He was “genuinely distressed” by his thoughts. RP 899.

Norris was also hallucinating, suspicious and paranoid, thought one of his cellmates was the devil and was very suspicious. RP 899. Norris had been put on antipsychotic medicine while he was in jail, prior to getting to Western State, but it had not gotten rid of his symptoms. RP 899.

Kent concluded that, at that time, Norris was not competent to stand trial. RP 900. Norris was not “reality-based” and “kept reverting back to delusional content.” RP 900. After he was committed for “competency restoration” for three months, Norris still did not improve much and had to be committed again. RP 903. He still thought he was hearing voices coming from outside his head, usually from a television, or a radio, or a vent in the wall. RP 903. Kent explained that brain scans of people suffering from the same severe mental illnesses as Norris show

that, when they said they “hear voices,” their auditory processing centers all “light up” so that they were really hearing the voices but they were just coming from inside their own head. RP 904. Indeed, Norris had trouble going to some of the required treatment classes because they had things like televisions monitors. RP 909.

Norris had been hospitalized for mental problems first as an adolescent, and those problems had continued throughout his adult life. RP 1012-13.

Norris told Kent he had found a dead cat on the porch before the shooting. RP 919. He did not know how it got there but believed that it was part of a “greater conspiracy” to hurt him or his wife or scare them. RP 919. At the time of the shooting, Norris was sure he was being “surveyed,” that somebody was monitoring him through his computer and that there were some phone calls to the house that were significant signs of that as well. RP 919-20. Kent said that Norris reported being under a great deal of stress at the time of the shooting and that he believed his house was bugged by the conspiracy against him. RP 949-50. He had been “having a lot of commentary in his head putting him down” and thought it was coming from the vents in the house. RP 950. Norris also said his wife did not believe him about what was going on and that frustrated him. RP 950.

The doctors at the mental hospital spent about nine months working to restore Norris’ competency to stand trial, a time period Kent admitted was unusually long. RP 913-14. Norris was put on several different medicines and eventually one of them seemed to start to work.

RP 908.

Kent believed that, at the time of the shooting, Norris was suffering symptoms of paranoid schizophrenia and was possibly in a psychotic episode. RP 921. Another expert described a “psychotic episode” as where the hallucinations and delusions became so severe that they dominate the person’s entire thinking pattern so that he becomes “quite out of touch with reality.” RP 1017. At the time of the shooting, Kent thought Norris was “very distressed, probably hallucinating, clearly delusional,” and that his behavior was obviously affected by his psychosis and delusions. RP 923.

Dr. Brett Trowbridge, a forensic psychologist who evaluated Norris several times, stated that Norris suffered from chronic paranoid schizophrenia and, at the time of the shooting, it was “acute.” RP 1007-08, 1015. Trowbridge described schizophrenia as a “major mental illness,” saying the main features of the illness are delusions, auditory hallucinations such as hearing voices, and, in the case of paranoid schizophrenia, the belief caused by the voices that someone is out to get you, attacking or threatening you. RP 1016. Norris was suffering these symptoms in July of 2006 even though he was taking an antipsychotic medication. RP 1016.

Indeed, Norris was still believing that the computer had been sending him messages, that voices were coming from the vents and that there were “pop-up” messages on his computer about his wife. RP 1013. The symptoms were even worse a year later, in 2007, when Norris told Trowbridge things like that maybe his attorney was not really a person but

instead a “shell,” that the attorney knew things he would only know if he had been inside Norris’ home, that there was a “Catholic banking problem,” and that microwaves and infrared signals were causing issues. RP 1044. When asked what kind of defense he was going to put forth, Norris said something about a “crazy ex-Marine trying to kill my wife,” but that he was “not at liberty” to explain because of the FBI and CIA and it could get Trowbridge killed. RP 1045. Norris was sure it had to do with military intelligence and that he had spoken about it with “Homeland Security.” RP 1045.

Trowbridge made it clear that Norris did not think that he was experiencing hallucinations but actually thought the voices were coming from the vents, computers, radio and television. RP 1014. What he was hearing was “sinister” and some of it talked about his wife and death. RP 1014-15. Norris was convinced his wife had been “manipulating the computer” from remote locations and was involved in the conspiracy he was sure was against him. RP 1014-15.

Trowbridge was sure that Norris suffered from acute paranoid schizophrenia on May 15, 2005, the date of the shooting. RP 1017. From the evidence Trowbridge reviewed, he agreed with Kent that Norris was clearly in the midst of a psychotic episode on that date. RP 1017. Indeed, Trowbridge said, there was no dispute among all of the experts who examined Norris that he was, in fact, suffering such an episode when Konik was shot. RP 1017-18.

Based upon the evidence he reviewed, Trowbridge stated that on the date of the incident Norris “capacity to form the mental state of

intent” was “substantially diminished.” RP 1018. Trowbridge said this seemed “quite obvious” from the evidence and that it was “clear” to him that “a person who’s in that kind of a psychotic state has diminished ability to form intent.” RP 1019. While Norris never told Trowbridge that he shot his wife because of a delusion, Trowbridge explained that it was not simply whether Norris claimed that there was some delusional reason for the shooting but instead the evidence which showed that, at the time of the shooting, he was thinking in a “rambling, disconnected, irrational way” which meant that Norris’ ability to form intent was diminished. RP 1035-39.

In contrast, Kent, who had told defense counsel that Norris was suffering from diminished capacity at the time of the shooting, had changed her opinion after talking with her supervisor, Dr. Roman Gleyzer, at WSH, as well as another. RP 925-27, 1065. At trial, Kent said she thought Norris could have had the capacity to form intent at the time of the shooting, explaining that she had changed her mind because she had come to “further understand what it means to form intent.” RP 926. When she had talked to the defense attorney, the reason she had thought Norris was unable to form intent was because “this man was so sick,” there had to be “diminished capacity.” RP 940. Gleyzer and another convinced her that Norris’ behavior was sufficiently “organized in the context of his psychotic thought processes” to accomplish things so that suggested he “had the ability to form an intent to harm somebody and be able to do that.” RP 941.

Kent conceded that she did not know whether Norris had actually

formed such intent, but was just opining that he had the capacity. RP 941. She also conceded that his mental illnesses affected Norris' behavior at the time of the shooting. RP 945. Kent also knew about "automatism," which is something like "being on auto pilot" and being able to do things without consciously being aware of them. RP 944. She conceded that the things she was referring to as supporting her belief that Norris could form intent were things like staining the cabinets and pouring a drink, all of which someone who has "automatism" could do. RP 946.

Kent's former supervisor at WSH, Dr. Gleyzer, admitted that Norris suffered from a "serious, very serious, psychiatric disorder." RP 1065, 1073. Gleyzer believed, however, that the majority of mentally ill people are "most of the times. . . capable, perfectly capable, of acting intentionally and purposefully," regardless of their diagnosis or illness. RP 1075. He also said someone with paranoid schizophrenia could act intentionally at certain times and not others, as could healthy people. RP 1109-10. Gleyzer was sure that Norris was experiencing symptoms "of the psychotic spectrum" at the time of the shooting and experienced delusional beliefs and active hallucinations at the time, but thought the symptoms did not interfere with Norris' ability to "act in a purposeful and goal-directed and meaningful fashion around that time." RP 1076-77. This was so even when he was being interviewed by the detective, when he put his hands through his hair and say, "I just want them out of my head." RP 1115.

Gleyzer stated that he and Trowbridge relied on the same facts and conducted essentially the same evaluation but that he could not agree with

Trowbridge's conclusions because he thought there was a "gap" between his assessment and conclusions. RP 1082. Gleyzer suspected that he had a "different" definition of diminished capacity, opining that Trowbridge thought that mental illness automatically diminished someone's ability to act in a purposeful, goal-directed, and organized fashion. RP 1082.

Gleyzer disagreed with that "point of view." RP 1082.

Trowbridge stated unequivocally that he did not have such a belief. RP 1034.

When asked about what had occurred when Norris called 9-1-1, Gleyzer said that it was "in part true" that Norris' actions at that point were being influenced by his delusions. RP 1097-98. Gleyzer also first said that all people who are delusional and psychotic are capable of intentional acts, but then said that was "probably not true." RP 1138. When asked again if all such people were capable of intentional acts, he said he believed so but could not refer to any source or psychiatric literature supporting that belief. RP 1139. Gleyzer also admitted people in his field might possibly disagree with him on that. RP 1139.

Gleyzer then said that his belief was "more of a philosophical question" because he could not see "why people who are viewed by society as mentally ill shouldn't be viewed also as capable of acting intentionally or purposefully, at least at times." RP 1142-43. He admitted it was "possible" such people might have a "diminished" ability to form intent but declared he did not "find that to be the case" with Norris. RP 1144.

Ted Thomas testified that Norris had worked for him as a

subcontractor and an employee for several years. RP 1159-62. Norris had said something to Thomas about people accessing Norris' computer and trying to control him, and had also said something similar about high voltage lines. RP 1159-62. Things got bad enough that Thomas stopped using Norris. RP 1163.

Norris' sister, Melissa Genin, said that Norris was being more "off" than normal when she was there until about the second week of February, being "weird with his computer and the televisions, and just the computer was talking to him and things like that." RP 954-56. Genin said she had known all her life that Norris was "a little paranoid or eccentric" and he had been hospitalized in a mental hospital as an adolescent. RP 956.

Genin had spoken with Norris the day before the incident and it was hard to have a conversation with him because he kept talking about how people were trying to get him and were after him. RP 958-59. He also kept talking about aliens. RP 958-59. To Genin, Norris' symptoms seemed much worse than they had been in February. RP 959.

Konik later said she told everyone it was an accident because she was scared, did not know where Norris was and did not want him to come after her. RP 604. According to Konik, on the day of the incident, Norris had started getting upset with her in the morning because she wanted to go shopping with her sister but he wanted her to spend time with him. RP 575. Konik testified that the incident started when she was in the bathroom trying to brush her hair and Norris was right behind her. RP 576. She tried to get away and elbow her way out of the door but he

grabbed her and shoved her down, so that she hit her head on the toilet.

RP 576.

At that point, Konik's sister called on the phone, wondering where she was. RP 576-77. Norris gave Konik the phone and Konik arranged to go shopping with her sister later in the day. RP 577. Konik said she then went to the den and sat down, upset, while Norris went out to the garage to sand and stain some cabinets. RP 577. After a short time, Konik joined Norris and they worked together on the cabinets for the rest of the day.

RP 578.

Konik testified that, later that evening, when she went to leave and go out with her sister, Norris again got upset, saying he thought they were going to spend the day together. RP 580-81. Konik nevertheless went out, saying she would be back in a few hours. RP 581. Konik and her sister went to the mall, where Konik said Norris called her, twice. RP 581-82. Konik said Norris sounded upset and did not seem to think his wife and her sister were actually at the mall. RP 581-82.

When Konik ultimately got home, she put away her coat and purse and walked into the den. RP 585. Norris then said he had something to show her so she walked towards him. RP 585. Konik testified that, when she got close, Norris shoved her into the wall. RP 585-86.

Konik asked what was going on and Norris started pointing at the computer which had some kind of document on it. RP 587. Norris accused her of sleeping with other people, saying he had proof he could show her. RP 588. She kept denying it and he kept getting angrier. RP 588. At one point, she went into the bathroom, then tried to go up the

stairs and he shoved her back into the room. RP 590.

Konik said she was “flailing” at Norris to let her go and he slapped her on the face. RP 591. She fell to the floor and he told her to shut up, throwing her a towel for the blood on her face. RP 591-92. Konik said she was crying, saying she was telling Norris the truth, but he was not believing her. RP 592. Konik also said that Norris then grabbed a gun and was waving it in her face. RP 592. In addition to the gun, Konik said, Norris had a knife and said he was going to stick it in her eye and would show her what torture was. RP 592. According to Konik, Norris then put the knife down, shoved the gun in Konik’s face and said he was going to blow her “fucking” head off. RP 596.

Konik testified that she kept saying she was telling Norris the truth and Norris kept saying she was not but that she was “going to.” RP 597. Norris stuck the gun to Konik’s forehead and she then said, “okay, I’ll tell you the truth.” RP 597. He paused, and she said, “I didn’t do anything.” RP 597. At that point, she put her head down, he put his hand on her head and she then heard the gun go off. RP 597.

Norris then grabbed Konik, yelling “Oh, my God, I shot you. I shot you.” RP 597. Konik did not think she had been shot so she told Norris that, but he walked around and pulled up the back of her shirt and suddenly Konik’s arm felt like it was on fire. RP 598. Norris was “freaking out” and tried to pick her up, but Konik told him to lay her down instead. RP 598-99, 654-59. He did so and Konik then told him to call “911.” RP 599. Norris was pacing, saying, “[w]hat am I going to do? What am I going to do?” RP 599. Norris then did something in the file

cabinet, took the clip out of the gun and laid it on Konik's stomach, then said, "no, no," and put the clip into Konik's pants pocket. RP 599-600.

Konik said she kept telling Norris to call "911" and finally he said "okay," but then asked her what he should say. RP 600. Konik told Norris to say it was an accident, that "the gun just went off." RP 600. Norris agreed, then called the police. RP 600.

Shortly after the incident, Konik sought a divorce and filed a lawsuit against Norris. RP 625. At Norris' trial, Konik tried to minimize Norris' mental symptoms, claiming he had never told her he was hearing voices or "getting messages" prior to the date of the shooting. RP 628-30. Konik admitted, however, that during the divorce, she asked at one point for a guardian to be appointed for Norris, because he was in the mental hospital. RP 626-27.

Konik also conceded that she had told a detective that, a few weeks before the incident, Norris started staying up late, was on the computer all night, started making wild accusations that she was going to orgies, said he had proof, claimed that he had run reports and it would show up as her doing something on the computer, and said he thought someone had hacked into the computer and was watching them. RP 626-48. Konik also told police Norris had been upset because he thought hackers were messing with their computers and their lives and that he thought she was the one who was doing that at one point but had become sure others were involved, as well. RP 649. Konik admitted Norris had said he believed the computer was manipulating their lives and that Konik was somehow "in his head." RP 649, 681-82.

During her interview with police just after the incident, the detective asked if Konik thought Norris was mentally stable and she said “no.” RP 1020. She also told police that she thought Norris was having some kind of a mental breakdown or was on drugs at the time of the shooting. RP 1020.

At trial, Konik conceded that, during the incident, while Norris was telling her he knew that she was doing something and not telling the truth and that the proof was on the computer, she was thinking this was not “right” and not “normal,” what he was doing. RP 655.

Genin was sure that Konik was aware of what was going on with Norris because she was there when Genin noticed Norris’ symptoms had gotten worse. RP 957.

D. ARGUMENT

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON  
THE CRUCIAL QUESTION OF DIMINISHED CAPACITY

Defendants in criminal cases have a state and federal right to a fair trial. See, e.g., State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999). To meet those constitutional demands, jury instructions, read as a whole, must correctly tell the jury the applicable law, must not be misleading, and must permit the defendant to present his theory of the case. See State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). This Court reviews jury instructions de novo to determine if they meet those requirements. Id.

In this case, the jury instructions failed to meet those constitutional standards, because the instruction on diminished capacity did not inform the jury that the prosecution bore the burden of disproving that defense,

beyond a reasonable doubt. Further, counsel was ineffective in failing to propose an instruction which would have satisfied his client's constitutional rights.

a. Relevant facts

At trial, counsel argued that the Washington Pattern Jury Instruction ("WPIC") on diminished capacity, WPIC 18.20, was not clear and that further instruction needed to be given in order to tell the jury how to properly apply the law. RP 986-89. He proposed an instruction which would have provided:

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

The prosecution is required to prove beyond a reasonable doubt that the defendant, Matthew Norris, attempted to cause the death of another, with premeditated intent in Count I, and intended to assault another with a firearm in Count II. If you find from the evidence, that his capability to intend an act that was criminal was substantially diminished as a result of a mental disease or disorder, you must find him not guilty of that crime.

CP 198.

Counsel argued that the proposed instruction properly told the jury how to apply the law and the WPIC did not tell them to do anything. RP 988. The prosecution said that the jury should be told to do anything relating to diminished capacity and that the proposed instruction was "unnecessary" and "unduly" emphasized the state's burden of proof. RP 990. After taking time to look at the law, the court stated it could not find anything which helped it determine what the proper instruction would say. RP 995. The court decided, however, that it would not give the proposed defense instruction, because it thought the WPIC gave the defense the

opportunity to argue its theory and that the proposed instruction could cause “confusion” and make it seem that the defense had something to “disprove.” RP 995. The court did not explain further. RP 995.

Later, in discussing the instructions, counsel again objected to the court giving the WPIC, stating that instruction was faulty. RP 1152. When the court asked for any exceptions on the instructions, counsel again noted that he had proposed a different diminished capacity instruction which he believed was a correct statement of the law and would allow Norris to argue his theory of the case. RP 1173. Counsel argued that the court should not give the instruction designated as 9A, stating that instruction provided no guidance to the jury regarding intent and that it was a “misstatement of the law.” RP 1174.

The instruction the court gave, instruction 9A, provided:

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent as required in Counts I and II and their lesser included offenses.

CP 280.

- b. The jury should have been instructed on the state’s burden of disproving the diminished capacity defense. Failure to do so violated Norris’ rights to due process and counsel was constitutionally ineffective.

Both the state and federal due process clauses mandate that the prosecution shoulder the burden of proving all the essential elements of an offense, beyond a reasonable doubt. State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); 6<sup>th</sup> Amend.; 14<sup>th</sup> Amend.; Art. I, §§3, 21, 22. In

addition, where a defense negates an element of the charged crime, due process mandates that the prosecution has the burden of proving the absence of that defense, also beyond a reasonable doubt. State v. R.H., 86 Wn. App. 807, 808-809, 939 P.2d 217 (1997). Failing to properly instruct the jury on the prosecution's constitutionally mandated burden can be reversible error, if the instructions given relieve the prosecution of the full weight of its burden or mislead the jury as to the law. See, e.g., State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996), disapproved in part and on other grounds by, State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009).

In this case, the jury instruction on diminished capacity was in error, because it failed to instruct the jury that the prosecution had the burden of disproving diminished capacity beyond a reasonable doubt.

As a threshold matter, this issue is properly before the Court. While counsel did not object that the instruction failed to tell the jury that it was the state's burden to disprove the defense of diminished capacity, counsel objected to the instruction as not proper because it failed to tell the jury how to apply the diminished capacity defense, and also because it was a "misstatement of the law." RP 969-89, 1174. Further, the failure to properly instruct the jury on the prosecution's constitutionally mandated burden can be a manifest constitutional error which may be raised for the first time under RAP 2.5(a). See, e.g., O'Hara, 167 Wn.2d at 98-101.

In O'Hara, the Court departed from the previous rule, set down in LeFaber, supra, that all misstatements of the law in relation to a defense for which the prosecution carries the burden of proof are automatically reviewable as manifest constitutional error. O'Hara, 167 Wn.2d at 101-

104. Instead, the Court held, such errors must be examined on a case-by-case basis, in order to determine whether they affect a constitutional right by doing something such as misstating the prosecutor's burden or shifting a burden to the defendant. O'Hara, 167 Wn.2d at 104. In O'Hara, the error was simply a failure to define a term further, which the Court held was nothing more than a failure to "further define one of the elements" and did not relieve the state of its constitutionally mandated burden. 167 Wn.2d at 107-108. The Court contrasted that error with the one in LeFaber, which was ambiguous about whether the state had the burden of disproving a defense when in fact it carried such a constitutional burden. O'Hara, 167 Wn.2d at 107-108. Because in LeFaber the instruction effectively relieved the state of its constitutional burden, it was a manifest constitutional error, reviewable for the first time on appeal. O'Hara, 167 Wn.2d at 108.

Here, as in LeFaber, the failure to properly instruct the jury relieved the state of its constitutionally mandated burden. Further, this constitutional error was "manifest," because Norris can make a plausible showing that it had a practical and identifiable consequence on the trial. See State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). First, however, it is necessary to examine why the instruction was constitutionally improper.

In order to determine whether the prosecution must bear the burden of disproving a defense, the Supreme Court has applied two tests, one of which focuses on the mandates of due process and one of which is not constitutional but simply a question of legislative intent. See Acosta,

101 Wn.2d at 616; see also, State v. Lively, 130 Wn.2d 1, 11-12, 921 P.2d 1035 (1996). The latter asks if the legislature intended the state to have to bear the burden of proving the absence of the defense as an element of the crime. Acotsa, 101 Wn.2d at 615-16. The former looks at the function of the defense and asks whether it negates an element. 101 Wn.2d at 615-16; see State v. Seek, 109 Wn. App. 876, 883, 37 P.3d 339 (2002). If the defense negates an element of the relevant crime, then that defense must be disproven by the state in order to comply with due process. Acosta, 101 Wn.2d at 616; see State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983).

Thus, in Acosta, where the relevant crime required the defendant to “knowingly” inflict “grievous bodily harm” and the defendant claimed self-defense, the Court held that the prosecution had to disprove self-defense, beyond a reasonable doubt. 101 Wn.2d at 616. “Knowledge” is defined as being “aware of facts or circumstances ‘described by a statute defining an offense,’” the Court reasoned, but self-defense is a lawful act, so that a person cannot possibly “knowingly” inflict grievous bodily harm while acting in self-defense. 101 Wn.2d at 616. Put another way, the Court declared, “proof of self-defense negates the knowledge element” of the crime, so that due process requires the prosecution to disprove it. 101 Wn.2d at 616.

Similarly, where a defendant is charged with criminal trespass and invokes the defense that he was lawfully on the premises, that defense negates the “unlawful” entry element of trespass, so that due process mandates that the state shoulder the constitutional burden of proving the

absence of the defense, beyond a reasonable doubt. R.H., 86 Wn. App. at 809.

In contrast, the defense of entrapment does not have to be disproven by the state beyond a reasonable doubt, because it does not negate any element of the charged crime. Lively, 130 Wn.2d at 13-14. Entrapment simply involves a claim that, while the defendant committed all the elements of the crime, that conduct was excused because the government incited it. See, State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987). As a result, it does not negate any elements - it just forgives the conduct - so there is no due process requirement for the state to disprove it. Lively, 140 Wn.2d at 13-14.<sup>2</sup>

Here, unlike in the case of entrapment, the relevant defense must be disproven by the state. The defense was diminished capacity based upon a mental disorder. That defense applies when a mental disorder not amounting to insanity impairs the defendant's ability to form the culpable mental state to commit the charged crime. See State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998). The relevant mental state to which the diminished capacity applies is the mental state required to prove the crime, rather than general "specific intent." See State v. Atsbeha, 142 Wn.2d 904, 914 n. 18, 16 P.3d 626 (2001). This requirement represents a shift from prior caselaw, which had focused on the general concept of

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<sup>2</sup>The Lively Court also found that the statute creating the defense did not indicate an intent by the Legislature to have the state disprove the entrapment defense. 140 Wn.2d at 14-15.

“specific intent” only. State v. Griffin, 100 Wn.2d 417, 418, 670 P.2d 265 (1983); see State v. Edmon, 28 Wn. App. 98, 103-104, 621 P.2d 1310 (1981). With the advent of four separate levels of culpability, codified in RCW 9A.08.010, however, courts now hold that the defense goes directly to the relevant mental state of the specific crime, i.e., intent or knowledge.<sup>3</sup> Griffin, 100 Wn.2d at 418; see also, State v. Allen, 101 Wn.2d 355, 359, 678 P.2d 798 (1984) (heirarchy of mental states).

As a result, under current law, with diminished capacity, the defense is saying that the defendant did not and *could not* have the mental state to commit the crime. See, e.g., Brett C. Trowbridge, *The New Diminished Capacity Defense in Washington*, 36 Gonz. L. Rev. 497, 499 (2001). Effectively, the defense establishes the absence of an essential element of the crime, i.e., the mental state. As a result, the defense “negates one of the elements of the charged crime,” i.e., the required mental state. See State v. Nuss, 52 Wn. App. 735, 737, 763 P.2d 1249 (1988).

In this case, the relevant crimes of attempted first-degree murder, attempted second-degree murder and first-degree assault all required intent as their mental states. First-degree assault requires a defendant to have acted with “intent to inflict great bodily harm.” RCW 9A.36.011(1). Attempted first-degree murder requires proof of an intent to commit first-degree murder, in this case by premeditation. RCW 9A.32.030(1)(a): see

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<sup>3</sup>The Supreme Court has held that the diminished capacity defense does not apply to the mental state of “negligence.” See State v. Coates, 107 Wn.2d 882, 893, 735 P.2d 64 (1987).

CP 54-55. Attempted second-degree murder requires proof of an intent to cause the death of another, without premeditation. RCW 9A.32.050(1)(a).

Under RCW 9A.08.010, a person acts with “intent” or “intentionally” when “he or she acts with the objective or purpose to accomplish a result which constitutes a crime.” This is akin to the “knowledge” definition in Acosta, requiring that the defendant is “aware of facts or circumstances ‘described by a statute defining an offense.’” 101 Wn.2d at 616. As the Acosta Court noted, because self-defense is a lawful act, it is “therefore impossible for one who acts in self-defense to be aware of facts or circumstances ‘described by a statute defining an offense,’” because self-defense negates the “knowledge” element of the crime. Similarly, a person suffering diminished capacity cannot act “intentionally,” i.e., with the objective or purpose to accomplish a crime if he or she is incapable of forming intent.

Indeed, the Supreme Court has held that a defense which negates the ability to act “intentionally” must be disproved by the state. In McCullum, supra, the defendant was charged with first-degree murder, which required proof of “premeditated intent.” 98 Wn.2d at 487. After first examining the Legislative intent did not clearly impose the burden of proving self-defense onto defendants, the Court then examined whether self-defense negated one or more of the essential elements of the crime. 98 Wn.2d at 494. The Court noted that the definition of intent was acting “with the objective or purpose to accomplish a result which constitutes a crime.” 98 Wn.2d at 495. The Court then concluded that a person who acted in self-defense could not have acted with “intent” because “intent”

mandated acting with the objective or purpose to accomplish a crime whereas self-defense was a lawful act. 98 Wn.2d at 495.

Similarly, here, a defendant cannot have acted with “objective or purpose to accomplish a result which constitutes a crime,” i.e., with intent, if he or she cannot *form* intent because of diminished capacity. Because diminished capacity negates the mental state of intent, due process mandates that the prosecution bear the burden of disproving that defense. The Court’s failure to so instruct the jury here was error.

In response, the prosecution may attempt to argue to the contrary based upon State v. James, 47 Wn. App. 605, 736 P.2d 700 (1987). Any such reliance should be rejected. In James, this Court held that the trial court was not required to give a separate jury instruction explaining that the state had to disprove diminished capacity caused by voluntary intoxication, beyond a reasonable doubt. 47 Wn. App. at 606-607. The Court held that McCullum, supra, and Acosta, supra, were “inapposite to diminished capacity defenses,” declaring that those cases were decided as they were because the defense of self-defense “adds another element to the State’s case” and thus “the absence of self-defense is an element of the State’s case. . .not covered by the ‘to-convict’ instruction.” James, 47 Wn. App. at 608.

James should not be followed, for several reasons. First, James did not involve the defense in this case - diminished capacity based upon mental illness. Instead, it involved “intoxication causing diminished capacity.” 47 Wn. App. at 609. There is a significant difference between the two defenses, which was crucial to the decision in James, because the

defense of voluntary intoxication at issue in James is created by a statute, RCW 9A.16.090, while the defense of diminished capacity based upon mental illness is not. See, e.g., John Q. LaFond and Kimberly A. Gaddis, *Washington's Diminished Capacity Defense Under Attack*, 13 U. Puget S. L. Rev. 1, 4, 15 (1989). James specifically relied on the language of the statute in reaching its conclusion, noting that the statute clearly provides that voluntary intoxication does *not* render acts by a person in such a state “less criminal” but that people are simply allowed to claim that they were so intoxicated that they did not act with the requisite intent. See, e.g., State v. Gallegos, 65 Wn. App. 230, 238, 828 P.2d 37 (1992).

Indeed, courts have recognized that, while a voluntary intoxication defense is “similar” to a mental diminished capacity defense, it is still “separate from” it. See e.g., State v. Thomas, 123 Wn. App. 771, 781, 98 P.3d 1258 (2004). And this distinction extends to the very nature of the two defenses. Under the defense of voluntary intoxication, it is not the “fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant’s ability to formulate the requisite mental state.” Gallegos, 65 Wn. App. at 238, quoting, Coates, supra. In contrast, a defendant is not even *entitled* to a diminished capacity instruction unless there is evidence not only that he or she suffered from a mental disorder but that the mental disorder had the effect of preventing him or her to have the capacity to form intent. See, State v. Cienfuegos, 144 Wn.2d 222, 228, 25 P.3d 1011 (2001).

Notably, in another context, the Legislature specifically treats voluntary intoxication and diminished capacity-type conditions

differently, reflecting not only their differences but also the public policy behind acknowledging those differences. In the exceptional sentencing realm, being voluntarily intoxicated - even if addicted - is not a mitigating factor allowing the defendant to be treated with more leniency, while mental conditions which cause significant impairment *can* be a basis for a lesser sentence. See, e.g., State v. Hutsell, 120 Wn.2d 913, 845 P.2d 1325 (1993); RCW 9.94A.535(1)(e) (making it a mitigating factor that the defendant's "capacity to appreciate the wrongfulness" of his or her conduct or act in accordance with the law was "significantly impaired" but specifically excluding from consideration "[v]oluntary use of drugs or alcohol"). The exclusion of voluntary use of alcohol or drugs from the list of mitigating factors while including mental conditions reflects the different public policy considerations underlying excusing criminal behavior based either on voluntary intoxication or the usually involuntary condition of suffering from mental illness. Put simply, allowing a person to escape responsibility based upon their choice to get drunk or stoned is far different than recognizing that a person's mental illness may cause them to be incapable of forming intent and thus incapable of being proven guilty of a particular crime.

In any event, James was simply wrong when it declared that the reason that Acosta and McCullum were decided as they were was because self-defense created a new "element of the State's case." James, 47 Wn. App. at 608. In fact, both Acosta and McCullum were decided based upon the Court's determination that proof of the relevant defense negated an element of the state's case, not that it *created* a new element. See Acosta,

101 Wn.2d at 616; McCullum, 98 Wn.2d at 490.

Thus, James does not apply in this case, because it involved a different defense. Further, it relied on a misapprehension of Acosta and McCullum. Under those cases and under the state and federal due process clauses, the defense of diminished capacity must be disproven by the state, beyond a reasonable doubt, because the defense negates the mental element of the relevant crimes. The trial court erred in failing to so instruct the jury.

There can be no question that this constitutional error in instructing the jury was “manifest,” because Norris can make more than a plausible showing that it had a practical and identifiable consequence on the trial. See Kirkman, 159 Wn.2d at 935. The only issue at trial was whether the defense of diminished capacity would be accepted by the jury. RP 1186-1252. The instruction the court gave, instruction 9A, told the jury only that “[e]vidence of mental illness or disorder *may* be taken into consideration in determining whether the defendant had the capacity to form intent as required in Counts I and II and their lesser included offenses.” CP 280 (emphasis added). It did not require the jury to consider whether the state had disproven that Norris’ significant mental illness of paranoid schizophrenia had negated his ability to form the required intent. Had the jury been properly instructed, given the evidence in this case, it is more than probable that the jury would have found that the state had failed to disprove the defense, and Norris would have been acquitted. The error was clearly “manifest.”

Finally, counsel was ineffective in failing to propose an instruction

which would have properly informed the jury of the prosecution's burden of disproving the diminished capacity defense. Both the state and federal constitutions guarantee the right to effective assistance of counsel.

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and other grounds by, Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Failure to propose a correct jury instruction may amount to ineffective assistance where there is a substantial likelihood the failure may have affected the verdict. Cienfuegos, 144 Wn.2d at 228.

In this case, counsel clearly was aware that there were significant problems with the diminished capacity instruction. He knew that the instruction did not tell the jury to *do* anything. He knew that it was insufficient to tell the jury how to apply the defense. But the instruction he proposed did not tell the jury that the state had the burden of disproving the defense. Such an instruction was required in order to inform the jury of the prosecution's full constitutional burden, however. Counsel's failure to propose the instruction precluded the court from giving it; the result

was that Mr. Norris was convicted by a jury which was not properly instructed and which failed to be aware that the prosecution had the burden of disproving the defense. As a result, counsel's performance was deficient and the deficiency clearly prejudiced Norris, whose defense would likely have been accepted had the prosecution been held to its true burden. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 15<sup>th</sup> day of February 2010.

Respectfully submitted,

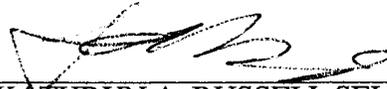
  
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CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached brief, first class postage prepaid, to opposing counsel and the defendant at the following address on this date:

- TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;
- TO: Matthew Norris, DOC 724510, WSP, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA. 99362.

DATED this 18<sup>th</sup> day of February 2010.



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## APPENDIX A

The verbatim report of proceedings in this case consists of 23 bound volumes. Unfortunately, some of the volumes contain multiple days, some of which are chronologically paginated and some of which are not.

The volumes will be referred to as follows:

June 7, 2005, contained in the volume reported by Suzanne Trimble with multiple dates, none of which are chronologically paginated, separated by numbered tabs, as "1RP;"

June 14, 2005, tab 1 of the Trimble volume, as "2RP;"

June 22, 2005, as "3RP;"

August 11, 2005, as "4RP;"

November 9, 2005, as "5RP;"

February 2, 2006, as "6RP;"

May 1, 2006, as "7RP;"

June 15, 2006, tab 2 of the Trimble volume, as "8RP;"

August 16, 2006 (nothing on record; not referred to in brief);

September 21, 2006, tab 3 of the Trimble volume, as "9RP;"

October 3, 2006, tab 4 of the Trimble volume, as "10RP;"

November 8, 2006, tab 5 of the Trimble volume, as "11RP;"

December 5, 2006, tab 6 of the Trimble volume, as "12RP;"

December 12, 2006, tab 7 of the Trimble volume, as "13RP;"

March 14, 2007, tab 8 of the Trimble volume, as "14RP;"

March 22, 2007, as "15RP;"

the volume containing the chronologically paginated proceedings of July 3 and November 30, 2007, and January 8 and June 2, 2008, as "16RP;"

September 4, 2007, October 10-11, October 15 and 17, all chronologically paginated, contained in tabs 9, 10, 11, 12 and "Exhibit E" in the Trimble volume, as "17RP;"

the 14 chronologically paginated volumes containing the pretrial and trial proceedings of November 20, 24-25, December 1-4, 8-11, 15-16, 2008 and February 27, 2009, as "RP."