

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

NO. 39254-2-II

STATE OF WASHINGTON,

Respondent,

vs.

RHONDA MARCHI,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 06-1-00598-7

BRIEF OF RESPONDENT

BRIAN PATRICK WENDT, WSBA #40537
Deputy Prosecuting Attorney

Clallam County Courthouse
223 East Fourth Street, Suite 11
Port Angeles, WA 98362-3015
(360) 417-2297 or 417-2296

Attorney for Respondent

01-10-10 1111

SERVICE	Mr. Gregory Link Washington Appellate Project 1511 Third Ave, Suite 701 Seattle, WA 98101	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: March 12, 2010, at Port Angeles, WA
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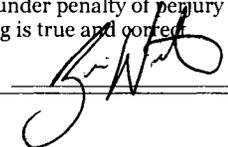


TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
I. COUNTER STATEMENT OF THE ISSUES ...	1
II. STATEMENT OF THE CASE	1
A. Facts	1
B. Procedural History	5
III. ARGUMENT	10
A. CONVICTIONS FOR ATTEMPTED MURDER AND ASSAULT OF A CHILD DO NOT VIOLATE DOUBLE JEOPARDY.	10
B. SHOULD THIS COURT HOLD THAT THE TWO CONVICTIONS VIOLATE DOUBLE JEOPARDY, THE PROPER REMEDY IS TO AFFIRM THE CONVICTION FOR ATTEMPTED MURDER.	15
C. THE TRIAL COURT DID NOT RELIEVE THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CRIMES BEYOND A REASONABLE DOUBT.	16
IV. CONCLUSION	22
APPENDIX	

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page(s)</u>
<u>Federal Case Law</u>	
<i>United States v. Blockburger</i> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)	11
<u>Washington State Case Law</u>	
<i>In re Burchfield</i> , 111 Wn. App. 892, 46 P.3d 840 (2002)	15
<i>In re Orange</i> , 152 Wn.2d 795, 100 P.3d 291 (2004)	15
<i>In re Stranger Creek</i> , 77 Wn.2d 649, 466 P.2d 508 (1970)	19
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	20
<i>State v. Atsbeha</i> , 142 Wn.2d 904, 16 P.3d 626 (2001)	17 - 18
<i>State v. Calle</i> , 125 Wn.2d 769, 888 P.2d 155 (1995)	10-14
<i>State v. Carter</i> , 31 Wn. App. 572, 643 P.2d916 (1982)	18
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001)	17
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005)	11
<i>State v. Fuller</i> , 42 Wn. app. 53, 708 P.2d 413 (1985)	20 - 22
<i>State v. Griffin</i> , 100 Wn.2d 417, 670 P.2d 265 (1983)	17
<i>State v. Gohl</i> , 109 Wn. App. 817, 37 P.3d 293 (2001)	15
<i>State v. Greene</i> , 139 Wn.2d 64, 984 P.2d 1024 (1999)	19
<i>State v. Greene</i> , 92 Wn. App. 80, 960 P.2d 980 (1998)	19
<i>State v. Hughes</i> , 166 Wn.2d 675, 212 P.3d 558 (2009)	15 -16
<i>State v. James</i> , 47 Wn. App. 605, 736 P.2d 700 (1987)	18 - 21

<i>State v. Lively</i> , 130 Wn.2d 1, 921 P.2d 1035 (1996)	18
<i>State v. McCullum</i> , 98 Wn.2d 484, 656 P.2d 1064 (1983)	20
<i>State v. Martin</i> , 149 Wn. App. 689, 205 P.3d 931 (2009)	15
<i>State v. Nuss</i> , 52 Wn. App. 735, 763 P.2d 1249 (1988)	18
<i>State v. Pirtle</i> , 127 Wn.2d 628, 904 P.2d 245 (1995)	16
<i>State v. Redmond</i> , 150 Wn.2d 489, 78 P.3d 1001 (2003)	17
<i>State v. Stumpf</i> , 64 Wn. App. 522, 827 P.2d 294 (1992)	18
<i>State v. Thomas</i> , 123 Wn. App. 771, 98 P.3d 1258 (2004)	19
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003)	17
<i>State v. Valentine</i> , 108 Wn. App. 24, 29 P.3d 42 (2001)	15
<i>State v. Weber</i> , 159 Wn.2d 252, 149 P.3d 646 (2006)	16

STATUTES:

Revised Code of Washington [hereinafter RCW]

RCW 9A.28.020	10, 12
RCW 9A.32.030(1)(a).	10, 12, 13
RCW 9A.36.011(1)(b).	10, 12, 13
RCW 9A.36.120(1)(a)	10, 12

OTHER AUTHORITIES

W. LaFave & A. Scott, <i>Criminal Law</i> ss 8, 45 (1972)	18
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I. COUNTER STATEMENT OF THE ISSUES

1. Did the defendant's convictions for Attempted Murder in the First Degree and Assault of a Child in the First Degree violate double jeopardy when (1) they each require the State to prove elements not included in the other, and (2) are located in different chapters of the criminal code?
2. Did the trial court err when it did not give an instruction stating that the prosecution had the burden to disprove the proffered defense of diminished capacity beyond a reasonable doubt when its instructions (1) specifically placed the burden of proving each element of the alleged crimes beyond a reasonable doubt on the State, (2) advised the jury that each element in the "to convict" instruction had to be proved beyond a reasonable doubt in order to render a guilty verdict, and (3) informed the jury that it could consider evidence of diminished capacity?

II. STATEMENT OF THE CASE

FACTS

In 2006, M.H. spent the Christmas Holiday with her father, who resided in Boise, Idaho. RP (03/10/2009) at 18-19, 45. On December 25, M.H. returned home to her mother, the defendant, Ms. Rhonda Marchi. RP (03/10/2009) at 20. Ms. Marchi met her daughter at the airport, and the two drove back to their home in Port Angeles, Washington. RP (03/10/2009) at 21.

At some point during the drive, M.H. complained of a toothache. RP (03/10/2009) at 21. Ms. Marchi promised to give her daughter some medicine when the pair arrived home. RP (03/10/2009) at 21. As the trip

progressed, M.H. told her mother about her visit to see her father. RP (03/10/2009) at 33. M.H. shared that her stepmother believed that Ms. Marchi was “crazy” and that she had “play[ed] games with the flight schedules.” RP (03/10/2009) at 37. In response, Ms. Marchi said the stepmother's comments were not very nice. RP (03/10/2009) at 39.

When the two arrived home, M.H. went inside to get ready for bed before joining her mother to watch a movie. RP (03/10/2009) at 22. After putting on her pajamas, M.H. walked to her mother's bedroom. As she passed the kitchen, M.H. saw two cups of “foggy water” sitting on the kitchen counter. RP (03/10/2009) at 22-23.

At approximately 10:30 p.m., Ms. Marchi joined M.H. in the master bedroom, carrying one of the cups of “foggy water.” RP (03/10/2009) at 24. Ms. Marchi told M.H. to drink the “medicine” so that her tooth would feel better. RP (03/10/2009) at 24. M.H. drank the solution as instructed, despite having told her mother that the toothache had subsided and she no longer needed anything for the pain. RP (03/10/2009) at 23-24. M.H. quickly fell asleep after consuming the elixir. RP (03/10/2009) at 24.

After Ms. Marchi rendered her daughter unconscious, she proceeded to work on her computer. RP (03/12/2009) at 67. At 11:17 p.m., Ms. Marchi typed a word document entitled “Last Will.” RP (03/12/2009)

at 84-85. The word document was remarkably free of any typographical errors, and it explained the funeral arrangements that Ms. Marchi desired for her daughter and herself. *See* RP (03/18/2009) at 84, 88-89. Ms. Marchi titled and saved the document at 11:37 p.m. RP (03/12/2009) at 109. The document was saved a second time at 12:09 a.m. on December 26, 2006.¹ RP (03/12/2009) at 109.

Ms. Marchi printed a copy of her last will and placed it on the kitchen table. RP (03/12/2009) at 88. Ms. Marchi then laid down alongside M.H. after she consumed some of the same “medicine” that she administered to her daughter.

At 2:05 a.m., Ms. Marchi called 911. *See* Exhibit 19 at 1-8 (Appendix A) – Clerk’s Papers To Be Determined. While Ms. Marchi told 911 that she deliberately gave her daughter a potent drug cocktail², she explained:

[M.H. had] just come back from her dad’s today and he was really abusive and everything and I just snapped.

I’m not really like this but I just, I just snapped and I couldn’t control myself.

¹ A forensic computer analyst could not determine if this final save was manual or automatic. RP (03/12/2009) at 132.

² The drug infused cocktail included 20-100 crushed tablets of an assortment of prescribed medications: Lorazepam (a central nervous system depressant); Clonazepam (a central nervous system depressant); Trazodone (a central nervous system depressant); and Hydrocodone (a narcotic analgesic). RP (03/10/2009) at 100, 102; RP (03/11/2009) at 36, 155. Exhibit 19 at 1.

Exhibit 19 at 5; RP (03/10/2009) at 78, 163-64. Additionally, Ms. Marchi provided a detailed description of her home, how paramedics should access the residence, and corrected certain information incorrectly recorded by the 911 operator. Exhibit 19 at 1-8.

When emergency personnel arrived, they found M.H. unconscious and unresponsive. RP (03/10/2009) at 86, 97. Paramedics described M.H.'s condition as "grave." RP (03/10/2009) at 99. According to medical personnel, the drug infused cocktail depressed M.H.'s neurologic function, her respiratory system, and her blood pressure. RP (03/10/2009) at 129-30, 138. As a result, M.H. was in a coma-like state. RP (03/11/2009) at 15-16. It was not until medical personnel administered a third reversal agent that M.H. started to respond and her condition began to improve. RP (03/11/2009) at 16.

In contrast to M.H.'s condition, Ms. Marchi arrived at the hospital in a stable condition: alert, oriented, good vital signs. RP (03/11/2009) at 25. Ms. Marchi told attending hospital staff that her ex-husband was abusive throughout their marriage, and that he had threatened to keep M.H. in Idaho. RP (03/11/2009) at 42, 48. Ms. Marchi never inquired of her daughter's condition until two hours after her admission to the hospital. RP (03/11/2009) at 27, 46-48.

When law enforcement contacted Ms. Marchi, she explained that “I thought [M.H.] would be better off in Heaven than with her dad, he’s beat every wom[a]n he’s ever been with, chocked me until I couldn’t breath.” RP (03/11/2009) at 77.

PROCEDURAL HISTORY

The State charged Ms. Marchi with Attempted Murder in the First Degree and Assault of a Child in the First Degree. CP 175-76. The State’s theory of the case was that Ms. Marchi intended to kill her daughter in an effort to hurt or exact some level of revenge on her ex-husband. *See e.g.* RP (03/19/2009) at 18, 25, 61-62.

At trial, Ms. Marchi never challenged the underlying facts pertaining to the two crimes. Instead, Ms. Marchi argued that she did not have the requisite *mens rea* to commit the offenses as charged. In support of her diminished capacity defense, Ms. Marchi relied on her friends and family members who testified that they observed her physical and emotional health deteriorating in the months leading to Christmas 2006. *See e.g.* RP (03/16/2009) at 117-18, 139, 154-55, 179, 182; RP (03/18/2009) at 13, 18, 28. Ms. Marchi also proffered the expert testimony of Dr. Stephen Melson. *See* RP (03/16/2009) at 6-110.

Dr. Melson testified that Ms. Marchi suffered from major depressive disorder, certain anxiety disorders, and borderline personality disorder. RP (03/16/2009) at 24-26. While Dr. Melson stated that the presence of one or more of these disorders “does not necessarily mean that a person is unable to function or is impaired[,]” he surmised that Ms. Marchi’s combination of disorders would lead her to misperceive her ex-husband to be threatening, abusive, or damaging. RP (03/16/2009) at 31-33, 38-39. Dr. Melson opined that Ms. Marchi’s increased reliance on prescribed medication, and the progression of her physical and mental symptoms in December 2006 would tend to make her emotionally and psychologically fragile, reducing her ability to fully reason and function. RP (03/16/2009) at 52-53, 60. According to Dr. Melson, when M.H. relayed certain disparaging comments to her mother, Ms. Marchi’s emotional state further deteriorated, substantially impairing her ability to formulate intent to commit murder. RP (03/16/2009) at 64, 67-68.

However, Dr. Melson also explained that Ms. Marchi “probably even knew that committing suicide [and] administering poison to one’s daughter are not only illegal but immoral and that that would be wrong.” RP (03/16/2009) at 70. When asked explicitly if Ms. Marchi could form the requisite intent to harm her daughter, Dr. Melson explained:

A. Well, in one sense she could - - she could form the intent to the extent she could commit the physical act. But I think she was impaired in being able to formulate the intent to harm her daughter. Because I don't think she was thinking of it at the time as harming her daughter.

Q. Well, what was she thinking of it as?

A. Well, I wish I could say. We'd all be better off if we knew what other people were thinking at such a time. But, it rests on the belief that one has to rescue one's self and one's daughter who is a part of one's self from an impossibly threatening situation that she could not live with.³

RP (03/16/2009) at 72.

In rebuttal, the State called Dr. Ken Muscatel. *See* RP (03/18/2009) at 55-130. Dr. Muscatel affirmed that Ms. Marchi suffered from a personality disorder not otherwise specified (NOS) in the DSM-IV⁴. RP (03/18/2009) at 69, 106-07. However, Dr. Muscatel testified that he did not see any evidence that suggested that Ms. Marchi was unable to act intentionally on the late night / early morning of December 25 and 26, 2006. RP (03/18/2009) at 80-81. Important to Dr. Muscatel's conclusion

³ According to Dr. Melson, Ms. Marchi was so devoted to her daughter that she was unable to see M.H. as a separate individual with her own personality/needs, but instead viewed her as an extension of Ms. Marchi's own self. RP (03/16/2009) at 39-40.

⁴ Diagnostic and Statistical Manual of Mental Disorders, 4th Edition (DSM-IV) is a manual published by the American Psychiatric Association and covers all mental health disorders for both children and adults.

was that the events that transpired on the night in question were the result of intentional, organized, goal directed behavior. RP (03/18/2009) at 82.

Dr. Muscatel stated that the document Ms. Marchi produced after administering the drug cocktail to her daughter could not have been prepared in an automatic/dream-like state, and it was evidence that she knew and understood the consequence of her actions. RP (03/18/2009) at 86-89. Dr. Muscatel further explained that Ms. Marchi's ability to provide certain details about the incident and correct misinformation relayed to emergency personnel demonstrated the clarity of her mental state and awareness of the distressing circumstances. RP (03/18/2009) at 90-93.

Based upon the evidence that mental illness may have played a role in the tragic events surrounding Christmas 2006, the superior court instructed the jury as follows:

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent. [Instruction No. 13].

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form premeditation. [Instruction No. 15].

CP 133, 135. The trial court specifically instructed the jury that the State had the "burden of proving each element of each crime beyond a reasonable doubt. CP 123. Additionally, in each of the "to convict" instructions, the superior court reminded the jury that the elements of each

crime must be proved beyond a reasonable doubt[.]” CP 130, 138, 140, 145, 151.

The jury’s only inquiry did not question or express concern regarding the jury instructions, but instead requested the superior court’s permission to listen to the 911 recording a second time. CP 117. The jury convicted Ms. Marchi of both Attempted Murder in the First Degree and Assault of a Child in the First Degree. CP 114-15.

The superior court imposed a mitigated sentence of 12 years on Count I (attempted murder) and 10 years on Count II (assault). RP (04/30/2009) at 71, CP 13. While the superior court noted that Ms. Marchi had committed two atrocious acts, the judge mitigated the sentence because (1) she called 911, albeit not a heroic act; and (2) “there [were] some mental health reasons that at least explain – not excuse – but at least explain to some degree what might have occurred.” RP (04/30/2009) at 65, 67, 69.

Ms. Marchi appealed. CP 09.

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III. ARGUMENT

A. CONVICTIONS FOR ATTEMPTED MURDER AND ASSAULT OF A CHILD DO NOT VIOLATE DOUBLE JEOPARDY.

Ms. Marchi argues that principles of double jeopardy prohibit separate punishments for her convictions for (1) Attempted Murder in the First Degree,⁵ and (2) Assault of a Child in the First Degree.⁶ This is incorrect. The rule against double jeopardy is not violated because (1) the statutes do not share the same elements, and (2) the placement of the statutes reveals the Legislature's intent to punish each crime separately.

Subject to constitutional constraints, the Legislature has the absolute power to define criminal conduct and assign punishment. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In many cases, a defendant's conduct - - even a single act - - may violate more than one criminal statute. In such a situation, a defendant can permissibly receive multiple punishments for a single act that violates more than one criminal statute depending on the intent of the Legislature. *Calle*, 125 Wn.2d at 858-60 (finding no double jeopardy violation where a single act of intercourse violated both the rape statute and the incest statute). Double jeopardy is only implicated when the courts exceeds the authority granted

⁵ RCW 9A.32.030(1)(a), RCW 9A.28.020.

⁶ RCW 9A.36.120(1)(a), RCW 9A.36.011(1)(b).

by the Legislature and impose multiple punishments where multiple punishments are not authorized. *Calle*, 125 Wn.2d at 776. This Court reviews double jeopardy claims *de novo*. *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

The Washington Supreme Court has set forth a three-part test to determine whether the Legislature intended multiple punishments. The first step requires this Court to review the language of the statutes to determine whether the legislation expressly permits or disallows multiple punishments. *Calle*, 125 Wn.2d at 776. If the statutes are silent in this regard, this Court should turn to step two to determine legislative intent and employ the two-part “same evidence” or *Blockburger*⁷ test. This test asks whether the offenses are the same “in fact” and “in law.” *Calle*, 125 Wn.2d at 777. Failure under either prong creates a strong presumption in favor of multiple punishments, a presumption that is only overcome where there is “clear evidence” that the Legislature did not intend for the crimes to be punished separately. *Calle*, 125 Wn.2d at 778-80. The search for “clear evidence” or contrary legislative intent is the third step of the double jeopardy analysis. *Calle*, 125 Wn.2d at 780-82.

In the present case, the jury found Ms. Marchi guilty of (1) Attempted Murder in the First Degree, pursuant to RCW 9A.28.020 and

⁷ *United States v. Blockburger*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

RCW 9A.32.030, and (2) Assault of a Child in the First Degree, pursuant to RCW 9A.36.120(1)(a) and RCW 9A.36.011(1)(b). CP 10, 114, 115. The relevant statutes do not address the issue of whether multiple convictions arising from a single act - - the administering a lethal drug cocktail to a child - - is authorized under the law. *See* RCW 9A.28.020, RCW 9A.32.030, RCW 9A.36.120(1)(a), RCW 9A.36.011(1)(b).

While the crimes in the present case are the same “in fact,” they are not identical “in law.” This is because the elements of the relevant statutes are far from the same.

As charged and proven, to convict Ms. Marchi of Attempted Murder in the First Degree, the State was required to prove (1) the defendant did an act which was a substantial step toward the commission of first degree murder, (2) the act was done with the premeditated intent to cause the death of M.H., and (3) the act occurred in the State of Washington. CP 128-130. *Compare* RCW 9A.28.020; 9A.32.030(1)(a).

In contrast, to convict Ms. Marchi of Assault of a Child in the First Degree, the State was required to prove (1) that M.H. was under the age of thirteen, (2) the defendant was over the age of eighteen, (3) the defendant administered a poison or another destructive/noxious substance to M.H., (4) the act was performed with the intent to inflict great bodily harm, and

(5) the act occurred in the State of Washington. CP 139-141. *Compare* RCW 9A.36.011(1)(b); 9A.36.120(1)(a).

The only shared element between the two crimes is jurisdictional. Otherwise, the facts required to prove each element are markedly different. To prove attempted murder, the State needed to show that Ms. Marchi actually planned to kill her daughter. *See e.g.* RP (03/18/2009) at 84-85, 88-89. To prove assault of a child, the State needed to present additional facts establishing the defendant's and victim's requisite age. *See e.g.* RP (03/10/2009) at 15; Exhibit 19 at 1. Because assault does not require a premeditated design to cause the death of another, it does not necessarily establish attempted murder. Because attempted murder is not concerned with the age of the defendant or victim, it does not necessarily establish first-degree assault of a child. The two crimes are not identical under the "same evidence" or *Blockburger* tests.

Because the two convictions are not the same under the "same evidence" test, there is a "strong presumption" favoring multiple punishments, a presumption that is only overcome by "clear evidence" of contrary legislative intent. *Calle*, 125 Wn.2d at 778-80. Ms. Marchi fails to present any legislative history that could overcome this presumption.

An examination of the statutes actually supports the conclusion that the Legislature intended to punish the two crimes separately. First, the

statutes are located in different chapters of the criminal code. The Legislature's decision to list crimes in separate criminal chapters indicates that it intended to punish the two offenses separately. *See Calle*, 125 Wn.2d at 780. Premeditated murder is included in RCW 9A.32. While assault is contained in its own chapter, RCW 9A.36. The Legislature's placement of the offenses in separate chapters reflect the fact that the two statutes guard against separate evils. The homicide statutes guard against the most vile crime and individual can commit, and they seek to preserve life and criminalize acts that extinguish it prematurely. The assault statutes guard against crimes of aggression, power, and violence that disrupt the social order and threaten individual security.

This Court should hold that Ms. Marchi's convictions for both Attempted Murder in the First Degree and Assault of a Child in the First Degree do not violate the rule against double jeopardy. The two crimes are not the same "in law", and Legislature has demonstrated its intent to punish the two offenses separately by listing them in different chapters because they guard against separate and distinct evils. This Court should affirm both convictions.

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B. SHOULD THIS COURT HOLD THAT THE TWO
CONVICTIONS VIOLATE DOUBLE JEOPARDY,
THE PROPER REMEDY IS TO AFFIRM THE
CONVICTION FOR ATTEMPTED MURDER.

The State recognizes that recent case law holds that the rule against double jeopardy is violated where a criminal defendant is convicted of both attempted murder and assault. *See In re Pers. Restraint of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004); *State v. Gohl*, 109 Wn. App. 817, 37 P.3d 293 (2001). *State v. Valentine*, 108 Wn. App. 24, 29 P.3d 42 (2001). *See also State v. Hughes*, 166 Wn.2d 675, 212 P.3d 558 (2009) (convictions for second-degree child rape and second-degree rape based upon a single act of sexual intercourse violated double jeopardy); *State v. Martin*, 149 Wn. App. 689, 205 P.3d 931 (2009) (convictions for attempted rape in the third-degree and second-degree assault violate double jeopardy prohibition); *In re Pers. Restraint of Burchfield*, 111 Wn. App. 892, 46 P.3d 840 (2002) (first degree manslaughter and first degree assault arising out of a single gunshot causing death violated double jeopardy). However, these cases do not present the same facts in this specific case: an adult who deliberately administered a lethal drug cocktail to a victim of tender years.

Should this Court find that there is a double jeopardy violation, the proper remedy requires this Court to affirm Ms. Marchi's conviction for

Attempted Murder in the First Degree, vacating only the lesser assault conviction. *Hughes*, 166 Wn.2d at 686, n. 13 (citing *State v. Weber*, 159 Wn.2d 252, 268, 149 P.3d 646 (2006)).

C. THE TRIAL COURT DID NOT RELIEVE THE STATE OF ITS BURDEN TO PROVE EACH ELEMENT OF THE CRIMES BEYOND A REASONABLE DOUBT.

The dispositive issue on appeal is whether trial courts are required to give a separate jury instruction expressly stating that the State must disprove beyond a reasonable doubt a defense of diminished capacity. This Court should hold that the instructions sufficiently allocated the burden of proof to the State in the present case. Additionally, a separate instruction requiring the State to disprove the proffered diminished capacity beyond a reasonable doubt is not required by law.

A trial court commits reversible error if it instructs the jury in a manner that relieves the State of its burden to prove every essential element of a criminal offense beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). This Court reviews challenged jury instructions *de novo*. *Pirtle*, 127 Wn.2d at 656.

A diminished capacity instruction is justified whenever a defendant presents sufficient evidence of a mental illness or disorder and the evidence logically connects the defendant's alleged mental condition with

the inability to form the mental state necessary to commit the crime. *State v. Cienfuegos*, 144 Wn.2d 222, 227-28, 25 P.3d 1011 (2001) (quoting *State v. Griffin*, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983); *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003)). See also *State v. Atsbeha*, 142 Wn.2d 904, 917-18, 16 P.3d 626 (2001). A defendant is entitled to a diminished capacity instruction, when it properly instructs the jury on the applicable law, is not misleading, and allows the accused to argue his or her theory of the case. See *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

Here, the trial court specifically instructed the jury on diminished capacity. CP 133, 135.^{8,9} See also CP 147, 154. It also instructed the jury that the State had the burden to prove each element of the crime charged beyond a reasonable doubt. CP 130, 140. See also CP 138, 145, 151. Ms. Marchi never requested that the trial court instruct the jury that the State had the burden to prove the absence of diminished capacity beyond a reasonable doubt. See CP 158-163; RP (03/19/2009) at 1-9.

⁸ Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent. [Jury Instruction No. 13] CP 133.

⁹ Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form premeditation. [Jury Instruction No. 15] CP 135.

The shifting of the burden of proof from the State to the defendant is only justified if the defendant is claiming an affirmative defense. *State v. Lively*, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996). Diminished capacity is an affirmative defense only to the extent that the defendant carries the burden of producing sufficient evidence of diminished capacity to put the defense at issue. *State v. Carter*, 31 Wn. App. 572, 575, 643 P.2d 916 (1982) (citing W. LaFare & A. Scott, *Criminal Law* ss 8, 45 (1972)). See also *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001) (diminished capacity, unlike insanity, is not a complete defense); *State v. Stumpf*, 64 Wn. App. 522, 525 n.2, 827 P.2d 294 (1992) (diminished capacity defense is more accurately described as a rule of evidence that allows the defense to introduce evidence relevant to subjective states of mind); *State v. Nuss*, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988) (diminished capacity is not an affirmative defense because it merely negates one of the elements of the alleged crime); *State v. James*, 47 Wn. App. 605, 608, 736 P.2d 700 (1987) (diminished capacity, unlike self-defense, is not a “true” defense because it does not raise an issue beyond that of required mental state). Although diminished capacity raises factual issues regarding the defendant’s ability to form the requisite *mens rea* for the charged crime, the State retains the ultimate burden of proving the

requisite mental state beyond a reasonable doubt. *James*, 47 Wn. App. at 609.

An argument identical to the one Ms. Marchi presents on appeal was rejected in *State v. James* and *State v. Fuller*. Nevertheless, Ms. Marchi argues that these cases are inapplicable because they addressed diminished capacity in the context of voluntary intoxication, rather than a mental infirmity. See Appellant's Opening Brief at 16. However, diminished capacity is analogous to the defense of intoxication. See *State v. Thomas*, 123 Wn. App. 771, 781, 98 P.3d 1258 (2004) (a voluntary intoxication defense is separate from but similar to a diminished capacity defense); *State v. Greene*, 92 Wn. App. 80, 106, 960 P.2d 980 (1998) (voluntary intoxication is one basis for arguing diminished capacity) *overruled in part on other grounds by State v. Greene*, 139 Wn.2d 64, 984 P.2d 1024 (1999). Additionally, Ms. Marchi claims that Washington's diminished capacity jurisprudence addressing the issue before the court is erroneous.¹⁰ See Appellant's Opening Brief at 15. This Court should find Ms. Marchi's arguments are unpersuasive.

¹⁰ In order for this Court to overrule its own previous decision and prevailing Washington case law, Ms. Marchi must convincingly demonstrate that the controlling law is both harmful and wrong. See *In re Stranger Creek*, 77 Wn.2d 649, 652-53, 466 P.2d 508 (1970) (the importance of continuity in the law and the necessity of respect for precedent . . . requires a clear showing that an established rule is incorrect and harmful before it is abandoned).

In *State v. James*, 47 Wn. App. 605, 606, 736 P.2d 700 (1987), the defendant relied on a defense of diminished capacity based on intoxication and depression. Similar to Ms. Marchi, the *James* defendant analogized diminished capacity to self-defense. 47 Wn. App. at 608. This Court rejected the argument because “[t]he defense of self-defense adds another element to the State’s case because to be convicted of assault or homicide, one must have acted unlawfully. Self defense is a lawful act and absolves the actor of culpability.” *James*, 47 Wn. App. at 608 (citations omitted). In contrast, this Court noted that diminished capacity is not a “true” defense: *i.e.* neither intoxication nor diminished capacity adds an additional element to the State’s case. *James*, 47 Wn. App. at 608.

In *State v. Fuller*, 42 Wn. App. 53, 708 P.2d 413 (1985), Division 1 rejected the argument that *State v. McCullum*¹¹ and *State v. Acosta*¹² required the court to give an instruction expressly stating that the State has the burden of disproving intoxication. In *Fuller*, the State charged the defendant with second-degree assault while armed with a deadly weapon and a firearm. 42 Wn. App. at 54. The defendant presented expert testimony that he did not have the mental capacity to knowingly assault the victims because he was suffering from severe depression and

¹¹ 98 Wn.2d 484, 656 P.2d 1064 (1983).

¹² 101 Wn.2d 612, 683 P.2d 1069 (1984).

intoxication at the time of the crimes. *Fuller*, 42 Wn. App. at 54. Division 1 held that “[a]n instruction on burden of proof similar to the one given on self-defense need not be given because [intoxication] is not a legally recognized defense. A criminal act committed by a voluntarily intoxicated person is not justified or excused. Intoxication may raise a reasonable doubt as to the mental state element of the offense, thus leading to acquittal or conviction of a lesser included offense, but evidence of intoxication does not add another element to the offense.” *Fuller*, 42 Wn. App. at 54.

In the present case, Ms. Marchi argued that the terrible acts she committed against her daughter were the result of a mental illness. Like intoxication, and unlike self-defense, this does not justify or excuse her actions. Consequently, Ms. Marchi’s claim of diminished capacity does not present an issue in addition to or beyond the issue of the required mental state set forth in the “to convict” instructions. *See* CP 130, 140. The only issue posed by Ms. Marchi’s diminished capacity defense was whether she was capable of forming the requisite intent. This was a factual issue that was best determined by the jury when deciding whether the State proved the requisite *mens rea* beyond a reasonable doubt. *See James*, 47 Wn. App. at 609. While diminished capacity may bear upon whether the defendant acted with the requisite mental state, resolution of this issue

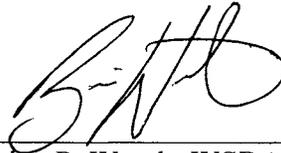
should not be dealt with in the instructions any differently from the other elements of the offense. *See Fuller*, 42 Wn. App. at 55, n.1 (The “intoxication defense” is conceptually similar to the “alibi defense,” for which the Supreme Court has recommended that no specific instruction regarding burden of proof be given.).

This Court should hold that the instructions in this case did not relieve the State of its burden to prove beyond a reasonable doubt every element of the charged offense. No additional instruction was required.

IV. CONCLUSION

For the reasons argued above, the State respectfully requests that this Court affirm Ms. Marchi’s convictions for both Attempted Murder in the First Degree and Assault of a Child in the First Degree. However, should this Court find that the two convictions violate the rule against double jeopardy, the State respectfully requests that this Court affirm Ms. Marchi’s attempted murder conviction and vacate only the lesser offense of assault.

Respectfully submitted this 12th day of March 2010.



Brian P. Wendt, WSBA No. 40537
Deputy Prosecutor

APPENDIX A

ORIGINAL

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DISPATCH: 9-1-1 Emergency?

CALLER: Yes, I need somebody.

My daughter and I just took a bunch -- a lot of pills.

DISPATCH: Who took the pills?

CALLER: My daughter and I.

DISPATCH: You both took a lot of pills?

CALLER: Yeah.

DISPATCH: Deliberately?

CALLER: Like over 50.

DISPATCH: What kind of pills were they?

CALLER: Uh, Hydrocodone and Atenolol and

Clonazepam and um . . .

DISPATCH: Okay, how old is your daughter?

CALLER: Ten.

DISPATCH: She took them as well?

CALLER; Yeah.

DISPATCH: And how old are you?

CALLER: 41.

DISPATCH: 21?

CALLER: 41.

DISPATCH: Oh, 41.

1 Did you guys take these deliberately?

2 CALLER: Um, yeah, we did.

3 DISPATCH: Okay, were you trying to commit suicide?

4 CALLER: Uh, yes.

5 DISPATCH: Okay.

6 CALLER: I can't move my body right now but I'm really
7 scared for her.

8 DISPATCH: Okay, is she able to talk to you?

9 Is she conscious?

10 CALLER: No.

11 DISPATCH: She's not conscious?

12 CALLER: No.

13 DISPATCH: Where is she now?

14 CALLER: She's in bed with me.

15 DISPATCH: Okay and is she there with you right now?

16 Can you see her?

17 CALLER: Yeah.

18 DISPATCH: Okay, we're going to get the paramedics on
19 the way over there.

20 I'll be right back with you.

21 Don't hang up now.

22 CALLER: Would you wait – I can't move my body.

23 So my front door is locked . . .

24 DISPATCH: Your front door is locked?

25

1 CALLER: But my back door is not.

2 DISPATCH: The back door is open.

3 Okay, I'll be right back with you.

4 Don't hang up, okay?

5 CALLER: Okay.

6 DISPATCH: Yes.

7 You're at 613 West 14th, right?

8 CALLER: Yes.

9 DISPATCH: Okay.

10 We've dispatched the paramedics, okay?

11 Now until they get there, if I could keep you on the phone, that'd be great.

12 Can you – is there anybody else there in the house there with you?

13 CALLER: No.

14 DISPATCH: No?

15 CALLER: No.

16 DISPATCH: How long ago did your daughter take those

17 pills?

18 CALLER: Um, we both took them about, what time is it

19 right now?

20 DISPATCH: It's 2:05 right – it's 2:06 right now.

21 CALLER: At 10 – 10:30?

22 DISPATCH: AT 10:30?

23 Okay.

24 How long has she been unconscious?

25

1 CALLER: Well, she just went to sleep but I checked
2 her heart and her breathing and she's still doing that.

3 DISPATCH: She's still breathing?

4 CALLER: Yeah.

5
6 DISPATCH (to paramedics): Hydrocodone – four different
7 kinds of medications she said.

8
9 DISPATCH: All right.

10 Can you get the phone?

11 The phone is near her, right?

12 You're right there near your daughter right now?

13 She's right there near you?

14 CALLER: Yeah.

15 DISPATCH: Would you do me a favor and make sure
16 she's still breathing?

17 CALLER: I just checked her a few minutes ago.

18 DISPATCH: Okay, is she on a bed or on the floor, in a
19 chair?

20 Where is she?

21 CALLER: She's on the bed.

22 DISPATCH: On the bed?

23 Okay, would you tilt her head back, please?

24 Is she on her back?

25

1 CALLER: Yeah.

2 DISPATCH: Okay, is she on her back now?

3 CALLER: Yeah.

4 DISPATCH: Can you tilt her head back for me, please?

5 CALLER: What do you mean, tilt her head

6 (interrupted)

7 DISPATCH: Tilt her head back so her airway is open.

8 Can you do that for me please?

9 CALLER: Yep.

10 DISPATCH: Okay, she is still breathing?

11 CALLER: I can't move.

12 DISPATCH: You can't move?

13 CALLER: I can't move.

14 She did – I put the Trazodone in some juice for her and gave her.

15 She just come back from her dad's today and he was really abusive and

16 everything and I just snapped.

17 I'm not really like this but I just, I just snapped and I couldn't control myself.

18 DISPATCH: Is this house in the alley?

19 CALLER: No, it's on the front -- you can walk to the

20 back of (inaudible)

21 DISPATCH: Rhonda, what color – is this Rhonda?

22 CALLER: Yeah.

23 DISPATCH: What color's your house?

24 CALLER: it's gray.

25

1 DISPATCH: It's gray, okay.

2 CALLER: With blue trim.

3 DISPATCH: With blue trim.

4 613 West 14th?

5 CALLER: Yeah.

6 DISPATCH: Okay, I have officers there now.

7 We're going to try to get you some help, Rhonda.

8 Now stay on the phone with me, okay?

9 CALLER: I don't know if I can.

10 DISPATCH: Well if you can, please do that.

11 Are you on the bed as well?

12 CALLER: Yeah.

13 DISPATCH: Okay.

14 Are you sitting down?

15 Laying down?

16 CALLER: Well, yeah.

17 DISPATCH: Okay.

18 Well stay with me.

19 CALLER: She doesn't know that she took them

20 because I think that (inaudible) in pop.

21 DISPATCH: She doesn't know how many she took?

22 CALLER: She doesn't know she took 'em.

23 DISPATCH: Oh, she doesn't know she took 'em?

24 Did you put them in something and she took them that way?

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CALLER (to paramedics): Right here.

Right here.

They're here right now.

DISPATCH: You have some officers there right now?

CALLER: Yeah.

DISPATCH: I'll let you go then.

CALLER: Okay, bye.

DISPATCH: Okay, bye.

(end of call)

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TRANSCRIBER'S CERTIFICATE

STATE OF WASHINGTON)
)
COUNTY OF CLALLAM) ss.

I hereby declare under penalty of perjury that the foregoing transcript of proceedings was prepared by me from cd recordings of the proceedings, monitored by me and reduced to typewriting to the best of my ability;

I further certify that I am neither an attorney for, nor a relative of any of the parties to the action, further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

11-05-08

(date)

Joyce Cox
JOYCE COX

Joyce Cox, Electronic Reporter