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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give Capoeman's proposed instruction on an act lacking mental processes is not voluntary in support of his diminished capacity defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether it was reversible error for the trial court to fail to give Capoeman's proposed instruction on an act lacking mental processes is not voluntary in support of his diminished capacity defense? [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

1. Procedure

Gabriel J. Capoeman (Capoeman) was charged by second amended information filed in Thurston County Superior Court with one count of assault in the second degree—strangulation. [CP 70].

Prior to trial, no motions regarding CrR 3.5 or CrR 3.6 were made or heard. Capoeman was tried by a jury, the Honorable Carol Murphy presiding. Capoeman objected and took exception to the court's failure to give his proposed instruction No. 15, modified to include only the first paragraph, on an act lacking mental processes is not voluntary in support of his diminished capacity defense. [CP 93; Vol. II RP 391-394].

Capoeman also objected and took exception to the court's giving of Instruction No. 9, the definition of strangulation, conceding that it was the statutory definition without offering an alternative definitional instruction. [CP 113; Vol. II RP 391-394]. The jury found Capoeman guilty as

charged of assault in the second degree—strangulation. [CP 118; Vol. III RP 442-446].

The court sentenced Capoeman to a standard range sentence of 6-months based on an offender score of zero. [CP 119-120, 121-128; 2-4-10 RP 19-23].

A notice of appeal was timely filed on February 5, 2010. [CP 129]. This appeal follows.

2. Facts

On February 1, 2009, Susan Coburn (Coburn), Capoeman's girlfriend, went to St. Peter's Hospital Emergency Department with stomach pains. [Vol. II RP 226-228]. Capoeman arrived at the hospital, found Coburn in pain, and became upset with Coburn's treatment. [Vol. II RP 228, 230-232]. Capoeman, who is diabetic, checked his blood sugar level with a glucometer getting a reading of 51, and went to a vending machine to get a candy bar and cup of sweetened coffee. [Vol. II RP 227-230]. Capoeman became disruptive and hospital security was called. [Vol. II RP 231-232]. Dr. Timothy Zola, the emergency room physician who had been treating Coburn when Capoeman became upset, testified that aside from being angry he did not detect any signs of Capoeman being severely affected by hypoglycemia such as being incoherent or having

slurred speech because Capoeman was alert, oriented, and deliberate in his actions. [Vol. I RP 188-196].

Shortly before 4 PM, Deborah Fast (Fast), a hospital security guard, approached Capoeman asking him to leave the treatment and lobby areas of the hospital. [Vol. I RP 80-82, 91-95]. Capoeman, who was agitated, was directed outside by Fast. [Vol. I RP 95-99]. Once outside, Capoeman would not calm down throwing his coffee aside and demanding to go back inside the hospital to get his belongings which included his diabetic kit. [Vol. I RP 99-101]. Fast offered to get Capoeman's belongings a number of times. [Vol. I RP 101-102, 126]. Capoeman then went back into the hospital with Fast following and reaching out to halt Capoeman. [Vol. I RP 102-105].

Capoeman suddenly swung around putting Fast into a chokehold with his arm around her throat dragging her to the ground. [Vol. I RP 105-116]. Fast testified that her head started buzzing, she saw stars then started losing her sight, and couldn't breathe. [Vol. I RP 117]. The two struggled on the ground until Brian Lea, another hospital security guard, and Robert King, a registered nurse, came to Fast's aid and subdued Capoeman until the police arrived to take custody of Capoeman. [Vol. I RP 119-120, 136-141, 156-163]. From the struggle with Capoeman, Fast's spine and neck were out, her left shoulder was significantly

damaged, and her right shoulder was damaged. [Vol. I RP 121-122].  
Capoeman told the police after he had been mirandized and waived his rights that he had attempted to go back into the hospital to retrieve his belongings when Fast grabbed him and “when people grab me, I grab them back.” [Vol. I RP 169-173]. Capoeman’s blood sugar level was 155 when it was tested in the Thurston County Jail at approximately 5:45 PM. [Vol. II RP 217-219].

Dr. Allison Spencer, a family physician seeing Capoeman since August of 2008, testified that Capoeman has type-one diabetes (a complete lack of insulin) that it is fairly poorly controlled meaning that “the blood sugars tend to go up and down, not in a very narrow range.” [Vol. II RP 207-208].

Jerome Jaeger and Jeff Marchell (Marchell), both of whom knew Capoeman through their work with the Olympia Union Gospel Mission, testified that Capoeman carries a bag/kit containing his diabetes medication with him and that he becomes frantic if he is separated from his medication. [Vol. II RP 254-255, 258-259]. Marchell explained that several times he had seen Capoeman agitated or very incoherent but wasn’t sure of Capoeman’s blood sugar levels at those times thereafter insisting that Capoeman keep his diabetes kit with him as “that is your life line.” [Vol. II 258-259]. Marchell also testified that he keeps

Capoeman's bank accounts paying his bills because Capoeman has "memory problems." [Vol. RP 259].

Sally Heath (Heath), a cross-cultural behavioral specialist licensed and qualified to diagnose and treat mental illnesses, testified that she began treating Capoeman on a bi-weekly basis in early 2009. [Vol. II RP 240-241]. Heath testified that Capoeman was diagnosed with general anxiety disorder manifesting in irritability, difficulty concentrating, difficulty focusing, and persistent worrying thoughts; and cognitive disorder NOS (not otherwise specified) manifesting in short-term memory problems and confusion. [Vol. II RP 242-249]. According to Heath, Capoeman's mental diagnoses coupled with his diabetes could be a very intense grouping. [Vol. II RP 248]. Heath also testified that Capoeman always carried his insulin supplies. [Vol. II RP 252].

Dr. August Piper (Piper), a physician board certified in internal medicine and psychiatry, testified on behalf of Capoeman regarding the importance of glucose on the brain, and diabetes as being where blood sugar levels are too high and there's not enough insulin to keep the levels in the normal range of 70 to 100. [Vol. II RP 265-269, 271]. Piper also explained hypoglycemia as being where blood sugar levels are too low (60 or less) causing the brain to fail to operate inefficiently manifesting in muzziness, clouded thinking, and unreality about the world. [Vol. II RP

269-271]. He testified that a low blood sugar level of “say, 50-55, 50-45,....the signs and symptoms become worse, that is, the person becomes more and more disoriented, confused—muzzy, was the word I used—having more difficulty formulating rational thoughts and making sensible decisions and becomes, well, as described in the book grossly confused.” [Vol. II RP 276-277]. Piper testified that a person with a blood sugar level of 51, like Capoeman, would have significant difficulty in forming a higher level of intent—the ability to form an intent to assault would be impaired to some extent. [Vol. II RP 279-283].

Dr. Bret Trowbridge (Trowbridge), a forensic psychologist, testified on behalf of Capoeman that he evaluated Capoeman and that he diagnosed Capoeman as suffering from cognitive disorder not otherwise specified—he has thinking problems in that he has a poor memory and thinks rather slowly. [Vol. II RP 328-335]. Trowbridge also reviewed Capoeman’s records including letters and police reports, and interviewed Coburn, Marchell as well as those treating Capoeman coming to the conclusion that Capoeman also suffered from a serious anxiety disorder. [Vol. II RP 335-338, 340]. Trowbridge testified, based on Capoeman’s anxiety disorder and his cognitive disorder, that Capoeman’s ability to form the intent to assault was substantially diminished at the time of the incident involving Fast. [Vol. II RP 340-341].

Capoeman did not testify.

Dr. William Richie (Richie), a forensic and general psychiatrist at Western State Hospital, testified on behalf of the State in rebuttal that he evaluated Capoeman including reviewing reports and records related to Capoeman. [Vol. II RP 359, 362-363, 365-367]. Richie acknowledged that Capoeman suffered from insulin-dependent diabetes. [Vol. II RP 370]. Richie found no significant documentation supporting a diagnosis of cognitive disorder NOS and disagreed with the anxiety disorder diagnoses determining that adjustment disorder mixed with disturbance of emotions and conduct was the more appropriate diagnosis. [Vol. II RP 368-370]. Richie testified that in his opinion that Capoeman's adjustment disorder would not interfere in his ability to form an intent to do something and act intentionally. [Vol. II RP 372]. Moreover, while Richie did not believe Capoeman suffered from anxiety disorder or from cognitive disorder, it was his opinion that such diagnoses would not prevent Capoeman from having the ability to act intentionally. [Vol. II RP 372-373]. Finally, Richie testified that it was his opinion "on February 1<sup>st</sup>, 2009, Mr. Gabriel Capoeman was not significantly affected by diabetes or any other mental condition such that he was unable to form the mental state of intent." [Vol. II RP 373]. Richie admitted that he conducted no tests on Capoeman to determine whether he suffered from anxiety disorder

or cognitive disorder. [Vol. II RP 379]. Richie also admitted that a person suffering from “brittle diabetes,” diabetes poorly controlled and extremely dependent on insulin, would be subject to significant problems. [Vol. II RP 381].

D. ARGUMENT

- (1) IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO GIVE CAPOEMAN’S PROPOSED INSTRUCTION ON AN ACT LACKING MENTAL PROCESSES IS NOT VOLUNTARY IN SUPPORT OF HIS DIMINISHED CAPACITY DEFENSE.

Under the Sixth Amendment to the United States Constitution and Art. 1 sec. 22 (amend. 10) of the Washington Constitution, a criminal defendant has the right to present all admissible evidence in his or her defense. State v. Clark, 78 Wn. App. 471, 999 P.2d 964 (1995); State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). Evidence is admissible when relevant, provided other rules do not preclude its admission. State v. Clark, 78 Wn. App. at 477; ER 401, 402; *see also* State v. Austin, 59 Wn. App. 186, 194-195, 796 P.2d 746 (1990).

A party is entitled to have the court instruct the jury on its theory of the case if evidence exists in the record to support the theory. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Jury instructions must be supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of

the applicable law. State v. Rodriguez, 121 Wn. App. 180, 184-85, 87 P.3d 1201 (2004). A defendant is entitled to have his or her theory of the case submitted to the jury under the appropriate instructions when the theory is supported by substantial evidence. State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681, *review denied*, 139 Wn.2d 1027 (2000) (*citing State v. Washington*, 36 Wn. App. 792, 793, 677 P.2d 786, *review denied*, 101 Wn.2d 1015 (1984)). “[I]n evaluating the adequacy of the evidence [to support the proposed instruction], the court cannot weigh the evidence.” State v. Williams, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), *review denied*, 138 Wn.2d 1002, 984 P.2d 1034 (1999). State v. Fernandez-Medina, 141 Wn.2d 448, 460-61, 6 P.3d 1150 (2000). An appellate court will review a trial court’s decision to reject a jury instruction for an abuse of discretion. State v. Hall, 104 Wn. App. 56, 60, 14 P.3d 884 (2000) (*citing State v. Picard*, 90 Wn. App. 890, 902, 954 P.2d 336, *review denied*, 136 Wn.2d 1021 (1998)).

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. State v. Atesbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001), *citing State v. Ellis*, 136 Wn.2d 498, 521, 963 P.3d 843 (1998). In the instant case, it cannot be disputed that

Capoeman satisfied his burden in meeting the requirements of a diminished capacity defense as evidenced by the court instructing the jury on this defense in Instruction No. 12, which states:

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

[CP 116].

Capoeman proposed an instruction to fully explain his theory of diminished capacity as follows:

A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act of which he is physically capable. When an “act” does not involve mental processes, but rather is a learned reaction to external stimuli that operates automatically, it is not voluntary.

[CP 93].

This instruction was based on State v. Utter, 4 Wn. App. 137, 479 P.2d 946 (1971), in which the court acknowledged:

‘Without the consent of the *will*, human actions cannot be considered culpable; nor where there is no will to commit an offense is there any just reason why a party should incur penalties of a law made for the punishment of crimes and offenses.’ State v Strasburg, 60 Wash. 106, 113, 110 P. 1020 (1910).

....

The issue of whether or nor the appellant was in an...automatic state at the time he allegedly committed the criminal acts charged is a question of fact. Appellant’s theory of the case should have been presented to the jury if there was substantial evidence in the record to support it.

State v. Utter, 4 Wn. App. at 143. This case has not been overruled.

Based on Utter, Capoeman's instruction accurately stated the law. Capoeman presented evidence related to his diabetes and extremely low blood sugar level that physiologically called into question his ability to act intentionally even while acting purposefully. Capoeman presented evidence that he suffered from cognitive disorder and anxiety disorder that psychologically called into question his ability to act intentionally even while acting purposefully. Capoeman's proposed instruction would have allowed him to fully argue his defense of diminished capacity.

The court declined to give Capoeman's proposed instruction over his exception. [Vol. II RP 391-394]. In doing so the court improperly weighed the evidence and determined that:

...In addition, the Court did not include a proposed instruction by the defense, and although the Court reviewed the that proposed instruction in detail, and even after Ms. Brammel had on the record modified the instruction to include only the first paragraph and not the remaining language in defense proposed instruction number 15, I find, having sat through and listened to the testimony in this case, that the instruction is not within the evidence that has been offered in this case, and, therefore, it would be inappropriate to instruct the jury. ....

[Vol. II RP 393-394].

The court's ruling establishes reversible error in that the court improperly weighed the evidence and usurped the role of the jury when it

denied Capoeman his proposed instruction that would have fully explained his diminished capacity defense. *See State v. Fernandez-Medina, supra.* Capoeman was entitled to have the jury fully instructed on the diminished capacity defense to include an instruction on an act lacking mental processes is not voluntary. This court should reverse Capoeman's conviction for assault in the second degree—strangulation.

E. CONCLUSION

Based on the above, Capoeman respectfully requests this court to reverse his conviction.

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

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 15<sup>th</sup> day of October 2010, I present a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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(and the transcript)

Signed at Tacoma, Washington this 15<sup>th</sup> day of October 2010.

Patricia A. Pethick  
Patricia A. Pethick

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