

No. 40316-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL CAPOEMAN
Appellant.

FILED IN COURT
BY
JUN 11 2010
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JUN 11 2010
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable, Judge Carol Murphy
Cause No. 09-1-00191-3

BRIEF OF RESPONDENT

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01/01/10

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court correctly refuse to give one of Mr. Capoeman's proposed jury instructions when it was not supported by the evidence?

B. STATEMENT OF THE CASE.

The State accepts the Appellant's Statement of the Case with the following additions and corrections.

Ms. Deborah Fast, a former auxiliary constable for the Royal Canadian Mounted Police, had been employed as a security guard at St. Peter's Hospital since 2000. [RP 81]. On February 1, 2009, while on duty at St. Peter's Hospital she was assaulted by Mr. Capoeman. [RP 105-121]. Ms. Fast described how the defendant had become angrier and angrier over time leading up to the assault; she was especially concerned for the safety of the doctor and was concerned that Mr. Capoeman was "going to seriously harm the doctor". [RP 101]. She tried to "negotiate" with Mr. Capoeman as she led him out of the emergency room and offered to get Mr. Capoeman's property for him; Mr. Capoeman remained very angry. [RP 101].

Mr. Capoeman next told Ms. Fast to "[G]et out of my way"; Ms. Fast again tried to defuse him telling him he could not go back

in to the emergency room but she would get “what he needed”.

[RP 105]. Ms. Fast described what Mr. Capoeman did next:

He took a step forward like he was looking through the window behind me. I moved – because I was trying to figure out what he was going to do, and I was trying to watch his hands, because his left hand now was clenched, and he was making that really tight lip and gritting his teeth, saying, “Get out of my way.” And he was – I felt it was like he was starting to raise his hand up, and I just looked at him, and it was at that point that he swung. He brought it up to go like this, in this kind of a motion (indicating).

[RP 105].

Ms. Fast believed that she was going to be struck in the face; she tried to block the punch but could not. [RP 108-110]. Ms. Fast next described how the defendant put his arm around her neck; at this time, she was able to pull away and the defendant lost his grip. [RP 110]. Then, Mr. Capoeman regained his grip and he applied pressure through an arm lock around her throat; she described the effect as follows:

Well, that, he hit, I felt, a nerve on the left side of my neck, and it was like paralyzing, and he kept crushing to where I could not breathe at this point. Because he was trying to grab this, and I kept trying to put my hand up to break that hold, because he was trying to close off my windpipe.

[RP 111].

Her security partner Brian Lea tried to help her but could not stop the defendant at that point. [RP 111-112]. Ms. Fast next described how the defendant was attempting to pull her down to the ground and continued applying pressure to her neck and throat. [RP 112]. Ms. Fast continued to try to get away but the defendant forced her to the ground. [RP 114]. Ms. Fast, in the following exchange, described what happened next:

Q. So as you fell, did he continue to keep it in that position, or did it move?

A. No. As I made contact with the floor, he had released it and somehow placed it – I felt pressure on my back, on my shoulders, and I just thought he did that so the front of his face didn't hit the back of my head.

Q. Sure. Yeah. So once you hit the floor and you felt him land on top of you in that way, what's the next thing that you – that happened to you?

A. He just immediately put that arm right back under and on my throat.

Q. And which arm are you referring to?

A. Left.

Q. And what did you note about – I mean, as you're lying there, what did you realize was happening with regard to the way in which that arm was being placed around your neck?

A. When he first had it on my throat, he had this part of the arm – I could feel that muscle against my throat, my esophagus, and then I felt a deliberate movement where he turned it like this, and then I felt bone, bone against bone.

[RP 115-116].

Ms. Fast described the pain as "horrific" and stated that she could not breathe. [RP 116]. She then described that he began

punching her “extremely hard” three times over her right ear area and the back of her head. [RP 116]. Her partner tried to pull him off her; Mr. Capoeman retaliated by focusing on the neck choke hold and increasing the pressure on her neck. [RP 116-117]. Ms. Fast described the impact of this increased pressure on her neck:

I couldn't breathe. I started to lose sight. My eyes saw like stars and bright flashes in darkness. My head started buzzing, and my face got really hot. My eyes started making a lot of tears. I couldn't talk.

[RP 117].

Ms. Fast continued to fight but every time she maneuvered her body to try to get a breath of air, Mr. Capoeman “countered” her attempts and re-established his hold. [RP 117-119]. Ms. Fast testified, “I was being strangled to death.” [RP 119].

Ultimately, with the help of Mr. Lea and nurse Rob King, they are able to free Ms. Fast from Mr. Capoeman's choke hold. [RP 120]. Ms. Fast suffered substantial injuries to her spine, neck and left shoulder. [RP 121-122].

Dr. Zola, the St. Peter's Hospital emergency room physician who had contact with Mr. Capoeman before the assault, described the defendant as “perfectly alert and oriented and deliberate in his actions”. [RP 193]. Dr. Zola also testified that the defendant was

physically threatening. RP 193]. Dr. Zola also stated that he did not observe Mr. Capoeman suffering any mental confusion. [RP 193]. Regarding Mr. Capoeman's blood sugar level, Dr. Zola testified to his observations, based on his training and experience in the following exchange:

Q. All right. Now based on your observations of Mr. Capoeman, the defendant, that afternoon, both in terms of his appearance, his speech, his actions, do you have an opinion to a reasonable degree of medical certainty whether he was severely affected by low blood sugar?

A. I'm very certain that he was not severely affected.

Q. And what is the basis for your conclusion that he was not severely affected?

A. Because he and I had a conversation for several minutes in the hallway in the emergency department. And, as part of my training as an emergency medicine physician, I assess people who have altered mental status on a daily basis, and he did not have altered mental status in any way.

[RP 196].

Defense expert Dr. Piper testified regarding a hypothetical low blood sugar level and its impact on intent in the following exchange on cross-examination:

A. The problem that we're having here is one of semantics. Intentional, the way I'm using it, means deliberately thought out, considered, weighed the options, decided to do this, thought about it.

Q. Yes.

A. That's not the way that you're using the word here.

Q. It is not.

A. That's right.

Q. That's right.

A. And so it's a semantic problem that we are struggling with.

Q. So you are talking about intent in terms of not only purposefully doing something, but having deliberately thought it through before doing it?

A. Yes, something like that.

Q. Okay. I'm going to ask you to depart from your perception of intent for a minute and work off of my conception for just a second and view intent simply as purposeful action, action taken to accomplish a goal, even though the goal is impulsively arrived at.

A. That's a very degraded definition, but if I must use that as the definition, then, yes, that is a form of intent.

Q. All right.

A. It's not the way I've been using it in my discussion here.

Q. And I thank you for clarifying that. So using this version of intent that I have put to you and taking a person at the range of 50 to 51, would that person not have the ability to act intentionally in the form that I have tried to describe it?

A. Again, if I must use your definition, the answer would be yes.

[RP 308-309].

Dr. Trowbridge, another defense expert, testified regarding diminished capacity and intent as follows:

Q. So, Trowbridge, can you refresh my memory about what you said regarding diminished capacity regarding his capacity to form the intent?

A. I'm not saying that he did or did not form that intent. What I'm saying is that, based on his anxiety disorder and his cognitive disorder, his ability to form that intent was diminished. It's up to the jury to decide whether he formed that intent or not, and that's one of the main issues in this trial. But what I'm saying is, his ability to do that was diminished due to his cognitive disorder and his anxiety disorder.

[RP 341].

Dr. Ritchie, a forensic and general psychiatrist at Western State Hospital, testified, based on his examination of the defendant, that Mr. Capoeman suffered from adjustment disorder; Dr. Ritchie further testified that this disorder would not interfere with the defendant's ability to form intent. [RP 372]. Dr. Ritchie did not believe that Mr. Capoeman suffered from anxiety disorder or from a cognitive disorder; however, he opined that neither of those disorders would have interfered with the defendant's ability to form intent. [RP 372-373].

C. ARGUMENT.

1. The trial court correctly refused to give one of Mr. Capoeman's proposed jury instructions when it was not supported by the evidence.

An appellate court reviews 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)). Jury instructions are sufficient when both sides can argue their theories of the case, they are not misleading, and when read as a whole properly state the law to be applied. *State v. Douglas*, 128 Wn. App. 555, 562, 16 P.3d 1012 (2005) (citing to *Bodin v. City*

of *Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). “Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.” *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

The defendant proposed and the trial court instructed the jury regarding the diminished capacity defense standard instruction located at WPIC 18.20. [CP 92 and CP 116]. This instruction stated,

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

[CP 116].

The defense also proposed a jury instruction based on language from *State v. Utter*, 4 Wn. App. 137, 479 P.2d 946 (1971). [CP 93]. This proposed instruction was not adopted by the trial court as it was not supported by the evidence. [RP 393-394].

In *State v. Utter*, the defendant introduced evidence on “conditioned response” during the trial; the nature of this defense to the charge of manslaughter was that the defendant as a result of his jungle warfare training and experiences in World War II would react violently toward people approaching him unexpectedly from the rear. *Utter*, at 139. “Conditioned response” was defined by an

expert witness psychiatrist Dr. Jarvis as “an act or a pattern of activity occurring so rapidly, so uniformly as to be automatic in response to a certain stimulus”. *Id.*, at 139.

The Court of Appeals found that the trial court should have allowed the defense to present this defense if there was substantial evidence in the record to support it. *Id.*, at 143. However, the Court stated the following when ruling that there was insufficient evidence in the record to support this defense:

“It is the function and province of the jury to weigh evidence and determine credibility of witnesses and decide disputed questions of fact. *State v. Dietrich*, 75 Wn.2d 676, 453 P.2d 654 (1969). However, a court should not submit to the jury an issue of fact unless there is substantial evidence in the record to support it. *State v. Brooks*, 73 Wn.2d 653, 440 P.2d 199 (1968); *State v. Collins*, 66 Wn.2d 71, 400 P.2d 793 (1965).”

Id., at 143.

Mr. Capoeman’s defense of diminished capacity was based on Dr. Trowbridge’s finding that “based on his anxiety disorder and his cognitive disorder, his ability to form that intent was diminished”. There was insufficient evidence that the defendant acted “automatically” and the trial court was well within its discretion to decline to give the defense proposed jury instruction as it was not supported by the evidence adduced at trial. Therefore, the trial

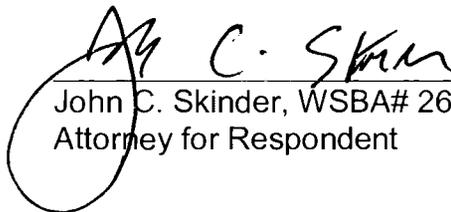
court did not abuse its discretion when it declined to give this instruction.

Instead, the trial court properly instructed the jury as to the diminished capacity defense which allowed the defense to argue its theory of the case; specifically, the defense was able to argue that “[E]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent”. The jury, after considering and weighing all of the testimony, rejected diminished capacity and found that the defendant intentionally assaulted Ms. Fast.

D. CONCLUSION.

For the above reasons, the State respectfully requests that the Court affirm Mr. Capoeman's conviction for assault in the second degree.

Respectfully submitted this 8th day of DECEMBER 2010.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

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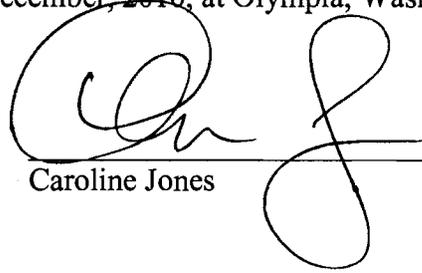
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--AND--

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

Dated this 7 day of December, 2010, at Olympia, Washington.



Caroline Jones