

NO. 41823-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL MUSTARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-00478-0

BRIEF OF RESPONDENT

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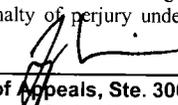
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in refusing to give an insanity instruction when the record potentially contained substantial evidence of insanity under the Model Penal Code's Insanity test but the record did not contain substantial evidence that the Defendant was insane under Washington Law?

2. Whether the Defendant's claim that there was insufficient evidence that 87 year-old Ruby Andrews was a particularly vulnerable victim is without merit when a showing of advanced age, in and of itself, is sufficient under Washington law to demonstrate that a victim was particularly vulnerable?

II. STATEMENT OF THE CASE

A. INTRODUCTION

Washington has adopted the M'Naghten insanity test (codified in RCW 9A.12.010) and that test requires that in order to be found insane a defendant must be unable to perceive the nature and quality of the charged act or be unable to tell right from wrong. Authorities from around the country have explained that the concept of "nature and quality" as used in M'Naghten test means the *physical* nature and quality of the act.

Furthermore, the Washington Supreme Court has held that the

statute's use of the word "unable" means that "incapable" and that that a defendant who is limited, even significantly, in his or her ability to perceive does not meet the statutory requirement because "Unable means incapable, not merely possessed of a limited capacity."

Some other states, however, use the Model Penal Code's less rigid insanity test which allows a defendant to be found insane if her or she "lacks substantial capacity" to appreciate the "moral wrongfulness" of his or her acts. Washington, however, has rejected the Model Penal Code insanity test.

In the present case the defense expert repeatedly and consistently conceded that Defendant could tell right from wrong and conceded that defendant could perceive physical nature and quality. The defense expert, however, claimed that the Defendant could not appreciate the "moral significance" of his action and was therefore, insane.

While this testimony would be perhaps be sufficient to warrant an insanity instruction in a Model Penal Code State, it was insufficient to warrant an instruction in Washington. In essence, the Defense was asking the trial court to rule that the Model Penal Code test should be the test for insanity in Washington and the mitigation or failed defense statute, was actually the insanity test in Washington. The trial court (as other the Legislature and other Washington Courts have done in the past) rejected this claim. This Court should do the same.

B. PROCEDURAL HISTORY

The Defendant, Daniel Mustard, was charged by amended information filed in Kitsap County Superior Court with Murder in the First Degree under two alternative theories (namely, premeditated intentional murder and felony murder committed during the course of a robbery) and one count of Robbery in the First Degree.¹ CP 200-05.

Following a jury trial the Defendant was found guilty of First Degree Murder (felony Murder) and Robbery in the First Degree. CP 332-40. With respect to each of these crimes the jury also found that the Defendant was armed with a deadly weapon and that the Defendant knew or should have known that the victim was particularly vulnerable.² At sentencing the trial court imposed an exceptional sentence of 600 months. CP 558. This appeal followed.

¹ The First Degree Murder charged based on premeditated intentional murder also contained an allegation of two aggravating circumstances (Specifically, that: (1) the murder was committed during the course of or in flight from one of the following crimes: Robbery 1 or 2, Rape 1 or 2, Burglary 1 or 2 or residential burglary, kidnapping 1 or arson; and (2) that the murder was committed to conceal the commission of a crime or conceal the identity of the perpetrator). The Felony murder charge also included two special allegations (namely, that: (1) the defendant was armed with a deadly weapon other than a firearm; and (2) that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance). The Robbery charge also included two special allegations (namely, that: (1) the defendant was armed with a deadly weapon other than a firearm; and (2) that the defendant knew or should have known that the victim was particularly vulnerable or incapable of resistance). CP 200-205.

² On the premeditated intentional murder count the jury found the defendant guilty of the lesser included offense of second degree intentional murder. As this count was charged in

C. FACTS

The facts of the crime were not meaningfully contested below as the defense acknowledged that the Defendant killed 87 year-old Ruby Andrews. Rather, the defense argued that the Defendant was either insane or suffered from diminished capacity. The facts regarding the murder, however, are summarized as follows.

On April 5, 2009 92 year-old Earl Andrews lived with his wife of 66 years, Ruby Andrews and their son Brian at a home on 1055 Puget Drive in Port Orchard. RP 317-18. At approximately 3:00 in the afternoon on April 5, Earl Andrews left his house to go pick up Brian who had been in the hospital for a few days. RP 323. When he left, his wife Ruby was home alone and the couple's white Cadillac was at the house. RP 324, 326.

While Earl Andrews was gone, a neighbor saw a young man (wearing a blue long sleeved shirt and a beige or tan ball cap) in the Andrews' yard and then saw the young man walk into the Andrews' home. RP 239-41. A short time later the neighbor also saw the young man drive off in the Andrews' white Cadillac. RP 243. When Earl and Brian Andrews returned home the neighbor told them what he had observed. RP 245-46.

the alternative the Defendant was not sentenced on this count. CP 558.

Earl Andrews then went into the house and found his wife on the bathroom floor in a pool of blood. RP 329-30. He reached down to touch her hand and realized that she had passed away. RP 330.³

A subsequent autopsy revealed that Ms. Andrews suffered 14 stab wounds and 6 “incised wounds.” RP 467.⁴ These included numerous cuts and stab wounds to her face, neck (including one that cut into her right jugular vein and one near her collar bone that penetrated the upper lobe of her left lung), chest (including one that penetrated the right ventricle of her heart), abdomen (including one that penetrated her liver), and five stab wounds on her back (some of which penetrated her chest cavity). RP 467-70.⁵

Law Enforcement was immediately notified, and when the police arrived the neighbor told them what he had seen. RP 249-50. When Earl Andrews looked around the home he found that a number of items had been

³ The neighbor, Mr. Means, went next door and summoned his wife who was a nurse. RP 247-48. Ms. Means came to the house where Brian was trying to perform CPR on his mother. RP 249, 257. Ms. Means checked for a pulse, but found none. RP 257-58. Ms. Means thought at that point that Ruby Andrews was dead, so she tried to get Brian to leave the room because she thought it was a crime scene and that nothing should be disturbed. RP 258. Brian, however, refused and continued to try to revive his mother. RP 249, 258.

⁴ At the time of the autopsy Ms. Andrews weighed 105 pounds. RP 466.

⁵ Ms. Andrews also had superficial incised wounds to her right hand and left index finger that were described as “defense-type wounds.” RP 470. In addition to the stab wound, Ms. Andrews also suffered a number of blunt force injuries including laceration on her face, fractures of her nasal bones, and her left central incisor had been “dislocated from the socket in the gums.” RP 470. The cause of Ms. Andrews’ death was attributed to multiple stabbed and incised wounds to the head, neck, chest and abdomen. RP 489.

taken or disturbed. A solid sheet of 32 one-dollar bills that had been in a glass frame hanging in a hallway was missing, and the empty picture frame was found in the bedroom (with the glass scattered all over the floor). RP 334-35. Numerous other items were also taken, including two handguns, numerous pill bottles, a watch, and Ruby Andrews' wedding ring. RP 331-32, 341-43, 346-47.

Numerous law enforcement officers had responded to the Andrews' home to process the scene and begin the investigation. They noticed a vehicle had pulled up to the barrier tape that had been placed across the road. RP 359. Detective Ron Trogdon of the Kitsap County Sheriff's Office contacted the car and its occupants: Judy Marasco and her nephew, the Defendant. RP 360. Ms. Marasco stated that she had picked up the Defendant in the area of Marcus Whitman Junior High and that she was bringing him to his nearby home. RP 361. Detective Trogdon had been given a description of the individual that the neighbor had seen at the Andrews' home, and when he contacted the Defendant he noticed that had on a long sleeved blue shirt, appeared to be in his late teen or early twenties, and was either wearing or holding a hat. RP 361.⁶

⁶ Detective Trogdon asked the Defendant if he would be willing to come and speak with the detectives and the Defendant said he would. RP 361. As the news media had begun to arrive, Detective Trogdon asked the Defendant if he would be willing to talk with him in his patrol car, and the Defendant agreed. RP 361.

Detective Trogdon asked the Defendant what he had been doing that day, and the Defendant stated that he and a friend named T.L.K.⁷ had been given a ride to the area of Marcus Whitman Junior high by T.L.K.'s mother, that he and T.L.K. then went to Wal-Mart to return an item, and that he had then called his aunt to give him a ride home. RP 362, 366.

Detective Trogdon then asked if he could see the Defendant's shoes, and the Defendant agreed and handed his shoes to the detective. RP 362. Detective Trogdon notice some "red staining" on one of the shoes. RP 363.⁸

Detective Trogdon then asked the Defendant if he had T.L.K.'s phone numbers because the officers wanted to contact T.L.K. to confirm the Defendant's story. RP 366. After some initial reluctance, the Defendant eventually gave the number to Detective Trogdon who then called T.L.K. RP 366-67. T.L.K. eventually informed Detective Trogdon that the Defendant had picked him up in a white Cadillac and had confessed that he had killed the victim, took items from her residence and took her car RP 368-69.

⁷ T.L.K. and two other witnesses who testified at trial were 16 years-old at the time of their testimony in late 2010 and thus would still be minors at this time. The State, therefore, shall refer to them by their initials.

⁸ Within a short time in their conversation the Defendant then asked if the detectives thought he committed this murder. RP 364-65, 554. Prior to that point, however, the detectives had not informed the Defendant that they were investigating a murder. RP 365, 554. Detective Trogdon then asked the Defendant if his fingerprints would be found in the white Cadillac, and the Defendant responded with something to the effect of "No, because my fingerprints

Detective Trogdon then returned to the Defendant and placed him under arrest. RP 370. When the Defendant was booked and searched Ms. Andrews' gold wedding ring was found in the Defendant's pocket. RP 596.

Detectives Trogdon and Keeler then went to T.L.K.'s residence to talk to him further. RP 374. At trial, T.L.K. explained that he had known the Defendant for approximately three months prior to April 5. RP 1100. Several weeks before the murder he began talking to T.L.K. about wanting to rob someone and that it "sounded cool." RP 1161. On the morning of the murder the Defendant called T.L.K. and asked him if he wanted to help him rob someone and suggested that he was going to get "mass dough" (meaning a lot of money). RP 1162.

The undisputed evidence at trial also showed that after committing the murder the Defendant drove the Andrews' Cadillac to go and pick up T.L.K. and two other minors (C.T. and C.C.P).⁹ RP 997, 1113-14. The Defendant admitted to these three youths that he had killed the victim and taken a number of items from her house, including several firearms, numerous bottles of prescription pills, a sheet of uncut dollar bills, a wedding ring, and a watch. RP 1005-08, 1069-71, 1125-28. The Defendant then showed the three youths a cell phone with a picture on it that showed an old lady lying on the

are not on file." RP 365.

⁹ C.T. and C.C.P, who were both sixteen at the time of their testimony, described that they

ground in blood. RP 1002-03, 1116-17. The Defendant explained that it was a picture of an old lady that he had just killed, and that “This is what happens when you mess with me.” RP 1003, 1062.¹⁰

The Defendant drove the others around for a period of time until they saw a police car with its lights on. RP 1011, 1131-32. After seeing the police car the Defendant drove in and parked the car at an apartment complex and everyone got out of the car. RP 1014, 1072, 1132-34. After stopping briefly at a nearby park where the four smoked marijuana and where the Defendant hid one of the handguns, C.T. and C.C.P. left the Defendant and T.L.K. RP 1015-18, 1073, 1137-40.

The Defendant then called his aunt, Jodi Marasco, to see if she could give him and T.L.K. a ride home. RP 260-65, 1140. Ms. Marasco then picked up the Defendant and T.L.K., dropped T.L.K. off, and then drove the Defendant towards his home. RP 267-73. The Defendant told Ms. Marasco that he and T.L.K. had been at Wal-Mart returning some items for T.L.K.’s mother, that T.L.K.’s mother had dropped them off at Wal-mart, and that he didn’t want to walk all the way home so that is why he called for a ride. RP 270. When Ms. Marasco pulled up Puget Drive she saw yellow police tape

did not know the Defendant prior to April 5. RP 988-89, 1054-55.

¹⁰ C.T. explained that he didn’t know what to think and the thought that crossed his mind was “shock.” RP 1003. T.L.K. explained that although he had not believed the Defendant previously, he was now becoming concerned and was in “awe.” RP 1118.

and stopped. RP 273. As outlined previously, law enforcement then contacted Ms. Marasco and the Defendant and ultimately arrested the Defendant. RP 273-74.

The police later recovered the Andrews' white Cadillac parked at the Mariner's Glen apartment complex. RP 298. Inside the car they found the stolen Colt .38 revolver in a holster, a cardboard box of empty prescription pill bottles (some with labels indicating they belonged to Brian Andrews), and a "pill minder." RP 532-33, 535. The blue Ruger pistol was recovered in some bushes at the park near Jackson and Lund. RP 384. The gold watch was later recovered from some brush at Marcus Whitman Junior High, where T.L.K. had tossed it after the Defendant had said he did not want it. RP 615, 1142-43.

Later testing showed that a number of the Defendant's fingerprints were located on the broken glass from the picture frame in the Andrews' residence, as well as on one of the guns taken from the residence and on the inside of the driver's side door of the Andrews' Cadillac. RP 666-67.

Finally, in a subsequent search of the Defendant's home officers recovered a pair of beige cargo pants or shorts in the Defendant's room that had a "red stain" in several locations. RP 412-14. DNA testing of the blood found on the Defendant's shoe and the shorts recovered from his bedroom

confirmed that the blood had come from Ruby Andrews. RP 670-71.

Given the overwhelming nature of the evidence, the defense at trial did not dispute that the Defendant murdered Ruby Andrews. Rather, the defense pursued two mental defenses: insanity and diminished capacity. With respect to diminished capacity the defense expert, Mark Whitehill testified that the Defendant was unable to form the intent required for the charged offenses. Although the State presented expert testimony rebutting this issue the State acknowledged that the defense had presented sufficient evidence to instruct the jury on diminished capacity, and the jury was so instructed. RP 3739-40, CP 294.

With respect to insanity, however, State argued that the record did not contain evidence that warranted an insanity instruction and the trial court agreed. The State noted that at trial the defense expert conceded that that the Defendant was able to tell right from wrong. In addition, the defense expert conceded that the Defendant was able to perceive the physical nature and quality of his acts. Specifically, the defense expert was asked the following:

Q. . . . Are you willing to concede that the Defendant perceived Ruby Andrews as a human being on April 5?

A. I have no reason not to.

Q. And are you willing to concede that he was able to perceive he was stabbing her with a knife when he was?

A. In all likelihood. I would agree.

Q. Right. He didn't think he was carving a pumpkin. There's no evidence of that.

A. No.

Q. And so it's fair to say, at least with regard to the actual nature of the act of stabbing Ruby Andrews, he perceived that when he was doing it, did he not?

A. I have no reason to believe otherwise.

RP 2220.

Despite the fact that the defense expert agreed that the Defendant could tell right from wrong and could perceive the physical nature and quality of his act, the defense expert nevertheless concluded that the Defendant was insane because he was substantially impaired with respect to his ability to appreciate the "wrongfulness of his conduct" or the "moral significance" of the conduct. The defense expert also explained that he believed that the concepts of "appreciation of the wrongfulness of the conduct" or the "moral significance" of the act were part of "nature and quality" as used in the statutory insanity defense. For instance, the defense expert specifically stated that,

"Nature and quality has to do with an appreciation of the wrongfulness of his conduct, in particular, the moral significance of the conduct at issue." RP 2117.

"[D]istinguishing right from wrong, especially in the way that the evidence suggests he did on April 5, 2009, is, if you will, a more concrete, lesser form of abstraction than understanding the moral significance, if you will, the degree of wrongfulness of his behavior." RP 2119.

Defining nature and quality as - "An awareness of the

significance of the conduct at issue. In particular, it's most commonly referenced as an appreciation of the moral significance of the conduct at issue." RP 1767.

Defining nature and quality- "But I would define it in term of the—in this case, the Defendant's awareness of the moral significance of his action, if you will, an appreciation of the level of wrongfulness." RP 1837.

"What I've come up with in my review of the literature, is that nature and quality is thought of as appreciation of the moral significance of one's action." RP 1718.¹¹

Then, near the end of his testimony, the defense expert was asked the following question,

Q. So I guess, finally, Doctor—hopefully finally—is it fair to say that in your opinion the Defendant was able to perceive the nature of the act, that is, the physical nature of the act, and some qualities of his act, like it was violent and bloody and things like that; that he was able to perceive the nature, the physical nature of the act and some qualities of the act, but was unable to perceive the moral qualities of the act?

A. I think that's fair.

RP 2305-06.

Six days after the State rested the defense filed proposed jury instructions on the insanity defense. Included in the proposed instructions was the following instruction:

¹¹ See also, RP 2206 ("In terms of his appreciation of the moral significance of his actions and the relevance of that impairment to nature and quality is why I came to the conclusion I did."); RP 2210("There are a variety of behaviors that suggest his appreciation of the wrongfulness was compromised as a result of mental illness."); RP 1888 ("...[I]f we're looking at nature and quality in the way that I've previously defined it, in terms of his

With respect to determining whether or not Mr. Mustard was insane at the time the crimes were committed, the concept of appreciation of nature and quality means more than intellectual knowledge and requires an awareness of the significance of the act. An individual may intellectually know his actions are wrong, but mental disease or defect may render that individual unaware of the moral significance of his actions.

CP 211, 220, citing “Packer, I.K. (2009) *Evaluation of Criminal Responsibility*. New York: Oxford, pp 11-12.”

When the parties argued about potential jury instructions below the State argued that there was insufficient evidence to support an insanity instruction under Washington law. The State pointed out the concept of “nature and quality” as used in the M’Naghten test (which Washington has adopted) refers to the physical nature and quality of the act, and that the only evidence before the jury was that the Defendant could, in fact, perceive the physical nature and quality of his act (as the defense expert repeatedly conceded). See, CP 249-59.¹²

appreciation of the moral significance . . .”).

¹² Furthermore, the State argued that even if it could be said that the concept of “nature and quality” included both the physical nature of the act and the “moral qualities” or “moral significance,” then the evidence showed, at best, that the Defendant was “significantly limited in his ability to perceive the nature and quality of the acts for which he was charged;” that is, he was able to perceive the physical nature and quality of his act but unable to perceive the “moral significance” of the act. Under Washington law, however, the mere fact that the defendant was limited, even significantly, in his ability to perceive the nature and quality of his act does not meet the statutory requirement that a defendant “unable to perceive,” because, as the Supreme Court has explained, “Unable means incapable, not merely possessed of a limited capability.” Thus, a *limited ability* to perceive, even if significant, does not equate with the statutory standard of being *unable* to perceive. *Jamison*, at 665.

The State also pointed out that the concepts of “moral appreciation” and “moral significance” used by the defense expert were part of the Model Penal Code insanity defense, but this defense had never been adopted as the insanity test in Washington. CP242-48. Rather, the Washington legislature has adopted the Model Penal Code test as a possible mitigating factor to be considered at sentencing. See, CP247, citing to RCW 9.94A.535. In addition, the defense’s proposed “Packer” jury instruction was based exclusively on sections from Packer’s book that dealt exclusively with the Model Penal Code test. CP 244-45, 268-71. The proposed instruction, therefore, further demonstrated that the defense was essentially asking the court to define insanity based on concepts from the Model Penal Code.

The trial court ultimately agreed with the State and declined to instruct the jury on the insanity defense. Specifically the court gave its detailed ruling as follows,

[W]hat I need to determine, first of all, is how to proceed with the State’s motion regarding the request to preclude the insanity defense, based upon the current state of the law in Washington.

And I’m going to preface my remarks by letting you know that I don’t take this decision lightly. And I looked very hard at what the current state of the law is, the interpretations that have to be made, and looking at what the burdens are and what the requirements are, in order to properly apply the law.

So first of all, this matter came on so far as the issue regarding the Jamison case and whether or not the Defense has met its burden in presenting substantial evidence of the

insanity defense. And particularly, we're looking at the nature and quality aspect of the insanity statute. There has not been any specific argument that right and wrong is the prong under which the Defense is proceeding but purely under nature and quality.

And so in looking at the *Jamison* case, there has to be substantial evidence in the record to show that nature and quality is something that should go to the jury. *Jamison* itself does not define what is nature and quality. And so this Court does have to look at the statute, as well as other authorities, for guidance. And it is implicit in being able to determine this issue what the definition must be or at least what definition it cannot be.

So first of all, I start with the statutory M'Naghten test. And we've talked about or we've heard a lot about that in this courtroom over the many days of trial. And the M'Naghten is the test that applies to Washington, as compared with other states that have applied what is sometimes the ALI standard or the Model Penal Code. So the M'Naghten test is the test.

In determining whether or not there has been a threshold showing, I do have to make a determination of what is nature and quality. And there are three alternatives that could be looked at. One is to regard nature and quality as the physical nature and quality. One is to look at the physical and moral appreciation. And one is to look exclusively at the moral appreciation as the definition of nature and quality. And it is the third of those, the moral appreciation exclusively, which is what is proposed and set forward by the Defense.

I have reviewed the statute, the case law that has been argued by both sides. I've looked at the legislative history. And I've looked, also, as a comparison, at the Model Penal Code and the ALI. And I have considered the arguments of both sides in this case.

Again, the Defense takes the position that the moral appreciation, in and of itself, is the definition to be applied to nature and quality. I cannot find, based upon the reading of the statute and all the other authorities, that that is the definition to be applied. And I believe it would be an incorrect definition under the case law and under all the authorities. I

am persuaded by the State's presentation of the authorities, in this case, and agree with the State that it cannot be an exclusively defined moral appreciation standard.

Physical nature and quality, I have determined, must be the analysis or at least part of the analysis. Even if moral appreciation is part of the analysis, there still must be some consideration of the physical nature and quality. And that is borne out in the authorities.

Having said that, I have to go back to the Jamison case and determine whether or not there has been the necessary showing or necessary evidence put forward, substantial evidence in this case, by the Defense to be able to present the insanity defense.

And having gone back to -- having gone back to the transcripts, certainly from the defense expert, his definition that he was working under was clearly the moral appreciation definition that he was applying. Again, that is not the definition under Washington State law.

At this time, I must determine, without any further authorities provided by Defense, that the Jamison requirement have not been met. I do not see, based upon the presentations, that there has been a showing, a substantial showing, that the Defendant was unable to appreciate the nature and quality of his actions.

And by nature and quality, I do mean the physical nature of his actions. And that, again, even if we were allow some argument or presentation as to moral, physical must be in there, as well. And there has not been any demonstration that -- there's not been any testimony that the Defendant was unable to appreciate both the nature -- well, the nature and quality based upon physical actions and/or -- and -- excuse me. There has not been a showing that there has been substantial evidence that the physical requirements of nature and quality have been shown. Certainly Dr. Whitehill has not presented that. His entire analysis was based upon a moral appreciation. I have not heard argument as to any other basis.

The only other possible argument would be that presented this morning, which was an excerpt from Dr. Dietz. But that question posed to Dr. Dietz was in terms of the definition if it

were a moral analysis, as opposed to a physical. And so that still doesn't answer the question from the Defense or doesn't present to this Court that the physical aspect has been addressed to the satisfaction of Jamison. There has been nothing to say that the Defendant was unable to appreciate the nature and quality of his actions as it pertains to the physical aspect. That has not been presented. And without that being presented, the insanity defense cannot go forward.

RP 3688-92.¹³

Consistent with the trial court's ruling, the jury was ultimately instructed on diminished capacity but the jury was not instructed on the defense of insanity. CP 294.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN REFUSING TO GIVE AN INSANITY INSTRUCTION BECAUSE (ALTHOUGH THE RECORD POTENTIALLY CONTAINED SUBSTANTIAL EVIDENCE OF INSANITY UNDER THE MODEL PENAL CODE'S INSANITY TEST) THE RECORD DID NOT CONTAIN SUBSTANTIAL EVIDENCE THAT THE DEFENDANT WAS INSANE UNDER WASHINGTON LAW.

Mustard argues that the trial court erred in refusing to instruct the jury on the insanity defense. App.'s Br. at 9. This claim is without merit because under Washington law it is error to instruct the jury on the defense of insanity

¹³ The trial court also further explained its ruling by stating, "Dr. Whitehill's testimony effectively said that there was some aspects -- the moral appreciation was the question he was relying upon. Dr. Whitehill specifically indicated that there was some aspects of nature that were clearly known to the Defendant, such as being able to hold a knife, such as being able to inflict harm; that he knew the physical aspect of what he was doing. And so Dr. Whitehill has acknowledged that there was an appreciation of the nature of his act." RP 3694.

absent substantial evidence, and the trial court below correctly found that the record did not contain substantial evidence of insanity. The undisputed testimony showed that the defendant was able to tell right from wrong and was able to perceive the physical nature and quality of his acts. The trial court, therefore, did not err in refusing to instruct the jury on insanity.

A defendant is entitled to instructions defining a defense only when substantial evidence in the record supports every element of that defense. *State v. Bell*, 60 Wn. App. 561, 566, 805 P.2d 815 (1991). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). Specifically, it is error to instruct the jury on the defense of insanity absent substantial evidence. *State v. Wicks*, 98 Wn.2d 620, 622, 657 P.2d 781 (1983); *see also State v. Johnson*, 92 Wn.2d 671, 683, 600 P.2d 1249 (1979).

- 1. Washington uses the M’Naghten insanity test, a rigorous test that requires a defendant to be completely unable to perceive the nature and quality of his her act. A mere limitation in a defendant’s ability to perceive nature and quality, even a significant limitation, is insufficient to demonstrate insanity under the Washington test.***

Since 1975, the Washington test for insanity has been codified in RCW 9A.12.010 and states as follows:

To establish the defense of insanity, it must be shown that:

(1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:

(a) He was unable to perceive the nature and quality of the act with which he is charged; or

(b) He was unable to tell right from wrong with reference to the particular act charged.

(2) The defense of insanity must be established by a preponderance of the evidence.

RCW 9A.12.010.

In addition, Washington applies the M'Naghten insanity test very rigorously. *State v. McDonald*, 89 Wn.2d 256, 571 P.2d 930 (1977). Furthermore, Washington courts (even after 1975) have consistently held that,

“It [the insanity defense] is available only to those persons who have lost contact with reality so **completely** that they are beyond any of the influences of the criminal law.”

State v. Jamison, 94 Wn.2d 663, 665, 619 P.2d 352 (1980)(emphasis in original); *See also, Crenshaw*, 98 Wn.2d at 797 (same quote); *McDonald*, 89 Wn.2d at 272 (same quote); *State v. Rice*, 110 Wn.2d 577, 601, 757 P.2d 889 (1988)(same quote).

The Washington Supreme Court has also explained that the statute requires more than a mere showing that a defendant is significantly limited in his or her ability to perceive. Rather, the statute requires that a defendant “be **unable** to perceive the nature and quality of the charged act.” *Jamison*, 94

Wn.2d. at 665(emphasis in original).

In *Jamison*, the defendant relied upon the testimony of a clinical psychologist who testified that defendant was “significantly limited in his ability to perceive the nature and quality of the acts for which he was charged.” *Jamison*, 94 Wn.2d at 665. On cross-examination, however, the psychologist said he could not conclude that defendant was completely unable to perceive the nature and quality of these acts. *Jamison*, 94 Wn.2d at 665. The trial court, the Court of Appeals, and the Supreme Court all held that this evidence was insufficient to support a jury instruction on insanity. The Supreme Court specifically held that this testimony did not meet the statutory criteria, noting that,

“RCW 9A.12.010(1)(a) requires that defendant be unable to perceive the nature and quality of the charged act. The psychologist testified that defendant was significantly limited in his ability to so perceive. **Being limited, even significantly, does not equate with the statutory standard of being unable to perceive. Unable means incapable, not merely possessed of a limited capability.**

We have held that the requirement for application of the insanity defense is very rigorous. It is available only to those ‘who have lost contact with reality so completely that they are beyond any of the influences of the criminal law.’ The trial judge was correct when he ruled that the testimony wholly failed to meet the statutory test.”

Jamison, 94 Wn.2d at 665 (citations omitted)(emphasis added). Thus, based on the plain language of the statute and the caselaw interpreting that statute, there can be no question that the Washington insanity test is a rigorous test

that (under the first prong) requires a defendant to be completely unable to perceive the nature and quality of his her act. A defendant who has a limitation in his or her ability to perceive nature and quality, even a significant limitation, is simply not insane under the Washington test.

Although the Washington insanity statute does not define the concept of “nature and quality,” a common sense reading of the plain language of the statute demonstrates that a defendant is considered insane if he is unable to perceive what it is that he or she is physically doing (that is, the nature and quality of his act) or is unable to appreciate that what he is doing is wrong.

Because numerous jurisdictions around the country use the M’Naghten test, Washington courts have routinely looked to other authorities for assistance in interpreting the contours of the modern insanity statute. *See, e.g., State v. Crenshaw*, 98 Wn.2d at 794-805(examining the meaning of the word “wrong” as used in the M’Naghten test and examining authorities from around the country on this issue).¹⁴

Although the Washington Supreme Court has not previously specifically addressed the definition of “nature and quality,” other authorities from around the country have examined that phrase and concluded that the phrase “nature and quality of the act” deals solely with the issue of whether a

¹⁴ No Washington court has ever held that “nature and quality” as used in RCW 9A.12.010

defendant is able to perceive the *physical* nature and quality of his acts. For example, Wharton's Criminal Law discusses the two M'Naghten prongs of "nature and quality" and "wrongfulness" and states that these concepts have been explained as follows:

The first portion relates to an accused who is psychotic to an extreme degree. It assumes an accused who, because of mental disease, did not know the nature and quality of his act; he simply did not know what he was doing. For example, in crushing the skull of a human being with an iron bar, he believed that he was smashing a glass jar. The latter portion of M'Naghten relates to an accused who knew the nature and quality of his act. He knew what he was doing; he knew that he was crushing the skull of a human being with an iron bar. However, because of mental disease, he did not know that what he was doing was wrong.

2 Charles E. Torcia, Wharton's Criminal Law § 101 at 17 (15th ed.1994).¹⁵

Similarly, noted scholar Wayne Lafave has explained that the phrase "nature and quality" has been typically held to mean that "the defendant must have understood the physical nature and consequences of the act," and that, by way of example, this requires merely that "an accused must have known that holding a flame to a building would cause it to burn, or that holding a

differs from its use in the M'Naghten test (which has been adopted in numerous other states).

¹⁵ See also, "Filling in the holes of the insanity defense: the Andrea Yates case and the need for a new prong," 10 Va. J. Soc. Pol'y & L. 383, n 53 (2003)(noting that "**A person who does not know the 'nature and quality' of her actions is one who, because of severe mental illness, cannot even understand what she is physically doing or what people/objects she is acting upon.** Examples include someone who takes an axe to the head of another person thinking that the head was actually a pumpkin, or someone who squeezes the throat of another person thinking that she was squeezing a doll. *This aspect of the insanity standard is not controversial*")(emphasis added).

person's head under water would cause him to die.” Wayne Lafave, 1 Substantive Criminal Law § 7.2 (2d ed. 2003). Lafave has also noted that this understanding of the phrase has long been held. *Id.*

The Model Jury instructions from the Federal Third Circuit even go so far as to include the following in the model instruction on insanity, “‘Nature and quality of (his) (her) acts’ means the physical nature and consequences of what (he) (she) was doing.” See CP 273 (Mod. Crim. Jury Instr. 3rd Cir., No. 8.06).

Other courts have also held that a defendant has failed to satisfy the “nature and quality of the act” prong of the insanity defense when the evidence shows that a defendant was in fact aware that he was committing a violent act against a human being (as opposed to acting under some delusion that prevented him from understanding the physical nature and quality of his acts). For instance, the Pennsylvania Supreme Court has held that,

“For the Commonwealth to meet its burden of demonstrating that a defendant is legally sane, it most certainly does not have to demonstrate that he or she has a “rational appreciation as well of all the social and emotional implications” or the ability “to measure and foresee the consequences” of the act. As this Court stated long ago in adopting the M’Naghten test in this Commonwealth, “to the eye of reason, every murderer may seem a madman, but in the eye of the law he is still responsible.... [T]o constitute a sufficient defense on this ground there must be an entire destruction of freedom of the will....” *Commonwealth v. Mosler*, 4 Pa. 264, 268 (1849). **Contrary to appellant's position, legal sanity is not demonstrated by a murderer's appreciation of the social**

and emotional implications of the killing nor by his ability to measure and foresee all of the consequences of that act, but rather is demonstrated by the murderer's knowledge that he or she has killed and the knowledge that it was wrong.

Commonwealth v. Banks, 521 A.2d 1, 15 (Pa., 1987)(emphasis added). *See also, People v. Skinner*, 704 P.2d 752, 760 (Cal. 1985)(Where the California Supreme Court explained that when the evidence showed that the defendant knew that he was committing an act of strangulation that would, and was intended to, kill a human being, the evidence supported the trial court's findings that this defendant was aware of the nature and quality of his homicidal act).¹⁶

A similar definition of "nature" is utilized in New York¹⁷, where the Courts utilize a pattern jury instruction which specifically states that "nature" is defined as "the physical nature of the conduct" while "consequences" is defined as "the potential for harm of the conduct." *See, People v. Mawhinney*, 622 N.Y.S.2d 182 (N.Y. Sup. Ct., 1994).

¹⁶ The United States Supreme Court had also recently discussed the M'Naghten test and explained that the "nature and quality" prong "asks about cognitive capacity: whether a mental defect leaves a defendant unable to understand what he is doing." *Clark v. Arizona*, 548 U.S. 735, 747, 126 S. Ct. 2709 (2006).

¹⁷ See, New York Penal Law 40.15 which states,

"In any prosecution for an offense, it is an affirmative defense that when the defendant engaged in the proscribed conduct, he lacked criminal responsibility by reason of mental disease or defect. Such lack of criminal responsibility means that at the time of such conduct, as a result of mental disease or defect, he lacked substantial capacity to know or appreciate

A recent Washington opinion from this Court shows that experts in Washington, at least anecdotally, understand full well that nature and quality means the physical nature and quality of an act. *See, State v. Chanthabouly*, __ Wn.App. __ 2011 WL 4447863 (Div II, Sept 27, 2011). In *Chanthabouly*, expert witnesses for the State and defense disagreed about whether the defendant could tell right from wrong. Both agreed, however, that the defendant was able to perceive the nature and quality of his act based upon the fact that the evidence showed that the defendant “knew he was shooting a human being at the time of the act and that the victim could be harmed by this act.” *Chanthabouly*, __ Wn.App. __ , at footnote 9.

In sum, Washington employs the M’Naghten insanity test, which requires that a defendant be unable to perceive the nature and quality of his or her act or be unable to tell that the act is right or wrong. Furthermore, the plain language of Washington’s insanity statute as well as the wealth of scholarship from around the country shows that the concept of “nature and quality” means the “physical” nature and quality of the acts.¹⁸

either: 1. The nature and consequences of such conduct; or 2. That such conduct was wrong.”

¹⁸ In the trial court below the Defendant argued, relying on a strained analysis of some pre-1975 cases, that the phrase “nature and quality” meant nothing more than the “moral quality” of the act. *See* CP 275-81. The Defendant, however, appears to have abandoned this argument on appeal. The State’s lengthy rebuttal to this defense argument, however, can be found at CP 250-59.

2. ***The Model Penal Code insanity test (which does not include the concept of “nature and quality”) is less rigorous than the M’Naghten test and requires only a showing lacks a “substantial capacity” to “appreciate” the wrongfulness of his actions.***

In the middle part of the 20th Century a number of courts and legislatures decided to adopt the Model Penal Code (MPC) insanity test which was less stringent than the M’Naghten test. Unlike insanity law in Washington (which requires a complete inability to perceive the nature and quality of the charged acts), the MPC test requires only a showing that a defendant lacks a “substantial capacity.” Specifically, the American Law Institute, in its Model Penal Code, sets forth the following standard:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he or she lacks substantial capacity either to appreciate the criminality [wrongfulness] of his or her conduct or to conform his or her conduct to the requirements of the law.

Model Penal Code § 4.01(1). In addition the Commentary to the Model Penal Code explains that its use of the term “wrongfulness” allows for the inclusion of such concepts as “moral wrongfulness.”¹⁹

¹⁹ Specifically, the Commentary to the Model Penal Code explains that states are free to choose between the term “criminality,” meaning legal wrongfulness, and the term “wrongfulness,” which includes legal and moral wrongfulness. Model Penal Code and Commentary at 164, 169. See also, *State v. Wilson*, 700 A.2d 633, 639 (Conn. 1997)(noting that “The history of the Model Penal Code indicates that “wrongfulness” was offered as a choice so that any legislature, if it wishes, could introduce a “moral issue” into the test for insanity,” citing MPC Commentary at 164 and A.L.I., 38th Annual Meeting, Proceedings (1961) p. 315).

Similarly, Ira Packer's book, *Evaluation of Criminal Responsibility* (which the Defendant cited below as authority for a proposed jury instruction)²⁰ also discusses the differences between the M'Naghten test and the MPC test and specifically discusses the MPC's concept of "appreciation of wrongfulness" as follows:

The two critical words in this part of the definition are "appreciate" and "wrongfulness." The concept of appreciation was meant to broaden the conceptualization beyond intellectual knowledge to incorporate the need for an awareness of the significance of the act. The commentary that accompanied the development of the standard noted that the M'Naghten standard does not readily lend itself to application of "emotional abnormalities." (ALI, 1985 p. 166). The use of the term "wrongfulness" connotes that the focus is on the defendant's appreciation of the moral wrongfulness of the behavior, not simply that it is legally prohibited, or criminal."

See CP 270-71. Packer also goes on to state that it is noteworthy that the test requires only that "the defendant must lack 'substantial capacity,' a term that connotes a significant degree of impairment but not an absolute lack of ability." CP 271.

²⁰ The proposed instruction reads as follows,

"With respect to determining whether or not Mr. Mustard was insane at the time the crimes were committed, the concept of appreciation of nature and quality means more than intellectual knowledge and requires an awareness of the significance of the act. An individual may intellectually know his actions are wrong, but mental disease or defect may render that individual unaware of the moral significance of his actions."

Although the defense cites pages 11-12 of Packer's book as authority for his proposed instruction on "nature and quality," those pages of the book do not deal with the M'Naghten rule; rather they deal with the Model Penal Code test which does not include the concept of "nature and quality" at all. Nor does Packer ever suggest that his language regarding the

In short, the language of the Model Penal Code and its commentaries, as well as the language from the Packer book cited by the defense, clearly demonstrates that the MPC test contains three concepts not found in the Washington Insanity test: namely that,

- 1) Insanity requires only a lack of substantial capacity, not a complete lack of ability;
- 2) The word “appreciate,” which requires an awareness of the “significance” of an act; and
- 3) “Wrongfulness,” which includes the issue of a defendant’s “appreciation of the moral wrongfulness” of the act.

Washington, however, continues to use the M’Naghten insanity test.

3. The Model Penal Code Insanity Test Has Been Rejected in Washington

The Model Penal Code insanity test, however, is not the law in Washington. Prior to the 1975 insanity statute the Washington Supreme Court was asked several times to adopt the Model Penal Code test in place of Washington’s long used M’Naghten test. Each time, however, the Supreme Court rejected the Model Penal Code test. *See, e.g., State v. White*, 60 Wn.2d 551, 593, 374 P.2d 942 (1962)(rejecting the Model Penal Code insanity test); *State v. Collins*, 50 Wn.2d 740, 752, 314 P.2d 660 (1957)(rejecting several alternative insanity tests including the Model Penal Code’s insanity test).

MPC test has anything to do with the M’Naghten concept of nature and quality.

Furthermore, when the Legislature revamped the criminal code in 1975 it specifically considered a proposal to adopt several of the portions of the Model Penal Code insanity test, yet rejected the MPC test. *See, e.g., State v. Allert*, 58 Wn. App. 200, 207, 791 P.2d 932 (1990) *citing* D. Boerner, Sentencing in Washington § 9.12(c)(3), at 9-26 (1985)(stating that the legislature in 1975 “considered and rejected” Model Penal Code §4.01 as an insanity defense standard).

Furthermore, the legislative history from the 1975 enactment of the insanity statute shows that the Legislature specifically considered several of the Model Penal Code’s insanity test provisions, yet rejected them. *See* CP 265-66 (G. Golob and G. Mooney²¹, Revised Criminal Code Training & Seminar Manual (WSCJTC 1976)).²²

²¹ Washington courts have frequently cited Golob & Mooney’s criminal code manual as a source of the legislative history for the 1975 criminal code. *See, e.g., State v. Saylor*, 36 Wn. App. 230, 235, 673 P.2d 870 (1983); *State v. Bergeron*, 105 Wn.2d 1, 14, 711 P.2d 1000 (1985); *State v. Jackson*, 87 Wn. App. 801, 811, 944 P.2d 403 (1997)(specifically referring to Golob & Mooney’s manual to explain what provisions of the Model Penal Code’s accomplice liability rules were specifically adopted or rejected by the legislature).

²² For instance the Orange Code’s²² proposed insanity test (which was based in part on the Model Penal Code’s insanity test at §4.01) used such phrases as “lacks substantial capacity,” “appreciate,” and “appreciate criminality.” As outlined above, these concepts come directly from the Model Penal Code’s insanity test. The other proposed code considered by the Legislature (the “Prosecutor’s Code”) proposed the M’Naghten test, which the Legislature eventually adopted with minor changes. For an explanation of the “Orange Code,” *see State v. Warfield*, 103 Wn. App. 152, 158, 5 P.3d 1280 (Div. 2,2000)(Explaining that “When the Legislature enacted the Washington Criminal Code, ‘it had before it a precursor code known colloquially as the Orange Code and officially as the proposed Revised Washington Criminal Code....’ *State v. Thomson*, 71 Wn. App. 634, 643, 861 P.2d 492 (1993)).

In short, there is no dispute that the Washington insanity test is governed by RCW 9A.12.010 and that the Washington legislature has rejected the Model Penal Code's insanity test.

Finally, although the Legislature rejected the Model Penal Code's test and chose instead to adopt RCW 9A.12.010 as the test for the insanity defense, later acts show that the Legislature was sympathetic to the argument that concepts such as a defendant's ability to "appreciate the wrongfulness" of an act should play a role in criminal cases. What the Legislature chose to do, however, was to not include these concepts in the statutory definition of the insanity *defense*, but to create a *mitigating circumstance* that would take account of a defendant's ability to appreciate the wrongfulness of his acts. Thus, the Legislature created RCW 9.94A.535.

Under RCW 9.94A.535 a court at sentencing (as opposed to a jury at trial) may consider a number of mitigating circumstances when determining the appropriate sentence for a crime. The statute specifically outlines a number of these mitigating circumstances. One of these, RCW 9.94A.535(e) [formerly, RCW 9.94A.390(1)(e)] states that the court may impose an exceptional sentence downward when:

"The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired."

The language of this statute, of course, is drawn directly from the Model Penal Code insanity test. The Washington Supreme Court has explained that the mitigating circumstances outlined in RCW 9.94A.535 are often referred to as “failed defenses,” and that “the mitigating circumstances enumerated in RCW 9.94A.390 represent failed defenses.” *State v. Jeannotte*, 133 Wn.2d 847, 851, 947 P.2d 1192 (1997). Further, “these ‘failed defense’ mitigating circumstances include . . . mental conditions not amounting to insanity . . . RCW 9.94A.390(1)(e) (capacity to appreciate wrongfulness of conduct was significantly impaired).” *Jeannotte*, 133 Wn.2d at 851. Finally, the Supreme Court noted that,

By allowing failed defenses to be treated as mitigating circumstances, the Legislature recognized there may be “circumstances that led to the crime, even though falling short of establishing a legal defense, that justify distinguishing the conduct” from that in other similar cases.

Jeannotte, 133 Wn.2d at 851, *citing Hutsell*, 120 Wn.2d at 921 (quoting Boerner, *supra*, at 9-23).

The existence of RCW 9.94A.535(e) and its use of the Model Penal Code’s language as a mitigating factor further reinforces that fact that the Legislature has chosen to draw a clear line of demarcation between the insanity defense in Washington and the Model Penal Code’s insanity test. While the Washington Legislature chose to reject the MPC test as the test for an insanity defense, it nevertheless allowed that the concepts in the MPC test

could be used in one narrow aspect of Washington law, namely in a defendant's request that a court (as opposed to a jury) impose an exception sentence. Thus, the Model Penal Code's insanity test is of no relevance to a jury's determination of guilt in Washington, as the Legislature (and the Courts before it) specifically rejected the Model Penal Code's insanity test.

4. Evidence in the Present Case

In the present case the defense expert, Dr. Whitehill, testified that the Defendant was able to tell right from wrong, and the defense never argued that the Defendant was insane under this prong of the insanity test. See, RP 1716, 1892, 2117, 2300.²³ Thus, the only remaining basis for an insanity instruction in the present case would have required the record to contain substantial evidence that the Defendant was completely incapable of perceiving the nature and quality of the charged act. The record, however, establishes that the Defendant was able to perceive the physical nature and quality of his acts.

a. The defense expert conceded that the Defendant was able to perceive the physical nature and quality of his acts.

There is no doubt that the defense expert in the present case stated

²³ For instance, at RP 1892 Dr. Whitehill was asked if he conceded that the Defendant knew right from wrong, as follows:

Q. You're telling this jury there's ample evidence -- without any question, you're telling this jury there's ample evidence the Defendant knew right from wrong on April 5, when he slaughtered Ruby Andrews?

that the Defendant was unable to perceive the “moral qualities” or “moral significance” of his act. The defense expert, however, specifically conceded that the defendant was able to perceive the physical nature and qualities of his act. Specifically, the defense expert was asked the following:

Q. . . . Are you willing to concede that the Defendant perceived Ruby Andrews as a human being on April 5?

A. I have no reason not to.

Q. And are you willing to concede that he was able to perceive he was stabbing her with a knife when he was?

A. In all likelihood. I would agree.

Q. Right. He didn't think he was carving a pumpkin. There's no evidence of that.

A. No.

Q. And so it's fair to say, at least with regard to the actual nature of the act of stabbing Ruby Andrews, he perceived that when he was doing it, did he not?

A. I have no reason to believe otherwise.

RP 2220. The defense expert was then asked a number of questions regarding the defendant's ability to perceive the physical qualities of his acts,

Q. Now, I think perhaps you would also concede and you have conceded that he knew what he did was wrong but didn't appreciate, in your opinion, the moral significance of what it was that he was doing; is that fair?

A. That is fair.

Q. But the statute that we're talking about, nature and quality, it doesn't say nature and moral quality; does it? It just says quality.

A. Yes.

A. That is so.

Q. And there were physical qualities to this crime as well, correct?

A. Certainly physical dimensions or aspects.

RP 2221. The defense expert then acknowledged that there were a number of physical qualities to the murder (that it was violent, agonizing, bloody, etc).

RP 2221-22. There is no testimony in the record, however, to suggest that the Defendant was unable to perceive these qualities of the charged act. Rather, on re-cross, the State asked the defense expert the following question,

Q. So I guess, finally, Doctor—hopefully finally—is it fair to say that in your opinion the Defendant was able to perceive the nature of the act, that is, the physical nature of the act, and some qualities of his act, like it was violent and bloody and things like that; that he was able to perceive the nature, the physical nature of the act and some qualities of the act, but was unable to perceive the moral qualities of the act?

A. I think that's fair.

RP 2305-06.

As explained above, however, in order to be found insane under the M'Naghten insanity test a defendant must show that he or she was unable to perceive the physical nature and quality of his or her acts. As the only evidence before the trial court below was that the Defendant was in fact able to perceive the physical nature of his acts, the Defendant failed to show substantial evidence that would warrant an insanity instruction. The trial court, therefore, did not err in refusing to give an insanity instruction.

- b. The defense expert’s opinion that the defendant was unable to “appreciate the moral significance” of his act, while perhaps sufficient to warrant an insanity instruction in a Model Penal Code state, was insufficient to warrant an insanity instruction in Washington.**

In the present case the defense expert testified repeatedly and consistently that he understood that the statutory phrase “nature and quality” meant an “appreciation of the wrongfulness of the conduct” or an “appreciation of the moral significance” of the conduct. RP, 1718, 1767, 1837, 1888, 2117, 2119, 2206, 2210.

These phrases “appreciation of the wrongfulness of his conduct” or “appreciation of moral significance,” of course, are not found in RCW 9A.12.010. In addition, no Washington case has ever held that these phrases are in any way related to the insanity defense in Washington. Rather, the concepts of “appreciation of the wrongfulness of the conduct” and “moral significance,” are associated with the insanity defense in those states that employ the ALI’s Model Penal Code insanity test.

As outlined above, under Washington law an insanity instruction is only warranted if an expert testifies that a defendant was completely unable to perceive the nature and quality of the charged acts. A “lack of substantial capacity” to “appreciate the wrongfulness” or to “appreciate the moral significance” of the charged act, while potentially sufficient in a Model Penal Code state, are insufficient as a matter of law in Washington.

The defense, therefore, is not entitled to a jury instruction on insanity because it has failed to meet his burden on showing that the Defendant was completely unable to perceive the nature and quality of his acts.

- c. **Even if the concept of “nature and quality” in the M’Naghten test could be said to include both the physical and moral nature and quality of an act, the evidence in the present case was still insufficient to warrant an insanity instruction because: (1) Washington requires a total inability to perceive nature and quality - a limited ability (even a significantly limited ability) to perceive nature and quality is insufficient; and (2) a defendant who could perceive the physical nature and quality of his act but was limited in his ability to perceive the moral nature and quality of the act inability cannot be said to be completely unable to perceive nature and quality.**

Furthermore, even if the concept of “nature and quality” was understood encompass both the physical nature and quality and the “moral” nature and quality, then the evidence (even interpreted in a manner most favorable to the Defendant) showed at best that that the Defendant had a limited capability to perceive, not a total and complete inability to perceive nature and quality.

As outlined above, the defense expert explained quite clearly that the Defendant was able to perceive the physical nature and quality of his acts but was unable, in his opinion, to perceive the moral qualities of his acts:

Q. So I guess, finally, Doctor—hopefully finally—is it fair to say that in your opinion the Defendant was able to perceive the nature of the act, that is, the physical nature of the act, and some qualities of his act, like it was violent and bloody and

things like that; that he was able to perceive the nature, the physical nature of the act and some qualities of the act, but was unable to perceive the moral qualities of the act?

A. I think that's fair.

RP 2305-06. The record in the present case demonstrates repeatedly that the defense expert's testimony regarding nature and quality was premised on his understanding that nature and quality was synonymous with the Model Penal Code concept of "moral significance."

As explained previously, however, the concept of "nature and quality" under the M'Naghten insanity test means the physical nature and quality of an act. However, even if one were to assume for the sake of argument that "nature and quality" encompassed both the physical nature and quality of an act and its "moral significance, then the testimony below would still be insufficient.

As the Supreme Court explained in *Jamison*, an insanity instruction is not warranted based on testimony that a defendant was "significantly limited in his ability to perceive the nature and quality of the acts for which he was charged." *Jamison*, 94 Wn.2d at 665. Rather,

"RCW 9A.12.010(1)(a) requires that defendant be unable to perceive the nature and quality of the charged act. The psychologist testified that defendant was significantly limited in his ability to so perceive. Being limited, even significantly, does not equate with the statutory standard of being unable to perceive. Unable means incapable, not merely possessed of a limited capability."

Jamison, 94 Wn.2d at 665 (citations omitted)(emphasis added).

The defense expert's testimony in the present case exactly parallels the defense expert's testimony in *Jamison*, because by conceding that the defendant was able to perceive the nature and quality of his acts with the exception of the "moral qualities" of the act, the defense expert has, at best, testified that the defendant was "significantly limited in his ability to perceive the nature and quality of the acts for which he was charged." Just as in *Jamison*, the mere fact that the defendant was limited, even significantly, "does not equate with the statutory standard of being unable to perceive." *Jamison*, 94 Wn.2d at 665. "Unable means incapable, not merely possessed of a limited capability." *Jamison*, 94 Wn.2d at 665.

As the Defendant failed to present substantial evidence that he was completely unable to perceive the nature and quality of his acts, the Defendant was not entitled to a jury instruction on the insanity defense.²⁴

²⁴ A careful examination of the record provides further evidence that the defense expert misunderstood Washington insanity law and mistakenly based his testimony on concepts from the Model Penal Code. For example, as outlined above, Washington courts have consistently held (even after 1975) that with respect to the insanity defense that:

"It is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law."

State v. White, 60 Wn.2d 551, 590, 374 P.2d 942 (1962)(a case cited both defense expert at trial); *Jamison*, 94 Wn.2d at 665; *See also*, *Crenshaw*, 98 Wn.2d at 797 (same quote); *McDonald*, 89 Wn.2d at 272 (same quote); *Rice*, 110 Wn.2d at 601 (same quote)). Furthermore, the Washington Supreme Court in *Jamison* clearly held that a mere limitation, even a significant limitation, in a defendant's ability to perceive the nature and quality of his

acts is insufficient to support an insanity instruction. *Jamison*, 94 Wn.2d at 665.

On cross-examination, the defense expert was asked about this specific language from *White* as follows,

Q. And do you agree that this *State v. White* case that you're using for authority – do you have any reason to agree or disagree with the language of that case that states that the defense of insanity is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of criminal law?

A. My understanding is that's no longer the standard.

...

Q. Why is it your belief that what I just read to you, that the defense of insanity is available to only those persons who have lost contact with reality so completely that they're beyond the influences of criminal law, why do you believe that's no longer the standard?

A. Well, my understanding of the standard, based on the 1975 revision to the law, outlines two distinct prongs in which that particular phraseology is not present.

Q. But are you familiar with subsequent case law, after 1975, which cites that very standard?

A. I am not.

RP 2154-56. As outlined above, however, there is no question that even after 1975, the Washington courts still require a complete loss of contact with reality. The defense expert, however, was clearly unaware of this fact, which would explain why he would be willing to opine that a partial inability to perceive the nature and quality of one's act is sufficient to demonstrate insanity. The defense expert's misapprehension, however, does not change the applicable law, and a court may not give an instruction absent substantial evidence in the record that supports every element of that defense. *Bell*, 60 Wn. App. at 566. Furthermore, *Jamison* makes it clear that merely being significantly limited in one's ability to perceive the nature and qualities of one's act is insufficient. The statute requires complete incapability.

Clark v. Arizona, discussed above in footnote 15, raises one addition with the defense expert's testimony. In *Clark*, the Supreme Court explained, "if a defendant did not what he was doing when he acted, he could not have known that was performing the wrongful act charged as a crime." *Clark*, 548 U.S. at 753-54. Washington courts have reached a similar conclusion. In *State v. Thomas*, 8 Wn.App. 495, 500-01. 507 P.2d 153 (1973)(a case cited by the defense throughout the present trial) the court explained that an "accused's proof that he did not know the nature and quality of his act is a means of proving that he did not know it was wrong." The court went on to note that the phrase "nature and quality" is sometimes omitted altogether; "the underlying theory is that if the accused did not know the nature and quality of his act, he would have been incapable of knowing it was wrong." *Thomas*, 8 Wn.App. at 501. The opinion of the defense expert in the present case (that the defendant was insane under the "nature and quality" prong yet was able to understand that his act was wrong) is, therefore, impossible according to the US Supreme Court and *Thomas*. This seeming conundrum, however, is explained by the fact the defense expert was not employing a true M'Naghten test: rather he has consistently used the Model Penal Code insanity test. Thus, the seemingly anomalous result is easily explained.

5. *The Defendant's argument that the trial court applied the wrong standard is without merit.*

The Defendant argues that trial court applied wrong standard in evaluating whether the Defendant was entitled to an insanity instruction. App.'s Br. at 12-19. This argument, however, is without merit because the trial court applied the proper standard.

Under Washington law, a defendant is entitled to instructions defining a defense only when substantial evidence in the record supports every element of that defense. *Bell*, 60 Wn. App. at 566. Specifically, it is error to instruct the jury on the defense of insanity absent substantial evidence. *Wicks*, 98 Wn.2d at 622; *State v. Tyler*, 77 Wn.2d 726,739, 466 P.2d 120 (1970); *Johnson*, 92 Wn.2d at 683. Substantial evidence is evidence sufficient to persuade a fair-minded rational person of the truth of the declared premise or evidence which “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *Bering v. Share*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (citing *In re Welfare of Snyder*, 85 Wn.2d 182, 185-86, 532 P.2d 278 (1975)), cert. dismissed, 479 U.S. 1050 (1987); *Hutton*, 7 Wn. App. at 728.

In the present case the trial court expressly stated that the standard it applied was the “substantial evidence” standard. RP 3689. The trial court then explained that “nature and quality” meant the physical nature and quality

and that there had not been “a showing, a substantial showing” that the Defendant was unable to perceive the nature and quality of his actions. RP 3691. The trial court further explained that even if “nature and quality” included some moral component, the concept must still include the physical nature and quality of the act as at least a part of the overall definition, and that there had not been any showing that the Defendant was unable to perceive the physical nature and quality of his act. RP 3691-92. Thus, pursuant to *Jamison* (which requires a complete inability to perceive nature and quality), there had not been any showing that the Defendant was unable to perceive the nature and quality of his acts. RP 3689-92.

Furthermore, the Defendant’s argument appears to be that if a defense expert opines that a defendant is “insane,” then the defendant is entitled to an insanity instruction even if it is undisputed that the expert was using an improper definition of insanity (and was using a definition of insanity that was directly contrary to Washington law). This argument, however, is without merit and misconstrues the “substantial evidence” test.

The Washington Supreme Court, for instance, has previously held that if the defense expert’s opinion is based on a legally insufficient or an incorrect standard, then the defendant is not entitled to an insanity instruction despite the fact that the expert witness opines that a defendant is insane and unable to understand the nature and quality of his acts. In *Wicks*, for

example, the defense presented testimony from two experts (both psychiatrists). *Wicks*, 98 Wn.2d at 624-25. The first psychiatrist testified that the defendant had an underlying condition (chronic undifferentiated schizophrenia) and that at the time of the crime the defendant was also suffering from toxic psychosis. *Id.* at 624. This first expert thus opined that the defendant was “legally insane.” *Id.* at 625. The second expert testified that at the time the defendant committed the assaults the defendant “was insane” in the sense that he “did not understand the nature and quality of his acts.” *Id.* at 625. The Supreme Court however, said that because both experts had also conceded that the defendant’s insanity was aggravated or brought on due to his voluntary ingestion of alcohol and drugs, the Defendant was not entitled to an insanity instruction despite the experts’ testimony. *Id.* at 625-26. In short, the Supreme Court in *Wicks* looked past the “magic words” of insanity and nature and quality and looked at the basis for the experts’ opinions. As both opinions were ultimately inconsistent with Washington law (which does not allow for an insanity defense if the insanity brought on by voluntary intoxication, even when a defendant suffers from a preexisting mental illness), the Supreme Court concluded that the record was “devoid of substantial evidence to support a plea of insanity.” *Id.* at 621, 625-26.²⁵

²⁵ See also, *State v. Crenshaw*, 98 Wn.2d 789, 659 P.2d 488 (1983)(holding that error, if any, in insanity instruction was harmless because evidence was insufficient to support an insanity instruction at all despite fact that one expert testified that defendant was insane).

These holdings, of course, are not surprising because the “substantial evidence” standard requires that the evidence be sufficient to persuade a fair-minded rational person of the truth of the declared premise. If the expert reaches the conclusion that a person is insane but bases that opinion on a complete misunderstanding of the legal definition of insanity, then the mere fact that the expert stated “the defendant is insane,” standing alone, cannot be characterized as substantial evidence that the Defendant was insane. To the contrary, the only conclusion that a fair-minded rational person could draw from this evidence is that the expert’s conclusion was invalid since it was based on a faulty premise.²⁶

In conclusion, the Defendant’s argument that the trial court applied the wrong legal standard is without merit because the trial court applied the correct legal standard. In addition, the trial court did not error in concluding that there was no evidence in the record that the Defendant was insane as that term is properly defined in Washington law, because the undisputed evidence was that the defendant was in fact able to perceive the physical nature and quality of his acts. Finally the trial court correctly held that even if a more expansive definition of “nature and quality” was to be used, the record did

²⁶ For instance, if an expert opines that a defendant was insane because he suffered from a mental disease that caused him to be colorblind and further explained that “nature and quality” means nothing more than being able to perceive the “true color” of an act, it would be absurd to conclude that the expert had presented substantial evidence of insanity.

not contain any evidence (as required by *Jamison*) that the Defendant was *completely* unable to perceive the “nature and quality” of his act, because “nature and quality” even under a more expansive definition, must at the least include the physical nature and quality of the act as a part of the definition.

Furthermore, even viewing the evidence in a light most favorable to the Defendant, the only evidence in the record was that the Defendant was unable to appreciate the “wrongfulness” or the “moral significance” of his acts.²⁷ Given this record, in order to instruct the jury on insanity the trial court would have been, by necessity, required to make the following findings:

- 1) That the M’Naghten concept of “nature and quality” is limited solely to the “moral nature and moral quality” of an act;
- 2) That the Washington insanity defense includes the Model Penal Code concepts of “substantial capacity,” and “appreciation of the wrongfulness” and “appreciation of the moral significance” of an act; and,
- 3) That the Washington mitigation statute is not actually a mitigation statute at all, but rather is an alternative source of a complete defense to criminal charge.

As there is no support for any of these findings, the trial court correctly concluded that the Defendant was not entitled to an insanity instruction.

²⁷ At the hearing on the insanity issue below the defense continued to argue that “nature and quality” was defined exclusively as “moral appreciation.” RP 3674. There can be no question, therefore, that Defense counsel and the defense expert consistently maintained throughout the trial below that “nature and quality” meant nothing more than “moral appreciation.” As this argument was contrary to Washington law (and the weight of authority from around the country) and was clearly drawn from the Model Penal Code and the Washington mitigation statute, the trial court had no choice but to reject the defense’s invitation to incorporate the Model Penal Code into the Washington insanity defense.

B. THE DEFENDANT’S CLAIM THAT THERE WAS INSUFFICIENT EVIDENCE THAT 87 YEAR-OLD RUBY ANDREWS WAS A PARTICULARLY VULNERABLE VICTIM IS WITHOUT MERIT BECAUSE A SHOWING OF ADVANCED AGE, IN AND OF ITSELF, IS SUFFICIENT UNDER WASHINGTON LAW TO DEMONSTRATE THAT THE VICTIM WAS PARTICULARLY VULNERABLE.

The Defendant next claims that that there was insufficient evidence that 87 year-old Ruby Andrews was a particularly vulnerable victim. App.’s Br. at 21. This claim is without merit because: (1) Washington courts have held that victims as young as 67 have been considered particularly vulnerable due to advanced age, and that when the victim is of this age, no further showing of vulnerability is required; and (2) the Legislature specifically stated that 2005 amendment to the aggravating factor did not expand or restrict the then existing statutory or common law aggravating circumstances.

RCW 9.94A.535 provides that a court may impose an exceptional sentence above the standard range upon a finding that “the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.” Mustard argues there was insufficient evidence to impose the aggravating circumstances. “The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992).

Mustard claims that when the legislature modified RCW 9.94A.535 in 2005 it must have intended to narrow the class of cases in which a victim would qualify as “particularly vulnerable.” This claim is not supported by the plain language of the statute nor is it supported by the legislative history.

Prior to 2005 the statute provided that the court could impose an exceptional sentence if:

The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.

Former RCW 9.94A.535(2)(b). In 2005 the legislature amended the statute in the wake of *Blakely v. Washington* and specified that certain aggravating factors must be found by a jury. The Legislature also modified the vulnerable victim language to read as follows:

The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

RCW 9.94A.535(3)(b).

Mustard argues that by eliminating the phrase “due to extreme youth, advanced age, disability, or ill health” the legislature must have intended that these types of factors were no longer sufficient. App.’s Br. at 24.

The stated purpose of the 2005 amendment, however, demonstrates that Mustard's argument is without merit. Specifically, the legislature specifically outlined its intent as follows:

“The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, *without expanding or restricting existing statutory or common law aggravating circumstances.* The legislature does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances.”

Laws of 2005 c 68 §1 (emphasis added).

An examination of the Washington appellate decision demonstrates that it is well settled that a victim's advanced age in and of itself is sufficient to show that a victim is particularly vulnerable. Specifically, the courts have held that victims as young as 67 have been considered particularly vulnerable due to advanced age, and that when the victim is of this age, no further showing of vulnerability is required. *See, e.g., State v. George*, 67 Wn.App. 217, 221-22, 834 P.2d 664 (1992) (stating that vulnerability due to advanced age may alone, as a matter of law, justify an exceptional sentence in robbery, assault, and rape of 77-year-old woman); *State v. Clinton*, 48 Wn.App. 671, 676, 741 P.2d 52 (1987) (fact that rape victim was 67 years old established that she was particularly vulnerable due to advanced age).²⁸

²⁸ See also, *State v. Hawkins*, 53 Wn.App. 598, 607, 769 P.2d 856, 860(1989) (75-year-old

Given these cases it is clear that the prior to the 2005 amendment the fact that the victim was 87 years old was in and of itself sufficient to show that the victim was particularly vulnerable. As the stated purpose of the 2005 amendment was to neither expand nor restrict the then “existing statutory or common law aggravating circumstances,” it is clear that the holdings of these cases remain the law of Washington.

Furthermore, there is nothing about the plain language of the statute after the 2005 amendment that in any way suggests that advanced age is no longer sufficient to demonstrate that a victim is particularly vulnerable. Rather, the current statute was merely simplified (as the legislature explained) to allow a finder of fact to consider the various different factors (that had been developed in the common law) that might support a finding that the victim was particularly vulnerable. It is clear that under Washington law (both before and after 2005) a victim’s advanced age is sufficient to demonstrate that the victim was particularly vulnerable under RCW 9.94A.535. Any argument to the contrary is clearly without merit.

victim); *State v. Vandervlugt*, 56 Wn.App. 517, 522–23, 784 P.2d 546, 548 (1990) (76 years old); *State v. Hicks*, 61 Wn.App. 923, 930, 812 P.2d 893, 896 (1991) (77 years old); *State v. Sims*, 67 Wn.App. 50, 60, 834 P.2d 78, 83 (1992) (78 years old); *State v. Jones*, 130 Wn.2d 302, 312, 922 P.2d 806, 809 (1996) (77-year-old victim); *State v. Butler*, 75 Wn.App. 47, 51–53, 876 P.2d 481, 484–85 (1994) (89-year-old victim).

In addition, an adult may be particularly vulnerable because of small stature as long as the record establishes the victim's size. *See, e.g., State v. Gore*, 143 Wn.2d 288, 316–18, 21 P.3d 262, 278–79 (2001); *State v. Sly*, 58 Wn.App. 740, 748–49, 794 P.2d 1316, 1321 (1990); *State v. Holyoak*, 49 Wn.App. 691, 695, 745 P.2d 515, 517 (1987); *State v. Payne*,

In the present case the record demonstrated that the victim, Ruby Andrews was At the time of the autopsy Ms. Andrews was 87 years-old, was 5 feet 5 inches tall and weighed 105 pounds. RP 466. These facts were sufficient, viewing the evidence in a light most favorable to the State, for a jury to conclude that Ms. Andrews was a particularly vulnerable victim

The Defendant's argument that the trial court erred in imposing an exceptional sentence after the jury had specifically found that the 87 year-old victim in the present case was particularly vulnerable is, therefore, without merit.

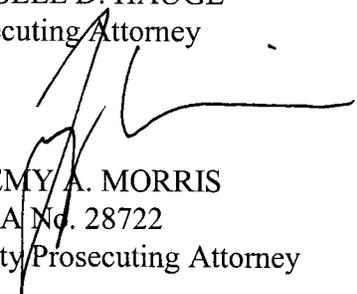
IV. CONCLUSION

For the foregoing reasons, the Defendant's conviction and sentence should be affirmed.

DATED October 17, 2011.

Respectfully submitted,

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45 Wn.App. 528, 531, 726 P.2d 997, 999 (1986).

KITSAP COUNTY PROSECUTOR

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