

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

SHERRY G. HAMM,

Appellant.

No. 38309-8-II

UNPUBLISHED OPINION

Hunt, J. — Sherry G. Hamm appeals her bench trial conviction for second degree assault with a deadly weapon, a hammer. She argues that the evidence was insufficient to support this conviction because the trial court “totally disregarded” expert witness testimony that she was suffering from diminished capacity at the time of the offense. We affirm.

FACTS

I. Background

On March 8, 2007, Sherry Hamm called Jim Hutchinson, the brother of her live-in boyfriend, Ken Hutchinson, and asked him to come to her home, stating that Ken¹ “was anxious

¹ We use first names for clarity, intending no disrespect.

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to settle [his mother's] Estate.” 3 Verbatim Report of Proceedings (VRP) (Feb. 4, 2008) at 162. On March 10, Hamm again called Jim and asked him to come to her home to settle the estate. When Jim arrived at her home later that day, Hamm told him that Ken had left but would return soon and she proposed discussing the estate paperwork in a nearby motor home while they waited for Ken to return. Contrary to Hamm's statement, Ken was asleep in an upstairs bedroom during this time.

In the motor home, Hamm handed Jim two checks from the estate, apparently payable to him. She also suggested that while waiting for Ken, they go to a nearby storage shed to retrieve several estate items for Jim's wife. Inside the shed, Hamm pointed to some items in the back, directed Jim to collect them, and struck him twice in the back of the head with a hammer as he turned to reach them. Jim grabbed the hammer as she attempted to hit him again, and he started to dial 911 on his cell phone. Hamm interrupted the call, pleaded with Jim not to call the police, and said, “I can't go to jail.” 3 VRP (Feb. 4, 2008) at 181.

When Jim continued to dial 911, Hamm stabbed him in the stomach with a knife, but Jim's jacket zipper prevented the blade from piercing his skin. Bleeding from his head wounds, Jim grabbed the knife from Hamm and sustained two cuts to his hand.

Jim then went inside Hamm's house and asked aloud if anyone was present, but no one responded. As Jim was leaving, Hamm hit him in the back of the head with a wrench. Jim next went to his car, and Hamm tried to prevent him from leaving by blocking the car with her body. Jim managed to leave the property without hitting her and drove to a nearby convenience store to call 911. In response to Jim's 911 call, an ambulance arrived and transported him to the hospital.

When Officer Charles Gailey arrived at Hamm's house, Hamm approached him, with blood on her face and hand, and said that she had hit Jim with a hammer after he had assaulted her "for no reason" in the shed, 5 VRP (Feb. 5, 2008) at 220, 222, because she was "tired of being a victim." 5 VRP (Feb. 5, 2008) at 204. Shortly thereafter, Officer Jason Capps arrived at the scene to assist with the investigation, and an ambulance transported Hamm to a nearby hospital for medical care.

Unable to determine whether Hamm was the victim or the perpetrator, Gailey and Capps searched the premises and observed blood on her home's exterior front steps and on various surfaces inside the home including the kitchen floor and sink, the telephone, the bathroom floor and sink, and the bedroom doorknob. They also discovered Ken asleep in the upstairs bedroom, seemingly unaware that anything had happened.

Gailey interviewed Hamm and Jim at the hospital. Gailey advised Hamm of her *Miranda*² rights and asked her about the incident. Hamm told Gailey that (1) Jim came to her house without informing Ken, so Jim could collect his share of the estate and several of his mother's personal effects; (2) Jim slapped her on the face after she had accidentally tripped and fell into him in the shed; and (3) she hit Jim with the hammer in self-defense because she "did not want to be a victim again." 5 VRP (Feb. 5, 2008) at 222. When Gailey told Jim about Hamm's version of the events, Jim denied having slapped Hamm and explained that she had hit him in the back of the head with a hammer, had tried to stab him in the stomach with a knife, and had struck him in the back of the head with a wrench, all without provocation.

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

II. Procedure

The State charged Hamm with three counts of second degree assault with a deadly weapon under RCW 9A.36.021(1)(c): a hammer (Count I), a knife (Count II), and a wrench (Count III). Hamm waived her right to a jury trial.

A. February 27 Incident³

Officer Arlie Boggs testified about the February 27 incident. He testified that when he first approached Hamm, she was bleeding, and she reported that a female acquaintance, Karen Bailey, had struck her in the head and had attempted to hit her with a rock. Conversely, Bailey later told Boggs that Hamm was “the monster that [had] tried to attack” her by hitting her in the head “30 to 40 times” with a metal pipe, 5 VRP (Feb. 6, 2008) at 101, 104, and a blunt object. Boggs testified that he found a rock with blood and human hair on it at the incident scene.

Dr. Frank Hing, who had treated both women for their head injuries, testified that the cuts on the back of Bailey’s head and the dried blood in her hair were consistent with having been struck by a hard object such as a rock. He had also observed bruising and swelling on Bailey’s forehead. According to Dr. Hing, Hamm’s wounds could have caused a traumatic head injury such as a concussion.

Dr. David Lush testified about having treated Hamm for injuries resulting from the February 27 incident, including black eyes, facial swelling, lacerations, and anxiety. He did not believe that Hamm suffered from a “psychiatric disorder” because she had “no history of

³ Hamm joined the State’s pretrial ER 404(b) motion to admit evidence of a February 27, physical altercation between Hamm and her female acquaintance. The trial court granted the motion but limited its consideration of this evidence to the issue of Hamm’s diminished capacity defense.

instability” in her medical records. 4 VRP (Feb. 5, 2008) at 107, 109. In his opinion, Hamm was “overwhelmed” by a “severely traumatic, stressful situation,” 4 VRP (Feb. 5, 2008) at 121; he attributed her emotional injuries to “emotional crisis and stress,” rather than to “brain damage”, 4 VRP (Feb. 5, 2008) at 126, and classified her condition as post-traumatic anxiety disorder (PTSD).

B. March 10 Incident

Jim testified that (1) when he initially spoke to Hamm on the phone, her demeanor was “pleasant” with no sign of anger; (2) he did not slap Hamm or recall her bumping into him in the shed, 3 VRP (Feb. 4, 2008) at 164, 178; (3) Hamm assaulted him with a hammer and a knife in the shed; (4) when Hamm was pleading with him not to call 911, her demeanor was “unhinged” and “desperate,” 3 VRP (Feb. 4, 2008) at 181-82, and (5) thereafter, she assaulted him with the wrench outside her house and blocked his car with her body to prevent his departure. Gailey similarly testified that Hamm appeared “distraught” at her house, 5 VRP (Feb. 5, 2008) at 204, and that during her interview at the hospital, she seemed “very upset and [in an] excited state, crying and shaking.” 5 VRP (Feb. 5, 2008) at 216.

Dr. David Lush had earlier treated Hamm on February 27 and had treated both Hamm’s and Jim’s injuries at the hospital on March 10. Dr. Lush testified that, according to Hamm’s explanation, she “fought back” against Jim because his slapping her “triggered” the idea that she “was not going to let another person kill [her], or almost kill [her].” 4 VRP (Feb. 5, 2008) at 146. Dr. Lush characterized Hamm’s mental state “as alert and responsive” with no sign of delusion. 4 VRP (Feb. 5, 2008) at 19. He testified that (1) acute stress disorder, a shorter, less

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frequent variety of PTSD, accurately described her symptoms; (2) people affected with such stress disorders can ordinarily differentiate between right and wrong and make rational choices; and (3) Hamm likely did not plan the assault on Jim; instead, “She just reacted.” 4 VRP (Feb. 5, 2008) at 181.

Dr. Lush also noted that, contrary to Hamm’s claim that Jim had struck her in face and driven his car over her foot, she had suffered only minor injuries, including small cuts on her hand and a fractured toe. In contrast, Jim had cuts and a large laceration on the back of his head.

Hamm testified that when she and Jim were in the shed, she had stumbled and placed her hand on Jim’s back, causing him to fall forward; Jim then struck her in the face; and, in response, she had grabbed a hammer from a box in the shed and hit him with it. Hamm further testified that (1) after leaving the shed, she no longer felt threatened because she was more concerned about Jim’s well-being, (2) she did not want Jim to leave because she worried that his head injury would interfere with his ability to drive, and (3) when Jim began to drive away, he ran over her foot with his car.

Defense expert, Dr. Robert Stanulis, a neuropsychologist and PTSD specialist, testified about Hamm’s likely mental state during the March 10 incident based on his review of the transcripts and exhibits from the pretrial hearing and Dr. Lush’s medical reports. Dr. Stanulis had not met Hamm or reviewed her medical history before trial. Dr. Stanulis opined that, if she had perceived Jim as a threat, she may have overreacted with a “fight or flight” response. 7 VRP (Feb. 7, 2008) at 203. Dr. Stanulis also noted that Hamm’s statement about not “want[ing] to be a victim again” indicated that during the incident, her [acute stress disorder] was “quite active”

and she was “re-experiencing her [anxiety and panic] symptoms suggest[ing] a flashback.” 7 VRP (Feb. 7, 2008) at 200.

The trial court found Hamm guilty of second degree assault with a deadly weapon (hammer) on Count I.⁴ The trial court also found that (1) Hamm’s testimony about the March 10 incident was “not credible,” whereas Jim’s testimony was “credible as well as supported by the evidence beyond a reasonable doubt,” CP at 58; (2) Hamm “acted of her own free will and not under the effects of post-traumatic stress disorder, acute stress disorder, or self-defense at any time during the day of the assault,” CP at 59; and (3) Hamm did not act in self defense or suffer from diminished capacity⁵ during the March 10 incident. Hamm appeals.⁶

ANALYSIS

Sufficiency of Evidence

Hamm argues that the trial court based her conviction on insufficient evidence because it disregarded expert witness testimony that she was suffering from acute stress disorder at the time of the March 10 incident, which negated the intent element of the offense. This argument fails.

When a defendant challenges the sufficiency of the evidence on appeal, he or she admits

⁴ The trial court found Hamm not guilty of second degree assault with a knife (Count II) and second degree assault with a wrench (Count III) because the State failed to “prove each element of the crime beyond a reasonable doubt.” CP at 58.

⁵ The trial court noted that it had considered the February 27 incident only for the limited purpose of considering Hamm’s diminished capacity defense.

⁶ The State originally filed a cross appeal, arguing that the trial court improperly refused to consider evidence of Hamm’s prior acts on February 27 for the purpose of establishing motive, intent, or plan, but it later withdrew the cross appeal.

the truth of the evidence admitted at trial and all the inferences reasonably drawn from this evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We determine only whether substantial evidence supports the trial court's findings and whether these findings, in turn, support its conclusions of law. *State v. Vickers*, 148 Wn.2d 91, 116, 59 P.3d 58 (2002). When substantial but disputed evidence supports a trial court's findings of fact and conclusions of law, we will not disturb the trial court's ruling. *Vickers*, 148 Wn.2d at 116. When reviewing issues of fact about conflicting testimony, witness credibility, and persuasiveness of the evidence, we defer to the trier of fact. *Salinas*, 119 Wn.2d at 201; see *In re Detention of Stout*, 159 Wn.2d 357, 382, 150 P.3d 86 (2007). See also *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (credibility determinations are not subject to appellate review).

A person is guilty of committing second degree assault "if he or she, under circumstances not amounting to first degree assault," assaults another with a deadly weapon." RCW 9A.36.021(1)(c). Although this statute does not contain the words "knowledge" or "intent," Washington courts have held that assault includes the element of intent. *State v. Hopper*, 118 Wn.2d 151, 158-59, 822 P.2d 775 (1992). Diminished capacity is an affirmative defense, which can negate the specific intent or knowledge element of a crime. *State v. Eakins*, 127 Wn.2d 490, 496, 902 P.2d 1236 (1995); *State v. Gough*, 53 Wn. App. 619, 622, 768 P.2d 1028 (1989).

To establish a diminished capacity defense, "a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged." *State v. Atsbeha*, 142 Wn.2d 904, 925, 16 P.3d 626 (2001) (quoting *State v. Ellis*, 136 Wn.2d 498, 521, 963 P.2d 843 (1998)).

Washington courts have held that proof of a mental disorder, standing alone, is not enough to raise the inference that diminished capacity exists. *Atsbeha*, 142 Wn.2d at 921. Instead, the evidence must “logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the required specific intent to commit the crime charged.” *State v. Ferrick*, 81 Wn.2d 942, 945, 506 P.2d 860 (1973).

Hamm challenges the trial court’s finding that she “did not suffer from diminished capacity at the time of the assault.” CP at 139. She contends that the trial court erroneously disregarded and rejected Dr. Stanulis’s testimony about her inability to form the requisite intent. The record does not support her argument.

Substantial evidence supports Hamm’s conviction for second degree assault with a deadly weapon. First, contrary to Hamm’s assertion that she “did not have the capacity to form the intent to commit the assault,” Br. of App. at 26, Dr. Stanulis’s testimony never reached this conclusion; rather, he was equivocal about Hamm’s mental state during the March 10 incident: He used indefinite language to describe Hamm’s mental state, noting that her account of the incident “*suggests* [that] her [acute stress disorder] is quite active” and “*suggests* a flashback.” 7 VRP (Feb. 7, 2008) at 200 (emphasis added). We further note that Dr. Stanulis based his testimony on the reports of others who had actually examined or interviewed Hamm close in time to the incident, including Dr. Lush.

Second, Dr. Lush undermined Dr. Stanulis’s mere suggestion that Hamm was suffering from an acute stress disorder-induced flashback during the incident with Jim. Dr. Lush, who unlike Dr. Stanulis had treated Hamm for injuries resulting from both the February 27 and the

March 10 incidents, (1) testified that people affected by stress disorders are usually capable of making rational choices; and (2) characterized Hamm's attack on Jim as an unplanned reaction, rather than a flashback, noting that in treating her injuries immediately after the March 10 incident with Jim, she had seemed alert, apparently with with no sign of delusion.

Dr. Lush's testimony cast further doubt on Hamm's diminished capacity and self-defense theories of the case. He testified that (1) although Hamm had told him about Jim's running over her foot with his car, she had only minor injuries, instead of the type of severe trauma expected from such an event; (2) these minor injuries, a fractured toe and a cut hand, did not support Hamm's claim that Jim had hit her several times in the face; and (3) Hamm's involvement in two successive violent altercations caused him to "worry more about believing what she [had] told [him] about each incident." 5 VRP (Feb. 5, 2008) at 197.

Third, Hamm's argument fails to acknowledge the applicable standard of review—that we defer to the finder of fact on questions of persuasiveness and credibility of expert witness testimony. As the fact finder, the trial court was in the best position to evaluate the persuasiveness and credibility of all the witnesses; we do not reevaluate the trial court's credibility determinations.⁷

Viewing the evidence and all reasonable inferences in the light most favorable to the

⁷ That Dr. Stanulis had not met with Hamm or reviewed her full medical history before trial supports the trial court's determination that she failed to show diminished capacity through his testimony. CP at 57-59.

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State, we hold that substantial evidence supports the trial court's finding that Hamm committed second degree assault with a deadly weapon, a hammer. *Vickers*, 148 Wn.2d at 116. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.