

MAR 15 2012

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff - Appellee,</p> <p>v.</p> <p>JOHNATHON FRANK,</p> <p>Defendant - Appellant.</p>

No. 11-30091

D.C. No. 2:09-cr-02075-EFS-2

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Edward F. Shea, District Judge, Presiding

Submitted March 9, 2012**
Seattle, Washington

Before: PAEZ and MURGUIA, Circuit Judges, and TUCKER, District Judge.***

Appellant Jonathon Frank was charged with (Count One) a crime on an
Indian reservation - assault resulting in serious bodily injury and aiding and

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

*** The Honorable Josephine Staton Tucker, United States District Judge for the Central District of California, sitting by designation.

abetting, in violation of 18 U.S.C. §§ 1153, 113(a)(6), and 2; and (Count Two) a crime on an Indian reservation - voluntary manslaughter and aiding and abetting, in violation of 18 U.S.C. §§ 1153, 1112, and 2. Having pled guilty pursuant to a conditional guilty plea, Frank appeals the district court's order granting the government's motion to exclude Frank's defense of diminished capacity and related expert testimony. We review *de novo* whether diminished capacity is a defense to a charged offense. *United States v. Vela*, 624 F.3d 1148, 1154 (9th Cir. 2010). We do not recite the facts as they are known to the parties.

A diminished capacity defense is "ordinarily available only when a crime requires proof of a specific intent." *Id.* (citing *United States v. Twine*, 853 F.2d 676, 679 (9th Cir. 1988)). Assault resulting in seriously bodily injury is a general intent crime. *United States v. Fitzgerald*, 882 F.2d 397, 399 (9th Cir. 1989).¹ Voluntary manslaughter, 18 U.S.C. §1112, is also a general intent crime. *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1968). There is no legal authority for Frank's claim that his alleged use of a weapon transformed these charges into specific intent crimes. Because the crimes with which Frank was charged are both

¹ *Fitzgerald*, 882 F.2d at 399 (9th Cir. 1989), examined assault causing serious bodily injury as codified at 18 U.S.C. § 113(f), which has since been re-codified as 18 U.S.C. § 113(a)(6). See Pub. L. No. 103-322, §§ 170201(c)(4)-(6), 108 Stat. 1796 (1994).

general intent crimes, we hold that the district court did not err in excluding the defense of diminished capacity and any evidence thereof. *Vela*, 624 F.3d at 1154.

AFFIRMED.