In the Missouri Court of Appeals
Eastern District

Writ Division I

Anthony Caruthers, Relator,	)	No. ED106685
	)	Writ of Prohibition
vs.	)	St. Francois County Circuit Court Cause No. 16SF-CR01512-01
The Honorable Wendy Wexler-Horn, Judge of the Circuit Court of the County of St. Francois, 24th Judicial Circuit, Respondent.	)	Filed: July 10, 2018

OPINION

Anthony Caruthers ("Relator") seeks a writ of prohibition to prevent the trial court ("Respondent") from ordering a mental examination pursuant to Chapter 552. Relator is charged with murder in the first degree, armed criminal action, burglary in the second degree, tampering in the first degree, tampering with physical evidence, resisting arrest, and escape. Relator's charges stem from conduct he allegedly committed on November 3, 2016. Counsel for Relator has endorsed Dr. Stacie Bunning and disclosed reports she had prepared that support Relator's position that he was incapable of deliberation at the time of the alleged murder offense (i.e., a diminished capacity defense). In response, the State filed a motion on April 23, 2018, requesting a mental examination of Relator pursuant to § 552.020. On May 2, 2018, the State withdrew this motion and then refiled a motion requesting a mental examination pursuant to § 552.015 and/or §

552.020, which the trial court ("Respondent") granted. Relator filed a petition for a writ of prohibition with this Court on May 4, 2018. On May 9, 2018, Respondent filed Suggestions in Opposition. On May 10, 2018, this Court issued a preliminary order in prohibition staying Respondent's May 2, 2018, order for a mental examination.[1] Despite this order, the Department of Mental Health interviewed Relator on May 11, 2018. Respondent maintains that the mental examination was conducted by Dr. Rachel Springman, who had no knowledge of the order, and there was no intent to violate the preliminary order. Following our issuance of the preliminary order in prohibition, Relator filed a reply to Respondent's Suggestions in Opposition, and Respondent filed a Response to Relator's Reply. Because our stay order of May 10, 2018, vitiated any legal authority for the Department of Mental Health to conduct an interview, we issued an order on May 15, 2018, stating the following:

> [a]ny report generated by the Department of Mental Health based on any interview or mental examination of [Relator] or any other evidence … related to the interview or mental examination of [Relator] which was conducted in violation of this Court's stay order is void and of no effect and shall not be admissible at trial of Defendant, pending further order of this Court.

We dispense with further briefing and oral argument as permitted by Rule 84.24(i).[2] After reviewing the parties' filings and conducting independent research on the matter, we find that neither § 552.015 nor § 552.020 grant the trial court authority to order a mental examination to assess whether a criminal defendant had a diminished capacity at the time of the alleged offense. The preliminary order in prohibition is made permanent as modified. The report or any evidence conducted in violation of the court's stay order is void and of no effect. Respondent is directed to vacate and set aside her order of May 2, 2018, ordering a mental examination of Relator.

[1] The Clerk's office e-mailed the preliminary order in prohibition to Respondent at 12:38 p.m. on May 10, 2018, and to the attorneys for Relator and the State at 12:39 p.m. In addition, Respondent and counsel were also separately notified of the order by the e-filing system at 6:33 p.m. that day.
[2] All references are to Missouri Supreme Court Rules (2017).

Discussion

I. Mental Examinations Under Chapter 552

Respondent claims that under § 552.015 and/or § 552.020 the trial court had the authority to order a mental examination of Relator to assess whether Relator had a mental disease or defect that rendered him incapable of deliberation at the time of the alleged murder. Respondent contends that Relator injected this issue into the trial by expressing his intent to call Dr. Bunning to testify on Relator's ability to deliberate at the time of the alleged offense, and that by injecting this issue, the trial court "had clear discretion to order a mental examination pursuant to Chapter 552."

Section 552.015 governs when evidence of a mental disease or defect is ***admissible*** in criminal proceedings; there is nothing in the statute relating to a trial court's authority to order a mental examination under any circumstances. Accordingly, § 552.015 does not provide a basis for a court to ***order*** a mental examination. Section 552.020 permits a judge to order a mental examination under two circumstances. Under the first circumstance:

> Whenever any judge has reasonable cause to believe that the accused lacks mental fitness to proceed, he shall, upon his own motion or upon motion filed by the state or by or on behalf of the accused, by order of record, appoint one or more private psychiatrists or psychologists, ... or physicians ... to examine the accused.

State, ex rel. Proctor v. Bryson, 100 S.W.3d 775, 777 (Mo. banc 2003) (quoting § 552.020.2). This first circumstance "specifically addresses the occasion when a defendant lacks the capacity to understand the proceedings or lacks the ability to assist counsel in the defense." *Id*. The mental examination would be permitted to assess the defendant's capacity ***at the time of the relevant criminal proceeding***. *See id*. "It does not allow the court to order an examination as to the mental capacity of [a defendant] at the time of the alleged criminal conduct." *Id.* Thus, in the present case, the first circumstance is inapplicable.

The second circumstance in which a court has authority to order a mental examination is provided by § 552.020.4. *Id*. This subsection reads:

> ***If the accused has pleaded lack of responsibility due to mental disease or defect*** ... the court shall order ... [an] examination conducted pursuant to this section ... [the examination shall include] an opinion as to whether at the time of the alleged criminal conduct the accused, as a result of mental disease or defect, did not know or appreciate the nature, quality, or wrongfulness of his conduct or as a result of mental disease or defect was incapable of conforming his conduct to the requirements of law. A plea of not guilty by reason of mental disease or defect shall not be accepted by the court in the absence of any such pretrial evaluation which supports such a defense.

Section 552.020.4 (emphasis added). "Absent from both [sub]sections is language allowing the trial court to order a psychiatric examination concerning mental state at the time of alleged criminal conduct ***without*** a plea of not guilty by reason of mental disease or defect." *Proctor*, 100 S.W.3d at 777–78 (emphasis in original). In the instant case, the State is seeking a mental examination concerning Relator's mental state "at the time of alleged criminal conduct without a plea of not guilty by reason of mental disease or defect," but § 552.020.4 does not grant the trial court the authority to order such an examination.

Respondent claims there is "no functional difference" between a criminal defendant's notice to raise a defense for not guilty by reason of a mental disease or defect (also referred to as "NGRI") and a defense of diminished capacity. We disagree. Most notably, unlike a NGRI defense, which is an "affirmative defense," the State's burden is not altered by Relator's diminished capacity defense. Our Supreme Court explained the difference between defenses of diminished capacity (under MAI–CR 3d 308.03) and NGRI:

> A "not guilty by reason of mental disease or defect excluding responsibility" (NGRI) defense requires the defendant to comply with special notice provisions and injects into the case an issue on which defendant has the burden of proof. If defendant succeeds on his affirmative defense, he is absolved of criminal responsibility. A diminished capacity defense, if successful, does not absolve the

> defendant of responsibility entirely, but makes him responsible only for the crime whose elements the state can prove.

State v. Walkup, 220 S.W.3d 748, 756 (Mo. banc 2007).[3] A diminished mental capacity defense "does not alter the elements to be proved by the state." *State v. Frazier*, 404 S.W.3d 407, 415 (Mo. App. W.D. 2013) (quoting MAI–CR 3d 304.11).[4] Rather, "[e]vidence of mental disease or defect negating a culpable mental state is simply evidence that the defendant did not have the culpable mental state that is an essential element of the crime." *Walkup*, 220 S.W.3d at 755 (quoting MAI–CR 3d 308.03, Note 3). Although it is commonly referred to as a defense, "it is a negative or negating defense because the defendant has no burden to present evidence or to persuade." *Id*. "Evidence of diminished capacity is intended simply to negate an element of the state's case—a culpable mental state—which is the state's burden to prove beyond a reasonable doubt." *Id*. Conversely, an affirmative defense—such as NGRI— "is an independent bar to liability in which the defendant carries the burden of persuasion; an affirmative defense does not negate any of the essential elements that the State must prove in order to convict a defendant." *State v. Jones*, 519 S.W.3d 818, 825 (Mo. App. E.D. 2017).

Under Missouri Approved Jury Instructions, Second Edition, "diminished capacity" was considered a "special negative defense." *State ex rel. Westfall v. Crandall*, 610 S.W.2d 45, 47 (Mo. App. E.D. 1980).When a special negative defense is raised regarding a defendant's mental capacity at the time of the offense, "the state has the burden of proving that the defendant did not suffer from a mental disease or defect affecting his state of mind," and "[i]nherent in this burden

[3] Missouri Approved Jury Instructions–Criminal, Fourth Edition, is the relevant edition in the case before us. However, MAI–CR 4th 408.03 and its Notes on Use are substantially similar to the language of MAI–CR 3d 308.03 and its Notes on Use.

[4] MAI–CR 4th 408.11 and its Notes on Use are substantially similar to the language of MAI–CR 3d 308.11 and its Notes on Use.

of proof, is the recognition that the state will need to have the defendant's mental abilities examined." *Id.* Thus, if a trial court could not order a mental examination upon a showing of good cause, it would "effectively hamper[] the state from carrying its burden of proof on the intent element." *Id*. "Similarly, the NGRI defense, as provided in section 552.030.1, is an affirmative defense that must be initiated and proven by the defendant." *State ex rel. Koster v. Oxenhandler*, 491 S.W.3d 576, 594 (Mo. App. W.D. 2016); *see also* MAI–CR 4th 404.11.[5] Relevant to the present case, under MAI–CR 4th, "diminished capacity" is no longer considered a "special negative defense," and the State's burden is not changed by a criminal defendant raising this defense. *See Frazier*, 404 S.W.3d at 415 ("[C]ontrary to Frazier's characterization, diminished capacity is not a special negative defense."); *see also Walkup*, 220 S.W.3d at 756; *see also* MAI–CR 4th 404.11 (excluding "diminished capacity" from its list of "Special Negative Defenses"). The fact that both special negative defenses and affirmative defenses change the State's burden helps explain why a diminished capacity defense under MAI–CR 3d and MAI–CR 4th is treated differently than NGRI and diminished capacity under MAI–CR2d. Accordingly, we find that neither § 552.015 nor § 552.020 provides the court with the authority to order a defendant to submit to a mental examination if the defendant raises a diminished capacity defense.

II. Mental Examinations Under Rule 25.06(B)(9)

To be clear, the only issue currently before this Court is whether the trial court had authority to order a mental examination of Relator under Chapter 552. However, Respondent

[5] Although similar, we note that "special negative defenses" and "affirmative defenses" operate in different manners. For example, regarding "special negative defenses," "the defendant has the burden of injecting the issue (the burden of producing evidence), but the state has the burden of persuasion." MAI–CR 3d 304.11(E); MAI–CR 4th 404.11 (E). However, '[u]nlike a 'special negative defense,' the defendant bears the risk of nonpersuasion as to an affirmative defense." MAI–CR 3d 304.11 (F); MAI–CR 4th 404.11 (F). We note that MAI–CR 3d 304.11 is substantially similar to MAI–CR 4th 404.11.

suggests that Missouri Supreme Court Rule 25.06(B)(9) may also provide the court with authority to require defendant to submit to a mental examination to determine the defendant's ability to deliberate ***at the time of the charged offense***, upon a showing of good cause, and Respondent cites *Westfall*, 610 S.W.2d at 47 to support its position. We find that *Westfall* is not persuasive. At the time of the criminal proceedings in *Westfall*, the defense of diminished capacity was viewed as a "special negative defense" that altered the State's burden under MAI–CR 2d. However, a diminished capacity defense no longer affects the burden placed on the State, as it is not considered a "special negative defense" under MAI–CR 3d, nor is it considered an "affirmative defense." *See* MAI–CR 3d 304.11.

While "diminished capacity" may be deemed a "negative" or "negating" defense, in more recent cases, Missouri courts have not treated "diminished capacity as a "***special*** negative defense," and the State does not have "the additional burden of ***disproving*** that [the defendant] was operating with a diminished capacity at the time of the murder." *See Frazier*, 404 S.W.3d at 415 (emphasis added); *see also Walkup*, 220 S.W.3d at 755 (explaining that diminished capacity "is a negative or negating defense because ***the defendant has no burden to present evidence or to persuade***") (emphasis added). Based on this reasoning, we disagree with the concurrence to the extent it relies on *Westfall* to suggest the state carries an additional burden of disproving evidence of mental disease whenever a diminished capacity defense is raised.

The concurrence states that, in accordance with *State ex rel. Thurman v. Pratte*, 324 S.W.3d 501, 504 n.6 (Mo. App. E.D. 2010):

> [o]nce the defendant produces expert medical evidence inserting a defense of diminished capacity into the case in order to negate the intent element of the crime charged, the State, in order not to be prevented from or hindered in its ability to carry its burden of persuasion on intent, may for "good cause" under Rule 25.06(B) request a mental examination of the defendant to obtain its own evidence at the level of expert medical

> testimony to discern and then demonstrate, if it can, whether or not the defendant's capacity to form intent is diminished by reason of some mental defect.

The concurrence directs the reader to *Thurman*, 324 S.W.3d at 504, n. 6 to support its position, explaining that, in *Thurman*, our Court found that the trial court could have found good cause to order a pretrial mental examination regarding defendant's claim of [intellectual disability] under Rule 25.06(B). However, we do not believe that finding is applicable to the matter currently before us. Here, the issue presented is whether a mental examination can be ordered to assess a defendant's ability to deliberate ***at the time of the charged offense***. This Court specifically said "the trial court could find that good cause exists under Rule 25.06(B) to order a pretrial mental examination of Relator regarding his claim of [intellectual disability] ***for the purposes of Section 565.030***." *Id.* (emphasis added). Section 565.030 governs trial procedure for first degree murder charges. In the footnote referenced in *Thurman*, the mental examination would have been for purposes of determining whether the defendant was intellectually disabled at the time of the proceedings, as such a finding would affect the defendant's eligibility for the death penalty. *Id.*; *see also* § 565.030.4(1). Thus, the mental examination our Court alluded to in *Thurman*, 324 S.W.3d at 504, n. 6 concerned the defendant's mental abilities at the time of the examination (i.e., the time of the criminal proceedings). The concurrence's interpretation of the footnote on which it relies is difficult to reconcile with this Court's finding in the same opinion:

> Rule 25.06(B) ***generally*** allows a trial court to order a mental examination of a defendant upon good cause being shown. *State ex rel. Westfall v. Crandall*, 610 S.W.2d 45, 47 (Mo. App. E.D.1980); *see also State v. Boyd*, 143 S.W.3d 36, 44 (Mo. App. W.D.2004). ***However***, Sections 552.020 and 552.030 mandate specific prerequisites before a trial court may order a mental evaluation regarding ***a defendant's mental state at the time of the alleged criminal conduct***. *See State ex rel. Proctor*, 100 S.W.3d at 777–78.

Id. at 504 (emphasis added). Thus, our Court articulated an exception to the general rule that a court may order a mental examination of a criminal defendant for "good cause" under Rule

25.06(B); the court only has authority to issue an order for a mental examination for purposes of assessing "a defendant's mental state ***at the time of the alleged criminal conduct***," if the requirements in either § 552.020 or § 552.030 are satisfied. *Id*. (citing *Proctor*, 100 S.W.3d at 777–78).

We have found no reason to deviate from this Court's interpretation that "[s]ections 552.020 and 552.030 mandate specific prerequisites before a trial court may order a mental evaluation regarding a defendant's mental state at the time of the alleged criminal conduct." *Id*. (emphasis added). For example, § 552.020 only concerns a criminal defendant's competency at the time of the proceedings, and § 552.030 only allows the trial court to order a mental examination when the defense of NGRI is raised, whether by plea or written notice.

Similar to the case before us, in *Thurman*, the issue before this Court was "whether Respondent has the authority to order a mental examination of Relator regarding his mental state at the time of the alleged criminal conduct [pursuant to Chapter 552]." *Id*. at 502. As in the present case, in *Thurman*, the trial court granted the State's request to order the relator to undergo a mental examination regarding his mental state at the time of the alleged crime. *Id*. at 504. This Court concluded that the trial court "exceeded [its] authority because a trial court may not order an evaluation as to the defendant's mental state at the time of the alleged crime without the required plea [of not guilty by reason of mental disease or defect] or written notice." *Id*. Like in *Thurman*, here, Relator has not expressed any intent to plead not guilty by reason of a mental disease or defect. Accordingly, we find Respondent exceeded its authority in ordering Relator to undergo a mental examination to assess his mental state at the time of the alleged crimes.

In the present case, § 552.030 is not relevant; it only applies when a defendant pleads not guilty by reason of mental disease or defect which renders him or her "incapable of knowing and

appreciating the nature, quality, or wrongfulness of such person's conduct." *Id*; § 552.030. As discussed *infra*, § 552.020 is only applicable if the mental examination concerns the defendant's competency to stand trial—which concerns the defendant's mental state at the time of the criminal proceedings—or the defendant pleads NGRI. In the case before us, neither circumstance is present. Accordingly, we find that Rule 25.06(B)(9) does not grant the court the authority to order a mental examination to assess a criminal defendant's mental state ***at the time of the alleged offense*** when the defendant uses a diminished capacity defense.

The concurrence suggests that if Rule 25.06(B)(9) did not grant the trial court authority to order a mental examination in the circumstances before us, "the [S]tate would not [be] able to show [the defendant] was malingering and indeed had the requisite mental capacity to form intent." We disagree. The finder of fact "may consider evidence that the defendant had or did not have a mental disease or defect in determining whether the defendant had the state of mind required to be guilty of [the charged offense[s]," and the fact finder should consider "all of the evidence" before deciding whether the defendant had the requisite mental state at the time of the conduct underlying the charges brought against him or her. MAI–CR 4th 408.03. Thus, the State has the opportunity to adduce evidence independent of a mental examination to support that the defendant had the ability to deliberate at the time of the charged offense. For example, if the examiner is called by the defense as a witness, the State has the opportunity to cross-examine the expert witness who conducted the mental examination. Additionally, the State has the ability to depose the defense's expert witness and retain its own expert witness to undercut the methodology of or bases for the defense's expert witness's testimony and/or report.

We also find it notable that the legislature has imposed limitations on the use of statements made during a criminal defendant's mental examination to support a conviction against him or her. These limitations are most apparent in § 552.020.14 and 552.030.5. Section 552.020.14 provides:

> No statement made by the accused in the course of any examination or treatment pursuant to this section and no information received by any examiner or other person in the course thereof, whether such examination or treatment was made with or without the consent of the accused or upon his motion or upon that of others, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding then or thereafter pending in any court, state or federal. A finding by the court that the accused is mentally fit to proceed shall in no way prejudice the accused in a defense to the crime charged on the ground that at the time thereof he was afflicted with a mental disease or defect excluding responsibility, nor shall such finding by the court be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

"[Section 552.020.14] prevents testimony about statements made by the accused or information received during a section 552.020 examination being used as evidence on the issue of guilt." *Anderson v. State*, 196 S.W.3d 28, 35 (Mo. banc 2006).[6]

Similarly, § 552.030.5 provides that no statement made by a criminal defendant over the course of a mental examination can be used as "evidence against the accused on the issue of whether the accused committed the act charged," such a statement may only be used as it relates to "the issue of the accused's mental condition." The Supreme Court of Missouri explained the purpose of this subsection as follows:

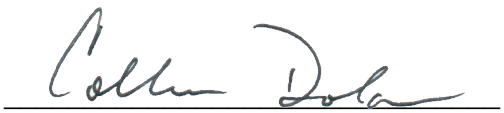
> Subsection five [of 552.030] is designed to protect a criminal defendant from a finding by the jury that he committed the acts charged against him as a result of statements made by him or information obtained by the examiner during the course of the accused's examination. *State v. Speedy*, 543 S.W.2d 251, 256–57 (Mo. App. 1976). If any statement or information obtained from the section 552.030 examination is admitted, the trial court must, orally at the time of its admission, and, later, by instruction, inform the jury that it must not consider the statement or information as evidence of whether the accused committed the act charged against him.

[6] We note that § 552.030.3 provides an exception to the limitations of § 552.020.14, however, § 552.030.3 is not applicable to the facts of the case before us. *Anderson*, 196 S.W.3d at 35.

State v. Kreutzer, 928 S.W.2d 854, 870 (Mo. banc 1996). Unlike these two statutory provisions, Rule 25.06(B) imposes no limitations on how the State may use an accused's statements made over the course of a mental examination.

Conclusion

Based on the foregoing, the trial court does not have the authority to order a mental examination based solely on defendant's anticipated use of the defense of diminished capacity. Accordingly, the preliminary order in prohibition is made permanent as modified. The report generated by the Department of Mental Health, as well as any other evidence conducted in violation of this Court's stay order, is void and of no effect, and it shall not be admissible at trial of Relator. Respondent is directed to vacate and set aside the order issued on May 2, 2018, ordering a mental examination of Relator.



Colleen Dolan, Presiding Judge

Lisa P. Page, C.J., concurs.

Sherri B. Sullivan, J., concurs in a separate opinion.

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	)	
	)	Filed: July 10, 2018
	)	

CONCURRING OPINION

I agree with the majority neither Section 552.015 nor Section 552.020 grants the trial court authority to order a mental examination to assess whether a criminal defendant had a diminished capacity at the time of the alleged offense, but I would hold the trial court does have the authority to order a mental examination for good cause shown under Rule 25.06(B) based on a defendant's anticipated use of the negative defense of diminished capacity.

The defense of diminished mental capacity is one in which the defendant does not carry the burden of proof, but may choose to raise it and inject it into the case. State ex rel. Westfall v. Crandall, 610 S.W.2d 45, 47 (Mo. App. E.D. 1980). Once a defendant raises and injects the defense of diminished mental capacity, the state has the burden of proving that the defendant did not suffer from a mental disease or defect affecting his state of mind. Id. Inherent in this burden

of proof, is the recognition that the state will need to have the defendant's mental abilities examined, in order to carry its new burden of disproving evidence of mental disease. Id. Without a mental examination of its own, the state is effectively precluded from carrying its burden of countering expert medical evidence presented by the defendant negating an element of the crime on which the state ultimately has the burden of proof and persuasion. The trial court's failure to order a mental examination, upon good cause being shown, would effectively hamper the state from carrying its burden of proof on the intent element. Id.

Rule 25.06(B) is separate and distinct from Chapter 552, and in particular Sections 552.020.2 and 552.020.4, which deal exclusively with the affirmative defense of Not Guilty By Reason of Insanity (NGRI). Section 552.020.2 sets forth the court's duty to order an examination if the court reasonably believes a defendant is currently unable to stand trial because he lacks capacity to understand the proceedings or to assist counsel in his defense. Section 552.020.4 controls the court's action mandating a psychiatric examination when a defendant asserts he is not guilty due to a mental disease or defect. State ex rel. Proctor v. Bryson, 100 S.W.3d 775, 778 (Mo.banc 2003).

A NGRI defense seeks to completely exonerate a defendant from the crime charged. A diminished capacity defense does not seek complete exoneration; it is not an affirmative defense. Yet, it still involves a claim and evidence of mental disease or defect, which affects a defendant's ability to form the requisite intent.

Intent is rarely susceptible to proof by direct evidence; rather, it is usually inferred circumstantially. State v. Lammers, 479 S.W.3d 624, 633 (Mo.banc 2016). A jury may determine a defendant's mental state from the defendant's conduct before the act, from the act itself, and from the defendant's subsequent conduct. State v. Hineman, 14 S.W.3d 924, 927-28

(Mo.banc 1999); State v. Jones, 519 S.W.3d 818, 823 (Mo.App. E.D. 2017). However, when the defense intends to present expert testimony on the issue of whether the defendant suffered from a mental disease or defect rendering him unable to deliberate at the time of the murder, the state has good cause to obtain expert testimony derived from its own mental examination of the defendant because the state is entitled to comparable evidence in order to carry its burden of persuasion on the injected defense negating intent. In fact, the trial court's failure to order a mental examination, upon the state's request with good cause being shown, would effectively hamper the state from carrying its burden of persuasion on the intent element. State ex rel. Westfall, 610 S.W.2d at 47.

In State v. Frazier, 404 S.W.3d 407 (Mo.App. W.D. 2013), both parties presented expert testimony on the issue of whether Frazier suffered from a mental disease or defect rendering him unable to deliberate at the time of the murder, and the court instructed the jury on the defense of diminished capacity. Id. at 415. The state's evidence at the trial was sufficient to support rejection of the defendant's defense of diminished capacity; the social worker at the state hospital where the defendant was admitted after the murder testified the defendant did not exhibit any of the behaviors or symptoms common to that mental illness, and the psychologist and the forensic examiner who examined the defendant diagnosed the defendant as malingering, concluded that the defendant's borderline intellectual functioning did not have any impact on his behavior, and did not see any evidence the defendant was suffering from depression, schizophrenia, or schizoaffective disorder on the day of the murder. It was the jury's responsibility to determine the weight and credibility of all testimony, including the expert testimony, and it was within the jury's exclusive province to accept or reject all, some, or none of the testimony of any witness. Id.

In Frazier, the instruction on diminished capacity read as follows:

> You may consider evidence that the defendant had or did not have a mental disease or defect in determining whether the defendant had the state of mind required to be guilty of murder in the first degree.
>
> The term "mental disease or defect" means any mental abnormality regardless of its medical label, origin, or source. However, it does not include an abnormality manifested only by repeated antisocial conduct.

Id. at 413. The above excerpts from Frazier demonstrate medical evidence of the defendant's claimed mental disease (or lack thereof) was equally available to both sides. If the door was closed to the state to obtain such information, it would not have been able to show Frazier was malingering and indeed had the requisite mental capacity to form intent. The chilling effect of the majority's opinion would foreclose the jury's opportunity to weigh both sides and render a well-informed decision on the ultimate issue of intent.

A defendant is permitted to present evidence he suffers from a mental disease or defect to prove he did not have a state of mind which is an element of the offense. Davis v. State, 486 S.W.3d 898 (Mo.banc 2016). The state is equally permitted to present such evidence but axiomatically, it must first be allowed to procure it. Once the defendant produces expert medical evidence inserting a defense of diminished capacity into the case in order to negate the intent element of the crime charged, the state, in order not to be prevented from or hindered in its ability to carry its burden of persuasion on intent, may for "good cause" under Rule 25.06(B) request a mental examination of the defendant to obtain its own evidence at the level of expert medical testimony to discern and then demonstrate, if it can, whether or not the defendant's capacity to form intent is diminished by reason of some mental defect. In accord, State ex rel. Thurman v. Pratte, 324 S.W.3d 501, 504, n. 6 (Mo.App. E.D. 2010) (trial court could have found good cause existed sufficient to order a pretrial mental examination regarding defendant's claim

of mental retardation under Rule 25.06(B)). The majority's opinion closes any and all avenues for the State to obtain the requisite evidence. This closure also contravenes Rule 25.06(B), rendering it meaningless and ineffective, and intrudes on the trial court's discretion to order a mental examination for "good cause shown" and disrupts the jury's right to have both sides of the issue presented to them.

As hereinbefore noted, Section 552.015.2(8) does not grant the trial court authority to order a mental examination to assess whether a criminal defendant had a diminished capacity at the time of the alleged offense. It only provides for the admissibility of evidence of a mental disease or defect in a criminal trial to demonstrate diminished capacity, to-wit:

> 2. Evidence that the defendant did or did not suffer from a mental disease or defect shall be admissible in a criminal proceeding:
> …
> (8) To prove that the defendant did or did not have a state of mind which is an element of the offense….

However, if there is no route to obtain a mental examination to assess whether a criminal defendant had a diminished capacity at the time of the alleged offense, of what use is a specific statutory section explicitly providing for the mental examination's admissibility? Again, the majority renders this statutory provision meaningless. Courts never presume that our legislature acted uselessly and should not construe a statute to render any provision meaningless. Caplinger v. Rahman, 529 S.W.3d 326, 332 (Mo.App. S.D. 2017).

Based on this reasoning, I would hold the trial court does have the authority to order a mental examination for good cause shown by the State under Rule 25.06(B) based on defendant's anticipated use of the negative defense of diminished capacity in order for the State to fairly carry what is ultimately its burden of persuasion on the issue of intent once defendant

indicates he will inject the issue of diminished capacity into trial supported by expert testimony derived from the defense's own mental examination of defendant.

Sherri B. Sullivan

SHERRI B. SULLIVAN, J.