IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINTON, Respondent, v. GABRIEL J. CAPOEMAN, Appellant.	)))))))))	No. 67133-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 18, 2011

Schindler, J. — Gabriel Capoeman appeals his conviction of assault in the second degree by strangulation. The court instructed the jury on diminished capacity. The court refused to instruct the jury on the question of whether Capoeman acted voluntarily when he committed the assault because the evidence did not support giving the instruction. We affirm.

On February 1, 2009, Susan Coburn went to the emergency room of St. Peter's Hospital suffering from severe stomach pains. Gabriel Capoeman is Coburn's fiancé. Capoeman is an insulin-dependent diabetic. Soon after Capoeman arrived at the hospital, he checked his blood sugar with a glucometer. The glucometer registered a blood sugar level of 51, a level in the hypoglycemic range. In order to raise his blood sugar, Capoeman went to the vending machines to get a cup of sweetened coffee and a candy bar. When he returned to check on Coburn, Capoeman began yelling at the

hospital staff about the treatment Coburn was receiving. Dr. Timothy Zola, the emergency room physician, asked Capoeman to stop yelling and calm down. Capoeman continued yelling that Coburn needed narcotics for her pain. Dr. Zola told Capoeman that Coburn did not need narcotics. Because Capoeman was so disruptive, Dr. Zola requested hospital security escort Capoeman out of the hospital.

Hospital security officer Deborah Fast asked Capoeman to follow her to the waiting area. Capoeman was still very angry but he complied with Fast's request. After Fast and Capoeman entered the waiting area, the secure automatic doors to the emergency department closed. Gritting his teeth, Capoeman told Fast that he wanted to go back and talk to Dr. Zola. Fast was concerned that Capoeman was "going to seriously harm the doctor" and told Capoeman he could not go back to the emergency department. Fast stood in front of the doors to block him from returning to the emergency department. Capoeman then said that he left his bag in the emergency department. Fast offered to retrieve the bag.

Capoeman told Fast to get out of his way and tried to get through the doors as a group exited the emergency department. Fast was able to block the doors with her arms. Capoeman angrily told Fast, "'Get out of my way,'" and attacked Fast. Fast testified:

> He took a step forward like he was looking through the window behind me. I moved -- because I was trying to figure out what he was going to do, and I was trying to watch his hands, because his left hand now was clenched, and he was making that really tight lip and gritting his teeth, saying, "Get out of my way." And he was -- I felt it was like he was starting to raise his hand up, and I just looked at him, and it was at that point that he swung.

Fast said that Capoeman then wrapped his left arm around her neck and put her in a choke hold. Fast tried to get away but Capoeman tightened his grip around her throat, cutting off her air supply. Security officer Brian Lea and nurse Robert King intervened and tried to pull Capoeman off of Fast. Capoeman fell on top of Fast but, grunting with effort, Capoeman quickly regained his grip around Fast's throat. Fast could not breathe. She began losing her vision and seeing stars. Capoeman then struck Fast several times in the head with his fist. When Fast attempted to get away, Capoeman wrapped his legs around her so she could not move. After several minutes, King was able to break Capoeman's grip on Fast and a bystander helped Fast get away. Several people restrained Capoeman until the police arrived. Fast suffered substantial injuries to her spine, neck, and left shoulder.

In an amended information, the State charged Capoeman with assault in the second degree by strangulation. Capoeman asserted a defense of general denial and diminished capacity based on his diabetes and low blood sugar. Capoeman presented the testimony of several expert witnesses in support of his diminished capacity defense.

Behavioral specialist Sally Heath testified that Capoeman had been diagnosed with general anxiety disorder and cognitive disorder, not otherwise specified. Dr. August Piper testified that an individual with low blood sugar might have "difficulty formulating rational thoughts and making sensible decisions." However, on cross-examination, Dr. Piper said that a person with a blood sugar reading of 50 to 51 would still have the ability to act intentionally. Forensic psychologist Dr. Brett Trowbridge testified that based on Capoeman's anxiety and cognitive disorder, his ability to form

intent for the assault was substantially diminished.

Dr. Zola, and forensic psychiatrist and physician Dr. William Richie, testified on behalf of the State. Dr. Zola testified that based on his conversation with Capoeman and his experience as an emergency room physician, Capoeman "did not have [an] altered mental status in any way" and was "perfectly alert and oriented and deliberate in his actions." Dr. Zola was "very certain that [Capoeman] was not severely affected" by low blood sugar during their encounter. Dr. Richie testified that any anxiety or cognitive disorder Capoeman might suffer from did not interfere with his ability to form the intent to assault Fast.

The trial court agreed to give Capoeman's proposed jury instruction on diminished capacity. The jury instruction provides:

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

Capoeman asked the court to also give a jury instruction on whether he acted with volition. The proposed instruction states:

> A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act of which he is physically capable. When an "act" does not involve mental processes, but rather is a learned physical reaction to external stimuli that operates automatically, it is not voluntary.

The trial court refused to give the proposed instruction because there was no evidence that Capoeman involuntarily committed the act of assault by strangulation. The court ruled, in pertinent part:

> [H]aving sat through and listened to the testimony in this case, that the instruction is not within the evidence that has been offered in this case, and, therefore, it would be inappropriate to instruct the jury.

> However, the jury has been instructed with regard to defense proposed instruction number 14 [diminished capacity]. That was included in the Court's instructions, and, obviously, the WPIC instruction on intent is also included, and I feel that that fairly allows the defense to make an argument consistent with the evidence and the law, and, therefore, those are the Court's instructions.

The jury found Capoeman guilty of assault in the second degree by strangulation. Capoeman appeals.

Capoeman contends that based on State v. Utter, 4 Wn. App. 137, 479 P.2d 946 (1971), the court erred in refusing to give the proposed jury instruction that he acted voluntarily when he committed assault. Capoeman asserts that the instruction was necessary to fully explain his defense of diminished capacity.

A trial court's refusal to give a jury instruction based on the evidence is reviewed for abuse of discretion; a trial court's refusal to give a jury instruction based on the law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). If evidence exists in the record to support the theory, the defendant is entitled to have the court instruct the jury on its theory of the case. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). However, a defendant is not entitled to an instruction that inaccurately represents the law or is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

The trial court did not err in refusing to give a jury instruction based on the language used in Utter. In Utter, the defendant was charged with murder in the second degree. The jury convicted the defendant of manslaughter. Utter, 4 Wn. App. at 138. At trial, the defendant testified that as a result of jungle warfare training, he reacted violently towards people approaching him unexpectedly from behind. Utter, 4 Wn. App.

at 139. The defendant presented expert witness testimony about "'conditioned response.'" Utter, 4 Wn. App. at 139. The expert defined conditioned response as "'an act or a pattern of activity occurring so rapidly, so uniformly as to be automatic in response to certain stimulus.'" Utter, 4 Wn. App. at 139.

On appeal, we held that while the defendant's theory that he acted automatically is similar to diminished capacity, "it is nevertheless distinct from that concept" and relates to the actus reus necessary to commit the crime. Utter, 4 Wn. App. at 141. "An 'act' committed while one is unconscious is in reality no act at all. It is merely a physical event or occurrence for which there can be no criminal liability." Utter, 4 Wn. App. at 143. Because the evidence did not show that the defendant was unconscious or in an "automatistic" state at the time of the crime, we affirmed the trial court's refusal to give a jury instruction on involuntarily committing the crime. Utter, 4 Wn. App. at 143.

Here, the defense was diminished capacity and the evidence at trial did not support giving an instruction telling the jury that the assault was the result of a "learned physical reaction to external stimuli that operates automatically."

We also disagree with Capoeman's argument that the trial court improperly weighed the evidence in concluding that the instruction was "not within the evidence that has been offered in this case." The case Capoeman cites, State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000), is distinguishable. In Fernandez-Medina, the court held that in deciding whether the evidence supports giving instructions on inconsistent defense theories, the trial court must evaluate the adequacy of the

evidence supporting proposed instructions and cannot weigh the evidence. Fernandez-Medina, 141 Wn.2d at 460-61. Here, Capoeman did not propose giving jury instructions on inconsistent theories and the record does not reflect that the court improperly weighed the evidence. The court properly evaluated the adequacy of the evidence at trial and found that the evidence did not support giving a jury instruction on whether the

assault was voluntary. The record supports the court's determination.

We affirm.

Schindler, J.

WE CONCUR:

Leach, J.

Cox, J.