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

STATE OF WASHINGTON,	)	No. 68331-4-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
DANIEL JAMES MUSTARD,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: June 4, 2012
	)	

Ellington, J. — Daniel Mustard was convicted in the brutal slaying of 87-year-old Ruby Andrews. He contends the court erred by refusing to instruct the jury on his insanity defense. He also contends the evidence was insufficient to support a finding that Andrews was "particularly vulnerable." We affirm.

BACKGROUND

The facts of this Port Orchard murder are not in dispute. Seventeen-year-old Daniel Mustard waited until his elderly neighbor's husband left their house. Mustard went to the door, planning to commit a robbery, and employed a ruse to gain entry. Inside was 87-year-old Ruby Andrews. She resisted, and Mustard stabbed her to death.

Mustard took a sheet of uncut one dollar bills from a picture frame, two handguns, several bottles of prescription narcotics, a watch, and Andrews' wedding ring. He also

took a picture of Andrews' body with his phone. Mustard then left the house, taking Andrews' Cadillac. Neighbors saw him going in, coming out, and driving off.

Mustard stopped briefly at his own home, where he changed clothes. He took the Cadillac and picked up his friend T.L.K. and two other juveniles. He showed them the picture of Andrews' body, admitted he had just killed her, and said, "This is what happens when you mess with me."[1] Mustard drove the others around for a while until they saw a police car with its lights on. He left the Cadillac in a parking lot and they all went to a park, where they smoked marijuana and Mustard hid one of the handguns.

Andrews' husband and son returned home. A neighbor approached and reported that she had seen a young man walk into the house and later drive off in Andrews' Cadillac. Andrews discovered his wife on the bathroom floor in a pool of blood. Eventually he noticed that a number of items had been taken.

Meanwhile, Mustard called his aunt, Jodi Marasco, to ask if she would give him and T.L.K. a ride home. She picked them up, dropped off T.L.K., and drove Mustard toward his home. When they reached the neighborhood, Marasco saw yellow police barrier tape and stopped.

Kitsap Sheriff Detective Ron Trogdon contacted Marasco and Mustard. Mustard matched the description neighbors had given of the person they saw entering Andrews' home and leaving in her car. Trogdon interviewed Mustard in a patrol car. Trogdon noticed Mustard's shoe had "red staining" on it.[2] After Trogdon learned that Andrews'

[1] Report of Proceedings (RP) (Nov. 17, 2010) at 1062.

[2] RP (Nov. 8, 2010) at 363.

Cadillac had been found in the vicinity of Marasco's residence, he read Mustard his Miranda rights.[3] Mustard agreed to continue the conversation, asking, "You don't think that I did this murder?"[4] Up to that point, there had been no mention of any death. When Trogdon asked if they would find his fingerprints inside the Cadillac, Mustard "said something to the effect of, 'No, because my fingerprints aren't on file.'"[5]

Mustard claimed he had spent the day with T.L.K. and eventually agreed to give Trogdon T.L.K.'s phone number. Trogdon called T.L.K., who in two conversations indicated Mustard had picked him up in a white Cadillac and confessed to killing the victim, taking items from her residence, and taking her car. Trogdon arrested Mustard.

When Mustard was booked and searched, police found Andrews' wedding ring in his pocket. Mustard's fingerprints were later found in the Cadillac, on the broken glass from the picture frame in Andrews' home, and on one of the guns taken from the residence. DNA tests confirmed that red stains on his shoes and shorts were Ruby Andrews' blood.

The State charged Mustard with first degree robbery and first degree murder under alternative theories of premeditation and felony murder committed in the course of first degree robbery. The State alleged a number of aggravating factors, including that Mustard knew or should have known that Andrews was particularly vulnerable or incapable of resistance.

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

[4] RP (Nov. 8, 2010) at 364.

[5] Id. at 365.

The defense pursued theories of diminished capacity and insanity. Defense expert Mark Whitehill testified that Mustard was unable to form the intent required for the charged offenses. Although the State presented expert testimony to rebut the claim, there was sufficient evidence to warrant an instruction on diminished capacity and one was given.

With respect to insanity, the defense conceded that Mustard was able to tell right from wrong. Whitehill testified that Mustard was also able to perceive the physical nature and quality of his acts. But Whitehill opined Mustard was nevertheless insane at the time of the murder because he was unable to appreciate the "moral significance" or "degree of wrongfulness" of his conduct.[6]

The defense proposed an insanity instruction which stated:

> 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 that his actions are wrong, but mental disease or defect may render that individual unaware of the moral significance of his actions.[7]

After briefing and oral argument, the court concluded that the insanity defense required evidence that Mustard was unable to perceive the physical nature and quality of his acts, and the defense had provided none. Accordingly, the court refused to instruct the jury on insanity.

The jury found Mustard guilty of first degree felony murder and second degree

[6] RP (Nov. 30, 2010) at 2119.

[7] Clerk's Papers at 211.

intentional murder. With respect to the felony murder, the jury also found two aggravating factors: that Mustard was armed with a deadly weapon and that Andrews

was particularly vulnerable. The court rejected Mustard's request for an exceptional sentence below the standard range, and imposed an exceptional sentence above the standard range of 600 months.

DISCUSSION

Insanity Instruction

A defendant is entitled to instructions defining a defense when substantial evidence in the record supports every element of that defense.[8] "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury."[9]

Washington follows the *M'Naghten* rule for determining insanity,[10] which has been codified at RCW 9A.12.010. To establish the defense, the defendant must show 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 or she was unable to perceive the nature and quality of the act with which he is charged; or
>
> (b) He or she 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.[11]

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[8] State v. Bell, 60 Wn. App. 561, 566, 805 P.2d 815 (1991).

[9] State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000).

[10] M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (1843).

[11] RCW 9A.12.010.

Mustard conceded he was able to tell right from wrong. The State's expert conceded that Mustard had a mental disease. Thus, the only contested issue was whether Mustard's mental problems affected him to such an extent that he was unable to perceive the nature and quality of his acts. The trial court ruled that Mustard was required to establish he was unable to perceive the *physical* nature and quality of his act. Mustard no longer argues to the contrary.

Instead, Mustard argues the court improperly applied a preponderance of the evidence standard rather than the substantial evidence standard in deciding whether to allow the jury to consider his defense. There is no merit to this argument. The court expressly stated that the issue was "whether or not the [d]efense has met its burden in presenting substantial evidence of the insanity defense."[12] There is no indication the court held Mustard to any higher standard.

Mustard also argues the court erred by "fail[ing] to examine Dr. Whitehill's testimony on insanity in the light most favorable to Mr. Mustard."[13] Specifically, he argues the court "ignored the fact that the doctor's written report . . . cited RCW 9A.12.010, the statute which states the current Washington statutory version of the M'Naghten rule, and opined that . . . at the time of the murder Mr. Mustard was insane."[14]

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[12] RP (Dec. 9, 2010) at 3689; see also id. at 3691 (Mustard had not made "a showing, a substantial showing" that he was unable to perceive the nature and quality of his actions).

[13] Appellant's Br. at 16.

[14] Id. at 18-19.

To the extent Mustard relies on Whitehill's written report, the issue is unreviewable because the report is not part of the record on appeal.[15] Assuming Whitehill's testimony accurately reflects his written report, his conclusion that Mustard was insane does not provide substantial evidence because it is based upon an erroneous understanding of the insanity defense. Whitehill insisted that the "nature and quality" component of the insanity defense has to do with "an appreciation of the wrongfulness or the moral significance his action."[16] The court concluded this was not so. As to the *physical* nature and quality of his act, which the court ruled is the relevant issue, Whitehill readily conceded Mustard's perceptive ability was unimpaired.[17]

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[15] Mustard cites exhibit 200, but no exhibits have been designated for review.

[16] RP (Nov. 24, 2010) at 1837.

[17] Whitehill testified on cross-examination as follows:

> 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 stabbing Ruby Andrews, he perceived that when he was doing it, did he not?
>
> A. I have no reason to believe otherwise.
>
> . . . .
>
> Q. So I guess, finally, Doctor, . . . 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

Whitehill's conclusion that Mustard was insane was based on the wrong legal standard. Because his testimony made it clear that Mustard would not be considered insane under the correct standard, Whitehill's opinion does not provide substantial evidence warranting a jury instruction on insanity.[18]

Particularly Vulnerable Finding

The record establishes that Ruby Andrews was 87 years old, five feet five inches tall, and weighed approximately 105 pounds. The State relied on only on her age and stature to argue that she was particularly vulnerable.[19] Mustard contends the evidence is insufficient to support the jury's special verdict.

In a challenge to the sufficiency of the evidence to prove a crime, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant."[20] Evidence is sufficient if, when viewed in the light

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

A. I think that's fair.

RP (Nov. 10, 2010) at 2220, 2305-06.

[18] See State v. Wicks, 98 Wn.2d 620, 621, 624-25, 657 P.2d 781 (1983) (expert opinion that defendant was legally insane did not provide substantial evidence to support insanity plea because experts opined that insanity was caused by voluntary ingestion of large quantities of alcohol and drugs, and Washington law does not permit the insanity defense when insanity is "proximately induced by the voluntary act of a person charged with a crime." Former RCW 10.77.010(7) (1974), recodified as RCW 10.77.030(3)).

[19] In closing, the State argued Mustard "took advantage of her vulnerability. He took advantage of her age, her inability to fight back." RP (Dec. 10, 2010) at 3855-56.

[20] State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995).

most favorable to the prosecution, "any rational trier of fact could have found the elements of the crime beyond a reasonable doubt."[21]

The court instructed the jury that a person is particularly vulnerable if "she is more vulnerable to the commission of the crime than the typical victim of Murder in the First Degree. The victim's vulnerability must also be a substantial factor in the commission of the crime."[22]

Mustard acknowledges that Washington courts have repeatedly held that advanced age alone can support a finding of particular vulnerability.[23] He points out that these cases were decided when the statute specifically identified advanced age as an aggravating factor.[24] Because the legislature amended the statute in 2005 to omit all examples of particular vulnerability, including advanced age, Mustard argues "there must be something more than merely the age of the victim which makes he or she 'particularly vulnerable.'"[25] We disagree.

Before the United States Supreme Court decision in Blakely v. Washington,[26] the

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[21] Id. at 596-97.

[22] Clerk's Papers at 324.

[23] See, e.g., State v. Sweet, 138 Wn.2d 466, 482-83, 980 P.2d 1223 (1999) (52 year old woman who was five feet two inches tall was particularly vulnerable); State v. Butler, 75 Wn. App. 47, 53, 876 P.2d 481 (1994) (89-year-old woman); State v. George, 67 Wn. App. 217, 221-22, 834 P.2d 664 (1992) (77-year-old woman); State v. Clinton, 48 Wn. App. 671, 676, 741 P.2d 52 (1987) (67-year-old woman).

[24] See former RCW 9.94A.390(2) (1983) ("The defendant knew or should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth, advanced age, disability, or ill health.").

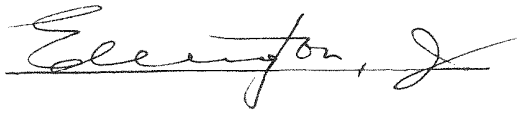
[25] Appellant's Br. at 24.

[26] 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

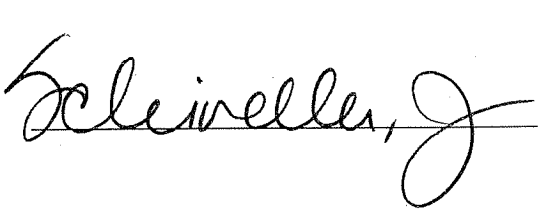
question of vulnerability was decided by the sentencing court. The relevant statute now provides that the jury must find certain aggravating circumstances, including whether "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance."[27] Nothing in this language supports an inference that the legislature intended to constrain the jury's ability to decide what constitutes a particular vulnerability. Indeed, when the legislature amended the statute in 2005 to comply with Blakely, it expressly stated it "does not intend the codification of common law aggravating factors to expand or restrict currently available statutory or common law aggravating circumstances."[28] Mustard's argument to the contrary is without merit.

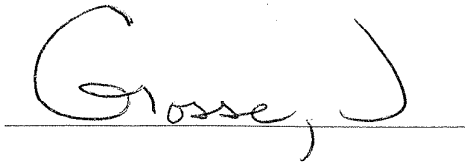
The evidence of Andrews' age and stature was sufficient to support the jury's conclusion that Andrews was a particularly vulnerable victim.

Affirmed.



WE CONCUR:





[27] RCW 9.94A.535(3)(b).

[28] Laws of 2005, ch. 68, § 1.