IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MARGIE LEE DERENOFF, Appellant.	No. 41443-1-II UNPUBLISHED OPINION

Hunt, J. – Margie Lee Derenoff appeals a jury verdict finding her not guilty of third degree assault by reason of insanity. For the first time on appeal, she argues that the jury instructions relieved the State of its burden to prove beyond a reasonable doubt that she intentionally assaulted the victim. Under *Taylor*,[1] we hold that the "to convict" instruction's inclusion of "assault," defined in a separate instruction, does not shift the burden of proof from the State. Accordingly, we affirm.

FACTS

Margie Lee Derenoff suffers from schizoaffective disorder (bipolar type). In summer 2009, she was homeless, stopped taking her medications, and became acutely psychotic. When two uniformed Port Angeles police officers tried to detain her on an involuntary mental-health

[1] *State v. Taylor*, 140 Wn.2d 229, 996 P.2d 571 (2000).

treatment hold, she "charged" at one officer, knocked him to the ground, "dug" her fingernails into his forearm, bit into and shook his "wrist," continued to resist physically, and shouted that the officers were "dirty" "corrupt" police officers and "members of a gang." Reporter's Transcript on Appeal (RTA) (Oct. 4, 2010) at 32, 66, 67.

The State charged Derenoff with third degree assault of a law enforcement officer. She pleaded not guilty,[2] claiming that she had acted in self defense;[3] in the alternative, she pleaded insanity and diminished capacity. After restoration of her competency, her case proceeded to a jury trial.

Derenoff testified that she had no "recollection" of the incident other than having been "fearful" and "paranoi[d]" and "trying to get away from [the officers] because [she] truly believed that they were corrupt police officers and that they weren't cops at all, that they were impersonating law enforcement so [she] had to get away from them." RTA (Oct. 4, 2010) at 88, 98. Derenoff attributed her lack of memory to having been off her medications and being "delusional" and "having auditory hallucinations" at the time of the incident. RTA (Oct. 4, 2010) at 88.

Forensic clinical psychologist Dr. Brett Trowbridge testified that, at the time of the incident, (1) Derenoff was suffering from "schizoaffective disorder, bipolar type" and was unable

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[2] Jury Instruction 5 provided, in part:

> The Defendant has entered a plea of not guilty. That puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The Defendant has no burden of proving that a reasonable doubt exists.

Supplemental Clerk's Papers (Suppl. CP) at 19.

[3] The trial court later refused to instruct the jury on self defense.

"to appreciate the nature and quality of her actions," unable to distinguish right from wrong, and "insane"; and (2) "her capacity to form . . . intent was diminished." RTA (Oct. 5, 2010) at 15, 16, 28. Clinical psychologist Dr. Phyllis Knopp testified for the State on rebuttal about Derenoff's ability to form intent at the time of the assault. She opined that, although Derenoff had been psychotic at the time, she still had the capacity to form the intent required for third degree assault but was "unable to appreciate the moral implications of her behavior" because of her mental illness. RTA (Oct. 5, 2010) at 61.

The trial court instructed the jury on reasonable doubt, the State's burden of proof, the presumption of innocence, third degree assault, the elements of third degree assault, the definitions of "assault,"[4], "intent," the diminished capacity defense,[5] and the insanity defense.[6]

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[4] These definitions of "assault" included that an assault requires an "intentional touching or striking" or "an act done with intent to inflict bodily injury upon another." Suppl. CP at 22 (Jury Instruction 8).

[5] The diminished capacity defense instruction provided: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form intent." Suppl. CP at 25 (Jury Instruction 11).

[6] The insanity defense instruction provided:

> In addition to a plea of not guilty, the Defendant has entered a plea of insanity existing at the time of the act charged.
>
> Insanity existing at the time of the commission of the act charged is a defense.
>
> For a defendant to be found not guilty by reason of insanity you must find that, as a result of mental disease or defect, the Defendant's mind was affected to such an extent that the defendant was unable to perceive the nature and quality of the acts with which the defendant is charged or was unable to tell right from wrong with reference to the particular acts with which the defendant is charged.

Suppl. CP at 26 (Jury Instruction 12).

The trial court refused to instruct the jury about Derenoff's delusions and on self defense. But Derenoff does not challenge these rulings, nor does she raise any self-defense-related issues in this appeal.

The trial court further instructed the jury that the insanity defense did not relieve the State of its burden to prove beyond a reasonable doubt that Derenoff had "actually committed the act charged"[7]; the trial court gave the jury a special verdict form on which to answer whether Derenoff had committed the act "charged" and, if so, whether she was nevertheless not guilty by reason of insanity.[8] Supplemental Clerk's Papers at 30. The trial court also told the jury to consider the instructions "as a whole."[9] Derenoff did not object to any instructions.

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[7] Suppl. CP at 28 (Jury Instruction 14).

[8] The special verdict form provided:

> If you find the Defendant not guilty, then answer the following questions:
> QUESTION 1: *Did [Derenoff] commit the act charged?*
> ANSWER: Yes. (Write "yes" or "no")
> (DIRECTION: If your answer to Question 1 is "no", answer no further questions.)
> QUESTION 2: Do you find [Derenoff] not guilty because of insanity existing at the time of the act charged?
> ANSWER: Yes. (Write "yes" or "no")
> (DIRECTION: If your answer to Question (2) is "no", answer no further questions.)
> QUESTION 3: If your answer to Question 2 is "yes", is the defendant a substantial danger to other persons unless kept under further control by the court or other persons or institutions?
> ANSWER: Yes. (Write "yes" or "no")
> QUESTION 4: If your answer to Question 2 is "yes", does the Defendant present a substantial likelihood of committing criminal acts jeopardizing public safety or security unless kept under further control by the court or other persons or institutions?
> ANSWER: Yes. (Write "yes" or "no")
> QUESTION 5: If your answer to either Question 3 or 4 is "yes", is it in the best interests of the Defendant and others that the Defendant be detained in a State mental hospital?
> ANSWER: No. (Write "yes" or "no").

Suppl. CP at 40-41(emphasis added).

[9] Suppl. CP at 15 (Jury Instruction 1).

Presenting three alternative defenses,[10] Derenoff argued that the jury should acquit because (1) she did not intentionally strike the officer; (2) by reason of insanity, if she did "intentionally" strike the officer, it was because she was unable to perceive the nature and quality of the acts or to tell right from wrong; or (3) "diminished capacity"[11] prevented her from having the capacity to form the requisite intent for third degree assault. The jury returned a special verdict finding that she had committed the acts charged as assault but that she was not guilty by reason of insanity. Derenoff appeals.[12]

ANALYSIS

Derenoff argues that (1) the "to convict" instruction, instruction number 7, relieved the State of its burden to prove every element of the offense beyond a reasonable doubt because it omitted the "intent" element; and (2) because the "intent requirement" was stated in a separate "assault" definition instruction, the trial court failed to instruct the jury that it had to find the necessary element of "intent" beyond a reasonable doubt. Br. of Appellant a 6-8. Assuming, without deciding, that Derenoff can challenge this instruction for the first time on appeal,[13] her argument fails.

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[10] The trial court refused to instruct the jury on self defense, Derenoff's fourth defense.

[11] *See* RTA (Oct. 5, 2010) at 118.

[12] We note the unusual circumstance of a defendant's appealing a favorable verdict that she affirmatively sought—not guilty by reason of insanity

[13] RAP 2.5(a) provides:

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right.

Derenoff pled and the jury found her not guilty by reason of insanity.[14] Assuming, without deciding, that Derenoff may nevertheless challenge the lack of an express intent element in the "to convict" instruction, our Supreme Court has already ruled against a similar argument in *State v. Taylor*. Addressing the adequacy of an information's using the word "assault" to include the otherwise unexpressed requisite intent for the charged fourth degree assault, the Supreme Court reiterated:

> A court does not imply an additional element in a charging document when it concludes that an allegation of intent is implicitly conveyed in a charge of assault under the plain meaning of the charge. Contrary to Respondent's assertions, Division One in *State v. Chaten*[15] did not "blur the distinction" between strict and liberal standards of review, but instead logically applied a uniform definition to the word "assault" contained in the charging document.
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> Application of a strict standard of review does not alter *the plain meaning of "assault." This Court has held that the word "assault" conveys an intentional or knowing act*.

Taylor, 140 Wn.2d at 242 (emphasis added).

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[14] We note that RCW 10.77.080 provides:

> The defendant may move the court for a judgment of acquittal on the grounds of insanity: PROVIDED, That a defendant so acquitted *may not later contest* the validity of his or her detention on the grounds *that he or she did not commit the acts charged*. At the hearing upon the motion the defendant shall have the burden of proving by a preponderance of the evidence that he or she was insane at the time of the offense or offenses with which he or she is charged. If the court finds that the defendant should be acquitted by reason of insanity, it shall enter specific findings in substantially the same form as set forth in RCW 10.77.040. If the motion is denied, *the question may be submitted to the trier of fact in the same manner as other issues of fact*.

(Emphasis added.) Derenoff, however, did not file a pretrial RCW 10.77.080 motion for the court to enter a judgment of acquittal by reason of insanity. Instead, she elected a jury trial. Accordingly, RCW 10.77.080's waiver provision does not preclude Derenoff's challenges on appeal.

[15] 84 Wn. App. 85, 925 P.2d 631 (1996).

Under *Taylor*, by long-standing definition, the word "assault" includes an intentional or knowing act. We hold, therefore, that (1) "intent" is not a separate essential element of assault that must be included in the "to convict" instruction; and (2) taken together with the additional instruction defining "assault,"[16] the "to convict" instruction did not improperly relieve the State of its burden of proof.

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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, C.J.

Quinn-Brintnall, J.

[16] Suppl. CP at 22 (Jury Instruction 8).