IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DARYL BURTON, Appellant.	No. 38378-1-II UNPUBLISHED OPINION

Penoyar, J. — Daryl Burton appeals his attempted first degree murder,[1] first degree assault,[2] vehicular assault,[3] second degree assault,[4] and felony harassment[5] convictions. He claims that the trial court's refusal to give his proposed diminished capacity instructions deprived him of a fair trial. He also claims that the trial court violated double jeopardy protections when it sentenced him for the first three of these offenses because they were the same offense. We affirm.

Facts

Jacqueline Bones met Burton in 1995. She was 18 and he was approximately 36. In December 1997, they began living together and in November 1998, they had a son. In March 2003, Bones moved into her own apartment because she felt that Burton's constant alcohol

---

[1]A violation of RCW 9A.32.030(1)(a), RCW 9A.28.020, and RCW 10.99.020(5) (domestic violence).

[2]A violation of RCW 9A.36.011(1)(a) and RCW 10.99.020(5) (domestic violence).

[3]A violation of RCW 46.61.522(1)(a)(b) and RCW 10.99.020(5) (domestic violence).

[4]A violation of RCW 9A.36.021(1)(a) and RCW 10.99.020(5) (domestic violence).

[5]A violation of RCW 9A.46.020(2)(b), RCW 9A.46.020(1)(a)(i), (b), RCW 9.94A.125, .602, .310, .510, .370, .530 (deadly weapon), and RCW 10.99.020(5) (domestic violence).

consumption had destroyed their relationship. Burton was then living with his ailing mother to care for her. During the following two-and-a-half years, they remained involved in each other's lives with child care, shared transportation, and attempts to reconcile.

Burton's mother died in September 2004 and Burton moved in with Bones until he got an apartment in Steilacoom in early 2005. About that time, Bones told Burton that she was moving on with her life, wanted to meet other people, and told him that he should do the same. Burton did not agree and in the month leading up to the incidents charged, he accused her of cheating, threatened her with a knife, slammed a door on her wrist, slapped her in the face while she was driving, and left messages on her voice mail threatening to kill her. At one point, she awoke in her apartment to find him coming in the door. She asked him to leave. He left. Shortly after leaving, he called saying: "See, I could have killed your ass and nobody would have even known." 7 Report of Proceedings (RP) at 351.

On October 11, 2005, Burton called Bones and asked her if she could give him a ride to the treatment center at St. Joseph's Hospital. When she picked him up that morning, even though he smelled of alcohol, she thought he was more sober than he had been all week, describing him as calm, quiet, and clear spoken. After stopping at a drive-thru restaurant to get him some breakfast, she proceeded down Steilacoom Boulevard and turned onto Custer Road. At that point, Burton pulled a hammer from his pocket, raised it, and said, "I'm going to kill you, bitch." 7 RP at 359, 360. She used her right hand to deflect his blows while trying to pull the car safely off the road. While they were wrestling over the hammer, Burton pulled Bones's little finger back, dislodging it from the socket.

When the hammer fell to the ground, Bones tried to get out of the car but could not get

her seat belt unfastened. Burton then took his hot coffee and threw it in Bones's face, burning her. Bones was able to get out of the car and start running. She looked back to see Burton getting in the driver's seat. When she looked back again, he was driving right at her. The car struck her from behind, lifting her off the ground and throwing her forward where she landed on her hip. Bones got up and ran toward the street, yelling "God, help me. Somebody help me." 7 RP at 365. Burton followed her, striking her again in the middle of the street, this time wedging her under the tire with her jawbone pressed into the pavement. Craig Burgener helped get her free and together they fled to the side of the road. Burton again drove at Bones but the car struck the curb, bounced off a retaining wall, and landed upside down with Bones wedged beneath it.

Bones survived the incident, suffering an orbital fracture to her eye, lacerations, multiple facial burns, a fractured rib, a scraped jawbone, pain in her hip, and surgery to her finger. When asked what she thought Burton was doing that day, she responded, "[H]e was trying to kill me. I mean, he just wouldn't stop. He kept trying to hit me." 7 RP at 379.

Several witnesses to the accident testified that Burton crawled out of the car, dusted himself off, and walked away toward a residential neighborhood. One report stated that Burton turned toward a witness that was following him and told him, "I have a gun. Stop or I'll shoot you." 10 RP at 703. The police found and arrested Burton shortly after that and, during an interview with Sergeant Thomas Stewart, Burton said that he was trying to kill himself. He did not remember seeing Bones that day and when told that she was in the hospital, he became distraught. He was then transported to the hospital for a blood draw, which showed a blood alcohol level of 0.17 g/100 ml three hours after the interview.

The State charged Burton with two counts of attempted first degree murder (Counts I and

II), two counts of first degree assault (Counts III and IV), one count of vehicular assault (Count V), one count of second degree assault (Count VI), and two counts of felony harassment (Counts VII and VIII). Counts II, IV, and VIII involved Burgener but the State was unable to locate him for trial and voluntarily dismissed those counts with prejudice. As to the remaining counts, the jury convicted on all five and returned special verdicts on Count VII that Burton threatened to kill Bones, and that he used a deadly weapon. We discuss the details of each count in the double jeopardy portion of this opinion.

The sentencing court accepted the State's agreement that the convictions involved the same criminal conduct and calculated Burton's sentence based on an offender score of zero. The sentencing court then imposed mid-point standard range sentences, and 6 additional months for the deadly weapon enhancement on count VII, for a total sentence of 216 months. Burton appeals.

analysis

I. Jury Instructions

Burton first argues that the trial court erred in refusing his proposed diminished capacity instructions.[6] He argues that Dr. Trowbridge's testimony supported the instructions and it was

[6] Burton proposed two instructions on diminished capacity:

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

Clerk's Papers (CP) at 106.

> Chronic alcoholism is a mental illness or disorder.

CP at 107.

reversible error not to provide them to the jury. *See State v. Staley,* 123 Wn.2d 794, 803, 872 P.2d 502 (1994) (defendant is entitled to instruction if legally correct and evidence supports it). Instead, the trial court gave a voluntary intoxication instruction.[7]

Jury instructions must allow the parties to argue their case theories and properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999) (quoting *State v. Bowerman*, 115 Wn.2d 794, 809, 802 P.2d 116 (1990)). Each party may instruct the jury on its case theory as long as evidence exists to support that theory. *State v. Williams*, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). Failure to instruct on a defense theory when evidence supports it constitutes reversible error. *Williams*, 132 Wn.2d at 260.

A trial court should instruct a jury on a diminished capacity defense when the defendant produces expert testimony of a mental condition that "logically and reasonably connects the defendant's alleged mental condition with the inability to possess the required level of culpability to commit the crime charged." *State v. Griffin*, 100 Wn.2d 417, 419, 670 P.2d 265 (1983). Here, Dr. Trowbridge testified that Burton met the Diagnostic and Statistical Manual of Mental Disorders, Edition IV, (DSM IV) criteria for alcohol dependence and therefore suffered from chronic alcoholism. He also testified that "due to his depression at the time and his intoxication, his ability to form that required intent was substantially diminished." 10 RP at 766-67.

---

[7] Instruction 36 provided:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted or failed to act with premeditation, intent, knowledge or recklessness.

CP at 193.

The trial court refused Burton's proffered instructions, explaining:

> [A]lthough Dr. Trowbridge did say something about his -- that is, Mr. Burton's capacity, formerly requisite intent, was substantially affected by alcohol intoxication and depression, it was clear from his -- from the testimony provided on recross that Dr. Trowbridge elaborated to say that if he was sober during this incident, there cannot be a diminished capacity defense because there would not have been an incapacitated condition, or words to that effect. And so therefore, he -- *I did not understand Dr. Trowbridge to be saying that he had a mental condition that affected his capacity to intend; merely that his intoxication affected or impacted his ability to form intent.* And the Court has provided in its proposed Instruction No. 36 that no act committed by a person while in the state of voluntary intoxication is less criminal by reason of that condition; however, evidence of intoxication may be considered in determining whether the defendant acted or failed to act with premeditation, intent, knowledge or recklessness. I do think that from that instruction, the defense is able to argue its theory of the case, that Mr. Burton was not able to form the intent to commit the crime. So I'll decline to give those instructions.

12 RP at 985-86 (emphasis added). Burton contends that the court misunderstood Dr. Trowbridge's testimony. Dr. Trowbridge testified:

> Q. So if Mr. Burton were stone-cold sober during this incident, what would you infer?
>
> Dr. Trowbridge: You know, if all of these behaviors happened when there's no incapacitating condition, then there can't be a diminished capacity defense, because there has to be an incapacitating condition.

10 RP at 830-31.

A defendant must show three elements when asserting a diminished capacity defense: (1) the crime charged must include a particular mental state as an element; (2) the defendant must present evidence of a mental disorder; and (3) expert testimony must logically and reasonably connect the defendant's alleged mental condition with the asserted inability to form the mental state required for the charged crime. *State v. Atesbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001).

During direct examination, Dr. Trowbridge explained how Burton's alcoholism could have affected him:

> DR. TROWBRIDGE: My opinion is that due to his depression at the time and his intoxication, his ability to form that required intent was substantially diminished.
>
> DEFENSE COUNSEL: Would his depressed state and the amount of alcohol affect his ability to form the mental state of knowledge?
>
> . . . .
>
> DR. TROWBRIDGE: It could.

10 RP at 766-67.

Our Supreme Court explained the distinction between diminished capacity and voluntary intoxication in *State v. Furman*:

> Diminished capacity is a mental condition not amounting to insanity which prevents the defendant from possessing the requisite mental state necessary to commit the crime charged. Voluntary intoxication is not a defense, as such, but a factor the jury may consider in determining if the defendant acted with the specific mental state necessary to commit the crime charged. If there is substantial evidence to support either of these theories, the jury should be given instructions which allow the defendant to argue the defense. *If the claim of diminished capacity is premised wholly or partly on the defendant's voluntary consumption of drugs or alcohol, however, one instruction can be adequate to permit the defendant to argue defendant's theory of the case. State v. Hansen*, 46 Wn. App. 292, 730 P.2d 706, 737 P.2d 670 (1987). In *Hansen*, the Court of Appeals held that an instruction on voluntary intoxication was adequate to allow the defendant to argue the claim of diminished capacity based on drug intoxication. In much the same manner, the diminished capacity instruction which appellant's jury received was adequate to permit him to argue that drug use and other factors made him unable to premeditate the murder. The trial court's failure to give a separate instruction on voluntary intoxication did not impair appellant's ability to argue his theory of the case.

122 Wn.2d 440, 454, 858 P.2d 1092 (1993) (footnotes omitted) (emphasis added). Similarly here, Burton was able to argue his case theory. There was unrefuted evidence that Burton was

intoxicated, and counsel was able to argue that this, combined with Burton's depression, medical issues, and relationship problems affected his ability to a form the requisite intents for the charged offenses.

II. Sentencing

Article I, section 9 of the Washington State Constitution provides that "No person shall be . . . twice put in jeopardy for the same offense." *Accord* U.S.Const. amend. V. When the State convicts a defendant for criminal conduct that may violate multiple statutes, the courts must determine if the legislature intended such a result or intended only to punish the more serious crime. *State v. Freeman,* 153 Wn.2d 765, 768, 108 P.3d 753 (2005). This is generally a matter of discerning whether the legislature intended to punish the charged offenses as the same offense. *Freeman*, 153 Wn.2d at 771 (quoting *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)).[8]

Here, there are no explicit statements of legislative intent regarding attempted first degree murder, first degree assault, and vehicular assault. Thus, we may turn to the *Blockburger* test to determine whether the two crimes constitute the "same offense" for double jeopardy purposes. *Freeman,* 153 Wn.2d at 772 *(see State v. Calle,* 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995); *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). *Blockburger* states that "[i]f each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes." *Freeman*, 152 Wn.2d at

[8] While the trial court concluded that the three offenses discussed were the "same criminal conduct" for purposes of sentencing under RCW 9.94A.589, a constitutional double jeopardy analysis differs.

772 (citing *Calle,* 125 Wn.2d at 777*; Blockburger***,** 284 U.S. at 304).[9] In other words:

> [W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

*Blockburger***,** 284 U.S. at 304.

Burton argues that his attempted first degree murder, first degree assault, and vehicular assault convictions constituted one offense. The first question then is whether all three offenses involved the same act or transaction. Clearly, they did not.[10] The State charged Burton with attempting to murder Bones with a hammer while a passenger in her car. There, he suddenly swung a hammer at her, telling her that he was going to kill her. Once she pulled the car over and fled, Burton moved to the driver's side and chased Bones down, striking her from behind and tossing her forward onto the ground. She again fled, this time Burton followed her course across a busy street and hit her again, pinning her under the vehicle. These were three separate and distinct episodes and convicting him for all three did not violate double jeopardy.

We also observe that under the *Blockburger* analysis we set out above, these offenses contained differing elements and thus proof of each required proof of a fact not required in the others.

---

[9] We need not engage in the third step (applying the merger doctrine) or the fourth step (independent purpose or effect to each) as the *Blockburger* analysis is dispositive. *Freeman*, 153 Wn.2d at 772-73.

[10] Burton's case differs from that in *State v. Valentine,* 108 Wn. App. 24, 27-29, 29 P.3d 42 (2001), where Valentine tried to kill his girl friend by assaulting her with a knife. As the assaultive act was the basis for the attempted murder charge, the court found a double jeopardy violation. As the facts in *Valentine* show neither a single nor multiple assaults, we disregard the parties' arguments in this regard.

The elements of attempted first degree murder are:

> (1) That on or about the 11th day of October, 2005, the defendant did an act which was a substantial step toward the commission of murder in the first degree;
> (2) That the act was done with the intent to commit murder in the first degree against Jacqueline Bones; and
> (3) That the acts occurred in the State of Washington.

CP at 169, Instr. 12.

The elements of first degree assault are::

> (1) That on or about [the] 11th day of October, 2005, the defendant assaulted Jacqueline Bones;
> (2) That the assault was committed with a deadly weapon or by a force or means likely to produce great bodily harm or death;
> (3) That the defendant acted with intent to inflict great bodily harm; and
> (4) That the acts occurred in the State of Washington.

CP at 178, Instr. 21.

The elements of vehicular assault are:

> (1) That on or about the 11th day of October, 2005, the defendant operated or drove a vehicle;
> (2) That the defendant's vehicle operation or driving proximately caused substantial bodily harm to another person;
> (3) That at the time the defendant
> (a) operated or drove the vehicle in a reckless manner, or
> (b) was under the influence of intoxicating liquor; and
> (4) That the acts occurred in the State of Washington.

CP at 184, Instr. 27.

These crimes all contain elements the others do not and thus charging all three of them does not violate double jeopardy. All three have different intents (intent to kill, intent to cause great bodily harm, and recklessness or intoxication). Additionally, proof of the attempted murder charge required the State to prove that Burton tried to kill Bones by striking her with a hammer.

No other charged offense required such proof. Second, proving first degree assault required proof that Burton intentionally struck Bones with her car intending to inflict great bodily harm. No other charged offense required such proof. Finally, proving vehicular assault required the State to prove that Burton drove Bones's vehicle while intoxicated or recklessly and caused substantial bodily harm. No other charged offense required such proof. Sentencing Burton for all three offenses did not violate his double jeopardy rights.

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 pursuant to RCW 2.06.040, it is so ordered.

Penoyar, A.C.J.

We concur:

Bridgewater, J.

Armstrong, J.