

DIMINISHED CAPACITY

THE WHAT, HOW AND WHAT TO DO

Mental States For Crimes

A criminal defendant must have a requisite mental state to commit a crime in Washington.

[RCW 9A.08.010\(1\)](#) lists four culpable mental states: intent, knowledge, recklessness, or criminal negligence.

In diminished capacity case, the State has the burden to prove that a defendant formulated the appropriate mental state beyond a reasonable doubt. If a defendant prevails in a **diminished capacity** defense, he will either be acquitted or convicted of a lesser offense than the one charged.

In contrast, an insanity defense is an affirmative defense for which a defendant has the burden of proving his insanity at the time of the incident by a preponderance of the evidence. If a defendant prevails in an insanity defense, he will likely be sent to a state mental hospital for treatment and may remain a patient at the hospital for up to the maximum sentence for the crime charged.

Diminished Capacity vs. Insanity

- Defendant claiming diminished capacity argues that he did not “intend” or “know” what he did because of some mental illness or disorder.
- “I did not intend to do it.”
- A defendant claiming insanity argues that he knew what he was doing but thought he was justified because of some delusion.
- “I did intend it, but I thought I was justified.”
- *The New Diminished Capacity Defense In Washington*, 36 Gonz.L.Rev. 497 (2000-2001)

Diminished Capacity vs. Insanity (cont'd)

Diminished Capacity is rule of evidence

Diminished capacity defense is a rule of evidence. If evidence establishes or negates a mental state of a crime, then the defendant is entitled to introduce such evidence. In other words, diminished capacity is not a substantive defense, but a rule of admissibility.

Diminished Capacity is rule of evidence (cont'd)

To support a diminished capacity defense, a defendant has to produce substantial evidence and expert testimony “demonstrating that a mental disorder, not amounting to insanity, impaired the defendant’s ability to form the culpable mental state to commit the crime charged.”

The evidence must “logically and reasonably connect to defendant’s alleged mental condition with the asserted inability to form the required mental states to commit the crime charged.”

State v. Guillot, 106 Wn.App. 355, 22 P.3d 1266 (2001); *State v. Atsbeha*, 142 Wn.2d 904, 16 P.3d 626 (2001); *State v. Ferrick*, 81 Wn.2d 942, 506 P.2d 860 (1973)

Expert Testimony Required

The pattern instruction may be submitted to the jury only if the defendant satisfies the following three requirements: (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 crime charged.

WPIC 18.20

Admissibility Of Experts

The trial court looks to ER 401, 402, and 702 to to determine the admissibility of expert testimony on diminished capacity.

State v. Ellis, 136 Wn.2d 498, 963 P.2d 843 (1998); *State v. Guillot*, 106 Wn.App. 355, 22 P.3d 1266 (2001)

Admissibility Of Experts (cont'd)

When determining admissibility of expert testimony on diminished capacity, ER 702 requires a two-party inquiry:

- 1) Does the witness qualify as an expert; and
- 2) Would the testimony be helpful to the trier of fact.

Testimony is helpful if “testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party.”

State v. Guillot, 106 Wn.App. 355, 22 P.3d 1266 (2001)

Choosing An Expert

Psychiatrist v. Psychologist v. Neuropsychologist

Do you need the expert to conduct testing on client to determine cognitive functioning?

Do you need expert to offer opinion on mental disorder and impact of drugs/medication or lack thereof?

Do you need multiple experts?

Choosing An Expert (cont'd)

CrR 4.7(g) allows the court to require a defendant to disclose any and all reports, test results, testimony or statements used or made by experts intended for use at trial.

State v. Hutchinson, 111 Wn.2d 872, 766 P.2d 447 (1989), interpreted CrR 4.7 to require disclosure of any existing reports of mental examinations, but did not require the preparation of such reports not already prepared

State v. Hamlet, 83 Wn.App. 350, 921 P.2d 560 (1996), when defense raises diminish capacity defense, trial court may compel disclosure of defense retained expert and state may call expert to rebut defense claim of diminished capacity

Lay Witnesses and Treating Providers

Lay witnesses and treatment providers can help bolster expert's testimony in support of diminished capacity claim.

Where intent or malice element of offense and defendant denies having mental state necessary to form intent, character evidence may be admissible to support inference defendant lack necessary mental state.

Issue is whether character trait in question would make any fact "of consequence of the determination" of the case more or less probable than it would be without evidence of the trait.

State v. Eakins, 127 Wn.2d 490, 902 P.2d 1236 (1995)

Trial to Post-Conviction . . .

Motions in Limine

Not uncommon for clients with behavioral health issues, especially mental health issues, to self-medicate with illegal drugs, (if an issue) ask to exclude as more prejudicial than probative under ER 403.

Trial to Post-Conviction . . .

Voir Dire:

Ask court to ask in general questions to jurors about their experiences with mental illness

In follow up ask jurors if they think person suffering from mental illness should be allowed to show that their mental illness prevented them from intending (or knowing) committed a crime?

Trial to Post-Conviction . . . (cont'd)

Cross-examination of state witnesses:

- Remember to emphasize incidents that establish client suffering from behavioral health issue
- Don't rush during this testimony, but take exaggerated pauses for emphasis

Trial to Post-Conviction . . . (cont'd)

When putting on defense case . . .

Lay witnesses should lay foundation for behavioral issues client experiencing

Expert should be last to testify

Discuss with client about not testifying to avoid jurors trying to assess the seriousness of client's mental illness

Diminished Capacity Jury Instruction

WPIC 18.20 Diminished Capacity—Defense

Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the [capacity] [ability] to form (fill in requisite mental state).

Diminished Capacity Jury Instruction (cont'd)

The pattern instruction may be submitted to the jury only if the defendant satisfies the following three requirements:

- (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 crime charged.

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Trial to Post-Conviction . . . (cont'd)

Closing:

This is your opportunity to not just talk about the client's actions but **SHOW** the jurors how this evidence establishes the client was mentally ill and shows your client did not intend or know what he was doing.

Trial to Post-Conviction . . . (cont'd)

Court has discretion under to impose an exceptional sentence below the standard range if it finds that the mitigating circumstance are established by a preponderance of the evidence. One mitigation factor is “[t]he defendant’s capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law was significantly impaired.”

BUT Voluntary use of drugs or alcohol is excluded.

RCW 9.94A.535(1) and (1)(e)

**THANK YOU AND
GOOD LUCK**

Hong Tran
hong.tran@kingcounty.gov
(206) 477-8787