Diminished Capacity and Insanity in Washington State: The Battle Shifts to Admissibility

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J Am Acad Psychiatry Law 28:77–81, 2000

The insanity defense and diminished capacity have long been the subject of debate with periodic calls for their elimination or, at least, restriction, especially after high profile trials involving their use such as in the case of John Hinckley. Two recent Washington State Supreme Court decisions, *State v. Ellis*[1] and *State v. Greene*,[2] may have significant implications on the future direction of psychiatric-legal defenses in criminal trials in the state of Washington. *Ellis* involves the diminished capacity defense, and *Greene* concerns the insanity defense.

State v. Ellis

The Case

Joey C. Ellis was charged with two counts of aggravated first-degree murder for the deaths of his mother and two-year-old half-sister, who were bludgeoned with a breadboard, occurring on or about January 8, 1996. On September 18, 1996, the prosecution filed a discovery motion for disclosure of any mental defense that Ellis intended to raise at trial. After reviewing the reports of a defense-retained psychologist, the prosecution anticipated that either a diminished capacity or insanity defense would be raised at trial. On September 23, 1996, the prosecution filed its intention to seek the death penalty. On January 3, 1997, the defense informed the prosecution of its intention to raise a diminished capacity defense and designated three psychologists as their expert witnesses.

On June 4, 1997, the prosecution filed a motion *in limine* to exclude or limit expert testimony. On June 7, 1997, the defense filed a motion to admit expert testimony on diminished capacity. Both parties cited *State v. Edmon*[3] as their legal authority.

Edmon was a 1981 Washington State Court of Appeals case, which by strict legal interpretation need only apply in Division 1 of the state's three appellate court divisions. However, *Edmon* had been followed generally in all three divisions. *Edmon* enunciated the following clinical and legal criteria for a legally acceptable claim of diminished capacity:

1. The defendant lacked the ability to form a specific intent due to a mental disorder not amounting to insanity.
2. The expert is qualified to testify on the subject.
3. The expert personally examines and diagnoses the defendant and is able to testify to an opinion with reasonable medical certainty.
4. The expert's testimony is based on substantial supporting evidence in the record relating to the defendant and the case, or there must be an offer to prove such evidence. The supporting evidence must accurately reflect the record and cannot consist solely of uncertain estimates or speculation.

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5. The cause of the inability to form a specific intent must be a mental disorder, not emotions like jealousy, fear, anger, and hatred.

6. The mental disorder must be causally connected to a lack of specific intent, not just reduced perception, overreaction or other irrelevant mental states.

7. The inability to form a specific intent must occur at a time relevant to the offense.

8. The mental disorder must substantially reduce the probability that the defendant formed the alleged intent.

9. The lack of specific intent may not be inferred from evidence of the mental disorder, and it is insufficient to only give conclusory testimony that a mental disorder caused an inability to form specific intent. The opinion must contain an explanation of how the mental disorder had this effect.

During a court hearing on June 16, 1997, to determine whether the case of Ellis would satisfy the *Edmon* criteria, the defense called no witnesses, relying on their written motions. The prosecution called the three defense psychologists as "hostile witnesses." The prosecution also called its own psychologist expert witness, who offered an opinion concerning the appropriate methodology for determining diminished capacity and application of the *Edmon* factors. On June 17, 1997, the trial judge ruled in favor of the prosecution's motion to exclude the testimony of the defense experts. After granting a rehearing on a defense motion that included defense expert witness testimony, the trial judge affirmed her prior ruling. On August 8, 1997, the defense sought discretionary review by the Washington Supreme Court, which was granted on September 4, 1997.

In forming their opinion for *Ellis*, the Washington State Supreme Court included various parts of the testimony or reports of the defense psychologists. Highlights of the expert testimony are provided in the following two paragraphs.

Psychologist L.C. testified that Ellis suffered from impulse control disorders. In his previous written report, L.C. wrote that the homicides were a "result of very complicated and powerful psychological and interpersonal factors which developed over many years, but were suddenly impulsively unleashed while in an intoxicated state." L.C. further explained that Ellis was "instantly flooded with angry emotion, a cauldron of stored up aggression was released, and he lost control." In a follow-up written report, L.C. stated that Ellis suffered from a "severe antisocial personality disorder with episodic dyscontrol which is the result of complex biosocial-psychological causes." In that same report, he stated that Ellis suffers from "a mental illness related to a long history of child and adolescent abuse which combined with drug abuse and the circumstances of the homicides resulted in a diminished capacity to normally control his mind and behavior." L.C. testified that Ellis' mental disorders substantially reduced the probability that he formed the necessary intent and that Ellis did not act with intent partly because "it's not very common that human beings kill their mothers and little sisters. This is an extraordinary thing. . . I mean people who plan and deliberately kill people, like hit men, don't do it with breadboards."

Psychologist M.W. testified that Ellis suffered from borderline personality disorder and was not in a dissociative state at the time of the killings. At another point in the testimony, M.W. stated that Ellis' mental disorders were borderline personality not otherwise specified and intermittent explosive disorder or the parallel condition of impulse control disorder. M.W. described Ellis' ability to form specific intent as "severely compromised" and estimated that his capacity to form intent was roughly at 25 percent, or reduced by 75 percent. M.W. explained that Ellis' disorders underlay his killing of his mother because he misperceived her remarks about his girlfriend and interpreted them as "extremely deflammatory [sic], as denying him his self. There would be some diminished ego function there, and then the capper, of course, is the reaction to the interpretation. This is what I have termed emotional discontrol [sic]. . . So we have an individual whose perceptional process, whose interpreting process, his decision making capacity and his ability to properly regulate this ongoing personality disturbance." M.W. further testified that Ellis in his "continuously disregulated [sic] state" killed his sister because he believed "that this was a child who symbolized all of what he did not receive with respect to maternal attachment, all of what Jamie, his young sister received. . . [s]he awakened as a stimulus, someone which reminded him, which triggered another intense exacerbation of an already existing level of emotional discontrol [sic]."

The Ruling and Opinion

On October 1, 1998, the Washington State Supreme Court reversed the trial court's ruling by a six

to two majority. The ruling permitted Ellis to proceed with presentation of expert testimony in the guilt phase of his case to establish his diminished capacity defense subject to admissibility under Evidence Rule (ER) 702 and to appropriate jury instructions.

The majority opinion recognized that to establish a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the specific intent to commit the crime charged. The majority recognized that although the trial court properly excluded the defense expert testimony because it did not satisfy the *Edmon* factors, *Edmon* was not the law. The majority reasoned that the defense expert witnesses were all qualified to give opinions and that it would be up to the trier of fact (jury) to then determine what weight, if any, would be given to the expert testimony. The majority asserted that such a procedure would be fundamentally fair and would satisfy due process.

In reaching their conclusion, the majority held that the trial court abused its discretion, particularly in a pretrial proceeding of a capital case, by failing to consider admissibility under ER 702* and by applying ER 401† and ER 402.‡ Washington State's ERs are essentially those of the Federal Rules of Evidence.

Postscript to Ellis

On January 12, 1999, Ellis pled guilty to two counts of aggravated first-degree murder and was sentenced on February 9, 1999 to life imprisonment without the possibility of parole.[4]

State v. Greene

The Case

In 1988, William B. Greene pled guilty to indecent liberties and was incarcerated at the Twin Rivers Correctional Center. Greene was accepted into the sex offender treatment program (SOTP) there. While in the SOTP, Greene underwent treatment with M.S., a female psychotherapist. During evaluation and treatment, 24 separate identities and additional identity fragments were identified. He was given the DSM-III-R diagnosis of multiple personality disorder (MPD, called dissociative identity disorder (DID) since adoption of DSM-IV in 1994) and major depression.

In 1992, Greene was released from Twin Rivers but voluntarily continued treatment through the SOTP, which included individual sessions with M.S. In the months leading up to April 1994, Greene's condition, which had been stable, began deteriorating. On April 29, 1994, alarmed by a telephone conversation with Greene earlier in the day, M.S. arranged to visit him at his home to assess whether Greene required psychiatric hospitalization. M.S. often visited patients in their homes in her professional capacity and had previously done so with Greene approximately 10 times without incident. On this occasion, Greene became aggressive and would not let M.S. leave his home. He sexually assaulted her, left her bound and gagged in his home, and eventually drove off in his car. After M.S. freed herself, she contacted the police, and Greene was apprehended.

Greene was charged with indecent liberties and first-degree kidnapping. Prior to trial, Greene entered a plea of not guilty by reason of insanity as a result of his MPD. Greene claimed that "Tyrone," one of his diagnosed alternate personalities, was the prime instigator of the incident with M.S. Greene contended that "Tyrone" was a "child, clearly less than seven years of age." He also contended that at least four other of his alternate personalities exchanged executive control of his body during the instant offense.

The trial judge conducted a pretrial hearing on the admissibility of the DID expert testimony to establish a defense of insanity. A defense expert witness and a prosecution expert witness had substantial agreement in their testimony. The court ruled that the proffered DID testimony was not admissible to establish a defense of insanity, satisfying neither the *Frye* test[5] or ER 702. In Washington, expert testimony has to meet the *Frye* standard of general acceptability, and, if it meets this test, it must be determined whether the testimony is relevant as per ER 702. Subsequent to this determination, the prosecution made a motion *in limine* to exclude any DID testimony that would be used to establish a defense of

* ER 702: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

† ER401: "Relevant evidence" means having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

‡ ER402: All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

diminished capacity. The trial court granted the motion and excluded such testimony. A jury found Greene guilty of both charges.

Court of Appeals Ruling

On appeal to the Court of Appeals, Greene's conviction was reversed, and he was remanded for retrial. The Court of Appeals accepted the argument that DID is generally accepted within the scientific community as a diagnosable psychiatric condition and is relevant to the defenses of insanity and diminished capacity. The prosecution appealed and the Washington State Supreme Court granted review.

State Supreme Court Ruling

After reviewing the clinical literature, the State Supreme Court ruled against the prosecution's assertion that DID was not generally accepted as a mental disorder in the clinical mental health community and concluded that DID met the standard for admissibility under the *Frye* test. The State Supreme Court agreed with the Court of Appeals that DID met the *Frye* test for general acceptability as a *bona fide* mental disorder. On the issue of whether DID testimony was relevant and admissible according to ER 702, the State Supreme Court disagreed with the Court of Appeals ruling. The State Supreme Court based their concern on the lack of scientific knowledge of DID insofar as apportioning culpability in cases where a defendant suffers from DID. Although the State Supreme Court affirmed in part and reversed in part the Court of Appeals decision, the Court ruling let stand Greene's conviction.

Implications of *Ellis* and *Greene*

The practical effect of *Ellis* appears to be preservation of diminished capacity and repudiation of *Edmon* to govern admissibility of expert testimony in case of diminished capacity. The *Edmon* criteria sought to impose reasonable limits as to what could be admitted into trial, that is, excluding speculation, reduced perception, overreaction, emotional responses such as jealousy, fear, anger, and hatred that do not arise from a mental condition, and other irrelevant mental states. In *Ellis*, the Washington State Supreme Court appears to have widened the net for what could be acceptable for a diminished capacity defense. This is in contrast with the U.S. Supreme Court's validation of limiting mental state defenses used in the guilt phase of trials.[6] In trend-setting California, diminished capacity transformed into the narrower diminished actuality after the high profile Dan White trial sparked tremendous negative public and legislative reaction.[7] A similar high profile case in Washington involving adverse publicity could conceivably generate the same negative sociopolitical backlash. Washington State appears to be fertile ground for such a reaction in view of its recent modification of civil and criminal psychiatric commitment statutes in response to a high profile homicide case.[8]

In the *Ellis* case itself, the Washington State Supreme Court did not merely remand the case for a rehearing at the trial court level, but, based on the defense expert witness testimony and reports, determined that such testimony would be helpful to the trier of fact. Interestingly, based on the clinical information and inferences referred to in *Ellis*, there would be real questions about the Court's being swayed by speculative and unfounded clinical assertions. For example, Ellis' capacity to form the intent was "roughly at 25 percent, or reduced by 75 percent." Nowhere in the literature or elsewhere in the scientific or clinical community have there been any guidelines or algorithm to assign probabilities to the capacity to form the requisite intent. None of the defense witnesses took into consideration the effect of their diagnosis of personality disorder, which would cast doubt on a diagnosis of an impulse control disorder and the presence of diminished capacity. The defense expert's argument that "a mental illness related to a long history of child and adolescent abuse which combined with drug abuse and the circumstances of the homicides resulted in a diminished capacity to normally control his mind and behavior" lacks a causal relationship and has the appearance of a "Twinkie"-type of defense, as Dan White's defense came to be known in the popular press. Thus, in *Ellis*, the Washington Supreme Court appeared to be easily influenced by what appears to be "junk science."

In *Greene*, the net effect of the Washington State Supreme Court's analysis was to eliminate the use of DID as a basis for the insanity defense and diminished capacity. While DID has caused courts particular consternation as to how to deal with these cases, the Washington State Supreme Court's rationale of waiting for scientific advancement in DID research would for all practical purposes eliminate the use of DID as a basis for a psychiatric-legal defense. Further

research in DID would not likely assist policymakers. Instead, the courts as dispensers of justice should adopt a thoughtful paradigm on how to conceptualize and dispose of the DID issue. The overcautious approach of the Washington State Supreme Court is not without merit given the conflicting appellate rulings in DID cases across jurisdictions.[9] Nonetheless, a reasonable paradigm on how to handle the complexities of the DID dilemmas under the law has been proposed.[9] In terms of the legal doctrine, the Court reiterated Washington's two-step test for admissibility of expert mental health testimony. First, the testimony would have to satisfy the *Frye* standard of general acceptability in the professional mental health community. Second, even if generally acceptable among the professional community, the proposed testimony must also pass the relevancy test under Washington's ER 702. In contradistinction to *Ellis*, in which the proposed expert testimony appeared to have a dubious clinical basis, in *Greene* the Court rejected outright the argument that a dissociative episode from DID could be a viable claim. The Court's concern stemmed from how to distribute culpability and not from a concern about whether DID had achieved general acceptability among mental health professionals.

Daubert v. Merrell Dow Pharmaceuticals[10] and its progeny have sought to admit only relevant and probative evidence. However, *Ellis* and *Greene* demonstrate the fallacy behind the fundamental premise of *Daubert*-type cases in which the trial court judge can determine whether the expert testimony is relevant and probative. These two cases illustrate the confusion of several appellate justices in regard to what constitutes reasonable clinical and clinical-legal constructs. They appeared to be willing to admit dubious testimony and prevent clinically solid testimony. This raises troubling professional and ethical questions for forensic mental health experts. Although the jury often ignores expert witness testimony, this does not absolve psychiatrists and other mental health clinicians from adopting formal guidelines or algorithms when testifying on subjects that have dubious clinical support. If the mental health field does not establish these tools, the legal system will be subject to the more persuasive expert witness and not the wisdom of clinical science. Establishment of professional guidelines or algorithms would afford the court an improved opportunity to make properly considered decisions in the post-*Daubert* era. Although society will likely continue the debate on substantive issues such as whether diminished capacity should be restricted to diminished actuality and whether those states continuing to follow the American Law Institute insanity rule should switch to the M'Naghten standard, in the post-*Daubert* era the major battle in cases of mental state defenses will likely be fought in court hearings outside of the main trial, with the focus on relevancy and probativeness. Although *Ellis* and *Greene* involve only Washington State, the post-*Daubert* emphasis on what expert testimony is admissible will undoubtedly assume greater importance in the near future.

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