For an activity to be covered by immunity, it must meet the meaning of a "professional review action." Such action is defined in the Act as

> . . . an action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. Such term includes a formal decision of a professional review body not to take an action or make a recommendation described in the previous sentence and also *includes professional review activities relating to a professional review action* [*Wojewski*, 730 N.W.2d, p 632; emphasis in original].

Dr. Wojewski claimed that the August 19 meeting was not a professional review committee or activity and should not be given immunity. He conceded that the later action taken to suspend his privileges was covered. He said that the group at the meeting was an *ad hoc* group, not a professional review body. The HCQIA grants immunity to the following individuals: "(A) the professional review body, (B) any person acting as a member or staff to the body, (C) any person under a contract or other formal agreement with the body, and (D) *any person who participates with or assists the body with respect to the action* . . ." (*Wojewski*, 730 N.W.2d, p 632; emphasis in original). It is not required by the statute that the group be formal, only that it follow the definition.

The court found that the group that met that morning was "not a powerless group, or an impromptu discussion. This group was meeting to make a decision about Wojewski's surgical privileges" (*Wojewski*, 730 N.W.2d, p 634).

The Supreme Court of South Dakota affirmed the trial court's decision and reasoned as follows:

> Any other interpretation than today's decision would frustrate the congressional intent behind the HCQIA. It was designed to facilitate peer review of potentially incompetent doctors to improve health care and protect patients. Taking Wojewski's argument to its logical consequence, no doctors would ever meet to discuss whether they should stop a surgeon from conducting surgery because they would be liable for their discussion and any subsequent decision [*Wojewski*, 730 N.W.2d, p 635].

Discussion

The decision of the Supreme Court of South Dakota strengthens the immunity provided "professional review committees" or "activities." It allows the monitoring of physicians and their activities without fear of legal action as a result of the monitoring. How could it be wrong to monitor and thereby be able to improve medical care? Would we not all do better if we received some feedback?

Although it is true that monitoring and quality improvement can lead to better health care, there can also be a downside to blanket immunity provided to these proceedings. The Act loosely defines what it takes to be covered by immunity. It defines those who are protected by immunity as, "any person who participates with or assists the body with respect to the action." It requires little to participate or assist in an action against a physician and thereby be covered by immunity, in accordance with the stipulations of the Act, which set a low bar for immunity. There should be more control over what constitutes a professional review body. For example, a physician who is not a mental health professional should not be making decisions about the mental health of another doctor. Further, a nonsurgeon should not decide whether a surgeon's skills are adequate. The committees should have appropriate participants to judge the subject they are reviewing.

Although it may be of concern that these "professional review" bodies are loosely defined and immune to legal remedies, quality improvement and monitoring is at least an attempt at improving health care. It would be difficult to convince anyone to participate on a professional review committee if he or she could be legally responsible for adverse decisions or poor outcomes. There may be no clear answer for whether we should allow "unmonitored" monitoring, but until a better solution for ensuring quality in medical care is found, it may be the best option we have.

Methamphetamine-Induced Psychosis and Diminished Capacity to Form Intent to Kill: Ultimate Issue in Expert Testimony

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Wyoming Does Not Recognize the Diminished-Capacity Defense: Expert Testimony Regarding the Ultimate Issue Is Inadmissible, but in This Case Was Harmless Error

The Supreme Court of Wyoming decided the case of *Martin v. State*, 157 P.3d 923 (Wyo. 2007), on May 10, 2007. At issue was a review of the conviction of Russell James Martin for attempted murder in the second degree. Mr. Martin contended that the trial court erred both in admitting certain hearsay evidence and in improperly instructing the jury on the use of that evidence. Mr. Martin also claimed that the trial court erred in allowing a mental health expert to "invade the province of the jury" by offering testimony regarding the ultimate issue of Mr. Martin's intent to kill his wife.

Facts of the Case

On August 22, 2004, Mr. Martin had "an unpleasant conversation with his wife." Later, he struck her multiple times on the head with a hammer while she was preparing breakfast. When his wife collapsed, Mr. Martin believed that he had killed her. He told his mother he had killed his wife and told a 911 dispatcher the same thing. Mr. Martin then discovered his wife was still alive and waited, as instructed, for medical assistance to arrive. Mrs. Martin was taken to a local hospital, was found to have a severe head injury, and underwent immediate neurosurgery. Law enforcement officers interviewed Mr. Martin. He reported that he had ingested a small amount of methamphetamine, had been up all night, and was hearing voices. He stated that the voices did not instruct him to harm Mrs. Martin, but rather he had "just lost it." Mr. Martin was charged with attempted second-degree murder. He was evaluated by a state psychologist, Dr. Buckwell, and was found competent to stand trial.

At trial, the defense did not deny that Mr. Martin had struck his wife, nor the Martins' previous domestic violence incidents. Instead, Mr. Martin offered a defense

> . . . premised upon two theories: (1) At the time of the incident, he was suffering from a mental disease or defect that made him unable to appreciate what he was doing; and (2) based upon his methamphetamine-induced psychosis, he had not acted with the specific intent to kill his wife [*Martin*, 157 P.3d, p 927].

The defense experts, Drs. Toews and Innes, both opined that "because of [Mr.] Martin's 'methamphetamine psychosis,' it was likely that he had acted impulsively."

The state called Dr. Buckwell as a rebuttal witness. She testified that Mr. Martin did not satisfy the requirements for the defense of not guilty by reason of mental disease or deficiency. She also testified that, based on her interpretation of the audio-taped statements Mr. Martin had made after the incident, he had acted with the specific intent of killing Mrs. Martin. The court instructed the jury that "it could consider expert testimony and the reasons offered therefore, but was not 'bound to accept the expert's opinion as conclusive' " (*Martin*, 157 P.3d, p 928). Mr. Martin was subsequently convicted of attempted second-degree murder and sentenced to 50 years to life imprisonment. He appealed the decision to the Wyoming Supreme Court.

Ruling and Reasoning

Mr. Martin's conviction was affirmed, with Chief Justice Voigt dissenting. To convict Mr. Martin of attempted second-degree murder, the state was required to prove that he had struck his wife purposely and maliciously, with the general intent of killing her. The defense argued that an expert witness is intended to help the jury understand an issue and should not be allowed "to opine on matters well within the grasp of the average individual." The defense asserted that Dr. Buckwell's testimony did not assist the jury as intended. The state countered that her testimony was admissible because it had been offered to explain which facts she relied on in forming her opinion of Mr. Martin's mental status at the time of the offense.

The Wyoming Supreme Court determined that the trial court's evidentiary rulings were entitled "considerable deference" and could not be "disturbed absent a finding of clear abuse of discretion." If the court found abuse of discretion, then it had to determine whether there was a "reasonable possibility" that the verdict might have been more favorable to Mr. Martin had the error not occurred. To demonstrate that the error was not harmless, Mr. Martin had to prove prejudice under "circumstances which

manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play" (*Skinner v. State*, 33 P.3d 758, 767 (Wyo. 2001)).

The court cited *Burton v. State*, 46 P.3d 309 (Wyo. 2002), and *Bennett v. State*, 794 P.2d 879 (Wyo. 1990), in noting, "Testimony by an expert witness concerning a belief that the defendant is guilty of the offense invades the province of the jury and generally mandates reversal of the conviction" (*Martin*, 157 P.3d, p 932). However, the court also cited *McGinn v. State*, 928 P.2d 1157 (Wyo. 1996), acknowledging that they had also previously held that "the trier of fact may give whatever weight and credence it may to the expert testimony as well as all the evidence in reaching a verdict" (*Martin*, 157 P.3d, p 932).

The court examined the context under which Buckwell evaluated Mr. Martin and the circumstances under which she was called to testify. In so doing, the court also reviewed Dr. Buckwell's "semantic" analysis of Mr. Martin's audio-taped interview at the time of his arrest, as well as her conclusions that he seemed coherent and that his statements indicated "deliberate or purposeful action." The court rejected the state's argument justifying Dr. Buckwell's testimony and agreed with the defense that the state had offered Dr. Buckwell's testimony "because it wanted the jury to hear" her opinion that Mr. Martin intended to kill his wife.

However, although the court found that Dr. Buckwell's testimony was improper, it also found that "any error was harmless" for the following two reasons: (1) the jury was able to consider the testimony offered by all experts, including the two defense experts who opined that Mr. Martin could not have had the specific intent to kill his wife, because of his methamphetamine-induced psychosis, and (2) the jury was instructed that it was not required to accept any expert's opinion as conclusive.

Dissent

In his dissent, Voigt stated he would reverse the conviction "because there were just too many errors. . . for us to know that [Mr.] Martin received a fair trial" (*Martin*, 157 P.3d, p 932). He also identified two problems with Mr. Martin's defense strategy that methamphetamine-induced psychosis prevented him from forming the intent to kill his wife, namely that: (1) Wyoming does not recognize diminished-capacity defenses, and (2) expert witnesses should not be allowed to testify as to the state of mind of the defendant outside the parameters of a mental illness defense. While Dr. Buckwell could properly testify that Mr. Martin did not have a mental illness or defect at the time of the offense, her testimony regarding the intent to kill "was simply inadmissible" because she had "invaded the province of the jury" and spoken to the ultimate issue. Voigt added, "We are never going to get adherence to the principles that underlie the admissibility of . . . expert opinion testimony as to guilt if we don't enforce those principles" (*Martin*, 157 P.3d, p 933).

Discussion

This case includes two issues of salience for forensic psychiatrists. The first is whether methamphetamine-induced psychosis is a condition that qualifies as a diminished-capacity defense. This question was not directly raised by the appeal, probably because the defense was unsuccessful in this case, nor was it addressed by the majority opinion. However, in his dissent, Chief Justice Voigt acknowledged that diminished-capacity defenses are not recognized by the state of Wyoming. Thus, both the majority and dissenting opinions avoided consideration of whether the condition of methamphetamine-induced psychosis qualifies as a basis for a diminished-capacity defense.

The second issue concerns the opinions offered as expert testimony. Both the majority and dissenting opinions found that Dr. Buckwell's testimony had been offered so the jury would hear expert opinion that Mr. Martin had acted with the intent to kill. Although the opinions differed in finding whether the error was harmless, both agreed that the testimony overstepped the limits placed on expert opinions. The conclusion that it is improper for an expert to testify about the defendant's intent, particularly in cases where intent is the ultimate issue, affirms that opinions of mental health experts are only admissible as they speak to the mental state of a defendant in relationship to a mental illness. Although it is ultimately the trial court's decision on how to delimit expert testimony, it would be wise for psychiatrists to bear in mind the standard limits for expert testimony in preparing their opinions.