IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

GREGORY STEPHEN BIAS,

Appellee.

Case No. 83,598
Case No. 83,557

CONSOLIDATED

ON DISCRETIONARY REVIEW FORM THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT STATE OF FLORIDA

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

While in her apartment Respondent, Gregory Stephen Bias, inflicted at least six blows to his mother's head. (R. 349-351). Respondent hit his mother with enough force to end her life. Respondent pursued his mother and hit her as she was moving away from him as evidenced by her blood on the walls, floors, and on the furniture of every room in the house. (R. 269-273, 309-326). After the final blow to his mother's head he left her in her bedroom face down on the floor. He then took her car keys and took all the money that was in her purse. (R. 329, 501-504). Respondent then left the apartment and rode down the elevator to the lobby. The security guard testified that Respondent seemed calm, cool, and collected as he walked through the lobby without signing out which he was required to do. (R. 233). She testified that Respondent was not swaying and did not appear in a state of disarray. (R. 233). Respondent then took his mother's car and left the scene. (R. 501-504).

As the Second District states in its opinion:

> The state filed motions in limine to exclude any evidence of Bias's mental defects. The State contended that "[i]n Florida there is no defense of diminished capacity. An accused must either elect the defense of insanity or stand in the shoes of a mentally competent person. Any evidence of mental disease or defect is irrelevant." The trial court ruled that the experts could not testify about the effect that voluntary intoxication might have on someone who was a schizophrenic; the experts would have to take the defendant as if he were a "normal person."

On appeal Respondent challenged his conviction for first degree murder and robbery. He argued that the evidence was insufficient to sustain his conviction and that the trial court erred in excluding expert testimony linking his schizophrenia and brain damage to his defense of voluntary intoxication. He also attacked his sentence as a habitual offender. The Second District Court of Appeal held that the evidence supported his conviction and affirmed on the point without discussion. The Second District found merit in Respondent's argument to the voluntary intoxication defense.

On April 13, 1994 the State filed its notice to invoke discretionary jurisdiction. This Court granted jurisdiction on May 9, 1994. The instant brief on the merits follows:

SUMMARY OF THE ARGUMENT

Since the diminished capacity defense is not available to defendants in Florida, evidence of a mental impairment in the absence of an insanity plea is inadmissible. Accordingly, a strict reading of Chestnut would preclude the evidence Respondent seeks to offer in the instant case.

ARGUMENT

ISSUE

> THE SECOND DISTRICT COURT OF APPEAL, ON THE BASIS OF POSSIBLE CONFLICT HAS CERTIFIED THE FOLLOWING QUESTION TO THIS HONORABLE COURT: WHERE A DEFENDANT WHO HAS A MENTAL DISEASE OR DEFECT RAISES THE DEFENSE OF VOLUNTARY INTOXICATION, CAN A TRIAL COURT EXCLUDE EXPERT TESTIMONY ABOUT THE COMBINED EFFECT OF THE DEFENDANT'S MENTAL DISEASE AND THE INTOXICANTS ALLEGEDLY CONSUMED ON HIS ABILITY TO FORM A SPECIFIC INTENT IF THE EXPERT CANNOT OFFER AN OPINION WITHOUT EXPLAINING THAT ONE OF THE FACTS HE RELIED UPON IN REACHING HIS OPINION WAS THE DEFENDANT'S MENTAL DISEASE?

The trial court correctly held that testimony regarding Respondent's paranoid schizophrenia was inadmissible under this Honorable Court's ruling in Chestnut v State, 538 So. 2d 820 (Fla, 1989). In Chestnut, the First District Court of Appeal certified the following question as one of great public importance:

> IS EVIDENCE OF AN ABNORMAL MENTAL CONDITION NOT CONSTITUTING LEGAL INSANITY ADMISSIBLE FOR THE PURPOSE OF PROVING EITHER THAT THE ACCUSED COULD NOT OR DID NOT ENTERTAIN THE SPECIFIC INTENT OR STATE OF MIND ESSENTIAL TO PROOF OF THE OFFENSE, IN ORDER TO DETERMINE WHETHER THE CRIME CHARGED, OR A LESSER DEGREE THEREOF, WAS IN FACT COMMITTED?

This Honorable Court answered in the negative.

In Chestnut, the defendant and two codefendants robbed and killed the victim, by striking him across the forehead with an axe handle. Prior to trial, the state filed a motion seeking to prohibit anticipated testimony by expert witnesses concerning the

defendant's mental condition. The trial court granted the motion, ruling that, in the absence of an insanity plea, expert testimony as to the defendant's mental condition would only tend to confuse the jury. The First District Court of Appeal affirmed the trial court, Chestnut v State, 505 So. 2d 1353 (Fla. 1st DCA, 1987) and certified the question above.

Initially, it should be noted that a state is not constitutionally required to permit a defendant to introduce evidence of "diminished capacity". Fisher v United States, 328 U.S. 463, 66 S.Ct. 1318, 90 L.Ed. 1382 (1946). In answering the certified question in the negative, this Honorable Court carefully traced the history and rationale of the diminished capacity rule, which provides that insanity is an all or nothing defense. A defendant in Florida may not introduce testimony or evidence that he lacked the mens rea necessary for a specific intent offence because of a mental impairment, where that impairment does not meet the legal test of insanity. See Ezzell v State, 88 So. 2d 280 (Fla, 1956); Everett v State, 97 So. 2d 241 (Fla, 1957), cert denied 355 U.S. 941, 78 S.Ct. 432, 2 L.Ed.2d 422 (1958). As this Honorable Court has recognized, there are several reasons counseling against admission of such testimony. For instance, introduction of such evidence would "confuse and create immaterial issues". Chestnut, at 821, quoting Tremain v State, 336 So. 2d 705,706 (Fla. 4th DCA, 1976), cert denied 348 So. 2d 954 (Fla, 1977). Additionally, evidence of psychiatric abnormality is "not susceptible to quantification

or objective demonstration" unlike such conditions as intoxication, infancy or senility. Chestnut, at 823, quoting Bethea v United States, 365 A.2d 64, 88 (D.C. 1976), cert denied, 433 U.S. 911, 97 S.Ct. 2979, 53 L.Ed.2d 1095 (1977). Therefore, while "it takes no great expertise for jurors to determine whether an accused was 'so intoxicated as to be mentally unable to intend anything'", Chestnut at 823, quoting State v Wilcox, 436 N.E.2d 523 (Ohio, 1982), the same can not be said of esoteric conditions such as paranoid schizophrenia. Finally, "to permit the defense of diminished capacity would invite arbitrary applications of the law because of the nebulous distinction between specific and general intent crimes". Chestnut at 824.

Thus, since the diminished capacity defense is not available to defendants in Florida, evidence of a mental impairment in the absence of an insanity plea is inadmissible. Accordingly, a strict reading of Chestnut would preclude the evidence Respondent seeks to offer in the instant case.

Respondent argues however, that the rule in Chestnut does not apply where the defendant seeks to introduce testimony of the effects of paranoid schizophrenia combined with intoxication. In the instant case, Respondent relied on a voluntary intoxication defense, arguing that because of the effect of the beers he allegedly consumed prior to the killing, he lacked the mens rea to form the specific intent, which is an element of first degree murder. However, the forensic psychiatrist and forensic psychologist Respondent intended to call would have testified

that alcohol has a more dramatic effect on a schizophrenic than it does others. Bias v State. The trial court precluded Respondent from offering testimony as to Respondent's schizophrenia, relying on Chestnut, supra. However, the trial court indicated it would allow testimony as to voluntary intoxication:

> THE COURT: (I)f Dr. Maher was able to draw the line as he's characterized it, voluntary intoxication is a defense as we have discussed, certainly to first degree, premeditated murder and also to the robbery, the intent to commit robbery. I don't know if he's able to draw the line or not and to this point, we have had no evidence of even intoxication or the drinking of anything, so it would seem to me that he is able to testify to that, then he can testify to that.
>
> I'm relying on Chestnut which is--we have discussed before, that I am considering paranoid schizophrenia to be an abnormal mental condition not normally understood by the lay person and, therefore, it's not a condition that he or any other doctor or psychiatrist or psychologist could testify to as being a defense to the specific intent or state of mind essential to prove either the first degree murder or the robbery.
>
> (T434-435).
>
> In other words, the court's ruling was that no testimony could be elicited regarding Respondent's underlying mental condition. The motion in limine thus granted by the trial court prohibited the Respondent from eliciting any such testimony (that the Respondent suffered from schizophrenia) and from referring to, or arguing in any way, any mental defect suffered by the defendant.
>
> (R107).

Accordingly, Respondent was not precluded from eliciting expert testimony as to his voluntary intoxication and the state would respectfully disagree with the Second District's finding that the trial court's ruling "effectively excluded the testimony". Bias, at. The only testimony that was excluded was testimony that is clearly inadmissible under Chestnut.

Respondent below relied on Easley v State, 629 So. 2d 1046 (Fla. 2d DCA, 1993), which held that evidence of an underlying mental condition could be introduced as to how it affected the defendant's intoxication. The state respectfully suggests that Easley was prompted by different concerns. In contrast to the instant case, the trial court in Easley ruled that the defendant's expert witness could not rely on or consider the defendant's underlying mental status. Id., at 1048. Such a ruling was arguably contrary to §90.704, Fla. Stat. which provides that "If the facts or data (upon which an expert bases an opinion) are of a type reasonably relied upon by experts in the subject...the facts or data need not be admissible in evidence". Thus, the concern of the Easley court was that the defendant was precluded from offering testimony as it related to his voluntary intoxication defense. In the instant case, the trial court clearly indicated that the defense could offer testimony as to his voluntary intoxication and placed no limitations on what the experts could consider, but only as to what they could testify to.

Thus, Respondent is attempting to use expert witness' as conduits to introduce otherwise inadmissible evidence. "As a rule, experts may express opinions drawn from data that itself may not be admissible. However, an expert's testimony may not be used merely to serve as a conduit to place otherwise inadmissible evidence before a jury". Kurynka v Tamarac Hospital Corporation, Inc., 542 So. 2d 412, 413 (Fla. 4th DCA, 1989). See also Department of Corrections v Williams, 549 So. 2d 1071 (Fla. 5th DCA, 1989). Respondent had the option of pleading not guilty by reason of insanity, in which case he would have been free to offer evidence of his mental status, including his paranoid schizophrenia. He chose not to do so, instead relying on a defense of voluntary intoxication. He cannot now have it both ways, arguing that he was not insane, yet seeking to introduce as a vague mitigating factor evidence of his mental condition.

The perils of permitting an expert to testify as to Respondent's schizophrenia are the same perils that this Honorable Court recognized in Chestnut; none are alleviated by the Respondent's claim that the testimony would go to voluntary intoxication. For instance, there is the danger that the jury would consider the evidence as a "vague and general mitigating factor" in the absence of an insanity defense. Allowing testimony as to Respondent's underlying mental condition would confuse and create immaterial issues as well as place the jury in a position of evaluating an esoteric mental condition not comprehensible to the ordinary layperson. These dangers are

unmitigated in the instant case. Indeed, they are compounded by the fact that the jury would be asked to consider not only the esoteric condition of paranoid schizophrenia, but to take the complicated analysis one step further, and identify its effect on intoxication. The state respectfully suggests that the courts in Easley and in the instant case below overlooked the fact that the rationale compelling the result in Chestnut is at least equally applicable to cases involving the effect of diminished capacity on voluntary intoxication. The court in Easley held that psychiatric testimony regarding a defendant's underlying mental condition is admissible, overlooking this Honorable Court's concern regarding a jury's ability to evaluate scientific testimony as to mental disease such as schizophrenia.

It is important to remember what applying Chestnut to the instant case and others like it would not do. Applying Chestnut to the facts of this case would not preclude an expert from testifying as to his belief that a defendant was too intoxicated to form a specific intent; nor would it prohibit an expert from considering a defendant's underlying mental condition. Such a holding would prohibit an expert only from testifying to facts that this Honorable Court has held to be irrelevant and immaterial. Hence, the defense of voluntary intoxication would in no way be impaired. Refusing to apply Chestnut straightforwardly would, however, give rise to all of the concerns and dangers identified by this Honorable Court in that case.

The State suggest that a comparison of the instant case with State v Stewart, 633 So. 2d 925 (La. Ct. of Appeal, 1994) is persuasive. In Stewart, the defendant was convicted of first degree murder. On appeal, the defendant argued that the trial court erred in refusing to present expert testimony as to the effect of intoxication on an individual who was mildly retarded. The trial court ruled that it would allow evidence of intoxication, but would not allow any type of diminished capacity defense. In affirming, the Louisiana Court of Appeal rejected the defendant's contention that testimony regarding his mental condition should have been admitted under the theory that intoxicants affect a mildly retarded person differently than they do "normal" persons. "Because he did not enter a plea of not guilty and not guilty by reason of insanity, the trial court correctly ruled that the defense could not elicit expert opinion testimony regarding the defendant's mental capacity". Id., at 934. Further, the defendant complained that the trial court ruled that his expert was precluded from testifying regarding his defense of voluntary intoxication. The court held that it appears that the court would have allowed expert testimony, provided it was limited solely to a defense of voluntary intoxication and not combined with evidence of the defendant's mental capacity. In any event, even if some of the trial court's comments during its ruling could have been construed to mean that Dr. Zimmermann was prevented from giving expert testimony on voluntary intoxication because he lacked enough information upon

which to base his opinion, we find that such a position was supported by the record. The only evidence of intoxication came from the defendant's own confession, wherein he admitted that he was under the influence of cocaine when he murdered the victim. Id.

The Court in the instant case is faced with precisely the same issues. Louisiana, like Florida, permits evidence of voluntary intoxication as it relates to a defendant's ability to form a specific intent. Like the respondent, the defendant in Stewart sought to introduce evidence of an underlying mental condition, arguing that it affected his intoxication. As in the instant case, the experts were not precluded from testifying as to the defendant's intoxication. A further similarity is that in both cases, the only evidence of intoxication was the defendants' own testimony. As in Stewart, this Honorable Court should find that if the testimony of Respondent's experts was "effectively excluded" because there was insufficient evidence of intoxication other than Respondent's own testimony, such an exclusion was supported by the record.

Respondent may not get in "through the back door" what he is precluded from getting in through the front. Because the Respondent in the instant case was not precluded from offering evidence of voluntary intoxication and because the dangers associated with expert psychological testimony in the absence of an insanity plea identified in Chestnut would be unmitigated, the certified question must be answered in the affirmative.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to STEVAN T. NORTHCUTT, ESQUIRE, Ashley Tower, Suite 1600, P. O. Box 3429, Tampa, Florida 33601-2429, this 27th day of June, 1994.

COUNSEL FOR PETITIONER

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v.

Case No. 83,598
Case No. 83,557

CONSOLIDATED

GREGORY STEPHEN BIAS,

Appellee.
_____/

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

GREGORY STEPHEN BIAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 92-04235

Opinion filed April 8, 1994.

Appeal from the Circuit Court
for Hillsborough County;
Susan C. Bucklew, Judge.

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Hirsch, Segall & Northcutt,
P.A., Tampa, for Appellant.

Robert A. Butterworth, Attorney
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S. Taylor, Assistant Attorney
General, Tampa, for Appellee.

RYDER, Judge.

Gregory Stephen Bias challenges his conviction for first degree murder and robbery. He argues that the evidence was insufficient to sustain his conviction and that the trial court erred in excluding expert testimony linking his schizophrenia and

brain damage to his defense of voluntary intoxication. He also attacks his sentence as a habitual offender. We hold that the evidence supported his conviction and affirm on that point without discussion. We find merit in Bias's argument that the trial court erred in precluding his experts' testimony pertaining to the voluntary intoxication defense. Accordingly, we reverse his conviction and remand for a new trial. Because of our reversal, the sentencing issue is moot.

The facts here are very similar to those in Easley v. State, 629 So. 2d 1046 (Fla. 2d DCA 1993). At trial, Bias intended to call a forensic psychiatrist and a forensic psychologist to opine that, on the night the crimes occurred, he was too intoxicated to form the specific intent to kill or rob. Both experts relied on the fact that Bias was schizophrenic in reaching their opinions. They both stated, on proffer, that it was necessary to take an individual's underlying condition into account when forming an opinion about whether he was intoxicated after consuming a given amount of alcohol. The forensic psychiatrist noted that alcohol has a more dramatic effect on a schizophrenic or anyone who has brain damage. He believed that Bias had used alcohol for many years as self-medication. Although this practice is common among schizophrenics, the doctor stated that alcohol actually exaggerates the delusions, hallucinations and other psychotic symptoms.

The state filed motions in limine to exclude any evidence of Bias's mental defects. The state contended that "[i]n Florida there is no defense of diminished capacity. An

accused must either elect the defense of insanity or stand in the shoes of a mentally competent person. Any evidence of a mental disease or defect is irrelevant." The trial court ruled that the experts could not testify about the effect that voluntary intoxication might have on someone who was a schizophrenic; the experts would have to take the defendant as if he were a "normal person." This ruling effectively excluded the testimony because both experts stated they would be unable to offer opinions unless they could take all of Bias's physical and mental characteristics into consideration.

The lower court based its ruling on Chestnut v. State, 538 So. 2d 820 (Fla. 1989), which rejected the defense of diminished capacity. We have held that Chestnut and Bunney v. State, 603 So. 2d 1270 (Fla. 1992), do not apply when a defendant raises a voluntary intoxication defense. Easley, 629 So. 2d at 1050. For the reasons stated in Easley, we hold that the lower court's exclusion of the expert testimony here was error. We reverse and remand for a new trial.

Because of the possibility that our decisions here and in Easley may be in conflict with Chestnut, we certify the following question to the Florida Supreme Court:

> WHERE A DEFENDANT WHO HAS A MENTAL DISEASE OR DEFECT RAISES THE DEFENSE OF VOLUNTARY INTOXICATION, CAN A TRIAL COURT EXCLUDE EXPERT TESTIMONY ABOUT THE COMBINED EFFECT OF THE DEFENDANT'S MENTAL DISEASE AND THE INTOXICANTS ALLEGEDLY CONSUMED ON HIS ABILITY TO FORM A SPECIFIC INTENT IF THE EXPERT CANNOT OFFER AN OPINION WITHOUT EXPLAINING THAT ONE OF THE FACTS HE RELIED UPON IN REACHING HIS OPINION WAS THE DEFENDANT'S MENTAL DISEASE?

If the answer to this question is in the affirmative, then:

IN THE SITUATION DISCUSSED ABOVE, MAY THE TRIAL COURT ALLOW AN EXPERT TO OPINE ABOUT THE EXTENT OF A DEFENDANT'S INTOXICATION AND HIS ABILITY TO FORM A SPECIFIC INTENT AS LONG AS THE EXPERT DOES NOT DISCLOSE THAT HIS OPINION IS BASED TO SOME EXTENT ON THE DEFENDANT'S MENTAL DISEASE OR DEFECT?

Reversed and remanded.

FRANK, C.J., and DANAHY, J., Concur.