IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Respondent,
v.
PAUL KAY SHIELDS,
Defendant-Appellant.

Lane County Circuit Court
201425268; A160497

Maurice K. Merten, Judge.

Argued and submitted April 21, 2017.

Erica Herb, Deputy Public Defender, argued the cause for appellant. With her on the briefs was Ernest G. Lannet, Chief Defender, Criminal Appellate Section, Office of Public Defense Services.

Erin K. Galli, Assistant Attorney General, argued the cause for respondent. With her on the brief were Ellen F. Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Before Armstrong, Presiding Judge, and Shorr, Judge, and Wollheim, Senior Judge.

SHORR, J.

Affirmed.

SHORR, J.

Defendant appeals a judgment convicting him of burglary in the first degree, ORS 164.225; robbery in the second degree, ORS 164.405; identity theft, ORS 165.800; and possession of methamphetamine, ORS 475.894. Defendant assigns error to the trial court's refusal to instruct the jury on the guilty except for insanity (GEI) defense, ORS 161.295, and to the trial court's refusal to include a GEI defense option on the jury verdict form. We conclude that the trial court did not err in either respect. Therefore, we affirm.

"We review the record to determine whether defendant presented any evidence to support the defenses he sought to assert and evaluate that evidence in the light most favorable to defendant." *State v. Miles*, 197 Or App 86, 88, 104 P3d 604, *rev den*, 338 Or 488 (2005).

The undisputed facts on appeal are as follows. Defendant first broke into a home, confronted the homeowners with a gun, and demanded cash, a debit card, and the "PIN" code for the card. He then used the card to withdraw money from an automated teller machine. Two days later, defendant robbed an adult video store. He was arrested at a bus stop after a police officer responding to the robbery recognized him based on a description that had been provided by one of the video store's owners. Defendant was carrying a waist pack containing needles and methamphetamine, and a backpack containing, among other things, items stolen from the store. The state subsequently charged defendant by indictment with burglary, robbery, identity theft, and possession of methamphetamine.

At the request of defense counsel, defendant was evaluated by Dr. Truhn, a psychologist licensed by the Oregon Board of Psychological Examiners to perform aid-and-assist evaluations and mental defense evaluations. Truhn evaluated defendant twice for the purpose of offering his opinion on whether defendant could aid and assist in his defense, first about one month after defendant's arrest and again several months later. In the interim, defendant was remanded to the Oregon State Hospital. Once the trial court found defendant fit to aid and assist in his own defense,

Truhn evaluated defendant a third time, again at defense counsel's request, for the purpose of offering testimony at trial in support of a potential GEI defense.

At trial, defendant requested that the court give the uniform criminal jury instruction on the GEI defense, Uniform Criminal Jury Instruction 1121-22, and include a GEI defense option on the verdict form. The trial court refused. The jury later found defendant guilty of all charges.

On appeal, defendant assigns error to the trial court's refusal to instruct the jury on GEI and to provide a GEI defense option on the verdict form. Defendant argues that he presented sufficient evidence from which a jury could find that he was guilty but insane, as defined by ORS 161.295, at the time of his crimes. In the state's view, defendant failed to provide any evidence from which a jury could find the requisite elements of the GEI defense.

Whether the evidence entitles a defendant to a jury instruction on an affirmative defense is governed by the statutory requirements for establishing the defense. We review a trial court's ruling not to give an instruction on an affirmative statutory defense for legal error, "viewing the record in the light most favorable to defendant to determine whether a jury permissibly could find the statutory elements of the defense from the facts or evidence contained in the record." *State v. Freih*, 270 Or App 555, 556, 348 P3d 324 (2015). The trial court may withhold an affirmative defense to a criminal charge from the jury only if there is no evidence in the record to support one or more elements of the defense. *Id.*

A defendant seeking to establish a GEI defense under ORS 161.295 must show that, at the time of the crime, as a result of a mental disease or defect (which does not include a personality disorder or general antisocial behavior), the defendant lacked the substantial capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of law.[1] *State v. Peverieri*, 192 Or App 229, 232,

[1] ORS 161.295 states:

"(1) A person is guilty except for insanity if, as a result of mental disease or defect at the time of engaging in criminal conduct, the person lacks

84 P3d 1125 (2004). The issue here is whether defendant presented "any evidence" of each of the foregoing elements.

The primary source of evidence from which a jury could find the statutory elements of the GEI defense in this case was Truhn's trial testimony. Truhn based his testimony on his two aid-and-assist evaluations, each of which comprised a series of sessions, and one GEI evaluation of defendant.[2] At trial, Truhn testified that, based on the tests that he administered to defendant during his first aid-and-assist evaluation, defendant's intelligence scores were "relatively uniform and very low." He explained that defendant was in the "second percentile," or the "extremely low range of abilities," for verbal comprehension, which "takes into account abstract reasoning, general fund of knowledge and long-term memory, [and] knowledge of common sense reasoning and ability to solve day-to-day problems." In addition, defendant was in the twelfth percentile, or the "low average range of abilities," for perceptual reasoning, and the fourth percentile for processing speed. Truhn agreed that he "found [defendant] very low functioning overall."

Truhn also explained that, during his initial evaluations, defendant was "consistently humming, snorting, [and] making clicking noises." When he asked defendant about those behaviors, defendant explained that they were in response to voices in his head, which Truhn believed to be "persistent auditory hallucinations." Truhn explained that defendant's "intellectual and cognitive functioning [might have been] impaired due to psychotic symptoms." Truhn noticed similar symptoms in his later aid-and-assist evaluations, but noted that they had decreased. He could not say

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substantial capacity either to appreciate the criminality of the conduct or to conform the conduct to the requirements of law.

"(2) *** [T]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, nor do they include any abnormality constituting solely a personality disorder."

ORS 161.295 has been amended by Oregon Laws 2017, chapter 634, section 3. The amendment is not effective until January 1, 2018.

[2] Truhn prepared at least three reports detailing his evaluations of defendant. Those reports were not admitted into evidence and, hence, cannot provide a basis on which the jury could conclude that defendant has shown the elements of the GEI defense.

whether that decrease could be attributed to antipsychotic medication administered by the state hospital, discontinuation of regular methamphetamine use, both, or neither.

When asked about his specific diagnoses, Tr\l\];

hn testified that he initially diagnosed defendant, under the criteria listed in the *American Diagnostic and Statistical Manual of Mental Disorders* (5th ed 2013) (DSM-5), with "unspecified schizophrenic spectrum and other psychotic disorder," and "stimulant use disorder, severe, amphetamine-type substance," as well as "rule-outs" for "schizoaffective disorder, bipolar type," "post traumatic stress disorder," "borderline personality features," and "unspecified neurocognitive disorder."[3] When he evaluated defendant again several months later, Truhn diagnosed him only with "unspecified schizophrenic spectrum and other psychotic disorder," "stimulant use disorder, severe, amphetamine type substance," and a rule-out for "unspecified neurocognitive disorder." Truhn confirmed that stimulant use disorder and borderline personality features are not mental diseases or defects under Oregon state law, and thus "don't fit for an insanity defense."

When asked to speak on "unspecified schizophrenic spectrum and other psychotic disorder," Truhn explained that, according to the DSM-5, that diagnosis refers to "psychotic symptoms" that an individual "might be presenting with but that it can't be confirmed, for instance, how long the symptoms have been present, exactly what some of the criteria are as far as decreased level of functioning, and those more specific types of symptoms that are associated with the specific diagnosis of schizophrenia." Truhn further explained that that diagnosis applies to presentations of schizophrenia and other psychotic disorders "that cause clinically significant distress or impairment of social, occupational, and other important areas of functioning," but that the symptoms "do not meet the full criteria for any of the disorders in the schizophrenia spectrum and other

[3] In Truhn's words, a "rule-out" means

"that I had some of the criteria to be able to look at these diagnostic categories, but not enough to provide a full diagnosis. *** I would hope either myself or someone else, such as at the Oregon State Hospital, would explore that further *** to be able to clarify if that diagnosis existed or not."

psychotic disorders diagnosis class." He then testified that the primary basis for that diagnosis in defendant's case was defendant's "persistent auditory hallucinations" and "what sounded to me like delusional beliefs."

Regarding his rule-out diagnosis for "unspecified neurocognitive disorder," Truhn explained that, according to the DSM-5, "[t]his category applies to the presentation in which symptoms of neurocognitive disorder that cause clinically significant distress or impairment in social, occupational, and other important areas of functioning predominate but do not meet the full criteria for any of the disorders in the neurocognitive disorders diagnostic class." Truhn elaborated that "this is again kind of a catch-all for where the clinician may have some evidence to possibly indicate that there is some type of cognitive disorder, either impairment of intellectual functioning, memory, executive organizational ability, *** but maybe is not sure of the [etiology] or more specific factors."[4]

Even assuming that Truhn's testimony provides evidence from which a reasonable jury could find that defendant suffered from a mental disease or defect as required for the GEI defense by ORS 161.295, no reasonable jury could find from Truhn's testimony that defendant lacked the substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, either as a general matter or as a result of his mental disease or defect. Defendant failed to establish an evidentiary link between his qualifying diagnoses and his conduct, and provided no basis on which a jury could reasonably infer that, as a result of the former, he was unable to appreciate the criminality of the latter.

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[4] Truhn also stated that, based on test results from his second round of aid-and-assist evaluations, he suspected defendant might be malingering, or feigning symptoms, and acknowledged that "there is an abundance of evidence *** that [defendant] is grossly exaggerating his symptomology." When asked why that might be the case, Truhn explained that one possible motive for malingering was to "avoid[] criminal responsibility." As Truhn put it,

> "my impression is that [defendant] experiences a psychotic disorder, the extent of which I don't know. My impression is there may be a cognitive disorder. *** [H]e may be able to be tested by a neuropsychologist to verify that. But with these motivational issues, I think that's also very difficult to determine at this time."

Two cases illustrate that point. First, in *State v. Jesse*, 360 Or 584, 385 P3d 1063 (2016), the Supreme Court affirmed the trial court's decision to exclude proffered expert testimony in support of the defendant's theory that certain admissions that he had made were not confessions of guilt, but rather the product of stress and poor coping skills caused by an adjustment disorder. 360 Or at 600. The expert's qualifications were not in dispute and the state did not challenge the foundation of her testimony that the defendant had an adjustment disorder that limited his coping skills. *Id*. But, the court explained, the expert's pretrial testimony "demonstrated only defendant's premises (that he was distressed [and] had poor coping skills), and not the inference that he wanted the jury to draw (that distressed people with poor coping skills *** may make admissions that are not actual confessions of guilt)." *Id.* The court went on to note that the expert did not testify that the defendant's adjustment disorder "was of a sort that has been observed by experts to influence a person to make admissions that were not confessions of guilt[,] *** nor did she provide any indicia that the jury could use to draw a reasonable inference that [defendant's] admissions were not actual confessions." *Id*. at 600-01. The court concluded that, "because defendant did not connect the facets of his adjustment disorder with the conditional fact that he wanted the jury to infer, the jury would have been left to speculate about the existence of a connection between that testimony and the issue of fact whether defendant [committed the crime charged]." *Id.* at 601-02.

Then, in *State v. Wright*, 284 Or App 641, 393 P3d 1192 (2017), we applied the analysis from *Jesse* to affirm the trial court's decision to exclude testimony that suggested that the defendant had an intellectual disability and therefore did not act with malice, an element of the crime charged against the defendant. We explained that the witness's "statement that defendant had an intellectual disability, without more, was not relevant to defendant's mental state." 284 Or App at 648. We went on to note that "[d]efendant did not offer admissible evidence, and did not make an offer of proof, of a connection between the intellectual disability and the alleged mental state, such as evidence that

his particular intellectual disability could affect his judgment." *Id.* We then concluded that "[a] factfinder could not reasonably infer from [the witness's] general statement that defendant had an unspecified intellectual disability that defendant did not [act maliciously]." *Id.*

We recognize that *Jesse* and *Wright* do not involve the elements of the GEI defense, and so are not controlling on our decision in this case; but those cases are instructive because they involve what evidence is necessary for a jury to reasonably find that a causal link exists between a defendant's purported mental condition and alleged criminal conduct. In other words, *Jesse* and *Wright* help to clarify, by analogy, when it is and is not possible for a jury to find that, as a result of a mental disease or defect, a defendant lacked substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law, as required for the GEI defense by ORS 161.295.

In the GEI context, testimony that generally describes a defendant's mental disorder without establishing a connection between the facets of that condition and defendant's conduct typically will be insufficient, as in this case, to allow a jury to find that the condition is the cause of the conduct, or that, as a result of the condition, the defendant lacked cognizance of the criminality of his conduct or the ability to conform his conduct to the requirements of the law. Such testimony would require a jury to make impermissible speculative determinations instead of drawing permissible inferences about the existence of those necessary connections.[5]

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[5] In *Jesse*, the Supreme Court explained that

> "[t]he line between permissible inferences and impermissible speculation is difficult to articulate with precision. The federal courts usefully have described that line in these terms: 'The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation *** is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts.'"

360 Or at 597 n 7 (citing *Tose v. First Pa. Bank, N.A.*, 648 F2d 879, 895 (3rd Cir), *cert den*, 454 US 893 (1981), *abrogated on other grounds by Griggs v. Provident Consumer Discount Co.*, 459 US 56 (1982)).

Here, Truhn testified about his evaluations of defendant and discussed the pertinent symptoms associated with his diagnoses under the DSM-5. But Truhn never testified whether he believed that defendant lacked the substantial capacity to appreciate the criminality of his conduct or ability to conform his conduct to requirements of the law, either as a general matter or as a result of his mental disease or defect. Nor did Truhn imply that that might be the case. For example, he did not testify that people with defendant's qualifying diagnoses are known to commit criminal acts without appreciating the criminality of their behavior, or that people with intelligence and capabilities similar to defendant's may find themselves unable to conform their conduct to the requirements of the law. While Truhn described defendant as "very low functioning" and highlighted defendant's poor problem solving, memory, and abstract reasoning abilities, along with defendant's past auditory hallucinations, those symptoms do not, on their own, reasonably suggest that defendant committed the crimes with which he was charged without appreciating that those acts were criminal in nature, or that defendant was unable to conform his conduct to the laws proscribing those acts.

Even viewed in the light most favorable to defendant, the evidence provided by Truhn's testimony is simply too general to support a GEI instruction in this case. Defendant failed to provide any evidence of a nexus between his diagnoses and his criminal behavior from which a reasonable jury could find that defendant's mental disease or defect deprived him of the substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. Therefore, the trial court did not err when it refused to submit the GEI defense to the jury.

As to defendant's second assignment of error, that the trial court erred by failing to provide a GEI defense option on the jury verdict form, we note that the jury instructions and the verdict form collectively make up "the instructions as a whole." *Rowlett v. Fagan*, 358 Or 639, 671, 369 P3d 1132 (2016). For the same reasons that defendant failed to establish that the court had to instruct the jury on the GEI

defense, we conclude that the trial court did not err when it did not include a GEI defense option on the jury verdict form.

In sum, the trial court did not err when it refused to give defendant's offered instruction on the GEI defense, nor did the trial court err when it refused to include a GEI defense option on the jury verdict form.

Affirmed.