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gate the prejudicial effects of introducing evidence of a prior criminal record by strictly limiting such evidence to those crimes that bear the highest degree of relevance to the present charges.

With the exception of the points discussed above, *Stanley* is essentially a reaffirmation of prior North Carolina law with greater reliance on the federal definition of entrapment.⁶⁴ Except for extreme cases, the issue remains one for the jury to resolve. The court also announced in *Stanley* that it will continue to focus on the particular defendant's predisposition to participate in the criminal act. However, the North Carolina court has recognized that abuses inevitably occur when overzealous law enforcement officers set traps, particularly in search of violations of drug laws. In correcting these abuses, it is hoped that the court, recognizing the need for judicial intervention, will continue to search for the appropriate responses.

JOSEPH D. JOHNSON

Criminal Law—Diminished Responsibility, Long Ignored in North Carolina, Is Given a Hearing But Not Yet Adopted

North Carolina has never recognized the doctrine of "diminished responsibility," by which a mentally disordered defendant may be deemed incapable of the degree of mens rea required for conviction of the crime for which he is charged, even though his mental illness does not reach the level of insanity.¹ In three recent cases² the North Carolina Supreme Court has indicated that it remains unwilling to adopt

64. See 288 N.C. at 29-32, 215 S.E.2d at 595-97.

1. The doctrine herein referred to as "diminished responsibility" goes by several different names, including "diminished capacity," "partial insanity" and "partial responsibility." F. LINDMAN & D. MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 355 (1961); *People v. Anderson*, 63 Cal. 2d 351, 364, 406 P.2d 43, 52, 46 Cal. Rptr. 763, 772 (1965). In addition, the term "diminished responsibility" is used to describe a quite different doctrine derived from civil and Scottish law whereby the defendant's punishment is reduced if he could not resist the criminal impulse. *Id.* Despite this confusion and the fact that the doctrine "contemplates full responsibility, not partial, but only for the crime actually committed," *State v. Padilla*, 66 N.M. 289, 292, 347 P.2d 312, 314 (1959), "diminished responsibility" is probably the most common term and is the one used by the North Carolina Supreme Court. *E.g.*, *State v. Baldwin*, 276 N.C. 690, 699, 174 S.E.2d 526, 532 (1970).

2. *State v. Shepherd*, 288 N.C. 346, 218 S.E.2d 176 (1975); *State v. Wetmore*, 287 N.C. 344, 215 S.E.2d 51 (1975); *State v. Cooper*, 286 N.C. 549, 213 S.E.2d 305 (1975).

the theory, at least under the label "diminished responsibility." Nevertheless, the court's statement in *State v. Cooper* that one who lacks the mental capacity to premeditate and deliberate cannot lawfully be convicted of first degree murder³ appears to acknowledge the basic theory underlying diminished responsibility, perhaps opening the way for that doctrine in North Carolina.

In *Cooper* the defendant was charged with the murder of his wife and four of his children.⁴ The trial court properly instructed the jury on insanity as a complete defense⁵ and on the elements of first and second degree murder.⁶ The jury was not instructed to consider the evidence of the defendant's mental disorder as it affected the elements of premeditation and deliberation, but the defendant did not request such an instruction.⁷ The jury found the defendant guilty of first degree murder despite considerable evidence that he was a paranoid schizophrenic.⁸

The supreme court, over a strong dissent by Chief Justice Sharp, held that the failure of the trial court to instruct the jury to consider the evidence of defendant's mental disorder on the question of premeditation and deliberation did not amount to reversible error.⁹ The court said that "a defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind . . . or some other cause."¹⁰ However, since the jury's verdict established that the defendant had the mental capacity to know right from wrong at the time of the killings, the court reasoned that it "necessarily follows that he had the lesser, included capacity" to intend to kill.¹¹ The court also noted that the jury, after "proper instructions as to what constitutes premeditation and deliberation," determined that the defendant "did, in fact, premeditate and deliberate upon the intended killings."¹² Accordingly, the court found no error of omission in the trial court's charge.¹³

3. 286 N.C. at 572, 213 S.E.2d at 320.

4. *Id.* at 552, 213 S.E.2d at 308.

5. See text accompanying note 23 *infra*.

6. 286 N.C. at 570-71, 213 S.E.2d at 319-20.

7. *Id.* at 595, 213 S.E.2d at 334 (dissenting opinion).

8. *Id.* at 552-64, 213 S.E.2d at 308-15.

9. *Id.* at 572, 213 S.E.2d at 320.

10. *Id.*

11. *Id.* at 573, 213 S.E.2d at 321.

12. *Id.*

13. *Id.* at 572, 213 S.E.2d at 320.

Chief Justice Sharp agreed with the majority that a person with a mental disorder that prevents his acting with premeditation and deliberation cannot be guilty of murder in the first degree. However, she said the defendant was entitled to the instruction the majority found unnecessary.¹⁴ She would require such an instruction in many such homicide cases even when defense counsel failed to request it:

[An instruction would be required in any case] in which proof beyond a reasonable doubt of a specific intent to kill, formed after premeditation and deliberation, is prerequisite to a conviction for murder in the *first* degree, and . . . in which there is substantial evidence that at the time of the homicide defendant had been and was suffering from a recognized serious mental disease and engaged in abnormal behavior characteristic of such disease.¹⁵

Accordingly, a first degree murder defendant who could not be convicted by use of the felony-murder rule would be entitled to a diminished responsibility instruction if his acts were characteristic of a serious mental disorder.

In *State v. Wetmore*¹⁶ the North Carolina Supreme Court noted that several states had adopted the theory of diminished responsibility, but the court did not consider the matter further because the defendant admitted in his brief that North Carolina had not adopted the doctrine.¹⁷ Despite the lack of discussion in *Wetmore* the court said in *State v. Shepherd*,¹⁸ "In *Wetmore* our Court discussed, but clearly did not adopt . . . the theory of diminished responsibility."¹⁹

Prior to 1975 the court specifically referred to diminished responsibility only once.²⁰ Although a number of jurisdictions have adopted the theory,²¹ the only test of criminal responsibility utilized by North Carolina courts to measure a state of mind has been the *M'Naghten* insanity

14. *Id.* at 595, 213 S.E.2d at 334-35.

15. *Id.* at 592, 213 S.E.2d at 332.

16. 287 N.C. 344, 215 S.E.2d 51 (1975).

17. *Id.* at 356, 215 S.E.2d at 58. The court also cited *Cooper*, both for its restatement of the *M'Naghten* rule and for its discussion of diminished responsibility, but it only implied that *Cooper* rejected the doctrine. *Id.* at 357, 215 S.E.2d at 58. In *Wetmore* the defendant took the stand and in effect admitted premeditation. Thus, despite her dissent in *Cooper*, Chief Justice Sharp agreed that the defendant was not entitled to a diminished responsibility instruction. *Id.* at 358-59, 215 S.E.2d at 59-60.

18. 288 N.C. 346, 218 S.E.2d 176 (1975).

19. *Id.* at 349, 218 S.E.2d at 176.

20. In *State v. Baldwin*, 276 N.C. 690, 174 S.E.2d 526 (1970), the court noted in dictum that several states had adopted a diminished responsibility theory. *Id.* at 699, 174 S.E.2d at 532.

21. See notes 33-35 and accompanying text *infra*.

rule.²² Under the *M'Naghten* rule a mentally disordered defendant is exempt from criminal responsibility "only if, at the time he commits the act which would otherwise be illegal, he was incapable of knowing the nature and quality of his act or of distinguishing between right and wrong with relation thereto."²³ A defendant who does not meet the insanity test is considered wholly sane and fully responsible for the consequences of his acts, for "there is no halfway house on the road to insanity."²⁴

It is a common law principle "that the state of mind with which a person commits a criminal act is material in determining not only whether he should be punished therefor, but also, if he is to be punished, how severely."²⁵ From this principle, which is manifest in any classification of offenses according to degree of mens rea, some jurisdictions have derived the doctrine of diminished responsibility.²⁶ These jurisdictions have said, in effect, that a defendant who was incapable of entertaining the state of mind required for the commission of a crime cannot logically be found guilty of that crime.²⁷ If this reasoning were carried to its logical conclusion, a defendant totally incapable of even a general intent should be absolved of all guilt. In practice, however, diminished responsibility is used only to negate specific intent, "allowing conviction for any lesser-included offense which does not have the requirement of a particular mental element."²⁸

Many states, including North Carolina, have allowed intoxication to negate the elements of premeditation and deliberation necessary for conviction of first degree murder.²⁹ Those jurisdictions that have adopted diminished responsibility have often been persuaded to do so because of the anomalous result of allowing the alcohol or drug user more lenient treatment than is afforded a defendant with a mental

22. See *State v. Helms*, 284 N.C. 508, 513-14, 201 S.E.2d 850, 854 (1974). In 1915 the supreme court suggested that lack of capacity to form a criminal intent would be a complete defense to crime. *State v. Cooper*, 170 N.C. 719, 723, 87 S.E. 50, 52 (1915). Nevertheless, the *M'Naghten* rule was set out immediately following this suggestion, so it is doubtful that the court intended to propose an alternate or supplemental test for criminal capacity.

23. *State v. Benton*, 276 N.C. 641, 652, 174 S.E.2d 793, 800 (1970).

24. *State v. Helms*, 284 N.C. 508, 514, 201 S.E.2d 850, 854 (1974).

25. H. WEIHOFEN, *MENTAL DISORDER AS A CRIMINAL DEFENSE* 177 (1954).

26. See *id.*

27. Comment, *Mental Disorders and Criminal Responsibility: The Recommendations of the Royal Commission on Capital Punishment*, 33 TEXAS L. REV. 482, 492 (1955).

28. Brady, *Abolish the Insanity Defense?—No!*, 8 HOUSTON L. REV. 629, 634 (1971).

29. E.g., *State v. Propst*, 274 N.C. 62, 71-72, 161 S.E.2d 560, 567 (1968).

disorder he cannot control.³⁰ The statement in *Cooper* that a defendant cannot be convicted of first degree murder if he lacked the requisite capacity "due to a disease of the mind, intoxication . . . or some other cause"³¹ indicates that the North Carolina Supreme Court was aware of this anomaly.

Diminished responsibility has been used most commonly in murder cases, to reduce the defendant's crime from first to second degree murder.³² Thus, under California's "rule of diminished responsibility" a defendant who was "suffering from a mental illness that prevented his acting with malice aforethought or with premeditation and deliberation" cannot be convicted of first degree murder.³³ A similar rule has been adopted in the District of Columbia³⁴ and in about one third of the states.³⁵

The North Carolina Supreme Court specifically stated in *Cooper*: "[A] defendant who does not have the mental capacity to form an intent to kill, or to premeditate and deliberate upon the killing, cannot be lawfully convicted of murder in the first degree, whether such mental deficiency be due to a disease of the mind . . . or some other cause."³⁶ Although the court did not use the term "diminished responsibility," this language in *Cooper* is similar to that used by courts in California and other states.³⁷ Consequently, it appears that North Carolina may be on its way toward adopting diminished responsibility, notwithstanding the admission in defendant's brief in *Wetmore* and the reliance thereon in *Shepherd*.

The defining language in *Cooper* is only dictum, because the evidentiary question was not before the court, and a diminished responsibility instruction was found unnecessary. Nevertheless, the statement that a defendant who is unable to premeditate "cannot be lawfully convicted" of first degree murder apparently means, at a minimum, that evidence of mental disorder is relevant to the premeditation issue in first degree murder cases. If this is true, a defendant whose mental disorder

30. *E.g.*, *State v. Padilla*, 66 N.M. 289, 294, 347 P.2d 312, 315 (1959).

31. 286 N.C. at 572, 213 S.E.2d at 320.

32. *F. LINDMAN & D. MCINTYRE*, *supra* note 1, at 355.

33. *People v. Goedecke*, 65 Cal. 2d 850, 855, 423 P.2d 777, 781, 56 Cal. Rptr. 625, 629 (1967).

34. *United States v. Brawner*, 471 F.2d 969, 1000-02 (D.C. Cir. 1972) (en banc).

35. *E.g.*, *State v. Santiago*, 55 Hawaii 152, 516 P.2d 1256, 1258-59 (1973); *see* Annot., 22 A.L.R.3d 1228, 1246-52 (1968).

36. 286 N.C. at 572, 213 S.E.2d at 320.

37. *See* text accompanying notes 33-35 *supra*.

does not reach the level of insanity should be free to introduce evidence to prove his lack of capacity to premeditate.

Of the states that have adopted diminished responsibility only California³⁸ requires a diminished responsibility instruction on the trial court's motion whenever it appears the defendant is relying on the doctrine.³⁹ Although it acknowledged in *Cooper* the relevance of mental illness to the premeditation issue, the court indicated that North Carolina is not ready to join California in requiring a diminished responsibility instruction. New York has refused to require such an instruction on the ground that it is self-evident to a jury "that a defendant who cannot deliberate does not deliberate."⁴⁰ The majority in *Cooper* arrived at the same result as the New York court by taking "judicial notice of the well known fact that a dog . . . may have the mental capacity to intend to kill." Accordingly, the *Cooper* court observed that "[i]t requires less mental ability to form a purpose to do an act than to determine its moral quality."⁴¹ Employing these postulates the court determined that the jury's verdict of guilty established that the defendant had the lesser capacity to intend to kill.⁴²

Although the court may be correct in finding that diminished responsibility instructions are not required, the manner in which the result was reached presents two problems. The first is that the court's reference to a dog's intent to kill obviously refers only to the general intent found in all criminal acts, since a dog surely does not have the capacity to premeditate and deliberate or to possess malice aforethought. The reference to a dog's general intent has no place in a discussion of diminished responsibility, for that doctrine has been applied to specific intent crimes only. The second problem is that the court, in its statement that less mental ability is required to form a purpose to do an act than to determine its moral quality, seems to be recognizing a theory that should not be judicially noticed, since it is not well

38. *People v. Henderson*, 60 Cal. 2d 482, 492, 386 P.2d 677, 682, 35 Cal. Rptr. 77, 82 (1963) (en banc).

39. New Mexico says that such an instruction is required, but it is not clear that the trial court must act on its own motion. *State v. Padilla*, 66 N.M. 289, 293-96, 347 P.2d 312, 315-16 (1959). Several other states seem to be close to the position that a diminished responsibility instruction is required. See, e.g., *State v. Donahue*, 141 Conn. 656, 663-65, 109 A.2d 364, 367-68 (1954); *State v. Gramenz*, 256 Iowa 134, 138-40, 126 N.W.2d 285, 291 (1964); *State v. Vigliano*, 43 N.J. 44, 62-66, 202 A.2d 657, 666-68 (1964).

40. *People v. Moran*, 249 N.Y. 179, 163 N.E.553 (1928) (per curiam).

41. 286 N.C. at 573, 213 S.E.2d at 321.

42. *Id.*

established or authoritatively settled.⁴³

As Chief Justice Sharp's dissent makes clear, *Cooper* was a first degree murder case in which the defendant had a history of mental disorder and engaged in abnormal behavior characteristic of that disorder at the time of the killing.⁴⁴ Unfortunately the majority did not discuss diminished responsibility in this context. Instead, by its reference to general intent crimes, the court indicated that it was unaware that diminished responsibility has ordinarily been applied to specific intent crimes only.

Under the North Carolina homicide statute a murder without deliberation is a lesser crime than murder with deliberation.⁴⁵ The state of the criminal law under this statute provides the prime opportunity to ameliorate the all-or-nothing nature of North Carolina's insanity defense without disrupting the purposes of the criminal law. At a first degree murder trial, when evidence of mental disorder is introduced to show insanity, a jury that finds that a defendant was sane will then determine whether he premeditated and deliberated upon the act. In such a case (of which *Cooper* is an example) it is arguable that, even in the absence of a diminished responsibility instruction, the jury will consider the defendant's mental disorder on the issue of deliberation. A finding that a defendant *did* deliberate presupposes a finding that he *could* deliberate.

On the other hand, if there is no doubt that at the time of his act a

43. "A matter is the proper subject of judicial notice only if it is 'known,' well established, and authoritatively settled." *Hughes v. Vestal*, 264 N.C. 500, 506, 142 S.E.2d 361, 366 (1965). The court in *Hughes* recognized, however, that when the information is not "the controlling or even a significant basis for decision" but is merely "rhetorical and illustrative," appellate courts are not bound by the restrictive judicial notice rule that governs adjudicative facts. *See id.* at 507, 142 S.E.2d at 366. Nevertheless, it appears that if the court in *Cooper* had not believed that it requires less mental ability to form a purpose than to tell right from wrong, it would have required a diminished responsibility instruction. Because the court's statement controlled its decision, the court should have been surer of its factual basis before invoking judicial notice.

If we define morality to include "the idea of predicting the consequences of our actions and being responsible for them," a certain mental level is, of course, necessary for moral behavior. N. WILLIAMS & S. WILLIAMS, *THE MORAL DEVELOPMENT OF CHILDREN* 106 (1970). If this is what the court meant to say, judicial notice might have been appropriate. However, if determining the moral quality of one's acts implies that one will stop those acts if they injure someone else, it is not "established" that determining moral quality requires less mental ability than forming a purpose. Certain scientific experiments have demonstrated that rats and monkeys will forego pleasure to themselves if their actions cause discomfort to other animals. S. DIMOND, *THE SOCIAL BEHAVIOR OF ANIMALS* 119-23 (1970).

44. 286 N.C. at 595-96, 213 S.E.2d at 334-35.

45. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

defendant knew right from wrong with respect to it, he cannot claim insanity. Accordingly, in a jurisdiction in which the only means of testing criminal capacity is the *M'Naughten* insanity test, such a defendant has no opportunity to introduce evidence of mental disorder. If a defendant who is insane nevertheless lacks the capacity to premeditate and deliberate, he ought to be allowed to introduce evidence to show his lack of capacity. If he is not allowed to introduce such evidence, he could be convicted of first degree murder though he lacked the capacity to premeditate at the time of the act. A refusal to admit evidence of lack of capacity is justifiable only if it is true that one who is sane necessarily possesses the mental capacity to premeditate; however, it is questionable that knowledge of right and wrong presupposes that capacity. Since the insanity test is inapplicable to those defendants who are not insane but who do not possess the requisite capacity, North Carolina would do well to supplement its insanity test with diminished responsibility, at least in first degree murder cases.⁴⁶

The only diminished responsibility issue in *Cooper* was whether the trial court must on its own motion instruct the jury to consider evidence of the defendant's mental disorder on the question of premeditation and deliberation. The answer given in *Cooper* was that the trial court need not give this instruction on its own motion.⁴⁷

Cooper also indicates that North Carolina acknowledges the underlying premise of diminished responsibility: a defendant so mentally disordered that he does not have the capacity to premeditate cannot be lawfully convicted of first degree murder. Conversely, *Cooper*, *Wetmore* and *Shepherd* show that North Carolina is willing to dismiss diminished responsibility without fully considering it. To date the North Carolina Supreme Court has had occasion to discuss the doctrine

46. One argument against diminished responsibility is that the defendant who is convicted of a lesser degree of crime because of mental disorder will be released from prison sooner than the supposedly less dangerous criminal who is mentally normal. The statute that provides for the involuntary commitment of dangerous defendants acquitted on grounds of mental illness could not be used against one found guilty, but of a lesser crime. N.C. GEN. STAT. § 122-84.1 (Cum. Supp. 1975). However, because diminished responsibility is being considered in North Carolina only to reduce the defendant's crime from first to second degree murder, he may still receive a maximum sentence of life imprisonment. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975). Of course, the benefits of diminished responsibility in murder cases would be negligible if capital punishment were abolished. See F. LINDMAN & D. MCINTYRE, *supra* note 1, at 355-57, for a survey of the arguments for and against recognizing the defense of diminished responsibility.

47. See text accompanying notes 9 & 13 *supra*. The court did not have to consider the case that would arise if the trial court, after counsel had tried to persuade the jury that there was evidence of insanity, exercised its right to instruct that there was no such evidence. *State v. Melvin*, 219 N.C. 538, 540, 14 S.E.2d 528, 529 (1941).

only with reference to instructions in cases in which the defendant, having pleaded not guilty by reason of insanity, has already introduced evidence of mental disorder. Hopefully, when the issue presented to the court is the admissibility of such evidence to show lack of capacity to premeditate, the court will give diminished responsibility more serious consideration.

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Criminal Law—Sua Sponte Instructions on Defendant's Failure to Testify

Section 8-54 of the North Carolina General Statutes provides that a defendant in a criminal action is a competent witness but that the defendant's failure to testify in his own behalf "shall not create any presumption against him."¹ In several decisions,² the most recent of which is *State v. Caron*,³ the North Carolina Supreme Court has dealt with the issue of whether it is error under section 8-54 for the judge, on his own initiative, to instruct the jury that the defendant has a right not to testify and that no adverse inference is to be drawn from the defendant's silence. Other state and federal courts, dealing with similar statutes, have divided⁴ as to whether such an instruction, given without a defendant's request, so sensitizes the jury to the defendant's silence that an inference of guilt may arise or an existing adverse inference may be

1. N.C. GEN. STAT. § 8-54 (1969) provides:

Defendant in criminal action competent but not compellable to testify.

—In the trial of all indictments, complaints, or other proceedings against persons charged with the commission of crimes, offenses or misdemeanors, the person so charged is, at his own request, but not otherwise, a competent witness, and his failure to make such request shall not create any presumption against him. But every such person examined as a witness shall be subject to cross-examination as other witnesses. Except as above provided, nothing in this section shall render any person, who in any criminal proceeding is charged with the commission of a criminal offense, competent or compellable to give evidence against himself, nor render any person compellable to answer any question tending to criminate himself.

2. *State v. Baxter*, 285 N.C. 735, 208 S.E.2d 696 (1974); *State v. Bryant*, 283 N.C. 227, 195 S.E.2d 509 (1973); *State v. Barbour*, 278 N.C. 449, 180 S.E.2d 115 (1971); *State v. Paige*, 272 N.C. 417, 158 S.E.2d 522 (1968); *State v. Rainey*, 236 N.C. 738, 74 S.E.2d 39 (1953); *State v. Wood*, 230 N.C. 740, 55 S.E.2d 491 (1949); *State v. McNeill*, 229 N.C. 377, 49 S.E.2d 733 (1948); *State v. Jordan*, 216 N.C. 356, 5 S.E.2d 156 (1939); *State v. Horne*, 209 N.C. 725, 184 S.E. 470 (1936).

3. 288 N.C. 467, 219 S.E.2d 68 (1975).

4. *See* Annot., 18 A.L.R.3d 1335 (1968) for a compilation of these cases.