IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM
Plaintiff-Appellee

vs.

YANSHUI JUNG
Defendant-Appellant

Supreme Court Case No. CRA00-004
Superior Court Case No. CF0381-96

OPINION

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Appeal from the Superior Court of Guam
Argued and submitted on February 6, 2001
Hagåtña, Guam

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BEFORE: BENJAMIN J.F. CRUZ, Chief Justice, PETER C. SIGUENZA, JR., and F. PHILIP CARBULLIDO, Associate Justices.

CARBULLIDO, J.:

[1] Defendant Yanshui Jung ("Jung") appeals from his convictions of manslaughter, attempted murder, aggravated assault, and related weapons possession special allegations. The jury found Jung not guilty of murder by reason of insanity, but guilty of manslaughter as a lesser included offense of murder. On appeal, Jung argues, *inter alia*, that (1) the trial court erred in failing to instruct the jury to not consider any lesser included offense if they found Jung not guilty by reason of insanity on the greater offense; (2) the trial court erred in failing *sua sponte* to give an instruction on diminished capacity; (3) his convictions for the lesser included offenses cannot stand because they were beyond the statute of limitations period; and (4) his sentence violated the Double Jeopardy Clause. We find that the jury's determination that Jung was not guilty by reason of insanity on the murder charge precluded a conviction on the lesser included offense ("LIO") and therefore reverse the manslaughter conviction. Further, we find merit in Jung's argument that the trial court erred in failing to give an instruction, *sua sponte*, on diminished capacity, and we therefore reverse and remand for a new trial on all other charges for which he was convicted.

I.

[2] The following evidence was adduced at trial. On or about June 24, 1996, Jung had an argument with De Fa Zhang ("Zhang"), a co-worker and friend, with whom he worked at a vegetable farm in Talofofo. During the course of the argument, a fight ensued and Zhang was struck with a knife and

subsequently died from his injuries. After the attack on Zhang, Jung proceeded to a store located in East Agana. At the store, he confronted his employer, Xin-Tang Dong ("Dong"), and struck Dong with the knife. Dong survived the attack. Jung ran to a nearby service station and told the employees to call the police so they could come and shoot him. Jung was subsequently arrested.

[3] On June 27, 1996, the grand jury returned an indictment charging Jung with Murder as to Zhang (As a First Degree Felony) with the Special Allegation of the Possession and Use of a Deadly Weapon in the Commission of a Felony; Aggravated Assault as to Dong (As a Second Degree Felony); and Attempted Murder as to Dong (As a First Degree Felony) with the Special Allegation. On July 2, 1996, Jung pleaded not guilty by reason of insanity.

[4] On September 4, 1996, Dr. James Kiffer (hereinafter "Dr. Kiffer"), a Clinical Psychologist, filed a forensic evaluation of Jung with the court. *See* Appellant's Excerpt of Record at pp. 3-12 (Forensic Evaluation). Dr. Kiffer concluded that Jung did not appear to be competent to stand trial. According to Dr. Kiffer, Jung did not understand the judicial system and more than likely could not assist his counsel. Jung, however, could communicate with his counsel through a translator. Dr. Kiffer noted that Jung would be able to follow the evidence in the case but probably could not make strategic decisions in his defense. The evaluation further found that Jung suffered from major depression at the time of the alleged conduct and that this depression "affected his capacity to know and understand what he was doing to some degree." Appellant's Excerpts of Record at p. 11. However, the evaluation also found that Jung knew that injuring another party would be wrong but that he had justified his actions because the victims were not living up to their portion of a contract and were berating him. *Id.* Additionally, Dr. Kiffer, recommended that if the

court found that Jung was incompetent, a different mental health professional should evaluate Jung at the appropriate time. *Id.*

[5] Three years later, on June 23, 1999, the trial judge ordered the parties to submit a status memorandum of the case. On August 5, 1999, the court ordered a psychiatric examination to be made by Dr. Joan Gill (hereinafter "Dr. Gill"), a psychiatrist. Her report was filed on September 10, 1999, and concluded that, in her opinion, Jung was competent to stand trial, assist his counsel, follow the evidence, participate in his defense and to be sentenced. Appellant's Excerpts of Record at p. 15. Dr. Gill further stated that Jung was suffering from a severe major depression and an acute stress disorder at the time of the alleged conduct, and that he was acting out his emotional and mental illness, and that he had lacked substantial capacity to know or understand what he was doing. *Id.* at pp. 15-16.

[6] Trial commenced on November 22, 1999 and concluded on December 9, 1999, when the jury returned guilty verdicts as follows: (1) Manslaughter, as a first degree felony and a lesser included offense of Murder (victim Zhang) and the Special Allegation; (2) Aggravated Assault, as a second degree felony (victim Dong); (3) Aggravated Assault, as a third degree felony and a lesser included offense of Aggravated Assault as a second degree felony (victim Dong); (4) Assault, as a misdemeanor and a lesser included offense of Aggravated Assault as third degree felony (victim Dong); and (4) Attempted Murder as a first degree felony (victim Dong) and the Special Allegation. On December 16, 1999, Jung filed motions for an acquittal and a new trial. The court, after hearing arguments, reversed the convictions of Aggravated Assault, as a third degree felony (victim Dong), and of Assault, as a misdemeanor (victim Dong). Appellant's Excerpts of Record at pp. 17-30 (Decision and Order, Jan. 18, 2000). The Jury acquitted

Jung of Murder, as a first degree felony (victim Zhang) by reason of insanity.

[7] Judgment was filed on March 9, 2000, *nunc pro tunc* to March 8, 2000. Jung filed a timely Notice of Appeal.

II.

[8] This court has jurisdiction over a final judgment pursuant to Title 7 of the Guam Code Annotated, sections 3107 and 3108 (1994).

III.

[9] Jung was ultimately convicted and sentenced on three charges: Manslaughter of victim Zhang; Attempted Murder and the Special Allegation of victim Dong; and Aggravated Assault, as a second degree felony, of victim Dong. Jung presents arguments supporting a reversal as to all charges. As set forth below, we reverse the Manslaughter conviction, and reverse and remand the remaining charges for a new trial.

A. Statute of Limitations

1. Standard of Review

[10] Jung challenges his convictions on statute of limitations grounds. The application of a particular statute of limitations is a question of law reviewed *de novo*. *United States v. Manning*, 56 F. 3d 1188, 1195 (9th Cir. 1995).

2. Analysis

[11] In support of his argument, Jung relies on C. C. Marvel, *Conviction of Lesser Offense Against Which Statute of Limitations Has Run, Where Statute Has Not Run Against Offense With Which Defendant is Charged*, 47 A.L.R.2d 887, § 3 (1956), which states the rule that "one cannot be convicted of a lesser offense upon a prosecution for a greater offense which includes the lesser offense, commenced after the statute of limitations has run on the lesser offense." Further, Jung argues that the statute of limitations is jurisdictional and that he has not waived that defense.

[12] The relevant limitations statutes provide that "[a] prosecution for murder may be commenced at any time." Title 8 GCA § 10.10 (1993). Further, while "[a] prosecution of murder shall have no statute of limitation; . . . . [a] prosecution for any other felony shall be commenced within three (3) years after it is committed." Title 8 GCA § 10.20(a),(c) (1993). "A prosecution for any offense which is not a felony shall be commenced within (1) year after it is committed." Title 8 GCA § 10.30 (1993).

[13] In this case, the events upon which Jung was charged with Murder, Attempted Murder and Aggravated Assault occurred on or about June 24, 1996. *See* Appellant's Excerpts of Record at pp. 1-2 (Indictment, June 27, 1996). Jung was indicted by the Grand Jury on or about June 27, 1996. *Id.* As indicated above, Jung was convicted of Manslaughter, as a first degree felony and as a lesser included offense of Murder, Aggravated Assault, as a third degree felony and as a lesser included offense of Aggravated Assault as a second degree felony, and Assault, as a misdemeanor and as a lesser included offense of Assault as a third degree felony. The applicable statute of limitations is three years for the two felonies and one year for the misdemeanor. *See* 8 GCA §§ 10.20(c) and 10.30 (1993).

[14] Jung cited several California cases for the proposition that the statute of limitations is a jurisdictional bar, that is, that the court may not entertain a time-barred prosecution of a defendant convicted of an offense charged after the statute of limitations has run absent an express waiver by the defendant. *See e.g.*, *People v. Williams*, 21 Cal. 4th 335, 87 Cal. Rptr 2d 412 (1999). Although Jung acknowledges that the issue, with respect to a time-barred lesser offense when the greater offense is not time-barred, had not been addressed, he cites and criticizes the holding of *People v. Stanfill*, 76 Cal. App. 4th 1137, 90 Cal. Rptr. 2d 885 (Ct. App. 1999). *Stanfill* held that "a defendant forfeits the right to complain on appeal of conviction of a time-barred lesser included offense where the charged offense was not time-barred and the defendant either requested or acquiesced in the giving of instructions on the lesser offense." *Stanfill*, 76 Cal. App.4th at 1150, 90 Cal. Rptr. 2d at 895.

[15] Jung's arguments are misplaced. First, Jung improperly relies on the Marvel annotation, cited at 47 A.L.R.2d 887. The subject of the annotation is limited in scope to "whether, upon an indictment for a larger crime at a time beyond the period of statutory limitation upon a lesser crime whose elements are included within the larger crime, the accused may be convicted of the lesser offense." Marvel, *supra*, at § 1. Thus, the factual premise of the annotation is distinguished from the instant case wherein the indictment was returned within the statute of limitations for all the LIOs that Jung was convicted. In fact, the annotation cited by Jung noted that

> [w]here a person is indicted for a greater offense than that for which he is convicted, and the indictment is returned within the statutory period applicable to a prosecution for the smaller offense, the indictment operates to suspend the statute, and a conviction may be had for the smaller offense after the statutory period has elapsed. This proposition is represented in a separate annotation.

Id. (footnote omitted). Moreover, the annotation Jung cites refers to the situation where "no prosecution of any sort has been initiated within the period of limitation applicable to the lesser offense." *Id.*

[16] Second, the California cases cited by Jung are factually distinct in the same way as the annotation referenced above. In *People v. Williams*, the defendant was charged by information with perjury on April 7, 1995. *Williams*, 21 Cal. 4th at 338, 87 Cal. Rptr. 2d at 413. The perjury allegedly occurred on or about February 10, 1992. *Id.* On its face, the information was defective because the offense was time-barred. The issue on appeal was whether the statute of limitations in a criminal case was an affirmative defense which was forfeited if not raised before or during trial. *Id.* 21 Cal. 4th at 339, 87 Cal. Rptr. 2d at 414. The California Supreme Court, after a review of previous California precedent, held that "when the charging document indicates on its face that the action is time-barred, a person convicted of a charged offense may raise the statute of limitations at any time." *Id.* 21 Cal. 4th at 341, 87 Cal. Rptr. 2d at 415.

[17] Further, in *Cowan v. Superior Court*, 14 Cal. 4th 367, 58 Cal. Rptr. 2d 458 (1996), the defendant was charged with the commission of three murders that had occurred in 1984, ten years after the fact. Cowan attempted, by plea agreement, to plead guilty to voluntary manslaughter in exchange for a lesser sentence. The California Supreme Court observed that there was no limitations period for prosecuting a murder; however, a prosecution for voluntary manslaughter must have been commenced within six years after commission of the offense. *Cowan*, 14 Cal. 4th at 370-371, 58 Cal. Rptr. 2d at 459. The six year statue of limitations had long since expired by the time the complaint for murder was filed. *Id.* at 371. The issue was whether the defendant could waive the statute of limitations and plead guilty to voluntary manslaughter to avoid prosecution for the more serious charges. *Id.* Although acknowledging the

long line of California cases that held that a defendant may assert the statute of limitations at any time, the court found that a defendant, such as Cowan, should be able to waive the statute of limitations and plead to a time-barred lesser offense but only if it is for his benefit, and he expressly waives the right to assert the statute of limitations after being properly informed. *Id.* 14 Cal. 4th at 372-373, 58 Cal. Rptr. 2d at 461.

[18] Finally, Jung offers the case of *People v. Stanfill*, wherein the defendant was charged with felony embezzlement and tried by jury, but was found guilty of the misdemeanor equivalent, as a lesser offense. *Stanfill*, 76 Cal. App. 4th at 1139, 90 Cal. Rptr. 2d at 887. The California court of appeal held that a defendant forfeits the right to complain on appeal of a conviction of a time-barred lesser included offense where the charged offense was not time-barred and the defendant either requested or acquiesced in the giving of instructions on the lesser offense. *Id.* 76 Cal. App. 4th at 1150, 90 Cal. Rptr. 2d at 895. The court purportedly took up the invitation of the California Supreme Court to address the issue of whether forfeiture should result in the situation where a conviction of a time-barred lesser offense occurs when the charged offense is not time-barred. *Id.* at 1146, 90 Cal. Rptr. 2d at 892. The court reasoned that the rule it announced would remove the incentive for gamesmanship on the part of a defendant, prevent surprise and prejudice to the prosecution, allow the opportunity to amend pleadings to rectify those situations where tolling provisions might apply to the lesser offense, and remove the need for reversal and retrial on that issue which may prejudice both parties. *Id.* 76 Cal. App. 4th at 1148-1149, 90 Cal. Rptr. 2d at 894. The foregoing concerns were balanced with the adverse effects of a forfeiture rule that "could trap an unwary defendant who (1) did not know of the limitations bar, (2) was not apprised of it by trial counsel, and (3)would not have wanted a lesser included offense instruction had he known." *Id.*

[19] The prosecution of Jung, unlike the prosecutions in *Williams*, *Cowan*, and *Stanfill*, was upon an indictment charging Jung with the greater offense, murder, for which there was no statute of limitations but which had additionally been returned within each of the respective LIOs' limitations periods. The Government seizes on this factual distinction and cite two cases in support of its position that Jung's convictions remain valid. Namely, that the statute of limitations for the LIO was tolled by virtue of the fact that the indictment for the greater offense occurred within the statute of limitations of the respective LIOs. *See State v. Diskin*, 1883 WL 8357 at *4 (La. 1883) (holding that an indictment for murder, if filed within a year of after the commission of the offense, interrupts the limitations period for manslaughter); *Howard v. State*, 385 So. 2d 739, 740 (Fla. Dist. Ct. App. 1980). Additionally, the Government cites to *In re McCartney*, 64 Cal. 2d 830, 51 Cal. Rptr. 894 (1966), where a defendant was charged via information with murder approximately one month after the commission of the offense. The defendant there was convicted of second degree murder, but her conviction was overturned on appeal. *Id.* 64 Cal. 2d at 831, 51 Cal. Rptr. at 895. On retrial, she was convicted of voluntary manslaughter, but this conviction was also reversed. *Id.* Defendant's third trial was set to proceed when she moved that the information be dismissed because her conviction of manslaughter was an acquittal of the charged murder and that the information could not be amended to charge manslaughter because the limitations period for manslaughter had run. *Id.* The California Supreme Court rejected her argument on the issue. *Id.* It held that if the information charging murder had been filed after the three year statute of limitations for manslaughter then the statute would have barred a conviction of manslaughter. *Id.* at 832 (citations omitted). However, because the information was filed before the limitations period for manslaughter, the court held that a conviction was

not barred. *Id.*

[20] Jung's waiver argument is inappropriate in the present circumstances because the issue is not whether Jung waived the limitations defense; but rather, whether the indictment for the greater offenses occurred before the limitations period for the lesser offenses expired. An indictment on the greater offense also charges all lesser offenses necessarily included in the greater offense. *Cf. McCartney*, 64 Cal. 2d at 831, 51 Cal. Rptr. at 895 (citations omitted); *see also* Title 8 GCA § 105.58 (1993). Here, the indictment against Jung was returned by the Grand Jury within, at most, three days after the events occurred. Therefore, this first ground for relief lacks merit.

B. Denial of Motion for Acquittal

1. Standard of Review

[21] Jung argues that the trial court erred in denying his Motion for Acquittal on the ground that the court failed to instruct the jury that a finding of not guilty by reason of insanity on the murder charge precludes review of the lesser included offense of manslaughter. We agree. Review of the trial court's ruling on a motion for judgment of acquittal is *de novo*. *People v. Quinata*, 1999 Guam 6, ¶ 9. In conducting this review, courts apply the same test which is used to challenge the sufficiency of the evidence. *Id.* Thus, the court reviews the evidence presented against Jung in a light most favorable to the Government to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (citations omitted). Jung has articulated the issue as whether the trial court erred in failing to instruct the jury that a verdict of not guilty by reason of insanity on the greater offense of Murder precludes

consideration of the lesser included offenses. Thus, the issue involves the trial court's formulation of jury instructions, which is reviewed for an abuse of discretion. *See e.g. United States v. Chastain*, 84 F.3d 321, 323 (9th Cir. 1996). However, whether a trial court's instructions adequately covered a defendant's proffered defense is reviewed *de novo*. *Id.* Additionally, when there is no objection to the jury instructions at the time of trial, an appellate court will review only for plain error. *People v. Perez*, 1999 Guam 2, ¶ 21; *see also* Title 8 GCA § 130.50(b) (1993). Plain error is highly prejudicial error affecting substantial rights. *Perez*, 1999 Guam 2. Such error will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Id.*

2. Analysis

[22] Jung seeks to escape the jury's verdict on the manslaughter charge because of his acquittal on the murder charge and the trial court's error in instructing the jury as to the effect of the insanity defense. Guam's codification of the affirmative defense of insanity provides:

> A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental illness, disease or defect, he lacked substantial capacity to know or understand what he was doing, or to know or understand that his conduct was wrongful, or to control his actions.

Title 9 GCA § 7.16 (1994).

[23] A person who is criminally insane is excused from criminal responsibility for his actions because, due to mental disease or defect, he lacks the substantial capacity to distinguish right from wrong with respect to the act or to adhere to the right or refrain from the wrong. Under the insanity statute, if a defendant is acquitted by reason of insanity for an offense, he is excused and bears no criminal responsibility

for his *conduct*. *See id*. Lesser included offenses stem from the same conduct upon which the charge on the greater offense is based. *See* Title 8 GCA § 105.58 (1994)[1]. If the conduct forming the greater offense is completely excused, a conviction on a lesser included offense is necessarily precluded. *See Ayrado v. State*, 431 So.2d 320, 321 (Fla. Dist. Ct. App. 1983) (holding that a guilty verdict as to the lesser offense must be overturned because it was totally inconsistent with the finding that the defendant was not criminally responsible for the greater offense by reason of insanity); *see also Biglow v. State*, 683 So.2d 176, 176-77 (Fla. Ct. App. 1996) ("Where a defendant is charged with unlawful display of a firearm during the commission of a felony and found not guilty by reason of insanity of the underlying felony, a conviction for display of the firearm cannot stand and an acquittal must be entered.") (citations omitted). Thus, when Jung was found not guilty by reason of insanity on the greater offense of murder, the jury should have been instructed that they could not consider the lesser included offenses. This conclusion is buttressed

[1] That section provides:

Guilt of Included Offense Permitted: Defined.

(a) The jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is included in that with which he is charged.

(b) An offense is included under Subsection (a) when:

(1) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged;

(2) It consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

(3) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

8 GCA § 105.58.

by the existence of provisions of the Criminal and Correctional Code which mandate that upon acquittal of a defendant for the reason of insanity the trial court has certain responsibilities including the determination of whether commitment is warranted or the court orders the defendant discharged from custody. *See* Title 9 GCA §§ 7.28, 7.31 and 7.34 (1994).

[24] However, our holding with respect to the LIO conviction of manslaughter has no bearing on the convictions of Attempted Murder and Aggravated Assault of victim Dong. In *State v. Brown*, 465 N.E.2d 889 (Ohio 1984), the defendant was indicted on three counts of rape, one count of gross sexual imposition, one count of kidnapping and one count of robbery. *Id.* at 890. At trial, the defendant raised the defense of insanity. The jury found him not guilty by reason of insanity as to two counts of rape and guilty as to the remaining counts in the indictment. *Id.* at 891. The Supreme Court of Ohio affirmed. *Id.* at 892. The court held that there was testimony that the defendant could fade in and out of insanity and that the jury could therefore have properly found that the defendant met his burden of proof on the insanity issue as to two rape charges and that guilty verdicts are not necessarily inconsistent or contradictory. *Id.*

[25] Similarly, the jury in this case had been instructed as follows: "Separate consideration on multiple counts. A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." Transcript, vol. VII(B) of VIII, p. 40 (Closing Jury instructions, Dec. 6, 1999). By contrast, the instructions for the conviction of lesser included offenses generally provided that if the jury was not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged then the jury may nevertheless convict the defendant of any lesser crime, if the jury was convinced beyond a reasonable doubt that the defendant was guilty of such lesser crime. *See*

Transcript, vol. VII(B) of VIII, pp. 38-40 (Closing Jury Instructions, Dec. 6, 1999).

[26] Thus, similar to the facts in *Brown*, Jung was acquitted on a charge by reason of insanity but found guilty as to other counts in the indictment. Because the jury could have found Jung to be insane on the count of murder and its LIO of victim Zhang, and not insane on the counts of Attempted Murder and Aggravated Assault of victim Dong, there was nothing inconsistent or contradictory about the jury's verdict on the separate counts.

[27] However, as discussed below, because the trial court failed to instruct the jury on the defense of diminished capacity, we reverse for a new trial on the Attempted Murder and Aggravated Assault charges.

C. Failure to give Diminished Capacity Instruction

1. Standard of Review

[28] Jung argues that the trial court erred in failing to instruct the jury, *sua sponte*, on the defense of diminished capacity. Jung did not object to the jury instructions at the time of trial. When there is no objection to the jury instructions at the time of trial, an appellate court will review only for plain error. *People v. Perez*, 1999 Guam 2, ¶ 21; *see also* 8 GCA § 130.50(b) (1993).[2] Plain error is highly prejudicial error affecting substantial rights. *Id.* (citations omitted). Such error will be found only where necessary to prevent a miscarriage of justice or to maintain the integrity of the judicial process. *Id.*

[2]Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Title 8 GCA § 130.50(b) (1993).

2. Diminished Capacity

[29] Jung argues that there was evidence to support his assertion that he was suffering from a mental disease or defect and that, even if it was not enough to prove insanity as to all counts of the indictment, the jury should have been instructed on diminished capacity. Specifically, the jury should have been informed that the evidence could have been used to negate the mental state element, the *mens rea*, required for conviction of the offenses for which he was charged and convicted. The Government argues that the defense of diminished capacity is applicable only to specific intent crimes and that the offenses Jung was convicted of were general intent crimes. We agree with Jung and therefore find that a new trial is warranted on the Attempted Murder and Aggravated Assault charges.

[30] Generally, the doctrine of diminished capacity[3] allows a criminal defendant to introduce evidence of a mental disease, defect or abnormality during trial to show that the defendant, although legally sane, was not capable of forming the necessary mental state required of the crime for which he is charged. Jennifer Kunk Compton, Note, *Expert Witness Testimony and the Diminished Capacity Defense*, 20 AM. J. TRIAL ADVOC. 381, 382 (Winter 1996-1997). "The jury uses the evidence to consider if the defendant's abnormality prevented him from having the specific mental state of the crime charged." *Id.*

[31] Diminished capacity is a concept separate and distinct from the defense of insanity. A successful insanity defense result is a finding of not guilty by reason of insanity and usually the subsequent commitment of the defendant. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 4.7

[3]The concept of the use of mental abnormality evidence has been called "diminished capacity" or "diminished responsibility" or "partial responsibility". *See Rhode Island v. Doyon*, 416 A.2d 130, 134 (R.I. 1980). For purposes of the present discussion, we will use what appears to be the most prevalent term, "diminished capacity".

(1986); *see e.g.*, Title 9 GCA § 7.34 (1994) (outline of the procedure to follow after an acquittal because of mental disease or defect). Diminished capacity, however, does not similarly absolve a defendant from criminal responsibility. It is only used to show that the defendant, although legally sane, was not capable of forming the necessary mental state required of the crime for which he is charged. LAFAVE & SCOTT, *supra*, at § 4.7; *see also United States v. Pohlot*, 827 F.2d 889, 897 (3d Cir. 1987) (noting that diminished capacity does not provide any grounds for acquittal not provided in the definition of the offense). As such, rather than completely absolving the defendant of criminal responsibility, diminished capacity is often used to reduce the defendant's guilt to a lesser offense. *State v. Sessions*, 645 P.2d 643, 644 (Utah 1982)(holding that "unlike the insanity defense, diminished capacity is not a complete defense; in most cases it reduces a defendant's guilt to a lesser included offense which requires only a general intent").

[32] In general, American jurisdictions take one of four views of permitting or disallowing the diminished capacity defense. Compton, *supra*, at 387-88.

[33] The majority view allows the admission of any evidence of a mental abnormality to negate the essential element of state of mind of the offense charged. *Id.* at 388-89. It essentially is nothing more than a recognition that relevant evidence is admissible. *Id.* (citing MODEL PENAL CODE § 4.02(1) (1980)). This view recognizes that, because a defendant must possess a certain state of mind in order to be convicted of that crime, any evidence showing the absence of that state of mind is relevant and thus admissible to negate that element. *Id.*; *see also United States v. Pohlot*, 827 F.2d 889 (3d Cir. 1987) (illustrating the strict *mens rea* approach).

[34] The Government argues in favor of the second view. This view, adopted in some jurisdictions, allows the admission of evidence of a mental abnormality but only to negate a specific intent element of the offense charged. Compton, *supra*, at 391. In other words, the evidence is admissible; however, it is limited to specific intent offenses. The leading case for this view is *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), *superceded by statute as stated in Shannon v. United States*, 512 U.S. 573, 114 S.Ct. 2419 (1994). According to *Brawner*:

> expert testimony as to a defendant's abnormal mental condition may be received and considered, as tending to show, in a responsible way, that defendant did not have the specific mental state required for a particular crime or degree of crime -even though he was aware that his act was wrongful and was able to control it, and hence was not entitled to complete exoneration.

Brawner, 471 F.2d at 998. One rationale advanced for the limitation of the doctrine to specific intent crimes was articulated by the Supreme Court of Alaska in the case of *Mill. v. State*, 585 P.2d 546 (Alaska 1978). The *Mill* court pointed out that Alaska's statute on the defense of insanity provided that "a person cannot be held responsible for his criminal conduct if at the time of the conduct, he lacks the substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." *Mill*, 585 P.2d at 550 (citation omitted). It reasoned that:

> [i]f the doctrine of diminished capacity were available to show the defendant's lack of ability to form a general intent to perform a prohibited act, it would be functionally indistinguishable from the defense of mental disease or defect and would serve only to lessen the degree of mental incapacity necessary to constitute a complete "insanity" defense. The defendant would no longer have to prove that he was substantially incapable of making choices or conforming his actions to law. He would need only prove that his mental capacity had been in some lesser way diminished.

Id. at 550-51.

[35] The third view of diminished capacity, adopted in a handful of jurisdictions, allows the admission of evidence of mental abnormality only in homicide cases to negate malice or premeditation as required as an element of the offense of homicide. Compton, *supra*, at 392-93.

[36] A fourth view, espoused by a few jurisdictions, holds that any evidence of mental abnormality that cannot show the defendant was legally insane is inadmissible. Compton, *supra*, at 394-95. An example of this approach is found in Alabama. *See Barnett v. State*, 540 So. 2d 810 (Ala. Crim. App. 1988). There the court observed that Alabama had adopted the criterion for insanity as contained in the Model Penal Code section 4.01 but that it did not adopt the accompanying diminished capacity provision, section 4.02(1). *Id.* at 812. Therefore, under the approach adopted by Alabama, "a defendant must either establish his insanity as a complete defense to or excuse for the crime, or he must be held to full responsibility for the crime charged." *Id.* (citation omitted).

3. Guam Codification

[37] Guam has adopted the Model Penal Code's articulation of the doctrine of diminished capacity. That principle is contained in 9 GCA § 7.19 which provides: "Evidence that the defendant suffered from mental illness, disease or defect is admissible whenever it is relevant to prove the defendant's state of mind." Title 9 GCA § 7.19 (1994). Unlike the insanity defense, *see* 9 GCA §§ 7.16, 7.22, diminished capacity as codified by 9 GCA § 7.19 is not an affirmative defense that justifies or excuses conduct otherwise criminal; but rather serves to negate the *mens rea* element of the crime charged. It permits the introduction of evidence which is relevant to the question of whether the prosecution has proven the required mental state beyond a reasonable doubt.

[38] Initially, we recognize that because Guam's legislature adopted both the insanity defense and diminished capacity provisions of the Model Penal Code, the legislature did not intend to limit the use of evidence of mental illness, disease or defect to proving legal insanity. We therefore reject the rule in those jurisdictions such as Alabama that do not recognize the doctrine of diminished capacity and limit the use of evidence of mental abnormality to proving that the defendant was insane.

[39] Furthermore, we agree with the majority view and are convinced that a better use of the doctrine is to permit the admission of evidence to negate the *mens rea* element of the offense charged, whether or not a general or specific intent offense is involved. *See Hendershott v. People*, 653 P.2d at 391-92 (holding that diminished capacity applies even to crimes with mental states of "knowingly" and "recklessly"); *State v. Abbott*, 622 A.2d 723 (Me. 1993) ("intentionally" or "knowingly"); *State v. Smith*, 960 P.2d 877 (Or. App. 1998) (applying diminished capacity to crime committed "knowingly"); *State v. Burge*, 487 A.2d 532 (Conn. 1985) (applying diminished capacity to crime committed "recklessly"); *but see State v. Baker*, 691 P.2d 1166 (Haw. 1984) (holding that diminished capacity is inapplicable to general intent crime committed "recklessly"); *United States v. Martinez*, 49 F.3d 1398 (9th Cir. 1995) (superceded by statute as indicated in *United States v. Randolph*, 93 F.3d 656, 661-662 (9th Cir. 1996)).

[40] The view that the diminished capacity defense should be limited to specific intent crimes has been criticized in that,

> it seems inconsistent to limit mental abnormality evidence to specific intent crimes, while acknowledging there are other states of mind that may be required as elements of a crime. When a court limits the use of such mental abnormality evidence to negate specific intents, the defendant is, likewise, not allowed to use evidence to negate general intent. Thus, a problem arises when other states of mind make up the elements of a crime, and a

> defendant is allowed to present evidence to show the absence of the required state of mind, but unable to use mental abnormality evidence to negate general intent as well. The courts have given no logical answer to this dichotomy.

Compton, *supra*, at 392 (footnotes omitted).

[41] In *Hendershott v. People*, 653 P.2d 385 (Colo. 1982), the Supreme Court of Colorado rejected the rule that the evidence of diminished capacity is limited to specific intent crimes. The issue was whether a defendant may offer mental impairment evidence to contest the culpability element for nonspecific intent crimes. In *Hendershott*, the trial court precluded the defendant's introduction of evidence of mental impairment to negate the requisite culpability for the crime charged against him, *to wit*, an offense whose mental states were knowingly and recklessly. *Id.* at 388. The appellate court reversed the defendant's conviction. *Id.* The court held that "reliable and relevant evidence of mental impairment is admissible, upon proper foundation, to negate the culpability element of the criminal charge." *Id.* at 394. The court stated that its holding was consistent with the Model Penal Code's provision regarding admissibility of such evidence. *Id.* at n.6. The court further reasoned that an accused is entitled to the presumption of innocence on all elements of a charge and is protected from conviction unless the prosecution establishes the requisite *mens rea* by proof beyond a reasonable doubt. *Id.* at 393. The court observed that preventing the defendant from introducing such evidence leaves the jury with only the single evidentiary consideration of whether the prosecution has met its burden of proof and results in a *de facto* presumption which clashes with the presumption of innocence. *Id.* Similarly, concerns with respect to the constitutional standard of proof are implicated in that "[d]enying the defendant any opportunity to controvert the prosecution's case by reliable and relevant evidence of mental impairment, in addition to cutting against our traditional concept

of the adversary system, downgrades the prosecution's burden to something less than that mandated by due process of law." *Id*.

[42] We agree that the constitutional burden of proof imposed upon the prosecution as to each element of an offense, most especially the mental state, should not be circumvented or otherwise diminished by precluding the admission of reliable evidence to counteract the government's proof of the issue. *See id.*; *see also Pohlot*, 827 F.2d at 900-901 (noting the constitutional concerns of barring mental abnormality evidence on the issue of *mens rea*). Therefore, we interpret the diminished capacity statute as allowing the admission of evidence of mental illness, disease or defect to negate the *mens rea* element of the crime charged, whether or not it is a specific or general intent crime.

[43] Further, the limitation on the use of evidence of mental abnormality to homicide cases is highly controversial and suffers from the same difficulty justifying the limitation in specific intent crimes outlined above. Compton, *supra*, at 393. We therefore reject the view that allows the admission of evidence of mental abnormality only in homicide cases to negate malice or premeditation as required as an element of the offense of homicide.

[44] Our adoption of the majority view, and consequent rejection of the other three views of the diminished capacity defense, is further supported by a plain reading of the diminished capacity statute. The language of the statute does not limit its application to specific intent offenses or homicide prosecutions, *see* 9 GCA § 7.19, and the existence of the diminished capacity statute reveals the legislative intent that evidence of mental abnormality should not be limited to proving legal insanity.

[45] The issue then becomes whether an instruction to the jury should be given on the use of the evidence of mental abnormality, disease or defect as it pertains to the invocation of diminished capacity. There is a split of authority in those jurisdictions that have recognized the doctrine of diminished capacity. *See* LAFAVE & SCOTT, *supra*, at § 4.7 n.2.1 (Treatise Pocket Part 2001). For example, the Kansas Supreme Court has held that a trial court is not required to give an instruction on diminished capacity. *State v. Maas*, 744 P.2d 1222, 1227 (Kan. 1987) (citing *State v. Jackson*, 714 p.2d 1368 (Kan. 1986)). In that case, the defendant was convicted of aggravated kidnapping, rape, aggravated assault, terroristic threat and criminal trespass. The defendant asserted his intent to rely on the defense of insanity and thus the issues in dispute were whether the defendant was insane at the time of the offenses and whether his mental condition was of such a nature as to prevent him from having the specific intent necessary to commit certain offenses. *Id.* at 1223. In Kansas, the doctrine of diminished capacity is applicable to specific intent crimes. *Id.* at 1227. The defendant raised the issue that it was error for the trial court to refuse to give an instruction on diminished capacity because four of the charges against him were specific intent crimes. The Kansas Supreme Court rejected the argument relying on prior case law holding that the trial court was not required to give a specific instruction. *Id.* The court found that the jury was adequately provided with the law when the trial court gave the insanity instruction but rejected the defendant's diminished capacity instruction, and they were instructed on all the lesser include offenses involved in the specific intent crimes. *Id.*

[46] We note, however, that although the court in *Maas* found that a specific instruction on diminished capacity was not necessary, a majority of the court was of the opinion that "it would be better practice for the trial court to give an instruction on diminished capacity where such an instruction is reasonably

necessary to inform the jury of the effect of a defendant's diminished capacity on the specific intent required for the crime charged." *Id.*; *see also State v. Phipps*, 883 S.W.2d 138 (Tenn. Crim. App. 1994)[4], *rev'd after remand by* 959 S.W.2d 538 (Tenn. 1997). An example of such instruction reads:

> Diminished mental capacity of the defendant not amounting to insanity is not a complete defense to a criminal charge, but when a particular intent or other state of mind is a necessary element of the offense charged, diminished mental capacity may be taken into consideration in determining whether the accused was capable of forming the necessary specific intent or state of mind.

Maas, 744 P.2d at 1227-1228.

[47] By contrast, other jurisdictions mandate a specific instruction on diminished capacity. For example, in New Jersey, the trial judge is obliged to instruct the jury to consider relevant evidence tending to show that the defendant did not have the requisite state of mind to commit the offense charged. *State v. Johnson*, 706 A.2d 1160, 1175 (N.J. Super. Ct. App. Div. 1998). An example of a charge to the jury on the issue of diminished capacity reads: "Now, as to certain counts, evidence has been produced alleging that defendant suffered from a mental disease or defect. You may consider that evidence in determining whether or not the State has proven beyond a reasonable doubt the mental states required for those counts." *Id.* at 1175. The trial court re-iterated those instructions at times to ensure proper context. *Id.; cf. Barrett v. State*, 772 P.2d 559, 564-565 (Alaska 1989).

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[4] In that case, the court held that "[w]hile nothing in Tennessee law requires that the trial court instruct the jury that expert testimony may be considered in determining whether the appropriate mental state exists, a trial judge must not issue instructions that will have the probable effect of excluding relevant, probative, and admissible evidence from jury consideration on the element of intent." *See Phipps*, 883 S.W.2d at 152.

[48] We think that the better practice in appropriate cases warranted by the facts would be a specific instruction to the jury that it may consider evidence of the defendant's mental illness, disease or defect on the issue of whether the prosecution's burden of proof beyond a reasonable doubt of each and every element of the charge against him.[5]

4. Plain Error Analysis

[49] We now turn to the application of the above discussion to the facts of the instant case. First, it is not disputed that the evidence proffered by the defendant on his mental abnormality was admitted. The evidence was admitted without limitation. Neither party requested an instruction on diminished capacity. Thus, the determinative inquiry is whether the failure of the trial judge to *sua sponte* instruct the jury on diminished capacity constituted plain error.

[50] Plain error is invoked to prevent a miscarriage of justice or to preserve the integrity and the reputation of the judicial process. *People v. Evaristo*, 1999 Guam 22, ¶ 23-24; *People v. Ueki*, 1999 Guam 4, ¶ 17 (citing *United States v. Olano*, 507 U.S. 725, 736, 113 S.Ct. 1770, 1776 (1993)). Consideration must be paid to all the circumstances at trial including the strength of the evidence against the defendant. *United States v. Campbell*, 42 F.3d 1199, 1204, (9th Cir. 1993) (citation omitted). There are limitations on a reviewing court's authority to correct plain error: (1) there must be an actual error and not a waiver of rights; (2) the error must be plain in that it is "clear" or "obvious" under current law; (3) the error was prejudicial in that it affected the outcome of the proceedings; and (4) the reviewing court's

[5] We reject *People v. Manalo*, Crim. No. 94-00095A, 1995 WL 604385, * 2 (D. Guam App. Div. Sept. 13, 1995), to the extent that the opinion stands for the proposition that giving an instruction on the insanity defense satisfies giving a separate diminished capacity instruction when evidence of mental abnormality is admitted to negate the mental element of the offense charged.

discretion should be employed only in those cases in which a miscarriage of justice would otherwise result. *Olano*, 507 U.S. at 732-736, 113 S.Ct. at 1776-78.

[51] The jury had before it evidence that was relevant to the consideration of whether the prosecution had proved, beyond a reasonable doubt, the mental state elements of the offenses charged against Jung. Evidence was adduced at trial that Jung was brought by the victim, Dong, to work at a farm. Transcript vol. VI of VIII at p. 11 (Trial, Dec. 2, 1999). Jung testified to the adverse working conditions at the farm, essentially working twelve to fifteen hours a day, seven days a week from 1993 to the date of the incident. Transcript, vol. VI of VIII at p. 14 (Trial, Dec. 2, 1999). The work had the effect of weight loss and that Jung began noticing that his "brain start[ed] to hurt" and began having suicidal thoughts. Transcript, vol. VI of VIII at p. 16 (Trial, Dec. 2, 1999). Jung further testified about the external pressures from family and its effect on his mental state. Transcript, vol. VI of VIII at pp. 21-23 (Trial, Dec. 2, 1999). Additionally, he testified as to the feeling of helplessness to protect himself and his family. Transcript, vol. VI of VIII at p. 28 (Trial, Dec. 2, 1999). Jung described that he had problems concentrating at work yet continued to perform mechanically. Transcript, vol. VI of VIII at p. 40 (Trial, Dec. 2, 1999). He described the incident involving the victim Zhang, his co-worker, and that he had picked up the knife and hit the victim. Transcript, vol. VI of VIII at p. 44 (Trial, Dec. 2, 1999). He described being in a dream-like state. Transcript, vol. VI of VIII at p. 45 (Trial, Dec. 2, 1999).

[52] Two mental health experts were called to testify on Jung's behalf. Dr. Kiffer, the first expert, was qualified by the court as an expert in clinical psychology with a sub-specialty in forensic psychology. Transcript, vol. IV of VIII, at p. 29 (Trial, Nov. 30, 1999). Dr. Kiffer testified that he had examined Jung

and had concluded that Jung suffered from major depression. Transcript, vol. IV of VIII, at p. 35 (Trial, Nov. 30, 1999). Kiffer had indicated that certain symptoms of Jung had affected his opinion, namely, Jung's complaints of headaches, feelings of stress, and difficulty concentrating or focussing. Transcript, vol. IV of VIII, at p. 36 (Trial, Nov. 30, 1999). He also indicated that Jung had been suffering from these symptoms for some time. Transcript, vol. IV of VIII at p. 36 (Trial, Nov. 30, 1999). Additionally, Dr; Kiffer mentioned that Jung had had suicidal thoughts. Transcript, vol. IV of VIII, at p. 41 (Trial, Nov. 30, 1999). Dr. Kiffer stated that stress or pressure can alter the brain's chemistry. Transcript, vol. IV of VIII, at p. 41 (Trial, Nov. 30, 1999). On cross-examination, Dr. Kiffer testified to a scale of assessment of a person's capacity to know and understand wrongfulness. Transcript, vol. IV of VIII, at p. 66 (Trial, Nov. 30, 1999). Dr. Kiffer admitted that it had been the first time he had used the scale and that it had arose out of a struggle, among other professionals, with the concept of diminished capacity and just where substantial capacity fell. Transcript, vol. IV of VIII, at p. 66 (Trial, Nov. 30, 1999). Dr. Kiffer admitted that the use of the scale assessment was misleading because he did not think that there may be an inability to measure capacity. Transcript, vol. IV of VIII, at p. 67 (Trial, Nov. 30, 1999). Dr. Kiffer finally admitted, after reviewing the police reports and a video tape of Jung, that Jung did not lack substantial capacity. Transcript, vol. IV of VIII, at p. 68 (Trial, Nov. 30, 1999).

[53] Jung's second expert, Dr. Gill, was qualified by the court as an expert in the field of psychiatry. Transcript, vol. IV of VIII, at p. 92 (Trial, Nov. 30, 1999). Dr. Gill testified that, in her opinion, Jung was suffering from a major depressive disorder and an acute stress disorder at the time of the incident. Transcript, vol. IV of VIII, at p. 98 (Trial, Nov. 30, 1999). She further testified that Jung was suffering,

at the time of her interview, from post-traumatic stress disorder. Transcript, vol. IV of VIII, at p. 98 (Trial, Nov. 30, 1999). Dr. Gill testified that Jung had reported symptoms indicative of a major depressive episode. Transcript, vol. IV of VIII, at pp. 99-106 (Trial, Nov. 30, 1999). Dr. Gill testified that she had also diagnosed Jung as having an acute stress disorder. Transcript, vol. IV of VIII, at p. 111 (Trial, Nov. 30, 1999). Dr. Gill explained that major depression was a mood disorder whereas an acute stress disorder is an anxiety disorder and more physiological in nature. Transcript, vol. IV of VIII, at p.112 (Trial, Nov. 30, 1999). Dr. Gill testified that, in her opinion, the major depressive episode and the acute stress disorder experienced by Jung affected his thinking and his actions. Transcript, vol. IV of VIII, at p. 135 (Trial, Nov. 30, 1999). Dr. Gill testified that she believed that Jung, as a result of mental disease or defect, had a diminished capacity. Transcript, vol. IV of VIII, at p. 192 (Trial, Nov. 30, 1999). She testified that the psychology of victimization, the acute stress, and the major depression, affected Jung's perception of events. Transcript, vol. IV of VIII, at p. 192 (Trial, Nov. 30, 1999).

[54] Thus, significant evidence was before the trial court with respect to the existence or non-existence of the requisite *mens rea*, or in the alternative, the capacity of Jung to form the requisite mental states of the respective offenses. We also note that in this case: (1) the evidence was admitted;(2) the jury was instructed on the burden of the government to prove guilt beyond a reasonable doubt;(3) the jury was instructed to consider all the evidence in the case and if it has a reasonable doubt that the defendant is guilty of the charge then it must acquit; (4) the jury was instructed to consider any statement made, done or omitted by the defendant and all other facts and circumstances in evidence which indicate his state of mind; (5) the jury was instructed as to all the culpable mental states at issue; (6) the jury was instructed that intent

and knowledge are usually established by surrounding facts and circumstances as of the time the acts in question occurred; (7) the jury was instructed on lesser included offenses; (8) the jury was instructed on the essential elements of the respective crimes that the government had to prove; and (9) the jury was instructed that it could consider evidence of the defendant's mental condition before or after the crimes to decide whether defendant was suffering from mental illness, disease or defect at the time of the crimes.

[55] However, we are of the opinion that notwithstanding these circumstances the jury may not have known it was permitted to considered the evidence of mental abnormality on the issue of *mens rea*. Jung here had posited the affirmative defense of insanity. As such, the burden of proof for that claim rested upon Jung. The instructions given, especially with reference to the effect of mental illness, disease or defect may have misled the jury into believing that the evidence was only relevant to the issue of insanity. Specifically, the court instructed:

> Now an instruction on mental illness, disease or defect, commonly referred to as insanity. . . .The defendant claims not to have been criminally responsible at the time of the crimes. Mental illness, disease or defect is a defense to the charges. The mental responsibility of the Defendant at the time of the crime charged is therefore a question for you to decide. . . .The defendant must prove mental illness, disease or defect at the time by a preponderance of the evidence – that means evidence that has more convincing force and greater probability of truth than that opposed to it.

Transcript, vol. VII(B) of VIII, at pp. 45-46 (Closing Jury Instructions, Dec. 6, 1999). Thus, in this case where the issue of the mental element is determinative of Jung's guilt, the instructions as given may have excluded the evidence of Jung's mental condition from the jury's consideration of *mens rea* and inextricably bound the relevance of mental abnormality to the issue of insanity. *Cf. Pohlot*, 827 F.2d at 894.

[56] Because Jung did not request a charge dealing with diminished capacity, the failure to deliver such a charge can lead to reversal only if it constitutes plain error. A finding of plain error in turn, must rest on a conclusion that the error was prejudicial in that it affected the outcome of the proceedings. *Olano,* 507 U.S. at 734, 113 S.Ct. 1777-78. We are satisfied that this is the case here. Jung's mental condition was at the heart of the case. The jury found Jung insane as to the charge of Murder as a first degree felony, therefore, it is not inconceivable that the jury could have found reasonable doubt as to the *mens rea* element of the crimes charged in light of the evidence of Jung's mental condition. *See State v. Nataluk*, 720 A.2d 401, 407 (N.J. App. Div. 1998) (citing *State v. Serrano*, 517 A.2d 509, 512 (N.J. Super. Ct. App. Div.1986) *certif. denied*, 526 A. 2d 175 (N.J. 1987)). "[E]rrors in charging the jury are 'poor candidates for rehabilitation under the harmless error philosophy'." *Id.* (citing *State v. Vick*, 566 A.2d 531 (N.J. 1989)). In this instance, therefore, the failure to charge the jury was not harmless error.

[57] Further, in the instant case, the jury was not given any indication that the evidence of mental illness, disease or defect was relevant to determining the specific *mens rea* element of each respective crime. *Cf. Barrett*, 772 P.2d at 564-565 (1989)(holding that the trial court could have adequately conveyed the significance of the diminished capacity statute by instructing the jury that the state had the burden of proving the essential mental state element of "knowingly", and an additional instruction that in determining whether defendant acted knowingly, the jury should consider any evidence of mental illness which defendant may have been suffering at the time he acted). Such instruction, though not explicitly illustrating the distinction between the use of evidence of mental illness, disease or defect as it applies to the insanity defense *vis-a vis* the diminished capacity defense, would likely preclude a finding of plain error.

[58] We are cognizant that the concepts inherent in criminal trials, such as *mens rea*, diminished capacity, and insanity, can be confusing to those trained in the law. Thus, it is not at all surprising that such concepts may confound a jury composed of average members of the community. The instructions given in this case wholly failed to clarify for the jury that evidence of mental illness, disease or defect was relevant to show that Jung was insane *as well as* that he lacked the mental state required for conviction of the crimes of which he was charged. Therefore, under the circumstances of this case, an instruction on the diminished capacity defense should have been submitted to the jury. The failure to do so constituted plain error. Accordingly, the convictions of the Attempted Murder and Aggravated Assault must be reversed and the matter remanded for a new trial on those charges.

[59] That being so, there is no need to consider Jung's alternative contentions that the failure of his counsel to make a motion to suppress Jung's confession and video taped re-enactment and to prepare the defense experts should be grounds to set aside the convictions by reason of inadequate representation of counsel. It is also unnecessary to consider Jung's argument that he was improperly sentenced to consecutive sentences for his convictions of Attempted Murder and Aggravated Assault upon the victim Dong.

IV.

[60] We hold that, as a matter of law, an acquittal of a greater offense on the basis of criminal insanity precludes conviction of any lesser-included offenses. Accordingly, we **REVERSE** the conviction on the charge of Manslaughter. Additionally, we hold that under the diminished capacity statute, 9 GCA § 7.19,

evidence of mental illness, disease or defect is admissible if relevant to determine whether the government had met its burden of proof with respect to the mental element of the offense charged, whether or not it is a specific or general intent crime. We find, under the circumstances in this case, that the failure of the trial court to *sua sponte* instruct the jury on the diminished capacity defense was plain error. Therefore, we **REVERSE** the convictions for Attempted Murder and Aggravated Assault, and **REMAND** for a new trial on these charges.

F. PHILIP CARBULLIDO
Associate Justice

PETER C. SIGUENZA, JR.
Associate Justice

BENJAMIN J. F. CRUZ
Chief Justice