No. 56189-1-II

101640-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

LARISA DIETZ, Petitioner

APPEAL FROM THE SUPERIOR COURT
OF CLALLAM COUNTY

THE HONORABLE JUDGE SIMON BARNHART

PETITION FOR REVIEW

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
253-445-7920

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I. IDENTITY OF PETITIONER

Petitioner Larisa Dietz, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

The Court of Appeals denied Ms. Dietz's supplemental briefing detailing ineffective assistance of counsel for offering incorrect jury instructions which the trial court used. The Court affirmed her conviction based on invited error. Ms. Dietz seeks review of the Court of Appeals unpublished opinion entered December 20, 2022 and its ruling denying timely supplemental briefing. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals err when it denied a timely motion for supplemental briefing on legal issues of merit?

B. Under certain conditions, a party is entitled to a diminished capacity jury instruction. The instruction must properly and clearly state the law. Where the diminished capacity jury instruction, proposed by defense counsel and the prosecutor, which was adopted by the court, did not tell the jury specific intent was the mens rea for two of the charged crimes, and recklessness for the alternative, did Ms. Dietz receive ineffective assistance of counsel?

C. RCW 9.94A.535 mandates that a trial court must set forth written reasons for imposing an exceptional sentence. Where the trial court made only oral findings for an exceptional sentence must the matter be remanded to the trial court to enter written findings of fact and conclusions of law?

III. STATEMENT OF THE CASE

Larisa Dietz suffered many violent assaults as a child and young woman. RP 1048-1050. As a result of the complex trauma, she developed post-traumatic stress disorder, substance addiction, prolonged depression, a severe personality disorder, and suffered from chronic homelessness. RP 634,698,707; 1042,1044. She received social security disability because of physical and mental disabilities. CP 405.

In October 2019, she spent part of the day visiting with Ricky McGowan. They both lived in permanent supportive housing for individuals who met the criteria of chronic homelessness and a documented disability. RP 698. Mr. McGowan used a wheelchair but ambulated with or without a walker. RP 701, 047. That day they drank vodka and malt liquor together, and later seemed drunk to others. RP 549-550, 1058-1060.

Ms. Dietz had sporadic memories but believed that as she visited Mr. McGowan in his apartment, he grabbed her crotch. RP 1084. Neighbors heard Mr. McGowan calling for help and dialed 911. RP 601. No strangers to Mr. McGowan's apartment, police and EMTs responded. RP 529, 791-792.

Emergency personnel found Mr. McGowan and Ms. Dietz on the floor in a pool of blood. RP 529-530. Ms. Dietz had her arms around Mr. McGowan's neck, grabbing his throat and sticking her hand in his mouth. RP 531-532. Ms. Dietz yelled "I am the victim" repeatedly. RP 532. Mr. McGowan had lacerations to his neck. RP 537. Officers collected a two-inch knife. RP 533, 793.

After her arrest for attempted murder in the second degree, and assault in the first degree, the court ordered a competency evaluation. CP 451-52. The court found her competent to proceed to trial. CP 442-443.

Ms. Dietz's only defense was diminished capacity. Two psychologists testified to Ms. Dietz's claim. Both agreed she had severe mental health diagnoses, but predictably disagreed whether she had the capacity to intend to commit the charged crimes. RP 1006-1103.

The defense expert diagnosed Ms. Dietz as mentally ill: having paranoid and borderline personality disorders, substance abuse disorder, depression, and post-traumatic stress disorder. RP 1044-1047. He opined that Ms. Dietz's intoxication and mental illness caused her to perceive herself as having been threatened by Mr. McGowan. RP 1057.

> **Q**….And then would you say that Larisa's PTSD/intoxication could have caused her to perceive a -could have caused her to defend herself against a perceived assault?
> **A**. Oh sure. Absolutely.
>
> **Q**. And that would affect her ability to not form the criminal intent of assault?

> A. Yeah, because it would have, ***we're talking about a mental disorder impacting what the contact of her thinking was not just about whether you can form any intent but that specific intent.***
>
> **Q**. And is that why you based your concluded [sic] based on my examination I opine there is sufficient information to assert that the foundational elements for diminished capacity are present?
>
> **A**. Yes.

RP 1064. (Italics and bold added).

Defense counsel proposed and the court instructed the jury using an incomplete version of WPIC 18.02. The instruction omitted the requisite mental state for the multiple crimes charged. CP 45, 686. Instruction No. 26:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the capacity to form the intent to commit the crimes of attempted murder in the second degree and assault in the first degree or assault in the second degree.

CP 686.

The jury submitted a question:

> Is 'intent' strictly on action or set of actions versus a state of mind with associated actions?

CP 656.

The court referred the jury back to the instructions. CP 656.

The jury found Ms. Dietz guilty. The court imposed an exceptional sentence. She made a timely appeal. CP 654-55; 475. The court did not enter written findings and conclusions of law for the exceptional sentence. Appellate counsel requested the trial attorneys to file the written findings of fact and conclusions of law for the exceptional sentence on May 23, 2022. On June 21, 2022, the State emailed an apology for the delay and stated it intended to prepare the findings and conclusions and then submit them to the court. To date, nothing has been filed.

Appellant and respondent both filed briefing to the Court of Appeals. On August 8, 2022, about 21 days after

the State filed its response brief, counsel filed a motion and supplemental brief to the Court raising two additional issues of legal merit calling for the Court's review. (Attached as appendix B).

The State objected to the submission of the supplemental briefing, citing the appellant was limited to an opening brief and a reply brief. The State further argued that new issues may not be raised in a *reply* brief.

Appellant filed a reply to the response, noting the motion was submitted under RAP 10.1(h) not RAP 10.1(b). Also, a supplemental brief was the proper vehicle for obtaining appellate review of newly assigned errors that should be considered after an opening brief has been filed.

The Commissioner denied the motion for supplemental briefing on August 18, 2022 citing "The appellant does not show good cause to file a supplemental brief." (See Appendix C). Appellant moved

to modify the ruling of the Commissioner that same day. (See Appendix D). On September 30, 2022, the Court denied the motion to modify without explanation. (See Appendix E). On October 26, 2022 the matter was set for a hearing on December 13, 2022. On December 20, 2022, the Court affirmed a conviction for attempted murder in the second degree, citing invited error on the erroneous jury instructions.

Further facts will be discussed in the argument section.

IV. ARGUMENT

A. Review Should Be Accepted Because The Court of Appeals Erred When It Denied Timely Supplemental Briefing On Legal Issues Of Merit.

Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. *State v. Ogden,* 21 Wn.App. 44, 48-

49, 584 P.2d 957 (1978) rev. denied, 91 Wn.2d 1013 (1979).

The Rules of Appellate Procedure provide guidelines to support the Appellate Court in administering justice and reaching a proper decision. Cases and issues will not be determined on compliance or noncompliance with the rules *except* in compelling circumstances where justice demands, subject to the restrictions in RAP 18.8(b). RAP 1.2(a).

RAP 10.1(b) provides that the brief of appellant, the brief of respondent, and a reply brief of appellant *may be* filed.

Using the same permissive language, RAP 10.1(h) allows supplemental briefing, whether directed by the Court, or on motion of a party, *other than those listed in the rule.* An appellant or respondent is not limited to the briefing provided for in RAP 10.1(b)

Washington Courts have been reluctant to deny review of an issue where a party's fundamental constitutional right to a fair trial was violated in the proceedings below. Thus, constitutional issues have even been considered when raised for the first time in a motion for reconsideration, in a reply brief, and in a petition for review. RAP 2.5(a); See *Connor v. Universal Util's,* 105 Wn.2d 168, 171, 712 P.2d 849 (1986); *State v. Kitchen,* 46 Wn.App. 232, 234, 730 P.2d 103 (1986)(affirmed in part, reversed in part on other grounds, 110 Wn.2d 403, 756 P.2d 105 (1988); *State v. Purdom,* 106 Wn.2d 745, 748, 725 P.2d 622 (1986); *State v. McCullum,* 98 Wn.2d 484, 487, 656 P.2d 1064 (1983).

Here, the appellant filed a timely supplemental brief under RAP 10.1(h) to discuss an issue of constitutional magnitude, and a failure by the trial court to enter statutorily required written findings and conclusions for an exceptional sentence.

The Commissioner's decision that appellant had not "shown good cause" was an erroneous ruling then affirmed by the Court. RAP 10.1(h) does not place a limitation that a motion for supplemental briefing will be granted only if "good cause is shown."

"Good cause" is the standard under RAP 18.3(a)(1) which allows counsel for a defendant to withdraw in a criminal case with permission of the appellate Court on a showing of "good cause." "Good cause" is not defined in RAP 18.3 but is generally understood to depend on the circumstances and context of a situation. *State v. Rafay,* 167 Wn.2d 644, 652, 222 P.3d 86 (2009).

Thus, even though petitioner contends good cause is not a necessary precedent to filing a supplemental brief, a timely supplemental brief which addresses a constitutional issue and the failure of the trial court to fulfill a statutory duty of entering findings for an exceptional

sentence indeed demonstrates "good cause." (See *State v. Friedlund,* 182 Wn.2d 388, 341 P.3d 280 (2015).

Justice is not served by a decision that fails to allow an argument which would likely result in the reversal of Ms. Dietz's conviction or at the very least a full review of the legal issues of merit.

Ms. Dietz respectfully asks this Court to accept review and hold that an appellant may file a timely supplemental brief that addresses issues of legal merit.

B. Ms. Dietz Received Ineffective Assistance of Counsel Where The Proposed Jury Instruction Failed To Include The Requisite Mens Rea For Each Charged Crime The Jury Should Consider In Determining If The State Proved Its Case Beyond A Reasonable Doubt.

The right to a fair trial is a fundamental liberty. U.S. Const. amend.VI; *State v. Sanchez,* 171 Wn.App. 518, 541, 288 P.3d 351 (2012). The Sixth Amendment to the United States Constitution and article I, § 22 of the

Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 685-86, 104 S.Ct. 2051, 80 L.Ed.2d 674 (1984); *State v. Grier,* 171 Wn.2d 17, 246 P.3d 1260 (2011). Where a defendant has been denied effective assistance of counsel, the resultant conviction must be reversed, and the matter remanded for a new trial. *Id.* at 32.

Even though the Court of Appeals denied the motion to supplement that addresses this error, this Court may review the error under RAP 2.5(a).

1) *Failure To Include The Requisite Mens Rea In The Diminished Capacity Jury Instruction Was Ineffective Assistance of Counsel.*

Counsel has rendered ineffective assistance when the defendant shows the attorney's performance was deficient and that deficiency prejudiced her. *Strickland v. Washington,* 466 U.S. at 687. Where counsel's performance has fallen "below an objective standard of

reasonableness based on consideration of all the circumstances", it is deficient. *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A jury instruction error which results from ineffective assistance of counsel is an issue of constitutional magnitude that may be reviewed for the first time on appeal. *State v. Kyllo,* 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

Ms. Dietz was charged with assault in the first degree, assault in the second degree, and attempted murder in the second degree. To convict, the State was required to prove the mens rea for first degree assault: *specific intent to inflict great bodily harm*. RCW 9A.36.011(1); *State v. Elmi,* 166 Wn.2d 209, 207 P.3d 439 (2009). Similarly, to prove the crime of attempted murder the State was required to prove Ms. Dietz had *specific intent to cause the death of another person*. *State*

v. Dunbar, 117 Wn.2d 587, 590, 817 P.2d 1350 (1991). CP 677,676.

Specific intent is defined as *intent to produce a specific result*, *rather than an intent to do the physical act* that produces the result. *Elmi,* at 215. The intent to produce a specific result is an essential element of each of the charged crimes.

The jury was also instructed on assault in the second degree: an *intentional* assault which *recklessly* inflicted substantial bodily harm or assault with a deadly weapon. CP 682.

Ms. Dietz's defense was that she suffered from diminished capacity. A jury may consider an accused's diminished capacity, due to mental illness, as it may impair the ability to form the requisite intent to commit a crime. *State v. Nuss,* 52 Wn.App. 735, 738, 763 P.2d 1249 (1988). Diminished capacity is not an affirmative

defense but rather, is evidence that negates specific mens rea.

A jury instruction that misstates the law is wrong. Jury instructions, read as a whole must "make the relevant legal standard manifestly apparent to the average juror." *State v. Kyllo,* 166 Wn.2d at 864. (Internal citations omitted). Where the proposed incorrect jury instruction relieves the State of its duty to prove every element beyond a reasonable doubt, and there is a reasonable probability that but for counsel's error the outcome of the proceedings would have been different, the defendant has established prejudice. *State v. Grier,* 171Wn.2d at 34. This court conducts a de novo review of alleged errors of law in jury instructions. *State v. Barnes,* 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

The Criminal Pattern Jury Instruction for diminished capacity provides:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the [capacity][ability] to form (**fill in requisite mental state).**

(Emphasis added).

The Note on Use provides:

> Use this instruction when diminished capacity is claimed. Used bracketed material as applicable. **Fill in the requisite mental state** in the space provided. **If there is more than one crime charged or an offense has multiple mens rea, it may be necessary to include more than one mental state.**

WPIC 18.20 (Emphasis added).

Here, the jury was not instructed that Ms. Dietz's mental illness could be considered in determining whether she had the capacity to form the specific intent to cause the death of another; or the capacity to form the specific intent to assault another. Nor was the jury instructed that it could consider whether Ms. Dietz's mental illness precluded her from intentionally assaulteing and recklessly inflicting substantial bodily harm.

Rather, the instruction provided only that evidence of mental illness could be considered whether Ms. Dietz had the capacity to form "the intent" to commit the charged crimes.

In *Taylor,* the Court held found the omission of the specific mental state of recklessness in the diminished capacity jury instruction was error. *State v. Taylor,*18 Wn.App.2d 568, 587, 490 P.3d 263 (2021). It held that "jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, *and properly inform the jury of the applicable law."* Id. at 585. (internal citation omitted).

Similarly, here the error of omitting the specific mental states caused prejudice. The jury was not properly informed of the applicable law and no basis of understanding what exactly they were deciding. The jury submitted a question:

Is intent strictly an action or set of actions versus a state of mind with associated actions? CP 656.

The inadequate diminished capacity jury instruction did not provide information that *specific* intent was required. Specific intent is intent to produce a specific result, as opposed to intent to do the physical act that produces the result. *State v. Wilson,* 125 Wn.2d 212, 883 P.2d 320 (1994).

Juries are presumed to follow the court's instructions. *State v. Warren,* 165 Wn.2d 17, 28, 195 P.3d 940 (2008). Thus, an instructional error is harmless only if it is trivial, or formal, or merely academic and in no way affected the final outcome. *State v. Woods,* 138 Wn.App. 191, 156 P.3d 309 (2007).

Here, the error is not harmless. Failing to instruct the jury fully on the exacting requirements in the diminished capacity instruction, "specific intent to kill" and "specific intent to assault" or "recklessness" as an

element of assault in the second degree, relieved the State of its burden of proving an essential element. Relieving the State of its burden created a fatal error. *State v. Byrd,* 125 Wn.2d 707,714, 887 P.2d 396 (1995).

Where a jury instruction prevents proper consideration of the defense, the Court simply cannot say the outcome of the trial would have been the same with proper instructions. *State v. Woods,* 138 Wn.App. at 202. Ms. Dietz respectfully asks this Court to review this error as only a fair trial is a constitutional trial.

C. Written Findings and Conclusions To Support Imposition Of an Exceptional Sentence Must Be Entered By The Trial Court.

Whenever a sentence outside the standard range is imposed, the trial court must set the reasons for its decision in written findings of fact and conclusions of law. RCW 9.94A.535. “Written findings ensure that the reasons for exceptional sentences are articulated, thus

informing the defendant, appellate court…and the public of the reasons for deviating from the standard range." *In re Pers. Restraint of Breedlove,*138 Wn.2d 298, 311, 979 P.2d 417 (1999). The appellate court reviews whether the trial court's reasons for imposing an exceptional standard are substantial and compelling, using a de novo standard. *State v. Hyder,* 149 Wn.App. 234, 259-60, 244 P.3d 454 (*rev. denied*, 171 Wn.2d 1024 (2011).

Written findings are required. *State v. Friedlund,* 182 Wn.2d 388, 394, 341 P.3d 280 (2015). "A trial court's oral or memorandum opinion is no more than an expression of its informal opinion at the time it is given; it has no binding effect unless formally incorporated into the written findings, conclusions, and judgment." *State v. Mallory,* 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966); *Friedlund,* 182 Wn.2d at 394-95.

Here, the trial court orally imposed additional time for Ms. Dietz's sentence, but did not enter the written findings

and conclusions. The remedy for a trial court's failure to enter written findings of fact and conclusions of law is to remand the case for their entry. *Friedlund,* 182 Wn.2d at 395. And Ms. Dietz should be granted opportunity to challenge the court's written ruling. Failure to enter written findings and conclusions is a matter of public significance. *Id.*

V. CONCLUSION

Based on the foregoing facts and authorities, Ms. Dietz respectfully asks this Court to accept review of her petition.

This document contains 3, 207 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Submitted this 19th day of January 2023.

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APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

December 20, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LARISA JEAN DIETZ, Appellant.	No. 56189-1-II UNPUBLISHED OPINION

VELJACIC, J. — Larisa Dietz appeals her conviction for attempted murder in the second degree and assault in the first degree. Dietz argues that the jury instructions failed to include the requisite mental state that the jury must consider in determining culpability. Dietz contends that this relieved the State of its obligation to prove every essential element of the crime.

We hold that the doctrine of invited error prevents Dietz from appealing the jury instruction because Dietz was the one who proposed the instruction language she now complains of. Accordingly, we affirm.

FACTS

On October 8, 2019, Larisa Dietz was visiting with Ricky McGowan in the Sunbelt Apartments where they both resided. Neighbors called 911 after hearing McGowan call for help. Firefighters and paramedics were dispatched to the scene, some of whom were familiar with McGowan because they had previously responded to help him for falling out of his wheelchair and cardiac issues. Upon entering the apartment, the first responders found Dietz with her right arm around McGowan's neck and her left hand reaching into his mouth. As the paramedics approached

Dietz and McGowan, Dietz began grabbing at McGowan's throat while yelling, "'I am the victim.'" Clerk's Papers (CP) at 188. The paramedics grabbed Dietz by the arms and pinned her to the ground. The paramedics found that McGowan had numerous lacerations on his neck, and police officers collected a two-inch knife covered in blood from within Dietz's reach. Dietz did not appear to have any injuries. Dietz only has sporadic memories of what occurred that day.

The State charged Dietz with attempted murder in the second degree and assault in the first degree, along with a deadly weapon enhancement and vulnerable victim aggravating factor for each count. A competency evaluation found Dietz competent to stand trial. Two psychologists testified to her diminished capacity. They agreed that Dietz had several mental health diagnoses, including borderline personality disorder, substance abuse disorder, and post-traumatic stress disorder. However, the experts disagreed as to whether she had the capacity to form the requisite intent to commit the charged crimes.

The defense proposed a diminished capacity jury instruction that read:

> Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the *ability* to form the *intent to commit the crimes of attempted murder in the second degree, assault in the first degree, assault in the second degree, or assault in the third degree*.

CP at 43 (emphasis added). Defense counsel referenced Washington Pattern Jury Instructions: Criminal 18.20 as the source of the proposed instruction. 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 18.20, at 315 (5th ed. 2021) (WPIC). WPIC 18.20 reads: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the [capacity] [ability] to form (fill in requisite mental state)."

After discussions between the parties, the court agreed to give Dietz's version of the instruction with only slight modifications. The diminished capacity instruction ultimately given

to the jury (hereinafter instruction 26) states: "Evidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the *capacity* to form the intent to commit the crimes of attempted murder in the second degree and assault in the first degree or assault in the second degree." CP at 686 (emphasis added).

The jury found Dietz guilty as charged. Dietz appeals.

ANALYSIS

I. INVITED ERROR

Dietz argues that she received an unfair trial because the diminished capacity jury instruction failed to include the specific intent that the State was required to prove, thereby relieving the State of its burden to prove every element of the charged crimes. The State argues that the doctrine of invited error bars review of Dietz's claim that the diminished capacity instruction was erroneous, because Dietz proposed the language that was ultimately given to the jury. We agree with the State.

A. Legal Principles

We review de novo alleged errors of law in jury instructions. *State v. Nelson*, 191 Wn.2d 61, 69, 419 P.3d 410 (2018). A jury instruction is erroneous if it omits or misstates the law thereby relieving the State of its burden to prove every element of the crime charged. *Id*. Under the invited error doctrine, even where constitutional rights are involved, an appellate court is precluded from reviewing jury instructions when the defendant has proposed the instruction. *State v. Weaver*, 198 Wn.2d 459, 465, 496 P.3d 1183 (2021); *see also State v. Bradley*, 141 Wn.2d 731, 736, 10 P.3d 358 (2000). When a defendant proposes an instruction that is identical to the instruction the trial court gives, the invited error doctrine bars us from reversing the conviction because of an error in that jury instruction. *State v. Summers*, 107 Wn. App. 373, 381, 28 P.3d 780 (2001). A party may

not request an instruction and later complain on appeal that the requested instruction was given. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). Even if error was committed, of whatever kind, if it was at the defendant's invitation the defendant is precluded from claiming on appeal that it is reversible error. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). "This holds true even if the defendant merely requests a standard [WPIC] approved by the courts." *Summers*, 107 Wn. App. at 381. Invited error is a "strict rule" to be applied whenever the defendant's actions, at least in part, cause the error. *Id.* at 381-82.

B. The Doctrine of Invited Error Bars Review of Dietz's Claim that the Diminished Capacity Instruction was Erroneous

In this case, Dietz proposed the challenged diminished capacity instruction that was given to the jury, which she now takes issue with on appeal. Dietz argues that the trial was unfair because the diminished capacity jury instruction failed to include "specific intent," which in turn relieved the State of its burden to prove every element of the charged crimes. Br. of Appellant at 6-7.

The instruction given to the jury is based on WPIC 18.20, which reads as follows: "[e]vidence of mental illness or disorder may be taken into consideration in determining whether the defendant had the [capacity] [ability] to form (fill in requisite mental state)."

Dietz's proposed instruction selected "ability" from the bracketed options available in WPIC 18.20 and filled in the requisite mental state as "*the intent to commit the crimes of attempted murder in the first degree, assault in the first degree, assault in the second degree or assault in the third degree*." CP at 43.

The trial court in turn gave instruction 26, wherein it opted for "capacity" instead of "ability" (one of the two options in the WPIC instruction) and used Dietz's proposed mental state language, albeit without the commas, and with an added "and": "*the intent to commit the crimes*

of attempted murder in the first degree and assault in the first degree or assault in the third degree." CP at 686.

As is evident, the language Dietz complains of on appeal is the exact language she proposed be added to the instruction. Dietz at least in part caused the error she now complains of on appeal, as she proposed the language. We conclude that the invited error doctrine precludes Dietz from now claiming this error before us. Accordingly, her argument fails.

Dietz makes no argument regarding the other minor differences in the instruction, so we do not address them. Additionally, Dietz asserts that the error was not harmless, but because we concluded above that she is precluded from claiming the error she invited on appeal, we do not need to reach harmless error. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Veljacic, J.

We concur:

Lee, P.J.

Price, J.

APPENDIX B

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF RESPONDENT,	)	Court of Appeals No. 56189-1
V.	)	
LARISA DIETZ APPELLANT.	)	MOTION TO SUPPLEMENT BRIEF OF APPELLANT

I. IDENTITY OF MOVING PARTY

Marie Trombley, attorney for Appellant, Larisa Dietz, asks this Court to grant the relief designated in Part II .

II. STATEMENT OF RELIEF SOUGHT

Appellant asks this Court to accept this supplemental briefing on the issue of ineffective assistance of counsel and failure to file written findings of fact and conclusions of law for an exceptional sentence.

III. FACTS RELEVANT TO THE MOTION

Counsel filed appellant's opening brief May 23,2022. In reviewing the briefing, counsel became aware there were two

issues that needed to be addressed on direct appeal which were not raised in the opening brief.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A criminal defendant has the right to effective assistance of counsel on direct appeal. *In re Theders,* 130 Wn.App. 422, 434, 123 P.3d 489 (2005). While failure to raise all possible nonfrivolous issues does not amount to ineffective assistance, counsel should raise issues with underlying merit and that can be successful on appeal. *Id.*

After reviewing the briefing and the record, counsel believes the issues raised in the supplemental brief are legally meritorious and deserve this Court's review.

To preserve judicial resources and allow for a full review of the issues on direct appeal, counsel respectfully asks this Court to grant a motion for supplemental briefing.

Respectfully submitted on 8th day of August 2022.

Per RAP 18.17, this document contains 222 words.

/s/ Marie Trombley, WSBA 41410
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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Larisa Dietz, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Motion for Supplemental Brief was sent electronic service to:
Clallam County Prosecuting Attorney: jespinoza@co.clallam.wa.us.

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APPENDIX C

Washington State Court of Appeals
Division Two

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Derek Byrne, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)
General Orders, Calendar Dates, and General Information at http://www.courts.wa.gov/courts **OFFICE HOURS**: 9-12, 1-4.

August 18, 2022

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CASE #: 56189-1-II/State of Washington, Respondent v. Larisa Jean Dietz, Appellant

Counsel:

On the above date, this court entered the following notation ruling:

A RULING BY COMMISSIONER SCHMIDT:

The motion to file a supplemental brief is denied and the Appellant's supplemental brief is stricken. Appellant does not show cause to file a supplemental brief.

Very truly yours,

Derek M. Byrne
Court Clerk

APPENDIX D

Filed
Washington State
Court of Appeals
Division Two

September 30, 2022

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

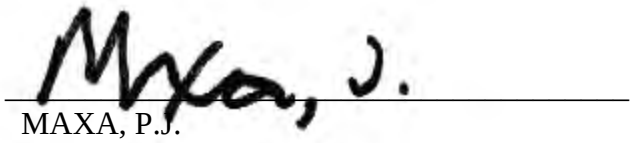
STATE OF WASHINGTON, Respondent, v. LARISA DIETZ, Appellant.	No. 56189-1-II ORDER DENYING MOTION TO MODIFY

Appellant Larisa Dietz moves to modify a Commissioner's ruling dated August 18, 2022, in this case. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Maxa, Lee, Price

FOR THE COURT:



MAXA, P.J.

CERTIFICATE OF SERVICE

I, Marie Trombley, hereby certify under penalty of perjury under the laws of the State of Washington, that January 19, 2023 I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, a true and correct copy of the Petition for Review to: Clallam County Prosecuting Attorney at jespinoza@co.clallam.wa.us.

Marie Trombley
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MARIE TROMBLEY

January 18, 2023 - 10:50 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56189-1
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