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NO. 69101-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHERYL RENEE LIDEL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARY YU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Expert testimony is admissible if it is relevant and helpful to the jury. Here, Lidel sought to admit evidence that she suffered from Dissociative Identity Disorder in support of her defenses of Not Guilty by Reason of Insanity and diminished capacity. Although Lidel's expert witness opined that one of Lidel's personalities was insane, he was unable to explain how a jury should apply that opinion to the legal questions of whether Lidel—a person, not a personality—had the capacity to perceive the nature and quality of her actions, understand right and wrong, or form the requisite intent to steal. Did the trial court act within its discretion in excluding the evidence as unhelpful to the trier of fact?

2. Lidel claims that she was entitled to a jury trial and proof beyond a reasonable doubt as to the question of whether she had two prior convictions for most serious offenses, requiring a sentence of life without the possibility of release as a persistent offender. She also argues that a statutory scheme that requires such procedures for proof of prior offenses when they are elements of a crime—as in Felony Communication with Minor for Immoral Purposes or Unlawful Possession of a Firearm—but not when they constitute a sentencing enhancement violates principles of equal protection. These arguments have been repeatedly rejected by this

Court and the Washington Supreme Court. Should these arguments be rejected again here based on controlling authority?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On February 18, 2010, the State of Washington charged the appellant, Cheryl Lidel, with one count of Robbery in the Second Degree. CP 1. The State requested bail in the amount of $1,000,000, alleging that the offense constituted Lidel's third strike. CP 2.

Eighteen months later, the defense first gave notice that Lidel would rely on the legal defense of Not Guilty by Reason of Insanity. CP 12. In support of this defense, Lidel provided a report by psychiatrist Dr. Richard Adler. CP 84-85, 276-77; PT Ex. 3.[1] He diagnosed Lidel as suffering from Dissociative Identity Disorder ("DID"), formerly known as Multiple Personality Disorder. CP 84-85, 276-77; PT Ex. 3, at 2. He concluded that, as a result of the DID, Lidel was insane at the time of the crime.[2] CP 276-77; PT Ex. 3, at 2. The State retained its own expert, Dr. Henry Richards; his evaluation, based on ten hours of structured

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[1] This brief will refer to pretrial exhibits as "PT Ex.," to distinguish them from trial exhibits, denominated simply "Ex."

[2] Lidel also produced a report by Dr. Craig Beaver in support of Dr. Adler's diagnoses, although Dr. Beaver did not opine that Lidel suffered from DID or that she was insane at the time of the crime. CP 276-77; PT Ex. 11; PT Ex. 12, at 101-02. Instead, Dr. Beaver provided diagnoses of mild mental retardation, bipolar type II, and heroin dependency, among other things. PT Ex. 11, at 16-20.

interviews with Lidel as well as a review of records, disputed this diagnosis and Adler's conclusion that Lidel was insane at the time of the crime. CP 85; PT Ex. 10, at 51, 59-60.

On the eve of trial, Lidel gave notice of an additional defense of diminished capacity. CP 113. In their reports, Lidel's experts had not opined that she had diminished capacity at the time of the crime. CP 278; PT Exs. 3, 4, and 11; PT Ex. 5, at 86; PT Ex. 12, at 100-01. The defense appeared to rest solely on the diagnosis of DID.[3] 4RP 10-13.[4]

On June 4, 2012, the case was assigned to the Honorable Mary Yu for trial. 2RP 1. Pretrial, the State moved to exclude Lidel's mental defenses of insanity and diminished capacity. CP 280-86. After reviewing the relevant reports, PT Ex. 3, 4, transcripts of the extensive pretrial interviews of Adler, PT Ex. 5, 6, and the authorities provided by the parties, 3RP 2, the court granted the State's motion. 3RP 24-26. The trial court determined that the opinion of Dr. Adler that Lidel suffered

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[3] To the extent a diminished capacity defense could have rested on any diagnosis other than DID, Lidel does not identify it. Further, she has assigned error only to the trial court's exclusion of DID as a basis for a diminished capacity defense, not any other diagnosis. Brief of Appellant at 1.

[4] The Verbatim Report of Proceedings consists of eight volumes, many covering multiple days. They are referred to in this brief as follows: 1RP is the volume covering April 28, 2010, May 26, 2010, October 27, 2010, November 8, 2010, December 27, 2010, April 8, 2011, and September 7, 2011; 2RP is June 4, 2012; 3RP is June 5, 2012; 4RP is June 6, 2012; 5RP is June 6 and 11, 2012, and July 20, 2012; 6RP is June 7, 2012; 7RP is June 11, 2012; and 8RP is June 11, 2012, and April 19, 2012.

from DID was not helpful to the trier of fact, and excluded it pursuant to ER 702. 3RP 24-26.

The matter proceeded to trial. 5RP 7. In accordance with the trial court's pretrial rulings, neither party offered any expert testimony about Lidel's mental state. 7RP 74. Lidel did not testify. 7RP 74. The jury was not instructed on the theories of either insanity or diminished capacity. CP 174-94.

The jury convicted Lidel as charged. CP 168. Pursuant to the Persistent Offender Accountability Act, RCW 9.94A.570, the State sought a sentence of life in prison without the possibility of early release. CP 195-201. After concluding that the State had met its burden of proving that Lidel had at least two prior most serious offenses pursuant to RCW 9.94A.030(32) and (37), specifically four prior convictions for Robbery in the First Degree with a Deadly Weapon, CP 260, the court found Lidel was a persistent offender and imposed a mandatory life sentence. CP 254-72; 5RP 64-65, 73-75. This appeal followed.

2. SUBSTANTIVE FACTS

On February 14, 2010, Lidel robbed a Subway sandwich shop at Howell Street and Yale Avenue in Seattle, Washington. She entered the shop while the employee running the business, Myrtle Pederson, was there alone. 6RP 28-29, 34. After scoping out the restaurant to make sure no

one else was present, Lidel approached Pederson and acted as if she wanted to order a sandwich. 6RP 34-37. She then entered the employee-only area, grabbed Pederson in a chokehold, and told her she had a gun. 6RP 34-38. Lidel threatened to shoot Pederson if she did not give her the money. 6RP 58-59. Pederson offered Lidel her tip jar, then gave her the cash from the till. 6RP 38-40, 58-59. After getting the money from Pederson, Lidel told her to put her hands on the register and not move for ten minutes, or people waiting outside would come in and shoot her. 6RP 40-41. Lidel fled. 6RP 41-42. The entire event was captured on clear, in-store surveillance video. Ex. 5, 8.

Moments later, Lidel was arrested; Pederson's boyfriend had seen her leaving the Subway through the employee door, and followed her out of the store while calling 911. Lidel had the stolen cash in her pocket. 6RP 66-84, 117-23, 140-43, 154-63; 7RP 12-23; Exs. 14, 17, 18.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXCLUDED EXPERT TESTIMONY REGARDING DISSOCIATIVE IDENTITY DISORDER.

a. The DID Diagnosis Was Inadmissible Pursuant To Evidence Rule 702.

Lidel complains that the trial court committed reversible error by excluding proffered evidence that she suffers from Dissociative Identity

Disorder. She is incorrect. Lidel's expert was unable to explain how his diagnosis of DID related to his conclusion that Lidel was insane at the time of the crime. Because he did not opine that Lidel had a diminished capacity to form the intent to steal, Adler also did not explain how his DID diagnosis of Lidel might support such a defense. The trial court properly excluded the evidence as unhelpful to the trial of fact under Evidence Rule 702.

A trial court's decision to admit or exclude evidence is given considerable deference. Thus, the trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Ortiz, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). In order to reverse a trial court's ruling, the challenging party must show that the decision was manifestly unreasonable, or that discretion was exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, Lidel sought to introduce the testimony of Dr. Richard Adler as relevant to her claimed defenses of insanity and diminished capacity. An insanity defense is governed by RCW 9A.12.010 and 10.77.030. RCW 9A.12.010 provides:

> To establish the defense of insanity, it must be shown that:
> (1) At the time of the commission of the offense, as a result of mental disease or defect, the mind of the actor was affected to such an extent that:
> (a) He or she was unable to perceive the nature and quality

> of the act with which he or she is charged; or
> (b) He or she was unable to tell right from wrong with reference to the particular act charged.
> (2) The defense of insanity must be established by a preponderance of the evidence.

Similarly, RCW 10.77.030 provides:

> (1) Evidence of insanity is not admissible unless the defendant, at the time of arraignment or within ten days thereafter or at such later time as the court may for good cause permit, files a written notice of his or her intent to rely on such a defense.
> (2) Insanity is a defense which the defendant must establish by a preponderance of the evidence.
> (3) No condition of mind proximately induced by the voluntary act of a person charged with a crime shall constitute insanity.

Both statutes place the burden on the defendant to prove insanity at the time of the crime by a preponderance of the evidence. See also State v. Wicks, 98 Wn.2d 620, 621-22 (1983).

> Insanity means more than mental illness.
>
> The insanity defense is not available to all who are mentally deficient or deranged; legal insanity has a different meaning and a different purpose than the concept of medical insanity. . . . A verdict of not guilty by reason of insanity completely absolves a defendant of any criminal responsibility. Therefore, "the defense is available only to those persons who have lost contact with reality so completely that they are beyond any of the influences of the criminal law."

State v. Crenshaw, 98 Wn.2d 789, 793 (1983) (citing State v. White, 60 Wn.2d 551 (1962)).

A diminished capacity defense, by contrast, requires a defendant to produce expert testimony that shows that a mental disorder impaired the defendant's ability to form the mental state required to commit the charged crime. State v. Ellis, 136 Wn.2d 498, 521, 963 P.2d 843 (1998); State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). Diminished capacity is not an affirmative defense; rather, it negates a particular element that the State must prove beyond a reasonable doubt. State v. Nuss, 52 Wn. App. 735, 739, 763 P.2d 1249 (1988); State v. Stumpf, 64 Wn. App. 522, 524-25, 827 P.2d 294 (1992). Nonetheless, a defendant claiming a diminished capacity defense has a burden of production; she must produce substantial evidence of a mental condition that logically and reasonably connects with the asserted inability to form the requisite mens rea. State v. Ferrick, 81 Wn.2d 942, 944-45, 506 P.2d 860 (1973); State v. Griffin, 100 Wn.2d 417, 418-19, 670 P.2d 265 (1983).

The proponent of evidence bears the burden of proving its admissibility. State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). To be admissible at trial, expert testimony in support of an insanity or diminished capacity defense must be helpful to the trier of fact pursuant to ER 702. That rule provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by

knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In the context of expert evidence offered in support of an insanity or diminished capacity defense, "it is not enough that, based on generally accepted scientific principles, a defendant may be diagnosed as suffering from a particular mental condition. The diagnosis must, under the facts of the case, be capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." State v. Greene, 139 Wn.2d 64, 73-74, 984 P.2d 1024 (1999) (citing State v. Wheaton, 121 Wn.2d 347, 352, 850 P.2d 507 (1993)), reversed by Greene v. Lambert, 288 F.3d 1081 (9th Cir. 2002).[5] "Scientific principles that are generally accepted but are nevertheless incapable of forensic application under the facts of a particular case are not helpful to the trier of fact because such evidence fails to reasonably relate the defendant's alleged mental condition to the asserted inability to appreciate the nature of his or

[5] The Ninth Circuit granted Greene relief via a writ of habeas corpus in Greene v. Lambert. However, this reversal was on the narrowest of bases. Greene, a prison inmate, was diagnosed by his prison therapist with DID, and she identified a number of alter personalities. Once released, Greene sexually assaulted that counselor in his home; he was charged with Indecent Liberties and Kidnapping. The trial court excluded all evidence regarding DID, including from Greene and the victim/therapist. The Ninth Circuit reversed on the narrow ground that Greene should have been able to introduce his own testimony regarding his state of mind, as well as the testimony of the victim/therapist as to the defendant's state of mind that she observed during the commission of the crime. Greene v. Lambert, 288 F.3d at 1091. The court expressly did not conclude that the Washington Supreme Court erred in excluding expert testimony about DID. Id. at 1093. Thus, the Ninth Circuit's holding is extremely limited; Greene is still good law. Here, Lidel disclaimed any intent to testify, and did not do so. 3RP 44; 7RP 5, 74.

her actions or to form the required specific intent to commit the charged crime." Greene, 139 Wn.2d at 74.

Here, the lynchpin of both Lidel's NGRI defense and her diminished capacity defense was Dr. Adler's diagnosis of her as suffering from DID. PT Ex. 3, at 2; PT Ex. 4, at 5; PT Ex. 5, at 85-86. DID "is characterized by the presence of two or more distinct identities or personality states that recurrently take control of the individual's behavior accompanied by an inability to recall important personal information that is too extensive to be explained by ordinary forgetfulness. It is a disorder characterized by identity fragmentation rather than a proliferation of separate personalities." Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR), at 519; see also PT Ex. 3, at 14; PT Ex. 5, at 91-92. The various personalities have separate names, personal histories, characteristics, and other attributes. DSM-IV-TR, at 526; PT Ex. 3, at 14. The primary identity is typically called the "host," and the other personalities are typically called "alters." Greene, 139 Wn.2d at 69. Dr. Adler opined that Lidel had three personalities: the primary personality "Cheryl," and the alters "Odessa" and "Debbie." PT Ex. 3, at 4-5; PT Ex. 5, at 81-82, 97-107.

A mental defense predicated on a diagnosis of DID naturally raises the question of how to apply the insanity and diminished capacity criteria:

to the person as a whole, or to a particular personality—and, if the latter, to which personality. This question has already been thoroughly examined by the Washington Supreme Court. Greene, 139 Wn.2d 64-66; Wheaton, 121 Wn.2d 347; see also State v. Jones, 82 Wn. App. 871, 920 P.2d 225 (1996).

Most notably, in Greene, the court addressed the question of whether an individual suffering from DID can be considered legally insane, or to have a diminished capacity, and the relationship between the diagnosis and insanity or diminished capacity. Greene, 139 Wn.2d at 70-71, 73. Specifically, the Court examined whether the diagnosis of DID was "capable of forensic application in order to help the trier of fact assess the defendant's mental state at the time of the crime." Id. at 74 (citing Wheaton, 121 Wn.2d at 352). After thorough analysis, which relied on extensive expert testimony, the Greene court concluded that it was not, and thus excluded evidence of the DID diagnosis under ER 702. In other words, assuming that a particular defendant suffers from DID at the time of the crime, the scientific community is unable to assist the court in determining whether the focus of sanity should be on the host personality, the alter in control at the time of the crime, all of the personalities together, or something else. Greene, 139 Wn.2d at 74-79. Because the current state of the science cannot answer these ultimately philosophical

and legal questions, the testimony is inadmissible under ER 702 as unhelpful to the trier of fact. Id. at 79. The Supreme Court reached a similar result in Wheaton.[6]

Lidel's case presents the identical issue as to the relevance of a DID diagnosis as did Greene. Dr. Adler diagnosed Lidel as suffering from DID, and concluded that "Ms. Lidel (herself) did not understand the nature of the illegal act and/or failed to understand its wrongfulness at the time."[7] PT Ex. 3, at 2. He clarified, however, that his opinion related to the personality "Cheryl"; he had no opinion as to the mental state of the personality in control at the time of the crime, which he thought was likely

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[6] In Wheaton, a defendant who had been diagnosed with Multiple Personality Disorder, a previous name for DID, was convicted of Theft in the First Degree. As in this case, the claim was that an alter personality was in control at the time of the crime. The issue for the Supreme Court was how to apply the diagnosis of Multiple Personality Disorder to issues of culpability. Despite having significantly more evidence in the record than the case at bar about how to apply the diagnosis to the defense of insanity, the Wheaton court determined that it lacked adequate scientific evidence to decide what approach to use. It held, "We conclude this record simply does not contain enough soundly based information about MPD, its nature and ramifications, for this court to announce a rule of law for determining how to assess the legal sanity or insanity of a defendant suffering from MPD." Wheaton, 121 Wn.2d at 357.

[7] Throughout his report and interviews, Dr. Adler repeatedly used the wrong legal standard for assessing insanity. He stated that the standard was that the defendant did not know the nature of her actions, or did not understand that those actions were wrong. Ex. 3, at 2; Ex. 5, at 84. In fact, the correct standard is that the defendant was unable to perceive the nature and quality of her actions or tell right from wrong with respect to those actions. RCW 9A.12.010. His application of the incorrect standard stands as an additional basis to exclude his testimony as unhelpful to the jury under ER 702.

"Odessa."[8] PT Ex. 5, at 103-07; PT Ex. 6, at 46-50. This opinion could only be helpful to the jury if the jury knew how to apply the diagnosis to questions of culpability: should it look at whether "Cheryl" was insane or had diminished capacity, or "Odessa," or "Debbie," or the defendant as a whole. Given that Adler's opinion was limited to the personality "Cheryl," his opinion could only be of use if the court adopted the legal theory that only the mental state of the host personality is relevant to the culpability of the defendant.

Moreover, Lidel did not even advocate for such a legal theory below, and does not do so now. Indeed, there would be no factual basis for her to do so. Adler was unable to provide the trial court with a scientific basis for how to forensically apply his diagnosis to the questions before the jury: whether the defendant—a person, not a personality—was not guilty by reason of insanity, or had a diminished capacity such that she was unable to form the criminal intent necessary to commit the offense. PT Ex. 5, at 103-06 ("[T]here's a complex legal issue here . . . that goes outside even the realm of forensic psychiatry."); PT Ex. 6, at 46-50 ("The issue of DID dissociative states, who's responsible, the host, the alter, is

[8] Given the facts of the crime demonstrating Lidel's rationality—making sure the Subway shop was empty of customers before committing her crime, using violence to obtain cash from the register, threatening Pederson if she did not give her money, warning Pederson not to move for ten minutes, and promptly fleeing—Adler's opinion as to sanity could have relied on no more than his diagnosis of DID. There was no evidence whatsoever of any irrational behavior by Lidel.

the host responsible for what an alter does right—that's an issue even having read some of the law—it's for a juror or the trier of fact."). In fact, unlike the experts in Wheaton and Greene, Adler did not advocate for a particular approach of how to forensically apply his diagnosis to the legal questions, or even articulate a basis for preferring one to another. Rather, he conceded that this was a question for lawyers, not scientists.

Because Lidel was unable to show how her diagnosis of DID, even if it were to be accepted by the jury, was relevant to the questions of insanity and diminished capacity, Dr. Adler's testimony was not helpful to the jury. His testimony was properly excluded under Greene, Wheaton, and ER 702. The trial court did not abuse its discretion in refusing to admit this evidence.

b. Excluding Evidence Of Lidel's DID Diagnosis Did Not Violate Her Right To Present A Defense.

Lidel claims that the trial court's decision to exclude testimony of her DID diagnosis as unhelpful to the trier of fact violated her constitutional right to present a defense. This is incorrect. The application of ordinary rules of evidence that are not arbitrary or disproportionate to the goals they are designed to serve does not violate a defendant's right to present a defense. ER 702 is such a rule. Lidel's claim must be rejected.

A criminal defendant has a due process right to present a defense. Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). This right has two constitutional components: the right to offer the testimony of witnesses, and compel their presence at trial if necessary, and the right to confront and cross-examine the prosecution's witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). "It is well settled, however, that the right to present a defense is not absolute. . . . The right to present a defense does not extend to irrelevant or inadmissible evidence." State v. Strizheus, 163 Wn. App. 820, 829-30, 262 P.3d 100 (2011) (citations omitted) (emphasis added), rev. denied, 173 Wn. 2d 1030 (2012); see also State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) ("Although Aguirre does have a constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence.").

As discussed above, ER 702 precludes the admission into evidence of Adler's testimony that Lidel suffered from DID. Where a rule of evidence constrains a defendant from presenting evidence on his behalf, the rule must give way only if it is arbitrary or disproportionate to the purposes it is designed to serve. United States v. Scheffer, 523 U.S. 303, 308, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998); Rock v. Arkansas, 483 U.S. 44, 55-56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The Supreme

Court has, on this basis, invalidated the application of evidentiary rules that precluded co-defendants from testifying on behalf of each other, Washington, 388 U.S. 14, that prevented a defendant from testifying herself where her memory had been hypnotically refreshed, Rock, 483 U.S. 44, and that prohibited a defendant from impeaching his own witness, Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Absent a finding that an evidentiary rule is arbitrary or disproportionate to the ends it is designed to serve, however, the constitutional right to present a defense must bow to the rules of evidence. See, e.g., Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) ("The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence."); Montana v. Egelhoff, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996) ("[A]ny number of familiar and unquestionably constitutional evidentiary rules also authorize the exclusion of relevant evidence."); State v. Rafay, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012) ("A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible."); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (same).

Indeed, examples abound of defendants being precluded from presenting relevant evidence because of routine applications of the rules of evidence. For instance, in State v. Thomas, this Court held that the exclusion of a defense expert's testimony under ER 702—on the grounds that the evidence was not helpful to the trier of fact—did not violate the constitutional right to present a defense. 123 Wn. App. 771, 781, 98 P.3d 1258 (2004); see also State v. Willis, 113 Wn. App. 389, 54 P.3d 184 (2002), aff'd in part, rev'd in part, 151 Wn.2d 255, 87 P.3d 1164 (2004) (same). In State v. Finch, the Washington Supreme Court held that the exclusion of the defendant's self-serving hearsay did not violate his right to present a defense. 137 Wn.2d 792, 825, 975 P.2d 967 (1999) ("A defendant's right to admit evidence pursuant to his right to compulsory process is subject to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."). In Rehak, the court held that foundational requirements for admissibility of other-suspect evidence do not violate a defendant's right to present a defense. 67 Wn. App. at 162-63.

By contrast, Lidel does not offer a single case in which a court has found that ER 702 is arbitrary or disproportionate to the purposes it is designed to serve. Moreover, she makes no argument that the rule is arbitrary or disproportionate. Nor can she. As mentioned above, at least

two cases in Washington have rejected a challenge to ER 702 on the basis that it deprives defendants of their right to present a defense. Thomas, 123 Wn. App. 771; Willis, 113 Wn. App. 389. The rule is one of general application; it restricts evidence offered by the State (or a party to a civil lawsuit) to the same extent it restricts evidence offered by a criminal defendant. And, by its terms, the purpose of ER 702 is to admit only that evidence that will "assist the trier of fact to understand the evidence or to determine a fact in issue." ER 702. In other words, the rule limits admissibility to evidence that is relevant.

Lidel really appears to be complaining that she did not have a defense. But the constitution does not guarantee a defendant a viable defense. When there is no bona fide defense to the charge, a defendant is not entitled to create one. Compare United States v. Cronic, 466 U.S. 648, 656 & n.19, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (observing that the Sixth Amendment right to counsel does not encompass the right to create a defense that does not exist). Instead, the defendant is entitled to hold the prosecution to its heavy burden of proof beyond a reasonable doubt. Id.; In re Davis, 152 Wn.2d 647, 744, 101 P.3d 1 (2004). That occurred here. Lidel was not denied the right to present a defense; she was denied the ability to put on evidence that would have confused the trier of fact and was foreclosed by ER 702. Her conviction should be affirmed.

2. LIDEL'S CHALLENGES TO THE PERSISTENT OFFENDER ACCOUNTABILITY ACT HAVE BEEN REPEATEDLY REJECTED BY THIS COURT.

Lidel contends that the Persistent Offender Accountability Act violates the Equal Protection Clause of the United States Constitution because similarly situated offenders are treated differently with respect to whether they receive a jury trial. More specifically, Lidel argues that although offenders like herself who have three "strikes" do not receive a jury trial regarding their prior convictions, offenders whose current substantive offense requires proof of a prior offense as an essential element of the crime[9] do receive a jury determination regarding the existence of the prior conviction. Appellant's Brief, at 21-28.

This Court has expressly rejected this argument on more than one occasion.[10] State v. Langstead, 155 Wn. App. 448, 453-57, 228 P.3d 799, rev. denied, 170 Wn.2d 1009 (2010); State v. Salinas, 169 Wn. App. 210, 225-27, 279 P.3d 917 (2012), rev. denied, 176 Wn.2d 1002 (2013); State v. Williams, 156 Wn. App. 482, 496-98, 234 P.3d 1174 (2010), rev.

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[9] Examples include Felony Communication with Minor for Immoral Purposes, RCW 9.68A.090(2); Felony Violation of a Court Order, RCW 26.50.110(5); Unlawful Possession of a Firearm, RCW 9.41.040(1)(a), (2)(a); and Felony Driving Under the Influence, RCW 46.61.502(6).

[10] Lidel's lawyer fails to cite any of the cases controlling the outcome here. It is not because he is unaware of them. His brief on this issue is cut-and-pasted nearly word for word— including grammatical errors—from the briefs filed by his Washington Appellate Project colleagues in State v. Langstead, COA No. 61869-5-I, State v. Williams, COA No. 27924-3-III, 27925-1-III, and State v. Salinas, COA No. 65527-2-I.

denied, 170 Wn.2d 1011; State v. Witherspoon, 171 Wn. App. 271, 303-05, 286 P.3d 996 (2012), rev. granted, __ Wn.2d __ (May 6, 2013).[11] This Court should reject it in this case as well.

Lidel also argues that the trial court erred by imposing a life sentence after finding proof of her prior most serious offenses by a preponderance of the evidence. She claims that instead, she was entitled to a jury trial and to have her prior convictions proved beyond a reasonable doubt. Lidel is incorrect.

The Washington Supreme Court has repeatedly held that a defendant subject to sentencing under the Persistent Offender Accountability Act is not constitutionally entitled to either a jury trial or proof beyond a reasonable doubt. State v. Ammons, 105 Wn.2d 175, 185-86, 713 P.2d 719 (1986); State v. Manussier, 129 Wn.2d 652, 682-84, 921 P.2d 473 (1996); State v. Thorne, 129 Wn.2d 736, 776-84, 921 P.2d 514 (1996), abrogated on other grounds by Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), as recognized in In re Eastmond, 173 Wn.2d 632, 272 P.3d 188 (2012). Lidel fails to cite this precedent, and argues instead that her prior convictions are elements of the crime. Brief of Appellant at 28-30. The State concedes that, if this

[11] The order granting the petition review was limited to four issues. One of them is "whether the Petitioner's previous strike offenses should have been proven to a jury beyond a reasonable doubt." State v. Witherspoon, No. 88118-9 (May 6, 2013). Review was not granted on the Equal Protection claim raised here and decided in Witherspoon.

Court determines that the existence of Lidel's two prior convictions for most serious offenses is an element of the crime of Robbery in the Second Degree, the State would have to prove those convictions to a jury beyond a reasonable doubt. E.g., State v. Byrd, 125 Wn.2d 707, 887 P.2d 396 (1995). However, as discussed above, this argument has already been rejected in Langstead, Salinas, Williams, and Witherspoon. Thus, Lidel's prior convictions are not an element of the crime of Robbery in the Second Degree. The State had no obligation to prove the prior convictions beyond a reasonable doubt to a jury.

The trial court did not err. Lidel's sentence, and the process by which the trial court imposed it, should be upheld.

D. CONCLUSION

For all of the foregoing reasons, Lidel's conviction for Robbery in the Second Degree, and her sentence as a persistent offender, should be affirmed.

DATED this 23rd day of May, 2013.

Respectfully submitted,

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Senior Deputy Prosecuting Attorney
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Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT in STATE V. CHERYL RENEE LIDEL, Cause No. 69101-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 13 day of May, 2013

Name
Done in Seattle, Washington