The New Diminished Capacity Defense in Washington*

A report from the Trowbridge Foundation

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I. INTRODUCTION

A criminal defendant must have a requisite mental state to commit a crime in Washington.[1] RCW 9A.08.010(1) lists four culpable mental states: intent, knowledge, recklessness, or criminal negligence.[2] In a diminished capacity case, the State has the burden to prove that a defendant formulated the appropriate mental state beyond a reasonable doubt.[3] If a defendant prevails in a diminished

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1. State v. Utter, 479 P.2d 946, 948 (Wash. Ct. App. 1971).
2. WASH. REV. CODE § 9A.08.010 (2000).
3. State v. James, 736 P.2d 700, 702 (Wash. Ct. App. 1987).

capacity defense, he will either be acquitted or convicted of a lesser offense than the one charged.[4] In contrast, an insanity defense is an affirmative defense for which a defendant has the burden of proving his insanity at the time of the incident by a preponderance of the evidence.[5] If a defendant prevails in an insanity defense, he will likely be sent to a state mental hospital for treatment and may remain a patient at the hospital for up to the maximum sentence for the crime charged.[6] An insanity defense requires a "mental disease or defect" to be the reason for the incapacitation.[7] Since any incapacitating factor can be used in a diminished capacity defense, including voluntary intoxication,[8] the diminished capacity defense has become more popular than the insanity defense in Washington.

II. BACKGROUND

Several developments served to increase the use of the diminished capacity defense in Washington. The common law presumed that every person intended the natural and probable consequences of his voluntary acts, and juries were instructed to follow that presumption.[9] In 1977, the Washington Supreme Court struck down presumptions shifting the ultimate burden of persuasion to a defendant and held that a jury must be informed that any presumption is permissive rather than mandatory.[10] Then, in 1979, the United States Supreme Court struck down even a presumption of intent as an impermissible shifting of the burden of proof to the defendant.[11] The Court also struck down rebuttable presumptions of intent in 1985.[12] The result of these developments is "intent" and "knowledge" are no longer presumed from acts, and only the statutory definitions of "intent" and "knowledge" may be given in jury instructions.[13] Juries were not instructed on diminished capacity because generalized

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4. State v. Parker, 683 P.2d 189, 192 (Wash. 1984); State v. Baggett, 13 P.3d 659, 660 (Wash. Ct. App. 2000), *rev. denied*, 21 P.3d 291 (Wash. 2001).

5. WASH. REV. CODE § 10.77.080 (2000); State v. Platt, 19 P.3d 412, 414 (Wash. 2001).

6. WASH. REV. CODE § 10.77.025 (2000).

7. WASH. REV. CODE § 9A.12.010 (2000); *Platt*, 19 P.3d at 414.

8. WASH. REV. CODE § 9A.16.090 (2000); State v. Norby, 579 P.2d 1358, 1360 (Wash. Ct. App. 1978).

9. *See* State v. Willis, 409 P.2d 669, 670 (Wash. 1966); State v. Dolan, 50 P. 472, 473 (Wash. 1897); State v. Utter, 479 P.2d 946, 951 (Wash. Ct. App. 1971).

10. State v. Roberts, 562 P.2d 1259, 1262-63 (Wash. 1977).

11. Sandstrom v. Montana, 442 U.S. 510, 514-15, 517, 524 (1979).

12. Francis v. Franklin, 471 U.S. 307, 316-17 (1985).

13. WASH. REV. CODE § 9A.08.010(1)(a), (b) (2000); 11 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTIONS - CRIMINAL § 10.01 (2d ed. 1994).

instructions on "intent" and "knowledge" were thought to be sufficient.[14] However, in 1983, the Washington Supreme Court reversed this policy, holding instructions on diminished capacity should be given if there was substantial evidence of a defendant's diminished capacity negating his knowledge or intent.[15]

As a result of the Washington Supreme Court's ruling, the State must now prove the mental element in each crime beyond a reasonable doubt without any presumption that an accused intended the ordinary consequences of his voluntary acts. It may be very difficult for the State to prove a defendant "intended" or "knew" what he was doing if the prosecutor cannot suggest that the voluntary act itself suggests such "intent" or "knowledge."

Insanity and diminished capacity defenses are conceptually different. For an insanity defense, a defendant must prove:

> (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 was unable to perceive the nature and quality of the act with which he is charged; or
> (b) He was unable to tell right from wrong with reference to the particular act charged.[16]

A defendant pleading an insanity defense argues that he intended (or knew) what he was doing but thought he was justified in doing so because of some delusion.[17] Insanity is a defense of confession and avoidance ("I did intend it, but I thought I was justified."). In contrast, diminished capacity is a defense of denial ("I did not intend to do it."). A defendant pleading a diminished capacity defense argues that he did not "intend" (or "know") what he did.[18] Thus, in a charge involving "intent," diminished capacity goes to whether a defendant actually intended to commit a crime.

In practice this distinction may be unclear because of the definition of intent which is used to instruct the jury as follows: "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime."[19] The defense can argue that a defendant was under the delusion that his conduct was justified, which shows he did not intend to act with the purpose to commit a crime. For example, a Vietnam veteran who shot

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14. *See* State v. Griffin, 670 P.2d 265, 266 (Wash. 1983).
15. *Id.*
16. WASH. REV. CODE § 9A.12.010 (2000).
17. State v. Cameron, 674 P.2d 650, 653 (Wash. 1983).
18. *See* State v. Gough, 768 P.2d 1028, 1029-30 (Wash. Ct. App. 1989).
19. *See* WASHINGTON PRACTICE, *supra* note 13, § 10.01.

someone believing he was still in combat would claim he thought he was justified in the killing, so he did not act with the purpose to accomplish a result which constitutes a crime.[20] The veteran can argue that he never formulated the criminal intent.[21] Because a similar argument can be made for virtually any delusion or hallucination that causes the defendant to feel his conduct was justified, insanity and diminished capacity can become identical concepts in practice.

State v. Atsbeha, a recent Washington State Supreme Court case, is an instructive example.[22] Atsbeha was charged with unlawful delivery of a controlled substance.[23] At trial he sought to call his physician as an expert witness to testify how organic brain damage (caused by syphilis), major depression, alcohol and substance abuse problems impaired his ability to form the requisite criminal intent, since he was operating under the delusion that he was acting on behalf of the police to help them to capture a "main" drug dealer.[24] At the conclusion of the physician's testimony, the trial judge refused to allow the testimony because it was not material to a diminished capacity defense.[25] The trial judge explained that Atsbeha's condition "'is what I would find to be insanity[,]' not diminished capacity."[26] She stated, "'[T]here is no evidence that we have before us that [Atsbeha] lacked the specific intent to be able to deliver an object from one person to another.'"[27] The jury convicted Atsbeha.[28] On appeal, Division One of the Washington State Court of Appeals stated in relevant part:

> In this case, if Atsbeha believed that he was helping the police capture a "main" drug dealer, that belief—even though irrationally formed because of the very nature of his profound disorder—would indeed negate specific intent, that is, acting with the objective to produce a result that constitutes a crime, even though Atsbeha could, according to Dr. Rose, respond to a request to do a physical act, that is, to buy something and give it to another person right away.[29]

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20. *See id.*
21. *See id.*
22. State v. Atsbeha, 16 P.3d 626 (Wash. 2001).
23. *Id.* at 627-28.
24. *Id.* at 628-30.
25. *Id.* at 631.
26. State v. Atsbeha, 981 P.2d 883, 885 (Wash. Ct. App. 1999), *rev'd*, 16 P.3d 626 (Wash. 2001).
27. *Id.* at 885.
28. *Id.* at 884.
29. *Id.* at 887.

The case was reversed and remanded for a new trial because the trial court erred in excluding the physician's testimony, which was material and relevant to Atsbeha's diminished capacity defense.[30]

The State appealed to the Washington State Supreme Court, which reversed the court of appeals' decision holding that the trial judge had not abused her discretion in excluding the testimony.[31] The supreme court pointed out the physician's response to questions from the trial judge regarding Atsbeha's intent, "'I think his intent to [sic] was to deliver to the police officer.'"[32] The physician had also admitted that despite his syphilitic encephalopathy, Atsbeha "would have been able to respond to a request to buy something and give it to another person."[33] In his dissent, Justice Sanders disagreed with the majority opinion stating, "Dr. Rose's testimony went to the very heart of Atsbeha's defense: whether he had diminished capacity to form the requisite intent to commit the crime with which he was charged."[34] There is considerable confusion on the issue of whether a delusion, under which a defendant thinks his behavior is legally justified, constitutes diminished capacity. Furthermore, trial judges' broad discretion to decide what expert evidence on diminished capacity defenses can be admitted or excluded adds to the confusion.

In both criminal and civil cases, Washington applies the *Frye*[35] test to determine the admissibility of scientific expert opinion evidence.[36] Under *Frye*, scientific opinions are admitted only if the scientific principles from which the opinions are deduced are sufficiently established to have gained general acceptance in the relevant scientific community.[37]

In 1979, the Washington Supreme Court adopted evidence rules worded almost identically to the Federal Rules of Evidence, which had been passed by Congress in 1975.[38] Washington Evidence Rule 702 (identical to Fed.R. Evid. 702)[39] states: "If scientific, technical, or other specialized knowledge will assist

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30. *Id.*

31. State v. Atsbeha, 16 P.3d 626, 635 (Wash. 2001).

32. *Id.* at 630 (emphasis omitted).

33. *Id.* (emphasis omitted).

34. *Id.* at 637 (Sanders, J., dissenting).

35. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

36. The Washington Supreme Court continues to follow *Frye* rather than the United States Supreme Court decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). State v. Copeland, 922 P.2d 1304, 1314 (Wash. 1996).

37. *Frye*, 293 F. at 1014; *Copeland*, 922 P.2d at 1312; Reese v. Stroh, 907 P.2d 282, 285 (Wash. 1995); State v. Woo, 527 P.2d 271 (Wash. 1974).

38. In 2000 Federal Rule of Evidence 702 was amended to incorporate *Daubert*. FED. R. EVID. 702 advisory committee's note.

39. WASH. R. EVID. 702 cmt.

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."[40]

Once a theory has met the *Frye* test, a trial court must determine whether the proposed testimony would be "helpful to the trier of fact" under Washington Evidence Rule 702 ("ER"). The Washington Supreme Court in *State v. Cauthron* stated, "The 2-part test to be applied under ER 702 is whether: (1) the witness qualifies as an expert and (2) the expert testimony would be helpful to the trier of fact."[41] When evaluating a trial court's ER 702 analysis, an appellate court will defer to the trial court's decision "[u]nless there has been an abuse of discretion."[42]

III. REQUIREMENT OF EXPERT TESTIMONY FOR DIMINISHED CAPACITY BASED ON MENTAL DISORDER

The court in *State v. Stumpf* set forth how both expert and lay opinion evidence can be used in cases involving mental defenses.[43] In *Stumpf*, the defendant was convicted of the attempted murder of his wife.[44] At pretrial hearings he indicated his intent to use a "diminished capacity" defense.[45] At trial, however, he presented "no expert testimony to support his contention [that] he suffered from diminished capacity at the time of the attack."[46] Therefore, the trial court did not allow lay opinion evidence as to his alleged diminished capacity or a jury instruction on diminished capacity, despite the defendant's testimony that he suffered from "command delusions," which had prevented him from having the requisite intent to cause his wife's death.[47]

On appeal, Division Three of the Washington State Court of Appeals held that expert opinion evidence is required for a diminished capacity defense and affirmed the trial court's refusal to allow a diminished capacity instruction and lay opinion evidence because no expert opinion evidence on diminished capacity was offered.[48] The court explained its ruling:

> Although lay testimony may be admitted to supplement expert testimony if the proper foundational requirements are met, the existence of

40. WASH. R. EVID. 702.
41. State v. Cauthron, 846 P.2d 502, 507 (Wash. 1993).
42. *Id.*
43. State v. Stumpf, 827 P.2d 294, 296-97 (Wash. Ct. App. 1992).
44. *Id.* at 295.
45. *Id.*
46. *Id.*
47. *Id.* at 295-96.
48. *Stumpf*, 827 P.2d at 297.

> an alleged mental disorder such as that asserted here and its connection with the diminished capacity constitute subject matter beyond lay expertise. Therefore, when a diminished capacity defense is asserted in a criminal action, expert testimony is required to establish the existence of the alleged mental disorder, as well as the requisite causal connection between the disorder and the diminished capacity. In so holding, we rely on the general rule that expert testimony is required "when an essential element in a case is best established by opinion but the subject matter is beyond the expertise of a lay witness."[49]

Thus, it seems clear that after *Stumpf*, expert opinion evidence would also be required for other mental defenses, such as incompetency, insanity, childhood incapacity, etc., and lay opinion evidence without expert testimony would also not be allowed.[50]

Lay opinion evidence will be admitted as character evidence under ER 404(a)(1) where an accused may introduce evidence of a "pertinent" state of his character.[51] The Washington Supreme Court addressed this issue in *State v. Eakins*.[52] Eakins was convicted at the trial court level of two counts of second degree assault.[53] He admitted to pointing a loaded gun at two people but claimed prescription tranquilizers and alcohol intoxication had interacted with his depression resulting in diminished capacity.[54] A psychiatrist testified that Eakins had been incapable of forming the "intent" to assault based on his depression and the effects of alcohol and anti-depressants.[55] The trial court excluded the fifteen lay character witnesses who would testify to Eakins' peaceable nature because Eakins had admitted to the acts charged, and the character evidence was irrelevant to the issue of intent.[56] The court of appeals reversed the trial court because intent was an essential element of the crime charged, so the reputation evidence should have been admitted under ER 404(a)(1).[57] The supreme court affirmed the court of appeals' decision holding that "'pertinent' [is] synonymous with 'relevant'" under ER 404(a)(1).[58]

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49. *Id.* (citations omitted).

50. In contrast, no expert testimony is required to establish whether a defendant was intoxicated at the time of an alleged offense because the subject matter of intoxication is within the expertise of a lay jury. State v. Smissaert, 706 P.2d 647, 649 (Wash. Ct. App. 1985).

51. WASH. R. EVID. 404(a)(1).

52. State v. Eakins, 902 P.2d 1236 (Wash. 1995).

53. *Id.* at 1237.

54. *Id.*

55. *Id.* at 1238.

56. *Id.*

57. *Eakins*, 902 P.2d at 1238.

58. *See id.* at 1238, 1242.

> To show diminished capacity, a criminal defendant must produce expert testimony demonstrating the defendant suffered from a mental condition that impaired his or her ability to form the requisite specific intent. Once this expert evidence has been received, the defendant's evidence of a pertinent character trait is admissible under ER 404(a)(1) to show circumstantially that the expert was correct. A pertinent character trait is one that is relevant to an essential element of the crime charged. Once the defendant has produced the appropriate expert testimony supporting a claim of diminished capacity, relevant character evidence is admissible even when specific intent is the only element at issue in the case.[59]

IV. ADMISSIBILITY OF TESTIMONY ON DIMINISHED CAPACITY

Until recently, the admissibility of expert testimony in diminished capacity cases was strictly limited by the nine foundational requirements (factors) in *State v. Edmon* which needed to be satisfied before an expert could give an opinion as to diminished capacity.[60] However, the Washington Supreme Court limited the applicability of the *Edmon* factors in *State v. Ellis*.[61] In *Ellis*, the court indicated that an ER 702 analysis was the appropriate method for trial courts to determine the admissibility of expert opinions with regard to diminished capacity.[62] *Ellis* was an aggravated murder (death penalty) case where the defendant allegedly bludgeoned his mother and half-sister to death.[63] At a pretrial hearing, the defense elected not to call any witnesses.[64] The prosecution called as "hostile witnesses" two psychologists who the defense had listed when it informed the prosecution of Ellis' diminished capacity defense and a Western State Hospital psychologist.[65] The defense and the prosecution both agreed that the *Edmon* factors were the appropriate analyses to determine the admissibility of the proffered testimony.[66]

The defense argued that all nine of the requirements had been met, but the State argued that *Edmon* factors five, six, seven, eight, and nine had not.[67] These factors are:

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59. *Id.* at 1242 (citation omitted).
60. State v. Edmon, 621 P.2d 1310 (Wash. Ct. App. 1981).
61. *See* State v. Ellis, 963 P.2d 843 (Wash. 1998).
62. *Id.* at 856.
63. *Id.* at 844-45.
64. *Id.* at 845-46.
65. *Id.* at 846.
66. *Ellis*, 963 P.2d at 845.
67. *Id.* at 846, 852.

5. The cause of the inability to form a specific intent must be a mental disorder, not emotions like jealousy, fear, anger, and hatred.
6. The mental disorder must be causally connected to a lack of specific intent, not just reduced perception, overreaction or other irrelevant mental states.
7. The inability to form a specific intent must occur at a time relevant to the offense.
8. The mental disorder must substantially reduce the probability that the defendant formed the alleged intent.
9. The lack of specific intent may not be inferred from evidence of the mental disorder, and it is insufficient to only give conclusory testimony that a mental disorder caused an inability to form specific intent. The opinion must contain an explanation of how the mental disorder had this effect.[68]

The State further argued that the testimony of one psychologist failed to meet *Edmon* factors three and four: "'3. The expert personally examines and diagnoses the defendant and is able to testify to an opinion with reasonable medical certainty. 4. The expert's testimony is based on substantial supporting evidence in the record relating to the defendant and the case.'"[69]

The trial court granted the State's motion to exclude the testimony.[70] The defense obtained discretionary review by the Washington Supreme Court.[71] Although the defense did not argue at trial that an ER 702 analysis should have been used instead of an *Edmon* analysis, it did so to the Washington Supreme Court.[72] The court accepted the argument stating:

> The trial court in this case intelligently evaluated the testimony and reports of defense expert witnesses. The court, however, placed too much reliance upon foundational criteria announced in *State v. Edmon*, a 1981 Court of Appeals case. We do not consider *Edmon* controlling in this case. Strict application of *Edmon* results in at least a questionable result in this capitol case by depriving Petitioner Ellis, before trial, of an opportunity to present a diminished capacity defense. The question of admissibility of the testimony of defense experts is better determined under ER 702, 401 and 402. If at trial the court allows any such testimony, its weight and value would then be determined by the trier of fact, the jury, under proper instructions, including an instruction such as WPIC 6.51.[73]

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68. *Id.* at 847 n.31 (alteration in original) (quoting State v. Edmon, 621 P.2d 1310, 1313-14 (Wash. Ct. App. 1981)).

69. *Id.* at 847 n.31, 852 (quoting *Edmon*, 621 P.2d at 1313).

70. *Id.* at 846.

71. *Ellis*, 963 P.2d at 846.

72. *Id.* at 853.

73. *Id.* at 855. Washington Pattern Jury Instruction for criminal cases 6.51 reads as

In its conclusion, the Washington Supreme Court admitted that the *Edmon* "foundational requirements . . . had not been satisfied" but stated that *Edmon* was not controlling.[74] The court held that the testimony of the witnesses

> should be allowed at trial under ER 702. [The witnesses] would be subject to cross-examination as they were as "hostile witnesses" in the pre-trial proceeding on the motion in limine. The trier of fact—the jury—can then determine what weight, if any, it will give to their testimony. This is fundamentally fair and consistent with due process.[75]

V. DISSOCIATIVE IDENTITY DISORDER (DID) AND DIMINISHED CAPACITY OR INSANITY

Any remaining questions regarding the validity of the *Edmon* factors were resolved in *State v. Greene*.[76] *Greene* is a Washington Supreme Court case involving the diagnosis of dissociative identity disorder ("DID"), also known as multiple personality disorder.[77] Greene had received sex offender treatment from M.S., a female psychotherapist, while he was incarcerated for an unrelated indecent liberties offense.[78] During the treatment M.S. diagnosed Greene as suffering from DID because he manifested 24 separate identities.[79] When Greene was released from prison, M.S. continued to treat him, sometimes at his home.[80] During a treatment session, Greene allegedly sexually assaulted her, left her bound and gagged in his home, and drove off in her car.[81]

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follows:

> A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

11 WASHINGTON PRACTICE, WASHINGTON PATTERN JURY INSTRUCTION - CRIMINAL § 6.51 (2d ed. 1994).

74. *Ellis*, 963 P.2d at 855.
75. *Id.* at 856.
76. State v. Greene, 984 P.2d 1024 (Wash. 1999).
77. *Id.* at 1025.
78. *Id.* at 1025-26.
79. *Id.* at 1026.
80. *Id.*
81. *Greene*, 984 P.2d at 1026.

According to the court:

> [T]he victim, M.S., was prepared to testify regarding her overall evaluation of the defendant in terms of his personality "system," as well as her perception of the personalities present at the time of the assault. In M.S.' opinion, there were several personalities present at the time of the assault: "Bill," the host personality; "Tyrone," a child alter who appeared to be around the age of three or four; "Sam," another alter; as well as a fourth unidentified alter, possibly "Otto." Nevertheless, in support of the defense's theory of the case, M.S. was prepared to testify that the child alter, "Tyrone," was primarily in control at the time of the assault, and there were "substantial amnestic barriers" between Tyrone and the other personalities.[82]

The primary issue on appeal was whether the DID testimony was admissible under *Frye* and ER 702 as either insanity or diminished capacity.[83] At a pretrial hearing, the trial court determined that the DID testimony was not admissible under *Frye* or ER 702 because "DID was not generally accepted within the relevant scientific community."[84] A jury convicted Greene of indecent liberties and first degree kidnapping.[85] The court of appeals reversed, and the supreme court accepted review.[86] The Washington Supreme Court held that the appropriate *Frye* analysis was whether the diagnosis was generally accepted in the scientific community and not whether the scientific community had reached a consensus as to the relationship between DID and insanity or between DID and diminished capacity.[87] The court explained DID was a generally accepted diagnosis because it was included in The Diagnostic & Statistical Manual of Mental Disorders ("DSM-IV").[88] Thus, DID testimony met the *Frye* test in Washington because "DSM-IV's diagnostic criteria and classification of mental disorders 'reflect a *consensus* of current formulations of evolving knowledge' in the mental health field."[89] It is likely, therefore, that any other DSM-IV diagnosis would also meet the *Frye* test under the same analysis.

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82. *Id.* at 1030 (citations omitted).
83. *Id.* at 1025.
84. *Id.* at 1025, 1027.
85. *Id.* at 1025.
86. *Greene*, 984 P.2d at 1025.
87. *Id.* at 1028.
88. *Id.*
89. *Id.* (quoting State v. Greene, 960 P.2d 980, 989 (Wash. Ct. App. 1998), *aff'd in part and rev'd in part*, 984 P.2d 1024 (Wash. 1999)).

The court further held that although the DID testimony satisfied the *Frye* test, it was inadmissible under ER 702 because it was "not helpful to the trier of fact":

> The relevant question to be resolved by the jury in this case was whether, at the time he committed the acts in question, Greene's mental condition prevented him from appreciating the nature, quality, or wrongfulness of his actions, or, in the alternative, whether the alleged condition demonstrably impaired Greene's ability to form the mental intent necessary to commit the charged crimes. In order to be helpful to the trier of fact, therefore, 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. 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 her actions or to form the required specific intent to commit the charged crime. Thus, we agree with the Court of Appeals that in this case a primary consideration under ER 702 is whether and how the symptoms of DID are relevant to the legal concepts of insanity and diminished capacity.[90]

The court concluded the "scientific principles" underlying DID were "generally accepted within the scientific community" under *Frye,* but nonetheless "incapable of forensic application" and thus not "helpful" to the jury under ER 702 because there was no generally agreed upon way of applying the DID concept to the issue of criminal responsibility.[91] If only one of the "personalities" was responsible for committing the crime, should the defendant be held responsible? That personality is part of the defendant's psychological make-up, but so are his other personalities. It is not possible to put one personality in jail or in a mental institution and then allow the others to remain free! Is it possible to hold an alter personality such as "Tyrone" responsible if he is supposedly only three or four years old?

The Washington Supreme Court stated:

> [W]e refused to adopt a specific legal standard by which to assess the sanity of a criminal defendant suffering from multiple personality disorder. Our decision was based in large part on the lack of consensus, both in the courts

90. *Id.* at 1029 (citations omitted).

91. *See Greene*, 984 P.2d at 1028-29.

> and the medical community, on the proper forensic method to be used. We find ourselves in no better position today than we did then.[92]

The court concluded:

> We do not exclude the possibility that there may be a case in which the sanity of a defendant suffering from DID can be reliably evaluated. However, based upon the evidence and testimony presented here, we do not find this is such a case. Accordingly, we must agree with the trial court that the proposed expert testimony in this case was inadmissible under ER 702 because it would not have been helpful to the trier of fact.
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> . . . [I]n this case, DID testimony was properly excluded because it was not possible to reliably connect the symptoms of DID to the sanity or mental capacity of the defendant.[93]

In a footnote, the *Greene* court made the following statement:

> ER 702 controls the analysis for both insanity and diminished capacity. The State asks us to revisit our recent decision in *State v. Ellis*, in which we held the admissibility of expert testimony regarding diminished capacity is to be determined under ER 702. We decline the State's invitation. ER 702 is the standard for admissibility of expert testimony in Washington.[94]

It appears that the rigorous approach under the *Edmon* factors for diminished capacity cases has been rejected in favor of the more discretionary approach under ER 702. The only apparent exception is the requirement that an expert personally examine and diagnose the defendant. These cases show that any DSM-IV diagnosis is presumably admissible under *Frye*. Diminished capacity and insanity cases are no longer limited to diagnoses involving major mental illnesses as demonstrated in *Ellis*.[95] However, an expert must show the trial court that his diagnosis of a defendant is such that the forensic application will assist the trier of fact in determining the defendant's state of mind at the time the crime was committed.[96] Evidence that does not help the trier of fact resolve any issue of fact is irrelevant and inadmissible under ER 702.[97]

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92. *Id.* at 1029 (citing State v. Wheaton, 850 P.2d 507 (Wash. 1993)).
93. *Id.* at 1031-32.
94. *Id.* at 1029 n.3 (citations omitted).
95. *See* State v. Ellis, 963 P.2d 843, 855-56 (Wash. 1998).
96. *Greene*, 984 P.2d at 1029.
97. *Id.*

VI. IS "REASONABLE CERTAINTY" REQUIRED?

In *State v. Mitchell*, Division One of the Washington Court of Appeals explained the applicability of the third *Edmon* factor regarding an expert being able to testify about the diagnosis of a defendant to a degree of medical certainty.[98] Mitchell appealed his conviction of one count of third degree assault and two counts of fourth degree assault contending the trial court had erred when it ruled that his proffered expert testimony regarding diminished capacity was inadmissible under either an *Edmon* or an ER 702 analysis.[99] Mitchell punched a twelve-year-old boy in the face without provocation and continued walking down the sidewalk.[100] A plain-clothed police officer who had seen the defendant hit the boy produced her badge and ordered him to stop, but Mitchell punched the officer as well.[101] After a violent struggle, Mitchell was arrested.[102] He was initially found incompetent to stand trial because of his schizophrenia, but he regained competency after three months of treatment.[103] Mitchell's attorney asserted a diminished capacity defense, and the trial court held a hearing at which Mitchell's expert psychologist testified he was "100 percent certain" that Mitchell was suffering from a mental disorder akin to schizophrenia which "would have the potential to interfere with his knowledge."[104] However, the expert was not able to testify with "reasonable medical certainty" that Mitchell was incapable of understanding what he was doing at the time of the incident because of the mental disorder.[105] Noting that *Edmon* "'is the controlling authority,'" the trial judge excluded the testimony because the psychologist's opinion would confuse the jury and invite speculation about Mitchell's state of mind unless the psychologist was willing to state with specificity that Mitchell was affected by his disorder at the time of the incident.[106]

The court of appeals held that an expert's "reasonable medical certainty" is not necessary to determine whether a defendant's disorder produced the asserted impairment. Instead, the expert need only testify that "it could have" done so.[107] The court stated:

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98. State v. Mitchell, 997 P.2d 373, 375 & n.1, 376 (Wash. Ct. App. 2000).
99. *Id.* at 374.
100. *Id.*
101. *Id.*
102. *Id.*
103. *Mitchell*, 997 P.2d at 374.
104. *Id.* at 374-75.
105. *Id.* at 375.
106. *Id.* at 375, 376.
107. *Id.* at 376.

> The jury, after hearing all the evidence, may find probability where the expert saw only possibility, and may thereby conclude that the defendant's capacity was diminished even if the expert did not so conclude. Further, other evidence introduced at trial may provide the jury with more information about the defendant's mental state than was available pretrial to the expert. For this reason, excluding expert testimony on the basis of a motion in limine may be especially risky.[108]

The *Mitchell* holding is inconsistent with a line of cases in which courts required an expert to hold his opinion with "reasonable certainty" before it is admissible.[109] However, *Mitchell* seems to be consistent with a series of Washington cases holding that the expert's inability to be certain goes to the weight of his testimony rather than to its admissibility.[110] In *State v. Lord*, the court noted that the scientific process is such that often times no more certainty can be determined than "possibilities" or "similarities."[111] Therefore, expert testimony is admitted and the lack of certainty is to be factored into the weight given the testimony.[112]

Thus, it now appears excluding expert testimony about a defendant's mental state at the time of an alleged crime is disfavored under Washington's ER 702 analysis. Furthermore, an expert does not have to be sure a defendant's disorder prevented him from forming the requisite "intent" or "knowledge." Instead, an expert only has to testify it is possible that the disorder caused a defendant to have diminished capacity.[113] In many cases this would be very helpful to the defense. It is not uncommon for an individual with a mental disorder to be unable or unwilling to describe to the expert in any detail what was going on in his mind at the time of an alleged crime. As a result, experts often have great difficulty testifying to a "reasonable certainty" that the disorder caused the individual to have a mental defect.[114] Indeed, such was the case in *Mitchell*, where the defendant could only tell the expert that he "did not believe they were police" but was unable or unwilling to provide more information.[115] As the *Mitchell* court stated:

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108. *Mitchell*, 997 P.2d at 377 (citing State v. Ellis, 963 P.2d 843 (Wash. 1998); Crawford v. Welsh, 508 P.2d 1039 (Wash. Ct. App. 1973)).

109. *See, e.g.*, McLaughlin v. Cooke, 774 P.2d 1171, 1175 (Wash. 1989).

110. *See, e.g.*, State v. Lord, 822 P.2d 177, 192 (Wash. 1991).

111. *See id.*

112. *See, e.g.*, State v. Warness, 893 P.2d 665, 669 (Wash. Ct. App. 1995).

113. *Mitchell*, 997 P.2d at 376.

114. *See id.* at 377.

115. *Id.*

> Without more information about what Mitchell was thinking and feeling at the time of the incident, [the expert psychologist] did not have an opinion about whether Mitchell was actually experiencing delusions when he encountered the officers. The court reasoned that if [the expert] did not have enough facts or information to state an opinion on the ultimate question, the jury would be similarly unable to do so. Under ER 702, this was error. A jury should be allowed to determine whether Mitchell was experiencing delusions at the time of his arrest even if [the expert] could only say it was possible.[116]

Mitchell opens the possibility for experts to speculate about a defendant's mental state. Since the expert only has to opine that it was possible that a defendant suffered from a delusion, an expert does not have to know what the delusion was.

VII. DISCOVERY ISSUES AND COMPELLED EXAMINATIONS

In Washington a defendant asserting an insanity defense or a diminished capacity defense can be forced to submit to a mental health evaluation by an expert chosen by the State.[117] In *State v. Hutchinson*, the Washington Supreme Court made it clear that a defendant who relies on a diminished capacity defense, even without asserting an insanity defense, can be compelled to submit to a psychiatric and/or psychological examination by an agent of the prosecuting attorney.[118] Defense counsel is entitled to attend any examination of the defendant by the prosecution's expert witnesses, but may not interfere with or participate in the examination.[119] Furthermore, if the defendant testifies at trial, the court should protect his "Fifth Amendment interests by 'refusing to permit cross examination on statements that might be considered confessional.'"[120] Citing the Iowa case, *State v. Craney*,[121] the *Hutchinson* court stated:

> We follow *State v. Craney* in holding:
> we are persuaded the better view is that a distinction should be drawn between testimony by the expert (a) which on the one hand gives (i) his opinion on sanity or insanity and (ii) his non-incriminatory observations in arriving at his opinion including non-incriminatory statements by the defendant, and (b) which on the other hand gives his incriminatory

116. *Id.*
117. State v. Hutchinson, 766 P.2d 447, 452, 454 (Wash. 1989).
118. *Id.*
119. *Id.* at 454.
120. *Id.* at 453 (citing State v. Brewton, 744 P.2d 646, 648 (Wash. Ct. App. 1987)).
121. State v. Craney, 347 N.W.2d 668 (Iowa 1984).

> observations in arriving at his opinion including incriminatory statements by the defendant. Opinions, observations, and statements under branch (a) are admissible, but observations and statements under branch (b) are inadmissible. Under these principles, an observation or statement is not "incriminatory" merely because it tends to show the defendant is sane.[122]

Washington Superior Court Criminal Rule 4.7(g) allows the court to require a defendant to disclose any and all reports, test results, testimony or statements used or made by experts intended for use at trial.[123] In *Hutchinson*, the Washington Supreme Court interpreted this to require the disclosure of any *existing* reports of mental examinations which have been written, but *not* to require the preparation of such reports if they have not already been prepared.[124] The trial court in *Hutchinson* had ordered the defense experts to write reports although no reports had been prepared.[125]

In *State v. Hamlet*, Division One of the Washington Court of Appeals addressed the issue of whether in a diminished capacity case the defense experts who had not found in favor of the defendant had to be revealed to the State and whether those experts could be used by the State against the defendant.[126] In Washington insanity cases, the State has the right to know which experts evaluated the defendant but will not be called at trial and to use those experts as part of its own case.[127] The *Hamlet* court applied this rule to diminished capacity cases.[128] "Incriminatory" statements made by the defendant to a defense-retained expert should be suppressed during trial as discussed in *Hutchinson*.[129] The *Hutchinson* court, citing a Colorado case,[130] stated:

> And as observed in *People v. Rosenthal*: . . . If the prosecution is permitted to make unrestricted use at the guilt trial of the defendant's psychiatric communications during a sanity examination by a privately retained psychiatrist, the defendant in effect becomes a witness against herself through the conduit of the psychiatric examiner . . . . The procedures governing the insanity defense cannot be applied in a manner that destroys the constitutional safeguard against self-incrimination. We hold, therefore,

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122. *Hutchinson*, 766 P.2d at 453 (citation omitted) (quoting *Craney*, 347 N.W.2d at 673).

123. WASH. SUPER. CT. CRIM. R. 4.7(g).

124. *Hutchinson*, 766 P.2d at 450.

125. *Id.* at 449.

126. State v. Hamlet, 921 P.2d 560, 562-63 (Wash. Ct. App. 1996), *aff'd*, 944 P.2d 1026 (Wash. 1997).

127. *See* State v. Pawlyk, 800 P.2d 338, 344-45 (Wash. 1990).

128. *Hamlet*, 921 P.2d at 564-65.

129. *See supra* notes 120, 122 and accompanying text.

130. People v. Rosenthal, 617 P.2d 551 (Colo. 1980).

> that the prosecution may not call as a witness in its case-in-chief during the guilt trial a psychiatrist privately retained by the defendant in connection with an insanity plea and elicit from the psychiatrist incriminating admissions made by the defendant during a sanity examination."[131]

These cases indicate no practical distinction in how courts handle insanity and diminished capacity cases other than the burdens of proof. For both types of cases (and presumably for all other types of cases involving mental health experts, e.g. competency, juvenile incapacity, self-defense), all experts must be revealed to the other side, so the defense may not "hip-pocket" a witness whose findings are unfavorable. In other words, the prosecution may routinely ask in discovery for experts who have evaluated the defendant, and the defense counsel must reveal *all* such experts. The prosecution may call defense experts witnesses to testify about their opinions (even if those opinions are adverse to the defendant) but may not have them testify as to "incriminatory" statements made by the defendant to the defense experts. Each side must inform the other party in discovery what its experts will say in court and must make its experts available for questioning by the other party, but an expert can not be compelled to prepare a report by the party that did not originally retain him.

VIII. CONCLUSION

Although it was previously difficult to have expert psychological or psychiatric testimony admitted in diminished capacity cases, it now appears excluding such testimony is disfavored in Washington. Whether an expert can testify with "reasonable certainty" is not determinative because this issue goes to the weight given to the testimony rather than to its admissibility. As a result, juries will be instructed under WPIC 6.51 that they may disregard the expert testimony if they wish. Furthermore, diagnoses in DSM-IV will usually be allowed under the *Frye* standard of general acceptability as will diagnoses previously excluded, such as personality disorders. Such testimony will be "useful to the trier of fact" under ER 702 if it has "forensic applicability," which seems to mean that there is a clear and generally accepted way for the testimony to be applied to the legal test at hand. Finally, all experts who have evaluated the defendant for either side must be revealed, and although they may not be required to prepare reports that do not already exist, all aspects of their evaluation and their opinions must be revealed before trial.

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131. State v. Hutchinson, 766 P.2d 447, 453-54 (Wash. 1989) (citations omitted) (quoting *Rosenthal*, 617 P.2d at 555).