

29120-1-III  
COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DAVID K. BREWCZYNSKI, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Mark E. Lindsey  
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court improperly instructed the jury on an uncharged alternative means of committing of burglary.
2. The information omitted an element of the crime of first degree burglary.
3. Defendant received ineffective assistance of counsel.
4. The court improperly denied defendant's motion to exclude testimony under Frye and Evidence Rule ("ER") 702.
5. Cumulative error violated defendant's constitutional right to due process.
6. The trial court improperly instructed the jury regarding how to answer the special verdict forms "no."

II.

ISSUES PRESENTED

1. Does defendant qualify for review pursuant to RAP 2.5(a) when defendant failed to object to the now alleged improper instructions at trial?
2. Was defendant deprived of due process by the inclusion of an uncharged alternative means of committing first degree burglary in the elements instruction?

3. Should the first degree burglary conviction be reversed because the Information charged one alternative means of committing the crime?
4. Was counsel ineffective in declining to impeach a witness with evidence of a prior conviction?
5. Did the trial court improperly admit expert testimony?
6. Does cumulative error require reversal of the convictions and remand for a new trial?

### III.

#### STATEMENT OF THE CASE

The Respondent accepts the Appellant's statement of the case for purposes of this appeal only.

### IV.

#### ARGUMENT

- A. DEFENDANT HAS NOT SHOWN THAT THE TRIAL COURT COMMITTED A MANIFEST ERROR WHICH QUALIFIES FOR REVIEW PURSUANT TO RAP 2.5(a)(3).

Generally, the failure to object to a trial court's jury instruction precludes appellate review. *State v. Scott*, 110 Wn.2d 682, 685-6, 757 P.2d 492 (1988). Neither the defendant nor his counsel objected to the jury instructions that he now contends were erroneous. Generally, an

issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. *See* RAP 2.5(a)(3). The applicability of RAP 2.5(a)(3) is determined by whether: (1) the alleged error is truly constitutional, and (2) is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). An error is manifest when it has practical *and* identifiable consequences in the trial of the case. *State v. Stein*, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). (Emphasis added).

Defendant claims the court committed a constitutional error by instructing the jury: (1) on an uncharged alternative means of committing first degree burglary; and (2) that it need be unanimous to return a “no” answer to a special verdict form. Jury instructions satisfy the constitutional demands of a fair trial, when read as a whole, the instructions provide the jury with the applicable law, are not misleading, and permit the defendant to present his theory of the case. *State v. Prado*, 144 Wn. App. 227, 241, 181 P.3d 901 (2008) (*citing State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005)). Erroneous jury instructions are reviewed *de novo* on appeal. *State v. O'Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007). Here, defendant has identified no practical and identifiable consequences in the *trial of this case* directly attributable to the alleged error. Defendant has not established that the court committed

a manifest error. Hence, defendant is not entitled to appellate review thereof.

**B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY.**

**1. The Court Properly Instructed The Jury On First Degree Burglary In The Context Of The Premeditated Murder With Aggravating Circumstances Charge.**

Defendant contends that he was deprived of due process by the court providing the jury the means to find him guilty based upon an uncharged alternative of first degree burglary. The United States and Washington State constitutions mandate that the jury be instructed on the essential elements of the crime charged. *State v. O'Donnell*, 142 Wn. App. at 322. Here, the court instructed the jury on the definition and elements of first degree burglary based on the charging language in the amended information. The amended information charged the defendant with premeditated murder in the first degree with aggravating circumstances, including that "the murder was committed in the course of, in furtherance of or in immediate flight from the crime of Burglary in the First Degree." CP 48-49. The amended information charged defendant separately with Burglary in the First Degree and Theft of a Firearm. The court was legally obligated to instruct the jury on the law to be applied based upon the charged offenses and the evidence produced.

The evidence before the jury was sufficient for the jury to conclude that the defendant had acted in a manner that satisfied both alternative means of committing first degree burglary. Specifically, that defendant committed the burglary while armed with a deadly weapon or by assaulting a person. The record before the jury included evidence that Mr. Cross died after defendant unlawfully entered Mr. Cross' home and killed him by means of either gunshots or at least twenty-four separate and distinct strikes to his head with an object. To convict defendant of premeditated murder in the first degree with aggravating circumstances, the State must prove that defendant caused the death of a human being with premeditated intent, and that the murder was committed in the course of, or furtherance of or immediate flight from the crime of a statutorily designed specific felony. RCW 9A.32.030(1)(a) and RCW 10.95.020(11)(c). Accordingly, the evidence before the jury legally obligated the court to define the alternative means of committing first degree burglary for purposes of resolving the premeditated murder in the first degree with aggravating circumstances charge.

2. Premeditated Murder With Aggravating Circumstances Is An Independent Crime That Does Not Require A Separate Conviction Of The Named Felony To Be Valid.

In *State v. Brett*, 126 Wn.2d 136, 892 P.2d 29 (1995), the Supreme

Court noted:

The felony murder statute...provides that when a death occurs in the course of robbery...or attempted robbery, the participants are guilty of felony murder. In contrast, under RCW 10.95.020(9)(a), only premeditated murders committed during the course of the robbery are within the scope of the statute... Whether the death penalty may be imposed depends upon whether the murder occurs 'in the course of' the robbery, not whether the robbery was completed.

*Id.*, at 163.

The same analysis holds true for the other felonies enumerated in RCW 10.95.020, including all forms of Burglary pursuant to subsection (11)(c). A premeditated murder in the first degree with aggravating circumstances does not list the elements of the named felony because in the aggravated murder context, while the named felony is an element of aggravated murder, the defendant is not actually charged with the named crime. Rather, the underlying crime functions as a statutory aggravator for purpose of sentencing not adjudicating guilt. *State v. Brett*, 126 Wn.2d at 170; *State v. Irizarry*, 111 Wn.2d 591, 594, 763 P.2d 432 (1988). Accordingly, the State can prove the named felony by

alternative means at trial. Nevertheless, the State must prove the elements of the named felony beyond a reasonable doubt. *State v. Kincaid*, 103 Wn.2d 304, 310-312, 692 P.2d 823 (1985). Here, the court properly instructed the jury on first degree burglary for purposes of rendering a verdict regarding the charge of premeditated murder in the first degree with aggravating circumstances.

Defendant claims the court erroneously instructed the jury by including the uncharged alternative means of committing first degree burglary in the elements instruction with regard to the separately charged crime of first degree burglary. Assuming, *arguendo*, that defendant's position is correct, the error was harmless.

3. Assuming, *Arguendo*, The Wording Of The Burglary Elements Instruction Was Erroneous, The Error Was Harmless Given The Facts Of This Case.

If the court's inclusion of the alternative means of committing burglary was an error of constitutional magnitude, a new trial is not necessarily the proper remedy.

Due process requires that the jury be instructed on the essential elements of the charged crime. Instructions that omit essential elements thereby relieve the State of its burden of proving each element beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827,

144 L. Ed. 2d 35 (1999). Here, the targeted instruction included more elements than was required by the charging pleading.

There is a limited class of fundamental constitutional errors that are so intrinsically harmful that they necessitate automatic reversal without consideration of the effect on the outcome of the trial. *Id.* When such errors are involved, the entire trial process is rendered fundamentally unfair. *Neder, supra.* Such errors are “structural” in nature and include: total denial of counsel, proceeding before a biased trial judge, racial discrimination in jury selection, denial of self-representation, and denial of a public trial. *State v. Zimmerman*, 130 Wn. App. 170, 121 P.3d 1216 (2005). These “structural errors” defy review because each deprives the defendant of the basic protections without which a criminal trial cannot reliably serve its function as a means for determination of guilt or innocence. *Neder*, 527 U.S. at 8. When a structural error is involved the resulting criminal punishment cannot be regarded as fundamentally fair. *Id.*, at 8-9.

The Supreme Court held that the omission of an essential element from the jury instructions is not a structural error. *Id.* Nevertheless, it is an error of constitutional magnitude which necessitates review. The court reasoned that such cases are to be reviewed under the harmless error doctrine. *Id.* An instruction that omits an element does not necessarily

render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *Neder, supra*. Omitting an element can be analogized to improperly instructing the jury on the element itself, an error that is subject to harmless error analysis. *Id.*

An error of constitutional magnitude does not require reversal if the error is shown to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Hoffman*, 116 Wn.2d 51, 96-97, 804 P.2d 577 (1991). The United States Supreme Court has made it clear that the failure to fully instruct a jury on all elements of an offense "does not necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v. United States*, 527 U.S. at 9. Under *Neder*, a defendant's Sixth Amendment right to a jury is violated when a jury is not fully instructed on all the elements of the offense, but such an error can be deemed harmless beyond a reasonable doubt. *Neder*, 527 U.S. at 9-10.

The Washington Supreme Court adopted the holding in *Neder* in *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). In *Brown*, a jury instruction misstated the law of accomplice liability. *Id.* at 338. The court in *Brown* followed *Neder* in reasoning that "not every omission or misstatement in a jury instruction relieves the State of its burden" so as to

require reversal. *Id.* at 339. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Brown*, 147 Wn.2d at 340 (*citing Neder* 527 U.S. at 9). Under *Brown* and *Neder*, a "jury instruction that omits or misstates an element of a charged crime is subject to harmless error analysis to determine whether the error has relieved the State of its burden to prove each element of the case." *Id.* at 344.

The test to determine whether such constitutional error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 341, (*quoting Neder*, 527 U.S. at 15). In performing this analysis, the court must determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element." *Neder*, 527 U.S. at 19. "If, at the end of the examination, the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error -- for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding -- it should not find the error harmless." *Neder*, 527 U.S. at 19. On the other hand, "[w]hen applied to an element omitted from, or

misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *Brown*, 147 Wn.2d at 341 (citing *Neder*, 527 U.S. at 18).

The *Neder* harmless error analysis applies here. The contested issue at trial was whether the defendant premeditated the murder of Mr. Cross, and the murder was committed in the course of, in furtherance of or in immediate flight from the crime of burglary in the first degree. Defense counsel acknowledged the DNA evidence discovered of Mr. Cross' blood on the outside of a glove and the boots found inside defendant's residence. Defense counsel acknowledged the discovery of defendant's DNA on the insides of that very same glove and those same boots. Nevertheless, defendant argued that: there were other sources of evidence that were not investigated; evidence that might have led to other possible suspects; and a general lack of sufficient evidence to convict defendant of the crimes charged. The verdicts reflect careful consideration of the parties' arguments in light of the evidence and the court's instructions.

There was no question that the premeditated murder in the first degree began with the aggravating circumstance of the burglary based upon the evidence that entry into the Cross home was effectuated by violently smashing through the locked door. There is no question that the evidence supports the verdict that the murder was committed "in the

course of, in furtherance of or in immediate flight from the crime of burglary in the first degree.” Any error in instructing the jury was harmless beyond a reasonable doubt.

4. Defendant Has Not Established That The Court Improperly Instructed The Jury Regarding The Special Verdict Forms.

Defendant claims that the special verdicts should be vacated because the court incorrectly instructed the jury that it had to unanimously answer “no” before the special verdicts could be rejected. Defendant cites the Supreme Court’s decision in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), in support of this claim. Defendant relies upon *Bashaw*, yet fails to heed the Supreme Court’s ruling in *State v. O’Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009), that appellate courts do not assume that an error is of constitutional magnitude. *Id.*

Defendant urges this Court to apply *Bashaw* to this case and to abandon its decision in *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011). In *Nunez*, this Court analyzed the requisites for review of the issue raised herein. Citing the Supreme Court’s decision in *O’Hara*, this Court analyzed whether the defendant in *Nunez* qualified for review of the court’s alleged instructional error. Specifically, this Court inquired whether Mr. Nunez had established that the court’s instructional error was constitutionally “manifest.” This Court sought proof that the instructional

error was constitutionally “manifest” in the only source available, the record before the trial court.

In *Nunez*, this Court found the record devoid of the facts required to demonstrate that the defendant had suffered actual prejudice. Accordingly, this Court held that Mr. Nunez had failed to carry his burden of proving that he had suffered actual prejudice from the instructional error. Mr. Nunez failed to prove the court’s instructional error had manifestly affected an identified constitutional provision, and thus did not qualify for the exceptions to RAP 2.5(a). Here, defendant has failed to cite to any aspects of the record that prove any practical and identifiable consequences *to the trial* of Mr. Brewczynski’s case to support the claim that the alleged instructional error was “manifest.”

5. Assuming, *Arguendo*, The Wording Of The Special Verdict Instruction Was Erroneous, The Error Was Harmless Given The Evidence In This Case.

Defendant claims the court committed manifest constitutional error instructing the jury that it had to unanimously answer the special verdict form “no” to avoid finding the sentencing enhancement factor. Defendant cites *State v. Bashaw* in support of his position; however, this position does not cure the fact that instructional error does not automatically constitute constitutional error.

The Supreme Court based its *Bashaw* decision on *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003). In *Goldberg*, the court instructed the jury: “To answer the special verdict form ‘yes,’ you must unanimously be satisfied beyond a reasonable doubt that ‘yes’ is the correct answer. If you have a reasonable doubt as to the question, you must answer ‘no’.” *Id.*, at 893. The Supreme Court held that this instruction did not mandate unanimity before a “no” answer could be rendered. *Id.*, at 893. The Supreme Court further ruled that the jury therein had completed their assigned task as instructed when it rendered a “no” verdict despite a lack of unanimity. *Id.*, at 893. It is important to note that the Supreme Court found that the error in *Goldberg* was precipitated by the trial court’s order that the jury continue to deliberate despite its having indicated that it was deadlocked and unable to reach a verdict regarding the special interrogatory.

Here, the court’s instruction on the special verdict form precluded the jury from facing the necessity for unanimity with regard to whether it had a reasonable doubt concerning the proof of the special interrogatory. The court instructed the jury that it *could not answer the special interrogatory affirmatively unless it was unanimous beyond a reasonable doubt that the answer was “yes.”* The court’s instruction focused the jury’s attention on the need to be unanimous beyond a reasonable doubt to answer the special interrogatory “yes.” Accordingly,

it is logical to infer from the instructions given in *Goldberg* and herein that unanimity was not required to render a “no” answer to the special interrogatory.

The defendant’s reliance upon *Bashaw* is understandable, yet misplaced. The court’s requirement of unanimity for the jury to answer the special interrogatory and complete the special verdict form comports with the instructions regarding how to resolve the issue presented by a general verdict form. This position is consistent with the general infrastructure of criminal jury trials. This position does not foreclose a jury from becoming deadlocked when trying to answer a special interrogatory. A jury that is deadlocked with regard to a special interrogatory provides the same practical and logistical resolution of the subject special interrogatory as would a unanimous “no” answer. The criminal justice system in Washington provides no procedural means by which a defendant could face jeopardy for a sentencing enhancement where a jury was unable to return a unanimous “no” answer thereto. A special verdict differs from a general verdict regarding the underlying charged offense in that a deadlocked jury on a general verdict results in a mistrial which places the defendant back in the position of facing trial on the charged offense. Such is not the result of a deadlocked jury with regard to a special interrogatory and special verdict. Accordingly, a jury

need not unanimously agree that the answer to the special interrogatory is “no” to render a negative resolution thereof and thereby foreclose its consideration by the trial court.

By incorporating, the presumption that the jury follows the law as instructed by the court into the process, *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994), a defendant *cannot face a sentencing enhancement* until a jury returns a general verdict finding that defendant committed the underlying charged offense beyond a reasonable doubt. Only then is the jury charged with resolving the special interrogatory and rendering a special verdict. Nevertheless, a defendant *cannot face a sentencing enhancement unless the jury returns a special verdict finding that the defendant committed the enhancing factor beyond a reasonable doubt while committing the charged offense*. If the court committed an instructional error with regard to the special interrogatory and verdict, it was harmless in light of the presumption that the jury follows the law as instructed.

Defendant contends that the alleged error created by the court’s special verdict form instruction was not harmless based upon the reasoning in *State v. Bashaw* that there was no way to discern how the jury would have answered the special interrogatory had it been properly instructed. Here, the essential elements instructions for the premeditated

murder in the first degree with aggravating circumstances required the jury to find that the murder was committed beyond a reasonable doubt by the use of a firearm in order to convict. The unchallenged testimony of the Medical Examiner was that Mr. Cross died as a result of two gunshot wounds to his head which shattered his skull. RP 630. Assuming that the jury followed the court's instructions, the jury had to unanimously find beyond a reasonable doubt that the defendant committed the murder with a firearm before it could render a guilty verdict thereon and before the jury could even consider the special verdict forms.

The standard of review requires the appellate court inquire whether it can conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error with regard to each charged crime. *See Chapman v. California, supra*. Here, there should be no reasonable doubt that the jury, having already agreed that defendant had used a firearm to commit the murder for purposes of the general verdict, would render the same answer to the interrogatory posed by the special verdicts. Accordingly, assuming, arguendo, that the instructional error was manifestly unconstitutional under *State v. Bashaw*, it was harmless beyond a reasonable doubt based upon the evidence before the jury.

C. THE INFORMATION NOTIFIED DEFENDANT THAT THE OMITTED ALTERNATIVE MEANS OF COMMITTING FIRST DEGREE BURGLARY BY ASSAULT WAS A POSSIBILITY SINCE COUNT I CHARGED PREMEDITATED MURDER.

Defendant claims that the Information was defective because it failed to notify defendant of an alternative element of first degree burglary. Specifically, that the Information charged defendant with first degree burglary by means of being armed with a deadly weapon, yet neglected to charge him with the alternative means of assault of a person. Defendant correctly sets out the standard of review to be applied to this issue as found in *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). “All essential elements of a crime, statutory or otherwise, must be included in a charging document to provide notice to an accused of the nature and cause of the accusation against him.” *Id.*, at 97. The *Kjorsvik* court reiterated its perspective that “the essential elements rule requires that a charging document allege facts supporting every element of the offense, in addition to adequately identifying the crime charged.” *Id.* (citing *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552(1989)). Here, the amended information charged defendant with premeditated murder and first degree burglary by means of being armed with a deadly weapon. Certainly, the defendant was on notice that he was accused of committing a homicide which necessitates the commission of some form of an assault.

The second requirement provided by *Kjorsvik*, involved how an appellate court should proceed when the defendant did not challenge the charging document until after the verdict was rendered. Here, defendant did not challenge the charging document prior to the verdict being returned. The *Kjorsvik* court held that such a circumstance requires that the charging document “be more liberally construed in favor of validity than those challenged before or during trial.” *Kjorsvik*, 117 Wn.2d at 102.

The Supreme Court acknowledged that the constitutional sufficiency of a charging document may be raised initially on appeal; however, the court ruled that a different standard of review should be applied because otherwise the defendant has no incentive to timely make such a challenge. *Kjorsvik*, at 103. Such a situation is fraught with the potential for a defendant to “sandbag” the trial court. Accordingly, the Supreme Court adopted the federal standard of liberal construction in favor of the validity of charging documents where challenges to the sufficiency thereof are not raised until after verdict or on appeal. *Kjorsvik*, at 105.

Therefore, the standard of review to be applied when a charging document is challenged for the first time on appeal is a two-step process. “An information will satisfy constitutional requirements if ‘the necessary facts appear in any form, or by fair construction can...be found’ on the

information's face; and the defendant cannot 'show that he or she was... actually prejudiced by the inartful language which caused a lack of notice.'" *Kjorsvik*, at 105-106. As noted, here, the amended information notified defendant that he was being charged with premeditated murder which necessarily includes an assault of some type, so defendant was fairly on notice that he needed to defend against a possible claim that he committed an assault in the commission of the burglary. An assault that was either separate from, or in addition to, the fact that defendant was armed with a deadly weapon when he committed the burglary and the murder. Here, defendant claims to have been prejudiced by the inartful language of the charging document, yet the record supports the reasonable inference that defendant's theory of the case would not have changed since he was claiming that he did not commit the burglary or the murder. Accordingly, defendant has not shown that his defense of the charged burglary was actually prejudiced, so he is not entitled to vacation of the burglary conviction.

**D. DEFENDANT WAS NOT DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL BY THE DECISION NOT TO SEEK FURTHER IMPEACHMENT OF A WITNESS.**

Defendant contends that counsel's failure to impeach a witness with evidence of a prior conviction constituted ineffective assistance of

counsel. Defendant is correct that the only purpose for admitting evidence pursuant to Evidence Rule (“ER”) 609 is to aid the trier of fact in assessing the truth of a witness’ testimony. *State v. Alexis*, 95 Wn.2d 15, 621 P.2d 1269 (1980).

ER 609(a) permits admission of evidence that a witness has been convicted of a crime to attack the credibility of that witness. The rule provides that the prior conviction evidence is admissible “if elicited from the witness or established by public record during examination.” ER 609(a)(1). Here, the witness voluntarily admitted being a convicted felon during examination, so the evidence thereof was properly admitted pursuant to ER 609(a)(1) despite the time limit prohibition of ER 609(b).

ER 609(a) precludes admission of prior conviction evidence where (1) the crime was not a felony and the trial court determines that the probative value of admitting the evidence outweighs the prejudice. Here, the voluntary admission of the felony conviction by the witness foreclosed the possibility, and necessity, that the court complete the pre-admission requisites of ER 609(a).

ER 609(b) excludes evidence of a conviction where:

more than ten years has elapsed since the date of the conviction or the release of the witness from confinement imposed for that conviction...unless the court determines, in the interests of justice, that the probative value of the

conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

ER 609(b).

Here, the subject conviction was twenty years old, so it was presumed inadmissible pursuant to ER 609(b) absent the court engaging in the required balancing test. Additionally, the subject conviction was for residential burglary, so its probative value was limited. The primary value of the subject prior conviction was impeachment of the credibility of the witness. That goal was achieved when the witness admitted to the conviction.

It is pure speculation to debate whether the prior conviction would have been admissible had the court not been foreclosed from engaging in the process required by ER 609 by the witness' voluntary disclosure. It is purely speculative to contend that more specific details of the conviction (i.e. that it was for residential burglary) would have added to the impeachment value of the conviction.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on considerations of all the circumstances, and that the deficient performance prejudiced the trial. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052,

80 L. Ed. 2d 674 (1984); *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If one of the two prongs of the test is absent, the claim fails. *Strickland*, 466 U.S. at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). The reasonableness inquiry presumes effective representation and requires the defendant show the absence of legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Prejudice is present if there is a reasonable probability that, but for counsel's error, the result would have been different. *Id.*, at 335.

Here, the inquiry focuses upon whether the trial counsel's failure to seek admission of additional details of the *already admitted* felony conviction (i.e. exact date, location, and nature of conviction) can be characterized as illegitimate trial strategy or tactics. Trial counsel adopted a legitimate tactical approach to the issue. Trial counsel anticipated that the witness would not voluntarily admit being a convicted felon, so counsel was prepared to offer proof of the conviction. The best evidence of the conviction was the witness' voluntary admission thereto. Typically, a certified copy of a conviction is offered to prove its existence once it has been denied by the witness on the stand.

The primary purpose for seeking admission of the subject conviction was to impeach the credibility of the witness since that is the

only reason why such evidence is admissible under ER 609. Once the evidence of the prior felony conviction was admitted, the legitimate legal, tactical, and strategic reasons for seeking its admission had been achieved, so there was nothing to be gained from further inquiry. Accordingly, trial counsel appropriately decided to not seek further inquiry.

“The extent of cross-examination is something a lawyer must decide quickly and in the heat of the conflict. This, too, is a matter of judgment and strategy.” *State v. Stockman*, 70 Wn.2d 941, 945, 425 P.2d 898 (1967). Even if some other tactical approach to cross-examination and impeachment might have been more successful in retrospect, trial counsel made a reasonable strategic decision. Defendant has not carried his burden of showing deficient performance, so the ineffective assistance claim should fail. Defendant’s failure to satisfy the requisites of the first prong should foreclose consideration of the second prong that the alleged deficient performance prejudiced the trial. Nevertheless, the record reflects that evidence that the witness had a prior felony conviction was admitted and argued to the jury. It is presumed that the jury weighed the fact of the witness’ prior felony conviction into its evaluation of the credibility of his testimony in deciding the facts of this case. The fact that the jury weighed the evidence and did not find

defendant's theory of the case credible does not establish that his trial counsel was ineffective.

E. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY.

Defendant claims that the court committed error: when it admitted footwear impression evidence in violation of *Frye v. United States*, 293 F. 1013, 1014 (D.C.Cir. 1923); and ER 702. Defendant contends that the State failed to prove that the method used to establish footwear comparison evidence was accepted in the scientific community; and that, even if it was, it did not qualify for admission under ER 702.

Washington State courts adopted the *Frye* test for evaluating the admissibility of new scientific evidence. *State v. Cauthron*, 120 Wn.2d 879, 886, 846 P.2d 502 (1993). The primary goal of conducting a *Frye* examination of evidence is to determine "whether the evidence offered is based on established scientific methodology. *State v. Gore*, 143 Wn.2d 288, 302, 21 P.3d 262 (2001). Evidence is admissible under *Frye* where the scientific theory underlying the evidence and the technique or methodology implementing that theory are generally accepted in the scientific community. *Id.*

Here, counsel's motion to exclude the footwear impression evidence was based upon a claim that the forensic examiner failed to use

the commonly recognized methodology to obtain the impression. The motion did not challenge the science of footwear impression examination. In fact, counsel proffered the work of Mr. Bodziak, a recognized footwear impression expert to compare and contrast whether the methodology utilized by Mr. Jenkins, the forensic examiner herein was reliable. The court based its decision regarding the admissibility of footwear impression evidence upon: review of the briefs, materials, and arguments of the parties; the expert treatise of Mr. Bodziak; the testimony of Mr. Jenkins, a Board-certified footwear analyst, regarding the science and methodology of footwear impression analysis; (RP 280; 336) and the testimony on the capture and comparison of the footwear impression found at the scene of the murder. RP 280-335. Hence, the first prong of the *Frye* test was satisfied. RP 336.

Next, the court needed to determine whether the footwear impression evidence was admissible under ER 702. The court found that Mr. Jenkins qualified as an expert in the field based upon the evidence of his extensive educational and professional experience in the area of forensic comparison analysis. RP 336-337. The court reviewed the evidence and properly exercised its discretion in denying the defendant's motion to exclude the evidence. The court properly ruled that the issue of whether the testimony of Mr. Jenkins was credible went more to the

weight the jury assigned to the evidence rather than its admissibility. Defendant's claims only succeed if all the other evidence is ignored: the blood of Mr. Cross discovered on the outside of gloves and boots located in defendant's residence; defendant's DNA discovered on the inside of those same gloves and boots; and numerous items of Mr. Cross' personal property discovered in defendant's residence. The jury had the opportunity to compare and contrast Mr. Jenkins' results with the photographs of the footwear impression and the subject boots alleged to have made the impression to determine the credibility of the evidence. The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse. *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984). Accordingly, the court properly denied defendant's motion to exclude the footwear impression evidence.

F. DEFENDANT HAS NOT ESTABLISHED THAT  
CUMULATIVE ERROR DEPRIVED HIM OF A  
FAIR TRIAL.

Defendant contends that the numerous errors claimed were part and parcel of his trial, though insufficient to warrant reversal individually, should be added together to justify reversal. Application of the doctrine of cumulative errors is limited to instances when there have been several trial errors that alone may not be sufficient to justify reversal, yet when

combined may deny a defendant a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Generally, a conviction is reversed pursuant to this doctrine when review shows that cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers Restraint of Lord*, 123 Wn.2d 296, 868 P.2d 835, *clarified by* 123 Wn.2d 737, 870 P.2d 964 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *Id.* Where there was no prejudicial error, there can be no cumulative error that deprived a defendant of a fair trial. *State v. Saunders*, 120 Wn. App. 800, 826 P.2d 1194 (2004). Here, defendant formally assigns six errors, yet defendant's appeal is primarily based upon a claim of instructional error, admission of unreliable evidence, and ineffective assistance of counsel.

The ineffective assistance of counsel claim is based upon defendant's contention that counsel failed to more thoroughly impeach the credibility of a witness than was achieved by his sworn testimony whereby he voluntarily admitted being a convicted felon. This position fails to acknowledge the fact that the legal strategy with regard to the witness' felony conviction was to have that fact admitted before the jury for impeachment purposes only. That legal strategy was accomplished.

Defendant identifies two instructional errors, yet fails to show how the outcome of the trial was affected thereby. Defendant bears the burden of demonstrating that the errors affected the outcome of the trial. The jury had a record filled with overwhelming evidence of defendant's guilt. That same record reflects how extensive and thorough counsel was in the defense of Mr. Brewczynski. It is clear from the record that no accumulation of errors combined to deprive the defendant of a fair trial.

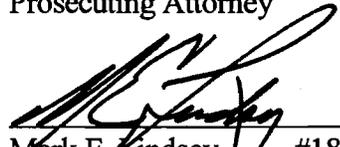
VI.

CONCLUSION

For the reasons stated, the convictions, special verdicts, and sentence should be affirmed.

Respectfully submitted this 29<sup>th</sup> day of April, 2011.

STEVEN J. TUCKER  
Prosecuting Attorney



Mark E. Lindsey #18272  
Senior Deputy Prosecuting Attorney  
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )       NO.   29120-1-III  
                                  v.                    )  
  )  
DAVID K. BREWCZYNSKI,        )  
  )  
                                  Appellant,    )       CERTIFICATE OF MAILING

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I certify under penalty of perjury under the laws of the State of Washington, that on April 27, 2011, I mailed a copy of the Respondent's Brief in this matter, addressed to:

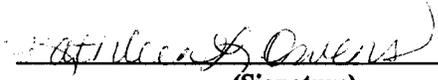
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4/27/2011  
(Date)

Spokane, WA  
(Place)

  
(Signature)