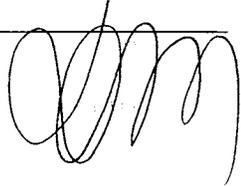


NO. 35702-0

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**



STATE OF WASHINGTON, RESPONDENT

v.

LARRY BLACKWELL and LISA KANAMU, APPELLANTS

---

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend

Nos. 04-1-03569-6  
04-1-03570-0

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**BRIEF OF RESPONDENT**

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GERALD A. HORNE  
Prosecuting Attorney

By  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANTS' ASSIGNMENTS OF ERROR.

1. Has defendant Blackwell failed to meet his burden of showing ineffective assistance of counsel when he has shown neither deficient performance nor resulting prejudice?
2. Has defendant Blackwell failed to demonstrate that there was an abuse of discretion or any prejudicial error when the court allowed Kanamu to testify that Blackwell sold drugs when that evidence was cumulative of properly admitted evidence?
3. Has defendant Kanamu failed to demonstrate that she preserved her claim in the trial court regarding the court's failure to instruct on missing evidence, and has she further failed to provide this court with sufficient record for the court to review this issue?
4. Has defendant Kanamu failed to show that the trial court abused its discretion in excluding a witness's twenty year old manslaughter conviction under ER 609 when it was not relevant to the witness's credibility and there were numerous other avenues of impeaching his testimony?

5. Was there sufficient evidence to support the jury's verdict finding defendant Blackwell guilty of assault in the second degree?

6. Has defendant Blackwell failed to demonstrate that there was an accumulation of prejudicial error so as to warrant relief under the cumulative error doctrine?

**B. STATEMENT OF THE CASE.**

1. Procedure

On July 20, 2004, the Pierce County Prosecutor filed an information in Pierce County Cause No. 04-1-03569-6 charging appellant LARRY DWAYNE BLACKWELL, with two counts of assault in the first degree (firearm enhanced), and one count of unlawful possession of a firearm. BCP 103.<sup>1</sup> On July 20, 2004, the Pierce County Prosecutor filed an information in Pierce County Cause No. 04-1-03570-0 charging appellant, LISA JANE KANAMU, with two counts of assault in the first degree (firearm enhanced), and one count of unlawful possession of a firearm. KCP 1-3.

The defendants were sent out for joint trial before the Honorable D. Gary Steiner, but the court declared a mistrial after opening statements.

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<sup>1</sup> Clerks papers relating to defendant Blackwell's cause number will be designated "BCP", and clerk's papers relating to defendant Kanamu's cause number will be designated as "KCP."

BCP 4-6; KCP 4-6; 3/14/05 RP 24.<sup>2</sup> The case was retried before Judge Steiner, and defendants were convicted of assault in the first degree (firearm enhanced) as to victim Vicenzi, assault in the second degree (firearm enhanced) as to victim Bucenski, and unlawful possession of a firearm. These convictions were vacated when the court granted a new trial due to juror misconduct. 6/13/05 RP 46-47. The State then amended the information to reflect the jury's finding of guilt on the lesser degree of assault in the second degree on Count II, after the acquittal on the greater charge. BCP 7-9; KCP 54-55. The case was next brought to trial before the Honorable Frederick W. Fleming, but that trial ended in a mistrial when the jury was unable to reach a verdict. 4/28/06 RP 4-12.

The third retrial was held before the Honorable Stephanie A. Arend. RP 5. The parties agreed that they would be bound by the decisions on motions that had been previously made in the case in the earlier trials. RP 6-8, 46-48.

After hearing the evidence the jury convicted defendants as charged. BCP 11-15; KCP 147-151.

Defendant Blackwell was given a standard range sentence of 279 months for the first degree assault, 73 months for the second degree

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<sup>2</sup> The twelve volumes of consecutively paginated transcripts of the trial proceedings before the Honorable Stephanie A. Arend occurring between October 9, 2006, and October 25, 2006, will be designated as "RP". All other transcripts will be designated by the date of the hearing followed by "RP".

assault, and 50 months for the unlawful possession of a firearm, plus an additional 96 months for the firearm enhancements, for a total sentence of 375 months in confinement. BCP 18-30. From entry of this judgment he filed a timely appeal. BCP 31.

Defendant Kanamu was given a standard range sentence of 277 months for the first degree assault, 70 months for the second degree assault, and 75 months for the unlawful possession of a firearm, plus an additional 96 months for the firearm enhancements for a total sentence of 373 months in confinement. KCP 154-166. From entry of this judgment she filed a timely appeal. KCP 174-186.

## 2. Facts

Dorothy and Harvey Knight were in their home on July 6, 2004, around 12:30 am when they heard a loud crash of breaking glass coming from the house across the street at 1467 South Fife Street, Tacoma. RP 76-80; Ex 133<sup>3</sup>. Just before this noise, Mrs. Knight then heard what she thought was a female voice saying “No. Stop. Don’t do this.” RP 82-83, 91. That was followed a few seconds later by a series of shots or “pow” sounds that could have been either a gun or fireworks. RP 80-83, 90; Ex 133. Mrs. Knight immediately called 911. RP 80; Ex 133. She heard

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<sup>3</sup> Harvey Knight was deceased by the time of the third retrial. His former testimony was read into the record. RP 117-123. The transcript of his former testimony was admitted for appellate purposes as Ex 133. RP 120.

emergency personnel respond within a few minutes. RP 83. Mr. Knight was at the window when the shots were fired. Ex 133. He didn't see anyone run out the front door immediately after the shots, but he did not stay at the window. Ex 133.

Diana Bucenski was an acquaintance of defendant Kanamu prior to 2004, but in 2004 her contacts with Kanamu became more frequent —once every few days to almost a daily occurrence. RP 292. Ms. Bucenski had developed a methamphetamine habit, and Kanamu had connections to acquire the drug. RP 293-294. Ms. Bucenski was living with Tom Monagin, but theirs was not an exclusive relationship. RP 296, 307-308. At the end of June and the first part of July, Ms. Bucenski and Mr. Monagin were moving from a condominium on Cirque (56<sup>th</sup> Street) to a house on Fife Street. RP 296, 306. Although she did not attend the wedding, Ms. Bucenski went to the reception held afterward at the Starlight bar celebrating Defendant Kanamu's wedding to Defendant Blackwell. RP 312. The wedding and reception occurred on June 25, 2004. RP 303-305, 312. Ms. Bucenski met Dave Vicenzi at the wedding reception where she asked him to dance. RP 308, 312, 319. Mr. Vicenzi loaned his car to the newlyweds as a wedding gift, so Ms. Bucenski gave him a ride back to her Fife Street house where they played poker. RP 319-320. The newlyweds came over later in the early morning hours to play poker as well. RP 321. While he was there, defendant Blackwell left a gun in a kitchen drawer. RP 334. After Blackwell left, he called Ms.

Bucenski to tell her that he left something in her kitchen drawer that he needed her to hold for him. RP 334. Mr. Vicenzi ended up spending the entire weekend with Ms. Bucenski and Mr. Monagin at their Fife Street house because the defendants never returned Vicenzi's car. RP 322-324.

Ms. Bucenski and Mr. Vicenzi finally located the car on June 27<sup>th</sup> at the Cirque condominium. RP 322-326. Mr. Monagin had allowed the newlyweds use of the condominium. RP 326. Mr. Vicenzi was unhappy about the delay in returning his car. Ms. Bucenski testified that defendant Blackwell gave Vicenzi a baggy of methamphetamine to compensate him for the inconvenience. RP 328-329. At Monagin's instruction, Ms. Bucenski was to return the .38 handgun to defendant Blackwell. RP 331. Mr. Vicenzi was present when Monagin had this discussion with Bucenski RP 334-335. After they located Mr. Vicenzi's car on the 27<sup>th</sup>, Ms. Bucenski realized that she had forgotten the gun at the Fife house; she drove back there to get it. RP 330-331. Mr. Vicenzi followed her back in his own car and they did a couple of lines of methamphetamine at the house. RP 331-332. Ms. Bucenski took the gun out to her car and put it under the driver's seat. RP 335. She then ran back inside the house to retrieve something else, came out, got in the car, and drove over to the Cirque condominium. RP 336. Mr. Vicenzi left but did not go with her back to the condominium. RP 336. When she got to the condominium, she discovered that the gun was missing. RP 336. Ms. Bucenski explained the situation to defendants Kanamu and Blackwell. RP 336-

337. Although both were upset, defendant Kanamu seemed angrier; Kanamu said the gun was hers and that she would try to get it back. RP 336-337.

Ms. Bucenski testified that she spoke to Mr. Vicenzi about the missing gun over the phone, telling him that he needed to return the gun immediately. RP 338-339. Mr. Vicenzi indicated that he did not know what she was talking about; in a second conversation occurring a short time later, however, Mr. Vicenzi told her that he would see what he could do. RP 339-340. Ms. Bucenski told the defendant that Mr. Vicenzi had the gun. RP 341. Ms. Bucenski showed defendant Kanamu and a young man named Chris where Mr. Vicenzi worked. RP 341-346. Defendant Kanamu insinuated that she was going to do something to Vicenzi's car. RP 344, 346. Ms. Bucenski testified that she later learned from Mr. Vicenzi that the car had been stolen. RP 347. She relayed her suspicions to Mr. Vicenzi as to who had taken it. RP 350-351. On July 5, 2004, Ms. Bucenski went to the Cirque condominium with Mr. Vicenzi and her godson. RP 354-355. She testified that Defendant Blackwell came out to the car and punched Mr. Vicenzi through the window, yelling about the stolen gun and some stolen jewelry. RP 355-356.

Ms. Bucenski testified that she was at her home on Fife Street on July 6, 2004, in bed with David Vicenzi, when she heard a female voice talking to her dog. RP 359-360. She recognized this voice as belonging to defendant Kanamu. RP 364. Ms. Bucenski testified that she saw a white

male she knew as "Jason" cross across her doorway. RP 364. She testified that then defendant Blackwell and defendant Kanamu came into the bedroom. RP 288-290, 364-365. Ms. Bucenski testified that defendant Blackwell shot Vicenzi, and that Kanamu was standing right behind Blackwell when it happened. RP 290-291. Kanamu handed the gun to Blackwell and stated something to the effect of "Shoot him, honey; shoot him, baby." RP 291. Vicenzi tried to get the defendants out of the room and close the door, but did not succeed; the door ended up broken. RP 368. Then Vicenzi broke out the window in the room and called for help. RP 367, 369. Ms. Bucenski testified that she was standing diagonally in front of Mr. Vicenzi when he was shot by Blackwell. RP 366-367. Ms. Bucenski testified that she was frozen and scared when she saw the gun come out and couldn't take her eyes off the gun. RP 366-368, 370. She estimates that Mr. Vicenzi was seven feet from the gun when Defendant Blackwell fired several shots at him. RP 372. Ms. Bucenski testified that after the shots were over, she saw Mr. Vicenzi slump, but was uncertain if he was hit or feigning injury; she ran from the house, scared for her life. RP 373-377, 380. She ran in to a nearby yard and covered herself with brush. RP 378. She testified that she "didn't want to be anywhere near the situation", and said that she was scared that she was going to be next. RP 381.

Later that night, Ms. Bucenski went to the hospital with an asthma attack. RP 382, 385. She did not tell anyone at the hospital about what

had happened. RP 385. She did not call the police because she was scared, she did not “want to get in the middle of this,” and because she had some outstanding warrants. RP 390-391. She called Mr. Monagin to tell him that shots had been fired at his house. RP 392. Ms. Bucenski testified that she heard from a friend that Vicenzi had been shot. RP 390. Ms. Bucenski decided to move out of town to protect herself from being shot. RP 391-392. Monagin told her that the police were looking for her. RP 393. Ms. Bucenski made arrangements to speak with Detective Pendrak. RP 393. She met with him and gave him a statement and told him that as “D”, meaning defendant Blackwell, was the shooter; she later identified Kanamu from a photo montage. RP 394-403. Ms. Bucenski then left town; she had not spoken to Mr. Vicenzi since the night of the shooting. RP 403.

Mr. Vicenzi testified that he was permanently disabled-paralyzed from the knees down- as a result of being shot the night of July 5-6<sup>th</sup>, 2004. RP 961. He testified that he was stark naked, about to have intercourse with Ms. Bucenski in the bedroom of her home on Fife street in Tacoma, when the defendants came into the bedroom. RP 961-965. Vicenzi testified that he tried to push them into the hallway, breaking the door as he tried to close it, then picked up a pillow and busted out the window in the bedroom. RP 967-968. He testified that the defendants pushed themselves back into the room; Kanamu handed a gun to Blackwell who pointed it at Ms. Bucenski’s face. RP 968. Kanamu then

said "Just shoot him" whereupon Blackwell opened fire on Vicenzi. RP 968. Vicenzi testified that when the gun was pointed at her, Bucenski was backing up, screaming "Don't shoot, Don't shoot." RP 969.

Vicenzi testified that three shots were fired and that he was hit twice in the left side near his lower back. RP 969-970. He slumped to the floor and played dead. RP 970-972. After a few minutes, Mr. Vicenzi crawled to the living room and called 911. RP 975-978. Mr. Vicenzi testified that he told the 911 operator that he had been shot and identified who had shot him. RP 978. He identified his assailants as "D" and "Lisa." RP 978-980; EX 46. Mr. Vicenzi testified that he felt that he was in and out of consciousness during that call. RP 981. He was aware that police and medical help arrived and he tried to answer the officer's questions. RP 983. He was then taken to a hospital where he was given morphine. RP 983-984. When he woke up in ICU he learned that he was paralyzed. RP 984. He spoke to detectives over the next few days giving them as much information about his assailant as he could. RP 984-985. He testified that Detective Pendrak showed him two montages of six photographs each from which he identified the defendants. RP 985-986. Mr. Vicenzi testified that he had met the defendants three or four times before the shooting, but did not know them very well. RP 987. Mr. Vicenzi testified that he met Ms. Bucenski at the Silver Dollar Casino about two weeks before the shooting. RP 996. At trial, Mr. Vicenzi denied ever loaning the assailants his car, denied being punched by

Blackwell prior to the shooting, and denied that he had stolen a gun from them. RP 990, 993, 1004. Mr. Vicenzi testified that his car was stolen from work, but denied ever being told by Ms. Bucenski that Kanamu had stolen it. RP 991-993.

Officer Stuart Hosington of the Tacoma Police Department was dispatched to 1467 South Fife Street regarding a call about shots fired. RP 126-128. He arrived at the scene at approximately 12:45 am and several other officers were there, or arriving at the same time. RP 129. He was one of several officers that approached the house; some officers entered and found an injured victim. RP 130-129. Officer Hosington stood at the threshold but did not enter; he could see the victim from this location. RP 138. Officer Hosington was standing at the threshold when he looked down and saw a partially opened folding knife just outside the entryway. RP 131. The knife was photographed and collected by forensic personnel, and ultimately admitted into evidence. RP 133-136. Officers Gregory Rock and Bryan Houser also responded and saw a nude white male, Vicenzi, laying on the living room floor with a bullet hole in his back. RP 713-718, 773. Officer Rock testified that he asked the victim who had shot him and the man said "D and his girlfriend Lisa". RP 720. He testified that the victim told him that the assailants had come into the bedroom and that he had tried to lock them out but they kicked in the door. RP 720. Vicenzi told the officers that D had a gun so he was trying to break out the window to go out that way; D shot him in the back and then

he fell and couldn't move his legs. RP 720. He told the officers that "D" and Lisa left, then he crawled out and called 911. RP 720. Officer Grant recalls that Vicenzi thought that "D's" full name might be Larry Williams, but wasn't sure. RP 674. The victim told the officers that he thought this was done over a car that "D" stole from him, and about which there had been a confrontation with Vicenzi's girlfriend had done at a residence on Cirque earlier that day where "D" was living. RP 674-675, 720-723, 731. Vicenzi could not tell the officers where his girlfriend Bucenski was, or whether she had been injured. RP 723.

Detective Pendrak testified that he met with Mr. Vicenzi while he was in the recovery room at the hospital on July 7, 2004, and obtained a statement from him as to what occurred. RP 790, 792-794. Detective Pendrak testified that he met with Ms. Bucenski on July 13<sup>th</sup> and got her statement as to what occurred. RP 819-822. She provided him with a handwritten statement as well. RP 822. Detective Pendrak learned that "D" stood for Dwayne, but could not get a last name; he obtained a last name of "Kanamu" for "Lisa." RP 822-823. Ms. Bucenski also told him that they had been recently married in Pierce County. RP 823. Using this information, Detective Pendrak used available resources to identify Larry Dwayne Blackwell and Lisa Jane Kanamu as possible suspects. RP 828. He constructed photo montages containing their photographs and showed them, separately, to Mr. Vicenzi, Ms. Bucenski and Mr. Monagin. RP 829, 832-834. Ms. Bucenski and Mr. Monagin each identified Kanamu,

but did not identify anyone from the montage containing Blackwell's photograph. RP 834-835. Mr. Vicenzi identified both Kanamu's and Blackwell's photograph as being his assailants. RP 836. Detective Pendrak then learned that his two suspects had just been arrested at a motel in Lakewood that day, July 14, 2004. RP 839, 889-891.

Defendant Kanamu stipulated that she had been convicted previously of a serious felony, and thus was not permitted to possess a firearm on July 6, 2004. RP 122. Defendant Blackwell stipulated that he had been convicted previously of a felony, and thus was not permitted to possess a firearm on July 6, 2004. RP 122, 124-125.

The defendants presented the testimony of Kay Sweeney, a forensic scientist specializing in criminalistics- the evaluation of all forms of physical evidence. RP 1124-1131. He discussed how the failure to collect evidence limited his ability to analyze the crime scene in this case. RP 1135-1138. He examined the photographs of the blood evidence and identified which were transfer patterns, and which were spatter and possible sources for each. RP 1139-1148, 1191-1198. Based upon the Mr. Vicenzi's statement as to where he was when he was shot, the location of the casings and some apparent bullet holes in the wall, Mr. Sweeney opined the probable location of the shooter at the time of firing. RP 1158-1162. He testified that the evidence to him looked as if the shots were fired from outside the room. RP 1168. Mr. Sweeney testified that the

physical evidence in the photographs was not consistent with Mr. Vicenzi's version as to what happened. RP 1152-1162, 1164-1167, 1202-1207.

Defendant Kanamu testified that she knew Ms. Bucenski and that she would see her a couple a times a week in 2004. RP 1240. Kanamu acknowledged that she was Ms. Bucenski's source for methamphetamine. RP 1241. She testified that she met Mr. Vicenzi through mutual friends when they called her to come sell him some drugs. RP 1241-1242. She testified that he was a regular purchaser from her. RP 1242-1243. She also testified that he would regularly loan her his car in exchange for drugs. RP 1243. According to Kanamu, she introduced Mr. Vicenzi to Ms. Bucenski at her wedding reception at the Starlight on June 25, 2004. RP 1245-1246. According to Kanamu, Vicenzi loaned her his car that night as a wedding present. RP 1247. They didn't return his car when they were supposed to, which got him upset. RP 1248-1249. On Sunday they met Vicenzi and Bucenski at the Cirque condominium; Kanamu testified that Blackwell gave Vicenzi some drugs to ease the situation. RP 1249. According to Kanamu, Ms. Bucenski told her that Vicenzi had stolen the gun that she had left at Bucenski's home. RP 1251. Both she and Blackwell called Vicenzi to get the gun back, but to no avail. RP 1251-1252. Kanamu testified that she decided to steal his car as pay back; which she did with Bucenski's assistance. RP 1252-1254. She sold the car for \$200. RP 1254-1255. Kanamu testified that she and Blackwell

were moving to Mountlake Terrance the night of July 5-6<sup>th</sup> and had nothing to do with the shooting of Mr. Vicenzi. RP 1258.

C. ARGUMENT.

1. DEFENDANT BLACKWELL HAS FAILED TO MEET HIS BURDEN OF SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see also, State v.

Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also, Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L.Ed.2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995). As the Supreme court has stated "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1 (2003).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and "so admissions of deficient performance by attorneys are not decisive." Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different."

Strickland, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case, defendant Blackwell seeks to show ineffective assistance of his trial counsel for his failure to object to the testimony of Ms. Bucenski that she had purchased drugs from Blackwell and that

Blackwell had provided drugs to Mr. Vicenzi. See Brief of Appellant Blackwell at p. 9, referencing the report of proceedings at pp. 303-304, 328-329<sup>4</sup>. It is true that there was no objection to the testimony regarding Blackwell's drug dealing at the time it was adduced. The reason for this is that the court had ruled on this matter previously.

The record reflects that prior to the third retrial, the prosecutor raised the issue of whether he could adduce that the reason Ms. Bucenski knew the defendants was because of their drug dealing in order to make sure that it was permissible. RP 46. The court and Mr. Blackwell's attorney each indicated that they thought the issue had been resolved by an earlier court order, issued by the judge who had presided over the first trial, indicating that the prosecutor could adduce such evidence. RP 46. Counsel for Ms. Kanamu suggested that such a motion should be revisited. RP 46. Counsel for Mr. Blackwell indicated that it had been re-raised before a different judge who presided over a retrial and that his ruling had been the same. RP 46. The trial court then indicated that it thought the parties had agreed to abide by the previous rulings in the case and pointed defendant to an order entered on April 4, 2006. RP 46-47; KCP 56-59.

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<sup>4</sup> On page 8 of the brief, appellant also cites to RP 344 as containing an improper reference to drug dealing. A review of that page reveals only a reference to Ms. Kanamu supplying Mr. Vicenzi with drugs; there is nothing regarding defendant Blackwell. RP 344.

Counsel for Ms. Kanamu then confirmed that they had agreed to abide by the prior rulings. RP 47.

The record indicates that Blackwell's attorney had raised the issue of whether the State could adduce evidence of drug dealing before the two judges who presided over two of the earlier trials and lost the motion on both occasions. No record of these rulings has been presented to this court, and the rulings allowing Bucenski's testimony are not challenged. Thus, Blackwell cannot show the failure to object to the testimony, as it was adduced, constituted deficient performance or that he was prejudiced by his attorney's failure to relitigate the issue it at the third retrial.

2. DEFENDANT BLACKWELL HAS FAILED TO DEMONSTRATE PREJUDICIAL ERROR IN THE COURT ALLOWING KANAMU TO TESTIFY THAT HE SOLD DRUGS AS THIS WAS MERELY CUMULATIVE OF BUCENSKI'S PROPERLY ADMITTED TESTIMONY.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651, review denied, 120 Wn.2d 1022 (1992). A party objecting to the admission of evidence must make a timely and specific objection in the trial court. ER 103; State v. Guloy, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). Failure to object precludes raising the issue on appeal. Guloy, 104 Wn.2d at 421.

The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. Rehak, 67 Wn. App. at 162.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." ER 401. Such evidence is admissible unless, under ER 403, the evidence is prejudicial so as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence.

A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987); State v. Hettich, 70 Wn. App. 586, 592, 854 P.2d 1112 (1993). Evidentiary errors under ER 404 are not of constitutional magnitude. State v. Robtoy, 98 Wn.2d 30, 44, 653 P.2d 284 (1982).

Washington courts have long held that "[t]he admission of evidence which is merely cumulative is not prejudicial error." State v. Todd, 78 Wn.2d 362, 372, 474 P.2d 542 (1970) (citing State v. Swanson, 73 Wn.2d 698, 440 P.2d 492 (1968)); State v. Acheson, 48 Wn. App. 630, 635, 740 P.2d 346 (1987).

Blackwell assigns error to the admission of Kanamu's testimony that he was a drug dealer. RP 1310. His attorney interposed the following objection:

PROSECUTOR: Your husband ... was also a drug dealer, correct?

COUNSEL FOR BLACKWELL: Objection, you Honor, 404(b), inadmissible . It's been ruled on.

RP 1310. The court excused the jury and asked defense counsel to identify where a prior court had ruled upon this issue. RP 1310-1312. Defense counsel was unable to identify when and where an earlier court had ruled such evidence inadmissible. RP 1312. The court then indicated that, based on its recollection, the jury had already heard similar evidence from Ms. Bucenski. RP 1313. The court indicated that in the absence of a showing that there had been an earlier ruling excluding such evidence, it would allow the question because the evidence was already before the jury. RP 1313, 1319. After the jury returned, the prosecutor asked Ms. Kanamu whether her husband, Mr. Blackwell, was also dealing drugs and she replied "At times." RP 1319.

As discussed in the previous section, the record on review reflects that in the earlier trials of this case there had been rulings on whether the prosecution could adduce evidence that the reason Ms. Bucenski knew the defendants was through drug dealings. See supra at pp. 19-20. No verbatim

report of proceedings reflecting the court's basis for these earlier rulings has been presented to this court as part of the record on review.

The party seeking review has the burden of perfecting the record so that the appellate court has before it all of the proceedings relevant to the issue. RAP 9.2(b). Allemeier v. University of Washington, 42 Wn. App. 465, 472, 712 P.2d 306 (1985). An appellate court need not consider alleged error when the need for additional record is obvious, but has not been provided. Marriage of Ochsner, 47 Wn. App. 520, 528, 736 P.2d 292 (1987). While the Rules of Appellate Procedure allow for the court to correct or supplement the record, they do not impose a mandatory obligation upon the appellate court to order preparation of the record in order to substantiate a party's assignment of error. Heilman v. Wentworth, 18 Wn. App. 751, 754, 571 P.2d 963 (1977). In Heilman, the appellant assigned error to the trial court's decision to deny his request for a continuance in order to obtain some medical testimony, but did not provide the relevant report of proceedings. The appellate court refused to consider the assignment of error stating:

We decline the implied invitation to search through an incomplete record, order that which should be obvious to support an assignment of error, and then make a decision.

Heilman, 18 Wn. App. at 754. An appellate court errs when it decides an issue on the merits when the necessary record for review is missing. State v. Wade, 138 Wn.2d 460, 979 P.2d 850 (1999).

In this case the trial court, upon agreement of the parties, abided by the evidentiary rulings made by judges who had presided over the earlier trials. The record shows that the court did not exclude Kanamu's testimony because it was merely cumulative of evidence that was already before the jury due to Bucenski's testimony. The reason that the evidence was before the jury was because judges presiding over earlier trials had ruled that such evidence could be adduced through Ms. Bucenski's testimony.

Blackwell has not directly assigned error to those earlier rulings and has not provided this court with the necessary record to review the propriety of the earlier rulings regarding Bucenski's testimony. He only attempts to challenge the rulings indirectly via an ineffective assistance of counsel claim, but fails to present this court with the record where the court made the rulings, or demonstrate that these rulings constituted an abuse of discretion. In light of these failures, the rulings are effectively unchallenged. The record before this court does reveal that all parties acknowledged that there was no way to avoid the fact that the jury was going to hear evidence regarding drugs in this case. 3/7/05 RP 6-7. The record before this court does establish that Ms Kanamu's testimony was cumulative of evidence that was already before the jury. RP 303-304, 328-329, 1319. Thus, Blackwell cannot show that the trial court abused its discretion in allowing Kanamu's testimony when it was cumulative of

properly admitted evidence or that he suffered any prejudice thereby. Any error in the admission of Kanamu's testimony would be harmless.

3. KANAMU HAS FAILED TO DEMONSTRATE THAT SHE PRESERVED HER CLAIM REGARDING THE COURT'S FAILURE TO INSTRUCT ON MISSING EVIDENCE AND FAILED TO PROVIDE SUFFICIENT RECORD TO THIS COURT TO ALLOW FOR PROPER REVIEW.

The standard for review applied to a trial court's failure to give jury instructions depends on whether the trial court's refusal to grant the jury instructions was based upon a matter of law or of fact. State v. Walker, 136 Wn.2d 767, 771, 966 P.2d 883 (1998). A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. Id. The law concerning the giving of jury instructions may be summarized as:

We review the trial court's jury instructions under the abuse of discretion standard. A trial court does not abuse its discretion in instructing the jury, if the instructions: (1) permit each party to argue its theory of the case; (2) are not misleading; and, (3) when read as a whole, properly inform the trier of fact of the applicable law.

State v. Fernandez-Medina, 94 Wn. App. 263, 266, 971 P.2d 521, review granted, 137 Wn.2d 1032, 980 P.2d 1285 (1999), citing Herring v. Department of Social and Health Servs., 81 Wn. App. 1, 22-23, 914 P.2d 67 (1996). A criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his theory of the case, and are supported by the evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. State v. Colwash, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. State v. Rahier, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing, State v. Jackson, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. State v. Harris, 62 Wn.2d 858, 385 P.2d 18 (1963).

The case law cited in the previous section regarding the burden of perfecting the record so that the appellate court has before it all of the proceedings relevant to the issue on review is applicable to this issue as well.

Defendant Kanamu assigns error to the trial court's failure to give a missing evidence instruction. It is questionable whether this claim was properly preserved below. Once the trial court distributed its packet of proposed instruction, it asked twice whether anyone was requesting any additional instructions or whether there were any exceptions to the instructions. RP 1347, 1351. After the first inquiry, there was a discussion as to whether the prosecution would be asking for a missing witness instruction. RP 1348-1349. The prosecutor indicated that he would not be asking for such an instruction. RP 1349. Counsel for Kanamu represented that he was not requesting addition instructions or excepting to the ones that the court proposed. RP 1351. Thus, this record does not reflect that Kanamu complied with CrR 6.15 by taking exception to the failure of the court to give her proposed instruction, or by stating the reasons why the proposed instruction should be given. This issue was not properly preserved below.

Defendant Kanamu relies upon a written motion to dismiss filed during the first trial, and a statement made by counsel before the start of evidence in the third retrial, to show that this issue was preserved. KCP 12-15; RP 9-10 (see appellant's brief at p. 11). The record on review contains this exchange:

COUNSEL FOR KANAMU: I want to raise one thing just as a reminder. We had requested an instruction that comes from I believe its Arizona vs. Youngblood on loss or destruction of evidence, and we did that in the first trial,

and I understand that that remains law of the case. It was denied, but I want to raise it again so that if this does come up on appeal, this will be remembered that three trials ago we requested this Arizona v. Youngblood. [sic]

THE COURT: Okay.

COUNSEL FOR BLACKWELL: I didn't, but he did. So its part of his packet.

RP 9-10. Neither of the two packets of instructions proposed by Kanamu, however, contains a missing evidence instruction based upon Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988). KCP 60-64, 65-68. Nor did Kanamu provide the verbatim report of proceedings from the earlier trial to demonstrate that she asked for such an instruction or to provide the reviewing court with the wording of her proposed instruction. She does not provide the transcript of the hearing where the motion was argued, or where the court gave its ruling, or where she took exception to the court's instructions in the earlier trial. This court has no proof that such an instruction was proposed and no information as to why the trial court refused to give the instruction if it was proposed.

It is impossible for this court to review whether there was any error in rejecting a proposed instruction when it is unclear that an instruction was proposed, and when there is no record of the wording of the proposed instruction. The court cannot discern that the wording of the proposed instruction properly stated the law.

Nor is it clear that Kanamu was entitled to any such instruction. Kanamu cites to State v Blair, 117 Wn.2d 479, 816 P.2d 718 (1991), and State v. Lopez, 29 Wn. App. 836, 631 P.2d 420 (1981), as authority for the giving of such an instruction. Blair and Lopez pertain to a "missing witness" instruction<sup>5</sup> which is similar to the type of instruction given in Youngblood, but not identical. A missing witness instruction is not applicable to a situation where police officers did not collect certain physical evidence from a crime scene that defendant now claims would have been helpful to his case. Defendant's complaint centers around evidence that the State did not collect during the investigation rather than a witness that the State failed to call at trial. Blair and Lopez are not on point.

The Youngblood decision issued nearly twenty years ago, yet no Washington court has found that such an instruction is a proper statement of the law or that a criminal defendant is entitled to such an instruction when there has been a failure to preserve evidence under circumstances that do not warrant dismissal of the charges. Other courts have not

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<sup>5</sup> A missing witness instruction is appropriate when (1) the witness is "peculiarly available" to the State, (2) the testimony of the uncalled witness relates to an issue of fundamental importance, and (3) circumstances at trial establish that, as a matter of reasonable probability, the State would not fail to call the witness unless his testimony would have been damaging or unfavorable. State v. Davis, 73 Wn.2d 271, 276-78, 438 P.2d 185 (1968). Such an instruction is not appropriate where the witness is unimportant or the testimony would be cumulative. State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). No inference is permitted if the witness's absence can be satisfactorily explained. Blair, 117 Wn.2d at 489.

interpreted Youngblood as requiring the giving of such an instruction. Griffin v. Spratt, 969 F.2d 16, 21-22 (3d Cir. 1992)(“there is nothing in the opinion in Youngblood that suggests that the decision rested in any way on [the giving of] this instruction.”); Autrey v. State, 204 S.W.3<sup>rd</sup> 84, 89-90, 90 Ark. App. 131, 142 (Ark. Ct. App. 2005)(“In Youngblood such an instruction was given at the trial level, but it was not adopted as the appropriate remedy by the Court.”). The State can find no Washington case that has indicated that a criminal defendant is entitled to an instruction such as that given by the Arizona trial court in Youngblood.

Defendant’s reliance upon State v. Wittenbarger, 124 Wn.2d 467, 880 P.2d 517(1994) is also misplaced. That case holds that “if the State has failed to preserve ‘material exculpatory evidence’, criminal charges must be dismissed.” Id. at 475. However, it cited to Youngblood for the proposition that “the right to due process is limited” and “the Court has been unwilling to ‘impose on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.’” Wittenbarger, 124 Wn.2d at 475, citing Youngblood, 488 U.S. at 58. The Washington Supreme Court agreed that it is not enough to show that the evidence might have exonerated the defendant. Id. “In order to be considered ‘material exculpatory evidence’, the evidence must both possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence

by other reasonably available means. State v. Wittenbarger, 124 Wn.2d at 475, citing California v. Trombetta, 467 U.S. 479, 489, 104 S. Ct. 2528, 81 L.Ed.2d 413 (1984). Wittenbarger does not hold that the defendant is entitled to a “missing evidence” instruction if he does not meet the standard for dismissal of the charges. Kanamu has presented no authority to this court holding that she was entitled to her proposed instruction under Washington law.

It should also be noted that Kanamu argued extensively that the blood evidence did not match up with Vicenzi’s wounds, and that this led to a conclusion that there was another person in the room that night who was injured that Vicenzi and Bucenski did not mention in their testimony. RP 1397-1401, 1405-1420, 1424-1425. Thus, the lack of the instruction did not impede her ability to argue her theory of the case.

Even if this court finds that the issue was preserved below, it is unknown why the trial court refused to give the instruction because the appellant has failed to provide the relevant transcripts. The trial court might have found that the missing evidence was not material, the proposed instruction was not a correct statement of the law or rejected the requested instruction on another basis altogether. It is impossible to know. The need for additional record should have been obvious to appellant. The failure of the appellant to provide the necessary record precludes this court from reviewing this issue on the existing record.

4. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THE VICTIM'S 1986 ATTEMPTED MURDER<sup>6</sup> CONVICTION AS IT WAS NOT RELEVANT TO HIS CREDIBILITY, AND DEFENDANT HAD NUMEROUS OTHER MEANS OF IMPEACHING HIS TESTIMONY.

The Sixth Amendment, applied to the states through the Fourteenth Amendment, guarantees criminal defendants a fair opportunity to present exculpatory evidence free of arbitrary state evidentiary rules. Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L.Ed.2d 37 (1987); Washington v. Texas, 388 U.S. 14, 18, 23, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967). The right to present evidence is not absolute, however, and must yield to a state's legitimate interest in excluding inherently unreliable testimony. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Baird, 83 Wn. App. 477, 482, 922 P.2d 157 (1996), review denied, 131 Wn.2d 1012 (1997).

A defendant 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, review denied, 120 Wn.2d 1022 (1992); In re Twining, 77 Wn. App. 882, 893, 894 P.2d 1331, review denied, 127 Wn.2d 1018 (1995). Limitations on the right to introduce evidence are not constitutional unless they affect fundamental principles of justice.

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<sup>6</sup> The record describes the conviction as both manslaughter and attempted murder. 3/7/05 RP 9-10; 4/4/06 RP 25-26; KCP 56-59.

Montana v. Engelhoff, 518 U.S. 37, 116 S. Ct. 2013, 2017, 135 L.Ed.2d 361 (1996) (stating that the accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence (quoting Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 653, 98 L.Ed.2d 798 (1988))). Similarly, the Supreme Court has stated that the defendant's right to present relevant evidence may be limited by compelling government purposes. State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)(discussing Washington's rape shield law).

The confrontation clause in the Sixth Amendment protects a defendant's right to cross-examine witnesses. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). Generally, a defendant is allowed great latitude in cross-examination to expose a witness's bias, prejudice, or interest. State v. Knapp, 14 Wn. App. 101, 107-08, 540 P.2d 898, review denied, 86 Wn.2d 1005 (1975). Nevertheless, the trial court still has discretion to control the scope of cross-examination and may reject lines of questions that only remotely tend to show bias or prejudice, or where the evidence is vague or merely speculative or argumentative. State v. Jones, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); State v. Kilgore, 107 Wn. App. 160, 184-185, 26 P.3d 308 (2001).

Admission of a witness's prior conviction for the purpose of impeachment is governed by ER 609.<sup>7</sup> ER 609(a)(1) requires the prior conviction have "probative value." The sole purpose of impeachment evidence under ER 609(a)(1) is to inform the jury with respect to the credibility or truthfulness of the witness." State v. Jones, 101 Wn.2d 113, 118-119 677 P.2d 131 (1984), overruled on other grounds, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989). Prior convictions are therefore only "probative" under ER 609(a)(1) to the extent they are probative of the witness's truthfulness. State v. Hardy, 133 Wn.2d 701, 708, 946 P.2d 1175 (1997). Generally "prior convictions not involving dishonesty or false statements are not probative of the witness's veracity until the party seeking admission thereof shows the opposite by demonstrating the prior conviction disproves the veracity of the witness." Hardy, 133 Wn.2d at 708. Assaults are not a crime involving dishonesty or false statement. State v. Rhoads, 35 Wn. App. 339, 666 P.2d 400 (1983), aff'd, 101 Wn.2d 529, 681 P.2d 841 (1984).

Under the rule, a conviction for a crime that occurred more than 10 years ago is presumed to be inadmissible for the purpose of attacking the credibility of a witness. ER 609(a) and ER 609(b). The time limit provides:

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<sup>7</sup> See Appendix A for full text of rule.

(b) Time limit Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, 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. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

More than one criminal defendant has challenged this provision as violating his Sixth Amendment right to present a defense when it has operated to exclude a remote conviction of a prosecution witness. State v. Jones, 117 Wn. App. 221, 233, 70 P.3d 171 (2003)(The Sixth Amendment does not entitle a defendant to present irrelevant evidence, and there was no showing that a witness's 20 year-old forgery conviction had any relevance to his credibility); State v. Martinez, 38 Wn. App. 421, 424, P.2d (1984)(trial court could exclude prosecution witness's nearly 20 year old conviction for passing bad checks without violating defendant's rights).

Hudlow recognizes that the State has an interest in precluding the admission of evidence that may interfere with the fairness of the trial. Hudlow, 99 Wn.2d at 15-16 (excluding rape victim's prior sexual history); see also, State v. Morley, 46 Wn. App. 156, 160, 730 P.2d 687 (1986).

The State has an interest in insuring that witnesses are not discouraged from coming forward with evidence of a crime out of fear of having a prior conviction brought forward. State v. Barnes, 54 Wn. App. 536, 539, 774 P.2d 547 (1989) (characterizing as compelling the state interest in assuring witnesses come forward with testimony without fear of having prior convictions or misconduct revealed); State v. Martinez, 38 Wn. App. at 424.

Rulings made under ER 609 are reviewed under an abuse of discretion standard. State v. Rivers, 129 Wn.2d 697, 704-705, 921 P.2d 495 (1996).

Kanamu assigns error to the court's exclusion of Mr. Vicenzi's 1984 conviction for attempted murder. KCP 56-59; 4/4/06 RP 26-33. The court had earlier granted the prosecution's motion in limine to exclude any reference to this conviction with little argument or objection from either defendant that the conviction was relevant. 3/7/05 RP 9-10. Kanamu changed her position and later argued that it was relevant because "Mr. Vicenzi's violent past (attempted murder and manslaughter) are the motive for him not wanting anyone to know who went through the window that night; Mr. Vicenzi was the aggressor and does not want to disclose who he was hurting that night." KCP 56-59; 4/4/06 RP 27-28. While it is clear that Kanamu was contending that Vicenzi was lying about the events of that night, she did not articulate how the prior conviction gave Vicenzi a motive to inculcate the defendants, or why Bucenski would

corroborate Vicenzi's testimony as to who shot him despite her lack of a similar prior conviction. The conviction was nearly twenty years old and very remote and inadmissible under ER 609. The prior conviction involved assaultive conduct, and therefore was not probative of the witness's credibility. Kanamu fails to establish relevance.

The use of other evidence to impeach has been held to be a factor in limiting cross examination on remote prior convictions. State v. Barnes, 54 Wn. App. at 541. Kanamu had plenty of other means of impeaching Vicenzi's version of events even without the use of the conviction. Kanamu cross-examined Vicenzi on his inconsistent statements (RP 999-1001, 1037-1050, 1057-1059, 1086-1092); she adduced testimony from responding officers that the blood evidence in the bedroom did not seem to fit Vicenzi's description of events (RP 751, 774-775); she could present the testimony of a defense expert in crime scene reconstruction to opine that Vicenzi's testimony was not consistent with the physical evidence at the scene (RP 1126-1167). Kanamu has failed to demonstrate that the trial court abused its discretion in excluding the twenty year old conviction, or that her right to present a defense was impeded.

5. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S FINDING THAT DEFENDANT BLACKWELL WAS GUILTY OF THE ASSAULT IN THE SECOND DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)(citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

The jury was instructed that to convict defendant Blackwell of the crime of assault in the second degree, the following elements had to be proved beyond a reasonable doubt:

- (1) That on or about the 6<sup>th</sup> day of July, 2004, the defendant or an accomplice assaulted Diana Bucenski with a deadly weapon; and

(2) That the acts occurred in the State of Washington.

BCP 37-67, Instruction No. 18. The jury was further instructed that the definition of assault meant : 1) an intentional shooting of another person that is harmful or offensive; 2) an act done with intent to inflict bodily injury upon another, tending but failing to accomplish it and accompanied by the apparent ability to inflict the bodily injury if not prevented; and, 3) an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and reasonable fear of bodily injury even though the actor did not actually intend to inflict bodily injury. BCP 37-67, Instruction 10.

Mr. Vicenzi testified that when the defendants came into the bedroom he and Ms. Bucenski were in, that Kanamu handed a gun to Blackwell who pointed it at Ms. Bucenski's face. RP 968. Kanamu then said "Just shoot him" whereupon Blackwell open fired on Vicenzi. RP 968. Vicenzi testified that he remains paralyzed from the three shots he suffered. RP 961. Vicenzi testified that when the gun was pointed at her, Bucenski was backing up, screaming "Don't shoot, Don't shoot." RP 969.

Ms. Bucenski testified that she was standing diagonally in front of Mr. Vicenzi when he was shot by Blackwell. RP 366-367. Ms Bucenski testified that she was frozen and scared when she saw the gun come out and couldn't take her eyes off the gun. RP 366-368, 370. She estimates that Mr. Vicenzi was seven feet from the gun when Defendant Blackwell

fired several shots at him. RP 372. Ms. Bucenski testified that after the shots were over, she saw Mr. Vicenzi slump, but was uncertain if he was hit or feigning injury; she ran from the house, scared for her life. RP 373-377, 380. She ran in to a nearby yard and covered herself with brush. RP 378. She testified that she “didn’t want to be anywhere near the situation” and said that she was scared that she was going to be next. RP 381.

Looking at this evidence in the light most favorable to the state, it is sufficient to uphold the jury’s verdict that defendant Blackwell is guilty of an assault in the second degree upon Ms Bucenski. There is evidence that Defendant Blackwell pointed a gun directly at Bucenski, and that this caused her to be in fear for her life. The jury could infer either that Blackwell was intending to cause her injury at that time or that he was intending to put her in reasonable apprehension and fear of bodily injury. She testified that she was in actual fear that she would be shot. Bodily injury is not required for assault in the second degree. Evidence that the gun Blackwell pointed at her was the same gun that fired the bullets that injured Mr. Vicenzi demonstrates that Blackwell was using a deadly weapon.

As the State adduced sufficient evidence for the jury to find each and every element beyond a reasonable doubt, its verdict should be upheld.

6. DEFENDANT BLACKWELL HAS FAILED TO ESTABLISH THAT THERE WAS AN ACCUMULATION OF PREJUDICIAL ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L.Ed.2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." Neder v. United States, 119 S. Ct. 1827, 1838, 144 L.Ed.2d 35 (1999)(internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." Brown v. United States, 411 U.S. 223, 232 (1973)(internal quotation omitted). Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105

(1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometimes numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 681 P.2d 1281 (1984); see also, State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) ("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of error will affect the court's weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L.Ed.2d 1005 (1995). There are two dichotomies of harmless error that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test, and therefore they will weigh more on the scale when accumulated. See, Id. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence, and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. See, e.g.,

Johnson, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal, because when the individual error is not prejudicial, there can be no accumulation of prejudice. See, e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990) ("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970)(holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988)(holding that three errors did not amount to cumulative error), and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see, e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to

cumulative error), or because the errors centered around a key issue, see, e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992)(holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was repeated so many times that a curative instruction lost all effect, see, e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976)(holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. Defendant Blackwell has failed to show that there were any errors in the trial. He has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the convictions below.

DATED: October 18, 2007.

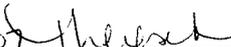
GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

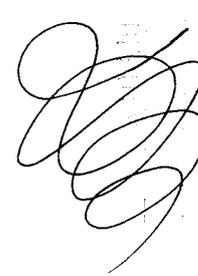
  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

*Gliniski*  
*Bouchey*

10-18-07   
Date Signature



# **APPENDIX “A”**

*Evidence Rule 609*

**Rule 609. Impeachment by evidence of conviction of crime**

(a) *General rule* For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) *Time limit* Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, 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. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) *Effect of pardon, annulment, or certificate of rehabilitation* Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of 1 year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) *Juvenile adjudications* Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a finding of guilt in a juvenile offense proceeding of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) *Pendency of appeal* The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

**HISTORY:** Adopted Dec. 19, 1978, effective April 2, 1979; amended June 2, 1988, effective Sept. 1, 1988.