

FILED

MAR 02 2011

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DIVISION III
STATE OF WASHINGTON
By _____

COA NO. 29120-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DAVID BREWCZYNSKI,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Annette S. Plese, Judge

OPENING BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
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(206) 623-2373

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RULES, STATUTES AND OTHERS (CONT'D)

William Bodziak, Footwear Impression Evidence (2d Ed.) 40-41

A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury on an uncharged alternative means of committing the crime of first degree burglary.
2. The information charging first degree burglary is defective because it omits an element of the offense.
3. Appellant received ineffective assistance of counsel.
4. The court erred in denying appellant's motion to exclude a State expert's footwear impression testimony under Frye¹ and ER 702.
5. Cumulative error violated appellant's constitutional due process right to a fair trial.
6. The court erred in failing to instruct the jury that it need not be unanimous in order to answer the special verdict forms "no."

Issues Pertaining to Assignments of Error

1. Is reversal required because the "to convict" instruction for first degree burglary contains an uncharged alternative means of committing the crime?
2. A charging document must properly notify a defendant of the charges against him. Is reversal of the burglary conviction required because the information specified one means of committing the crime but failed to allege an alternative means for which appellant was convicted?

¹ Frye v. United States, 54 App. D.C. 46, 293 F. 1013 (D.C.Cir.1923).

3. Was defense counsel ineffective in declining to impeach the State's key witness with evidence of a prior conviction?

4. Did the trial court commit reversible error in failing to exclude expert testimony on footwear impression evidence because (a) the State did not show the method used by the expert was generally accepted in the scientific community under Frye; and (b) the testimony was not helpful to the trier of fact under ER 702 due to its unreliability?

5. Is vacature of the special verdicts for aggravated murder and deadly weapon enhancement required because the court did not properly instruct the jury that it need not be unanimous in order to answer "no" on the special verdict forms?

B. STATEMENT OF THE CASE

1. Procedural History

The State charged David Brewczynski by amended information with the first degree murder of Kenneth Cross, first degree burglary and theft of a firearm. CP 48-49. The State further alleged the murder was aggravated and committed while armed with a firearm. CP 48-49. A jury returned general guilty verdicts on all counts and special verdicts that the murder was aggravated and committed while armed with a firearm. CP 111-15. The court imposed a life sentence without the possibility of parole. CP 122. This appeal follows. CP 129-30.

2. Trial

a. Immediate Circumstances Of Death.

The event at issue took place on September 20, 2008. RP² 486. Cross's girlfriend, Anna Turnwall, spoke with him on the telephone at 12:30 p.m. that day. RP 483, 487, 542. Cross said he would pick her up at 3 p.m. RP 487-88. A receipt and surveillance video placed Cross at a nearby supermarket at 2:20 p.m. RP 526-27, 1171, 1297-98.

After failing to reach Cross by telephone when he did not pick her up by 3:30, Turnwall asked a neighbor to go to Cross's house and check on him. 488-89. The neighbor went to Cross's house at about 6:30 p.m. and looked for him with the help of two others. RP 506-07, 634-35. Cross's body was found lying in a bedroom closet at about 7:30 p.m. RP 508, 542.

A forensic pathologist determined two gunshot wounds caused Cross's death, with contribution from blunt injuries to the head and chest. RP 602, 605, 630. The gunshot wound to the right side of the head was fired from at least a few feet away because there was no gunshot residue. RP 607, 627. The gunshot wound to the left side of the head was a contact wound, meaning the muzzle of the gun touched skin at the time of discharge. RP 607, 629. Cross was also severely beaten. RP 607-24. He

² The verbatim report of proceedings is referenced as follows: RP - nine consecutively paginated volumes from 4/5/10, 4/6/10, 4/7/10, 4/8/10, 4/13/10, 4/14/10, 4/15/10, 4/19/10, 4/20/10, 4/21/10 and 6/2/10.

was struck 24 times in the head, resulting in multiple skull fractures and blunt impact injuries to the head area, both irregular and linear in shape. RP 607, 610-11, 623. The pathologist also noted blunt impact injuries to the back (irregular and linear in shape) and chest, including rib fractures. RP 622-24.

There were signs of forced entry to the back door of the house. RP 544, 1042, 1265-66. The house in general was orderly and tidy. RP 1266. Various items on the floor seemed out of place. RP 1266-73. A lampshade was broken and items lay on the guest bedroom floor. RP 543-44. The office area in the basement was ransacked. RP 1088. The top of a desk had been torn off and its contents scattered. RP 636, 1046, 1088, 1279. A locked drawer and metal box were pried open. RP 1046-47.

b. The Stepson.

Cross's stepson, Douglas Livingstone, was initially the prime suspect. RP 520, 529. According to Detective Drapeau, Livingstone had motive, means and opportunity. RP 1498. During interrogation, Drapeau maintained a crime like this was all about family, as the circumstances of the crime demonstrated both rage and compassion.³ RP 1497-98.

³ Bloodstained eyeglasses were folded up and resting on a piece of luggage in the closet, placed there after blood had been deposited on the glasses. RP 765-66.

Livingstone had a small scratch below his right eye and an injury to his right forearm. RP 1199.

Livingstone gave differing accounts of when he last saw Cross on September 20, placing himself at Cross's house sometime between 11:45 to around 1:30 p.m. RP 521-24. Teresa Nelson, Cross's house cleaner, was there at the time. RP 522-24.

Deputy Tyler Smith was the first to talk with Livingstone when the latter arrived at Cross's house on the night of September 20. RP 689, 700. Livingstone asked if the back door had been kicked in, which Smith found odd because Livingstone had just arrived on the scene. RP 701. At trial, Livingstone denied asking about the door, claiming "I had no idea of that at the time." RP 560.

Livingstone later showed up at the Cross residence on September 22. RP 1091, 1110, 1158. Livingstone told a detective that he left the Cross residence at 1:30 p.m. on September 20 and that Teresa Nelson, the house cleaner, was still there at the time. RP 562, 1111-12, 1117-18. He told Detective Ricketts he was home by 2 p.m. RP 569. On the stand, Livingstone said he was mistaken about the time he had left. RP 569. He told Detective Ricketts that he had argued with Cross about some cookies his girlfriend had sent him. RP 569.

Livingstone denied killing Cross. RP 600-01. But he made the unsolicited comment that "I should be suspect number one." RP 1112. As a child, Livingstone had wanted to kill Cross because Cross used to beat his mother. RP 574. Livingstone had written various notes before trial. RP 583-84. One entry stated "into house and pulls door closed. Then yells to open the door motherfucker, I'm going to kill you. He repeats this a couple of times while the female driver of the car that brought him here keeps yelling at him from the driveway next door appeals to stop or something, couldn't really make out what she was saying. I contact 911 dispatch where operator asked if I'd like to have --[.]" RP 584.

Cross was 80 years old. RP 606. He scheduled a will appointment the day before he was killed after being urged by "the family" to get one. RP 518. Cross also scheduled an appointment to make a will for September 22. RP 501-02, 1386. Livingstone denied knowing Cross was going to get a will and denied arguing with Cross about the will. RP 599.

Livingstone had an acrimonious relationship between the executor of Cross's estate, whom he described as being brought in by "the cult." RP 585-89, 598. Livingstone believed Cross's family was "milking" Cross before he died. RP 600. Livingstone had a poor relationship with them. RP 587, 600. He thought he was going to be swindled out of money from

Cross's estate. RP 588. Livingstone gained financially from Cross's death: he received \$61,000. RP 600.

c. The House Cleaner.

Turnwall suspected Teresa Nelson, Cross's house cleaner, may have been involved. RP 493, 702, 1741. Nelson had worked three or four months for Cross. RP 1741. She also once cleaned Turnwall's house. RP 1741-42. Turnwall said Nelson was vulgar and could not be trusted. RP 493-94. Nelson had stolen a ring from Turnwall. RP 494.

According to Nelson's account at trial, she arrived at Cross's house on September 20 at 10 a.m. and left at 12:30 p.m. RP 1742. Livingstone arrived at some point. RP 1743. Livingstone and Cross argued about whether Livingstone was going to buy some chicken. RP 1746-47. Cross was fine when she was there. RP 1745. Cross told her that he was going to have lunch with his girlfriend. RP 1747. Nelson went home at 12:30 and later went to dinner with someone who picked her up at 1:30 or 1:45. RP 1744-45. They spent the rest of the day together. RP 1745.

Nelson drove a red Pontiac Grand Am. RP 1742. A neighbor who lived nearby testified he saw Nelson's car in Cross' driveway at 3:20 p.m. on the day Cross was killed. RP 1799-1801. The front floor mat on the driver's side of her car was missing when police later went to search the vehicle. RP 1454-55.

Nelson showed up at Cross's house on September 21. RP 1104-05. She was very fidgety, which could indicate deceit. RP 1105, 1432. Without being asked a question, Nelson blurted out she did not kill Cross. RP 1105. Police had not yet told her what had happened. RP 1106. She had no emotional response when told Cross was dead. RP 1434. She gave inconsistent stories regarding whether Livingstone was still there when she left, and also whether Cross was already gone before she left. RP 1431-32. Nelson told Detective Drapeau that Cross had shown her a pistol the day before he died, telling her "This is my gun, and if anyone tries to break into my house, I'll use it on someone." RP 1408-09, 1434-35.

Livingstone described Nelson as a "meth queen." RP 586. Livingstone wrote a note before trial that read "I should have thanked her for getting Kenny killed. He deserved it." RP 592.

d. The Investigation Takes A Different Path.

William Lundin owned land at 7513 West 51st Avenue in Spokane, which contained a trailer house, a motor home and a garage. RP 800, 805. Lundin lived in the trailer. RP 800. Brewczynski rented a studio apartment inside the garage in the summer of 2008. RP 801-02. Eric Whitehead and Tammi Bennett (Whitehead) lived behind the garage as of September 2, 2008. RP 801, 805, 827, 842-43.

Lundin was a painter who stored paint in the basement under the garage studio. RP 803-04. Lundin said that on September 28 he opened a paint bucket in the basement and found a cooler inside. RP 803-05. Lundin had gone through the paint buckets a couple weeks before and had not noticed the cooler at that time. RP 805.

He took the cooler to Whitehead and Bennett. RP 822. They removed the cooler and found a tin wrapped in tinfoil inside the cooler. RP 805-06, 812. Inside the tin was jewelry, a gun, a bullet, some gloves, a wallet with credit cards and Cross's identification. RP 806, 812, 830-31, 835. Blue aquarium rock was inside the cooler as well. RP 834-35. They put the items back into the cooler. RP 813. Upon being informed of Cross's death by a friend, Lundin called police. RP 807-08. Lundin denied knowing Cross or anything about his demise. RP 806.

Detective Drapeau came and looked at the contents of the cooler, which included various items associated with Cross. RP 1304, 1313-23, 1347-48, 1355-57. Drapeau located a pair of size 11 Pacific Crest Hiking Boots in the garage studio previously rented by Brewczynski. RP 1332, 1339. He also found industrial strength metal foil in the studio, consistent with the type of foil found in cooler. RP 1333-34. Pay stubs recovered from the studio showed Brewczynski's employer was an asbestos removal

company and that his year to date income was over \$20,000. RP 1362-63, 1526.

Prescription bottles with names of other people were found in bathroom cabinet of the garage studio. RP 1527-29. Lundin said Brewczynski had visitors. RP 1528. Rachel Sharp, Brewczynski's girlfriend, stayed with him in the garage studio in July. RP 1804-06. She saw other people there in July and August. RP 1806. Quite a few people came and went. RP 1806. She saw the big garage door left open on one occasion during the summer. RP 1808.

Lundin evicted Brewczynski on September 1, 2008 and gave him two weeks to get out. RP 802, 818. According to Lundin, only he and Brewczynski had keys to the main entrance door of the garage. RP 802, 809-10. The garage also had two big overhead rolling bay doors that could only be opened from the inside. RP 810, 819-20. Lundin "usually" kept them "pretty locked." RP 820. He did not know if anyone gained access through the bay doors. RP 820. There was also a blocked off side door with no key. RP 810, 819-20.

Whitehead saw Brewczynski access the garage after he had been evicted. RP 848. Bennett said she often saw Brewczynski "coming and going" through September 28, when the items were found in the cooler. RP 833-34.

Lundin initially testified he changed the locks "about two weeks after September." RP 802. He later testified he changed the locks three or four days before September 28. RP 804.⁴ On cross examination, Lundin testified he changed the locks a couple weeks after September 1. RP 818. On redirect, Lundin initially said he changed the locks on September 16 or 17th but then changed his answer to the 23rd or 24th. RP 825. Lundin did not see Brewczynski after the locks were changed. RP 802.

e. The House Cleaner And Brewczynski.

Nelson, the house cleaner, testified she did not know Brewczynski and had never met or talked to him. RP 1748-49.

Detective Ricketts contacted Nelson on September 21. RP 1190-91. He suspected she was involved. RP 1192-93. Detective Ricketts spoke with Nelson on four occasions. RP 1860. Nelson gave inconsistent statements about whether she knew Brewczynski.⁵ RP 1860. During one encounter, Detective Ricketts asked her if she knew David Brewczynski, to which Nelson replied "He did it. He did it. He is the guy who drives the maroon van." RP 1239, 1860-61. Brewczynski drove a blue Ford F-150 pickup truck. RP 920, 1183-84, 1805.

⁴ At trial, Detective Ricketts related a September 28 discussion in which Lundin said he changed the locks on September 25. RP 1252.

⁵ Nelson said she lied a lot.⁵ RP 1863.

At trial, Nelson testified she was referring to another person named "Dave" that she knew when she said "he did it." RP 1748-49, 1754. Nelson offered to take police to this person's house when they accused her of murdering Cross, but police did not follow up on the offer. RP 1749-50.

Nelson told Detective Ricketts that she met Brewczynski or "Dave" on a love line or chat line. RP 1239, 1861. She knew this individual by the name of "Dave" or "Dave at Bolos." RP 1861, 1868. "Dave" told her that he lived out in Airway Heights. RP 1861. Nelson told "Dave" about Cross and gave a description of the house. RP 1861. At trial, Nelson acknowledged telling police that she had met Brewczynski on a telephone "loveline," but said that was wrong. RP 1754.

Nelson did not pick Brewczynski out of a photomontage. RP 1240. Ricketts felt Nelson was refusing to participate in the identification process. RP 1251-52. In a subsequent interview, Nelson said she knew Brewczynski but only ran into him at a grocery store in the Valley. RP 1862. She then said Brewczynski was in the photo lineup shown to her earlier. RP 1862. But then she said "the Dave she was speaking about was a different Dave, the one who drives the maroon van." RP 1862. At trial, Nelson maintained she did not recognize anyone in the montage. RP 1749-50.

Police investigated but were unable to find a connection between Brewczynski and Nelson. RP 1868. Phone records showed no calls between the two and there was no common number that either of them had called individually. RP 1876. Police searched Nelson's residence. RP 1438. Police did not find anything with Brewczynski's name on it in Nelson's apartment. RP 1452. Police did find a letter from "David Arrington" and his address written down. RP 1449-51. Detective Ricketts did not interview David Arrington. RP 1867. Detective Drapeau checked a law enforcement database for Arrington and did not recall a red vehicle associated with him. RP 1551-52. A phone number for a "Dave Kenna" was also found in Nelson's residence. RP 1450.

Blue stones were in the bottom of Nelson's fish tank. RP 1444-45. Police also found a pawn slip for Turnwall's ring in Nelson's residence. RP 1446-47.

f. Investigation of Brewczynski

Detective Ricketts searched Brewczynski's truck on October 3. RP 1183. He found a screwdriver, a pry bar, some gloves and jewelry. RP 1184-86. The pry bar tested presumptively negative for blood. RP 1530, 1674-75. The pry bar was sent to the lab for testing but Ricketts did not know if it was ever actually tested. RP 1249, 1466-67.

Brewczynski had various minor injuries to his body when he was photographed on October 1, but police did not know how old the injuries were. RP 1174-80, 1244-46. A piece of jewelry fell from Brewczynski's clothing when he was photographed, but police did not attempt to find out if the jewelry came from the Cross residence. RP 1180, 1247-48.

Clothing collected from Brewczynski tested negative for blood. RP 1243-44. The defense forensic scientist opined blood spatter likely would have been on the perpetrator. RP 1834, 1838-40, 1847, 1856.

Sharp, Brewczynski's girlfriend, testified Brewczynski picked her up on September 20th and drove her to work sometime before 6:15 p.m. RP 1804-05.

g. Forensic Evidence

State forensic scientist Mitchell Nesson examined the bedroom where Cross's body was found. RP 728, 734-66. Small circular bloodstains on the ceiling could have been caused from receiving a blow in a standing position. RP 747-49. There was blood spatter at the foot of bed and the closet door radiating upward from the floor, potentially caused by blunt force. RP 739-44. Impact spatter high up on the wall was consistent with a beating. RP 758-59. Blood spatter on a garment bag inside the closet could have been caused by a gunshot. RP 762. There

was a saturation bloodstain inside the bedroom doorway leading to the closet and on the side of the bed. RP 734-36.

Nessan noted a possible partial shoe impression on a comforter and pair of jeans inside the bedroom closet. RP 762-63, 776. Photographs were taken of this impression. RP 906-07.

Forensic scientist Kevin Jenkins examined a photograph of the blood impression made on the blanket and compared it to the Pacific Crest boots recovered from Brewczynski's former residence. RP 1612. Jenkins concluded the toe area of the right boot could have made the impression. RP 1631, 1662-63, 1665. Jenkins said a size 11 and 1/2 was an approximate size that could have made impression. RP 1665. Livingstone wore a size 11 shoe. RP 1537. But Jenkins received no other footwear to compare with the impression. RP 1661. Both parties spent effort trying to show the shoe impression could or could not have been made by personnel at the scene, by those who initially found Cross, and others who had access to the house. RP 545-46, 549, 552-55, 676, 679, 684-85, 1126-27, 1158, 1197-99, 1441-42, 1486-90, 1546-48, 1556-59, 1730-38, 1870.

Cross owned two firearms: a semiautomatic Ruger revolver and an antique firearm. RP 510, 528-29, 649-50. State firearm and tool mark examiner Johan Schoeman analyzed the antique firearm, a J Stevens single shot pistol with the caliber of a .22 long rifle, which was recovered from

the paint bucket on Lundin's property. RP 1315, 1354, 1560, 1569. The Stevens pistol was manufactured around 1910 and was operational. RP 1569, 1572-73, 1594. The pistol needed to be reloaded after a single shot. RP 1569-70.

Schoeman could not determine if bullet fragments recovered from Cross's body during the autopsy or the bullet recovered from the closet came from the Stevens firearm. RP 1343-44, 1574, 1577-82, 1608. There were similar class characteristics, but no individual characteristics were the same. RP 1602-03. The defense forensic scientist opined dust in the bore of the Stevens pistol indicated it was not recently fired. RP 1842, 1851-52.

Unspent .22 caliber shells were found on the bedroom floor of Cross's house. RP 1341-46. A number of unspent .22 caliber rounds and two spent .22 shell casings were inside the cooler found at Lundin's property. RP 1312, 1318, 1319, 1322. Schoeman could not determine if the fired casings came from the Stevens pistol. RP 1594-95.

Livingstone owned a .22 Ruger revolver and a .22 caliber hunting rifle. RP 530, 576, 1124, 1159-60. Schoeman determined neither of these firearms were used to shoot Cross. RP 1587-91.

A box of .22 caliber ammunition was found inside the cooler. RP 1316-17, 1506-09. Police found the same type of box from the same

manufacturer of ammunition in Livingstone's house. RP 576, 1127-29, 1216-17, 1509.

There were two bullet holes in a phone book taken from Livingstone's car. RP 566-67, 1205. Livingstone said he had experimented with altering bullets. RP 567-68. A bent .22 caliber shell was found in the cooler. RP 1512-13.

Police found .22 caliber ammunition in Livingstone's residence. RP 1165. Detective Ricketts did not know if any ammunition collected from Livingstone's house compared to that found in Cross's house. RP 1216.

DNA from the barrel of the Stevens pistol recovered from the paint bucket matched Cross. RP 1680. The two gloves recovered from the paint bucket were two different sizes from different manufacturers. RP 1703. DNA from a bloodstain on one of the gloves matched Cross. RP 1679. DNA from inside the glove matched Brewczynski. RP 1681.

DNA from bloodstains on the exterior of the Pacific Crest boots recovered from Brewczynski's former studio residence matched Cross. RP 1687-88. DNA from the right boot interior matched Brewczynski. RP 1688-89. The DNA profile from the left boot interior was of mixed origin consistent with originating from at least two individuals. RP 1689. The main component matched Brewczynski. RP 1689, 1706-07.

The State's DNA specialist did not compare the minor component of the mixed DNA profile with the DNA of Livingstone or Nelson. RP 1707-08. Livingstone's shoes appeared to have blood spatter on them but were not tested. RP 1476-80. The shorts Livingstone wore on September 20th were collected by police but not tested for blood. RP 570, 1202, 1226. Detective Drapeau believed there was blood on two pair of Livingstone's shoes but they were not tested in the laboratory. RP 1478-80, 1536-37, 1709.

No fingerprints were obtained from the paint bucket, the cooler, or the gun inside. RP 976-81. A print on the tin can found inside the cooler did not match Brewczynski. RP 973, 1521. Brewczynski's fingerprints were not found in the Cross residence. RP 943, 958, 1470-71, 1523.

C. ARGUMENT

1. THE TRIAL COURT WRONGLY INSTRUCTED THE JURY ON AN UNCHARGED ALTERNATIVE MEANS OF COMMITTING BURGLARY.

The information charged only one means of committing the crime of first degree burglary, i.e., the defendant or another participant in the crime "was armed with a handgun, a deadly weapon." CP 48. The "to convict" instruction for burglary allowed the jury to consider the alternative means, i.e., the defendant "assaulted a person." CP 89.

Reversal of the burglary conviction is required because the jury was allowed to convict Brewczynski based on an uncharged alternative means.

a. It Is Error To Instruct The Jury On Uncharged Alternative Means Of Committing The Offense.

"Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed." State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007).

RCW 9A.56.200 sets forth the elements of the crime of first degree burglary as follows:

A person is guilty of burglary in the first degree if, with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or in immediate flight therefrom, the actor or another participant in the crime (a) is armed with a deadly weapon, or (b) assaults any person.

"Under the statute, burglary in the first degree may be committed in two different ways, either by being armed with a deadly weapon, or by assaulting any person. Accordingly, these two modes of commission constitute alternative means by which the crime of burglary may be proved." State v. Williams, 136 Wn. App. 486, 498, 150 P.3d 111 (2007).

The "to convict" instruction for first degree burglary included both alternative means, providing in pertinent part:

To convict the defendant of the crime of burglary in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 20th day of September, 2008, the defendant entered or remained in a building;
- (2) That the entering or remaining was with intent to commit a crime against a person or property therein;
- (3) That in so entering or while in the building or in immediate flight from the building *the defendant was armed with a deadly weapon or assaulted a person*; and
- (4) That any of these acts occurred in the State of Washington.

CP 89 (Instruction 8) (emphasis added).⁶

The State, however, charged Brewczynski by amended information with first degree burglary by alleging only one alternative means: the defendant "was armed with a handgun, a deadly weapon." CP 48.⁷ The information does not allege Brewczynski committed the crime by the statutory alternative of assaulting a person.

"One cannot be tried for an uncharged offense." State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). The trial court erred in instructing the jury on an uncharged alternative means of committing the

⁶ The jury was also given a definition of first degree burglary that included both statutory alternatives: "armed with a deadly weapon or assaults any person." CP 88 (Instruction 7).

⁷ The original information charged Brewczynski on this count in the same manner. CP 2.

crime of burglary by assault. This is an error of constitutional magnitude that may be raised for the first time on appeal. See State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (instructing jury on an uncharged alternative means violates the defendant's constitutional right to notice of the crime charged); accord State v. Laramie, 141 Wn. App. 332, 342-43, 169 P.3d 859 (2007).

"When a statute provides that a crime may be committed in alternative ways or by alternative means, the information may charge one or all of the alternatives, provided the alternatives are not repugnant to one another." Bray, 52 Wn. App. at 34. When an information charges one of several alternative means, it is error to instruct the jury on the uncharged alternatives, regardless of the strength of the evidence presented at trial. Id. (citing State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942) (reversible error to instruct the jury on alternative means of committing rape when only one alternative charged)); accord State v. Williamson, 84 Wn. App. 37, 42, 924 P.2d 960 (1996); Doogan, 82 Wn. App. at 188.

In State v. Nicholas, for example, the trial court erred in giving a robbery instruction that included the alternatives of being armed with a deadly weapon or displaying what appeared to be a firearm or deadly weapon, when the information just alleged that the defendant was armed with a deadly weapon under former RCW 9A.56.200(1)(a) but did not

allege that the defendant displayed what appeared to be a firearm or other deadly weapon under former RCW 9A.56.200(1)(b). State v. Nicholas, 55 Wn. App. 261, 272-73, 776 P.2d 1385 (1989).

The "to convict" instruction for first degree burglary in Brewczynski's case was improper because it violated established law on uncharged statutory alternatives. The instruction should have omitted the statutory alternative that Brewczynski "assaulted a person" because this alternative was not set forth in the charging document. Brewczynski had the constitutional right to be informed of the nature of the charges against him. Laramie, 141 Wn. App. at 343; U.S. Const. amend. VI; Wash. Const. art. I, § 22. If an "information alleges only one alternative . . . it is error for the factfinder to consider uncharged alternatives, regardless of the strength of the evidence presented at trial." Williamson, 84 Wn. App. at 42.

b. Reversal Is Required Because The Jury Could Have Convicted On The Uncharged Alternative Means.

Where the instructional error favors the prevailing party, "it is presumed to be prejudicial unless it affirmatively appears the error was harmless." Bray, 52 Wn. App. at 34-35. If it is possible that the jury might have convicted the defendant under the uncharged alternative, then

the error is prejudicial. Doogan, 82 Wn. App. at 189; Severns, 13 Wn.2d 542, 549, 125 P.2d 659 (1942); Bray, 52 Wn. App. at 34-35.

The error here was necessarily prejudicial because, under the instructions given, the jury could have convicted Brewczynski of first degree burglary based on either the charged or the uncharged alternative means. Laramie, 141 Wn. App. at 343. Indeed, the prosecutor in closing argument invited the jury to convict on either one of the alternative means. RP 1908.

Such error may be harmless where other instructions clearly and specifically define the crime in such a way as to limit the jury's consideration to the charged means. Severns, 13 Wn.2d at 549. The definitional instruction for burglary in Brewczynski's case, however, specifies both means of committing the offense. CP 88. That instruction did not limit the jury's consideration of the means by which Brewczynski committed the crime to that charged in the information.

Instructing the jury on an uncharged alternative means may be harmless if there is otherwise no possibility that the jury convicted the defendant on the uncharged alternative means. Nicholas, 55 Wn. App. at 273. In Nicholas, the reviewing court held error in instructing the jury on an uncharged alternative means of committing first degree robbery was

harmless due to a special verdict form that required a finding of guilt on the charged means. Id. at 272-73.

Unlike Nicholas, no special verdict form in Brewczynski's case ensured the jury reached a verdict for burglary based only on the charged alternative means. The possibility that jurors convicted based on the uncharged alternative means therefore remains. Reversal of the burglary conviction is required.

2. THE INFORMATION WAS DEFECTIVE BECAUSE IT FAILED TO NOTIFY BREWCZYNSKI OF AN ALTERNATIVE ELEMENT OF THE CRIME OF FIRST DEGREE BURGLARY.

Brewczynski's conviction for first degree burglary must be reversed because the charging document does not set forth the element of "assaults any person" as an alternative means of committing the crime.

A charging document is constitutionally defective under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution if it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the well-established "essential elements" rule is to apprise the defendant of the charges against him and allow preparation of a defense. Vangerpen, 125 Wn.2d at 787.

Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Generally, the crime upon which the jury is instructed is limited to the offense charged in the information. State v. Foster, 91 Wn.2d 466, 471, 589 P.2d 789 (1979) (exception for uncharged lesser included and inferior degree crimes). Alternative means of committing the crime may be omitted from the information without depriving a defendant of notice of the charged crime. State v. Noltie, 116 Wn.2d 831, 841-42, 809 P.2d 190 (1991). However, when the information specifies one alternative means, the manner of committing a crime becomes an element. Bray, 52 Wn. App. at 34.

In State v. Tresenriter, the information charged only one means of committing the crime of burglary, i.e., with intent to commit a crime

against a person. The information failed to set forth the alternative means on which the jury was instructed, i.e., with intent to commit a crime against property. State v. Tresenriter, 101 Wn. App. 486, 490, 492, 493, 4 P.3d 145, 14 P.3d 788 (2000). Under the Kjorsvik test, the information was inadequate to give notice of the crime charged. Tresenriter, 101 Wn. App. at 489, 492.

In Williamson, the information alleged the defendant committed the crime of obstruction of a public servant by means of conduct but the trial court convicted on the uncharged alternative of obstruction by means of speech. Williamson, 84 Wn. App. at 39, 42, 44-45, 924 P.2d 960 (1996). Under the Kjorsvik test, the information failed to provide adequate notice of the alternative means ultimately considered by the trier of fact at trial. Id. at 39, 44-45.

In Brewczynski's case, as in Tresenriter and Williamson, the information was defective because it specified one alternative means but omitted a means for which he was ultimately prosecuted at trial. The information specified "the defendant or another participant in the crime, was armed with a handgun, a deadly weapon." CP 48. The information did not give notice that the State sought to convict Brewczynski of first degree burglary on the alternative basis that he "assaulted any person."

CP 48. The information was therefore inadequate to give notice of the crime charged.

A charging document need not include the exact words of a statutory element; words conveying the same meaning and import are sufficient. Kjorsvik, 117 Wn.2d at 108. But even under a liberal reading, being armed with a firearm does not mean the same thing as assaulting a person. Those are distinct means of committing the crime. Williams, 136 Wn. App. at 498. The information specifically alleges violation of RCW 9A.52.020(1)(a), the deadly weapon alternative. CP 48. RCW 9A.52.020(1)(b), which is not cited in the information, contains the specific alternative means of "assaulting any person."

"If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the "assault" element as an alternative means of committing the crime is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse Brewczynski's conviction for first degree robbery. McCarty, 140 Wn.2d at 425.

3. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO IMPEACH A CRITICAL STATE WITNESS.

Defense counsel failed to impeach Lundin, a key witness, with evidence of a prior conviction. Lundin's testimony was damaging. His credibility needed to be attacked. Reversal on all counts is required because counsel performed deficiently in declining to impeach the witness, which undermines confidence in the outcome.

a. Counsel Declined To Attack The State's Witness With Evidence Of A Prior Crime.

ER 609 states in relevant part:

(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.

In response to the prosecutor's direct examination question of whether he touched the gun, Lundin said he did not touch the gun because he had a felony 20 years ago. RP 815. The following bench conference occurred before defense counsel began cross examination of Lundin:

Mr. Reid: I'm going to ask him what the felony is for. I have a certified copy of it.

The Court: What is it for?

Mr. Reid: Res burg.

The Court: From 20 years ago?

Mr. Reid: He said it. He wasn't going to, but I thought that I needed. The burglary is from 10303 East Empire, which is about a mile away from Cross's house.

Mr. Garvin: I don't think it's admissible.

The Court: Well, it isn't admissible if he hasn't had criminal history since.

Mr. Reid: He has some criminal history out of both Washington and Arizona.

The Court: So does it wash?

Mr. Reid: No.

The Court: My concern is he won't say anything. That's my concern because if you open that door because they're partner's in crime?

Mr. Reid: No.

The Court: Because my worry is that the witness's statement get any kind of close to. I know you're cautious.

Mr. Reid: You were cautious, and I appreciate that. I'll leave it alone. I'll leave it alone.

The Court: Okay.

RP 816-17.

b. No Legitimate Strategy Justified Counsel's Failure To Impeach The State's Witness.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). The constitutional right to effective assistance "exists, and is needed, in order to protect the fundamental right to a fair trial." Strickland, 466 U.S. at 684.

"A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26.

Defense counsel decided not to use evidence of the burglary conviction against Lundin because he apparently agreed with the trial court's assessment that such evidence would allow jurors to see Lundin and Brewczynski as partners in crime. RP 817. This was deficient performance.

A limiting instruction would have prevented jurors from using the impeachment evidence for the improper purpose of inferring that Lundin and Brewczynski were partners in crime. "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." ER 105.

The only purpose of admitting evidence of prior convictions under ER 609 is to aid the trier of fact in assessing the truth of a witness's testimony. State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). Evidence of prior conviction under ER 609 is admitted for the purpose of impeachment only. Impeachment evidence goes to the credibility of the witness and is not proof of the substantive facts therein. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). When the court admits such evidence, an instruction cautioning the jury to limit its consideration to its

intended purpose is both proper and necessary. Johnson, 40 Wn. App. at 377.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 225-26. "Not all strategies or tactics on the part of defense counsel are immune from attack." State v. Grier, __ Wn.2d __, __ P.3d __, 2011 WL 459466 at *9 (slip op. filed Feb. 10, 2011). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

A limiting instruction in this case would have prevented jurors from using the conviction evidence concerning Lundin to improperly infer Lundin and Brewczynski were both involved in the Cross matter. "Jurors are presumed to follow instructions." State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982). A contrary presumption is untenable. See Grisby, 97 Wn.2d at 509 (quoting State v. Pepon, 62 Wn. 635, 644, 114 P. 449 (1911) ("[W]e must indulge some presumptions in favor of the integrity of the jury. It is a branch of the judiciary, and if we assume that jurors are so quickly forgetful of the duties of citizenship as to stand continually ready to violate their oath on the slightest provocation, we must inevitably conclude that a trial by jury is a farce and our government a failure.")).

In light of the presumption that jurors follow instructions, it was not a legitimate tactic to fail to impeach Lundin based on a concern that the jury could use the impeachment evidence as substantive evidence that Lundin and Brewczynski were partners in crime. Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The record in this case rebuts the presumption of reasonable performance. No legitimate tactic justified the failure to impeach a key State witness.

The State may argue Lundin's conviction was too old to have any probative value. The court, however, did not rule the conviction was inadmissible on this ground. On the contrary, the court accepted the conviction was admissible. RP 817. Moreover, Lundin opened the door to being impeached with evidence of his prior felony by raising it as part of his testimony on the State's direct examination. RP 815.

The trial court's concern that Lundin "won't say anything" was misplaced. RP 817. Defense counsel did not need to accept Lundin's answer, assuming it would have failed to acknowledge the prior conviction. ER 609(a) allows proof of conviction "elicited from the

witness or established by public record." Counsel had the certified copy of the conviction in his hand. RP 816. Counsel therefore performed deficiently to the extent, if any, he relied on the court's concern that Lundin "won't say anything" as a basis to not seek admission of the conviction evidence for impeachment purposes.

c. Counsel's Failure To Impeach This Crucial Witness Prejudiced The Outcome Of The Case.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Brewczynski "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

Lundin was an important witness. Juror belief in the credibility of his account was crucial to the State's case. Lundin was the only person who could testify as to the circumstances under which the contents of the paint bucket were discovered in the garage. The contents of the bucket included Cross's personal effects, the possible murder weapon with Cross's blood on it, and a glove with Cross's blood on it and Brewczynski's DNA in it. Lundin's testimony linked Brewczynski to those items in a damning manner.

Significantly, Lundin gave two different answers as to when he changed the locks on the garage. RP 802, 804, 818, 825. The answer he settled on was that he changed the locks after Cross's death. RP 825. The other answer he gave was that he changed the locks before Cross's death. RP 802, 818, 825. The difference is important. The lock change prevented Brewczynski from accessing the garage interior. If the locks were changed *after* Cross's death, the State's theory that Brewczynski had the opportunity to access the garage interior and deposit the incriminating items inside while leaving behind the bloodstained Pacific Crest boots retains validity. But if the locks were changed *before* Cross's death, then there is no way Brewczynski would have been able to access the garage, put the incriminating evidence in the paint bucket, and leave the bloodstained Pacific Crest boots inside the garage studio. In that case, the link between Brewczynski and the crime is severely undermined.

Had the jury heard evidence impeaching Lundin's credibility as a witness, there would have been a basis to seriously question Lundin's account that Brewczynski was the person who deposited the items in the paint bucket. Moreover, jurors, in deciding when the locks were changed, would have been more inclined to discount Lundin's testimony regarding when the locks were changed as unreliable.

The prejudice prong of a claim of ineffective assistance of counsel is comparable to harmless error analysis. State v. Rodriguez, 121 Wn. App. 180, 187, 87 P.3d 1201 (2004). "When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial." State v. Martin, 73 Wn.2d 616, 627, 440 P.2d 429 (1968). Such a conclusion is no different than a probability sufficient to undermine confidence in the outcome. Thomas, 109 Wn.2d 226. For the reasons set forth above, that standard is satisfied here. Reversal on all counts is required.

4. THE COURT WRONGLY ADMITTED FOOTWEAR COMPARISON EVIDENCE UNDER THE FRYE STANDARD AND ER 702.

Reversal on all counts is required because the court wrongly failed to exclude expert testimony on whether the footwear impression left at the scene matched the footwear linked to Brewczynski. First, the evidence was inadmissible under the Frye standard because the State failed to prove the method used to establish comparison was accepted in the scientific community of footwear examiners. Second, the evidence was inadmissible because it was unhelpful to the trier of fact under ER 702.

a. The Impression Expert's Unique Method Of Making A Comparison.

The defense moved to exclude expert testimony on footwear comparison evidence under Frye, ER 702 and ER 403. CP 32-37; RP 332-34. At the conclusion of a pre-trial hearing on the issue, the court ruled the Frye standard was satisfied and the expert testimony was admissible under ER 702. RP 336-38.

Forensic scientist Kevin Jenkins, who worked in Washington State Patrol (WSP) lab, testified the field of footwear impression examination is established and generally accepted in the scientific community. RP 279, 281-82. Jenkins said the theory behind footwear impression analysis "is that a person in some certain circumstances can leave an impression of their shoe at a crime scene in some manner, and then the method is to record that question impression or collect it, preserve it, make a comparison to it once a known set of shoes is obtained from a possible suspect, and there's a number of different methods for doing both of those." RP 282.

Jenkins examined a single photo of an impression left at the crime scene and a pair of Pacific Crest boots that were recovered from Brewczynski's former residence. RP 285, 304. The photo showed blood on a blanket. RP 290. The photographed impression was referred to as a

question impression, i.e., an impression from an unknown source. RP 1620.⁸

Jenkins first looked at the photo and determined it was sufficiently detailed to conduct an examination. RP 286. Second, he made an overlay of the photo impression by tracing over a piece of clear plastic with a marker. RP 286, 1625-27. He traced using a marker "everywhere that I could see red, which the impression appeared to be in blood. Anywhere I could see a definite red pattern that I could distinguish as likely part of the question impression, I traced over the top of it[.]" RP 1627. Third, Jenkins looked at the boots and determined there were sufficient similarities to continue examination.

Fourth, Jenkins devised a method to make an exemplar impression of the shoes. RP 286. The question impression exhibited "side details, detail from the side wall of the shoe." RP 286. Jenkins determined the

⁸ In conducting de novo review, appellate courts look to all available information and authority on the issue, even if not presented to the trial court as part of its Frye determination. Grant v. Boccia, 133 Wn. App. 176, 179, 137 P.3d 20 (2006); State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996); State v. Cauthron, 120 Wn.2d 879, 887-88, 846 P.2d 502 (1993), overruled on other grounds, State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997)). Citations to both the pre-trial and trial phases of Jenkins's testimony are therefore included as part of the Frye issue presented here. Trial testimony from forensic examiner Naccarato, who took the original photograph upon which Jenkins relied to make his comparison, is also included for the same reason.

best method "would be to use a clay to make, a 3-D impression or three-dimensional impression of the part of the shoe that could be flattened into two dimension." RP 286. He used this method because there was detail in the question impression "that may have originated from the side of the shoe." RP 286-87. According to Jenkins, the only way to capture the detail from the sole of the shoe and the side of the shoe at the same time was to use a malleable material that could be formed around the bottom and side of the shoe at the same time and then flattened. RP 287. Jenkins said he was able to capture a good clay impression. RP 287.

Fifth, Jenkins used the overlay of the question impression from the photograph and overlaid that onto the clay impression from the right boot to determine if there was an area that was consistent with the impression left at the scene. RP 287.

Jenkins testified there was no way to avoid distortions. RP 1662. One distortion was that the question impression was not flat because it was photographed the way it was found. RP 1662. This resulted in a question impression that was not flat to the plane of the camera. RP 301-02. Jenkins did not know how close to flat the question impression was. RP 1662.

The blanket where the original impression was found was not rigid, which likely resulted in distortion. RP 1662. Jenkins also acknowledged the malleable fabric material led to a distorted tracing. RP 1660.

Jenkins acknowledged the three dimensional exemplar impression of the shoes became distorted when laid out flat into two dimensions. RP 1630, 1662. Jenkins also acknowledged he added a distortion to the original by cutting the clay mold and laying it flat. RP 1646. "It does not, as it sits now, does not approximate the actual shoe." RP 1646.

Jenkins said he took these distortions into account in forming his conclusions. RP 290-91, 1663. He did not explain how he took them into account, just that he did. His conclusion was that the right boot could have made the question impression, meaning that the tread pattern and approximate size were similar. RP 291, 1662.

Jenkins was familiar with William Bodziak's "Footwear Impression Evidence, Second Edition." RP 292. Bodziak was required reading at the Georgia Bureau of Investigation where Jenkins was trained. RP 295. WSP training follows the International Association of Identification (IAI) recommended course of study for footwear examiners. RP 1632. The IAI recommends Bodziak's "Footwear Impression

Evidence, Second Edition" to prepare for the IAI certification test.⁹ RP 295, 1633, 1643.

Jenkins was faced with the problem of how to make a test impression that captured both the bottom of the shoe and the side of the shoe at the same time, which he could then compare to the question impression. RP 1621. He determined the only way to do that was to wrap modeling clay around the toe and side of the exemplar shoes. RP 1622. Then he took the clay off each shoe: "now I have a two-dimension impression that is in three dimension because it's a curved piece of evidence, but I have to compare that now to a flat piece of evidence." RP 1622. "So I made cuts near the toes of the impression where there was no detail and laid it down flat, which would allow me to make that comparison. Now I have a similar type impression of a curved two-dimensional impression that is now laying flat." RP 1622. Cuts in the exemplar impressions were needed to "approximate" the question impression, which is a curved two-dimensional impression that is flat in the photograph. RP 1623-24.

Jenkins did not follow Bodziak's methods for creating a 3-D cast. RP 310-11. Bodziak recommended a different method for capturing side detail on the shoe: placing the shoe down on a flattened piece of clay. RP

⁹ Jenkins had not obtained IAI certification. RP 1632-33.

308-10, 1643. Jenkins thought Bodziak was wrong if he believed that the prescribed method could capture the side detail in a case such as this. RP 310, 1643. Jenkins believed Bodziak was not taking into account the circumstances surrounding the particular type of impression involved in this case. RP 1644. Jenkins did not contact Bodziak to see if he agreed with that assessment. RP 1644.

Jenkins said a soft material such as a blanket "will wrap around the sides of the item, the shoe in this case, and then once you step off, then it springs back, essentially, back to the way it was before the shoe print was put on there." RP 290. In other words, a three dimensional impression was initially created when someone stood with their foot on the blanket, but the impression became a two dimensional impression when the foot was taken off. RP 1641.

The question impression was "essentially" a two dimensional impression wrapped around the shoe due to the pliability of the soft blanket material. RP 1621. "We actually have a two-dimensional impression sort of in 3-D, but it's actually more true a two-dimensional impression." RP 327. "It's a two-dimensional impression of a 3-D item. Because it's a two-dimensional impression of the sole that wrapped around and made a partial two-dimensional impression of the side, so it's not really what is classically in Bodziak's book or in any other guidelines,

especially ours or IAI or any other guidelines referred to as a three-dimensional impression." RP 326-27.

Jenkins used a 3-D exemplar of the known shoe to compare to a 2-D question impression. RP 327. Jenkins did not know of any other method that would allow him to capture the sole and side of the shoe while laid out flat. RP 327-28. This was an "unusual" situation. RP 1625. In a normal case, Jenkins would make an exemplar impression of the boots on clear acetate using fingerprint powder. RP 1625. But there was no way in this case to compare the cast directly against the question impression in the photograph because the casts are opaque. RP 1625. He laid the tracing of the question impression over the top of the cast. RP 1625. In this way he compared the tracing of the question impression to the exemplar impressions. RP 1627.

Jenkins did not know if the method of cutting a three dimensional exemplar to compare it to a photograph was included in Bodziak's book. RP 1645-46. Jenkins stressed this was a "unique" situation. RP 1646. "There's no way for me to physically compare something that is a 2-D impression that is not curved or 3-D impression. In this case because of clay, that third dimension doesn't concern me. I cannot physically compare a curved impression to the question impression in this case." RP 1646. Jenkins acknowledged he could have made a photograph of the 3-D

exemplar and compared it to the photograph of the questioned impression, but he declined to do so because that would have risked "introducing more error." RP 1646. Jenkins said his method resulted in the best comparison available. RP 1646.

Bodziak listed nine different ways to make a 2-D test impression of an exemplar or known shoe. RP 311-14, 1646-48, 1650. Jenkins did not use any of these methods. RP 311-14, 1650. According to Jenkins, none of those methods would allow him to capture both the sole and side detail of a shoe. RP 1650-51. Jenkins could not think of any other method other than the one he used. RP 1651.

b. The Scientific Evidence Was Inadmissible Under Frye Because The Method Employed By The State's Expert To Conduct The Footwear Comparison Analysis Had Not Achieved Consensus In The Relevant Scientific Community.

The State's expert used a unique method of comparing the question impression with the actual boot. Under Frye, novel scientific evidence is admissible only where (1) the scientific theory or principle upon which the evidence is based has gained general acceptance in the relevant scientific community of which it is a part; and (2) there are generally accepted methods of applying the theory or principle in a manner capable of producing reliable results. State v. Riker, 123 Wn.2d 351, 359, 869 P.2d 43 (1994).

The trial court here correctly identified the first prong of the Frye test as whether the scientific theory or principle is generally accepted in the scientific community. RP 336. The court incorrectly identified the second prong of the Frye test. Instead of determining whether the method used by Jenkins was accepted in the relevant scientific community as required by the second prong of Frye, the court instead focused on whether his expert testimony on the issue was admissible under ER 702. RP 336; see United States v. Addison, 498 F.2d 741, 744 (D.C. Cir. 1974) (trial court erred in focusing more on the reliability of a technique than its general acceptance within the scientific community).

The court remarked it knew the defense was arguing about method, but erroneously indicated the issue is not reached under Frye. RP 337. Instead, the court addressed admissibility under ER 702: "I believe that the methodology and how he did it, whether he made from the picture and basically sketching the picture and making the transparency goes more to the weight rather than the admissibility." RP 337. From this, the court concluded the expert testimony met the Frye standard. RP 338. The trial court did not apply the correct test under Frye.

There is a difference between an expert who does not use an established methodology in a particular case and an expert who uses an established methodology but is accused of improperly applying it in a

particular case. The latter is only subject to ER 702 analysis. State v. Cauthron, 120 Wn.2d 879, 889-90, 846 P.2d 502 (1993), overruled on other grounds, State v. Buckner, 133 Wn.2d 63, 941 P.2d 667 (1997)). The former scenario, into which Jenkins falls, implicates Frye. Riker, 123 Wn.2d at 359; State v. Gore, 143 Wn.2d 288, 302, 21 P.3d 262 (2001).

Frye determinations are reviewed de novo. State v. Gregory, 158 Wn.2d 759, 830, 147 P.3d 1201 (2006). "The core concern of Frye is whether the evidence being offered is based on an established scientific methodology." State v. Russell, 125 Wn.2d 24, 41, 882 P.2d 747 (1994). Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under Frye. Gore, 143 Wn.2d at 302.

No Washington court has addressed whether footwear impression evidence is admissible under the Frye standard. The second part of the Frye test — that the evidence being offered is based on an established scientific methodology — is not satisfied in this case. The State, as proponent of the challenged expert testimony, bore the burden of establishing satisfaction of the Frye requirements. In re Marriage of Parker, 91 Wn. App. 219, 226, 957 P.2d 256 (1998). The State did not

show the method used by Jenkins to conduct his footwear comparison analysis was generally accepted in the scientific community.

The validity of the technique applying an underlying scientific principle is at issue here. State v. Sipin, 130 Wn. App. 403, 414-15, 123 P.3d 862 (2005). Jenkins acknowledged the nature of the impression evidence and the means by which to compare it to a known exemplar was "unique" and "unusual." RP 1625, 1646. This is what prompted him to use an inventive method of comparison. Bodziak, a prominent authority in the field, does not recognize the method of folding clay onto a shoe and then laying the clay exemplar out flat to compare it to a photographic impression. RP 308-14, 1643-46, 1650. There was no evidence that anyone in the relevant scientific community of footwear examiners had endorsed Jenkins's method of comparison.

An appellate court's task is not to determine whether a scientific method is correct because such determination is beyond the expertise of courts. Sipin, 130 Wn. App. at 419. Instead, its task is to determine whether the appropriate scientific community has generally reached consensus that the method is reliable. Id. at 419-20. The State produced no evidence that there was a consensus that this was a reliable method of conducting the comparison analysis. Instead, the State stood pat on

Jenkins's unilateral testimony that this method was acceptable. His testimony does not satisfy the Frye test.

Assuming reliable methods of comparing footwear impressions exist for Frye purposes as identified by Bodziak, Jenkins did not use any of them to conduct his comparison analysis. Jenkins clearly believed the method he used was the only one available to him that allowed for comparison. But that does not establish the method is accepted in the scientific community. It may be that the nature of the question impression at issue here did not allow for application of any of the established methods for comparison. The Frye test stills needs to be satisfied. The gate keeping function of Frye requires a reliable method of applying an accepted theory to the facts of the case. Riker, 123 Wn.2d at 363.

The Frye test is unsatisfied for another reason. The State failed to show Jenkins used a generally accepted method of capturing an accurate image of the question impression.

Bodziak, the IAI, SWGTREAD (a group of footwear and tire track examiners formed by the FBI),¹⁰ and the Georgia Bureau of Investigation have a procedure checklist for taking photographs of question impressions

¹⁰ Nat'l Research Council, Nat'l Acad. of Science, Strengthening Forensic Science in the United States: A Path Forward, 148 (2009).

and examination of quality photographs. RP 299, 302-07. Jenkins did not verify those procedures were followed in this case. RP 303-07.¹¹

For example, when there is a 3-D impression, the scale must be parallel to the impression on the film plane. RP 301. Jenkins did not verify that the film plane was parallel to the impression. RP 301. In his report, Jenkins noted the impression was photographed as it was found, which resulted in a question impression that was not flat to the plane of the camera. RP 301-02, 1637.¹²

Contradicting Jenkins, forensic examiner Naccarato, who took the photograph and was not an impression specialist, maintained at trial that she used a procedure that ensured the plane was the same and parallel to the impression. RP 951-53. But Naccarato did not use a tripod. RP 951. Instead, she simply held the camera with her hand. RP 956. According to Bodziak, plane perspective and scaling problems result when the ruler is not parallel and level to the impression in the film. RP 954-55. To prevent this problem, use of a tripod is part of the procedure checklist for

¹¹ With the exception of a photograph being taken before enhancing the impression. RP 307. At the scene, the forensic examiner destroyed the impression in attempting to enhance it with a product known as "Bluestar." RP 1654.

¹² Even if the film is parallel to the overall impression, the photograph may not result in an accurate representation of the impression. RP 307. This phenomenon occurs when an uneven footwear photograph is transferred from a three dimensional to a flat, two-dimensional image. RP 307-08.

quality photographs. RP 300, 302, 951-52. Bodziak warns "Reliance on one senses to place the plane parallel to that impression combined with the continuous movement of the camera while held in one's hand will affect perspective and focus and are likely to result in poor photographs." RP 956.

Jenkins said the photograph was fine because there was sufficient detail to make a comparison. RP 285-86. There may have been sufficient detail to make a comparison. But that is not the salient issue. The real issue is whether the details of the actual impression left on the blanket were accurately represented in the photograph. Jenkins recognized the goal of these photography methods was to obtain an accurate representation of the impression that can be made to scale. RP 329. Jenkins said he determined by looking at the photograph that it was of sufficient quality. RP 303-04, 329-30. He reached this subjective conclusion without verifying the methods used to obtain an accurate, distortion-free representation of the impression were followed. RP 303-04. His determination that the photograph was of sufficient quality assumes the photograph itself did not misrepresent the actual impression. Jenkins elsewhere acknowledged the question impression was not flat to the plane of the camera, which distorted the actual impression. RP 301-02, 1662.

Jenkins did not even know how close to flat the questioned impression was. RP 1662.

Nor did Jenkins know if the proper method of taking a photograph of the question impression had been followed. RP 303-04. That method is designed to ensure the photograph of the impression is accurate in all respects. RP 329. In the field of footwear impression analysis, every detail counts. If the method of capturing the actual impression via photograph results in a distorted representation of the actual impression, then the ensuing comparison analysis with an exemplar impression will be skewed.

The Frye test is unsatisfied because the State failed to show the generally accepted method of capturing an accurate photograph representation of the question impression was used in this case. The technique or methodology used to implement the scientific theory underlying the evidence must be generally accepted in the scientific community for evidence to be admissible under Frye. Gregory, 158 Wn.2d at 829.

The State may argue harmless error. That argument fails. Evidentiary error is prejudicial if, within reasonable probabilities, the error materially affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes

harmless error only if the evidence is trivial and of minor significance in reference to the evidence as a whole. Neal, 144 Wn.2d at 611; State v. Oswalt, 62 Wn.2d 118, 122, 381 P.2d 617 (1963).

The erroneous admission of expert testimony is reversible error when the case is circumstantial and the other evidence is not overwhelming. State v. Huynh, 49 Wn. App. 192, 198, 742 P.2d 160 (1987) (in arson case, trial court wrongly admitted expert testimony that gas recovered from the fire could have matched gas found in the defendant's car under Frye because there was no scientific consensus on the effectiveness of gas chromatography method of comparison).

The case against Brewczynski was highly circumstantial. The footwear evidence was not trivial. This evidence placed a boot linked to Brewczynski inside the closet of Cross's bedroom, where Cross was shot once on each side of the head, possibly by a gun that required reloading after each discharge. RP 607, 627-29, 762-63, 776, 1343-44, 1569-70, 1574, 1577-82, 1602-03, 1608. The impression was singular evidence supporting the State's premeditation theory on the first degree murder charge. The State's theory was that the DNA evidence placed Brewczynski at the scene of the crime. RP 1902, 1907. But jurors heard evidence of other suspects. See section B. 2. b., c., d., e., g., supra. Without the footwear impression evidence, jurors may have been less

inclined to find Brewczynski was the one who acted with premeditation by shooting at Cross three times with the gun, hitting him once on each side of the head. The outcome of the trial might reasonably have been different if the trial court had excluded the challenged evidence. Sipin, 130 Wn. App. at 421.

c. Expert Testimony On The Footwear Impression Evidence Was Inadmissible Under ER 702.

A trial court's evidentiary rulings are reviewed for abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999). "A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard." In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P. 2d 1362 (1997). "[I]t is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Littlefield, 133 Wn.2d at 47. "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." Neal, 144 Wn.2d at 609.

Expert testimony is admissible only if it is helpful to the trier of fact. ER702; In re Guardianship of Stamm, 121 Wn. App. 830, 838, 91 P.3d 126 (2004). ER 702 provides "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to

determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702 involves a two-step inquiry: whether the witness qualifies as an expert and whether the expert testimony would be helpful to the trier of fact. Reese v. Stroh, 128 Wn.2d 300, 306, 907 P.2d 282 (1995).

ER 702 embodies general reliability standards. Reese, 128 Wn.2d at 308. Proffered expert testimony must be carefully evaluated to ensure it is indeed helpful to the fact finder as required by ER 702. Stamm, 121 Wn. App. at 838. "An opinion formed on inadequate or unreliable grounds cannot be helpful." Id.

The methodologies used by Jenkins that render his testimony inadmissible under Frye necessarily render his opinion unhelpful to the trier of fact. The Frye inquiry prevents "pseudoscience" from entering the courtroom. Copeland, 130 Wn.2d at 259.

Even if the Frye test is satisfied, the expert testimony must still be admissible under ER 702. Copeland, 130 Wn.2d at 256. Other facts, in combination with those presented in support of the Frye argument, show Jenkins's opinion was too unreliable to be helpful to the trier of fact.

Jenkins's opinion was that the boot found in Brewczynski's former residence "could have" made the question impression found at the scene of

the crime. RP 291, 1662. That type of inconclusive opinion, in and of itself, at least verges on unhelpful speculation and militates against a determination that the opinion is helpful to the trier of fact in combination with other circumstances. See State v. Lord, 161 Wn.2d 276, 295 n.16, 165 P.3d 1251 (2007) (if the expert cannot express an opinion to a reasonable degree of probability, then opinion is irrelevant under ER 401 and unhelpful to their of fact under ER 702); Huynh, 49 Wn. App. at 194 (in arson case, expert conclusion that gas recovered from the fire "might have" or "could have" been from can found in defendant's car amounted to inadmissible speculation); cf. State v. Lord, 117 Wn.2d 829, 853, 822 P.2d 177 (1991) (lack of certainty goes to weight rather than admissibility).

When ruling on somewhat speculative testimony, "the court should keep in mind the danger that the jury may be overly impressed with a witness possessing the aura of an expert." Miller v. Likins, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (quoting Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 571-72, 719 P.2d 569 (1986)). The trial court here gave no consideration to this danger.

Other factors show Jenkins's opinion, offered as the product of scientific method, was too unreliable to be helpful to the jury. According to the NRC report cited by defense counsel below, the conclusions of impression examiners amount to no more than subjective impressions

unmoored from standardized assessment of how many points of similarity there needs to be for a given level of confidence in the result. Nat'l Research Council, Nat'l Acad. of Science, Strengthening Forensic Science in the United States: A Path Forward, 147-49 (2009) (NRC Report). "[T]here is no defined threshold that must be surpassed, nor are there any studies that associate the number of matching characteristics with the probability that the impressions were made by a common source." NRC Report at 147.

There are no population studies about the probabilities needed to support Jenkins's "could have" conclusion. RP 325. Indeed, "there is no consensus regarding the number of individual characteristics needed to make a positive identification, and the committee is not aware of any data about the variability of class or individual characteristics or about the validity or reliability of the method. Without such population studies, it is impossible to assess the number of characteristics that must match in order to have any particular degree of confidence about the source of the impression." NRC Report at 149. "The expert who assumes the aura of science while really basing her testimony on unsystematic inductions creates the worst of both worlds." Roger C. Park, SYMPOSIUM: Signature Identification in the Light of Science and Experience, 59 Hastings L.J. 1101, 1104 (2008).

Moreover, the proficiency testing for impression examiners is flawed: "the proficiency tests for footwear impressions include samples that

are either a match or not a match — that is, none of the samples included in the tests have the sort of ambiguities that would lead an experienced examiner to an 'inconclusive' conclusion." NRC Report at 147-48. This is consistent with Jenkins's own experience. RP 296-97.

According to Bodziak, the primary examination should be between the question impression and the actual shoe. RP 315. But the primary examination used by Jenkins was to compare the question impression and the clay mold rather than the actual shoe. RP 317. Furthermore, Bodziak directs examiners, when comparing a 3-D impression represented by a photograph, to compare it to a photograph of a 3-D test impression taken under the same light source, height and position conditions as the question impression photograph. RP 308. Jenkins did not do this. RP 308.

Bodziak suggests making a transparency from the photographic negative of the test impression. RP 308. Jenkins did not do this. RP 308. In addition, Jenkins drew a free hand transparency of the question impression based on the "the way [he] saw it," without attempting to create a mechanical transparency that would remove the subjective factor inherent in creating a free hand drawing. RP 308, 316, 1651, 1653-61.

Jenkins said his examination was subject to peer review before he completed the final report. RP 320-21. But Jenkins reported that the peer reviewer reviewed his draft one day *after* the final report was complete.

RP 321. At the hearing, Jenkins was unable to explain "how that happened," but maintained without supporting evidence that "it would have been before the final draft." RP 321-22.

"Evidence which is unreliable has little or no probative value and is not helpful to the trier of fact and, therefore, is inadmissible." Huynh, 49 Wn. App. at 196. When an expert reasonably relies on information in forming her opinion, the opinion assists "the trier of fact to understand the evidence or to determine a fact in issue." ER 702. But an expert's opinion should be based on relevant and reliable evidence before it is put in front of the jury. Stamm, 121 Wn. App. at 838. Taking all of the factors identified above together, the footwear impression testimony offered here fails to surpass the threshold of reliability and relevance needed to be helpful to the trier of fact under ER 702. For the reasons set forth in section C. 4. b., supra, this evidentiary error is not harmless because there is a reasonable probability that the outcome would have been different had the evidence been excluded.

5. CUMULATIVE ERROR VIOLATED BREWCZYNSKI'S CONSTITUTIONAL DUE PROCESS RIGHT TO A FAIR TRIAL.

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. Amend. V and XIV; Wash. Const. art. 1, § 3. Under

the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981 (1998).

As discussed above, an accumulation of errors affected the outcome of Brewczynski's trial and produced an unfair trial. These errors include (1) ineffective assistance as set forth in section C. 3., supra and (2) improper admission of the footwear comparison evidence under Frye and ER 702 as set forth in section C. 4., supra.

6. THE FLAWED SPECIAL VERDICT INSTRUCTIONS ON UNANIMITY REQUIRES VACATURE OF THE AGGRAVATED FIRST DEGREE MURDER CONVICTION AND THE DEADLY WEAPON ENHANCEMENT.

Jury instructions failed to make it manifestly clear that unanimity was not required to answer "no" to the special verdicts. The special verdicts on aggravated murder and being armed with a deadly weapon during commission of the murder must therefore be vacated.

a. Jury Instructions Failed To Set Forth The Correct Legal Standard On Unanimity For Special Verdicts.

The jury was given two special verdict forms pertaining to count I (premeditated first degree murder). CP 112-13. One form asked whether

the State had proven the following aggravating circumstance: "The murder was committed in the course of, in furtherance of, or in immediate flight from Burglary in the first degree." CP 113. The other special verdict form asked whether the State had proven Brewczynski was "armed with a firearm at the time of the commission of the crime in Count I." CP 112.

Instruction 26 told the jury what was required in order to answer these special verdict forms:

You will also be given a special verdict form for the crime of Premeditated Murder in the First Degree. If you find the defendant not guilty of this crime do not use the special verdict forms. If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP 108.

All 12 jurors need not agree to return an answer of "no" on a special verdict. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010). In Bashaw, the jury was instructed "Since this is a criminal case, all twelve of you must agree on the answer to the special verdict." Bashaw, 169 Wn.2d at 139. This was an incorrect statement of the law. Id. at 146-47. A unanimous jury decision is not required to find that the

State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Id. at 146 (citing State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003)).

Challenges to jury instructions are reviewed de novo. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Instruction 26 is erroneous because it does not inform the jury that it can answer "no " to the special verdict form in the absence of unanimity. "[J]ury instructions 'must more than adequately convey the law. They must make the relevant legal standards manifestly apparent to the average juror.'" State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007) (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). Instruction 26 fails that standard. It presented the jury with a false choice between unanimously agreeing that the answer was "yes" or unanimously agreeing the answer was "no." The third option — answering "no" where at least one juror did not agree — was not presented to the jury.

Jury instructions, when read as a whole, must properly inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). But looking to other instructions in this case does not cure the problem found in Instruction 26. On the contrary, they confirm the impression that unanimity was required to return an answer of "no" on the special verdicts.

Instruction 25, addressing the general verdicts, told jurors "Because this is a criminal case, each of you must agree to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision." CP 106. In light of Instruction 25, an average juror reading Instruction 26 would reasonably conclude unanimity was required for all the verdicts in the absence of being specifically told that unanimity was not required to answer "no" to the special verdicts. See State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997) (instructional error informed by the way a reasonable juror could have interpreted the instruction).

Instruction 28, which addresses what must be proven to return a special aggravating circumstance verdict, did not cure the problem either. In stated, in relevant part "if you unanimously agree that a specific aggravating circumstance has been proved beyond a reasonable doubt, you should answer the special verdict "yes" as to that circumstance." CP 110. Instruction 28 further stated "If you have a reasonable doubt whether the defendant was the participant, you should answer the special verdict "no." CP 110. Instruction 28 does not make it manifestly clear that the jury could answer "no" on the special verdict form even if it did not unanimously have a reasonable doubt.¹³ Instruction 26 required unanimity

¹³ Instruction 27, which covered what must be proven to return a special firearm verdict, did not address unanimity. CP 109.

to answer the special verdicts. Instruction 25 buttressed this interpretation. Read as a whole, the jury instructions fail to make it manifestly clear that the jury could answer "no" on the special verdict forms in the absence of unanimity.

b. The Instructional Error Was Not Harmless Beyond A Reasonable Doubt.

Instructional error is presumed to be prejudicial unless it affirmatively appears to be harmless. Clausing, 147 Wn.2d at 628. In order to hold that a jury instruction error was harmless, the reviewing court must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error. Bashaw, 169 Wn.2d at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

As in Bashaw, "[t]he error here was the procedure by which unanimity would be inappropriately achieved." Bashaw, 169 Wn.2d at 147. As in Bashaw, "[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction." Id.

The State may argue the error was harmless by pointing to the general verdicts. As required by law, the jury was instructed it had to be unanimous in order to return a general verdict. CP 106; see Bashaw, 169 Wn.2d at 145 n.5 (general verdicts in criminal cases must be unanimous to

convict or acquit (citing Wash. Const. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)).

The general verdicts in this case do now show the erroneous unanimity requirement for the special verdicts was harmless beyond a reasonable doubt. The "to convict" instruction for burglary allowed the jury to convict on the alternative means of being armed with a deadly weapon or assault. CP 89. Juror unanimity is not required for alternative means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). The general verdict for burglary does not tell us whether the jury unanimously found Brewczynski was armed with a deadly weapon during the commission of the burglary. See In re Detention of Pouncy, 168 Wn.2d 382, 391-92, 229 P.3d 678 (2010) (where jury faced with alternative means of finding mental abnormality or personality disorder in involuntary commitment case, appellate court had no way of knowing from the general verdict which alternative means jury relied on). The general verdict for premeditated first degree murder, meanwhile, did not contain any element related to whether the murder was committed during the course of the first degree burglary. CP 85, 111.

The deliberative process is different when the jury is given the option of not returning a unanimous verdict. Given a proper special verdict instruction that did not require unanimity, the jury may have

returned a different special verdict. Bashaw, 169 Wn.2d at 147. As articulated by the Supreme Court in Bashaw, "We can only speculate as to why this might be so. For instance, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless." Id. at 147-48. The same holds true here. The sentencing enhancements should be vacated. Id. at 148.

c. The Instructional Error May Be Raised For The First Time On Appeal.

Both the Washington Constitution and United States Constitution guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. 1 , §§ 3, 22. Only a fair trial is a constitutional trial. State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). The failure to provide the defendant with a fair trial violates minimal standards of due process. State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994); U.S. Const. amend. XIV; Wash. Const. art. 1 , § 3.

Defense counsel did not object to the instruction but the error can be raised for the first time on appeal as an error of constitutional magnitude. RAP 2.5(a)(3). The defendant in Bashaw did not object to the

flawed special verdict instruction¹⁴ but the Supreme Court still reversed after applying the harmless error test applicable to constitutional error. Bashaw, 169 Wn.2d at 147-48. The Court would not have done so if the error was not a manifest constitutional error. The Court cannot be presumed to have disregarded established law on the issue.

One court recently held Bashaw-type errors cannot be raised for the first time on appeal. State v. Nunez, __ Wn. App. __, P.3d __, 2011 WL 505335 (slip op. filed Feb. 15, 2011). The Nunez court believed the error was not constitutional. But the Supreme Court in Bashaw did. Bashaw, 169 Wn.2d at 147-48. A decision by the Supreme Court is binding on all lower courts in the state. 1000 Virginia P'ship v. Vertecs, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). The Nunez court erred in not following directly controlling authority by the Supreme Court. 1000 Virginia P'ship, 158 Wn.2d at 578; Gore, 101 Wn.2d at 486-87.

"[M]anifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right." State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). It is "well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal." State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977

¹⁴ State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2008), reversed, 169 Wn.2d 133, 234 P.3d 195 (2010).

(2000) (citing State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996)). To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law. State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2009). The applicable law here is that the jury need not be unanimous to return a special verdict of "no."

The right to a jury trial embodies the right to have each juror reach his or her verdict by means of "the court's proper instructions." State v. Boogaard, 90 Wn.2d 733, 736, 585 P.2d 789 (1978) (reversal required where judge's questioning suggested need for holdout jurors to come to an agreement on special verdict). Goldberg, which held the trial court erred by instructing a nonunanimous jury to reach unanimity on the special verdict, cited Boogard and the right to a jury trial as authority for its decision. Goldberg, 149 Wn.2d at 892-93.

The incorrect instruction on unanimity results in a flawed deliberative process. Bashaw, 169 Wn.2d at 147. The Nunez court does not explain how jury instruction that causes a flawed deliberative process somehow avoids a due process violation. The integrity of the fact finding process is a basic component of due process. Parker v. United Airlines, Inc., 32 Wn. App. 722, 728, 649 P.2d 181 (1982). The instructional error here is constitutional in nature because it violates the constitutional right

to a fair jury trial and due process. The error is properly raised on appeal under RAP 2.5(a)(3).

Moreover, RAP 2.5(a) "never operates as an absolute bar to review." Ford, 137 Wn.2d at 477. This Court may review an issue raised for the first time on appeal in the interest of justice. RAP 1.2(a); State v. Lee, 96 Wn. App. 336, 338 n.4, 979 P.2d 458 (1999).

D. CONCLUSION

For the reasons stated, Brewczynski requests that this Court reverse the convictions. In the event it declines to do so, then the special verdicts should be vacated.

DATED this 24th day of February 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	COA NO. 29120-1-III
vs.)	
)	
DAVID BREWCZYNSKI,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF FEBRUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] MARK LINDSEY
SPOKANE COUNTY PROSECUTING ATTORNEY'S OFFICE
PUBLIC SAFETY BUILDING, 1ST FLOOR
1100 WEST MALLON
SPOKANE, WA 99260

- [X] DAVID BREWCZYNSKI
DOC NO. 728836
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF FEBRUARY 2011.

x Patrick Mayovsky