

**NO. 65517-5-1**

**IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON**  
Respondent,

v.

**JOHN GALLAGHER**

Appellant.

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**ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY**

The Honorable Susan K. Cook, Judge

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**RESPONDENT’S BRIEF**

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## TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT .....	1
II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE.....	3
1. STATEMENT OF PROCEDURAL HISTORY .....	3
2. STATEMENT OF FACTS.....	7
IV. ARGUMENT .....	9
V. CONCLUSION.....	22

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>UNITED STATES SUPREME COURT CASES</u>	
<i>Ungar v. Sarafite</i> , 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964).....	11
<i>Chambers v. Maroney</i> , 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419, (1970).....	11
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	20
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).....	12
<u>WASHINGTON STATE CASES</u>	
<i>In re Personal Restraint Petition of Pirtle</i> , 136 Wn.2d 467, 965 P.2d 593 (1998).....	19
<i>Hiner v. Bridgestone/Firestone, Inc.</i> , 91 Wn. App. 722, 959 P.2d 1158 (1998) .....	15
<i>Miller v. Likins</i> , 109 Wn. App. 140, 34 P.3d 835 (2001).....	15
<i>Philippides v. Bernard</i> , 151 Wn.2d 376, 88 P.3d 939 (2004).....	15
<i>Queen City Farms, Inc. v. Central Nat'l Ins. Co.</i> , 126 Wn.2d 50, 882 P.2d 703, 891 P.2d 718 (1994).....	15
<i>Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993).....	15
<i>State v. Barker</i> , 35 Wn. App. 388, 667 P.2d 108 (1983).....	9, 13, 14
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	20
<i>Brown v. Spokane County Fire Protection Dist. No. 1</i> , 100 Wn.2d 188, 668 P.2d 571 (1983).....	20, 21
<i>State v. Cadena</i> , 74 Wn.2d 185, 443 P.2d 826 (1968).....	11
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984).....	9
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001) .....	20
<i>State v. Cunningham</i> , 93 Wn.2d 823, 613 P.2d 1139 (1980).....	21
<i>State v. Davis</i> , 73 Wn.2d 271, 438 P.2d 185 (1968).....	17, 18
<i>State v. Edwards</i> , 68 Wn.2d 246, 412 P.2d 747 (1966).....	10
<i>State v. Eller</i> , 84 Wn.2d 90, 524 P.2d 242 (1974).....	10, 11, 13
<i>State v. Farr-Lenzini</i> , 93 Wn. App. 453, 970 P.2d 313 (1999).....	16
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994) .....	19
<i>State v. Greene</i> , 92 Wn. App. 80, 960 P.2d 980 (1998).....	15, 16
<i>State v. Harp</i> , 13 Wn. App. 273, 534 P.2d 846 (1975).....	10
<i>State v. Henderson</i> , 26 Wn. App. 187, 611 P.2d 1365 (1980).....	9

<i>State v. Janes</i> , 121 Wn.2d 220, 850 P.2d 495 (1993).....	16
<i>State v. Kelly</i> , 32 Wn. App. 112, 645 P.2d 1146 (1982).....	10
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	19
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992).....	16
<i>State v. Picard</i> , 90 Wn. App. 890, 954 P.2d 336 (1998).....	18
<i>State v. Smith</i> , 101 Wn.2d 36, 677 P.2d 100 (1984).....	12
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	19
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981).....	21
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	19, 20
<i>State v. We</i> , 138 Wn. App. 716, 158 P.3d 1238 (2007).....	14
<i>State v. Wilber</i> , 55 Wn. App. 294, 777 P.2d 36 (1989).....	17
<i>State v. Yates</i> , 161 Wn.2d 714, 168 P.3d 359 (2007).....	15

OTHER CASES

<i>Ashley v. Wainwright</i> , 639 F.2d 258 (5th Cir.)(1981).....	12
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STATUTES, RULES AND OTHER AUTHORITIES

ER 403.....	15
ER 701.....	15
ER702.....	15
RCW 10.46.080.....	11

## **I. SUMMARY OF ARGUMENT**

On August 27, 2009, Tammy Lumby and Bobby Lilly came to Mr. John Gallagher's home in order to retrieve Ms. Lumby's personal belongings that had been left at Mr. Gallagher's property after she moved out of his home. Mr. Gallagher opened fire on both the women when they would not leave his property. Mr. Gallagher shot at the ground just feet away from where the women were standing. He also fired at a truck while the two women were inside the truck. Mr. Gallagher was charged with two counts of Assault in the Second Degree with firearm enhancements as to both charges for his actions on August 27, 2009. Mr. John Gallagher was convicted by a jury of one count of Assault in the Second Degree with a firearm enhancement. Mr. Gallagher claims that his right to a fair trial was violated when his counsel's request for a continuance during trial was denied. Mr. Gallagher also argues that the trial court abused its discretion in denying his counsel a continuance during his trial. Mr. Gallagher claims that the trial court erred when it allowed an expert witness instruction in relation to the testimony proffered by Deputy Holmes, a trained officer with numerous years of experience in law enforcement. Further, Mr. Gallagher contends that the trial court

erred when it declined to allow the defense to have a missing witness instruction before the jury in response to one of Mr. Gallagher's two victims not showing for trial. Finally, Mr. Gallagher claims that his attorney was ineffective and for this reason and all of the aforementioned reasons his conviction should be reversed and his case remanded.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court abused its discretion in denying the appellant's request for a continuance during the trial.
2. Whether the trial court erred in allowing an "expert witness" instruction based on Deputy Holmes' testimony.
3. Whether the trial court erred when it declined to provide a "missing witness" instruction to the jury.
4. Whether defense counsel was ineffective at trial.

### **III. STATEMENT OF THE CASE**

#### **1. Statement of Procedural History**

<sup>1</sup>The appellant was charged with two counts of Assault in the Second Degree with firearm enhancements as to each charge. CP 3-4; 12-13. On March 30, 2010, Mr. Gallagher appeared before the Honorable Susan K. Cook for trial. 3/30/2010 RP 12. A jury trial commenced. 3/30/2010 RP 13. One of the witnesses the State called during trial was Deputy Brad Holmes. On direct examination, Deputy Holmes testified that he was employed as a deputy at the Skagit County Sheriff's Office and that he had been employed as a law enforcement officer for ten years. 3/30/2010 RP 15. He testified that in addition to the training he received at the academy, he received at least forty hours of additional training each year. 3/30/2010 RP 15. During direct examination, Deputy Holmes testified that he investigated the scene of the crime in the instant case and in doing so was able to discern where some of the shots Mr. Gallagher had fired had landed. 3/30/2010 RP 43-46.

On cross examination, Mr. Gallagher's attorney asked Deputy Holmes the following questions regarding Deputy Holmes training

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number.

and experience with ricochet shots and she received the following answers:

Q: When you believe it had went under the truck, did you see any spots of impact under the truck?

A: No. I saw impact spots just prior to the truck.

Q: Okay. And so when you indicate a ricochet that's speculation that you have based on your observation of where the impact was?

A: Actually in training we were actually trained to shoot into the ground if necessary as bullets tend to ricochet an inch or so. We were trained to shoot underneath vehicles.

Q: You were trained?

A: We are trained that ricochet shots that are often just inches off the ground travel a long distance along the ground.

3/30/2010 RP 47.

Deputy Holmes' testimony regarding ricochet shots came up again when both parties were going over the instructions to be provided to the jury. The State offered an expert witness instruction and the defense objected stating the following in pertinent part:

The basis of my objection is, first of all, that despite requests in discovery demands and omnibus application, there was no indication of expert testimony. His officers were certainly listed, but they were not designated in any formal form of notification....I don't believe that Deputy Holmes' testimony about the ricocheting

of the bullet is particularly expert opinion as much as when he refers to training and experience...4/2/2010 RP 105-106.

Judge Cook denied the appellant's request to keep out the expert witness instruction.

The appellant also requested that Judge Cook allow a "missing witness" instruction based on the fact that Mr. Gallagher faced two counts of Assault in the Second degree at trial, one in regard to Ms. Lumby and one in regard to Ms. Lilly. Only Ms. Lilly appeared at trial. The State did not agree to this instruction and pointed out to the court that the defense interviewed Ms. Lumby in person; was provided Ms. Lumby's address and phone number and as far as the State knew, none of that information had changed. 4/2/2010 RP 108. Judge Cook declined to provide the missing witness instruction and noted that the contact information that the State had for Ms. Lumby was the same as what the defense had. 4/2/2010 RP 112.

Separate and apart from the discussion on jury instructions, during trial, defense counsel for the appellant requested that the court allow a recess from trial and continue the trial onto the following Monday, thus allowing for a weekend break. 4/1/2010 RP 89. The defense sought this continuance in order to interview an employee,

Lettie Alvarez, who worked at the Office of Assigned Counsel and who happened to be out of town at the time of the trial. 4/1/2010 RP 89-92. This person spoke with Mr. Gallagher briefly right after he was taken into custody on this instant case and made notes to that effect, which, incidentally, the State offered to stipulate to and allow as admitted evidence at trial. 4/1/2010 RP 85-88. The person in question may have been able to add nothing additional from what was already on the record, and, at this point of the trial even though Judge Cook denied the defense request for a continuance over the weekend, she *did allow* the defense a continuance during trial where the jury broke midday and thus allowed for the defense to have an afternoon free during trial. 4/1/2010 RP 91-92. Judge Cook denied the defense request for a continuance over the weekend until the following Monday stating:

You know, it occurs to me that this is a tempest in a tea pot. What we are talking about is what people remember of their observations about what Mr. Gallagher looked like in August of 2009. We already have some testimony about that from Mrs. Gallagher, from other deputies. We could probably bring into court each and every person who had eyeballs to lay on Mr. Gallagher back in August 2009, and we could be here until the 4th of July this year doing it. But to me I don't really think that's what's going to make a difference to the jury. They are going to decide this case and it isn't going to be based on

Deputy Stewart or Lettie Alvarez's testimony about what they can drudge up from their memory about what happened nine months ago. 4/1/2010 RP 91.

At the close of trial, the jury found the appellant guilty of one count of Assault in the Second Degree with a firearm enhancement. CP 72. Specifically, the jury found Mr. Gallagher guilty of assaulting Ms. Lilly, the victim who testified at trial. CP 71-75. The jury did not find Mr. Gallagher guilty of assaulting Ms. Lumby, who did not appear at trial. CP 71-75. The appellant filed a timely notice of appeal. CP 86-87.

## **2. Statement of Facts**

On August 27, 2009, Deputy Brad Holmes responded to a call regarding an altercation with a former landlord and that shots had possibly been fired. 3/30/2010 RP 16. Deputy Holmes met up with two obviously distraught females (Tammy Lumby and Bobby Lilly) who directed him to go to a home on Russell Road where an altercation involving gunshots and Mr. Gallagher had taken place. 3/30/2010 RP 18-19. Deputy Holmes arrived at the home of Mr. Gallagher and cautiously approached Mr. Gallagher's home knowing he was armed with a firearm and that shots had been fired. 3/30/2010 RP 23-24. Mr. Gallagher told Deputy Holmes that Tammy

Lumby had come onto his property and that he wanted her to leave. 3/30/2010 RP 24. Mr. Gallagher went on to say that there was a confrontation and when he confronted Ms. Lumby and tried to get her to leave, a physical altercation occurred between them and she had thrown several punches at him. 3/30/2010 RP 24. Mr. Gallagher then went into his home, got his firearm, and came out on his porch and fired warning shots. 3/30/2010 RP 24. Mr. Gallagher stated it was not his intent to hit the women or else he would have. 3/30/2010 RP 25. Mr. Gallagher told Deputy Holmes that he couldn't be reckless; he hit exactly where he was aiming. 3/30/2010 RP 25. Mr. Gallagher pointed out to Deputy Holmes the different areas where he had fired the shots at the two women. 3/30/2010 RP 35. Mrs. Gallagher told the deputy that the shots her husband fired were towards a pickup truck while the two women had been inside that same truck; Mr. Gallagher indicated that he fired five rounds, but could locate only four of five of them. 3/30/2010 RP 35, 38. Mr. Gallagher also told the deputy that he fired all of the shots within three feet of where the women were located. 3/30/2010 RP 36. Deputy Holmes arrested Mr. Gallagher and while taking him into custody Mr. Gallagher stated, "I'll be honest with you, the next time she comes onto my property I will kill her." 3/30/2010 RP 36.

Mr. Gallagher was charged with two counts of Assault in the Second Degree with a firearm enhancement as to each charge. He was found guilty of one count (with the enhancement) in relation to Ms. Lilly. CP 71-75.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENSE A CONTINUANCE DURING TRIAL IN ORDER TO INTERVIEW AN UNNECESSARY WITNESS.**

The grant or denial of a continuance will not be disturbed on appeal absent a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1097, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). A motion for a continuance is addressed to the sound discretion of the trial court, whose decision will only be reversed for abuse of discretion, that is, only "if no reasonable person would have taken the view adopted by the trial court." *State v. Henderson*, 26 Wn. App. 187, 190, 611 P.2d 1365 (1980); *State v. Barker*, 35 Wn. App. 388, 397, 667 P.2d 108 (1983).

Moreover, the decision to deny a continuance will be disturbed only if the defendant shows he was prejudiced or that the result of the trial would likely have been different had the motion for a continuance

been granted. *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); *State v. Kelly*, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982).

Courts have noted that continuances and the compulsory process in criminal cases involve such disparate elements as surprise, diligence, materiality, redundancy, due process, and the maintenance of orderly procedures; and that this Court leaves the decision largely within the discretion of the trial court, to be disturbed only upon a showing that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied. *State v. Harp*, 13 Wn. App. 273, 275, 534 P.2d 846, 848 (1975); *State v. Edwards*, 68 Wn.2d 246, 412 P.2d 747 (1966).

The trial court here acted properly in denying Mr. Gallagher a last-minute continuance after trial had commenced. Given the fact that defense wanted to interview a possible witness about an issue that had previously been stipulated to, a reasonable person would likely take the same view as the trial court and deny the continuance. In fact, the information the possible witness could provide would only be cumulative of other evidence, if helpful at all. Furthermore, Mr. Gallagher failed to make a showing that he was prejudiced by the denial of the continuance or that the result of his trial likely would

have been different had the motion been granted; therefore, denial of the continuance was appropriate.

**B. THE APPELLANT'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE COURT DENYING HIS CONTINUANCE REQUEST; FURTHERMORE, REVERSAL IS NOT APPROPRIATE.**

Motions for continuance are addressed to the sound discretion of the trial court and there is no mechanical Fifth Amendment test for deciding when a denial of a continuance violates due process. Each case must be judged according to its own circumstances. *Ungar v. Sarafite*, 376 U.S. 575, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964); *State v. Cadena*, 74 Wn.2d 185, 188-89, 443 P.2d 826 (1968); *State v. Eller*, 84 Wn.2d 90, 95-96, 524 P.2d 242 (1974); RCW 10.46.080. Likewise, there is no mechanical Sixth Amendment test regarding what constitutes a reasonable time to prepare a case; each case must be examined individually to determine whether the defendant has been given sufficient time for effective legal representation. See *Chambers v. Maroney*, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 1982-1983, 26 L.Ed.2d 419, 429-30 (1970).

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as

well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

Although guarded jealously, the right to present witnesses is not absolute. The Court's holding in *Washington* limits the right to compel witnesses to those witnesses who are material to the defense. In *Washington*, the Court found error because the defendant was denied access to a "witness who was physically and mentally capable of testifying to events that he had personally observed, and whose testimony would have been relevant and material to the defense." *Washington*, at 23, 87 S.Ct. at 1925; *State v. Smith*, 101 Wn.2d 36, 677 P.2d 100, 103 (1984). As suggested in the aforementioned section above, the defendant carries the burden of showing materiality, especially when requesting a continuance in order to secure a witness's testimony or appearance. This burden has been described as establishing a colorable need for the person to be summoned. See *Ashley v. Wainwright*, 639 F.2d 258 (5th Cir.)(1981); *State v. Smith*, 101 Wn.2d 36, 677 P.2d 100 (1984).

In *State v. Eller*, the trial court denied defense motion to continue to allow time for service of process upon a reluctant witness. *State v. Eller*, 84 Wn.2d 90, 524 P.2d 242 (1974). Our State Supreme Court sided with the trial court finding that the missing witness could have offered merely cumulative information to that of evidence available at trial and that there would have been no qualitative impact on the ultimate result of the trial. *State v. Eller*, 84 Wn.2d 90, 98, 524 P.2d 242 (1974). Similarly, in the instant case, Mr. Gallagher requested a continuance to possibly procure an additional witness, but nothing on the record supports that this additional witness would have been material to Mr. Gallagher's case or that the witness would have offered new information, rather than merely cumulative information.

Further, as in the instant case, the court in *State v. Barker* also properly denied the defense motion for a continuance. In *Barker*, the original defense attorney withdrew prior to trial and new counsel was appointed one month before trial was set to begin. *State v. Barker*, 35 Wn. App. 388, 390, 667 P.2d 108, 114 (1983). The new defense counsel had access to all of the state's witnesses, access to prior counsel's notes and no motion for a continuance was made until just three days before trial. *Id.* at 397. In addition, the defendant in

*Barker* failed to indicate how he would be materially prejudiced by the court's denial of a continuance of the trial. *Id.* at 397-98. Based on the aforementioned facts, the court properly denied Barker's request for a continuance.

Like the appellant in *Barker*, Mr. Gallagher failed to make a showing that he was materially prejudiced by the trial court's denial of his continuance request. Mr. Gallagher's attorney had received short continuances during trial in order to have more time to tie up loose ends even though Judge Cook appeared reluctant to do so. The trial court did not err in denying Mr. Gallagher's last minute request for a continuance.

The trial court in the instant matter acted reasonably in denying Mr. Gallagher's request for a continuance the morning of trial and reversal is inappropriate.

**C. THE TRIAL COURT DID NOT ERR IN PROVIDING THE JURY AN "EXPERT WITNESS" INSTRUCTION IN REGARD TO DEPUTY HOLMES' TESTIMONY.**

The decision whether to admit expert testimony is within the trial court's discretion. *State v. We*, 138 Wn. App. 716, 158 P.3d 1238 (2007). The Court of Appeals will not disturb the trial court's ruling if the reasons for admitting or excluding opinion evidence are

both fairly debatable. *Miller v. Likins*, 109 Wn. App. 140, 34 P.3d 835 (2001). Trial courts have broad discretion in determining the admissibility of expert testimony, and a trial court's decision should not be disturbed absent an abuse of that discretion. *Philippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004). Practical experience is sufficient to qualify a witness as an expert. *State v. Yates*, 161 Wn.2d 714, 168 P.3d 359 (2007).

ER 704 allows for the admission of an opinion or inference on an ultimate issue that the trier of fact must decide provided that the opinion or inference is otherwise admissible. *Seattle v. Heatley*, 70 Wn. App. 573, 578-79, 854 P.2d 658 (1993). To be otherwise admissible, opinion evidence must also satisfy ER 403, ER 701, and ER 702. *Heatley*, 70 Wn. App. at 579, 854 P.2d 658. "Expert testimony on scientific, technical or specialized knowledge is admissible under ER 702 if it will assist the trier of fact to understand the evidence or a fact in issue." *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wash.App. 722, 734-35, 959 P.2d 1158 (1998) (citing *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wash.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994)). ER 702 requires the court to make two inquiries: "(i) does the proffered witness qualify as an expert; and (ii) would the proposed testimony be helpful to the trier of fact." *State v.*

*Greene*, 92 Wn. App. 80, 96, 960 P.2d 980 (1998); *State v. Janes*, 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993).

“Practical experience is sufficient to qualify a witness as an expert.” *State v. Ortiz*, 119 Wash.2d 294, 310, 831 P.2d 1060 (1992); See *State v. Farr-Lenzini*, 93 Wn. App. 453, 460-461, 970 P.2d 313, 318 – 319 (1999).

Here, no objection was made as to Deputy Holmes’ testimony during trial. In fact, the statement that Mr. Gallagher points to in the opening brief—the fact that Deputy Holmes testified that he had been “trained that ricochet shots that are often just inches off the ground travel a long distance along the ground” was not a statement elicited on direct, but rather, information elicited from Deputy Holmes while under cross-examination by Mr. Gallagher’s counsel. Furthermore, Deputy Holmes’ testimony was not akin to a ballistics expert giving opinion evidence, he was merely stating what he had learned in training. Deputy Holmes has numerous years as a law enforcement officer and has been a party to numerous hours of training during his law enforcement career. Deputy Holmes has practical experience and specialized experience from his years as a law enforcement officer trained in handling firearms. His opinion testimony is helpful to the trial of fact. Frankly, most trained officers in good standing can

and will qualify as an expert at trial. This case is no exception. No objection was made to his testimony at trial; and the information he provided that is now at issue was not in the form of expert opinion, rather it covered what Deputy Holmes had learned in training, thus this Court should deny Mr. Gallagher's request to find that the trial court erred in providing an "expert witness" instruction to the jury. Even if this Court were to find that the testimony should not have been allowed, any error was harmless, as the testimony proffered by the deputy was not in regard to the ultimate issue of fact left to the jurors. *State v. Wilber*, 55 Wn. App. 294, 777 P.2d 36 (1989).

Reversal is inappropriate.

**D. THE TRIAL COURT DID NOT ERR IN DECLINING TO PROVIDE A "MISSING WITNESS" INSTRUCTION TO THE JURY.**

To invoke the missing witness rule and obtain an instruction in a criminal case, the defendant is not required to prove that the prosecution deliberately suppressed unfavorable evidence. Instead, the defendant must establish circumstances which would indicate, as a matter of reasonable probability that the prosecution would not knowingly fail to call the witness in question unless the witness's testimony would be damaging. *State v. Davis*, 73 Wn.2d 271, 280 438 P.2d 185 (1968).

The missing witness instruction is appropriate only when the uncalled witness is “peculiarly available” to one of the parties. *Id.* For a witness to be peculiarly available to one party to an action, there must have been such a community of interest between the party and the witness, or the party must have so superior an opportunity for knowledge of a witness, that it was reasonably probable that the witness would have been called to testify for such party except for the fact that the testimony would have been damaging. *Davis*, 73 Wn.2d at 277. (where the court held that an uncalled undersheriff, who was an eyewitness to the interrogation in question and worked closely with the county prosecutor’s office, was peculiarly available to the prosecution).

A trial court's refusal to give a requested instruction is a matter of discretion and will not be disturbed on review except upon a clear showing of abuse of discretion. *State v. Picard*, 90 Wn. App. 890, 902 954 P.2d 336 (1998).

Here, Ms. Lumby was not “peculiarly available” to the State. Mr. Gallagher’s attorney had met with Ms. Lumby in person and was given her physical address in Bremerton, Washington. The State made a record before the trial court that personal service of process was attempted on Ms. Lumby, but was not effectuated. Rather, Ms.

Lumby's subpoena was served on a person who was at Ms. Lumby's home in Bremerton. 4/2/2010 RP 112. All of the contact information on Ms. Lumby that the state had in its possession was provided to Mr. Gallagher's defense counsel. Ms. Lumby was not "peculiarly available" to the State, thus the trial court did not abuse its discretion in declining to provide the jury with the "missing witness" instruction. The trial court did not err, thus reversal is inappropriate.

**E. MR. GALLAGHER DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL; THUS THE VERDICT SHOULD REMAIN.**

To show ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when, but for the deficient performance, the outcome would have differed. *In re Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

There is great judicial deference to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

There is a strong presumption that counsel was effective. *Id.* A court will not find ineffective assistance of counsel if the challenged actions relate to the theory of the case or to trial tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Washington has adopted the Strickland test to determine whether a defendant had constitutionally sufficient representation. *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). The defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced him. *Cienfuegos*, 144 Wn.2d at 226-27. In other words, the appellant bears the burden of showing that, but for the ineffective assistance, there is a reasonable probability that the trial outcome would have differed. *Cienfuegos*, 144 Wn.2d at 227 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The benchmark for judging ineffectiveness is whether Counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland*, 466 U.S. at 686.

The improper admission of evidence at trial constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *State v. Bourgeois*,

133 Wn.2d 389, 403, 945 P.2d 1120 (1997). See *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). “An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal.” *Brown v. Spokane County Fire Protection Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Where an error is from violation of an evidentiary rule, not a constitutional mandate, the courts generally do not apply the more stringent “harmless error beyond a reasonable doubt” standard. See *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Instead, the courts apply ‘the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’ *Tharp*, 96 Wn.2d at 599.

The burden on the appellant for showing that defense counsel was ineffective at trial is reasonably high. Here, the appellant has failed to meet his burden of showing that the trial outcome would have been different but for his counsel’s alleged ineffectiveness. In fact, quite to the contrary, Ms. Wilson was effective in her handling of Mr. Gallagher’s case. Ms. Wilson requested a continuance to possibly provide additional information, and although that request was denied, Ms. Wilson made an attempt at securing more time for

the trial and for interviewing a potential witness. Ms. Wilson sought a “missing witness” instruction and while the court denied that request, Ms. Wilson made an adequate record of why she was seeking such an instruction. Ms. Wilson also sought to keep the “expert witness” instruction out of the jury instructions, and while her request was denied by the trial court, she was acting as competent counsel in making such a request. The record supports that Ms. Wilson acted with preparation, determination and competence. She did receive a brief continuance during the trial to take care of matters that arose during trial. The record simply does not support that she acted ineffectively. The benchmark for judging ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. In this case, the result was just and Mr. Gallagher received effective counsel. Mr. Gallagher's verdict should remain intact.

## **V. CONCLUSION**

The trial court properly denied Mr. Gallagher's request for a continuance during over a weekend until the following Monday. Mr. Gallagher did not make a showing that he was materially prejudiced

by the denial of the continuance. The trial court also did not err in declining to remove the expert witness instruction or including the missing witness instruction. Mr. Gallagher was provided effective, competent counsel at trial and thus, reversal is inappropriate.

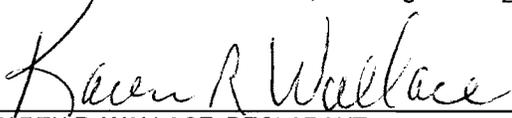
DATED this 25<sup>th</sup> day of April, 2011.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
MELISSA W. SULLIVAN, WSBA#38067  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:  
I sent for delivery by;  United States Postal Service; [ ] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: RICHARD HANSEN, addressed as 600 University St., Suite 3020, Seattle, Washington 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 25<sup>th</sup> day of April, 2011.

  
KAREN R. WALLACE, DECLARANT