SUPREME COURT NO. _____

NO. 40172-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TRISTAN BEEMAN,

Petitioner.

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

The Honorable Annette Plese, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Tristan Beeman asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the opinion in State v. Beeman, COA No. 40172-3-III, filed on July 29, 2025, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether Beeman was denied his right to present a defense when the trial court refused to give his proposed missing witness instruction?

2. Whether Beeman received ineffective assistance of counsel when his attorney failed to object to inadmissible hearsay?

3. Whether Beeman's sentence of life without parole violated Beeman's Sixth Amendment right to a jury trial and proof beyond a reasonable doubt?

4. Whether this Court should accept review because Beeman's petition raises significant questions of law under the state and federal constitutions? RAP 13.4(b)(3).

D. STATEMENT OF THE CASE

Beeman was convicted of first degree burglary and second degree assault, allegedly committed against his former girlfriend M.S. at her apartment on November 2, 2022. CP 45, 47-49. There was evidence Beeman had been living and/or staying at the apartment. RP 223.

The only eye-witnesses to the alleged burglary and assault were Beeman and M.S. Brief of Appellant (BOA) at 12-18 (setting forth trial testimony). The state rested without calling M.S., despite having subpoenaed her for trial (RP 13) and despite S.M.'s failure to appear for defense interviews set up by the state. CP 15. The state had contact with S.M. during the pendency of the case,

while the defense was unable to reach her despite attempts. CP 15.

Beeman requested a missing witness instruction, based on the state's failure to call M.S. CP 15-17; WPIC 5.20.[1] The court ruled M.S. was equally available to the

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[1] If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw this inference only if you find that:

(1) The witness is within the control of, or peculiarly available to that party;

(2) The issue on which the person could have testified is an issue of fundamental importance, rather than one that is trivial or significant;

(3) As a matter of reasonable probability, it appears naturally in the interest of the party to call the person as a witness;

(4) There is no satisfactory explanation of why the party did not call the person as a witness; and

(5) The inference is reasonable in light of the circumstances.

The parties in this case are the State of Washington and Tristan Duane Beeman.

CP 17; WPIC 5.20.

defense and as a tactical matter, chose not to subpoena her. The court ruled that choice could not be held against the state and refused to give the instruction. RP 277-78.

Beeman was convicted based in part on telephone conversations M.S. had with her mother Rebecca McCullough preceding the alleged burglary and assault. BOA at 14-15. McCullough worked at a restaurant across the street from M.S.'s apartment and called 911 that morning after M.S. called a second time. RP 212.

During McCullough's testimony, defense counsel made hearsay objections that were sustained because the state failed to lay a proper foundation the statements M.S. allegedly made to her mother qualified as excited utterances. RP 211-12.

On direct, McCullough testified that from the restaurant she could see M.S.'s apartment. RP 210. She further stated she could see Beeman outside at one point. But she did not see him at the door or kicking in the door

(the crux of the burglary allegation).[2] But she claimed she heard that on the phone. RP 211.

The prosecutor asked if McCullough was worried, and the following exchange occurred:

> Q Okay. Were you concerned by [M.S.'s] call?
>
> A Of course I'm concerned about the safety of my kids.
>
> Q Why did you have concern about her safety?
>
> A Because she said he was threatening to kick the door in.
>
> MS. WHELAN [defense counsel]: Objection. Hearsay.
>
> THE COURT: I'm going to go ahead and sustain it.
>
> MR. VAN AKIN [prosecutor]: Your Honor, the State –
>
> THE COURT: If you want to ask her some additional questions, feel free.

---

[2] A police officer who responded to the 911 call testified the door looked broken in when he arrived. RP 168. However, the officer did not know who broke the door because he was not there when it happened. RP 179.

MS. WHELAN: I'm sorry. If we could move to strike the response.

THE COURT: I've already sustained it. He's going to ask her additional questions.

MS. WHELAN: Thank you.

Q (By Mr. Van Akin) So while you were at work, you received the call from [M.S.] Did she say who was near her home?

A Yes.

Q Who did -- did she state what was happening?

A Yes.

Q And when she was describing these things to you -- I guess let me ask a back-up question. Are you pretty familiar with [M.S.'s] demeanor or her normal character?

A I would say so.

Q Okay. And that morning when she called you on November 2nd, what was her tone? What was her demeanor that morning over the call?

A I talked to her a couple times.

Q Okay.

A The first time she was concerned Tristan is outside. She didn't want to let him in.

Q And about what time was that?

A I don't know.

RP 211-212. Defense counsel did not object to the underlined testimony although McCullough never indicated the time of morning M.S. reportedly made this first phone call nor M.S.'s tone, nor any other circumstances that would indicate M.S. was under the stress or excitement of a traumatic event at the time.

Austin Neale was the responding officer. RP 157. While en route, another officer arrested Beeman a block or so away from M.S.'s apartment. RP 158.

When Neale arrived at the apartment, M.S. came out to greet him. RP 165. Neale described her as upset with cuts on the back of her hand and a bruised eye (the crux of the assault charge). Neale identified a photo of

M.S.'s hand with cuts and a photo of M.S. with bruising under her eye. RP 166-68.

M.S. told Neale the injury to her eye had nothing to do with Beeman. RP 179. M.S. also told the officer there was prior damage to the door. RP 271. In Neale's experience, however, it was not uncommon for a domestic violence victim to be uncooperative or try to protect her abuser. RP 179-80.

At sentencing, the state asserted Beeman was subject to mandatory life without parole as a persistent offender based on prior convictions of first degree robbery and second degree manslaughter. RP 353. In the absence of persistent offender sentencing, Beeman would be subject to a standard range sentence of 87-116 months. RP 353.

Beeman disputed the manslaughter convictions qualified because the court of appeals remanded to amend the judgment and sentence because the

combination of incarceration and community custody exceeded the statutory maximum. RP 353-34.

The sentencing court found Beeman had two prior qualifying strike offenses and sentenced him to life without parole. CP 57; RP 355, 359.

On appeal, Beeman argued the court denied his right to present a defense when it refused to give the missing witness instruction. BOA at 18-32; Reply Brief of Appellant (RBOA) at 1-9. The court of appeals disagreed, finding the defense could have called M.S. rather than rely on the state, that the state had reasons – other than damaging testimony – for not calling M.S. (allegedly wishing to not traumatize her); and that regardless, the negative inference permitted by the missing witness instruction is not substantive evidence. Appendix at 6-8.

On appeal, Beeman also argued he received ineffective assistance of counsel when his attorney failed to object to McCullough's testimony about M.S.'s first

phone call, when McCullough testified "The first time she was concerned Tristan is outside. She didn't want to let him in." RP 212. BOA at 32-41; RBOA at 9-14. The appellate court disagreed, finding counsel's failure was likely tactical. Appendix at 12. Alternatively, the court found an objection likely would not have been sustained. Id.

Finally, Beeman argued the sentence of life without parole under the Persistent Offender Accountability Act (POAA) was entered in violation of Beeman's constitutional right to a jury trial. BOA at 55-63; Erlinger v. United States, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024). The appellate court held Erlinger does not apply to prior qualifying conviction determinations under the POAA. Appendix at 20-21.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. WHETHER THE COURT ERRED IN REFUSING BEEMAN'S MISSING WITNESS INSTRUCTION INVOLVES A SIGNFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS THAT SHOULD BE REVIEWED BY THIS COURT.

The trial court abused its discretion in refusing to give WPIC 5.20 and that refusal denied Beeman his right to present a defense. This Court should accept review. RAP 13.4(b)(3).

The right to present a defense is essential to the right to a fair trial under the Due Process Clause. U.S. CONST., amend. VI; WASH. CONST., art I, section 22; Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury

discretion to decide questions of fact. State v. Koch, 157 Wn. App. 20, 33, 237 P.3d 287 (2010). The accused is entitled to have the jury instructed on their theory of the case if, viewed in the light most favorable to the accused, there is any evidence to support that theory. State v. Fisher, 185 Wn.2d 836, 374 P.3d 1185 (2016). Said another way, this due process right requires courts to instruct juries on the law supporting a defense theory of the case unless the theory is "*completely* unsupported by evidence." Koch, 157 Wn. App. at 33 (emphasis in original).

Jury instructions are inadequate where they fail to permit the parties to argue their theories of the case, mislead the jury, or do not properly inform the juries of the applicable law. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). A court's failure to give the jury a defense instruction where it is warranted deprives a

defendant of his right to present a defense. State v. Yokel, 196 Wn. App. 424, 433, 383 P.3d 619 (2016).

This Court reviews a denial of the right to present a defense in two steps. State v. Arndt, 194 Wn.2d 784, 489, P.3d 696 (2019). First, it reviews whether the refusal to give the instruction was an abuse of discretion. State v. Argobast, 199 Wn.2d 356, 380, P.3d 1238 (2022). Then, if necessary, it determines whether the accused was denied the right to present a defense de novo. Arndt, 194 Wn.2d at 812.

(i) The Court Abused Its Discretion in Refusing Beeman's Missing Witness Instruction.

The court must give a requested adverse inference instruction on missing evidence or a missing witness when the defendant establishes (1) the evidence or witness appears reasonably under the government's control or peculiarly available to the government, such that the government would not have failed to produce the

evidence unless it was unfavorable, (2) the evidence is material and not cumulative, and (3) the evidence's absence is not satisfactorily explained. State v. Montgomery, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008); see also State v. Derri, 17 Wn. App.2d 376, 404, 486 P.3d 901 (2021), affirmed 199 Wn.2d 658, 511 P.3d 1267 (2022) (although often referred to as "missing witness" rule, same inferences arise from failure to produce other forms of evidence as well).

Where the accused meets the standard for a missing witness instruction, they are entitled to an instruction that informs the jury they may infer from the fact of the missing evidence or testimony that it would have been unfavorable to the government. State v. Davis, 73 Wn.2d 271, 276-81, 438 P.2d 185 (1968), overruled on other grounds, State v. Abdulle, 174 Wn.2d 411, 275 P.3d 113 (2012). The accused does not need to

show any deliberate action or bad faith by the government to secure this instruction. Davis, 73 Wn.2d at 279-80.

Here, the instruction that Beeman requested was an accurate statement of the law, supported by the evidence at trial, and necessary to explain his defense to the jury. BOA at 21-29. The trial court abused its discretion in failing to give it.

In deciding otherwise, the appellate court found the defense could have subpoenaed M.S. itself instead of relying on the state and that it was not reasonably probable the state's failure to call M.S. was due to damaging testimony. Appendix at 6. The appellate court is wrong on both counts.

At the outset, it should be noted that no one disputed M.S.'s testimony was material and not cumulative. Nor did anyone dispute M.S.'s testimony would be unfavorable to the state. Indeed, she was uncooperative and told responding officer Neale that the

injury to her eye happened on a separate and unrelated occasion not involving Beeman. CP 16; RP 271. She also told the officer there was prior damage to the door. RP 271.

Rather, the lower court and court of appeals bought into the state's asserted rationale that it didn't want to "revictimize the victim." Appendix at 6. But it had not yet been determined M.S. was a victim. There was no evidence Beeman and M.S. had prior calls to the police. The whole point of trial was to determine whether M.S. was in fact a victim. And regardless, the state chose to pursue charges despite its lack of certainty regarding M.S.'s willing participation. The state should have had to seek a material witness warrant. Because it did not, Beeman was entitled to the missing witness instruction.

And contrary to the trial and appellate court, M.S. was not equally available to the defense. Whether the defense could subpoena M.S. – let alone interview her –

is highly suspect. The state had set up several appointments with M.S. for a defense interview, but she failed to appear for each one. Despite this, M.S. periodically reached out to the state to schedule the interviews and met with the state's attorney during the pendency of the case. But she never responded to any of the attempts defense counsel made to contact her. M.S. was subject to subpoena issued by the state and the state did not request a material witness warrant despite knowing where she was. Defense counsel did obtain her number from the state but was unable to contact her through that number. CP 15.

Defense counsel explained there was no reason for the defense to subpoena M.S. because the state communicated to the defense it was setting up an interview and it had been scheduled the Friday before trial, just a few days earlier. RP 275. The defense had every reason to believe it would speak to M.S. on that

Friday but she no-showed. RP 276. These circumstances do not show a "strategic choice to forego a subpoena while claiming that some of her testimony would have been favorable to the defense," as claimed by the appellate court. The defense was attempting to interview M.S. right up until the trial date, with assurances by the state.

The circumstances warranted a missing witness instruction – even under an abuse of discretion standard.

(ii) The Court's Error Denied Beeman His Right to Present a Defense.

Beeman's right to instruct the jury on his defense arises from his Sixth Amendment and article I, section 22 right to present a defense. Therefore, the court's error is of constitutional magnitude, and the government bears the burden of proving this error was harmless beyond a reasonable doubt. State v. Coristine, 177 Wn. 2d 370, 380, P.3d 400 (2013).

The failure to give the instruction denied Beeman the opportunity to argue his theory of the case to the jury – that it could presume, based on M.S.'s absence, that her testimony would have been unfavorable to the state's case. And this inference was extraordinarily important in light of the state's other witnesses who testified to "excited utterances" they thought they heard. Significantly, however, these other witnesses could only testify to their perceptions after-the-fact. They did not know, for instance, if Beeman spent the night and/or if the door was broken while he was lawfully in the residence. Moreover, they did not know how or when M.S.'s eye was injured. The instruction would have allowed Beeman to argue the jury could infer M.S.'s testimony would not have supported these other witnesses' perceptions, or the state would have called her to testify.

In finding no violation of the right to present a defense, the appellate court writes: "The inference is not

substantive evidence. Despite the negative inference, the jury cannot speculate as to what the witness would have said and then use that speculation as evidence." Appendix at 8. The court cites no authority for this proposition. The WPIC 5.20 appears to the contrary. It says the jury may presume M.S.'s testimony would not have been favorable to the state. Testimony is substantive evidence. And "negative inference" means does not support the state's case. That does not require speculation.

Alternatively, the court held there was no violation because Beeman was not prevented from arguing the state's evidence was insufficient because the only people who knew what happened were Beeman and M.S. But jurors were not informed they could draw an adverse inference from her absence. Such would have been critical to the jury's consideration of disputed facts, such

as whether Beeman had a key or lived there and therefore was lawfully on the premises.

Without the instruction, Beeman was left with no vehicle to argue the state's evidence – in the absence of testimony from its primary witness – was deficient and unpersuasive. This Court should accept review. RAP 13.4(b)(3).

2. WHETHER BEEMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IS A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS THAT SHOULD BE REVIEWED BY THIS COURT.

Counsel committed ineffective assistance of counsel when he failed to object to McCullough's inadmissible hearsay testimony that the first time M.S. telephoned, M.S. said she was concerned because Beeman was outside and she did not want to let him in. Contrary to the appellate court, counsel's failure to object was not strategic and an objection would have been

sustained. This Court should accept review. RAP 13.4(b)(3).

Both the federal and state Constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when (1) his or her attorney's conduct falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would be different but for the attorney's conduct. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

"A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. A reasonable probability is lower than a preponderance standard. State v. Estes, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

When a defendant centers their claim of ineffective assistance of counsel on their attorney's failure to object, then:

> "[T]he defendant must show that the objection would likely have succeeded." [State v. Crow, 8 Wn. App. 2d 480, 508, 438 P.3d 664 (2019)]. "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." Id. However, if defense counsel fails to object to *inadmissible* evidence, then they have performed deficiently, and reversal is required if the defendant can show the result would likely have been different without the inadmissible evidence.

State v. Vazquez, 198 Wn.2d 239, 431-32, 494 P.3d 424 (2021).

The state sought to admit M.S.'s statements through McCullough as excited utterances. The excited utterance exception is stated in ER 803(a)(2), which provides:

> **(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

> ...
> (2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This exception is based on the idea that "under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control." 6 J. Wigmore, Evidence § 1747, at 195. The utterance of a person in such a state is believed to be "a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock", rather than an expression based on reflection or self interest. 6 J. Wigmore, at 195.

But here, the state failed to establish anything exciting had happened yet. There are three prerequisites to admission under this exception:

> Three closely connected requirements must be satisfied for a hearsay statement to qualify as an excited utterance. First, a startling event

> or condition must have occurred. Second, the statement must have been made while the declarant was under the stress of excitement caused by the event or condition. Third, the statement must relate to the startling event or condition.

State v. Chapin, 118 Wash. 2d 681, 686, 826 P.2d 194, 197 (1992).

But all the state established here is that M.S. called her mother sometime that morning because she was concerned. There was no evidence anything startling had occurred at that point or that M.S. was under the stress or excitement caused by such an event.

Contrary to the court of appeals, it is not likely counsel's failure to object was strategic. In the appellate court's opinion, it is reasonable to presume counsel "knew that a foundation could be laid." Appendix at 13. The record belies this opinion because McCullough testified she did not know when M.S. called the first time. RP 211-12. In other words, it was not noteworthy. And it is clear

from the context of McCullough's testimony about the *second* call, that the second call is when something arguably alarming happened and why McCullough called 911. Not before. Thus, counsel's failure to object was oversight not strategic.

And as evidenced by the court's prior ruling sustaining defense counsel's objection in the absence of a proper foundation, it is clear a timely objection would have been sustained. Under Vazquez, defense counsel's failure to object to the testimony constituted deficient performance.

Because the appellate court did not find deficient performance, it did not reach the prejudice prong. This Court should accept review and address both prongs. RAP 13.4(b)(3). For the reasons stated in Beeman's briefs, he was prejudiced. BOA at 40-41; RBOA at13-14.

3. WHETHER THE SENTENCE WAS ENTERED IN VIOLATION OF BEEMAN'S CONSTITUTIONAL RIGHT TO A JURY TRIAL IS A SIGNFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS THAT SHOULD BE REVIEWED BY THIS COURT.

This Court has held that a judge rather than jury may make the required timing findings for persistent offender sentencing under RCW 9.94A.570. State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001). However, the continued validity of Wheeler is questionable in light of the United States Supreme Court's recent decision in Erlinger v. United States, 602 U.S. 821 (2024).

Under RCW 9.94A.507:

> Notwithstanding the statutory maximum sentence or any other provision of this chapter, a persistent offender shall be sentenced to a term of total confinement for life without the possibility of release[.]
>
> A "Persistent offender" is an offender who:
>
> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and

> (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.525; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted[.]

RCW 9.94A.030(37).

Thus, sentencing as a persistent offender is predicated on factual findings that the offender has been convicted on two separate occasions of most serious offenses and that at least one of the convictions must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted. This entails more than finding just the fact of a prior conviction.

The United States Supreme Court has held that "[o]ther than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt" in order to comply with the Sixth Amendment right to a jury trial. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). It further explained that the statutory maximum is the maximum sentence a judge may impose without any additional findings. Blakely v. Washington, 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). In other words, in order to impose a sentence enhancement or aggravating factor that would increase the penalty faced by the defendant beyond the statutory maximum, any facts supporting such an increase in penalty need to be proved to a jury beyond a reasonable doubt.

In interpreting Apprendi and Blakely, this Court has held that the exception to the jury requirement under Apprendi applies "*only* for prior convictions" and that

where an enhancement requires findings of "new factual determinations and conclusions" beyond "mere criminal history," those findings are required to be made by a jury. State v. Hughes, 154 Wash.2d 118, 141-42, 110 P.3d 192 (2005), abrogated by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Blakely error in failing to submit sentencing factor to jury is not structural error that will always invalidate the conviction).

However, this Court also held that when a sentence is increased because of prior convictions, as provided by Apprendi, the fact of those prior convictions need not be found by a jury. State v. Wheeler, 145 Wash.2d at 123-24. In Wheeler, two defendants challenged the trial court's use of two prior convictions to prove the defendants' status as "persistent offenders" under the Persistent Offender Accountability Act of chapter 9.94A RCW. 145 Wash.2d at 117. The defendants argued that under Apprendi, the existence of those prior convictions

was required to be proved beyond a reasonable doubt to a jury before the sentence enhancement could be imposed. Wheeler, 145 Wash.2d at 119. This Court disagreed, noting that while the state is required to prove every element of an offense beyond a reasonable doubt, "traditional factors considered by a judge in determining the appropriate sentence, such as prior criminal history, are not elements of the crime." Id. at 120. "All that is required by the constitution and the statute is a sentencing hearing where the trial judge decides by a preponderance of the evidence whether the prior convictions exist." Wheeler, 145 Wash.2d at 121.

As indicated above, however, there is more at issue under RCW 9.94A.570 than the fact of a prior conviction. There is a timing aspect to the priors. In Erlinger v. U.S., the United States Supreme Court considered an analogous sentencing provision and held similar timing

findings required under that provision must be found by a jury, not a judge.

Erlinger pled guilty to possession of a firearm and faced a sentence up to 10 years in prison. Id. at 1846. However, the government charged Erlinger under the Armed Career Criminal Act (ACCA), which increased his prison term to a minimum of 15 years and to a maximum of life if he had three prior convictions for "violent felon[ies]" or "serious drug offense[s]" that were "committed on occasions different from one another." Id. at 1846–47. At a resentencing hearing, the government based its request for a 15-year sentence based on decades-old burglaries that spanned multiple days. Id. at 1847. Erlinger maintained the burglaries had not occurred on four separate occasions but during a single criminal episode. Id. The district court, rejecting Erlinger's request for a jury determination, found the burglaries occurred on distinct occasions. Id.

The United States Supreme Court reversed and held that whether the past offenses occurred on three or more different occasions is a fact-laden task to be determined by a jury. Id. at 1851.

The ACCA's "occasions" inquiry is no different than RCW 9.94A.570's timing of the prior most serious offenses inquiry. Under Erlinger, it must be decided by a jury, not a judge. Because the timing findings were made by the judge in Beeman's case not the jury, his life sentence was entered in violation of his right to a jury trial. This Court should accept review of this significant question of law under the state and federal constitutions. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated above, this Court should accept review. RAP 13.4(b)(3).

This document contains 4,755 words in 14-point font, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 17th day of August, 2023.

Respectfully submitted,

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APPENDIX

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CASE # 401723
State of Washington v. Tristan Duane Beeman
SPOKANE COUNTY SUPERIOR COURT No. 2210281632

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:ko
Attach.
c: **Email:** Hon. Annette S. Plese
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. TRISTAN DUANE BEEMAN, Appellant.	)))))))))	No. 40172-3-III UNPUBLISHED OPINION

Staab, J. — Tristan Beeman was charged with first degree burglary and second degree assault after he unlawfully entered his former girlfriend's residence and physically assaulted her. After a jury found him guilty, the court found that Beeman was a persistent offender and imposed a sentence of life without the possibility of parole. On appeal, Beeman raises four issues. First, he contends that the trial court abused its discretion when it denied Beeman's motion for a missing witness instruction. Second, he argues that he was denied effective assistance of counsel when his attorney did not object to the State's failure to lay a proper foundation for a hearsay statement. Third, he asserts that the Persistent Offender Accountability Act (POAA), RCW 9.94A.570, is unconstitutional because it disproportionately impacts African Americans. Alternatively, he contends that he was denied his right to a jury trial when the court, not a jury, determined facts about his prior convictions that were used to increase the statutory

minimum and maximum for his offenses as a persistent offender, contrary to the Supreme Court's recent decision in *Erlinger v. United States*, 602 U.S. 821, 144 S. Ct. 1840, 219 L. Ed. 2d 451 (2024).

We conclude that Beeman's arguments fail and affirm his convictions and sentence.

BACKGROUND

Tristan Beeman was charged with first degree burglary–domestic violence and second degree assault–domestic violence for breaking through his ex-girlfriend's door and assaulting her. Prior to trial, the State subpoenaed the ex-girlfriend and indicated she did not want to testify but stated it may call her to testify. However, the State also indicated that because it had other witnesses it believed could establish the case, it was not seeking a material witness warrant for the ex-girlfriend at that time.

Both parties filed motions in limine with the trial court. Beeman moved for an order requiring the State to produce the ex-girlfriend for an interview and requested dismissal if the interview did not occur. The motion acknowledged that the State had previously scheduled an interview with the ex-girlfriend for November 17, 2023, but was unable to secure her presence. Thereafter defense counsel attempted to contact the ex-girlfriend by the phone number listed on the police report, but the number had been disconnected. The State opposed the motion, explaining that it had gone "above and beyond" trying to set up interviews but could not force the ex-girlfriend to be present.

Rep. of Proc. (RP) at 27. The court stated that if she did not show up and the State was unable to prove its case, it would entertain a motion to dismiss.

The State requested the court find that certain statements made by witnesses were admissible under the hearsay exceptions for present sense impressions or excited utterances. The court reserved on the issue.

The case proceeded to trial. At the outset, defense counsel informed the court that if the ex-girlfriend did not appear to testify it would be seeking a missing witness instruction. The State objected. After the defense rested, the State noted that the witness was not "particularly available to the State." RP at 264. The State noted that it had asked the witness to appear on multiple occasions, but she did not want to participate. And while the State had subpoenaed the witness for trial, it was unwilling to request a material witness warrant for a domestic violence victim when her testimony was not fundamentally important. The State also pointed out that defense counsel could have subpoenaed the witness as well but chose not to.

Defense counsel responded that it would not subpoena a witness without knowing what she would say on the stand. Furthermore, the ex-girlfriend's testimony was fundamental because she was the only person who could testify that Beeman broke through the door and entered the apartment.

The court denied Beeman's request for a missing witness instruction. In support of this decision, the court made several findings. First, the court found that the State tried

to coerce the ex-girlfriend to appear for trial, but she did not want to participate. Defense counsel made a tactical decision not to subpoena the ex-girlfriend even knowing that some of her testimony would be favorable to Beeman. Finally, the act of subpoenaing the ex-girlfriend did not make her particularly available or within the control of the State.

The jury found Beeman guilty of both offenses. Because this was Beeman's third strike offense, the court imposed a persistent offender sentence of life without parole.

Beeman appeals.

ANALYSIS

1. MISSING WITNESS INSTRUCTION

Beeman argues that the trial court abused its discretion and violated his constitutional right to present a defense when it refused to give a missing witness instruction. Beeman contends that the failure to give the instruction denied him the opportunity to argue his theory of the case—that the jury could presume, based on the State's failure to call the ex-girlfriend, that her testimony would have been unfavorable to the State. The State responds that the court did not err when it declined to give the instruction because the witness was equally available to both parties.

This court reviews the trial court's failure to give a missing witness instruction for abuse of discretion. *State v. Houser*, 196 Wn. App. 486, 491, 386 P.3d 1113 (2016); *see also In re Det. of Alsteen*, 159 Wn. App. 93, 99, 244 P.3d 991 (2010). A trial court abuses its discretion when its decision is "'manifestly unreasonable or based upon

untenable grounds or reasons.'" *Houser*, 196 Wn. App. at 491. Additionally, "[w]e review de novo whether legal error in jury instructions could have misled the jury." *Id.*

A. Missing Witness Instruction

The purpose behind the missing witness instruction is to inform "the jury that it may infer from a witness's absence at trial that his or her testimony would have been unfavorable to the party who would logically have called that witness." *State v. Reed*, 168 Wn. App. 553, 571, 278 P.3d 203 (2012). However, "[t]he missing witness 'instruction should be used sparingly.'" *Houser*, 196 Wn. App. at 492 (emphasis omitted) (quoting 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.20 note on use at 177 (3d ed. 2008). Such an instruction is considered proper when (1) the missing witness's testimony is material and not cumulative, (2) the witness is particularly available to only one of the parties and not equally available to both of them, and (3) the witness's absence cannot be satisfactorily explained. *State v. Montgomery*, 163 Wn.2d 577, 598-99, 183 P.3d 267 (2008).

Although there are several factors the court considers, in this case, the parties largely dispute whether the witness was particularly available to the State. "A witness is not '[particularly] available' merely because the witness is subject to the subpoena power." *Reed*, 168 Wn. App. at 572. Instead, for a witness to be considered particularly available to one party,

> "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, as in ordinary experience would have made it reasonably probable that the witness would have been called to testify for such party except for the fact that his testimony would have been damaging."

Id. (quoting *State v. Davis*, 73 Wn.2d 271, 277, 438 P.2d 185 (1968)).

Here, the trial court did not abuse its discretion when it denied Beeman's motion for a missing witness instruction. The court found that both parties had the ability to subpoena the witness, and Beeman made a strategic choice to forego a subpoena while claiming that some of her testimony would have been favorable to the defense. Additionally, the court also found that reasons other than damaging testimony supported the State's decision to not seek a material witness warrant, noting that the State did not wish to retraumatize a domestic violence victim when it was not necessary. *See Montgomery*, 163 Wn.2d at 599 (noting that "the doctrine applies only if the witness's absence is not satisfactorily explained"); *see, e.g., Reed*, 168 Wn. App. at 572-74 (missing witness was satisfactorily explained with domestic violence victim subject to witness tampering did not appear). These findings support the court's decision to deny the request for a missing witness instruction.

Nevertheless, Beeman contends that the State had the witness under subpoena, knew of her location, and could have pursued a material witness warrant but chose not to, making her particularly available to the State. This argument fails for several reasons.

First, a witness is not particularly available to one party merely because they are subject to subpoena power. *Reed*, 168 Wn. App. at 572. Second, as discussed, the failure to pursue a material witness warrant was satisfactorily explained. Finally, as explained by the court, if the defense felt that the testimony would be helpful to its case, they could have chosen to subpoena the witness rather than rely on the State.

B. Right to Present a Defense

Beeman contends that the trial court's failure to give the missing witness instruction violated his right to present a defense by denying him the opportunity to argue that the jury could presume from the State's failure to call the ex-girlfriend as a witness, that her testimony would have been detrimental to the State. We disagree.

The United States and Washington State Constitutions protect a criminal defendant's right to present a defense. U.S. CONST., amend. VI; WASH. CONST., art. I, § 22. "We review claims that an omitted jury instruction violated the defendant's right to present a defense de novo." *State v. Butler*, 200 Wn.2d 695, 718-19, 521 P.3d 931 (2022). "Jury instructions are constitutionally adequate 'when, taken as a whole, they properly inform the jury of the applicable law, are not misleading, and permit the defendant to argue [their] theory of the case.'" *State v. Knapp*, 197 Wn.2d 579, 586, 486 P.3d 113 (2021) (quoting *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999)).

Beeman's argument fails for several reasons. First, the presumption is only available when it is reasonably probable that the reason for not calling the witness was

that the witness's testimony would be damaging to the party for whom the witness was particularly available. *Reed*, 168 Wn. App. at 572. Here, the court found that the State had other legitimate reasons for not calling the witness.

Regardless, in considering whether an evidentiary decision violates a defendant's right to present a defense, we distinguish "between evidence that merely bolsters credibility and evidence that is necessary to present a defense." *State v. Jennings*, 199 Wn.2d 53, 66-67, 502 P.3d 1255 (2022). The missing witness inference is used to challenge the credibility of the party's case by suggesting that the party's failure to produce the witness indicates that the testimony would not support their position. *State v. Dixon*, 150 Wn. App. 46, 54-55, 207 P.3d 459 (2009). The inference is not substantive evidence. Despite the negative inference, the jury cannot speculate as to what the witness would have said and then use that speculation as evidence.

Finally, the failure to give the missing witness instruction did not prevent Beeman from arguing that the State's evidence was not credible or sufficient. Beeman argued that the State failed to meet its burden of proof because none of the testifying witnesses had observed the events supporting the charges, and the only people who knew what happened were the ex-girlfriend and Beeman.

The trial court did not abuse its discretion in denying Beeman's request for the missing witness jury instruction and the failure to give the instruction did not violate Beeman's constitutional right to present a defense.

2. INEFFECTIVE ASSISTANCE OF COUNSEL

Beeman contends he was denied effective assistance of counsel when his attorney failed to object after the State failed to lay a foundation for a hearsay exception.

A. Additional Background

During trial, Beeman's ex-girlfriend's mother was called to testify. The mother testified that when she left for work, she was not aware of any damage to her daughter's front door. The State posed the following questions to the mother:

[STATE]: . . . did you make a call to 911 that morning, November 2nd?

[MOTHER]: Yes.

[STATE]: Why?

[MOTHER]: Because [my daughter] called my cell phone and told me that she—

[DEFENSE]: Objection. Hearsay.

THE COURT: I'm going to go ahead and sustain it without foundation.

[STATE]: When you were at work, you said that you could see the—you could see [your daughter]'s apartment, [your daughter]'s house from that window?

[MOTHER]: Yes.

[STATE]: When you were at work that morning, could you see anybody approaching or walking up to [your daughter]'s house?

[MOTHER]: If I looked outside, I could.

[STATE]: And did you see anybody walk up to her house that morning?

[MOTHER]: I did see Tristan out there, yes.

[STATE]: And when you say you saw him, was he standing there? Was he approaching the house? What was he doing?

[MOTHER]: I don't recall. If I remember, there may have been a vehicle there that he was by. I didn't see him at the door or kicking in the door. I heard that on the phone.

[STATE]: Okay. Were you concerned by [your daughter]'s call?

[MOTHER]: Of course I'm concerned about the safety of my kids.

[STATE]: Why did you have concern about her safety?

[MOTHER]: Because she said he was threatening to kick the door in.

[DEFENSE]: Objection. Hearsay.

THE COURT: I'm going to go ahead and sustain it.

. . .

THE COURT: If you want to ask her some additional questions, feel free.

. . . .

[STATE]: So while you were at work, you received the call from [your daughter]. Did she say who was near her home?

[MOTHER]: Yes.

[STATE]: Who did—did she state what was happening?

[MOTHER]: Yes.

[STATE]: And when she was describing these things to you—I guess let me ask a back-up question. Are you pretty familiar with [your daughter]'s demeanor and her normal character?

[MOTHER]: I would say so.

[STATE]: Okay. And that morning when she called you on November 2nd, what was her tone? What was her demeanor that morning over the call?

[MOTHER]: I talked to her a couple times.

[STATE]: Okay.

[MOTHER]: The first time she was concerned Tristan is outside. She didn't want to let him in.

RP at 210-12. Defense counsel did not object to the last set of questions.

B. Ineffective Assistance of Counsel Standards

Both the United States and Washington State Constitutions guarantee the right to the assistance of counsel. U.S. CONST. amend VI; WASH CONST. art. I, § 22. This court reviews ineffective assistance of counsel claims de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). Washington has adopted the two-prong test outlined in *Strickland v. Washington*[1] to evaluate "whether a defendant had constitutionally sufficient representation." *Id.* Under the *Strickland* test, the defendant must make a showing of both (1) deficient performance; and (2) resulting prejudice to succeed on a claim of ineffective assistance of counsel. *Id.* at 457-58.

Performance will be considered deficient "if it falls 'below an objective standard of reasonableness based on consideration of all the circumstances.'" *Id.* at 458 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). However, "Washington courts also indulge a strong presumption that counsel's representation was

[1] 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

reasonable." *Estes*, 188 Wn.2d at 458. Furthermore, representation will not be considered deficient if it can be characterized as a legitimate trial strategy or tactic. *Id.*

Deciding whether or not to object is often considered a classic example of a trial strategy or tactic. *State v. Stotts*, 26 Wn. App. 2d 154, 165, 527 P.3d 842 (2023). For example, failing to object to evidence that otherwise may be inadmissible can be considered a legitimate tactic "to avoid highlighting certain evidence." *Id.* In this context, Washington courts typically presume "'the failure to object was the product of legitimate trial strategy.'" *Id.* (quoting *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007)). For this reason, even failing to object a few times is typically not cause to find that an attorney's representation is deficient. *Id.* at 166. Where the defendant's ineffective assistance claim is based on the failure to object, "'the defendant must show that the objection would likely have succeeded.'" *Vazquez*, 198 Wn.2d 239, 248, 494 P.3d 424 (2021) (quoting *State v. Crow*, 8 Wn. App. 2d 480, 508, 438 P.3d 541 (2019)).

Here, Beeman alleges defense counsel was deficient for failing to object to the mother's hearsay testimony because a proper foundation for a hearsay exception was not laid on the record. This argument fails for several reasons. First, given the presumption that counsel is effective, it is likely that the failure to object was tactical. It is clear that defense counsel was conscious of hearsay statements although it is unclear what defense counsel knew prior to the mother's testimony. It is reasonable to assume that counsel

knew that a foundation could be laid if an objection were raised and believed the foundational evidence would do more harm than good.

Second, the objection likely would not have been sustained. The statement would have qualified as an excited utterance because Beeman was near her home, she made the statement to McCullough that she was concerned he was outside and did not want to let him in, thus making the statement under the stress of the event that related to it. ER 803(a)(2).

Beeman has failed to demonstrate deficient performance. Because Beeman failed to demonstrate deficient performance, his ineffective assistance argument fails. *State v. Bertrand*, 3 Wn.3d 116, 128, 546 P.3d 1020 (2024) (failure to show either prong of the test for ineffective assistance of counsel defeats the claim).

3. WHETHER THE POAA IS UNCONSTITUTIONAL

Beeman argues, for the first time on appeal, that the mandatory imposition of life without parole under the POAA is unconstitutional as applied because of its racially disproportionate impact. We decline to review this unpreserved error.

A. Additional Background

Prior to trial, the State notified Beeman that a conviction of either offense could classify him as a "persistent offender" if he had been convicted on two previous occasions for other "most serious offenses" as defined in RCW 9.94A.030(32). Additionally, if classified as a persistent offender, the sentence would be "life without the

possibility of parole." Clerk's Papers (CP) at 76. After Beeman was found guilty on both counts, the State filed a sentencing brief, which included copies of Beeman's prior judgments. Beeman had previously been convicted of first degree robbery in April 1998. He then committed second degree manslaughter on January 13, 2003, and was later sentenced on March 7, 2006, after he pled guilty. The defense did not file a sentencing memorandum.

At sentencing, Beeman argued that the manslaughter conviction was facially invalid because it was corrected post-appeal so that the combined incarceration and community custody would not exceed the maximum sentence. Additionally, Beeman requested that the court consider his youthfulness at the time of his first strike, the robbery conviction.

After the court reviewed the exhibits that had been presented, it found that Beeman was found guilty on April 16, 1998, and sentenced on that date for first degree robbery, noting that it was a first strike offense. The court also found that the second degree manslaughter and first degree unlawful possession of a firearm conviction would give Beeman his second strike. As a result, the court found the current offense was a third strike, and sentenced Beeman to a life sentence without the possibility of parole.

B. Analysis

In his opening brief, Beeman fails to acknowledge that his challenge to the constitutionality of this statute is unpreserved. Nor does he set forth grounds for

reviewing an unpreserved error. In his reply brief, he contends we should review the issue as a manifest error affecting a constitutional right under RAP 2.5(a)(3) or under our discretionary authority as provided in RAP 2.5(a). For several reasons we decline to review this issue.

Generally, this court will not review a claim of error raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). "Stated another way, the appellant must 'identify a constitutional error and show how the alleged error actually affected the [appellant]'s rights at trial.'" *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (alteration in original) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). Under this rule, the defendant "must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension." *Id.*

Beeman fails to demonstrate manifest error. "Manifest error" is an "'error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record.'" *Id.* at 100 n.1 (quoting BLACK'S LAW DICTIONARY 622 (9th ed. 2009)). As the State points out, it would not be obvious to a trial court that the POAA is unconstitutional.

Even if we were to consider the issue under our discretionary power, the record is insufficiently developed. *See McFarland*, 127 Wn.2d 322, 333. The data Beeman presents on appeal was not presented at sentencing, thus denying the trial court an

opportunity to consider it. Likewise, the failure to present this data at sentencing denied the State an opportunity to contest it. Case law demonstrates that this kind of challenge typically requires thorough studies on disproportionality. *See, e.g., State v. Gregory*, 192 Wn.2d 1, 12-13, 427 P.3d 621 (2018) (defendant commissioned thorough study on the effect of race, vetted and was then reviewed by the supreme court commissioner).

Moreover, while Beeman argues that statistics and data demonstrate bias on a systemic level, he fails to contend that the alleged errors specifically applied to his situation. *City of Redmond v. Moore*, 151 Wn.2d 664, 668-69, 91 P.3d 875 (2004) ("An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute *in the specific context of the party's actions* or intended actions is unconstitutional." (emphasis added).

Finally, our Supreme Court, and most recently, Division Two, have upheld the POAA against similar challenges. *State v. Moretti*, 193 Wn.2d 809, 446 P.3d 609 (2019); *State v. Nelson*, 31 Wn. App. 2d 504, 550 P.3d 529, *review denied*, 3 Wn.3d 1030 (2024). In *Nelson*, this court addressed the argument being raised by Beeman and upheld the POAA after concluding that while the "POAA may have a racially disproportionate impact, [the defendant] has not shown that the POAA is administered in a racially disproportionate manner." *Nelson*, 31 Wn. App. 2d at 507. Beeman argues that *Nelson* was wrongly decided because it failed to consider that the disparate impact is informed by the wide discretion held by police and prosecutors prior to sentencing. Contrary to

Beeman's argument, the court in *Nelson* recognized that the "disproportionate impact likely is due to systemic racial injustice throughout the criminal justice system rather than the administration of the POAA," but concluded that "[w]e are not in a position to address these systemic problems." *Id.* at 517.

Ultimately, we conclude that Beeman failed to preserve an as-applied constitutional challenge to the POAA and fails to demonstrate that we should consider the issue as a manifest constitutional error affecting a constitutional right.

4. RIGHT TO JURY TRIAL FOR POAA SENTENCE

For the first time on appeal, Beeman contends his sentence was entered in violation of his constitutional right to a jury trial when a judge, rather than a jury, made the requisite finding that he was a persistent offender under RCW 9.94A.570. He asserts that the United States Supreme Court's decision in *Erlinger v. United States*, 602 U.S. 821, requires a jury to make this finding. The State contends that we should not review the unpreserved error, *Erlinger* does not clearly apply, and any error is harmless.

A. Error Preservation

Generally, this court will not review a claim of error raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). In his opening brief, Beeman does not acknowledge the lack of objection or assert any grounds for reviewing the unpreserved error. In his reply brief, Beeman does not contend the error is manifest but instead requests review in light of *Erlinger*.

While Beeman does not provide analysis on our ability to review an unpreserved error in light of subsequent decisions, the State acknowledges that waiver may not apply when an intervening decision material to the defendant's case is at issue. While the failure to object at trial generally waives appellate review of an issue, this rule does not apply when application of the general rule would be counterproductive. As such, the rule on issue preservation does not apply where these conditions are present:

> (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation.

State v. Robinson, 171 Wn.2d 292, 305, 253 P.3d 84 (2011). Here, the State argues that *Erlinger* is not material or applicable to the issue raised by Beeman.

B. Applicability of Erlinger

"The Fifth and Sixth Amendments placed the jury at the heart of our criminal justice system." *Erlinger*, 602 U.S. at 831. In particular, the Fifth Amendment to the United States Constitution provides that no "person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. Additionally, the Sixth Amendment guarantees a criminal defendant "speedy and public trial, by an impartial jury." U.S. CONST. amend. VI. Generally, these Amendments have been construed to require that any fact that increases the statutory maximum penalty or the mandatory

minimum penalty for a crime is an element that "must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *Alleyne v. United States*, 570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013). However, as a narrow exception to this rule, a sentencing court may consider "'the fact of a prior conviction'" so long as it only determines "'what crime, with what elements, the defendant was convicted of.'" *Erlinger*, 602 U.S. at 838 (quoting *Alleyne v. United States*, 570 U.S. 99, 111 n.1, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)) (quoting *Mathis v. United States*, 579 U.S. 500, 512, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016)).

Following *Apprendi* and *Alleyne*, our state Supreme Court had reaffirmed that application of the POAA does not require a jury determination. *State v. Wheeler*, 145 Wn.2d 116, 117, 34 P.3d 799 (2001); *State v. Witherspoon*, 180 Wn.2d 875, 892-93, 329 P.3d 888 (2014). Beeman contends that *Erlinger* overruled these cases.

In *Erlinger*, the defendant pleaded guilty to felon unlawfully in possession of a firearm in violation of 18 U.S.C. § 922(g), which carries a statutory maximum sentence of ten years in prison. 602 U.S. at 825. The government charged Erlinger under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), which increased the mandatory minimum term to fifteen years and the maximum term to life if the defendant had three prior convictions for predicate offenses "committed on occasions different from one another." *Id.*; *see also* 18 U.S.C. § 924(e)(1). At resentencing, the government

produced evidence that decades earlier Erlinger had committed four burglaries within the span of a few days. *Id.* at 826-27. Erlinger objected, arguing that the burglaries had not occurred on separate occasions but instead were part of a single criminal episode, and did not qualify as three prior offenses the ACCA requires. *Id.* at 827. The question addressed by the Supreme Court was "whether a judge may decide that a defendant's past offenses were committed on separate occasions under a preponderance-of-the-evidence standard, or whether the Fifth and Sixth Amendments require a unanimous jury to make that determination beyond a reasonable doubt." *Id.* at 825.

Ultimately, the Supreme Court held that whether the past offenses occurred on different occasions was a fact-intensive task to be determined by a jury. *Erlinger*, 602 U.S. at 834. Indeed, "ACCA's occasions 'inquiry' can require an examination of a 'range' of facts, including whether the defendant's past offenses were 'committed close in time,' whether they were committed near to or far from one another, and whether the offenses were 'similar or intertwined' in purpose and character." *Id.* at 828 (quoting *Wooden v. United States*, 595 U.S. 360, 369, 142 S. Ct. 1063, 212 L. Ed. 2d 187 (2022)).

While the decision in *Erlinger* was significant, the court made clear that its holding was limited to the conclusion that a jury must decide ACCA's occasions inquiry. *Erlinger*, 602 U.S. at 835. *Erlinger* did not overrule the prior conviction exception. *Id.* at 838. Under the prior conviction exception, a judge may "'determine what crime, with what elements, the defendant was convicted of.'" *Id.* (quoting *Mathis v. United States*,

579 U.S. 500, 512, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016)). To properly make this determination, "a court may need to know the jurisdiction in which the defendant's crime occurred and its date in order to ascertain what legal elements the government had to prove to secure a conviction in that place at that time." *Id.* at 839.

Application of the POAA is different from the application of ACCA. Whereas ACCA requires a court to determine if the defendant's prior convictions were "committed on occasions different from one another," 18 U.S.C. § 924(e)(1), the POAA requires a court to determine whether the defendant was convicted of predicate offenses before the current crime was committed and also to determine whether at least one of the prior offenses occurred before the commission of any other predicate offense. RCW 9.94A.030(37). Beeman argues that the date when a crime occurs or the date when a crime is committed is factual and while usually this determination is straightforward, it may involve an examination of a range of facts similar to the factual scenario presented in *Erlinger*.

Here, we do not need to decide whether *Erlinger* changes the analysis of our POAA jurisprudence because even if it does, any error was harmless beyond a reasonable doubt. The "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury" is subject to harmless error review. *Washington v. Recuenco*, 548 U.S. 212, 222, 218, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (citing *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)).

At sentencing, the State submitted uncontroverted evidence that Beeman was convicted of first degree robbery committed in 1998 and second degree manslaughter committed in 2003. At sentencing, Beeman raised a legal challenge to the manslaughter conviction, arguing that it was facially invalid based on the sentence imposed, but this argument was rejected by the superior court (and not raised again on appeal). Otherwise, Beeman did not challenge the evidence of these prior convictions. On appeal, he does not address the State's argument that any error was harmless.

We affirm Beeman's sentence. We are convinced beyond a reasonable doubt that even if the application of the POAA required findings by a jury, any reasonable jury would have reached the same result. *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Staab, J.

WE CONCUR:

Lawrence-Berrey, C.J.

Murphy, J.

NIELSEN KOCH & GRANNIS P.L.L.C.

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