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**WA State Court of Appeals, Division III**

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

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| STATE OF WASHINGTON, Respondent, v. ROY H. MURRY, Appellant. | ) | No. 35035-5-III<br>OPINION PUBLISHED IN PART |

KORSMO, J. — Roy Murry appeals from convictions for three counts of aggravated first degree murder, one count of attempted first degree murder, and one count of first degree arson. Due to an admitted defect in the charging document, we reverse the attempted murder conviction without prejudice. Because the evidence of identity was sufficient, and because the trial court did not abuse its considerable discretion in resolving evidentiary challenges, we affirm the remaining convictions.

In the published portion of this opinion, we address Murry's *Frye*[1] challenge and the inadequacy of the attempted murder charging language.

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[1] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923).

## FACTUAL BACKROUND

Although extensive evidence was admitted during the lengthy trial, the nature of the appellate challenges counsels we leave more detailed discussion of the voluminous facts to the appropriate argument. Accordingly, there need only be a generalized discussion of the factual background of this case.

Murry, who lived in Lewiston, Idaho, was estranged from his wife, Amanda Constable.[2] She worked in Spokane as a nurse and lived with her mother and stepfather, Lisa and Terry Canfield, at their Colbert-area residence. Also residing there was her brother, John Constable. Amanda Constable was contemplating a divorce.

On the night of May 25, 2015, Memorial Day, Amanda Constable worked her standard shift at a Spokane hospital and was expected to return home around 12:00 to 12:15 a.m. on May 26. A co-worker called in ill and Amanda Constable had to work until 3:38 a.m. to cover. When she finally reached the family home, she discovered that law enforcement had responded to a crime scene.

The Canfields and John Constable had been murdered. Each had been shot multiple times and their bodies set on fire.[3] Both the house and an outbuilding where Terry Canfield's body was found were burned. The subsequent investigation determined that both gasoline and barbecue lighter fluid had been used as accelerants in multiple

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[2] Constable used the name Murry prior to the dissolution of the couple's marriage.
[3] In each instance, the cause of death was attributed to the gunshot wounds.

areas of the house. Investigators did not identify the ignition sources, but several possible fire starters were located.

Burglary and theft were ruled out as motives for the crime since the only item missing from the scene was a .38 caliber revolver taken from Amanda's bedroom; the weapon had been a gift from Murry. $3,000 in cash was left undisturbed in the same room and other valuables in the house were not taken. Suspicion almost immediately fell on Murry.

Detectives twice interviewed him within four days of the killings. He claimed to have been camping with friends along the Snake River, but declined to name his companions. Extensive efforts ensued to verify the alibi, but no corroborating evidence was located.

Prosecutors filed the noted charges and a lengthy jury trial ensued in the Spokane County Superior Court. The identity of the killer was the primary contested issue at trial. Due to the circumstantial nature of the case, numerous witnesses were called to testify about Mr. Murry's habits, his behavior leading up to the killings, and his motive. That testimony is discussed later as necessary.

The jury found Mr. Murry guilty on the five noted charges and the court imposed the mandatory sentence of life in prison on the three aggravated first degree murder convictions. Mr. Murry timely appealed to this court. A panel heard oral argument of the case.

## ANALYSIS

The published portion of this case addresses two issues. We first consider what is the relevant scientific community for purposes of a *Frye* analysis. We then turn to the adequacy of the attempted first degree murder charging language.

*Frye Community*

We conclude that the relevant scientific community is not the "criminal forensics community," but, is instead the community of experts who are familiar with the use of the technique in question.[4]

This issue arises from the discovery of strangely shaped nanoparticles on some of the shell casings recovered from the crime scene. William Schneck, a forensic scientist from the Washington State Patrol Crime Laboratory, used a Scanning Electron Microscope (SEM) to examine the casings. The SEM is the most powerful microscope at the lab. He believed the particle might be AccuDure, a firearms lubricant, but his opinion was inconclusive. He therefore sent the samples to MVA Scientific Consultants, a private laboratory in Georgia. Richard Brown of MVA used a Transmission Electron

[4] Mr. Murry's related issues concerning the nanoparticle testimony largely derive from his belief that the trial court erred in its analysis of the *Frye* community and will not be separately addressed. To the extent that he also challenges the use of the Transmission Electron Microscope under *Frye*, we consider the challenge foreclosed by the holding of *State v. Noltie*, 116 Wn.2d 831, 850-51, 809 P.2d 190 (1991), that there is nothing novel about using a magnifying glass to enhance vision.

Microscope (TEM) and concluded that the samples were unique, synthetic silicon-based nanoparticles that were consistent with the distinctive component of AccuDure.[5]

Washington uses the test of *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) to limit expert testimony to principles generally accepted in the scientific community. *State v. Copeland*, 130 Wn.2d 244, 255, 922 P.2d 1304 (1996); *State v. Canaday*, 90 Wn.2d 808, 812, 585 P.2d 1185 (1978). The reviewing court considers the issue de novo and is expected to conduct a searching review that may include scientific materials developed after trial. *Copeland*, 130 Wn.2d 255-56. If the scientific principle satisfies *Frye*, the trial court applies ER 702 in determining whether to admit the individual expert's testimony. *In re Det. of Pettis*, 188 Wn. App. 198, 204-05, 352 P.3d 841 (2015).

A witness may qualify as an expert by knowledge, skill, experience, training, or education. ER 702. After an expert's qualifications are established, any deficiencies in the expert's knowledge goes to the evidentiary weight of the testimony. *Keegan v. Grant County Pub. Util. Dist. No. 2*, 34 Wn. App. 274, 283, 661 P.2d 146 (1983). This court reviews the trial court's decision to admit expert witness testimony for abuse of discretion. *Pettis*, 188 Wn. App. at 205. Discretion is abused if it is exercised on

[5] Murry was the only known user of the lubricant and the evidence figured prominently in establishing the identity of the killer.

untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

A *Frye* hearing was conducted prior to trial. Mr. Murry alleged that the TEM was not used in the "criminal forensics community" and that, accordingly, *Frye* precluded consideration of TEM evidence in Washington. Mr. Murry had an expert listen to the *Frye* hearing testimony, but, ultimately, he did not present any evidence or testimony at the hearing. The State presented testimony from Brown, Schneck, and the developer of AccuDure, Pavlo Rudenko, Ph.D. Dr. Rudenko used both a SEM and a TEM while developing AccuDure and also hypothesized that he would use a TEM in order to protect his patent should the need arise. He testified that differences between lubricants are discernable under a microscope.

Mr. Brown, who had used the TEM for 35 years, testified to the history of TEM, a microscope developed during the 1940s that became useful in forensic work in the 1980s due to its ability to distinguish asbestos fibers. He explained that due to the high resolution offered by TEM, it is the most common tool for examining nanoparticles. In addition to forensics, TEM commonly is used by medical device manufacturers and also by the Center for Disease Control to identify viruses.

Brown explained that TEM is the most powerful microscope for purposes of magnification and resolution. The difference between SEM and TEM is the difference between looking at the surface level of a particle (SEM) or at the atomic level (TEM).

Brown also explained that there was no debate in the scientific community concerning use of TEM.

The trial court rejected the defense effort to classify the relevant scientific community for *Frye* purposes as the criminal forensic community. Concluding that the more general scientific community was appropriate, the court ruled that the testimony about the AccuDure nanoparticles was admissible.

In this court, Mr. Murry reprises his challenge to the trial court's determination of the relevant scientific community for the *Frye* assessment. One enduring criticism of *Frye* has been the court's failure to define the scientific community by which to judge the acceptance of novel scientific methods. DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 1.5, at 9 (2005-2006 ed.). This problem becomes complicated because various overlapping scientific disciplines use the same information and techniques. *Id.*[6]

Washington courts have not squarely addressed this issue. A commonly cited answer to this challenge was provided by the Massachusetts Supreme Court: "the requirement of the *Frye* rule of general acceptability is satisfied, in our opinion, if the

[6] The Washington Supreme Court acknowledged: "When determining whether a witness is an expert, courts should look beyond academic credentials. For example, depending on the circumstance, a nonphysician might be qualified to testify in a medical malpractice action. The line between chemistry, biology, and medicine is too indefinite to admit of a practicable separation of topics and witnesses." *L.M. v. Hamilton*, 193 Wn.2d 113, 135, 436 P.3d 803 (2019) (citation omitted) (internal quotation marks omitted).

principle is generally accepted by those who would be expected to be familiar with its use." *Commonwealth v. Lykus*, 367 Mass. 191, 203, 327 N.E.2d 671 (1975).

We believe the *Lykus* standard is consistent with the actual application of *Frye* by the Washington Supreme Court. The mechanics of child birth injuries were at issue in a recent medical malpractice case. *L.M. v. Hamilton*, 193 Wn.2d 113, 135, 436 P.3d 803 (2019). In addition to hearing from the obstetrics community, the court permitted the testimony of a biomechanical engineer despite his lack of expertise with the biomechanics of childbirth. *Id.* at 138. In the seminal criminal cases that paved the way for use of DNA evidence at trial, the court looked at evidence from experts in multiple disciplines. In the case involving statistical DNA analysis, the court heard from forensic scientists, a university genetics professor, a university genetics researcher, and a university statistics professor. *State v. Kalakosky*, 121 Wn.2d 525, 542, 852 P.2d 1064 (1993). In the case involving DNA typing, the court heard from a large number of university researchers, geneticists, biochemists, and a statistician, in addition to forensic scientists. *State v. Cauthron*, 120 Wn.2d 879, 884, 846 P.2d 502 (1993).

In none of these cases did the experts belong solely to the civil or criminal forensics community. Mr. Murry has not identified a single *Frye* case where our courts have excluded expert testimony from outside the forensic community. Limiting testimony solely to those who use the science or equipment, instead of those also familiar with the principle, unduly narrows the field to those who favor the science in question. It

also discourages innovation by excluding the opinions of cutting-edge researchers who may be demonstrating the utility of a new principle or a device.

The Massachusetts standard is consistent with the Washington practice and we adopt it. Accordingly, we hold that scientists familiar with the use of the scientific principle in question constitute the relevant scientific community for purposes of a *Frye* analysis.

Here, the trial court heard from scientists familiar with the examination of nanoparticles and properly based its ruling on their testimony. The trial court did not err in determining that examination of nanoparticles by a Transmission Electron Microscope was accepted in the scientific community familiar with the technology. Accordingly, its ruling is affirmed.

*Charging Document Sufficiency*

Mr. Murry next argues that the attempted murder count was inadequately charged. Precedent agrees with that argument and we reverse the attempted murder conviction without prejudice to refiling.

A defendant has the constitutional right to be informed of the charges against him. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). This requires that the charging document include each essential element of the charged offense; merely citing to the appropriate statute is insufficient. *Id.* The rationale for this rule is that the defendant must be informed of the allegations so he or she can properly prepare a

defense. *State v. Simon*, 120 Wn.2d 196, 198, 840 P.2d 172 (1992). Further, the statutory manner or means of committing a crime is an element that the State must include in the information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). When a charging document fails to state a crime, the remedy is to dismiss the charge without prejudice to the State's refiling of a correct charge. *Vangerpen*, 125 Wn.2d at 792-93.

Mr. Murry argues that the charging document erroneously omitted the element of premeditation. Despite the fact that premeditation actually is not an element[7] of attempted first degree murder, he is correct. *Vangerpen* is dispositive.

In that case, the original charging document[8] alleged that the defendant, with the intent to kill, attempted to do so.[9] At the close of the prosecution's case, the defense moved to dismiss for failure to state a crime. The State agreed that the original document charged only attempted second degree murder since the element of premeditation was missing. *Id.* at 785. In its subsequent review, the Washington Supreme Court agreed that

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[7] *State v. Boswell*, 185 Wn. App. 321, 335-36, 340 P.3d 971 (2014) (elements are specific intent to commit first degree murder and taking a substantial step toward committing the crime); *State v. Reed*, 150 Wn. App. 761, 772-73, 208 P.3d 1274 (2009).

[8] The trial court had granted the prosecution's motion to amend the information after the State had rested to add premeditation. *Vangerpen*, 125 Wn.2d at 785-86.

[9] Although the charging document is not discussed in the Supreme Court's version of *Vangerpen*, it is set forth in the Court of Appeals opinion. *See State v. Vangerpen*, 71 Wn. App. 94, 97 n.1, 856 P.2d 1106 (1993).

the charging document was defective and expressly stated that premeditation was an element of attempted first degree murder for charging purposes. *Id.* at 791.

It is possible to distinguish *Vangerpen*, as the prosecutor urges we do, on the basis that the information filed in *Vangerpen* was improper due to failure to recite the statutory elements of the crime, while the information in this case correctly recited those elements. *See State v. Boswell*, 185 Wn. App. 321, 335-36, 340 P.3d 971 (2014) (elements are specific intent to commit first degree murder and taking a substantial step toward committing the crime). We decline to do so for two reasons.

First, the rulings of the Washington Supreme Court are binding on this court. *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). Even if possible to distinguish the *Vangerpen* pronouncement, we have declined to do so in the past. *E.g.*, *State v. Mellgren*, No. 35312-5-III (Wash. Ct. App. Dec. 11, 2018) (unpublished), http://www.courts.wa.gov/opinions/pdf/353125_unp.pdf. Similarly, Division Two of this court has recognized the *Vangerpen* pronouncement as requiring the element of premeditation in a charging document. *Boswell*, 185 Wn. App. at 335-36 (declining to extend *Vangerpen* to jury instructions).

Secondly, leaving premeditation out of an attempted first degree murder charging document would create an additional problem. First degree murder can be committed in three ways: (1) premeditated intentional murder, (2) extreme indifference, and (3) felony murder. RCW 9A.32.030(1)(a)-(c). However, it is impossible to attempt murder by

extreme indifference or felony murder because neither offense requires proof of intent to kill. *State v. Dunbar*, 117 Wn.2d 587, 817 P.2d 1360 (1991) (extreme indifference); *State v. Wanrow*, 91 Wn.2d 301, 311, 588 P.2d 1320 (1978) (intent to kill not an element of felony murder). Thus, a charging document that merely states that a defendant took a substantial step toward committing first degree murder would fail to state a crime unless premeditated murder was identified as the basis for the charge.

Since only attempted premeditated murder can constitute attempted first degree murder, the charging document must, in some manner, identify the premeditation element lest it commit the same error as in *Vangerpen*. Accordingly, although the charging document used in this case adequately conveyed the elements of the offense, it still failed to state a crime. For that reason, we reverse the conviction for attempted first degree murder without prejudice and remand for further proceedings. *Vangerpen*, 125 Wn.2d at 792-93.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

UNPUBLISHED ISSUES

The appeal raises numerous other challenges including the sufficiency of the evidence of identity on all charges as well as a contention that the killer did not take a

substantial step toward killing Amanda Constable. We group those two challenges together before turning to look at his evidentiary arguments, another topic that we treat as one. Next, we briefly consider Mr. Murry's challenges to his mental competency and legal financial obligations (LFOs). Finally, we briefly address Mr. Murry's statement of additional grounds (SAG).

*Sufficiency of the Evidence*

The overriding issue in this appeal is the sufficiency of the evidence to establish Mr. Murry as the killer. He also argues that the evidence did not permit the jury to determine that a substantial step was taken toward killing Amanda Constable. The evidence permitted the jury to make those determinations.

These challenges are controlled by long-settled standards of review. Evidence is sufficient to support a verdict if the jury has a factual basis for finding each element of the offense proved beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). The evidence is viewed in the light most favorable to the prosecution. *Green*, 94 Wn.2d at 221. Appellate courts defer to the trier-of-fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Circumstantial evidence is as reliable as direct evidence. *Rogers Potato Serv., LLC v. Countrywide Potato, LLC*,

152 Wn.2d 387, 391, 97 P.3d 745 (2004); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The State's proof of identity was entirely circumstantial. The facts are known to the parties and will not be repeated here except in a summary form. Murry had a motive to kill his estranged wife—both of them were contemplating divorce—and disliked her family, who he blamed for turning his wife against him. The killings occurred at a time when someone knowledgeable about her schedule would expect she should have just returned home. Each victim received multiple fatal wounds—strong evidence of both premeditation and murder committed by someone motivated to kill.

The physical evidence tied Murry to the scene. The most damaging evidence was the AccuDure particles discovered on some of the shell casings. Dr. Rudenko testified that there were only two vials of AccuDure in existence—one belonged to Murry (and was discovered in his car) and the other vial Dr. Rudenko turned over to the WSP Crime Laboratory. Rudenko did not own or use firearms, while Murry was a gun enthusiast who owned numerous weapons. A .22 caliber gun missing from Murry's collection had been used to test AccuDure. The victims were killed by .22 caliber Remington rimfire hollow-point bullets. The same ammunition was found in Murry's car and his residence.

Traces of a fire starter, Trioxane, were discovered on a headlamp found inside Mr. Murry's car. He gave away his remaining Trioxane supplies shortly after the killings. Investigators believed that Trioxane could have been used to set the fires. Flares were

identified as another possible ignition device. Flares also were recovered from Murry's car. The arson was committed by the same person who killed the victims.

In summary, the killer used AccuDure to lubricate his weapon. Mr. Murry was one of two people to possess that unique synthetic lubricant, and the only one of the two who had a motive to kill the family. He owned the same ammunition as the killer. The gun Murry used to test the AccuDure fired the same ammunition and was missing from his collection. Based on this evidence, the jury could conclude beyond a reasonable doubt that Mr. Murry was the killer and the arsonist. The evidence supported the verdicts.

In order to convict a person of attempted first degree murder, the evidence must allow the jury to conclude that a defendant intended to commit first degree murder and took a substantial step toward committing the offense. RCW 9A.28.020(1); RCW 9A.32.030(1)(a); *In re Pers. Restraint of Borrero*, 161 Wn.2d 532, 539-40, 167 P.3d 1106 (2007). "A 'substantial step' is conduct strongly corroborative of the actor's criminal purpose." *Borrero*, 161 Wn.2d at 539.

A nonexhaustive list of factors suggesting that a substantial step had been undertaken was derived from the Model Penal Code by *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). Those factors are:

> (a) lying in wait, searching for or following the contemplated victim of the crime;

(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
(c) reconnoitering the place contemplated for the commission of the crime;
(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
(e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

*Id.* at 451 n.2.

At least three of these factors were present in this case. Factor (f) was established by Mr. Murry's appearance at the residence, armed, at a time Amanda Constable was expected to be present. His subsequent use of the weapon against her family members established his intent to kill. Even standing alone, factor (f) supported the existence of a substantial step.

The State argues, correctly, that factor (a) also was present. After arriving at the scene and killing the family, Mr. Murry appears to have waited more than an hour before setting fire to the victims and the buildings, an act that announced his intent to leave the scene and cover his tracks. There was no reason to delay his departure except for waiting for Amanda Constable; his continued presence at the crime scene increased the likelihood he would be apprehended there.

Finally, factor (d) also appears to be present, although this factor overlaps to an extent with the previous one. Murry was not an invited guest and appears to have unlawfully entered the house and immediately killed the victims. If he was unaware at that time that Amanda Constable had not returned, the jury could also find that he initially entered the house with the intent to kill her and was forced by circumstances to change his plans.

The evidence allowed the jury to determine that Roy Murry had taken a substantial step toward killing Amanda Constable. Accordingly, the evidence was sufficient to support that element of the attempted murder charge.

*Evidentiary Objections*

Mr. Murry raises a host of evidentiary arguments, most of which are wholly or largely not properly before us. We preliminarily will discuss the standards of review governing evidentiary claims as well as several of the error preservation doctrines that Mr. Murry attempts to evade. We will then consider, often in very summary manner, the individual challenges raised in this appeal.

With respect to preserved challenges, this court will review the trial court's evidentiary rulings for abuse of discretion. *State v. Young*, 160 Wn.2d 799, 805-06, 161 P.3d 967 (2007); *State v. Guloy*, 104 Wn.2d 412, 429-30, 705 P.2d 1182 (1985). As noted earlier, discretion is abused when it is exercised on untenable grounds or for untenable reasons. *Junker*, 79 Wn.2d at 26.

With respect to unpreserved challenges, several doctrines are in play. A proper objection must be made at trial to perceived errors in admitting or excluding evidence; the failure to do so precludes raising the issue on appeal. *Guloy*, 104 Wn.2d at 421. "'[A] litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.'" *Id.* (quoting *Bellevue Sch. Dist. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967)). The party must have challenged the admission of evidence at trial on the same basis that it raises on appeal. *Id.* at 422. As explained there:

> As to statement (d), counsel objected but on the basis that it was not proper impeachment nor was it within the scope of redirect. A party may only assign error in the appellate court on the specific ground of the evidentiary objection made at trial. Since the specific objection made at trial is not the basis the defendants are arguing before this court, they have lost their opportunity for review.

(Citation omitted.)

The *Guloy* specificity requirement is a particular application of the general principle of waiver—if a party forgoes a challenge, even one of constitutional significance, the challenge is waived. *State v. Mierz*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). Another species of waiver involves claims that result from a party's own actions at trial. One cannot cause an error and then attempt to benefit from the error on appeal. This is known as the doctrine of invited error. *E.g.*, *State v. Studd*, 137 Wn.2d 533, 545-49, 973 P.2d 1049 (1999).

The waiver, objection specificity, and invited error doctrines apply to multiple arguments Mr. Murry raises. Other relevant doctrines that apply only to a single claim will be addressed within those particular arguments. An additional argument of general application that needs to be discussed is Mr. Murry's peculiar take on the cumulative error doctrine.

The cumulative error doctrine is a recognition that multiple errors, none of which alone were significant enough to justify relief, can still result in a trial that was unfair due to the cumulative harm resulting from the errors. *Rookstool v. Eaton*, 12 Wn. App. 2d 301, 311, 457 P.3d 1144 (2020). It is not a doctrine for avoiding error preservation requirements. *Id.* Rather, it is an additional method of looking at the prejudice engendered by multiple errors. Mr. Murry, however, treats cumulative error as allowing appellate courts to consider the impact of unpreserved claims in conjunction with other preserved or unpreserved arguments. It does not. Only if an argument is properly presented to the trial court by timely objection or timely posttrial motion will we consider the cumulative impact of multiple errors. *Id.*

Thus, we reject Mr. Murry's cumulative error argument as it relates to unpreserved claims. We now turn to the individual evidentiary objections he raises in this appeal.

*Gun Collection.* Mr. Murry argues that evidence that he owned a large number of guns, habitually carried a handgun, and always handled ammunition with gloves and wiped the ammunition down, constituted improper character evidence in violation of ER

404 and ER 405. We disagree with his characterization of the evidence. It is not a "bad act" to own or carry guns, let alone to regularly clean ammunition. This evidence is more properly classified as habit evidence governed by ER 406.

Mr. Murry did object to most of this testimony and has preserved his argument.[10] Nonetheless, the court properly admitted the testimony because evidence about the gun collection was highly relevant. A thorough investigation showed that Murry owned and regularly carried weapons capable of firing the ammunition used in the killings. Several weapons were tested and shown not to have been the murder weapon; other potential murder weapons were missing from his collection, raising the possibility that one had been used and discarded.

No fingerprints or DNA were recovered from the shell casings collected at the scene. Mr. Murry's habit of cleaning his ammunition and handling it with gloves explained the absence of any trace evidence. Once again, this was highly relevant evidence.

The habit evidence was relevant and not prejudicial. The trial court did not abuse its discretion by admitting it.

*"Prepper" Evidence.* Testimony was elicited from several witnesses that Mr. Murry was a "prepper"—a person preparing to survive the breakdown of society by

[10] The defense did not challenge the statement by one witness that Murry was "obsessed" with guns. That claim is waived.

stockpiling supplies and weapons. His belated challenge to this testimony on appeal fails. He did not object at trial, thus waiving his argument. He also elicited the prepper testimony from three of the four witnesses who testified on the subject and then used the testimony in closing to explain why he possessed the weapons and other survival gear. Thus, his challenge also is precluded by the invited error doctrine.

Similarly, he did not challenge trial testimony describing his survival equipment. This component of his "prepper" challenge also is waived.

*Conspiracy Theories.* Evidence of Mr. Murry's belief in conspiracies, including his belief that Amanda Constable and her family were working with the Russian government against him, was presented through several witnesses who repeated Mr. Murry's statements to them. This evidence was the subject of a pre-trial hearing to identify which statements were being offered by the prosecution.

Mr. Murry withdrew objections to many of the statements, thus waiving any claim of error as to them. For the remaining statements, the defense objected on the basis of relevance. His appellate argument alleges that the evidence constituted improper character evidence. However, the failure to challenge this testimony on those grounds in the trial court not only prevented that court from assessing the argument, it runs afoul of the *Guloy* objection specificity doctrine. For both reasons, this challenge is not preserved.

*Internet Search History and Song Posting.* Mr. Murry next argues that evidence of his Internet search history concerning Trioxane and other fire starters, and his posting of four songs to his social media accounts while he was doing his searches, was unduly prejudicial. At trial, he challenged this evidence on the basis of authenticity. Thus, his current challenge is not preserved in this court. *Guloy*, 104 Wn.2d 412.

Since we do not consider this claim, we do not address the State's arguments distinguishing this case from *State v. DeLeon*, 185 Wn.2d 478, 374 P.3d 95 (2016). We also note that Mr. Murry does not believe the evidence warrants reversing his convictions. Br. of Appellant at 38-39. Instead, he argues this unpreserved claim as part of the cumulative error argument we rejected previously. For this reason, too, we need not consider the claim.

*Internet Aliases.* Mr. Murry argues that the court erred in permitting testimony that he used aliases while on the Internet. He did not object to the testimony at trial. The contention is waived. It also was one of the claims he hoped to resurrect under his cumulative error theory. For both reasons, this issue is not before us.

*Amanda Constable's Testimony.* Mr. Murry next presents multiple challenges to the testimony of Amanda Constable. All fail for varying reasons, but we address the claims separately for that same reason.

Mr. Murry first argues that her entire testimony was precluded by the spousal competency and spousal communication privileges found in RCW 5.60.060(1). This contention fails for multiple reasons.

First, the statute is not applicable when one spouse is the victim of a crime committed by the other spouse. In relevant part, the statute provides:

> A spouse or domestic partner shall not be examined for or against his or her spouse . . . without the consent of the spouse or domestic partner; nor can either during marriage . . . or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage . . . . But this exception shall not apply . . . to a criminal action or proceeding for a crime committed by one against the other.

RCW 5.60.060(1).

This privilege is two-fold: a spousal competency privilege that prevents one spouse from testifying against the other, and a communications privilege forbidding one spouse from disclosing communications from the other spouse. *State v. Thornton*, 119 Wn.2d 578, 580, 835 P.2d 216 (1992). By its terms, the statute did not bar the testimony of Amanda Constable. She was a victim and permitted to relate statements made during the marriage that were relevant to this case.

Equally important, the defense expressly waived any application of the statute, writing in response to the State's pretrial memorandum: "The defense is not intending to invoke the marital privilege with regard to Amanda Murry." Clerk's Papers at 362. Further, much of Amanda Constable's testimony was elicited by the defense in support of

its theory of the case. Thus, he also invited the error he now claims. For all three reasons, the statutory argument is utterly without merit.

Mr. Murry also argues that certain statements related by Ms. Constable were entered in violation of ER 402 and ER 403. Although we disagree with that assertion, we do not address it because he did not object to the statements at trial and does not support his contention with reasoned argument. RAP 10.3(a)(6); *State v. Farmer*, 116 Wn.2d 414, 432, 805 P.2d 200 (1991). For both reasons, we decline to consider this unpreserved claim.

The one aspect of Mr. Murry's challenge to Ms. Constable's testimony that was preserved for appeal was an objection to his former spouse testifying about his "shit list" of people against whom he would seek revenge if the circumstances permitted. No written list existed, but Mr. Murry would routinely put people on his mental list if they wronged him or breached his trust. He not only would hold a grudge, but he would repeatedly talk about how he would take revenge if he could. Testimony at trial indicated that Mr. Murry believed "trust is everything" and that Amanda Constable was one of two people in the world he trusted.

Evidence of "other bad acts" is permitted to establish specific purposes such as the identity of an actor or the defendant's intent or purpose in committing a crime. ER 404(b). Those purposes, in turn, must be of such significance to the current trial that the evidence is highly probative and relevant to prove an "essential ingredient" of the current

crime. *State v. Lough*, 125 Wn.2d 847, 863, 889 P.2d 487 (1995). Evidence admitted under ER 404(b) is considered substantive evidence rather than impeachment evidence. *State v. Laureano*, 101 Wn.2d 745, 766, 682 P.2d 889 (1984), *overruled in part by State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989). The decision to admit evidence of other bad acts under ER 404(b) is a matter within the discretion of the trial court. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *Lough*, 125 Wn.2d at 863.

Citing to ER 404, the trial court initially excluded the evidence on the basis that the probative value did not outweigh the prejudice to Mr. Murry. The State did not address the topic with Ms. Constable. During cross-examination, defense counsel elicited testimony that Mr. Murry had not expressly threatened her and had never physically harmed her. Prior to redirect examination, the prosecutor sought permission to address the "list" in response to the cross-examination. The prosecutor believed the evidence admissible to establish both premeditation and the reason Ms. Constable feared Murry.

The court concluded that the testimony was relevant both to establish premeditation and to show how Mr. Murry would respond to a breach of trust.[11] In the court's words, the testimony established Mr. Murry's "belief system." Report of Proceedings at 2880. On redirect examination, Ms. Constable answered two questions

[11] The trial court correctly ruled that evidence of Ms. Constable's fear of Murry was not relevant. *See State v. Parr*, 93 Wn.2d 95, 103, 606 P.2d 263 (1980).

from the prosecutor on the topic. She explained that he maintained the "list" of people who had betrayed him and that was the reason why she did not want to bring up the topic of divorce with him. On re-cross, defense counsel asked ten questions related to the list.

The trial court correctly concluded that Mr. Murry had "opened the door" to this topic. This court recently discussed this topic at length in *State v. Rushworth*, __ Wn. App. __, 458 P.3d 1192 (2020). There we noted that "the open door doctrine is a theory of expanded relevance." *Id.* at ¶ 17. When relevant evidence initially is excluded for policy reasons, such as undue prejudice to one party, the protected party "can waive protection from a forbidden topic by broaching the subject." *Id.* That is what happened here.

Despite the relevance of Mr. Murry's penchant for planning revenge on those who wronged him, the trial court excluded the evidence for the purpose of protecting Mr. Murry. He, however, used the opportunity to suggest that Ms. Constable's fear of him was unreasonable and, implicitly, that he was of peaceful character.[12] Having broached the subject, he waived the protection of the court's earlier ruling. *Id.*

The trial court had tenable grounds for admitting the testimony. Accordingly, it did not abuse its discretion in permitting limited testimony about the "list" on redirect examination.

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[12] It appears that the "list" testimony was relevant character evidence. *See State v. Brush*, 32 Wn. App. 445, 648 P.2d 897 (1982). Since the trial court did not address this

Mr. Murry has not identified any evidentiary error among his preserved arguments. Accordingly, we need not address the remainder of his cumulative error claim.

*Mental Competency*

In light of testimony about Mr. Murry's belief in aliens and being a shapeshifter, as well as his paranoia, he now argues that the trial court erred by not ordering a competency evaluation sua sponte. He has not established error.

A person is not competent to stand trial if he or she lacks "the capacity to understand the nature of the proceedings against him or her or to assist in his or her own defense." RCW 10.77.010(15). Whether a hearing should have been ordered is reviewed for abuse of discretion. *In re Pers. Restraint of McCarthy*, 193 Wn.2d 792, 802, 446 P.3d 167 (2019).

Simply having delusions is not itself sufficient reason to question a defendant's competency. *Id.* at 805. Instead, there must be a current reason to question the defendant's ability to understand the proceedings or assist in the defense. *Id.* at 806-07. There was no indication of either concern in the trial record of this case. Mr. Murry's precharging symptomology does not appear to have affected his competency at trial.

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issue, we do not do so either.

There is no support in the record for believing Mr. Murry's competency was impaired during trial. Accordingly, the trial court did not abuse its discretion by failing to act sua sponte.

*Legal Financial Obligations*

By supplemental brief, Mr. Murry asked that the $200 criminal filing fee be struck from the judgment and sentence. The trial court is directed to strike the fee in accordance with *State v. Ramirez*, 191 Wn.2d 732, 735, 426 P.3d 714 (2018).

*Statement of Additional Grounds*

Mr. Murry raises numerous claims in his SAG. None have merit. We will address, in summary form, some of those claims.

RAP 10.10(a) authorizes a pro se statement of grounds that "the defendant believes have not been adequately addressed by the brief filed by the defendant's counsel." In the event that issues of possible merit have been identified, the court may require both counsel to address the SAG issues. RAP 10.10(f). Only documents in the record may be considered when assessing a SAG argument. RAP 10.10(c).

The latter requirement also is an obligation of any brief filed in the appellate courts. An appellate court need not consider an issue raised for the first time on appeal when the record does not contain sufficient facts to resolve the claim. *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Typically, the remedy in such situations is for the defendant to bring a personal restraint petition in which he can

present his evidence. *E.g.*, *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

With those general observations, it is time to turn to Mr. Murry's arguments. His first and fifth arguments, and inferentially in his second argument, allege that the State failed to preserve, find, or present evidence in his favor. He misunderstands the government's obligation.

Very well established case law governs our review. The State has a duty to preserve evidence that is both material and exculpatory. *State v. Donahue*, 105 Wn. App. 67, 77-78, 18 P.3d 608 (2001). When dealing with evidence that is not exculpatory, but only potentially useful to the defense, Washington courts apply the federal analysis found in *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). *See State v. Straka*, 116 Wn.2d 859, 810 P.2d 888 (1991). Under *Youngblood*, a defendant must establish that evidence was destroyed (or not preserved) because of *bad faith* on the part of the government. If bad faith is not established, the due process inquiry is at an end. 102 L. Ed. 2d at 289. In addition, there is no police duty to seek out or test evidence. *Donahue*, 105 Wn. App. at 77-78. Mr. Murry's arguments all fail under these standards. He has not pointed to any exculpatory evidence that was not preserved, nor has he shown that any potentially useful evidence was destroyed in bad faith.

The third and fourth SAG issues allege that witnesses testified differently than expected and that trace evidence may have been contaminated. Neither of these issues was

raised at trial and, therefore, neither is preserved for our review. Also, there is no factual support in the record for the third argument. His eighth argument fails for both of these reasons.

The sixth argument alleges that counsel performed ineffectively in nine different instances. This argument also is assessed under well-settled standards of review. An attorney must perform to the standards of the profession; the failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *McFarland*, 127 Wn.2d at 334-35. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Thus, to prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant, in light of the entire trial record, that it deprived him of a fair trial. *Id.* at 690-92. When a claim can be disposed of on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697.

The first, third, fifth, and eighth rationales for asserting ineffective assistance all refer to alleged facts outside the trial record. Accordingly, there is no basis for adjudging these claims. The second, third, fourth, fifth, sixth, seventh, and ninth sub-arguments all fault counsel for not cross-examining or calling witnesses, or for failure to object to arguments or exhibits offered by the State. The decisions whether to cross-examine a

witness, call a witness, and to object to evidence all involve trial tactics. *E.g.*, *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004) (cross-examination); *State v. Robinson*, 79 Wn. App. 386, 392, 902 P.2d 652 (1995) (call witness); *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989) (object). A reviewing court presumes that a "failure to object was the product of legitimate trial strategy or tactics, and the onus is on the defendant to rebut this presumption." *State v. Johnston*, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007) (citing cases). Accordingly, none of these arguments overcome the *Strickland* presumption of effectiveness. The ineffective assistance claim is without merit.

The final SAG argument is a contention that the prosecutor engaged in misconduct during closing argument by misrepresenting some of the evidence. His first two sub-contentions fail because they were reasonable inferences from the evidence. The final claim is that the State's closing argument was speculative and inconsistent. It was not. The prosecutor noted that the evidence did not allow the State to determine the order in which the victims died, but he consistently argued that Mr. Canfield died first. Again, this was a reasonable inference from the evidence. It also was largely irrelevant to the jury's determination of who the killer was. Even if there had been some minor error in making this argument, it was of absolutely no consequence to the outcome of the trial. Mr. Murry has not established misconduct.

The SAG is without merit.

Reversed in part and remanded for further proceedings consistent with this opinion.



Korsmo, J.

WE CONCUR:

Siddoway, J.

Siddoway, J.

Pennell, C.J.

Pennell, C.J.

APPENDIX B

Documents establishing the appellate court's handling of the issues raised pro se; the rulings actually being challenged by Petitioner. . . . . 2 pgs

*Renee S. Townsley*
*Clerk/Administrator*

*(509) 456-3082*
*TDD #1-800-833-6388*

***The Court of Appeals***
***of the***
***State of Washington***

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July 23, 2019

Larry D. Steinmetz
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1100 W Mallon Ave
Spokane, WA 99260-2043
*Email*

CASE # 350355
State of Washington v. Roy Howard Murry
SPOKANE COUNTY SUPERIOR COURT No. 151024222

Counsel:

During the pre-workup review of the above matter, the panel determined that a supplemental respondent's brief responding to the statement of additional grounds is warranted. RAP 10.10(f) Accordingly, respondent's supplemental brief is now due August 22, 2019.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:jld

c: Dennis W. Morgan
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September 18, 2019

Roy Howard Murry, #396387
Washington State Penitentiary
1313 North 13th Ave
Walla Walla, WA 99362

CASE # 350355
State of Washington v. Roy Howard Murry
SPOKANE COUNTY SUPERIOR COURT No. 151024222

Appellant:

We received electronically your "Motion for Clarification of Briefing Rules" on September 10, 2019. A copy is enclosed for counsel.

The request to file a supplemental brief is denied unless or until the panel assigned to hear the matter on the merits calls for supplemental briefing from the appellant. In the normal course, the Respondent is to respond to the Appellant's brief and need not respond to the statement of additional grounds. Appellant's counsel responds to the respondent's brief when filing an appellant reply brief, if any. Pursuant to RAP 10.10(f) the court may request additional briefing from counsel to address issues raised in the statement of additional grounds which has occurred in the instant case. Therefore, no further action will be taken.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:jld

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APPENDIX C

# THE SUPREME COURT OF WASHINGTON

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>ROY H. MURRY,<br><br>Petitioner. | ) | No. 98724-6<br><br>**ORDER**<br><br>Court of Appeals<br>No. 35035-5-III |

Department II of the Court, composed of Chief Justice Stephens and Justices Madsen, González, Yu, and Whitener (Justice Madsen recused and Justice Owens sat for Justice Madsen), considered at its November 3, 2020, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied. The motion to file a pro se supplemental petition, motion to file an overlength supplemental petition, and motion to amend the supplemental petition are all denied.

DATED at Olympia, Washington, this 4th day of November, 2020.

For the Court

CHIEF JUSTICE

APPENDIX D

Documents establishing the presentation of the claimed denial of the Right to Counsel on direct review to the Washington Supreme Court for discretionary review. . 3 pgs