IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT SHERMAN WILSON, Appellant.	No. 40179-7-II Consolidated with: No. 40259-9-II UNPUBLISHED OPINION

Johanson, J. — Following a jury trial, Robert Wilson appeals eight convictions arising from three incidents the trial court joined for trial: (1) attempting to elude police, (2) first degree robbery with a firearm enhancement, and (3) possessing a stolen vehicle. Wilson asserts numerous claims on appeal: improper joiner, violation of his right to confront a witness, prosecutorial misconduct, insufficiency of the evidence, ineffective assistance of counsel, and cumulative error. Wilson also filed a statement of additional grounds for review[1] (SAG) contesting the validity of a jury instruction that implied jury unanimity on a firearm enhancement and asserting ineffective assistance of counsel. We affirm all counts.

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[1] RAP 10.10.

FACTS

I. Underlying Crimes

While on patrol in November 2008, Puyallup Police Officer Scott Engle observed a vehicle traveling between 60 and 67 mph in a 35 mph zone. Officer Engle stopped the speeding car and contacted the driver (later identified as Wilson), the vehicle's lone occupant.

Wilson gave Officer Engle his temporary Washington driver's license; but, before viewing the license, Officer Engle observed a handgun on the car's passenger floorboard. Officer Engle backed away from the car, drew his handgun, and advised Wilson not to move toward the gun. Wilson immediately drove away; Officer Engle pursued.

Wilson fled through a residential neighborhood at speeds between 90 and 95 mph for approximately 6 blocks before abruptly turning and stopping. He then immediately exited his vehicle and fled on foot. Officers could not locate Wilson but, in his abandoned car, they found a prescription pill bottle in his name, a small plastic bag containing methamphetamine, an electronic scale, three rounds of .45 caliber ammunition, and a cellular phone.

In December 2008, a man approached the Java 2 Go coffee stand in Graham. He stuck his upper body into the window; pulled out a semiautomatic handgun; cocked it; and commanded Alysha Chandler, the barista, to open the register and give him all the money. Chandler complied, giving the man $120 from the cash register before he fled. Chandler immediately telephoned the authorities, and Deputy Anthony Filing responded.

Java 2 Go's security system camera recorded the robbery, capturing images of the

weapon, as well as the robber wearing jeans with a white embroidered design on the back pockets. Deputy Filing printed photos from the surveillance video and submitted them to Crime Stoppers, which made fliers that Deputy Filing distributed in the Graham area.

On January 2, 2009, Deputy Filing had a stack of the Crime Stoppers fliers in his car; in the back seat, a confidential informant (CI) working on an unrelated matter "looked over and said that [the photo on the flier] looked like Robert Wilson." 1 Report of Proceedings (RP) at 135. Deputy Filing then created a six-photo montage, including Wilson's photo, and asked Chandler whether any of the images resembled the robber. She identified Wilson. Deputy Filing learned that he could find Wilson at a house in Tacoma on January 2. Deputy Filing and members of a regional task force positioned themselves at the Tacoma home awaiting Wilson's arrival.

Eventually, Wilson pulled into the driveway driving a Nissan pickup truck. As officers converged on the house in their cars, Wilson attempted to leave. At this point, Wilson and Deputy Filing were moving toward one another, and Deputy Filing turned on his overhead lights and wigwags. As Deputy Filing continued toward Wilson, Wilson switched lanes and attempted to get around Deputy Filing; but, Deputy Filing positioned his vehicle to cut off Wilson. Wilson then backed up his truck, and Deputy Filing, believing Wilson was attempting to "get away," pinned Wilson's truck into the roadside ditch. 1 RP at 94. Wilson immediately jumped from the truck, ran through a residential yard, and hopped a fence. Deputy Filing pursued him on foot. Wilson ran around another house before he "stopped and gave up," and Deputy Filing placed him in custody. 1 RP at 99.

At the time of arrest, Wilson wore jeans with a white embroidered design on the back pocket flaps. The officers learned that Wilson was driving a stolen truck. Wilson had used a shaved Honda key to start the truck, and the officers found several other shaved keys in the truck. They also found a pistol grip, holster, smoking pipes, and a cellular phone in the truck.

II. Procedure

The State charged Wilson with one count of attempting to elude a pursuing police vehicle and one count of first degree unlawful possession of a firearm, both stemming from the November 18, 2008 incident. The State later added one count of possessing a stolen vehicle and one count attempting to elude a pursuing police vehicle, arising from the January 2, 2009 incident. Finally, the State charged Wilson with one count of first degree robbery with a firearm, stemming from the December 15, 2008 incident.

The State moved to join the three sets of charges. Wilson contested the joinder and argued that the separate sets of charges lacked any direct evidentiary link and would unfairly prejudice him at trial. The trial court granted the State's motion to join the charges, with leave for Wilson to move for severance should severance become necessary during trial.

Finally, the State filed a second amended information that set out eight counts against Wilson: first degree robbery with a firearm enhancement (count I, Dec. 15, 2008); two counts of first degree unlawful possession of a firearm (counts II and VI, Dec. 15, , and Nov. 18,2008); unlawful possession of a stolen vehicle (count III, Jan. 2, 2009); two counts of attempting to elude a pursuing police vehicle (counts IV and V, Jan. 2, 2009, and Nov. 18, 2008); unlawful

possession of a controlled substance (count VII, Nov. 18, 2008); and obstructing a law enforcement officer (count VIII, Nov. 18, 2008).

On direct examination, with no objection from Wilson, Deputy Filing testified that car thieves commonly use shaved keys to steal automobiles and that possession of shaved keys, alone, violates state law. During cross-examination, Deputy Filing testified about the CI's role in identifying Wilson. Later, the State elicited Deputy Filing's testimony that someone with greater familiarity with an individual, like a CI who is an acquaintance of an individual pictured in a flier, may have an easier time recognizing who that person is because of prior knowledge of that person's appearance. Deputy Filing refused to disclose the CI's identity.

Wilson's father testified that, on the day of the robbery, Wilson and his sister had been at their father's home. Wilson's father also testified that Wilson's sister revealed to him that Wilson was sought in connection with the Java 2 Go robbery.

Verizon Wireless executive relations coordinator, Fuad Dadabhoy, also testified for Wilson. Wilson used Dadabhoy's testimony to demonstrate that the phone Wilson commonly carried, one owned by Shannon Diaz, was used near the time of the robbery, up to 14 miles away from the robbery site.

The jury instructions included a firearm enhancement special verdict form implying that jury unanimity was required to render the special verdict. Wilson did not object to the special verdict instruction. In closing argument, Wilson's attorney said he did not call Wilson's sister to testify because she had problems in her past that prevented her from testifying.

The jury reached unanimous verdicts on all counts, including the special verdict for the firearm enhancement. Wilson appeals.

ANALYSIS

I. Joinder

Wilson first argues that the trial court erred in granting the State's motion to join for trial the charges arising from three separate incidents; specifically, he asserts that the joinder unfairly prejudiced him at trial. We disagree.

We review de novo questions of whether two or more offenses are properly joined. *State v. Bryant*, 89 Wn. App. 857, 866, 950 P.2d 1004 (1998), *review denied*, 137 Wn.2d 1017 (1999). Joinder allows the State to combine two or more offenses in one charging document with each offense listed as a separate count when the offenses: "(1) [a]re of the same or similar character, even if not part of a single scheme or plan; or (2) [a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3(a). We construe this rule expansively to promote the public policy of conserving judicial and prosecutorial resources. *State v. Hentz*, 32 Wn. App. 186, 189, 647 P.2d 39 (1982), *rev'd in part on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983). Yet, to lessen the chance for prejudice against a defendant, courts consider four factors before deciding whether to grant joinder: "(1) the strength of the evidence on each count, (2) the clarity of the defenses on each count, (3) the court's instructions on considering each count separately, and (4) the cross admissibility of the evidence on each count." *State v. Williams*, 156 Wn. App. 482, 500-01, 234 P.3d 1174, *review*

denied, 170 Wn.2d 1011 (2010).

Once a trial court properly joins offenses, the charges remain joined for trial unless the trial court severs them. *See* CrR 4.3.1; *Williams*, 156 Wn. App. at 501. If a party does not bring a motion to sever offenses during trial, it waives the right to later challenge that issue. *State v. Henderson*, 48 Wn. App. 543, 551, 740 P.2d 329 (1987) (holding that failing to renew a motion to sever "before or at the close of all the evidence" waived the severance issue).

Even though the trial court specifically granted Wilson leave to move to sever during trial, he failed to do so before the trial's conclusion. Wilson failed to renew his objection to the joinder and seek severance at trial; therefore, he failed to preserve this issue for appeal, and we do not address this issue further. *See Henderson*, 48 Wn. App. at 551.

II. Confrontation Clause

Wilson next argues that he is entitled to a new trial because he was denied his right to cross-examine the unknown CI upon whose statements the State relied. But Wilson, not the State, elicited the CI's statements from Deputy Filing. The invited error doctrine provides that a party who sets up an error at trial cannot complain of that error on appeal. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). This doctrine even applies to errors of constitutional magnitude being raised for the first time on appeal. *State v. Heddrick*, 166 Wn.2d 898, 909, 215 P.3d 201 (2009). Thus the invited error doctrine precludes Wilson from alleging this error on appeal. *See Henderson*, 114 Wn.2d at 868.

III. Prosecutorial Misconduct

Wilson next asserts that the State committed numerous instances of prosecutorial misconduct because it (1) elicited prejudicial testimony regarding the profile of car thieves; (2) elicited testimony that possession of shaved keys is a crime and then instructed the jury of the crime of possessing shaved keys during closing arguments; (3) withheld the identity of the CI, but argued the credibility of the CI; and (4) committed general misconduct during closing arguments. These claims fail.

To establish prosecutorial misconduct, Wilson must show both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Prejudice exists only where there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). We review a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Brown*, 132 Wn.2d at 561. A defendant's failure to object to alleged prosecutorial misconduct at trial fails to preserve the issue for appeal, unless the misconduct is so flagrant and ill intentioned that it evinces an enduring and resulting prejudice incurable by a curative instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

Also, RAP 10.3(a)(6) requires appellants to support their arguments with citation to relevant parts of the record and legal authority. We will not consider arguments unsupported by argument or citation to authority in the appellate brief. *State v. Mills*, 80 Wn. App. 231, 234, 907 P.2d 316 (1995).

A. Shaved Keys

Wilson argues that the State improperly elicited profile evidence regarding car thieves' use of shaved keys and that this testimony was not relevant to Wilson's case. He also argues that the State improperly instructed the jury on the law regarding shaved keys during closing argument.

Deputy Filing's testified that thieves commonly use shaved keys to commit automobile theft.[2] This constituted circumstantial evidence, and the State merely made circumstantial inferences as to Wilson's intent from his possession of the shaved keys. Deputy Filing's testimony was not improper profile evidence. And, the State did not commit misconduct by eliciting this evidence because Wilson's possession of shaved keys was relevant in showing Wilson's knowledge that the Nissan truck he was driving on January 2 had been stolen. *See* ER 401, ER 402.

Wilson's brief lacks any citation to the record to substantiate his claim that the State improperly instructed the finder of fact on the law. Because he fails to cite to relevant sections of the record, we will not consider this issue on appeal. *See Mills*, 80 Wn. App. at 234.

B. Confidential Informant

Wilson further argues that the State improperly withheld the CI's identity and then proceeded to argue the CI's credibility. This argument fails.

1. Withholding the CI's identity

The State has a legitimate interest in protecting a CI's identity. *State v. Atchley*, 142 Wn.

[2] Deputy Filing testified that car thieves commonly use shaved keys to steal automobiles and that possession of shaved keys, alone, violates state law.

App. 147, 154, 173 P.3d 323 (2007). The ability to protect a CI's identity from disclosure is termed "informers' privilege," which is the State's privilege to withhold from disclosure the identity of persons who provide information to law enforcement concerning the commission of crimes. *Atchley*, 142 Wn. App. at 154-55. This privilege, however, must yield to the defendant's need to know the CI's identity in cases where the CI is a material witness to the question of a defendant's guilt or innocence. *State v. Casal*, 103 Wn.2d 812, 816, 699 P.2d 1234 (1985).

Here, the State did not err in withholding the CI's identity because the law provides the State the privilege to withhold disclosure of the identity of confidential informants. *See Atchley*, 142 Wn. App. at 154-55. The CI was not a material witness and offered nothing regarding the question of Wilson's guilt.

Moreover, it was Wilson, not the State, who elicited the CI's identification of Wilson during Deputy Filing's cross-examination and Wilson also failed to object when Deputy Filing refused to share the CI's identity. Because Wilson elicited the CI's identification of Wilson, the invited error doctrine precludes him from raising this error on appeal. *See Henderson*, 114 Wn.2d at 868.

2. Arguing the CI's credibility

The State commits prosecutorial misconduct if, during closing argument, it bolsters a CI's credibility, using facts not in evidence. *See State v. Jones*, 144 Wn. App. 284, 293-94, 183 P.3d 307 (2008). But, a prosecutor has wide latitude in closing arguments to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Boehning*, 127

Wn. App. 511, 519, 111 P.3d 899 (2005).

Wilson's brief lacks any citation to the record to substantiate his claim that the State argued about the CI's credibility. Because Wilson fails to cite to relevant sections of the record, we need not consider this issue on appeal. *See Mills*, 80 Wn. App. at 234.

Although we need not consider this issue, we note that Wilson may be referring to this portion of the State's closing argument: "Was she or he, the CI, a better person to recognize the defendant from the flier than Deputy Filing, who had never seen him before?" 3 RP at 331-32. Wilson unsuccessfully objected to this question. The State did not commit misconduct because it did not base its credibility argument on facts outside the record. *See Jones*, 144 Wn. App. at 294. Moreover, the State may draw inferences from the evidence, like the CI's greater likelihood in recognizing Wilson. *See Boehning*, 127 Wn. App. at 519. Therefore, the State did not improperly bolster the CI's credibility.

C. Undermining the Presumption of Innocence

Wilson also argues that the State committed prosecutorial misconduct when, during closing argument, it "undermined the presumption of innocence." Br. of Appellant at 37. Again, Wilson's brief lacks any citation to the record to show the State undermined his presumption of innocence. Because Wilson fails to cite to relevant sections of the record, we decline to consider this issue on appeal. *See Mills*, 80 Wn. App. at 234.

IV. Sufficiency of the Evidence

Wilson further asserts that the evidence was insufficient to prove his guilt on the first

degree unlawful possession of a firearm (count VI, Nov. 18, 2008); first degree robbery (count I, Dec. 15, 2008); and, first degree unlawful possession of a firearm (count II, Dec. 15, 2008) convictions. These arguments lack merit.

We review a claim of insufficient evidence for whether, when viewing the evidence in the light most favorable to the State, "'any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.'" *State v. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009) (quoting *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990)). A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences from it. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *aff'd*, 166 Wn.2d 380, 208 P.3d 1107 (2009). And, we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Wilson argues that the State failed to prove that the gun Officer Engle spotted on the floorboard of Wilson's car on November 18, 2008, was indeed a real gun and not a fake. This claim lacks merit.

Officer Engle testified that the weapon he saw in Wilson's automobile appeared to be a

large, real silver handgun. Additionally, officers recovered real .45 caliber ammunition from the automobile after Wilson fled on foot. Wilson's arguments go to the weight to be given to evidence by the trier of fact, not to the sufficiency of the evidence. Viewing the evidence in the light most favorable to the State, particularly Officer Engle's testimony that he saw a real gun, any rational trier of fact could have concluded that Wilson possessed a real gun. *See Yarbrough*, 151 Wn. App. at 96. Also, officers recovered .45 caliber ammunition from Wilson's car after he fled, circumstantial evidence that could create reasonable inferences of gun possession. *See Theroff*, 25 Wn. App. at 593.

Wilson next claims that the State offered deficient proof on the robbery charge because the victim, Alysha Chandler, could not identify Wilson as the robber.

Chandler identified Wilson's picture in a photo montage, as well as in court, expressing no doubt that he was the robber. Wilson's arguments go to the weight to be given to evidence by the trier of fact, not to the sufficiency of the evidence. We do not weigh evidence nor make credibility determinations, as this is left to the jury. *Thomas*, 150 Wn.2d at 874. Construing the evidence in the light most favorable to the State, the evidence sufficiently identifies Wilson as the robber to sustain the conviction.

Wilson next asserts that the State failed to prove beyond a reasonable doubt that the firearm the robber used at Java 2 Go was operable and, therefore, real. But, Wilson identifies an incorrect standard, and the State need only prove that the gun was a "gun in fact" rather than a "toy gun." *State v. Raleigh*, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010), *review denied*, 170

Wn.2d 1029 (2011). The State need not even demonstrate that the gun was operable. *Raleigh*, 157 Wn. App. at 734.

The State presented an expert witness on firearms, Deputy Filing, who testified that, from the Java 2 Go surveillance video, he could see the firearm and determine that the weapon was a real, semiautomatic firearm. As the State proved that the gun was indeed a "gun in fact," it sufficiently presented evidence from which a reasonable trier of fact could find the essential elements of the crime beyond a reasonable doubt. *See Yarbrough*, 151 Wn. App. at 96.

V. Incorrect Jury Instruction

Wilson argues in his statement of additional grounds for review (SAG) that the trial court incorrectly instructed the jury that it needed to reach unanimity on the special verdict form for the firearm enhancement.[3] He is correct.

Generally, an appellant cannot raise an issue for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a). The appellant has the initial burden of showing that (1) the error is "truly of constitutional dimension" and (2) the error was "manifest." *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). An appellant cannot

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[3] The instruction for the special verdict form read:

> You will also be furnished with a special verdict form. If you find the defendant not guilty do not use the special verdict form. If you find the defendant guilty, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no."

Clerk's Papers at 127.

simply assert that an error occurred below and label the error "constitutional"; instead, he must identify an error of constitutional magnitude and show how the error actually affected his rights at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). If an appellant successfully shows that a claim raises a manifest constitutional error, then the State must prove that the error was harmless beyond a reasonable doubt under the *Chapman*[4] standard. *Gordon*, 172 Wn.2d at 676.

To determine whether an error is truly of constitutional dimension, appellate courts first look to the asserted claim and assess whether, if the claim is true, it implicates a constitutional interest, as compared to another form of trial error. *O'Hara*, 167 Wn.2d at 98. Jury instruction errors, however, are not automatically constitutional in magnitude. *O'Hara*, 167 Wn.2d at 106. Jury instruction errors requiring jury unanimity to answer "no" on the special sentencing-enhancement verdict form are not constitutional in nature. *State v. Grimes*, 165 Wn. App. 172, 189, 267 P.3d 454 (2011); *see also State v. Bertrand*, 165 Wn. App. 393, 402, 267 P.3d 511 (2011).

Wilson did not preserve the issue for appeal by timely objecting to the instruction at trial; and, on appeal he fails to identify any specific constitutional interest affected by the alleged jury instruction error. RAP 2.5(a); *See Grimes*, 165 Wn. App. at 189. He simply cites *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010); yet, we have interpreted *Bashaw*'s holding to indicate that jury instructions like those involved in Wilson's case do not constitute an error of

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[4] *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (noting that the State bears the burden to show harmless error beyond a reasonable doubt).

constitutional magnitude but, are instead, mere products of Washington common law.[5] *Grimes*, 165 Wn. App. at 189. And because the allegedly erroneous jury instruction does not rise to a level of constitutional magnitude, inquiry into whether the alleged error was "manifest" or "harmless" is not necessary.[6] For these reasons, we deny Wilson's appeal to vacate his firearm enhancement.

VI. Effective Assistance of Counsel

Wilson next claims that he was denied his constitutional right to effective assistance of counsel on five grounds: (1) during closing arguments counsel should not have noted Wilson's sister's "past problems;" (2) counsel should not have elicited testimony about the CI and then fail to move for the identity of the CI and her criminal history; (3) counsel should have objected to police testimony about the practices of car thieves and their possession of shaved keys; (4) counsel failed to subpoena witnesses that would establish an alibi; (5) and counsel failed to object to jury instructions that imply a unanimity requirement on the firearm enhancement and failed to propose an accurate instruction. Wilson's claims fail.

Washington has adopted the United States Supreme Court's two-pronged *Strickland* test

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[5] The Supreme Court in *Bashaw* applied a constitutional harmless error analysis *after* determining the instruction was erroneous. *Bashaw*, 169 Wn.2d at 147. The court neither expressly addressed nor held that the error was constitutional in nature for purposes of RAP 2.5(a).

[6] Even if the jury instruction error requiring unanimity was of constitutional magnitude, Wilson is required to show practical and identifiable consequences at trial. *See Gordon*, 172 Wn. App. at 676; *Grimes*, 165 Wn. App. at 190; *see also Bertrand*, 165 Wn. App. at 402. He cannot demonstrate any actual manifest prejudice resulting from this error. The error was harmless beyond a reasonable doubt, as Chandler testified to Wilson's being armed, and video footage captured Wilson wielding a semiautomatic weapon during the robbery.

for questions of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984); *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). The *Strickland* inquiry states:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."

State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 687). Under this standard, performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "'a strong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Also, when counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. *Kyllo*, 166 Wn.2d at 863.

First, Wilson asserts that his defense attorney should not have stated during his closing argument why he did not call Wilson's sister to testify.[7] The State concedes that this remark may

[7] Wilson's attorney argued during closing:

> She [the prosecutor] told you [the jury] that the sister should have testified,

constitute error, but it argues that Wilson cannot meet his burden to show that the statement prejudiced him. Wilson claims that this statement undercuts Wilson's father's credibility. Yet, given the volume of evidence against Wilson, this single remark seems very unlikely to have prejudiced Wilson. *See Thomas*, 109 Wn.2d at 225-26.

Second, Wilson now argues that his trial counsel should have compelled the State to offer the CI's identity and criminal history. Wilson asserts that the CI's identification of him (Wilson), bolstered Chandler's identification of Wilson as the armed robber and that with more information about the CI, Wilson could have better discredited the CI's identification. At trial however, defense counsel's decision to not elicit the CI's identity could be tactical. Wilson claimed that he had been misidentified as the robber, so the defense felt it was important to present to the jury the manner by which Wilson had first been identified. Also, in eliciting testimony that the CI identified Wilson in a photograph, the defense then introduced evidence that the CI may have supplied the identification in exchange for reward money or a plea deal, in an attempt to undermine the CI's credibility.[8] Because defense counsel's action could be considered a

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> where was the sister. The sister was here. I spoke to her. Could have been subpoenaed, could have been testifying. I talked to her. I didn't put her up there. The question becomes why didn't the defense put the sister on the stand. I'll be frank with you. There are problems with the sister, not of her testimony but of her past.

3 RP at 373.

[8] There may be other sound tactical reasons why defense counsel would not have pressed for further details on the CI's history. Perhaps the CI had a history of working closely with authorities to secure convictions. Perhaps the CI's track record demonstrates a reputation for reliability. Numerous reasons support how defense counsel's tactics may be characterized as legitimate trial strategy or tactics, so his performance is not deficient.

reasonable tactical decision, his performance was not deficient. *See Kyllo*, 166 Wn.2d at 863.

Third, Wilson claims that Deputy Filing's testimony about car thieves commonly using shaved keys lacked any probative value and that his counsel should have objected to it.[9] But the evidence was admissible to explain how the shaved keys recovered with the stolen vehicle were relevant to the charge of possession of a stolen motor vehicle. Because the evidence of shaved keys was probative, defense counsel's objection would have been futile. Thus, failing to object does not fall below the norms of practice, and Wilson's counsel's performance did not fall below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 688.

Fourth, Wilson argues that his defense counsel should have subpoenaed Shannon Diaz, the account holder of the telephone Wilson carried the day of the Java 2 Go robbery. During trial, Wilson presented evidence that, on the day of the robbery, Diaz's telephone made calls within the hour in which the robbery occurred; and, the phone's calls used cell towers up to 14 miles from the Java 2 Go coffee stand. Wilson asserts that Diaz's testimony would have established Wilson's exclusive possession of the cell phone and exonerated him by showing he

[9] It appears Wilson believes his counsel should have objected to Deputy Filing's testimony regarding shaved keys:

> Q Now, I want to talk about the shaved key [the shaved Honda key Wilson used to start the stolen Nissan truck]. You say it's ground down. Can that key, the Honda shaved key, fit into any kind of car?
> A Usually, they'll get a bunch of different ignition keys, not just one, and they'll shave them all down a little bit and they'll have more keys to try in a specific ignition and see which one fits the best, and the one that fits the best, a lot of times the suspects are able to get the key in there and are able to turn the vehicle on, using that foreign key that's not specific to the vehicle.

1 RP at 109-10.

was too far from the Java 2 Go stand at the time of the robbery to have committed the robbery.[10]

We do not review matters outside the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Nothing in the record supports Wilson's claim that Diaz's testimony had potential to exonerate him. Therefore, we need not review this matter. *See McFarland*, 127 Wn.2d at 335.

Fifth, Wilson claims that defense counsel was deficient in failing to object to the special verdict instruction's requirement that a "no" answer be unanimous—a requirement that the Supreme Court later held constituted error in *Bashaw*, 169 Wn.2d 133. At the time the trial court gave this instruction in Wilson's trial,[11] the Washington Pattern Instructions Committee accepted this instruction as standard law. Defense counsel's failure to challenge the instruction was not deficient performance, but accepted as within the norm.[12] Therefore, it was reasonable for defense counsel not to object to the jury instruction. *See Strickland*, 466 U.S. at 688.

VII. Cumulative Error

Wilson next asserts that his trial was "fraught with error," such that the cumulative error doctrine entitles him to relief. Br. of Appellant at 44. Under the cumulative error doctrine, an appellate court may reverse a defendant's conviction when the combined effect of errors during

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[10] Dadabhoy noted on cross-examination that anybody could have placed the calls from that phone on the afternoon of December 15, 2008.

[11] Wilson's jury reached a verdict on November 13, 2009. The Supreme Court did not issue *Bashaw* until July 1, 2010.

[12] *See e.g.*, *State v. Brown*, 159 Wn. App. 366, 372, 245 P.3d 776, *review denied*, 171 Wn.2d 1025 (2011) (counsel's failure to anticipate changes in the law does not amount to ineffective assistance).

trial effectively denied the defendant her right to a fair trial, even if each error standing alone would be harmless. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006), *cert. denied*, 551 U.S. 1137 (2007). The doctrine does not apply where the errors are few and have little or no effect on the trial's outcome. *Weber*, 159 Wn.2d at 279. There appear to be two errors committed at the trial court level, the improper jury instruction and defense counsel's remark that Wilson's sister did not testify because of past problems.

Wilson fails to establish that these errors were harmful such that they accumulated to deprive him of a fair trial or altered the trial outcome. Therefore, the cumulative error doctrine does not apply here because errors were few and had no effect on the trial's outcome. *See Weber*, 159 Wn.2d at 279.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Johanson, J.

We concur:

Armstrong, P.J.

Hunt, J.