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## Criminal Procedure - The Cumulative-Effect Approach to Plain Error Analysis - *Schmunk v. State*

Michael Pauling

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**CRIMINAL PROCEDURE—The Cumulative-Effect Approach to Plain Error Analysis. *Schmunk v. State*, 714 P.2d 724 (Wyo. 1986).**

Kay Schmunk suffered from severe migraine headaches for at least six years. Early in the morning of July 15, 1983, her husband, Dr. Robert Schmunk, injected her with three drugs, to relieve the pain of her latest attack. Dr. Schmunk awoke at 6:30 a.m., found Kay near death, and unsuccessfully attempted to resuscitate her.<sup>1</sup> Though the doctor informed the emergency room physician of the injections, toxicology tests revealed dosages of demerol and morphine that were three times what Dr. Schmunk had reported. These findings indicated that Kay died from an acute narcotic overdose.<sup>2</sup> Dr. Schmunk was later arrested for and convicted of first degree murder.<sup>3</sup>

On appeal Schmunk argued that the state failed to prove purpose and premeditation in those acts leading to Kay's death. He contended that his conviction was based solely upon speculation and innuendo created by the erroneous admission of a videotaped interview, hearsay, and other inadmissible evidence. He concluded that the prosecutor's success rested on a theory that Schmunk had a "dark side," which he hid from his friends and community and which caused him to kill what was imperfect.<sup>4</sup> Schmunk claimed that the state's efforts to establish this theory upon erroneously admitted evidence had the cumulative effect of denying him a fair trial.<sup>5</sup>

Noting the multitude of errors in the trial record and the prosecutor's exploitation of those errors, the Wyoming Supreme Court reversed Schmunk's conviction and held that several errors, considered together, may sufficiently prejudice a defendant so as to deprive him of a fair trial.<sup>6</sup> Previously, in *Browder v. State*,<sup>7</sup> the court labelled this treatment of multiple errors the cumulative effect approach.<sup>8</sup> Despite the court's prior use of this approach, three justices declined to apply it in *Schmunk*.<sup>9</sup>

To justify the court's reliance on the cumulative effect approach, this casenote examines the policies which recommend and limit its use. This casenote also investigates the characteristics of lower court proceedings which have consistently convinced other appellate courts to apply the

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1. Brief and Appendix of Appellant Robert P. Schmunk at 2-3, *Schmunk v. State*, 714 P.2d 724 (Wyo. 1986) (No. 84-176).

2. Brief of Appellee at 3-4, *Schmunk* (No. 84-176).

3. *Schmunk v. State*, 714 P.2d 724, 726 (Wyo. 1986).

4. *Id.* at 741-42.

5. *Id.* at 726-28.

6. *Id.* at 726.

7. 639 P.2d 889 (Wyo. 1982).

8. *Id.* at 895.

9. 714 P.2d at 745-46. Justice Brown concurred in reversing Schmunk's conviction, but transformed Justice Cardine's cumulative effect approach into plurality dictum by his refusal to apply it in this case. Justice Rooney, joined in dissent by Chief Justice Thomas, found no reversible error in Schmunk's trial.

cumulative effect approach in furthering those policies. Further examination shows that the cumulative effect approach ensures a fair trial without unduly burdening the trial court.

#### BACKGROUND

##### *The Cumulative Effect Approach and the Purposes of the Plain Error Rule*

The errors on which the *Schmunk* court based its reversal could only be considered if they rose to the level of plain error.<sup>10</sup> To reverse on the ground of plain error, the court must find that the error materially prejudiced the appellant by denying him a substantial right.<sup>11</sup> This requirement is derived from the policies underlying the federal plain error rule<sup>12</sup> which Wyoming adopted as Rule 49(b) of the Wyoming Rules of Criminal Procedure.<sup>13</sup> The drafters designed the federal rule to protect the defendant from substantial and harmful error while preventing wholesale reversal for harmless error.<sup>14</sup>

Typically, courts apply the plain error rule only to obvious errors or serious deficiencies affecting the fairness, integrity, or public reputation of the judicial proceeding.<sup>15</sup> Courts restrict the use of plain error to prevent parties from gambling on a favorable verdict and then resorting to an appeal on errors that might have been corrected by a timely objection.<sup>16</sup> Thus, in exercising the rule, courts must balance the waste of judicial resources, occasioned by giving effect to harmless error, against the possible prejudice to the defendant's right to a fair trial.<sup>17</sup>

The restricted use of the plain error rule suggests that appellate courts require such errors to be so substantial and serious that, unlike ordinary reversible errors, no objection is needed to apprise the court of the objec-

10. Because *Schmunk* failed to properly object to both the relevancy of certain hearsay and the admission of his refusal to take a lie detector test, the court's review was constrained by WYO. R. EVID. 103, which provides in part:

(a) Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) In case the ruling is one admitting evidence, a timely objection . . . appears of record . . . .

(d) Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court.

11. *Schmunk*, 714 P.2d at 739.

12. The Wyoming plain error rule is identical to FED. R. EVID. 103(a)(1), -(d). In the absence of Wyoming precedent, the court should rely on federal decisions. *Hays v. State*, 522 P.2d 1004, 1007 (Wyo. 1974).

13. WYO. R. CRIM. P. 49 provides:

(a) Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain error or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

This rule is identical to FED. R. CRIM. P. 52.

14. *Steele v. United States*, 243 F.2d 712, 715 (5th Cir. 1957).

15. *United States v. Jacquillon*, 469 F.2d 380, 386 (5th Cir. 1972).

16. *Id.*

17. *United States v. Frady*, 456 U.S. 152, 163 (1982).

tionable matter. However, no clear and objective standard exists to aid the courts in determining when that degree of seriousness is reached. Decisions finding plain error indicate that those findings depend upon the circumstances of a particular case.<sup>18</sup> Such results should be expected because an error's effect may be minor in one setting but crucial in another. The interplay between the participants in a trial, the potential consequences of the verdict, and the significance of the error in light of the other evidence, influence the jury's decision. The reviewing court should examine all these circumstances when considering plain error.<sup>19</sup> Thus, in elevating an error to the status of plain error, the court must view that error, not in isolation, but in light of the trial record as a whole. This consideration of collateral circumstances and the extent to which they magnify the prejudicial effect of error has been called the cumulative effect approach.<sup>20</sup>

### *Application of the Cumulative Approach: Federal Cases*

The United States Supreme Court, in *Berger v. United States*,<sup>21</sup> recognized that repeated prosecutorial misconduct could have a cumulative prejudicial effect upon a defendant. The Court found that the prosecutor repeatedly misstated facts, bullied witnesses, and suggested his personal knowledge of facts not in evidence. Though Berger failed to object to many of these tactics, the Supreme Court criticized the trial court for its failure to curb the continuing improprieties. The Court suggested that the prosecutor's conduct might have been calculated to misuse the public's trust in his office and to mislead the jury. Because the case was close, the Court, in reversing Berger's conviction, refused to dismiss the probable cumulative effect of the prosecutor's acts upon the jury's decision.<sup>22</sup>

While the *Berger* Court viewed the prosecutor's misconduct and the trial court's continuing tolerance as one protracted instance of error, the Second Circuit approached similar acts of misconduct in a different manner. In *United States v. Semensohn*,<sup>23</sup> the defendant denied that he had willfully evaded military service by furnishing false information to the draft board. The prosecutor, while cross-examining Semensohn, improperly invited the jury to doubt the defendant's credibility, falsely suggesting that Semensohn had previously committed a felony. Though the court of appeals thought this to be reversible even in the absence of an objection, it chose not to reverse for that error alone.<sup>24</sup> The prosecutor also commented on the defendant's exercise of his right to remain silent. Though the lack of a proper objection prevented the trial court from addressing this issue, the court of appeals found the prosecutor's comments to be

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18. *Schmunk*, 714 P.2d at 739.

19. *Kotteakos v. United States*, 328 U.S. 750, 761-64 (1946).

20. *Schmunk*, 714 P.2d at 743.

21. 295 U.S. 78 (1935).

22. *Id.* at 84-89.

23. 421 F.2d 1206 (2d Cir. 1970).

24. *Id.* at 1207-09.

25. *Id.* at 1210.

highly prejudicial. Because the case was close and the defendant's credibility crucial, the court found that the cumulative effect of the two instances of prosecutorial misconduct had denied Semensohn a fair trial.<sup>26</sup>

While the *Semensohn* Court clearly isolated individually reversible errors, the Supreme Court, in *Berger*, strained to characterize continuing prosecutorial misconduct as one protracted reversible error. Such results reflect the desire of these courts to ground their respective cumulative approaches in at least one definitely reversible error.

The Second Circuit retreated from this position when, in the same year as *Semensohn*, it decided *United States v. Grunberger*.<sup>26</sup> The defendant in that case pleaded not guilty to charges that he had sold and transported illegally imported watch movements. The sole witness to contradict Grunberger's testimony held a grudge against him, stemming from prior business dealings, and had agreed to inform on Grunberger only after both had been indicted on similar charges. The court of appeals considered several errors. The first error concerned the trial court's participation in the direct examination of both the defendant and his accuser. Though the content of the judge's questions and the impatient manner in which they were posed displayed obvious disbelief of the defendant, the defendant failed to object to those questions. He again failed to object when the prosecutor improperly offered his professional judgment and experience to the jury as guaranteeing the truth of the state's evidence. Finally, the trial court mistakenly instructed the jury that certain words spoken by the defendant constituted an admission of guilt, even though Grunberger claimed that he had been asking a question at the time.<sup>27</sup> Ignoring the individual sufficiency of these errors for reversal, the court of appeals declared that it could not ignore the totality of the improprieties when examining the fairness of the appellant's trial. The Second Circuit, therefore, adopted the position that, when analyzing an alleged error, it should examine the error's effect on the record as a whole, rather than as an isolated event.<sup>28</sup> By de-emphasizing the individual errors, the court modified the notion that such isolated events could be considered reversible without regard to other events at trial. In so doing, it abandoned the need to ground its cumulative effect approach in a single and definitely reversible error.

These cases have identified many of the factors which combine to prejudice the defendant. Typically, the evidence is close, and the defendant is relying heavily on his own credibility. The trial record typically reveals a series of errors. While appellate courts have claimed that one error contributes to another in the gradual growth of prejudice, they have consistently avoided a more detailed explanation of this process. Instead, they have focused upon the more obvious process by which prosecutors in each case have manipulated inadmissible evidence to disadvantage the defendant.

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26. 431 F.2d 1062 (2d Cir. 1970).

27. *Id.* at 1066-69.

28. *Id.* at 1069.

*Application of the Cumulative Effect Approach: Wyoming Cases*

In *Gabrielson v. State*,<sup>29</sup> the state alleged that the defendant attacked his companion with a knife after the latter rebuffed the defendant's homosexual advances. Prior to trial, the defendant moved to exclude evidence concerning prior felony convictions and prior accusations of illegal homosexual acts. The Wyoming Supreme Court held that the trial court properly denied the appellant's motion regarding evidence of his prior convictions. The court, however, declared that mere accusations were consistent with innocence and that the trial court should have excluded them.<sup>30</sup>

The court declined to comment upon the sufficiency of this error alone as a ground for reversal; instead it discussed prosecutorial misconduct as additional error. During cross-examination the prosecutor repeatedly sought information which, though not related to the charged offense, seriously damaged the defendant's credibility. The supreme court observed that the prosecutor lacked evidence to support the inferences suggested by these questions. It concluded that the state sought only to impugn the appellant's character.<sup>31</sup> Noting that the state's closing argument effectively asked the jury to convict solely on the basis of these attacks, the court concluded that the cumulative effect of all these errors prejudiced the appellant and deprived him of a fair trial.<sup>32</sup>

Nine years later, in *Browder v. State*,<sup>33</sup> the Wyoming Supreme Court took a slightly different approach to the cumulative effect doctrine. In a manner similar to *Berger*, the court found the prosecutor's conduct to be one protracted error.<sup>34</sup> In *Browder*, the only evidence was the rape victim's identification of the defendant. The prosecutor, attacking the defendant's credibility, repeatedly attested to the truth of the state's evidence and asserted his own beliefs as fact. Worse, he fabricated a description of the events leading to the alleged attack, offering no evidence to support his allegations.<sup>35</sup>

Though the defendant's closing argument outlined the weakness of the state's case and pointed to the prosecutor's unsupported allegations, the court found the defendant's right to a fair trial was severely prejudiced by the prosecutor's rebuttal. The prosecutor offered the authority and credibility of his office in lieu of evidence, asserting that the jury labelled him a liar if it failed to convict. The court, considering the closeness of the evidence against the defendant found it impossible to say that the evidence, rather than the prosecutor's unfair tactics, had swayed the jury. Though the appellant objected to none of the prosecutor's improprieties

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29. 510 P.2d 534 (Wyo. 1973).

30. *Id.* at 536.

31. *Id.* at 538.

32. *Id.* at 537-39.

33. 639 P.2d 889 (Wyo. 1982).

34. *Schmunk*, 714 P.2d at 746.

35. *Browder*, 639 P.2d at 892-94.

during trial, the supreme court determined that the cumulative effect of the prosecutor's conduct caused prejudicial error sufficient to require reversal.<sup>36</sup>

In these cases the Wyoming court applied the cumulative effect doctrine in a manner similar to that of the federal courts. In both jurisdictions the courts assess the role of the defendant's credibility in the jury's decision. The courts then determine the extent to which the errors affected that credibility. Finally, the courts examine the prosecutor's use of those errors. In a close case, where the prosecutor intentionally fostered the growth of prejudice, the court will be inclined to conclude that the defendant was denied a fair trial.

#### THE PRINCIPAL CASE

At trial, the state entered into evidence a videotaped pre-indictment interview between Dr. Schmunk and the state's investigator. In the videotape, Schmunk declined to take a polygraph test because he had experienced problems with a prior polygraph test, taken in relation to certain unnamed charges filed against him in Michigan.<sup>37</sup> Schmunk successfully moved to exclude any reference to the Michigan charges.<sup>38</sup> When the trial court admitted the videotape containing such references, Schmunk unsuccessfully moved for a mistrial. The court attempted to cure any prejudice by instructing the jury to ignore the objectionable portions of the tape and by ordering those portions excised from the tape. The tape, however, went to the jury during its deliberation, containing Dr. Schmunk's refusal to submit to the polygraph examination.<sup>39</sup>

The Wyoming Supreme Court concluded that the prosecutor impermissibly used Schmunk's refusal to establish "consciousness of guilt."<sup>40</sup> Therefore, the court held it to be error to inform the jury of Schmunk's refusal. The court further suggested that the admission of this evidence amounted to an improper reference to the exercise of Schmunk's right to remain silent, which it has long held to be prejudicial error.<sup>41</sup> The repetition of that error, that is, permitting the jury to view the tape again, especially disturbed the court. The court suggested that such a practice may be unfair regardless of the tape's content because it unduly emphasizes the testimony during the jury's deliberation. Here, the court concluded, this practice deprived Schmunk of a fair trial.<sup>42</sup>

Schmunk also disputed the admission of certain hearsay evidence. Pursuant to Rule 804(b)(6) of the Wyoming Rules of Evidence,<sup>43</sup> the state

36. *Id.* at 894-95.

37. *Schmunk*, 714 P.2d at 728.

38. *Id.* at 728-29.

39. *Id.* at 729-32.

40. *Id.* at 732-33.

41. *Id.* at 733 n.2.

42. *Id.* at 733, 744.

43. Wyo. R. EVID. 804(b)(6) provides:

Other Exceptions.—A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness,

served Dr. Schmunk with two separate notices, indicating that it would introduce hearsay regarding Kay's statements to her family about her dissatisfaction with her husband. Schmunk failed to object to the first notice but did object to the second notice which was served two days before trial. He complained that the second notice was too late; that it did not satisfy the requirements, spirit, or intent of the rule; and that it did not afford him a fair opportunity to meet the evidence. The trial court overruled the objection, permitting Kay Schmunk's mother to present her testimony.<sup>44</sup>

The Wyoming Supreme Court declared that hearsay is inadmissible unless it strictly conforms to one of the exceptions provided by the Wyoming Rules of Evidence. The second notice, arriving two days before the trial, did not meet the notice requirements of the rule. The court indicated that the failure to give sufficient notice is excusable when the proponent is not at fault. The state, however, possessed the evidence for nine months. The court held it error to admit such evidence over Schmunk's objections.<sup>45</sup>

Schmunk failed to object to evidence in the earlier notice but claimed on appeal that it was, nevertheless, inadmissible. The supreme court agreed, explaining that Rule 804(b)(6) requires hearsay to be evidence of a material fact. The court suggested that, had the doctor's knowledge of his wife's intentions affected his actions or motives, the hearsay statements describing those intentions might satisfy the materiality requirement. The state, however, offered no evidence suggesting the doctor's knowledge of Kay's plans to leave him. Kay's state of mind was, therefore, irrelevant. Finding that the record clearly showed the error and violated a clear and unequivocal rule of law, the court held that the admission of this hearsay under Rule 804(b)(6) was reviewable as plain error.<sup>46</sup>

The court explained, however, that a defect can only rise to the level of plain error if it is somehow more fundamental or serious than reversible error and if it materially prejudices the defendant.<sup>47</sup> Responding to the dissenting justice's concern with the specificity of Schmunk's objection to the admission of the videotaped interview,<sup>48</sup> the court conceded that the issues raised by that admission also might be reviewable only

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if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and interest of justice will best be served by admission of the statement into evidence. However, a statement may not be permitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

This rule is identical to FED. R. EVID. 804(b)(5).

44. *Schmunk*, 714 P.2d at 736-38.

45. *Id.* at 737-38.

46. *Id.* at 739-40.

47. *Id.* 739.

48. *Id.* at 749-50.



as plain error.<sup>49</sup> Thus, the court felt obliged to show that the effects of admitting the videotape and the hearsay were sufficiently serious to justify a finding of plain error. To establish this required degree of seriousness and to demonstrate the extent to which Schmunk had been prejudiced by these errors the court resorted to the cumulative effect approach to plain error analysis.

This approach isolates several factors which increase the prejudicial impact of errors, including: the importance of the defendant's credibility to his case, the evidentiary closeness of the case, the number of errors and their seriousness, the repetition of errors, and the extent to which the prosecuting attorney created and built upon those errors to the defendant's detriment. Nearly all of these factors were present in Schmunk's trial.

Schmunk offered, as his only defense, the credibility of his profession of innocence. The court thought it unlikely that his credibility could be restored after exposing the jury to such prejudicial materials as the videotape and Kay's hearsay statements.<sup>50</sup> Furthermore, the court reasoned that repeating the doctor's refusal to take a lie detector test had so damaged Schmunk's credibility that it seriously prejudiced his right to a fair trial.<sup>51</sup> Finally, the many serious errors in the case convinced the court that Schmunk could not have obtained a fair trial under such deficient proceedings.<sup>52</sup>

The court also suggested that the prosecutor played a significant role in prejudicing Dr. Schmunk because he controlled the videotape and was primarily responsible for introducing that excluded material into evidence.<sup>53</sup> Similarly, the prosecutor had Kay Schmunk's hearsay statements in his possession for nine months.<sup>54</sup> Noting that the notice requirement could be excused where the proponent was not at fault, the court refused to excuse the prosecutor in this case.<sup>55</sup>

The most damaging prosecutorial conduct, however, occurred in his closing argument when the prosecutor advanced the theory that Schmunk had a "dark side," which caused him to kill what was imperfect. The court observed that the state offered no direct evidence supporting that theory, but instead played upon the inferences drawn from evidence which was both inadmissible and prejudicial.<sup>56</sup> Because the material had been admitted into evidence at the trial, the court found the prosecutor's reference to it permissible. The court, however, having now found that evidence to

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49. *Id.* at 744.

50. *Id.* at 731-32.

51. *Id.* 733.

52. *Id.* at 745.

53. *Id.* at 728-30.

54. *Id.* at 736.

55. *Id.* at 736-37.

56. *Id.* at 742-43.

be inadmissible, concluded that such reference aggravated those errors by accumulating impermissible inferences, and deprived Schmunk of a fair trial.<sup>57</sup>

The concurring opinion<sup>58</sup> objected to the cumulative effect approach, if the court meant merely to combine several small, non-prejudicial errors in a decision to reverse. Justice Brown suggested that the cumulative effect approach was a vague concept which implied that no individual errors were sufficient to justify reversal. Because he found the individual errors to be reversible, Justice Brown proposed that the cumulative error concept unnecessarily cast doubt on those findings.

The dissenters<sup>59</sup> also criticized the plurality's reasoning as the mere addition of harmless errors. Recognizing, however, that such reasoning also represented the court's approach to the analysis of plain error, Justice Rooney restricted his criticism of the cumulative effect approach accordingly. Since plain error arises only in the absence of an objection, he argued that the plurality's approach would force a trial court to "keep score" of harmless errors and interfere with counsels' role in presenting the case.

#### ANALYSIS

These criticisms indicate that Justice Cardine, in his plurality opinion, did not clearly explain the cumulative effect approach. Because a majority of the court found certain errors sufficiently prejudicial to require reversal, an accumulation of prejudice seems superfluous. Justice Cardine's finding of reversibility, though, refers only to the situation that would exist had there been a proper objection in the trial court. Because he felt that plain error must rise to a level of seriousness beyond ordinary reversibility, Justice Cardine employed the cumulative effect approach to demonstrate such seriousness. To avoid criticism that its cumulative effect approach encourages reversals based upon a string of trivial errors, the court had to show that some of those errors would have, in the presence of an objection, required reversal. Because it must also establish that those errors could rise to the status of plain error, the court had to demonstrate through the cumulative error approach that prejudice had accumulated so as to seriously affect the fairness of Schmunk's trial.

The court's use of the cumulative effect approach suggests two aspects of its attitude towards the analysis of error. First, it suggests the court's view that certain errors, because they have a great potential to prejudice the defendant, demand careful scrutiny. Second, it suggests the belief that a reviewing court cannot evaluate an error's impression on a jury if it ignores other factors which contribute to that impression. This analytical posture is crucial if the court is to realistically assess the effects of prejudicial error and assure the defendant a fair trial.

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57. *Id.*

58. *Id.* at 745 (Brown, J., dissenting).

59. *Id.* (Rooney, J., dissenting).

Prejudice towards the defendant may significantly influence the jury's willingness to transform inferences into proof. Such prejudice arises when the jury is invited to speculate upon what evidence suggests rather than what it is capable of proving. This situation occurred twice during Dr. Schmunk's trial. The prosecutor's introduction of evidence concerning Kay Schmunk's desire to leave her husband invited the jury to infer that Dr. Schmunk knew of her feelings and that he killed her because of them. The prosecutor also invited the inference that Schmunk's refusal to take a lie detector test proved him guilty of murder.

In both instances the jury, relying on the prosecutor's trustworthiness, was not likely to distinguish between what the prosecutor proved and what he sought to prove. The jury might naturally assume that Kay's feelings proved that the Schmunks had an unhappy marriage. The prosecutor, however, introduced no other evidence to that effect, establishing only that Kay claimed to have had such feelings. The jury could also have decided that Dr. Schmunk's refusal to take the lie detector test proved that his claims of innocence were lies. The prosecutor, however, failed to provide evidence that Schmunk was insincere. He only succeeded in showing that Schmunk would take his chances at trial.

If criminal convictions are to be based upon proof beyond a reasonable doubt, the courts must require that the jury's inferences be guided by fact, rather than mere suggestion. Because innuendo may carry the jury beyond the facts, trial courts must adhere to those rules which limit the admissibility of evidence according to its trustworthiness and its probative value. Mistakes occur, however, and the trial court's conclusions about the prejudicial effect of such mistakes must be based on present events and experienced guesswork. The court cannot accurately predict how future events will affect the prejudicial impact of certain evidence. Therefore, appellate courts must closely examine erroneously admitted evidence to determine whether the jury made impermissible use of it. Because this determination is highly speculative, the Wyoming Supreme Court wisely chose to widen its inquiry through its use of the cumulative effect approach. By noting the use of the offending evidence throughout the trial, the court more accurately assessed its prejudicial effect upon the jury's decision.

Attempts to evaluate the prejudicial impact of an evidentiary error by isolating it from the rest of the proceedings ignores an important fact. The jury evaluates each piece of evidence only in relation to other evidence which either contradicts it or supports it. Guided by the suggestions and criticisms of the opposing counsel, the jury accumulates probabilities to arrive at its decision. The Wyoming Supreme Court correctly recognized that no analysis of an error's prejudicial effect on that jury decision could ignore this process.

If a piece of evidence predisposes the jury against the defendant, it will very likely affect the jury's evaluation of other evidence. If that evidence was erroneously admitted and suggestive of inferences beyond

those which the remaining evidence could support, such effect was achieved unfairly. The addition of similar errors during the trial increases the probability that those errors contributed to the gradual prejudgment of the defendant. Such prejudgment becomes especially harmful when properly admitted evidence is inconclusive. The jury's decision, which might otherwise rest largely on the defendant's credibility, will then rest on unobservable and unsupported speculation.

Though this predisposition against the defendant can grow spontaneously, a diligent prosecutor can contribute significantly to the speed and direction of that growth. An overzealous prosecutor attempting to buttress an unconvincing case can condemn the defendant to an unfair trial. When he fails to disclose his intention to offer prejudicial evidence and violates the trial court's orders to exclude prejudicial evidence, such a prosecutor gains an unfair advantage. When, as in *Schmunk's* case, he ignores weak though properly admitted evidence and resolves the material issues of a capital offense by reference to unsupported inferences, he unfairly builds upon the prejudice he has created. The Wyoming Supreme Court properly recognized the prosecutor's ability to create and nurture prejudice by its adoption of the cumulative effect approach to plain error analysis.

This approach recognizes a distinction between the trial court's duty to manage a fair trial and the appellate court's duty to ensure a fair trial. While the trial court could not anticipate the prosecutor's use of evidence nor the jury's evaluation of it, the reviewing court can examine the entire trial process. The trial court, therefore, should not be expected to evaluate errors except as they are individually raised by objection, but the appellate court need not limit itself to the type of review available to the trial court.

#### CONCLUSION

The Wyoming Supreme Court reversed *Schmunk's* conviction, not upon an accumulation of harmless error, but rather as a reaffirmation of the purposes of traditional plain error doctrine. These purposes, as embodied in both the Federal and Wyoming Rules of Criminal Procedure, cannot be achieved by attempts to standardize and define the concept of plain error. The integrity and fairness of judicial proceedings can only be evaluated by a thorough examination of the entire proceeding. By determining the effect of error over the course of the entire trial, this cumulative effect approach seeks to ensure that the entire proceeding was just and that the defendant, indeed, received a fair trial.

MICHAEL PAULING

