NO. 89485-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Appellee,

v.

JEFFREY RAY MONTGOMERY and REX ALAN McNICHOL,
Defendants/Appellants.

STATE OF WASHINGTON'S ANSWER TO PETITIONS FOR REVIEW

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I. INTRODUCTION

The request for review of the factual findings addressed in the Court of Appeals' unpublished decision does not raise an issue of public importance meriting Supreme Court review. The facts supporting the perjury convictions include a confession from one of the convicted officers, as well as the testimony of two witnesses present at the time the firearm was seized. Given the robust support for the jury's conclusion, there is no public interest in an additional review of the facts.

In addition to the lack of a factual issue of public importance, the Court of Appeals decision is consistent with longstanding case law, requiring that perjury convictions be supported by the testimony of at least one witness, plus an additional credible witness or corroborating circumstances established by independent evidence. *E.g., State v. Wallis,* 50 Wn.2d 350, 353, 311 P.2d 659 (1957). The testimony of the individual arrested and a second witness present at the arrest satisfied both prongs of the rule. Montgomery's audio recorded statement, in which he admits lying during the suppression hearing, provided further evidence.

Finally, contrary to Officer McNicol's assertion, admissibility of a stale conviction is not a constitutional issue. Crimes of dishonesty are presumed irrelevant for impeachment if they are over ten years old. *U.S. v. Bensimon,* 172 F.3d 1121, 1126 (9th Cir. 1999). As this Court has previously recognized, "the Sixth Amendment does not entitle a defendant to

present irrelevant evidence." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Even if the exclusion had been improper, alleged errors involving admission of a prior conviction do not raise a constitutional issue and are reviewed under a harmless error standard. *See State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989) (ER 609 errors reviewed under a harmless error standard, not for constitutional error).

II. ISSUES FOR REVIEW

If review were accepted, the issues would be:

1. Does sufficient evidence support a perjury conviction when two witnesses testified that the defendants' testimony was untrue, and one of the defendants confessed that the defendants' testimony was untrue?

2. Under Evidence Rule 609(b), convictions that occurred over ten years ago are presumptively inadmissible. Did the trial court err in denying admission of conviction of a gross misdemeanor conviction that was over ten years old?

III. STATEMENT OF THE CASE

Twelve-year-old J.A. lives with his mother Doris Resch and her boyfriend Robert Barham. RP 313; Ex. 10. On January 21, 2009, J.A. called 911 and reported that Resch and Barham are chronic meth users, and that Barham is a convicted felon and had a rifle hidden in the bedroom closet.[1] RP 313-14; Ex. 10. Pierce County sheriff's deputies Jeff Montgomery and Rex

[1] There is no evidence of a domestic dispute between Barham and Resch.

McNicol were dispatched to the home. RP 314; Ex. 10. On route, they confirmed that Barham had a felony drug conviction. Ex. 2 at 6; RP 424; Ex. 14 at 2-3. Montgomery believed there may have been a meth lab at the home in the past. RP 424; Ex. 14 at 3. After a firearm was retrieved from the home, Barham was arrested and transported to the jail at 7:07 p.m. RP 314; Ex. 10.

That same evening, Montgomery wrote the police report. RP 308, 400. Before or during the course of preparing the report Montgomery spoke with McNicol about the incident. RP 399; Ex. 2 at 46. In his report, Montgomery wrote that he knew Barham was a convicted felon and that Barham admitted having a rifle in the closet. Montgomery made numerous statements in his report detailing that both he and McNicol entered the home to retrieve the rifle from Barham. Montgomery wrote:

1. "Barham admitted to having the rifle and took Deputy McNicol in the house to get the rifle."
2. "I walked in the house and grabbed the rifle from Deputy McNicol."
3. "Deputy McNicol walked Barham outside where he told him he was under arrest for unlawful possession of a firearm."
4. "I went back in the house and spoke with [J.A.] and his mother, Doris Resch."

Ex. 1 at 6.

On March 16, 2010, McNicol and Montgomery met with Pierce County Deputy Prosecutor Lund to prepare for a suppression hearing that day. RP 117. Lund told the deputies that Barham's attorney was trying to suppress the firearm by arguing that entry into Barham's home was unlawful. RP 188. After the meeting, the parties proceeded to court.

McNicol and Montgomery were the only witnesses called by the State. RP 116, 146. McNicol testified that on January 21, 2009 dispatch advised him that a twelve-year old boy reported he was afraid to be in his home because his mother's boyfriend was a felon and had a firearm in the home. Ex. 2 at 5. McNicol said he contacted Barham and told him he knew he was a convicted felon and that there was a gun in the home. Ex. 2 at 8. McNicol testified that he believed the deputies did not have the right to enter the home to retrieve the gun. Ex. 2 at 23. McNicol claimed that after Barham admitted he was a felon and that he had a gun, McNicol allowed Barham to retrieve the gun from the home and bring it to him while he waited outside. Ex. 2 at 9. McNicol acknowledged that he read Montgomery's report prior to testifying. Ex. 2 at 26.

Montgomery testified next. Ex. 3 at 38. He said he was dispatched to the home for a welfare check after twelve-year old J.A. reported living with a convicted felon who had a gun in the home. Ex. 3 at 41-43. On route to the home, Montgomery confirmed that Barham had a felony drug conviction. Ex. 3 at 43, 50. Montgomery repeatedly claimed that Barham brought the

rifle to McNicol, who remained outside, and that Montgomery retrieved it from McNicol. Ex. 3 at 46-47, 57-60, 81. [2] Montgomery testified that every reference in his report stating he and McNicol entered the home was a mistake. Ex. 3 at 46-47, 57-60, 81.

On May 14, 2010 the trial judge issued an order finding neither deputy credible and suppressing the firearm. CP 136; RP 146-47. A day or two later, Lund reported the inconsistencies between the police report and the deputies' testimony to the Pierce County Sheriff's Office. RP 148. Based on her prior experience working with internal affairs investigations, Lund waited for entry of the order before reporting to the Sheriff's Office, because she knew they would not proceed until the Findings and Conclusions were entered and the criminal case was officially concluded. RP 148. Detective Sergeant Ben Benson was assigned to investigate whether the officers lied during the hearing. RP 306.

Detective Benson separately interviewed Appellants regarding the events at the Barham home and the suppression hearing. RP 322. McNicol acknowledged that he went to the Barham home for a welfare check after a child called dispatch to say he was afraid because drugs were being used in the home and his mom's boyfriend was a convicted felon who had a firearm in the home. RP 324. McNicol acknowledged that he and Montgomery

[2] At the beginning of his testimony, Montgomery had to jog his memory once to recall the information he received from dispatch. Ex. 3 at 42. McNicol never again expressed hesitation, doubt or uncertainty as he repeatedly testified that neither deputy entered the home to retrieve the firearm. Ex. 3.

discussed this incident on the evening it took place. RP 326. McNicol told Benson he believed the deputies did not have the right to enter the home to retrieve the gun. RP 327; Ex. 2 at 23 (McNicol testimony that he did not feel the deputies had the right to enter the home).

McNicol claims he advised Deputy Prosecutor Lund before the hearing that the police report was wrong. McNicol Pet. at 5. Lund denies this. RP 128. Although Montgomery and McNicol were together in the car, in the prosecutor's office and in the hallway prior to the suppression motion, Montgomery does not allege that he or McNicol advised the prosecutor the report was wrong. According to Montgomery, McNicol did not look at the report or tell him it was wrong until they were alone outside the courtroom prior to testifying. Ex. 14 at 4, 16; Ex. 15 at 4.

Detective Benson also interviewed Montgomery.[3] Montgomery initially claimed he did not know whether he and McNicol had entered the home to retrieve the gun or whether they had allowed Barham to bring it out to them. Ex. 14 at 3. Detective Benson pointed out that when Montgomery testified at the hearing he never said he could not remember how the deputies took possession of the gun, but instead insisted repeatedly and with certainty that Barham had brought it to them. Ex. 14 at 5, 9, 10. Montgomery acknowledged that was true. Ex. 14 at 5, 9. Montgomery ultimately

[3] A redacted version of the recorded interview was admitted and played for the jury without objection. Boxes drawn around portions of the transcript indicate which parts of the recording were redacted. RP 329-32; Ex14, 15.

admitted that he knew the deputies entered the home to retrieve the gun, that the statements in his report were true, and that his testimony at the hearing was false.[4] Ex. 15 at 7.

The officers were charged with perjury in the first degree and tried as co-defendants. CP 1-2, 325-26. Prior to trial, they moved to admit a variety of evidence to impeach Barham, including a 2000 gross misdemeanor conviction for attempted possession of stolen property. RP 88. The trial court excluded the 2000 gross misdemeanor but admitted more recent impeachment evidence. RP 93. A jury found them guilty as charged. CP 274, 372. In considering the consolidated appeals, the Court of Appeals affirmed the convictions.

IV. REASONS WHY REVIEW SHOULD BE DENIED

A. The Evidence Required To Establish The Perjury Was Consistent With State And Federal Case Law

Appellants claim that under *State v. Wallis*, a person cannot be convicted of perjury if there is any inconsistency between the testimonies of two State witnesses. *State v. Wallis*, 50 Wn.2d 350, 311 P.2d 659 (1957). Appellants misread *Wallis*. In *Wallis,* DiLuzio was charged with selling liquor to a minor. *Id.* at 350. After Diluzio was arrested, Defendant signed an affidavit documenting his purported knowledge of Diluzio's actions. *Id.*

[4] Asked if he knew during the suppression hearing that his testimony was inaccurate, Montgomery replied: "[t]he bottom line, yeah, cause here I had the report, and that's, I wrote it, and that's what I recall happening." "And you testified to something different?" "Yes." Ex. 15 at 7.

at 352. Defendant was convicted of perjury after disavowing the statements he made in the affidavit at Diluzio's trial. *Id.* at 350.

On appeal, the State conceded there was no "direct or independent evidence" to prove which of Defendant's two statements were false. Admittedly unable to meet the perjury requirement of either two credible witnesses whose testimony is positive and directly contradictory of the defendant's oath or one such witness plus independent evidence of corroborating circumstances, the State urged the Court to abandon this rule. *Id.* at 353-355. The Court refused, and overturned Defendant's conviction because the only evidence against him was his own two contradictory statements. *Id.* at 354-356.

Appellants cite to a statement in *Wallis* that "contradictory statements, sworn or unsworn, are not direct evidence of the falsity of the testimony which the law requires" and claim that two witnesses with direct testimony contrary to Defendant's oath cannot establish perjury if there are any inconsistencies between the witness' accounts. Montgomery Pet. at 10; McNicol Pet. at 12. On this basis, Appellants argue that the Court of Appeals' opinion that Barham's and Resch's testimony provided sufficient evidence for a conviction conflicts with *Wallis* because their testimony was not identical. This argument misconstrues *Wallis*. *Wallis* simply holds that a defendant's self-contradictory statements alone cannot sustain a perjury conviction.

B. The Request For Review Of The Factual Findings Does Not Present An Issue Of Public Importance

Barham testified that Appellants came to his home and told him they knew he was a felon and that he had a gun in the home. RP 231-232. Barham testified that he told the deputies this was true, and when he went to the back bedroom to get the gun McNicol went with him. RP 233-234. After Barham called for Resch, she and Montgomery met McNicol and Barham in the bedroom. When Resch tried to retrieve the gun from the closet McNicol took it from her. RP 234, 238.

Resch testified that Barham called her to the front room and when she arrived two deputies were there. RP 256. The deputies asked if there was a gun in the home, and Barham and Resch told them there was one in the back closet. RP 256-57. Resch testified that one deputy handcuffed Barham and took him outside while the other deputy followed her to the bedroom. RP 257. She pointed the gun out to the deputy and he either grabbed it or she handed it to him. RP 257; 269.

The Court of Appeals properly found that Barham's and Resch's testimony supported the perjury convictions because "[t]hough the details of these two eyewitness accounts differ, the material facts are consistent – they both testified that the deputies entered the home to seize Barham's firearm." *State v. Montgomery, No. 42938-1-II, slip op. at 7 (Wash. Ct. App. October 8, 2013).*

Appellants ignore well-established case law requiring reviewing courts to defer to a jury's determination of witness credibility. "[C]redibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), citing *State v. Casbeer*, 48 Wn. App. 539, 740 P.2d 335 (1987).

Minor differences between people recounting an event is common and therefore not a basis upon which to reject testimony. In denying a motion to dismiss made at the conclusion of the State's case, the trial judge found that Barham's and Resch's testimonies were consistent regarding the material issue of whether the officers entered the home. RP 384. The trial judge noted that consistent testimonies are more suspect than those involving minor discrepancies.[5] The Court of Appeals properly rejected Appellants' attempt to discredit Barham's and Resch's testimonies based on minor and inconsequential differences.

1. The trial court correctly found that the police report provided evidence of perjury

Appellants also challenge the Court of Appeals' determination that Montgomery's police report provided corroborating evidence to support a finding of guilt. *Slip op. at 7.* Appellants contend the report is not evidence because it was not admitted as "substantive evidence." This argument is

[5] "It's often said that if it was an exact mirror image of each other's testimony, you'd actually have more concern than if they [sic] were discrepancies, but I agree with the State. In regards to the issue of whether they entered that house, both of them were very consistent in regards to the fact that the officers did not stay out on the porch and that they, in fact, entered the home." RP 384.

without merit because the evidentiary value of the report does not hinge on which evidence rule it was admitted under. The evidentiary value of the report is that it shows what Montgomery wrote about the event just hours after it occurred.[6] Montgomery's argument that portions of the report containing statements of others should have been redacted is unpersuasive as those statements are irrelevant as to the issue of whether Appellants committed perjury. This Court should deny review.

2. Sufficient evidence was presented at trial to affirm the jury's verdict that Montgomery committed perjury.

A defendant's admissions or contradictory statements are sufficient to corroborate the testimony of a single witness, and together support a conviction for perjury. *State v. Buchanan,* 79 Wn.2d 740, 489 P.2d 744 (1971). For Montgomery, such evidence exists, both in the form of his admission and in the form of his contradictory statements.

Montgomery made numerous contradictory statements. He first testified at the suppression hearing that he remembered Barham bringing the gun out of the home. Ex. 3 at 46-47, 76, 79, 80, 81, 82, 103. He later told Benson he did not remember how the gun was retrieved, and that he was just basing his testimony on what McNicol had told him had occurred.[7] Ex. 14 at 3, 4, 14. He eventually admitted that his report was correct when it said he

[6] McNicol's attempts to distance himself from the police report are unconvincing given that both he and Montgomery admitted to discussing the call prior to or during Montgomery's writing of the report. RP 326; Ex. 3 at 46.

[7] If this statement to Benson were true then Montgomery's suppression hearing testimony claiming he remembered the events when in fact he did not constitute perjury.

and McNicol entered the home to retrieve a gun and that he lied about that during the hearing. Ex. 15 at 7.

Under *Buchanan,* Montgomery's admission or his contradictory statements plus the testimony of either Barham or Resch provide sufficient evidence to sustain his conviction. Additionally, Montgomery's police report written immediately after Barham's arrest which explicitly contradicted his testimony fourteen months later also provides independent and corroborating evidence that he committed perjury. The Court of Appeals correctly found that sufficient evidence supports the jury's finding that Montgomery committed perjury. This Court should deny review.

3. Sufficient evidence was presented at trial to affirm the jury's verdict that McNicol committed perjury.

McNicol's trial testimony was so incredible the jury had ample grounds to conclude that his claim that he allowed a convicted felon to retrieve a gun while he waited outside was a lie. McNicol admitted that during the fourteen months between his visit to the Barham residence and his testimony at the suppression hearing he responded to hundreds of calls. RP 455-56. McNicol maintained that despite this time passage and the hundreds of intervening calls he remembered allowing Barham to retrieve the gun while he waited outside. RP 455, 464-65.

The distance from the front door of Barham's home to the bedroom where the gun was located is approximately fifty feet. RP 237. Due to the

configuration of Barham's residence a person standing on the porch of the home, even if leaning in, cannot see the bedroom where the firearm was located. RP 315-17, 237-38. Prior to arriving at the Barham home McNicol knew that meth was possibly being used, that there was a firearm there and that Barham was a convicted felon. RP 458. McNicol further admitted on cross examination that he has encountered meth users before and they can act unpredictably, erratically and violently, and that meth plus guns can easily turn into a deadly situation. RP 465-66.

Detective Benson, a twenty-seven year veteran of the Pierce County Sheriff's Department, testified extensively about the officer safety training all deputies receive. RP 304. He explained that based on that training it would never be acceptable to let a convicted felon enter a home to retrieve a gun on his own. RP 317-19. The Court of Appeals noted that Benson's recorded interview of Montgomery, which was played for the jury and in which Montgomery admitted to lying during the suppression hearing, provided evidence that both Appellants committed perjury. In that interview, Montgomery said that in his experience McNicol would have never allowed Barham to retrieve the gun on his own, and that in the two years the deputies have worked together he had never seen McNicol do anything like that.[8] Ex. 14 at 6, 11. McNicol had about thirty-years of law enforcement experience.

[8] Montgomery told Benson "I can't imagine he would have let him go get the gun by himself," and explained that "to even think about that is, is ridiculous, that that's what happened." Ex. 14 at 13; Ex. 15 at 7.

RP 442, 464-65. McNicol's claim that he allowed Barham to retrieve the gun on his own is unbelievable on its face and wholly discredited by Benson's testimony, Montgomery's statements, and by the surrounding circumstances. RP 468.

McNicol also had a substantial motive to lie at the suppression hearing, because notwithstanding the prosecutor's belief that the entry into the home was lawful McNicol thought it was not. Indeed, even after the prosecutor's assurances McNicol testified at the suppression hearing that he did not believe the deputies had the right to enter the home to retrieve the gun. Ex. 2 at 23. He subsequently told Benson the same thing. RP 327. McNicol's belief demonstrates a strong motive to lie.

McNicol's testimony at trial further exposed him as a man willing to tailor his testimony to address unfavorable circumstances. For example, McNicol told Benson on June 8, 2010 that he reviewed the police report in the car while he and Montgomery drove to the courthouse together for the suppression hearing, and then told Montgomery the report was wrong. RP 327. McNicol was present at trial when Montgomery's June 8, 2010 recorded interview was played for the jury. During that interview Montgomery told Benson the he and McNicol never discussed the case in the car, and that it wasn't until they were sitting outside the courtroom with no one else present that McNicol asked to see the report and then told

Montgomery it was wrong. Ex. 14 at 4, 16; Ex. 15 at 4. Montgomery confirmed this when he testified at trial. RP 402.

After hearing this, McNicol testified at trial that although he told Benson he read the report in the car he now suddenly remembered he did not read it until he was in the hallway waiting for the suppression hearing to begin. RP 443-44. On cross, McNicol was confronted with the fact that he was now claiming that his recollection of the events of March 16, 2010 were better eighteen months after the event in question than they were when he talked with Benson two months after the event. RP 453-55. At that point McNicol hedged and said he was not sure when he told Montgomery the report was wrong. RP 455.

The discrepancy as to when McNicol realized the report was wrong is significant, because McNicol claimed he told the prosecutor the report was wrong when he learned that the defense was challenging the deputies' right to enter the Barham home. This could have occurred only if McNicol read the report prior to meeting with the prosecutor. Prosecutor Lund testified she did not know that McNicol and Montgomery were going to say that they did not enter the home until she heard them testify. Although Montgomery and McNicol were together at all times - in the car, in the prosecutor's office and in the hallway prior to the suppression motion - Montgomery never alleged that he or McNicol advised the prosecutor the report was wrong. In fact, according to Montgomery, McNicol did not look at the police report or tell

him it was wrong until the two men were alone outside the courtroom just prior to testifying. Ex. 14 at 4, 16; Ex. 15 at 4. McNicol's attempt to alter his recollection to support a false claim that he told the prosecutor the report was wrong served only to highlight his willingness to alter his testimony.

4. Any rational trier of fact could have found sufficient evidence to support a perjury conviction

The Court of Appeals properly found "because the State's direct and corroborating evidence all demonstrated the material issue – that the deputies entered Barham's home, contrary to their suppression hearing testimony – it satisfied both parts of the heightened sufficiency standard in perjury proceedings." *Slip op. at 8.*

A person is guilty of perjury in the first degree if in any official proceeding, he makes a materially false statement under oath which he knows to be false. RCW 9A.72.020(1). To prove perjury, the State must present (1) the positive testimony of at least one credible witness which is directly contradictory of the defendant's oath and (2) another direct witness or independent corroborating evidence of the circumstances that overcomes the defendant's oath and legal presumption of innocence. *State v. Olson*, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979).

The direct testimony required to support a perjury conviction "must come 'from someone in a position to know of his or her own experience that the facts sworn to by the defendant are false.'" *State v. Singh*, 167 Wn. App.

971, 976, 275 P.3d 1156 (2012)(quoting *Nessman v. Sumpter*, 27 Wn. App. 18, 24, 615 P.2d 522 (1980)). The corroborating evidence "need not equal in weight the testimony of a second witness," but it "must be clear and positive and so strong that, with the evidence of the witness who testifies directly to the falsity of the defendant's testimony, it will convince the jury beyond a reasonable doubt." *State v. Rutledge,* 37 Wash. 523, 527, 79 P. 1123 (1905).

The requirements regarding the form evidence in a perjury case must take do not alter the standard of proof which applies to all criminal charges. Nor do these requirements supersede case law requiring reviewing courts to accept the jury's determination of credibility. *E.g. State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton,* 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

When the sufficiency of the evidence is challenged, a reviewing court must decide whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the required elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A challenge to the sufficiency of evidence "admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002). Viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State and interpreted most

strongly against the defendants, a rational trier of fact could have found that Appellants committed perjury in the first degree.

5. Appellants' status as sheriff's deputies does not create a matter of public interest meriting review

Appellants argue review is warranted because convicting officers of perjury threatens to deter police candor. But as the United States Supreme Court has explained, the status of the defendant does not impact liability for perjury. "A police officer on the witness stand performs the same functions as any other witness; he is subject to compulsory process, takes an oath, responds to questions on direct examination and cross-examination, and may be prosecuted subsequently for perjury." *Briscoe v. LaHue*, 460 U.S. 325, 342, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983). The threat of perjury ensures the witness' reliability. *Bruce v. Byrne-Stevens & Associates Eng'rs, Inc.*, 113 Wn.2d 123, 126, 776 P.2d 666 (1989). The public interest strongly supports application of perjury laws to police officers. When an officer is dishonest on the stand, it has tremendous potential to negatively impact the constitutional rights of the defendant.

C. Denial of Admission Of Barham's Stale Conviction Was Proper And Does Not Raise A Constitutional Issue For Review

The trial court denied a pretrial motion to admit Barham's 2001 conviction for attempted possession of stolen property. Because the conviction was over 10 years old, it was inadmissible under Evidence Rule

609(b)[9] unless "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." RP 92. The trial court denied admission of the attempted conviction because it was over ten years old and Barham's credibility could be impeached with the 2003 felony drug conviction that was the basis of his Unlawful Possession of a Firearm arrest.

McNicol seeks review of the Court of Appeals' conclusion that even if the trial court had erred in denying McNicol's motion to admit Barham's stale conviction, it was harmless. The Court of Appeals properly applied a harmless error analysis. *Slip op. at 9.* Alleged errors under ER 609 are reviewed under a harmless error standard. *See State v. Brown*, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989). An erroneous ER 609 ruling does not constitute reversible error unless, "had the error not occurred, the outcome of the trial could have been materially affected." *State v. Calegar,* 133 Wn.2d 718, 727, 947 P.2d 235 (1997). In this case, the impeachment value of Barham's aged conviction was inconsequential and there was substantial evidence upon which to convict him.

The ability to use more relevant impeachment evidence may justify limiting cross examination. *State v. Barnes,* 54 Wn. App. 536, 541, 774 P.2d 547 (1989). Impeachment evidence admitted against Barham included a

[9] Under ER 609(b), a conviction is not admissible if over 10 years have elapsed since the conviction or release from confinement imposed for the conviction, unless the court determines "that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

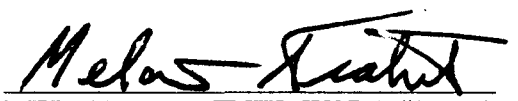
felony drug conviction, felonious possession of a firearm, alleged chronic meth use, and a possible prior meth lab in his home. The stale gross misdemeanor conviction would not have provided significant additional impact beyond the evidence the jury received. There was no reasonable probability that admitting the stale conviction would have materially affected the trial outcome. As such, any error was harmless.

Contrary to McNicol's contention, this does not present a constitutional question. Exclusion of a witness' conviction under ER 609(b) does not curtail the Sixth Amendment right to confrontation. *State v. Martinez*, 38 Wn. App. 421, 422-25, 685 P.2d 650 (1984). Crimes of dishonesty which are over ten years old are presumed irrelevant. *U.S. v. Bensimon,* 172 F.3d 1121, 1126 (9th Cir. 1999). Such convictions are inadmissible absent an extraordinary showing because "the Sixth Amendment does not entitle a defendant to present irrelevant evidence." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983).

V. CONCLUSION

The State asks that the Court deny the petitions for review.

RESPECTFULLY SUBMITTED this 3rd day of January, 2014.



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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent v. JEFFREY MONTGOMERY AND REX McNICOL, Defendant/Appellant	DECLARATION OF SERVICE

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Copies of the following documents:

1) State of Washington's Answer to Petitions for Review

2) Declaration of Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 3rd day of January, 2014.

LISSA TREADWAY
Legal Assistant

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Good morning. I attach for filing in Case No. 89485-0 (State v. Montgomery) the following documents:

- State of Washington's Answer to Petitions for Review
- Declaration of Service

The attached is filed on behalf of:

AAG Melanie Tratnik
WSBA #22576, OID #91093
(206) 389-2005

Please do not hesitate to contact our office if you have any questions.

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