No. 89485-0
Court of Appeals No. 42938-5-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff-Appellee,

v.

REX McNICOL
Defendant-Appellant

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

The Honorable John R. Hickman, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Appellant Rex McNicol asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

McNicol seeks review of the unpublished opinion filed in *State v. McNicol*, No. 42958-6-II. *See* Exhibit 1.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in affirming McNicol's perjury conviction when the conviction was not supported by the testimony of one credible and another corroborating witness.
2. Whether this case presents a question of public importance when a perjury conviction of a police officer can be supported by the inconsistent testimony of two witnesses, who were involved in a police investigation.
3. Whether the Court of Appeals erred in affirming the trial court's decision preventing Deputy McNicol from introducing evidence of one of the State's key witnesses about his prior conviction for a crime of dishonesty.

D. STATEMENT OF THE CASE

1. Background Facts

On January 21, 2009, J.A., a twelve-year-old boy, called 911 to report a domestic dispute between his mother and her boyfriend.[1] J.A.

[1] ER 458.

lived with his mother, Resch, and her boyfriend, Barham, in a small mobile home in Pierce County. During the 911 call, J.A. told the dispatcher that he was afraid of Barham. He feared that Barham would harm him or his mother. The boy was worried that a firearm located in the residence might be used in the dispute.

Pierce County Deputies McNicol and Montgomery were sent to investigate and diffuse the dispute. While en route, the deputies learned that Barham had a prior felony drug conviction[2] and was prohibited from possessing a firearm. Upon arrival at the scene, the deputies contacted the two residents, Barham and his girlfriend, Resch, outside the home. The deputies confronted each of them about J.A.'s report that there was a firearm in the home. Both confirmed that a firearm in the home.

At that point, both officers knew that the firearm was evidence of felony possession. More importantly, seizure of the firearm was necessary to protect J.A. and his mother from any potential harm. To serve these ends, the deputies secured the firearm and arrested Barham.[3]

Barham was later charged with Unlawful Possession of a Firearm. During Barham's prosecution, he moved to suppress the firearm, arguing that the deputies unlawfully seized the firearm from the home.[4] Before the

[2] Plaintiff's Exhibit 3 at 43.
[3] CP 18.
[4] RP 116.

suppression hearing, the prosecutor assigned to the case, Ms. Lund, discussed the merits of the motion with each of the Deputies.

She told the deputies that Barham's attempt to suppress the firearm was frivolous and that it was "ridiculous" that the motion had to be argued.[5] Ms. Lund also told the deputies that the motion lacked merit because Barham consented to the search, making the search lawful. And even if Barham did not consent, Ms. Lund told the deputies could have lawfully entered the house to seize the firearm as part of a "welfare" check, an exception to the warrant requirement.[6]

At the hearing, both Deputies McNicol and Montgomery testified that they entered the Barham's home to perform a welfare check because young J.A. reported a potential domestic dispute. And, given J.A.'s report that there was a firearm in the home, both deputies had significant concerns about the safety of the residents at that time including J.A. To address these concerns, both deputies testified that they entered the home to complete the welfare check.[7] But, they also testified that they did not do so until after they had placed Barham, the reported threat, under arrest.[8]

Barham's defense counsel vigorously cross-examined each

[5] RP 110, 117.
[6] RP 214.
[7] CP 31, 64, 67.
[8] CP 31, 64, 67.

Deputy.[9] Barham argued that the firearm must be suppressed because the Deputies entered the home without giving each resident *Ferrier* warnings. Judge Buckner granted Barham's motion to suppress the firearm.[10] After the suppression hearing, Ms. Lund did not tell defense counsel that she had concerns about the testimony.[11] Soon after the hearing, Ms. Lund wrote a report in which she evaluated the accuracy of the deputies' testimony. In that report, she noted that each deputy's testimony was inconsistent with Deputy Montgomery's written report. Even then, however, Ms. Lund still believed the deputies were being truthful.[12]

Not until months later did Ms. Lund change that opinion. In a second report, she wrote that she now believed that the deputies *had lied* during their testimony. She sent that report to the Pierce Country Sherriff's Office and the State later charged both deputies with perjury.[13]

Deputy McNicol steadfastly maintained his innocence throughout his prosecution. The State refused to dismiss the case and the ensuring trial devolved into nothing more than a swearing contest. In the end, the jury was sent back to the jury room, forced to decide which pair of witnesses to believe: Montgomery and McNicol, two Pierce County

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[9] CP 76.
[10] RP 146.
[11] RP 289.
[12] RP 181.
[13] RP 148. CP 1-5.

Sheriff Deputies, or Barham, the convicted felon arrested by the deputies, and his girlfriend, Ms. Resch—two people with obvious motives to lie. Apart from them, no one else testified as to the material facts of the case.

Deputy McNicol testified in his defense. Although a police report claimed he had entered the home to retrieve the firearm, he consistently denied that report's accuracy.[14] Deputy McNicol did not prepare the report; in fact, he did not even read the report until moments before the suppression hearing. After reviewing the report, Deputy McNicol told Deputy Montgomery that he thought the report was incorrect because they did not enter the home to retrieve the firearm.[15] Instead, he remembered that the firearm was brought out to them before they entered the home.

Deputy McNicol candidly explained to the jury that he knew his original testimony was inconsistent with the report.[16] He simply refused to blindly follow the written report because his actual memory was different. Deputy McNicol even alerted Ms. Lund to the report's inaccuracy before the suppression hearing occurred.[17]

The State's entire case hinged upon maintaining the apparent credibility of its only two witnesses, each with obvious motives to lie. Deputy McNicol's entire defense strategy relied upon attacking Barham's

[14] RP 443.
[15] RP 445.
[16] RP 446.
[17] RP 446.

credibility because it was *the issue* in the case. To do that, Deputy McNicol tried to introduce evidence of Barham's history of committing crimes of dishonesty. Despite the clear significance of Barham's credibility to the outcome of the case, the trial court refused to allow the defense to admit any evidence pertaining to Barham's prior conviction for a crime of dishonesty.[18]

Barham admitted that the deputies told him they had arrived at his residence to perform a welfare check.[19] He also admitted that there was a firearm in the home but he told the deputies that it belonged to his deceased father. According to Barham, Deputy McNicol entered the home *before* he obtained the firearm. Barham claimed that Deputy McNicol followed him to the bedroom where the firearm was located.[20]

Resch testified next for the State. She too confirmed that the deputies were at the home to perform a welfare check. She also confirmed that there was a firearm in the home. At this point, however, Resch's testimony diverged from Barham's. Contrary to Barham's testimony, Resch said that once the deputies *heard* a firearm was in the home, they immediately arrested Resch, *before* allegedly entered the home.[21] Then, Ms. Resch, said *she*, not Barham, led the deputies into the bedroom to

[18] RP 93.
[19] RP 231.
[20] RP 234.
[21] RP 264.

retrieve the firearm.[22] This vital part of her testimony cannot be reconciled with Barham's testimony. Even assuming that some facts were left out from one or both stories, Barham could not escort the Deputies to the firearm inside the house while simultaneously being under arrest on the front porch.

Notwithstanding these inconsistencies, the jury convicted both deputies of first degree perjury.[23] On appeal, Deputy McNicol argued that the evidence was insufficient to meet the exceedingly high standard of proof required to prove perjury. He also argued that the trial court erred when it refused to admit a conviction for a crime of dishonesty that belonged to the State's most crucial witness, Barham. The Court rejected both arguments. This petition maintains that these holdings were incorrect.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS' DECISION CONFLICTS WITH *WALLIS* BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MCNICOL'S STATEMENT WAS FALSE UNDER *WALLIS'S* STRICT STANDARD.

A conviction for first degree perjury requires, among other things,[24] proof that the defendant knowingly made a false statement.[25] To prove the statement's falsity, the State must meet "the strictest"

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[22] RP 264. RP 260 ("we told them that, yeah, there was one [firearm] in the back closet. Then that's when they asked [Barham] to step outside and onto the porch. They handcuffed him . . . put him in the car or truck.")
[23] CP 373-86.
[24] RCW 9A.72.020(1) (also requiring that the statement be make under oath and in an official proceeding, which are not challenged here).
[25] *Olson*, 92 Wn.2d at 136.

evidentiary requirements known to Washington law.[26] These requirements limit both the form and kind of evidence the State may use to obtain a perjury conviction.

The testimony of one witness, for instance, is insufficient to prove perjury. The State may meet this burden by producing two "credible" witnesses whose testimony "directly" and "positively" contradict the defendant's material statement.[27] If the State fails to meet this burden, "the defendant must be acquitted."[28]

The State's two witnesses objectively failed to satisfy this standard. They were not credible, nor did their testimony directly and positively contradict Deputy McNicol's allegedly false statements.

The lower incorrectly court held that these witnesses satisfied this exceptional standard of proof, but its reasoning fails to honor this Court's long-standing precedent in perjury cases. In upholding the perjury conviction, the Court reasoned,

> Barham testified that Deputy McNicol entered the home with him to retrieve the gun from the bedroom. Resch testified that she took one of the deputies to the bedroom to retrieve the firearm while the other deputy stood in the front room. Though the details of these two eyewitness accounts differ the material facts are consistent—they both testified that the deputies entered the home to seize

[26] *Id.*
[27] *Olson*, 92 Wn.2d at 136.
[28] *State v. Rutledge*, 37 Wash. 523, 527, 79 P. 1123 (1905).

Barham's firearm.[29]

On its face, this reasoning might appear to justify the court's holding. If the jury considered Barham's testimony, without giving any weight to Resch's testimony, and vise-versa, a jury could conclude that Deputy McNicol entered the home to retrieve the firearm. To reach this result, one must ignore the obvious and serious inconsistencies between each of the witness's stories.

According to Barham, McNicol entered the home to retrieve the firearm. In fact, he claimed that *showed* McNicol exactly where the firearm was located.[30] In contrast, Resch claimed that once the deputies *heard* a firearm was in the home, they immediately arrested Barham. This, according to Resch, occurred outside the residence and *before* either Deputy allegedly entered the home.[31] Then, she claimed that she led the deputies into the residence to retrieve the firearm.[32]

Reading both statements together, it is impossible for a reasonable jury to conclude that *both* sets of testimony were credible because, when the deputies entered the home, Barham could not retrieve the firearm from the bedroom while simultaneously being under arrest. Obviously, Resch's

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[29] Slip Opinion at 10.
[30] RP 234.
[31] RP 264.
[32] RP 264. RP 260 ("we told them that, yeah, there was one [firearm] in the back closet. Then that's when they asked [Barham] to step outside and onto the porch. They handcuffed him . . . put him in the car or truck.")

testimony as to who led the officers to the firearm's location is entirely inconsistent and irreconcilable with Berham's testimony to the contrary.

Under the State's normal burden of proof, such inconsistent testimony might be sufficient to establish that Deputy McNicol entered the home to retrieve the firearm. But that is not the standard to apply in a perjury case. Such irreconcilable testimony is insufficient to prove that Deputy McNicol's committed perjury for two reasons.

First, the testimony conflicts to such a degree that a reasonable juror could conclude that both witnesses were credible. The lower court reasoned that each set of testimony, if believed and if *read separately from the other*, established the material fact that Deputy McNicol entered the home to retrieve the gun. This logic forgets, however, that the jury was required to find that *both* witnesses were in fact credible to convict Deputy McNicol of perjury. By considering each witness's testimony in isolation, the Court of Appeals failed to address how, according to its reasoning, a jury could have reasonably believed both witness's version of events.

Further, to discount these inconsistencies, the court creates what appears to be an arbitrary distinction between the "details" of the testimony and the "material facts." When analyzed, however, this distinction lacks any real meaning. More importantly, the distinction ignores that what the court calls "material facts" ("that the deputies

entered the home to seize the firearm") cannot be separated from the inconsistent "details" (such as *who* lead the deputies to the firearm) without also sacrificing the credibility of at least one of the essential witnesses. Despite the name that the court attaches to the inconsistent facts, the testimony remains the same: inherently contradictory. Because the details are so intricately tied to each witness's testimony, no reasonable juror could have believed both witnesses' testimony simultaneously to find both witnesses credible.

Second, even if a reasonable juror could somehow find that both witnesses were credible, irrespective of the inconsistencies, each witness's testimony fails to "positively" and "directly" contradict Deputy McNicol's statement that he did not enter the home to seize the firearm, both core requirements of the State's heightened burden of proof. Testimony of two witnesses who contradict each other to such an extent are hardly "positive" proof of perjury, especially when the witnesses' testimony is only marginally different than the alleged perjured testimony.

During the suppression hearing, the deputies testified that they entered the residence to complete the welfare check *after* arresting Mr. Barham. All parties agreed on this issue. They also agreed that the firearm was in the home. The fundamental difference in the testimony is the precise time at which the deputies entered the mobile home. Because the

State's witnesses offered inconsistent testimony about this key fact, the State failed to meet the heightened standard of proof.

Finally, because "Contradictory statements, sworn or unsworn, are not direct evidence of the falsity of the testimony which the law requires," the evidence presented failed to corroborate the witness testimony by reference to police report. [33] The Court of Appeals ignored this rule, and upheld the perjury conviction on these alternative grounds. But these are precisely the types of contradictory statements that *Wallis* condemned. Although the report claimed the deputies entered the home, both deputies retracted that statement and emphatically disavowed its accuracy.

Even if *Wallis* permitted the police report to satisfy the corroboration requirement, the Court of Appeals erred in giving weight to it because the trial court never admitted it as substantive evidence. At trial, the State promised the defendants that the report was "not being offered for the truth of the matter asserted."[34] Therefore, the police report could not have offered sufficient corroboration to support the perjury conviction. The testimony of these crucial witnesses was not so "clear and positive" and so "strong" to meet the heightened burden in a perjury case.[35]

2. THIS CASE PRESENTS A QUESTION OF GREAT PUBLIC IMPORTANCE: UPHOLDING THIS POLICE OFFICER'S PERJURY CONVICTION WILL

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[33] *Wallis*, 50 Wn.2d at 354-55.
[34] RP 122.
[35] *State v. Rutledge*, 37 Wash. 523, 527, 79 P. 1123 (1905).

DETER POLICE CANDOR DURING FUTURE CRIMINAL PROCEEDINGS.[36]

As stated above, Washington imposes the "strictest" evidentiary requirements, especially with regard to witness credibility.[37] This heightened standard prevents perjury prosecutions from deteriorating into swearing contests.[38] To serve that purpose, courts must avoid applying it in a way that will "discourage witnesses from appearing or testifying."[39]

Upholding these convictions implicitly approves of the same type of "swearing contest" this Court has strived to prevent. And this is no ordinary swearing contest. It involved two historically credible witnesses, Pierce County Deputies, whose testimony was rebutted by two questionable witnesses, a criminal defendant seeking to suppress evidence of guilt, and his girlfriend, a possible domestic dispute victim. This Court should not allow the testimony of two witnesses, who offered inconsistent testimony and who have obvious motives to lie, triumph over two officers of the law.

Deputy McNicol's willingness to disagree with Deputy Montgomery's report strongly suggests the actions of a man who honestly believed what he said and refused to alter that belief in the face of evidence to the contrary. During his trial, Deputy McNicol explained that

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[36] RAP 13.4(b)(4).
[37] *Olson*, 92 Wn.2d at 136.
[38] *State v. Singh*, 167 Wn. App. 971, 978, 275 P.3d 1156 (2012).
[39] *Olsen*, 92 Wn.2d at 138.

although his testimony during the suppression hearing was inconsistent with the report (one that he did not write), he was fully aware of that inconsistency.[40] Deputy McNicol refused to lie about entering the home simply because the written report differed. The law should not deter an officer from abiding by such principles.

Similarly, his honest belief is further corroborated by the actions of other historically credible individuals. Before the suppression hearing, he notified Ms. Lund that the police report contained inaccuracies.[41] Ms. Lund had ample opportunity—and an obligation as a prosecuting attorney—to voice any suspicions that the deputies fabricated their stories. Yet, she did nothing for over two months. Thus, Ms. Lund either violated the RPC's or concluded that Deputy McNicol appeared to tell the truth.

But even assuming the jury was correct that Deputy McNicol made a false statement in the suppression hearing, the evidence simply failed to provide the assurances of guilt necessary to sustain a perjury conviction. Under the worst case scenario for Deputy McNicol, the jury could have seen that each set of witnesses shared motives to lie: the deputies wanted the evidence admitted just as the defendant and his girlfriend wanted the evidence suppressed. In the end, Deputy McNicol and Deputy

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[40] RP 446.

[41] Deputy McNicol did not even write the police report. Instead, Deputy Montgomery composed it based upon his notes—a piece of paper with three names scrawled on it.

Montgomery lost a swearing contest to two far less credible individuals, whose testimony was totally inconsistent with each other.

Affirming Deputy McNicol's conviction sends a message to all police officers in this state to offer testimony only if they are absolutely certain that it occurred *and* if they can be certain that the defendant cannot fabricate evidence to disprove their testimony. Likewise, police officers will also be far more reluctant to offer what they believe to be true testimony when it contradicts an incorrect police report. Such a perverse incentive will encourage police officers to religiously follow the words in their police reports, or worse yet, follow the words *in a fellow officer's* police report, even when it is inaccurate. To do otherwise would subject them to the tremendous penalties that accompany a perjury conviction, such as the loss of their job and their once strong sense of civic duty.

Meanwhile, the lower court's holding encourages another type of commonly called witness, who are notoriously deceptive, to actually take the stand and fabricate a story to obtain an acquittal. In light of the evidence presented here, such a task would not be difficult. A criminal defendant would only need to produce one other witness to corroborate his false story. Further, that witness would not even have to testify consistently with the defendant. Each witness would only need to remember the "material fact" that would result in the dismissal of the case.

3. THIS CASE RAISES A CONSTITUTIONAL ISSUE: MCNICOL WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVELY CROSS-EXAMINE THE STATE'S WITNESS WHEN THE TRIAL COURT REFUSED TO ADMIT THE WITNESS'S PRIOR CONVICTION FOR A CRIME OF DISHONESTY.[42]

The Court should grant this petition because this case involves a constitutional question. Due process requires that an accused be "afforded a fair opportunity to defend against the State's accusations."[43] To do that, the defendant may present evidence, which "must be of at least minimal relevance."[44] Relevant information can be withheld only if the State's interest outweighs the defendant's need to present it in his defense.[45]

The general right to present one's defense also encompasses the more specific right to confront and cross-examine adverse witnesses.[46] The primary interest secured by that right is the right of cross-examination.[47] Cross-examination is a critical tool because it is "the principal means by which the believability of a witness and the truth of his testimony are tested."[48] Although a defendant's right to cross examination has limits, none of them justify the trial court's refusal to allow Deputy McNicol to present evidence of Barham's previous crime of dishonesty and to attack his credibility through cross-examination.

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[42] RAP 14.3(b)(3).
[43] *Jones*, 168 Wn.2d at 720 (citing *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).
[44] *Id.* (citation omitted).
[45] *Id.*
[46] *State v. Hudlow*, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983) (citation omitted).
[47] *Davis v. Alaska*, 415 U.S. 308, 315 (1974).
[48] *Id.* At 316.

The trial court may, for example, refuse to allow the defense to ask questions that are vague, argumentative, merely speculative, or entirely irrelevant.[49] Evidence that Barham had been convicted of a crime of dishonesty was certainly not any of these. It related to a proven fact (the evidence of a prior conviction) and was directly relevant to at least two issues in the case, witness bias (criminal defendant biased against a police officer) and credibility (the obvious focus in a perjury trial).

Because the evidence was relevant, the State bore the burden "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial."[50] The State failed to meet this burden because it did not show that introducing the evidence of the conviction would disrupt the "fact-finding function of the trial."[51] And even if there was, evidence of Barham's prior conviction was of such "high probative value," that no "state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1 § 22."[52]

The probative value of impeachment evidence is immense in a perjury trial, where the credibility of the witness goes to the heart of the case. The only area of State law in which witness credibility is nearly as important is in some sex offenses cases. For example, in *Jones*, the trial

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[49] *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).
[50] *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).
[51] *Id.*
[52] *Hudlow*, 99 Wn.2d at 19.

court barred the defendant from introducing evidence that the alleged victim had "consented to sex during an all-night, drug-induced sex party."[53] Because this evidence was "not marginally relevant" and "constituted Jones's entire defense," the Court found that balancing the evidence against the State's interest in excluding evidence was in opposition to the Sixth Amendment.[54]

Likewise, evidence that Barham committed a crime of dishonesty was far more than "marginally relevant" to Deputy McNicol's defense, where credibility was the salient issue. When the case comes down to a swearing contest, as this one did, one of the most effective ways to attack a witness's credibility is by introducing evidence that the witness has a history of committing crimes that show his dishonest character. Possession of stolen property is such a crime[55] and Barham had such a conviction. Of course Deputy McNicol moved to admit the conviction. Yet, the court refused, citing the ER 609(b) balancing test, which violated Mr. McNicol's right to cross examination and his right to present a defense.

Excluding evidence of Barham's prior conviction was fundamentally unfair to McNicol. Any slight prejudice to the State's case was outweighed by Deputy McNicol's constitutional right to advance his

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[53] *Jones*, 168 Wn.2d at 721.
[54] *Id.*
[55] *State v. McKinsey*, 116 Wn.2d 911, 913, 810 P.2d 907 (1991).

defense. The lack of prejudice to the State is evident by the seemingly arbitrary timeframe set governing this type of evidence. Under ER 609, the attempted possession of stolen property conviction would have been *automatically* admissible had it occurred less than ten years before Barham testified.[56] But, because the trial began a few months after the ten-year timeframe, Deputy McNicol was prevented from providing evidence highly probative of his accuser's credibility. This restriction violated Deputy McNicol's right to cross examination.

Finally, the Court of Appeals incorrectly held that such an error was harmless. Error is harmless only "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.[57] The Court of Appeals did not hold that the error was harmless because the evidence of guilt was overwhelming. It implied that excluding the evidence was not prejudicial because Deputy McNicol was allowed to cross examine Barham as to his prior drug offense. In other words, evidence of the prior conviction was merely cumulative and could not have discredited the witness enough to even create the slightest bit of a reasonable doubt. Such a conclusion cannot stand. Crimes of dishonesty

[56] For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during the examination of the witness but only if the crime . . . involved dishonesty or false statement, regardless of the punishment. ER 609(a).

[57] *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002); *Jones*, 169 Wn.2d at 724 (quoting *Chapman v. California*, 386 U.S 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

bear directly on the witness's credibility. Drug crimes do not. Although Barham's felony drug conviction may have established why Barham would be biased against police (as could any crime), it had little, if any, bearing on Barham's truthfulness. In a case that was decided almost entirely on credibility, the error was not harmless beyond a reasonable doubt.

By denying him the opportunity to test his accuser's truthfulness in front of the jury, the court unjustly limited Deputy McNicol's fundamental right to cross-examine his accuser. Without a compelling reason to exclude such evidence, the court unfairly limited Deputy McNicol's right to control and present his own defense. His conviction for perjury is erroneous and should be reviewed by this court.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant review of this case.

DATED this 26 day of November, 2013.

Respectfully submitted,

THE LAW OFFICES OF JOHN HENRY BROWNE, P.S.

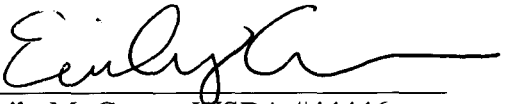

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EXHIBIT 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEFFERY RAY MONTGOMERY, Appellant.	No. 42938-1-II Consolidated with:
STATE OF WASHINGTON, Respondent, v. REX ALAN McNICOL, Appellant.	No. 42958-6-II UNPUBLISHED OPINION

JOHANSON, A.C.J. — A jury found Pierce County Sheriff's Deputies Rex Alan McNicol and Jeffery Ray Montgomery guilty of first degree perjury. Rejecting the claims of Deputies McNicol and Montgomery on appeal, we hold that (1) the State presented sufficient evidence to prove they committed first degree perjury; (2) assuming trial court error, it was harmless error to exclude evidence of a witness's gross misdemeanor conviction; (3) the trial court did not deprive the defendants or the public of the right to an open and public trial by sealing juror questionnaires; and (4) Deputy McNicol's counsel was not ineffective. Accordingly, we affirm.

FACTS

In January 2009, dispatchers sent Deputies McNicol and Montgomery to Robert Barham's and Doris Resch's home to perform a welfare check on Resch's son, JA.[1] According to Deputy Montgomery's incident report, the deputies met Barham at his front door. They told Barham they were there to check on JA's welfare. Deputy Montgomery spoke with JA off of the front porch while Deputy McNicol spoke with Barham on the porch. Barham, who the deputies knew had a drug-related felony conviction, admitted that he had a rifle in his closet. Per Deputy Montgomery's report, Barham took Deputy McNicol into the house so that Deputy McNicol could retrieve the rifle. Then Deputy Montgomery entered the home, took the gun from Deputy McNicol, and secured it. Next, Deputy McNicol walked Barham outside where Deputy McNicol arrested him, and Deputy Montgomery went back in the house to speak with JA and Resch.

At a pretrial suppression hearing, however, the deputies characterized differently what occurred at Barham's home. Deputy McNicol testified that after he contacted Barham, Barham acknowledged that he owned a firearm, and the deputies waited outside while Barham entered the home alone to retrieve the firearm. Deputy Montgomery testified that neither he nor Deputy McNicol entered the home to seize the firearm. When questioned why his incident report differed from his testimony 14 months after the incident, Deputy Montgomery explained that his memory was more accurate at the hearing: "It was a lapse of memory on mine. Thinking back on it now, I remember. But at the time I wrote it, a mistake on my part." Clerk's Papers at 68-69.

[1] We use the minor's initials to protect his privacy.

Because of these conflicting accounts, the prosecutor referred the matter to the Pierce County Sheriff's Department. Following an internal investigation, the State charged both deputies with one count of first degree perjury, and the deputies were tried in a single proceeding.

Before trial, the parties asked prospective jurors to complete a questionnaire that was then used in oral voir dire. Following jury selection, the trial court sealed the questionnaires without objection.

Because the State intended to call Barham to testify to the events at his house, Deputies McNicol and Montgomery sought to admit evidence of Barham's criminal history to undermine his credibility. While the State agreed that Barham's 2003 felony drug conviction was admissible under ER 609(a), it argued that Barham's March 2001 gross misdemeanor conviction for attempted second degree possession of stolen property should not be admitted because it was over 10 years old; and, it would be unfairly prejudicial because many venire members indicated that, at some point, they had filed police reports as property crime victims. The trial court excluded evidence of Barham's attempted second degree possession of stolen property conviction because the conviction was older than 10 years, and it had ruled that the defense could use Barham's drug conviction to attack his credibility.

At trial, Barham testified to the January 21, 2009 events. He explained that after the deputies arrived at his house, he, Deputy McNicol, and Resch walked to the bedroom to retrieve the firearm. Once Deputy McNicol obtained the gun, Deputy Montgomery entered the house to take the gun from Deputy McNicol and secure it.

Resch also testified that both deputies entered Barham's home. She recalled that once Barham admitted to having the firearm in the house, the deputies immediately arrested him. Then, one deputy entered the home and stood in the front room while the other went to the bedroom with Resch to locate the firearm.

Pierce County Detective Sergeant Ben Benson testified that it would be unacceptable for deputies to direct a convicted felon and suspected drug user to enter his home, unattended and outside of the deputies' view, to retrieve a firearm. During Detective Sergeant Benson's testimony, the State played a recording of Detective Sergeant Benson's interview of Deputy Montgomery, including this exchange:

> Q Well, I mean without thinking that, you knew that what you were testifying to wasn't accurate. Correct?
> A The bottom line, yeah, 'cause here I had the report, and that's, I wrote it, and that's what I recall happening.
> Q And you testified to something different?
> A Yes.

Ex. 15 p. 7.

Deputies McNicol and Montgomery testified that before the suppression hearing, they sat outside the courtroom and reviewed Deputy Montgomery's incident report. Deputy McNicol told Deputy Montgomery that they never entered the house and that they directed Barham to retrieve the gun and bring it out to them. Deputy Montgomery testified that he trusted Deputy McNicol's version of events more than his own memory and incident report. Deputy Montgomery added that at the suppression hearing, he remembered not entering the home, but now at trial, he could not remember whether they entered the home or not.

Deputy Montgomery explained that when he saw Deputy McNicol with the firearm outside the home, he had assumed that Deputy McNicol had gone inside the home to retrieve it; but, he later believed that Deputy McNicol had not actually entered the home. Deputy Montgomery then testified that he had made at least four uncorrected mistakes in his incident report when he twice indicated that Deputy McNicol had been inside the home and when he twice indicated that he too had entered the home.

Throughout trial proceedings, both defendants argued motions, offered and argued evidence, participated in direct and cross-examination of witnesses, and raised objections. The jury found both defendants guilty as charged. The defendants appeal in a consolidated case.

ANALYSIS

I. SUFFICIENCY OF THE EVIDENCE

Defendants first argue that the State failed to offer sufficient evidence to prove that they committed perjury. We disagree.

A. Standard of Review

Sufficient evidence supports a conviction if any rational trier of fact could find the crime's essential elements beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). An appellant claiming insufficient evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the trier of fact on issues of

conflicting testimony, witness credibility, 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).

B. Analysis

A person is guilty of first degree perjury when "in any official proceeding he or she makes a materially false statement which he or she knows to be false under an oath required or authorized by law." RCW 9A.72.020. In addition, the State must present:

> 1. The testimony of at least one credible witness which is positive and directly contradictory of the defendant's oath; and
> 2. Another such direct witness or independent evidence of corroborating circumstances of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his 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, *review denied sub nom. State v. Howie*, 94 Wn.2d 1021 (1980)). And 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 defendant's admissions and contradictory statements, even though not made under oath, are sufficient, given in corroboration of the single witness to satisfy the quantum of evidence required to support a perjury conviction. *State v. Buchanan*, 79 Wn.2d 740, 745, 489 P.2d 744 (1971).

As a threshold matter, the testimony regarding whether the deputies entered the home was material because this fact dictated the trial court's analysis of the legality of the deputies' search of Barham's home and seizure of the firearm. *See e.g., State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998) (holding that under article 1, section 7 of Washington Constitution, where police knock and request permission to enter and search one's home without a warrant, they must advise the home dweller of her or his right to refuse the request or limit the search).

Next, sufficient evidence supported the perjury convictions. Either Barham's or Resch's testimony satisfied the first element, and either Barham's or Resch's testimony satisfied the second element; and the jury instructions were clear that the jury had to use different evidence for elements one and two. In addition, regarding Montgomery, his incident report also satisfied element two.

Barham testified that Deputy McNicol entered the home with him to retrieve the gun from the bedroom. Resch testified that she took one of the deputies to the bedroom to retrieve the firearm while the other deputy stood in the front room. Though 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.

Deputy Montgomery's incident report provides additional evidence to support Deputy Montgomery's conviction. It twice indicated that Deputy McNicol had entered the home with Barham to seize the gun and twice indicated that Deputy Montgomery had entered the home to obtain the gun from Deputy McNicol. The incident report closely paralleled Barham's testimony and directly contradicted the deputies' suppression hearing testimony in which they claimed to have never entered Barham's home. And moreover, the jury heard the audio interview in which

Deputy Montgomery admitted to testifying contrary to what he recalled actually happening at Barham's residence. Therefore, the jury heard additional evidence to conclude that Deputies McNicol and Montgomery committed perjury at the suppression hearing. *See Rutledge*, 37 Wash. at 527.

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. Accordingly, the State presented sufficient evidence from which the jury could find that the defendants knowingly made false statements that were material to the earlier case's outcome.

II. Right to Confront and Cross-Examine Accuser

Next, the defendants argue that the trial court violated their right to confront and cross-examine their accuser when it ruled that the defense could not admit evidence of Barham's 2001 conviction for attempted second degree possession of stolen property. Even assuming, without deciding, that it was error, any error was harmless.

A. Standard of Review

We review a trial court's decision regarding the admissibility of prior conviction evidence under ER 609 for abuse of discretion. *State v. Rivers*, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996). A trial court abuses its discretion when its ruling is manifestly unreasonable or when it exercises discretion on untenable or unreasonable grounds. *State v. Bankston*, 99 Wn. App. 266, 268, 992 P.2d 1041 (2000).

Under ER 609(a) and (b), evidence that a witness has been convicted of a crime involving dishonesty is admissible to attack the witness's credibility if a period of less than 10 years has

elapsed since the conviction date. *State v. Jones*, 117 Wn. App. 221, 231, 70 P.3d 171 (2003). If more than 10 years has elapsed, however, under ER 609(b) the evidence is not admissible unless the court determines, in the interest of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.[2] *Jones*, 117 Wn. App. at 231. Any error regarding the admission or exclusion of prior conviction evidence is harmless, however, if within reasonable probabilities, the trial outcome would not have been materially different, had any error not occurred. *State v. Gresham*, 173 Wn.2d 405, 433, 269 P.3d 207 (2012).

B. Analysis

Here, on September 19, 2011, the defendants sought to admit evidence of Barham's March 2001 conviction for attempted second degree possession of stolen property. Because more than 10 years had elapsed since the conviction, the evidence was not automatically admissible under ER 609(b) and instead was only admissible if the trial court determined that the admission of the conviction was in the interest of justice and that the probative value substantially outweighed potential prejudice. *See Jones*, 117 Wn. App. at 231.

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[2] Under ER 609(b):

> Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

The trial court determined that the defendants could not admit Barham's gross misdemeanor conviction because it was over 10 years old and because they were allowed to use a prior drug conviction to impeach Barham. Even assuming it was error to exclude evidence of the gross misdemeanor conviction, Deputies Montgomery and McNicol were allowed to impeach Barham's credibility with the prior felony drug conviction. It is difficult to see, in light of this impeachment evidence, how the trial outcome would have differed had the trial court admitted Barham's gross misdemeanor conviction. Thus, even had the trial court erred, any error would have been harmless.

III. SEALED JURY QUESTIONNAIRES

Next, the defendants both argue that the trial court deprived their and the public's open and public trial right when it sealed the juror questionnaires without first performing a *Bone-Club*[3] analysis on the record. The trial court did not err in sealing the juror questionnaires.

When a trial court allows parties to use juror questionnaires as a screening tool during oral voir dire in open court, it need not perform a *Bone-Club* analysis before later sealing those questionnaires because the sealing does not constitute a courtroom closure implicating the public trial right. *State v. Beskurt,* 176 Wn.2d 441, 447-48, 293 P.3d 1159 (2013). Here, potential jurors completed questionnaires later used during oral voir dire on the record in open court. Following voir dire, the trial court sealed the questionnaires. Because sealing juror questionnaires used in oral voir dire does not constitute a courtroom closure implicating the

[3] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

public trial right, the trial court had no obligation to perform a *Bone-Club* analysis. Accordingly, the trial court did not err. *See Beskurt*, 176 Wn.2d at 447-48.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, Deputy McNicol contends that defense counsel provided ineffective assistance because he submitted no pretrial motions of his own, no written responses to the State's motions, and no persuasive legal authority on critical issues now raised on appeal. Deputy McNicol does not demonstrate ineffective assistance.

A. Standard of Review

To succeed on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's conduct was deficient, or fell below an objective reasonableness standard; and (2) the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel is presumed to have acted reasonably unless shown otherwise. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To show prejudice, the defendant must demonstrate reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. If the ineffective assistance claim fails on one prong, we need not address the other. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). We evaluate counsel's competency based on the entire trial record. *State v. Townsend*, 142 Wn.2d 838, 843, 15 P.3d 145 (2001).

B. Analysis

Deputy McNicol's portrayal of defense counsel as grossly underperforming is inaccurate. Defense counsel filed an omnibus application seeking additional materials beyond what had initially been supplied in discovery. He argued motions before the trial court and cross-

examined state witnesses. He also presented Deputy McNicol's testimony, as well as an opening statement and closing argument. Deputy McNicol asserts that defense counsel was ineffective because he joined his codefendant's written motions instead of filing separate ones. Because the State charged both defendants with the same crime stemming from the same conduct that arose from the same event, it was not unreasonable for defense counsel to make the strategic decision to decline to file his own pretrial motions which would have included nearly identical contents to those of Deputy Montgomery. Even assuming that it was objectively unreasonable, Deputy McNicol cannot demonstrate how filing separate motions—containing the same arguments and law that the trial court rejected in Deputy Montgomery's motions—would have resulted in a different outcome. Therefore, Deputy McNicol cannot prove resulting prejudice. Accordingly, he cannot demonstrate ineffective assistance of counsel. *See Strickland*, 466 U.S. at 687.

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, A.C.J.

We concur:

Penoyar, J.

Bjorgen, J.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by ABC Legal Messengers, one copy of this brief on the following:

Ms. Melanie Tranek
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and served a copy by First Class Mail, postage prepaid, on the following person:

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Nov 26, 2013
Date

Lorie J. Hutt
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