No. 89485-0
Court of Appeals No. 42938-1-II

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff-Appellee,
v.

JEFFERY RAY MONTGOMERY,
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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Appellant Jeffery Montgomery asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

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Montgomery seeks review of the unpublished opinion filed in *State v. Montgomery*, No. 42958-6-II.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

C.
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Did the Court of Appeals err in affirming Montgomery's perjury conviction when it was not based upon the testimony of one credible witness and another such witness or corroborating witness?

D.
STATEMENT OF THE CASE

Jeffery Ray Montgomery was charged with one count of first degree perjury. The State alleged that on March 16, 2010, he made a false statement under oath in an official proceeding. CP 325-26. The prosecution hinged on the question of whether Montgomery lied during a

CrR 3.6 suppression hearing when he testified that he did not enter Robert Barham's house to retrieve a gun.

On January 21, 2009, Robert Barham was arrested by Pierce County Deputy Sheriffs Jeffery Montgomery and Rex McNicol. The deputies were called in response to a 911 call from Jesse Anderson, age 12. ER 458. He said that he was afraid of his mother's boyfriend, Robert Barham, and that there was a gun in the house. A police report, authored by Montgomery, stated that during the welfare check both officers entered the Barham house and retrieved a gun.

Kawyne Lund was the Pierce County Deputy Prosecuting Attorney assigned to prosecute Robert Barham for being a felon in possession of a firearm in the first degree. RP 108. Prior to trial, Barham moved to suppress the firearm seized from him at the time of his arrest. RP 108-109. He argued that Deputies McNicol and Montgomery found that gun after entering his home, but that they did not have the right to enter. RP 110. According to Lund, based on her review of the police reports, she thought Barham's motion was "ridiculous" because the deputies had the right to enter under the "community caretaking function." RP 110, 112-114.

The suppression hearing was held on March 16, 2010. RP 116. Prior to the hearing Lund had a brief, joint meeting with McNicol and

Montgomery. RP 117-118. Lund told the officers that she believed they had a right to be in the house. *Id.* But while Montgomery and McNicol were waiting outside the courtroom, McNicol asked to see the report. After reviewing the report, McNicol told Montgomery that the report was incorrect – that they had not entered the house to get the gun. Instead, Barham brought it out to them. RP 402.

At the suppression hearing Deputy Montgomery testified that he and Deputy McNicol received a call at about 6:30 p.m. on January 21, 2009 for a "welfare check." Plaintiff's Exhibit 3 at 39. He and McNicol walked up to the front door and Barham answered. *Id.* at 40. He stepped down off the porch with Jesse to ask why he had called the police. *Id.* at 40. Montgomery stated that he was having a hard time recalling the details of the encounter. *Id.* at 42. But prior to arriving at the residence he confirmed that Barham was a convicted felon. *Id.* at 43. Montgomery concluded that Jesse was not at risk. When it came to the gun, Montgomery testified that when he first saw the gun, it was in McNicol's hands. RP 44. He said: "I went up on the porch and took the rifle from Deputy McNicol." *Id.* Later, "after everything was secured, [I] went back in to speak with Jesse's mother, and she kind of walked us through the house to show us where it came from." *Id.* at 45. Montgomery said that he and McNicol had discussed the case.

Mr. Barham's counsel, Chip Mosley, cross-examined Montgomery at length about the discrepancy between his report and his testimony. He testified quite clearly that he made a mistake in his report when he reported that he had gone into the house to get the gun. *Id.* at 54. He stated that what he meant was that he had walked onto the covered porch to get the gun from Barham. *Id.* at 60. He reiterated that he did go into the house later to speak to Barham's girlfriend, Resch. *Id.* at 56.

Prosecutor Lund attempted to clarify and asked Montgomery to look at his report. She asked about the discrepancy between the report, which stated that he had taken the gun from Barham on the porch, and Montgomery's testimony. *Id.* at 46. Montgomery stated that the report was incorrect and a mistake.

According to Lund, it was only after Montgomery testified that she thought the deputies had lied. "At this point I realized that they had changed their testimony, and I was stunned." RP 144.

Nonetheless, she said she did not ask for a recess because "it was improper." RP 144. Moreover, she said: "It was starting to dawn on me that this was no accident. These two had talked about it and I didn't figure there was going to be any difference.'" *Id.* Lund admitted that she never told defense counsel that she believed the deputies were lying. She also admitted that in her closing argument at the hearing, she said that it didn't

really matter how the deputies got into the house. RP 169. In that hearing she argued as follows: "The Court saw Officer Montgomery. He's a young officer. He admitted he made a mistake. I can pretty well guarantee you that he is going to probably be one of the more careful report writers we're going to have from now on." Exhibit 7; RP 293. She put a memo about the hearing in her file, but that memo did not say that the deputies lied. RP 181.

At the close of the hearing the trial judge suppressed the gun. RP 146. But it was not until May 2010, two months after the hearing, that Lund called the Sheriff's Office and told them that she believed the officers had lied. RP 148.

During the post-hearing investigation, Montgomery gave a statement to the Pierce County Sheriff's Department investigator. Exhibit 14, 15. The investigating officer accused Montgomery of discussing the case in the hall with McNicol and agreeing as to what they were going to say in court. Exhibit at 6. Montgomery said: "I can assure you that is not what it was." *Id.* Montgomery repeated that he believed, based upon Deputy McNicol's statement, that the police report was incorrect. He continued to state that given the discrepancy between what he remembered and what Deputy McNicol remembered, he was not sure what happened. *Id.* at 13. Montgomery said that because McNicol had been the one to

retrieve the gun, and because he trusted McNicol, he believed that his report was incorrect. *Id.* at 14. He stated that "looking back, I should have had him write a supplemental report." But Montgomery said that he had no reason to believe that Deputy McNicol would "lead me astray." *Id.*

Montgomery also testified at trial. He said that his job was to talk to Jesse about his welfare. RP 396. Deputy McNicol contacted Barham. McNicol got the gun, gave it to Montgomery and placed Barham in his patrol car. The two then went into the house to talk to Barham's girlfriend, Resch. Montgomery filed his report and did not look at it again until March 16, 2010, in Ms. Lund's office. RP 401.

Montgomery also said that after the hearing, Ms. Lund never questioned him about the difference between his report and his corrected testimony. RP 405. He stated that he believed the testimony he gave was the truth. *Id.*

McNicol testified that he did not prepare a police report regarding the incident. RP 443. He did not read Montgomery's report until just before the suppression hearing. *Id.* He told Montgomery that the report was wrong and that they were going to be cross-examined about it. RP 445. He said that he thought that as a result, the gun would be suppressed. RP 446. He said he never considered testifying in conformity with the report because that would have been untrue. *Id.* McNicol said he told

Lund about the discrepancy before trial. *Id.* He said that he did not need to "change his story" to save the case because he believed he would have authority to enter the house in any event. RP 447. He categorically denied lying about any of his actions at the Barham residence. RP 446-48.

The only two other witnesses with direct evidence of the incident were State's witnesses Barham and Resch. They gave conflicting testimony.

Barham, a convicted felon, testified that on January 21, 2009, two deputies came to his home. RP 231. He knew that he was not supposed to have a gun. *Id.* He said the deputies told him they were there for a child welfare check. RP 232. One deputy took his son off to the side; the other officer spoke with him. *Id.* According to Barham, he took McNicol to his back bedroom. His girlfriend, Resch, got the gun out of the closet and handed it to Deputy McNicol. *Id.* Barham stated that by the time the gun was out of the closet, Montgomery was in the bedroom. RP 238. Barham said that Montgomery took the clip out of the gun. *Id.* Barham said that he was arrested on the front porch. RP 242. Then he was placed in McNicol's patrol car. *Id.*

Resch, Barham's girlfriend, testified that when she first saw the two deputies they were in the front room. RP 257. She said the deputies asked if there was a gun in the home. When Barham said that there was,

the deputies took him to the front porch and handcuffed him. He was then placed in the police vehicle. *Id.* According to Resch, she pointed out the gun's location. *Id.*

> I pointed him to in the closet where the gun was at. I know this because there was a bunch of stuff in the middle of the floor. He had to step over. He reached in and grabbed it, and then he went out and put it in the back of the car.

RP 261. Resch had previously stated that she did not remember if she handed the gun to the deputy or if he reached in and grabbed the gun. RP 269. Resch said that the other deputy remained in the front room with her son the entire time. RP 257.

The State's remaining three witnesses had no direct evidence. Lund testified to her participation in the suppression hearing and her belated report to the authorities. Chip Mosley testified that he filed a motion arguing that the officers did not have a legal basis to enter the home. RP 279. Lund never asked for a continuance. RP 288. Lund never told Mosey that she suspected that Montgomery was lying. RP 289. Mosley explained that if a lawyer suspects a witness will lie, he or she must not call the witness or rely upon the witness's testimony. RP 297.

Detective Sergeant Ben Benson was called to lay the foundation for the admission of Montgomery's taped statement. He admitted that people were allowed to testify differently and admitted that people were

mistaken at times. RP 346. Benson admits that Montgomery had almost no notes of the incident – just three names written on a piece of paper.

Three character witnesses testified on Montgomery's behalf. RP 367-372.

The jury subsequently convicted Montgomery as charged. CP 372. Judgment and Sentence were entered. CP 373-386. This timely appeal followed. CP 387-403.

E.
ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should grant review because the Court of Appeals decision in this case conflicts with *State v. Olson*, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979); *State v. Wallis*, 50 Wn.2d 350, 311 P.2d 659 (1957); *Nessman v. Sumpter*, 27 Wn. App. 18, 24, 615 P.2d 522, *review denied by State v. Howie*, 94 Wn.2d 1021 (1980). In addition, in this case, the conviction of a police officer for perjury based upon conflicting and suspect testimony is a question of substantial public importance. RAP 13.4(b)(1)(2) and (4).

The Court of Appeals decision conflicts with the multitude of cases from this Court that state the standard of proof in a perjury case is exceedingly strict in order to avoid prosecutions that descend into

swearing contests. But here, the Court of Appeals condoned precisely the type of swearing contest that the law seeks to avoid.

> 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.

Olson, 92 Wn.2d at 136.

The Court of Appeals concedes that the testimony of Barham and the testimony of Resch was inconsistent. But the Court excuses that by stating that their testimony was the same on "material facts." But by excusing the very real inconsistencies in their testimony, the Court of Appeals lowers the State's burden of proof. The testimony of both Barham and Resch had to be "positive" and "of such character as to clearly turn the scale and overcome" Montgomery's oath. That level of proof was not met. In *Wallis* this Court said:

> Contradictory statements, sworn or unsworn, are not direct evidence of the falsity of the testimony which the law requires. Indeed, it may be said that while such evidence creates a strong probability of the appellant's guilt, or even proof beyond a reasonable doubt, the law still requires direct and independent evidence of the falsity of the testimony in addition. It is impossible to say whether the affidavit and the contradictory statements are true or whether the testimony is true.

Wallis, 50 Wn.2d at 354-55.

Worse yet, the Court of Appeals relied on Deputy Montgomery's police report admitted as Exhibit 1. But nothing in that exhibit was admitted as substantive evidence. Counsel objected to the admission of the police report because it was hearsay. RP 122. The State said that the report "is not being offered for the truth of the matter asserted." *Id.* The State also said that the report was a business record and a statement by a party opponent. Defense counsel argued that only portions of the exhibit would be admissible as "statements of a party opponent." RP 123. Nonetheless, the Court admitted the document.

Careful analysis reveals that the only basis on which the police report was admitted was that it could not be relied on for the truth of the matters asserted therein. That is, because neither of the other reasons cited by the State would have permitted its introduction as substantive evidence. A police officer's investigative summary is inadmissible hearsay that does not qualify for admission under the business records exception to the hearsay rule. *In re Det. of Coe*, 160 Wn. App. 809, 829, 250 P.3d 1056, 1066, *review granted*, 172 Wn.2d 1001, 258 P.3d 685 (2011), *affirmed on other grounds*, 175 Wn.2d 482, 286 P.3d 29 (2012); *State v. Hines*, 87 Wn. App. 98, 101-02, 941 P.2d 9, 11 (1997).

Even if, at some level, the police report was a "statement" by Montgomery, although he has consistently disavowed its accuracy, in the

absence of an applicable exception to the hearsay rule, the portions of the police report that contain the statements of others may not be admitted into evidence. *See, e.g., United States v. Boyd*, 640 F.3d 657, 662, 664-65 (6th Cir.), *cert. denied*, 132 S.Ct. 271, 181 L.Ed.2d 160 (2011) (each level of hearsay must be independently admissible even where "top" level is plainly the statement of a party opponent); *United States v. $92,203.00*, 537 F.3d 504, 508 (5th Cir. 2008) (where law enforcement officer told agent about defendant's statements, and agent took the stand, agent's testimony about what law enforcement officer said was inadmissible hearsay even though defendant's statements to law enforcement officer were admissions of party-opponent); *Vazquez v. Lopez-Rosario*, 134 F.3d 28, 34 (1st Cir. 1998) (For hearsay-within-hearsay to be admissible, "[e]ach link in the chain must be admissible, either because it is an admission and thus not hearsay or under some other hearsay exception.").

Because the trial court did not redact those portions of the police report that were not statements made by Montgomery, it clearly did not admit the report on the basis that it was a statement of a party opponent. Thus, it was admitted on the basis that nothing in the report was submitted for its truth. If the evidence was not submitted as true, then it cannot corroborate any other facts.

F.
CONCLUSION

This Court should grant review. There is no credible corroborated evidence that Montgomery knowingly testified falsely when he said that he and McNicol did not enter the house. Deputy Montgomery had no intention of knowingly lying to anyone. After Deputy McNicol told him the report was incorrect, he believed that it was. After all, Deputy McNicol was the officer who actually obtained the gun and was in a better position to recall what happened. When corrected, Deputy Montgomery testified to the corrected facts. That simply cannot constitute perjury under the law.

DATED this 28th day of October, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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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.