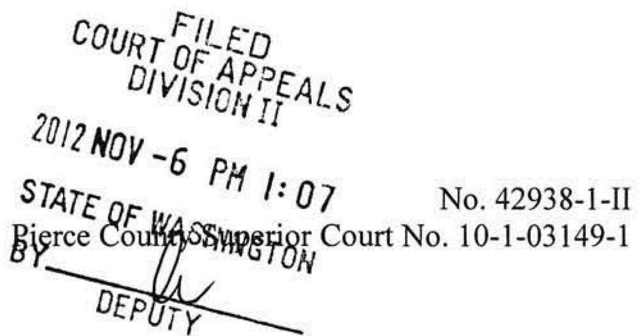

No. 42938-1-II
Pierce County Superior Court No. 10-1-03149-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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

APPELLANT'S REPLY BRIEF

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I.
REPLY ARGUMENT

A. THE STATE FAILED TO MEET THE HEIGHTENED BURDEN OF PROOF IN THIS CASE

1. This Case Was Nothing More Than A "Swearing Contest"

The State's briefing reaffirms that this case is precisely the type of swearing contest that the law seeks to avoid. It bears repeating that 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. Confusion, mistake, or faulty memory do not constitute perjury.

Moreover, to affirm a perjury finding on so slim a reed runs the risk of deterring police officers from ever correcting their facts before trial. Under the State's theory, Officer Montgomery should have rigidly adhered to his police report at the suppression hearing even though, by the time he took the stand, he had come to believe it was incorrect. This is completely contrary to sound public policy and law. Officers should be encouraged to correct their police reports or testify about conflicts, if any, between their written reports and their independent memory of events. Affirming Montgomery's conviction, however, would signal precisely the opposite.

2. The State Ignores The Fact That Their Witnesses Had Strong Motives To Accuse Montgomery Of Perjury

Assuming that Deputy Prosecutor Lund was truthful when she testified that she realized that Montgomery "had changed his testimony" during the suppression hearing, RP 144, she failed to discharge her ethical duties by immediately informing the trial court and Mr. Barham's counsel. So she had a motive to blame Montgomery. She also had a motive to blame Montgomery because she lost the hearing.

Barham had a very strong motive to lie because he was facing significant jail time if he were actually convicted of unlawful possession of a firearm. Resch had a motive to lie to protect her significant other.

3. The State Failed To Present Two Credible Witnesses

The State argues that it sustained its burden of proof of perjury by presenting two credible witnesses to contradict Montgomery. This Court should reject this argument. Barham, of course, had every reason to lie and has previously been convicted of a crime of dishonesty. But, even if his story were "credible" it conflicts with Resch's testimony. This is fatal to the State's case.

The heightened burden of proof for perjury charges requires "one credible witness, which is positive and directly contradictory of the defendant's oath" and "another such direct witness." But that burden is not

satisfied when the State presents two witnesses whose testimony is conflicting and contradictory. Here, Barham and Resch's testimony cannot be harmonized. On one very important point the testimony is flatly contradictory. Barhm testified that Montogmery entered the bedroom while the firearm was being retrieved. Resch stated that he remained with her son in the living room throughout the encounter.

4. The State Cannot Rely On Exhibit 1 For The "Truth Of The Matter" Asserted

Throughout its brief the State cites to the "facts" contained in Exhibit 1 as evidence that Montgomery committed perjury. But Exhibit 1 was not admitted for the truth of the matters asserted in the document. The State fails to cite to any support for its assertion that the "evidentiary value of the report does not hinge on the evidence rule the document was admitted under." Brief of Respondent [BOR] at 13.

In fact, quite the opposite is true. At most, the report here is proof that Montgomery made a report. Beyond that, because the prosecutor stated that she was not seeking its admission for the evidence contained in the report, any argument that Montgomery's testimony conflicted with his report is irrelevant. The State should not be permitted to make one argument in the trial court in order to overcome an evidentiary objection and another in this Court to overcome a challenge to the sufficiency of the proof presented.

5. Montgomery Did Not "Admit" or "Confess" To Perjury

The State calls Montgomery's statements to Detective Benson as an "admission" or a "confession." BOR at 13-14. This is a complete mischaracterization of his conversation with Benson. Throughout Exhibit 15, Montgomery expresses confusion, mistakes, and blames his faulty memory. Prosecutor Lund agreed and argued at the suppression hearing that Montgomery was simply mistaken in his report.[1] As noted above, this does not constitute perjury.

B. THE TRIAL COURT'S FAILURE TO ADMIT THE STATE WITNESS'S PRIOR CONVICTION FOR A CRIME OF DISHONESTY IN A PERJURY PROSECUTION IS REVERSIBLE ERROR

The question of whether the trial court erred in failing to admit Braham's conviction for a prior crime of dishonesty as impeachment in a perjury prosecution is a fundamentally different question than the more common question of whether a trial court should admit the defendant's convictions when he is testifying in his own case.

In its brief the State cites to many, many cases that analyze the propriety of admitting evidence of the defendant's own crimes against him or

[1] As noted in the opening brief, it was only after she lost the suppression hearing that Lund concluded Montgomery was lying. If she had truly believed that during the hearing, it was her ethical duty to call a halt to the proceedings, reveal her suspicious to the trial judge and refuse to proceed any further. But she did not do so.

her in a subsequent prosecution. *See, e.g., State v. Rivers*, 129 Wn.2d 697, 703, 921 P.2d 495 (1996); *State v. Alexis*, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980); *United States v. Bensimon*, 172 F.3d 1121, 1124 (9th Cir. 1999). When the question of the admissibility of the convictions against the defendant is at issue, it makes some sense to argue that no balancing test is required for excluding a conviction that is more than 10 years old. And, when the appellate courts talk about the prejudice of admitting prior convictions in those circumstances, their analysis is weighted towards excluding the prior conviction in order to protect the defendant's right to a fair trial and to prevent the jury from using such evidence as proof of the defendant's "propensity" to commit crimes. Thus, these cases are mostly irrelevant to the issue before this Court.

But there is a much lower bar to the admission of impeachment evidence of a prosecution witness's prior conviction for a crime of dishonesty because of the defendant's constitutional right to confront and cross-examine the witnesses against him. Under *State v. Hudlow*, 99 Wn.2d 1, 659 P.2d 514 (1983), the confrontation right is subject to the following limitations: (1) the evidence sought must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. *Id.*, 99 Wn.2d at 15. The threshold to admit relevant evidence is very

low. Even minimally relevant evidence is admissible. *Id.* at 16. However, relevant evidence may be deemed inadmissible if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. *Id.*

In *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576, 580 (2010), the Supreme Court said that where the impeachment evidence is of high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Appellant can find no cases that analyze the particular situation presented here – the admission of a witness's conviction for a prior crime of dishonesty in a perjury prosecution.[2] However, given the heightened burden of proof of evidence focused solely on witness credibility, Barham's prior conviction for a crime of dishonesty violated Montgomery's constitutional rights.

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[2] The State relies heavily on a different *State v. Jones,* 117 Wn. App. 221, 70 P.3d 171 (2003). It is true that in that case the appellate court found no error in the trial court's failure to admit the witness's 20 year old forgery conviction. But in that case the court said:

> the conviction was 20 years old—twice the number of years giving rise to the presumption of inadmissibility—and there is no indication in the record of any specific facts or circumstances by which the trial court could determine that the evidence was nevertheless relevant to Spragg's credibility.

State v. Jones, 117 Wn. App. at 233. Here, Barham's conviction was just barely 10 years old and his credibility was vitally important to the State's case.

C. THE CONSTITUTIONAL HARMLESS ERROR STANDARD APPLIES

The State argues that the non-constitutional harmless error standard applies. But in doing so, the State cites only to cases in which the question was whether the defendant's prior conviction was improperly admitted. But the most relevant case is *State v. Jones*, 168 Wn.2d at 724. In that case the State Supreme Court evaluated the trial court's limitation of cross-examination under the constitutional harmless standard. The Court stated that an error of constitutional magnitude can be harmless if it is proved to be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705, *reh'g denied*, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967). Stated another way, the error is harmless "if we are convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." *State v. Smith*, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

And the failure to admit Barham's conviction was prejudicial. The State says that the appellants "exaggerate" the importance of Barham's testimony and that given "the overwhelming weight of other evidence, there is no reasonable probability that admission of Barham's gross misdemeanor would have materially affected the outcome of the trial." BOR at 36-37.

But the standard of proof for perjury is as follows:

> There must be the direct testimony of at least one credible witness, and that testimony, to be sufficient, must be positive, and directly contradictory of the defendant's oath. In addition to such testimony, there must be either another such witness, or corroborating circumstances established by independent evidence, and of such a character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence; otherwise the defendant must be acquitted.

State v. Rutledge, 37 Wash. 523, 528, 79 P. 1123, 1124 (1905).

Under this burden, the fact that a prosecution witness in a perjury case has been convicted of a crime of dishonesty will rarely, if ever, be more prejudicial than probative. And the failure to admit such evidence against a State's witness will almost always be error. In other words, the appellants are not exaggerating Barham's importance as a witness. He was absolutely critical to the case and no amount of circumstantial evidence can substitute for his "directly contradictory" testimony.

The State also argues that there was other impeaching evidence available. But in closing the State argued as follows:

> You may not want a convicted felon or a meth user to be your neighbor or you may not want your children to go out with these people but that doesn't make them liars. That's what the defense is going to want to convince you is true.

RP 504. The State minimized the impeachment evidence because "it doesn't make them liars." But Barham's excluded conviction was a crime of dishonesty that did "make him a liar."

This Court should find that it is *not* convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error.

D. FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO AN OPEN AND PUBLIC TRIAL WERE VIOLATED WHEN THE TRIAL COURT SEALED JUROR QUESTIONNAIRES WITHOUT FIRST CONDUCTING A *BONE-CLUB*[3] HEARING

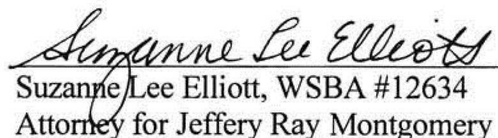
These issues are all still pending in *State v. Tarhan*, Sup. Ct. No. 85737-7, *review granted* September 8, 2011. In *Tarhan* the Court will decide whether the improper sealing of juror questionnaires requires reversal of the conviction without a showing of prejudice. Once *Tarhan* is decided, this Court's decision on these issues will be controlled by the opinion in that case.

II. CONCLUSION

For the reasons stated above, this Court should reverse Montgomery's convictions.

DATED this 5 4th day of November, 2012.

Respectfully submitted,



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

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 each of the following:

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05 Nov 2012
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William Hackney