

COURT
OF APPEALS

No. 39998-9

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DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DAVON JONES,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-1-00390-8

BRIEF OF APPELLANT

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I. INTRODUCTION

This case directly challenges the balance between CrR 4.3 joinder, promoting judicial economy, and CrR 4.4 severance, protecting a defendant's right to a fair and impartial trial. It is clear that any judicial economy furthered in this case – literally a few court days – is strongly outweighed by the undue and unfair prejudice against Davon Jones caused by not severing the two charges at trial.

The prejudice against Mr. Jones is that the jury likely used the evidence of one of the crimes to infer a criminal disposition on the part of the defendant which influences a finding on the other charge and the jury likely cumulated evidence to find guilt were, if considered separately, it would not so find. One charge was premised entirely upon the credibility of a confidential informant that was avoiding 20 years in prison, continually hiding her contract violations from her police handlers, could not go more than a day or two without cocaine, meth, or heroin, and appeared for her testimony after ingesting heroin. The second charge was simple possession, with the defense of unwitting possession, a defense based solely upon the credibility of the Mr. Jones. It cannot be said that the evidence of one charge did not improperly influence the verdict on the other.

Unfortunately, this case also involves a defense attorney's failure to meet an objective standard of reasonableness, as defendant's counsel both elicited and failed to object to otherwise inadmissible evidence pertaining directly to the credibility of the defendant, a material issue for

both charges.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Mr. Jones' motion to sever the June 7, 2007 charge from the January 22, 2008 charge at trial.
2. Mr. Jones was denied effective assistance of counsel when his trial counsel elicited testimony regarding uncharged allegations of Mr. Jones' involvement in other drug transactions, and failed to object to the State's presentation of evidence pertaining to allegations of uncharged transactions.
3. Mr. Jones was denied effective assistance of counsel when his trial counsel elicited testimony regarding Mr. Jones' prior criminal convictions, and failed to object to the State's presentation of evidence regarding Mr. Jones' prior criminal history.
4. The trial court erred when it denied Mr. Jones bail pending appeal.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred when it denied Mr. Jones' motion to sever the June 7, 2007 count from the January 22, 2008 count at trial.

(Assignment of Error No. 1)

2. Whether Mr. Jones was denied effective assistance of counsel when his trial counsel elicited testimony regarding uncharged allegations of Mr. Jones' involvement in other drug transactions, and failed to object to the State's presentation of evidence pertaining to allegations of uncharged transactions.

(Assignment of Error No. 2)

3. Whether Mr. Jones was denied effective assistance of counsel when his trial counsel elicited testimony regarding Mr. Jones' prior criminal convictions, and failed to object to the State's presentation of evidence regarding Mr. Jones' prior criminal history.

(Assignment of Error No. 3)

4. Whether the trial court erred when denied Mr. Jones bail pending appeal.

(Assignment of Error No. 4)

IV. STATEMENT OF THE CASE

A. Procedural History

On January 23, 2008, with an amended information filed on May 6, 2008, Davon Jones was charged in Pierce County Superior Court with two criminal charges: (1) delivery of a controlled substance on June 7, 2007, and (2) possession of a controlled substance with intent to deliver on January 22, 2008. CP 8-9. On two occasions prior to trial, Davon Jones filed a motion with the Court to sever the two counts. CP 240-246, RP 18-31. The issue was reserved from the trial judge, who denied the motion. CP 252, RP 30-31. At trial, which began on October 14, 2009 and ended five (5) court days later, the State presented evidence of both charges to a jury.

Prior to trial, defense counsel requested and obtained an order that all allegations of prior bad acts or criminal conduct be excluded at trial, other than the June 7, 2007 and January 22, 2009 allegations. CP 248-251, RP 18-30

In closing, the State requested the jury to consider evidence from the January 22, 2008 allegations in determining guilt for the June 7, 2007 charge. RP 337. No jury instruction was offered instructing the jury to not consider evidence of one charge when deciding guilt on the other. Jury Instruction No. 4 stated that the jury was not to consider the *verdict* for one charge when determining the verdict for the other. CP 380.

Upon sentencing, Mr. Jones timely filed a Notice of Appeal and

requested the Court to impose bail pending appeal. CP 403. The Court imposed \$100,000 bail. RP 407. Shortly thereafter, upon the State's motion for reconsideration, the judge refused to impose any bail. CP 421-427, 430-475, 479-484, RP 408-430. The Court based its ruling on a 2004 conviction, older out-of-state warrants and gun possession convictions

B. Facts

June 7, 2007

Tacoma Police Officer Kenneth Bowers developed Ms. Jennifer Richards as confidential informant number 273 as a result of her own sale of drugs in February 2007. RP 50-51, 170. Facing 20 months in prison, Ms. Richards signed a confidential informant contract which required her to assist in the investigation of three individuals, leading to arrest and charges, within six months of the contract. RP 64-66, 173, 189-190.

After Ms. Richards completed her contract, she continued to work as a confidential informant for the Tacoma Police Department. Rather than working towards saving prison time, which she already achieved, Ms. Richards participated in numerous drug transactions, wherein she was paid a percentage of the value of the drugs seized. RP 173-174.

Ms. Richards' contract as a confidential informant required her to cease any and all criminal activity and disclose any violations. RP 67, 191, 193. She continually violated these conditions by continuing to purchase drugs on her own, ingest drugs, shoplift, and drive on a suspended license. RP 192, 193, 207, 208. Ms. Richards admittedly could not go for more than a day or two without ingesting drugs, such as cocaine

and heroin. RP 168-169, 192. Ms. Richards hid all such activities from Officer Bowers while obtaining her relief from 20 months in prison and money from the Tacoma Police Department. RP 192, 193, 207, 208. A violation of her confidential informant contract would have resulted in her termination as a confidential informant. RP 49.

Ms. Richards arranged for the purchase of cocaine from David (not Davon) Jones on June 7, 2007. RP 50-55, 177, 202. Davon Jones was not a target of the investigation that day. RP 104, 202. Ms. Richards called David, who instructed Ms. Richards as to where the two would meet. RP 51, 178, 211.

Officer Bowers took Ms. Richards to the area behind the store where the meeting was to take place. RP 54, 179. Officer Bowers lost any sight or contact with Ms. Richards once she walked around the side of the building until she returned a short time later, providing him with cocaine she stated that she had just purchased. RP 56-59, 183-184.

Officer McColeman operated audio and video recording equipment from his vehicle positioned to record the front parking area of the arranged location. RP 138-141. The video shows Ms. Richards approaching the passenger side of a black and grey Suburban, and walking away from the car a short time later. The video does not show any actions specific or unique to a drug transaction. All evidence of a drug transaction came from Ms. Richards' testimony. RP 201-205. The first mention of anything specific to a drug transaction is on the audio portion, occurring after the driver of the Suburban gets out and walks into a store. RP 204,

282.

Ms. Richards, testifying approximately five (5) hours after ingesting heroin, testified that the cocaine she provided Officer Bowers was obtained in a transaction at the Suburban. RP 153-161. She testified that David Jones was in the passenger side of the Suburban, which was driven by Davon Jones. RP 180-183, 211. Davon Jones was identified by Ms. Richards as the driver through a photomontage several weeks later. RP 70-74, 185-187.

She stated that when she paid for the cocaine, Davon counted out rock cocaine from his pocket and handed them to David, who provided them to Ms. Richards, all before Davon left the Suburban. RP 180-183, 211. Ms. Richards provide no explanation for why any and all discussions regarding the transaction occurred after Davon Jones exited the car and entered the store. RP 201-205, 281-183.

Ms. Richards testified that she could not recall if she was under the influence of drugs when she was presented a photo montage. RP 212.

Davon Jones testified that he went to the store to buy a shirt. RP 296-297. After arriving to the parking lot, he used his cell phone for texting before he left the car to enter the store. RP 308. While he was texting, his brother, David Jones, in the passenger seat talked with a girl that walked up to the car. Davon believed the girl to be an acquaintance of his brother. RP 297-298. He did not observe any drug transaction or hear any discussions of a drug transaction, and testified that he did not participate in or know about a drug transaction. RP 311.

David Jones testified that he sold Ms. Richards cocaine on June 7, but that the transaction occurred after his brother Davon left the car. David testified that Davon Jones did not participate in the transaction and did not have any knowledge of the transaction. RP 274-275, 281-183.

January 22, 2008

On the morning of January 22, 2008, Officer Bowers debriefed several other officers regarding the execution of search warrants pertaining to David Jones, and that there was probable cause to arrest Davon Jones for the June 7, 2007 incident. RP 80-81.

Based upon Officer Bowers' debriefing, Officer Kenneth Smith stopped a car that was driven by a person he believed to be Davon Jones. RP 246-248. After arresting Mr. Jones, Officer Smith contacted Officer Brand to have a K-9 search conducted of the car. RP 252-253. Officer Brand testified that his K-9 dog responded positively for drugs in the car, which a further search confirmed. RP 252-253, 228-231.

Officer Smith testified that Davon Jones admitted at the scene of the arrest that the drugs were his. RP 255. Davon Jones denied any such admissions. RP 301. Officer Bowers testified that he interviewed Davon Jones later in the day on January 22, 2008, and Davon Jones denied any knowledge of the drugs in the car, which was not his. RP 95-97.

C. Trial Occurrences

Numerous times throughout the trial, Davon Jones' trial counsel either elicited otherwise inadmissible evidence or permitted such testimony and evidence without objection.

Defense counsel asked Officer Bowers whether, prior to June 7, 2007, Davon Jones had been a part of an investigation. Officer Bowers responded that Davon Jones had been identified as a co-conspirator earlier in the investigation, and Davon was known to drive a black and grey Suburban not registered in his name. RP 109, 112. As a result of this exchange, the State obtained permission to present evidence of a May 14, 2007 confidential informant purchase from David Jones wherein the State alleged Davon was present. The State also presented evidence that Davon was previously stopped by police in the black and grey Suburban. RP 117-120, 122-127, 133, 217, 218. Subsequently, defense counsel inquired further about the May 14, 2007 transaction. RP 129. Defense counsel then offered into evidence a video of the May 14, 2007 transaction, which included a black and grey Suburban. RP 133, 143-46.

Without objection, Ms. Richards testified that Davon was part of the investigation, that Davon usually drove a black and grey Suburban to drug transactions and Davon “sometimes” and “usually” came in the Suburban. RP 22, 80, 202.

Through and as a result of defense counsel’s questions, it was revealed to the jury that Davon had a suspended driver’s license, had been convicted of a DUI, did not have a required ignition interlock, had been previously arrested for drug charges, had plead guilty to a drug charge, had been charged with multiple counts of bail jumping and convicted of bail jumping, and had prior plea forms admitted into evidence. RP 259, 300-07, 310, 315-17, 319-20.

In closing argument, the State used evidence from the January 22, 2008 charge to support an argument for a guilty verdict for the June 7, 2007 charge. RP 337.

V. ARGUMENT

A. TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SEVERANCE.

While CrR 4.3 permits joinder of charges at trial if they are of the same or similar character, often deemed a liberal rule, joinder cannot be utilized in a manner as to prejudice a defendant. *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968). In *Smith*, the Washington State Supreme Court referred to the United States Court of Appeal's ruling in *Drew v United States*, 331 F.2d 85, (D.C. Cir. 1964), stating different ways improper joinder can prejudice a defendant:

The argument against joinder is that the defendant may be prejudiced for one of the following reasons: (1) he may be embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

Smith, 74 Wn.2d at 88.

In the case at hand, it is clear that the latter two circumstances of prejudice are at issue in Mr. Jones' trial. Given the confidential informant's extreme credibility problems, the jury likely used the evidence from the January 22, 2008 charge in assessing the informant's credibility.

In fact, the prosecution specifically asked the jury to consider the evidence of the January 22, 2008 charge when determining guilt for the June 7, 2007 charge.

Joinder is inherently prejudicial. *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972). In order to mitigate, offset, or neutralize the prejudicial aspects of joinder, the Court must consider several factors:

- (1) The strength of the State's evidence on each count, (2) clarity of defenses to each count, (3) the court properly instructs the jury to consider the evidence of the crime, and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joinder.

State v. Harris, 36 Wn.App. 746, 750, 677 P.2d 202, *citing State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968).

In applying the *Harris/Smith* factors, the Court of Appeals has specifically determined that prejudice may result against a defendant if joinder invites a jury to cumulate evidence or infer a criminal disposition. *State v. Watkins*, 53 Wn.App. 264, 268, 766 P.2d 484 (1989). In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice resulting from the joint trials. *State v. Bythrow*, 114 Wn.2d 713, 720, 790 P.2d 154 (1990), *citing State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 5 (1982), *cert. denied*, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983).

Application of the *Harris/Smith* factors to the instant matter makes clear the specific prejudice to Mr. Jones.

1. Disparity in Strength of State's Evidence in Each Count

There is a substantial disparity between the strength of the State's two cases against Mr. Jones. The first case, from June 7, 2007, is hinged solely and directly upon the testimony of the confidential informant. The only evidence that Mr. Jones played any role in the drug transaction between Ms. Richards and David Jones was the testimony of Ms. Richards. Police surveillance, including personal observation, video, and audio, failed to provide evidence that Davon Jones actually participated in the drug transaction, was present when it occurred, or knew about the transaction. Only Ms. Richards testified that Davon Jones did so; all other direct testimony was that the drug transaction took place once Davon Jones left the vehicle and entered a store, without any knowledge of the transaction.

Ms. Richards' credibility was at serious issue in the trial. She had admitted to hiding the fact that she continually broke her confidential informant contract by independently buying drugs, using drugs, shoplifting, and driving with a suspended license. Moreover, she was working towards saving 20 months in prison, *and* she was working towards developing her confidential informant contract into a relationship with the Tacoma Police Department wherein she would actually profit monetarily by receiving a certain percentage of the value of drugs seized

as a result of her work. Ms. Richards could not recall if she was under the influence of drugs at the time she reviewed a photo montage, or at the time she wrote a statement regarding her allegations. Ms. Richards could not refrain from drug use for more than a day or two, and had actually ingested heroin on the morning of her testimony at trial.

In contrast, the State's evidence against Davon Jones in the latter case, from January 22, 2008, is much stronger. Drugs were found in a car driven by Mr. Jones. In fact, the State's case was strong enough that the burden shifted to Mr. Jones to prove by a preponderance of the evidence that his possession was unwitting.

Thus, in comparing the two cases, there is a vast difference between the case built solely upon a witness whose credibility was seriously diminished versus the case whose evidence was such that the defense resulted in burden shifting to the defendant. The larger the disparity of strength of the cases, the more prejudicial the joinder of the cases. *See State v. Russell*, 125 Wn.2d 24, 63-65, 882 P.2d 747 (1994).

2. Clarity of Defenses

The second factor is whether the clarity of defenses to each count was prejudiced by joinder. Likelihood of confusion of defenses is smaller the more identical the defenses are to each charge. *State v. Hernandez*, 58 Wn.App. 793, 799, 794 P.2d 1327 (1990), *review denied*, 117 Wn.2d 1011, 816 P.2d 1223 (1991).

In the instant case, the defenses were not identical at all. To the June 7, 2007 charge, the defense was a general denial. To the January 22,

2008 charge, the defense was an affirmative defense, unwitting possession, which placed the burden of proof on Mr. Jones.

There is a substantial likelihood that Mr. Jones' defense to the January 22, 2008 charge confused and muddled his defense of general denial to the June 7, 2007 charge. Although his possession was unwitting, Mr. Jones inherently admitted to possession of drugs on January 22, 2008. This admission will confuse a jury as to his defense of denying possession or knowledge at all of any drugs on June 7, 2007. In addition, if the jury considered Mr. Jones' culpability on June 7 to be that of an accomplice, the jury would be similarly confused by the two defenses.

There is no way that a jury's assessment of Mr. Jones' defense to the June 7 charge would not be in any way influenced or confused by his defense to the January 22 charge where he admitted possession. In fact, in closing arguments, the State asked the jury to be influenced by Mr. Jones' admission of possession on January 22.

3. Trial Court Did Not Properly Instruct Jury

The third *Harris/Smith* factor also established specific prejudice to Mr. Jones in denying severance of the charges. While the Court instructed the jury, Instruction No. 4, that each count must be decided separately, the instruction states that the jury's *verdict* in one count should not control the verdict in the other count. This instruction *does not* instruct the jury to not consider *evidence* from one charge when determining the verdict in the other. This is especially problematic when the prosecutor specifically asked the jury to do just that.

In *State v. Harris*, 36 Wn.App. 746, 677 P.2d 202 (1984), the Court of Appeals determined the trial court abused its discretion by denying a motion to sever when the prosecution, during closing arguments, requested the jury to consider the evidence of each charged crime to convict for the other. Even though the jury was instructed to consider the counts separately, the relation between the two crimes by the prosecution created extreme danger that the defendant was prejudiced. The Court of Appeals determined that, in doing so, there was a clear violation of the rule prohibiting use of evidence of other crimes or misconduct in order to convict. Thus, evidence of actual prejudice was presented by the defendant and separate trials should have been granted. *Id.* at 749-51.

In the instant case, the Instruction directing the jury to consider the charges separately specifies that the jury should not consider *the verdict* of one charge, not *the evidence*, when determining guilt on the other charge. Moreover, the State, in closing, specifically asked the jury to consider the evidence from the January 22, 2008 charge when determining guilt on the June 7, 2007 charge.

Without further clarifying instructions, the State's request would lead a jury to believe consideration of the January 22 evidence in determining guilt for the June 7 case was appropriate. Thus, whatever mitigating effect Instruction Number 4 had was eliminated, leaving the jury without proper instruction.

4. Evidence Would Not Be Cross Admissible

Regarding the fourth and final *Harris/Smith* factor, it is without question that if the charges were tried separately, evidence of the other charge would be excluded at trial.

The inherent prejudice of joinder is mitigated when evidence of each crime would be admissible in a separate trial for the other. However, when this mitigating factor is absent, and the evidence of each crime would not be admissible in a trial for the other, it is an abuse of discretion for a trial court to deny a defendant's timely motion to sever. *State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984). In order to support a finding that the trial court abused its discretion in denying severance, the defendant must be able to point to specific prejudice resulting from the joint trials. *State v. Bythrow*, 114 Wn.2d 713, 720, 790 P.2d 154 (1990), citing *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 5 (1982), cert. denied, 459 U.S. 1211, 103 S.Ct. 1205, 75 L.Ed.2d 446 (1983).

Evidence of other crimes, wrongs or acts is not admissible to prove that a person acted in conformity therewith. ER 404(b). In criminal drug cases, evidence of other drug transactions *may* be admissible *only if* the evidence is used for something other than establishing propensity, such as establishing knowledge of cocaine. *State v. Pogue*, 104 Wn. App. 981, 986, 17 P.3d 1272 (2001); *State v. Wade*, 98 Wn.App. 328, 989 P.2d 576 (1999).

It is clear that the only use for the evidence of each crime at Mr. Jones' trial for the other crime would be for propensity purposes. Similar

to *Pogue*, Mr. Jones admitted that he was aware of what cocaine was, just that he was unaware of its presence in the car he was driving on January 22, 2008 or that his brother was selling it on June 7, 2007.¹

As it was in *Harris*, the specific prejudice to Mr. Jones is clear in the record, as evidence of the January 22, 2008 charge had to directly influence the jury's decision regarding the June 7, 2007 charge, *and the prosecution asked the jury to consider the January 22, 2008 evidence when determining guilt for the June 7, 2007 allegations.*

The jury's assessment of Ms. Richards' credibility was likely swayed by the testimony that Mr. Jones was in a car containing cocaine on January 22, 2008, and the officer's allegation that Mr. Jones admitted to having possessed the drugs. Combined with the State's specific request of the jury to consider the January 22, 2008 possession of cocaine when reviewing Mr. Jones' defense of general denial to the June 7, 2007 charge, the prejudice is extremely clear.

In balancing the *Harris/Smith* factors, it is clear that substantial prejudice against Mr. Jones occurred in denying his timely motion to sever. There is a substantial disparity in the strength of the State's cases, there is a substantial likelihood of confusion of Mr. Jones' defenses, the

¹ The State relied upon *State v. Thomas*, 68 Wn.App. 268, 272-74, 843 P.2d 540 (1992) for its assertion that other drug transactions may be used as evidence of intent. However, in *Thomas*, evidence of other drug transactions were within an hour or so prior to the arrest and at the same location of the arrest. The evidence was permitted because it was evidence from the exact same time period as the arrest and established the defendant's intent *at that time*. *Thomas* is limited to these facts, without extension to acts occurring seven (7) months apart. The assertion of *Thomas* as supporting evidence from either June 7 or January 22 in trial of the other is disingenuous at best.

jury was not properly instructed in light of the prosecution's closing, and evidence of one charge would not be admissible in a separate charge of the other.

As the record is clear, the jury's decision regarding witness credibility in the June 7 case was substantially influenced by evidence from the January 22 case. Such evidence could only effect a jury's belief that Mr. Jones had propensity for such activities. The State invited the jury to make this conclusion.

When there is a lack of cross-admissibility, and a defendant shows specific prejudice, it is an abuse of discretion to deny a motion for severance. The trial court in the instant matter abused its discretion, and new separate trials for each charge is warranted and necessary.

B. MR. JONES WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL INTRODUCED OR FAILED TO OBJECT TO EVIDENCE OF OTHERWISE INADMISSIBLE CRIMINAL CONDUCT, INCLUDING OTHER DRUG ALLEGATIONS AND PRIOR CRIMINAL CONVICTIONS AND ARRESTS.

The Sixth Amendment of the United States Constitution entitles a defendant to "effective" assistance of counsel acting on his or her behalf. U.S. Const. Amend. 6. A claim of ineffective assistance of counsel requires the Court to consider the entire record and determine (1) whether defense counsel's performance was deficient and (2) whether the performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The standard of

review in determining an ineffective assistance of counsel claim is *de novo*, a mixed question of fact and law. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). The appropriate remedy for a trial conducted with the ineffective assistance of counsel is for the case to be remanded for a new trial with new counsel. *Tower v. Glover*, 467 U.S. 914, 104 S.Ct. 2820, 81 L.Ed.2d 758 (1984), *State v. Emert*, 94 Wn.2d 839, 621 P.2d 121 (1980).

Courts presume that a defense counsel's conduct was effective when reviewing an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687. Defense counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). However, the presumption of effective conduct is sufficiently rebutted when there is no conceivable legitimate tactic explaining counsel's conduct. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Prejudice occurs when there is a reasonable probability that the outcome would have differed but for the deficient performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The fundamental question is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland* at 686.

1. Defense Counsel's Performance Fell Well Below Objective Standard of Reasonableness.

This Court, in *State v. Saunders*, 91 Wn.App. 575, 958 P.2d 364 (1998), addressed a case strikingly similar to the instant matter. In *Saunders*, the defendant was charged with possession of a controlled substance, to which the defendant claimed unwitting possession. In a search of the vehicle driven by, but not registered to, the defendant, the officer found a wallet sitting on top of a duffel bag in the back seat, along with clothes and tool. The defendant testified that the clothes and tools were his, but that the wallet was not. *Id.* at 365-66. Inside the wallet were three syringes, a spoon with heroin residue, cotton, and baggy with methamphetamine. Near the wallet was a set of scales. *Id.*

At trial, Saunders testified that he was unaware of the items in the back seat. During testimony, Saunders' defense counsel elicited testimony that Saunders had a previous conviction for possession of methamphetamine. On appeal, Saunders argued ineffective assistance of counsel. *Id.*

In review the defendant's argument in *Saunders*, the Court of Appeals, Division II, applied the *Strickland* test, focusing the test to ineffective assistance of counsel based upon counsel's failure to challenge the admission of evidence. The Court found:

To demonstrate ineffective assistance of counsel, the defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective

standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Hendrickson*, 129 Wash.2d 61, 77-78, 917 P.2d 563 (1996).

More specifically, where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained, *McFarland*, 127 Wash.2d at 337 n. 4, 899 P.2d 1251; *Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563; and (3) that the result of the trial would have been different had the evidence not been admitted, *Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563.

Saunders at 578.

In applying the test to the facts in *Saunders*, the Court found that the record revealed no reason of tactic or strategy for offering the evidence of the defendant's criminal history, and that no reason could be discerned from the record why counsel could not have objected to the evidence. *Id.* at 578-79.

The *Saunders* court also determined that ER 609(a)(1) would likely have rendered the evidence inadmissible, as the defendant's prior drug conviction was not for a crime of dishonesty and there is nothing inherent in a drug conviction to suggest that a person is untruthful. *Id.* at 579. Further, evidence of a prior conviction is *inherently prejudicial* when

the defendant is a witness because it shifts the jury focus from the merits of the charge to the defendant's general propensity for criminality. *Id.*

Therefore, because defense counsel failed to object to the evidence and was instrumental in eliciting the evidence, counsel's performance in *Saunders* fell below an objective standard of reasonableness. *Id.*

In the instant matter, Jones' counsel's performance dipped well below an objective standard of reasonableness, even further than *Saunders*. Defense counsel not only (1) elicited evidence of Mr. Jones' prior criminal record, but also (2) directly elicited evidence of the Tacoma Police Department's belief that Mr. Jones had been involved in prior transactions, (3) failed to object to the State's presentation of a May 14, 2007 drug transaction at which Mr. Jones was believed to have been present, (4) offered into evidence a video of the May 14, 2007 transaction which included a black and grey Suburban; (5) failed to object to the confidential informant's continual reference to Mr. Jones' "usual" actions; (6) failed to object to the State's further cross-examination of Mr. Jones' criminal history; and (7) failed to object to the introduction of copies of Mr. Jones' plea agreement in prior drug case, including marijuana and bail jumping convictions.

All evidence pertaining to Mr. Jones' prior arrests, charges, and convictions are clearly inadmissible pursuant to ER609(a)(1). None of the evidence pertains to crimes of dishonesty. Any probative value is clearly outweighed by the prejudicial value of the evidence. Importantly, such evidence is inherently prejudicial as Mr. Jones was a witness and it shifts

the jury focus from the merits of the charge to the defendant's general propensity for criminality. *Saunders* at 580, citing *State v. Hardy*, 133 Wn.2d 701, 709-10, 946 P.2d 1175 (1997).

All evidence pertaining to allegations of Mr. Jones' participation in any drug transaction other than those charged, including testimony and video of the May 14, 2007 transaction and testimony about Mr. Jones' "usual" acts, are also clearly inadmissible. In criminal drug cases, evidence of other drug transactions is not admissible to establish propensity. *State v. Pogue*, 104 Wn. App. 981, 986, 17 P.3d 1272 (2001); *State v. Wade*, 98 Wn.App. 328, 989 P.2d 576 (1999).

In fact, Mr. Jones' trial counsel was granted a motion *in limine* excluding reference to any allegations or investigations other than the June 7 and January 22 incidents. After having such evidence properly excluded, defense counsel elicited such testimony.

There is nothing in the record that suggests a legitimate trial tactic or strategy in eliciting such evidence or failing to object to the admissibility of such evidence. Testimony of the police suspicions of other transactions Mr. Jones may have been involved in can only serve to prejudice Mr. Jones. Similarly, testimony of Mr. Jones' inadmissible criminal history can only prejudice Mr. Jones.

There are absolutely no trial advantages that could conceivably exist by the introduction of any such evidence. It is clear that Mr. Jones' defense counsel's performance fell below an objective standard of reasonableness. Any and all inferences a jury may make regarding the

evidence are impermissible, that Mr. Jones had a criminal propensity and on June 7 and January 22 acted in conformity therewith.

2. Prejudice

Defense counsel's insufficient performance resulted in prejudice to Davon Jones as there is a reasonable probability that the outcome would have been different but for the introduction of inadmissible prior transaction and criminal history evidence. *See Strickland*, 466 U.S. at 694, *see also Hardy*, 133 Wn.2d at 712-13.

In *Saunders*, the Court of Appeals found that a defense of unwitting possession caused the case to be hinged upon the defendant's credibility. Specifically, if the jury believed the Defendant, the jury could have accepted his unwitting possession defense. *Saunders* at 580-81. Therefore, there was a reasonable probability that the outcome would have been different but for the introduction of the defendant's prior conviction. *Id.* at 581.

Similarly, in *Hardy*, the Washington State Supreme Court determined that, due to lack of overwhelming evidence, the case turned on the defendant's credibility. There, the defendant was accused by two women of robbing one of them of jewelry. The Court admitted evidence of the defendant's prior drug conviction as an unnamed felony. While the defendant was found with the jewelry in his pocket, the only evidence of how it got there was the testimony of two women. The admission of a prior conviction sufficiently damaged the defendant's credibility such that there was a reasonable probability that there would have been a different

outcome had the evidence not been admitted. *Hardy* 133 Wn.2d at 713.

The instant matter is another prime example of damage to the defendant's credibility through inadmissible evidence which had a reasonable probability of affecting the outcome of the jury verdict. With regard to each count levied against Mr. Jones, the evidence was not overwhelming such that the jury's determination of Mr. Jones' credibility was material to each verdict.

Regarding the June 7, 2007 charge, the only evidence that Mr. Jones participated in the transaction or was actually present for the transaction was the testimony of the confidential informant. The confidential informant's credibility was drawn into serious question as she continually hid her breaches of the CI contract, continually bought and used drugs, obtained money for her actions, and showed up to Court after ingesting heroin. Thus, the jury had to balance the credibility of the confidential informant against that of Mr. Jones.

Regarding the January 22, 2008 charge, exactly the same as in *Sauders*, Mr. Jones' defense was unwitting possession. Therefore, the jury had to assess Mr. Jones' credibility.

For both charges, the admission of either Mr. Jones' otherwise inadmissible criminal history or the police department's suspicions of other drugs transactions would have irreparably and unfairly damaged Mr. Jones' credibility. Combined, Mr. Jones's credibility was demolished such that he could not have possibly received a fair trial.

For each charge, the introduction of inadmissible evidence resulted

in sufficient damage to Mr. Jones' credibility that there was a reasonable probability that the outcome would have been different but for the introduction of the evidence of prior drug transaction allegations and prior conviction. Therefore, defense counsel's performance below an objective standard of reasonableness prejudiced Mr. Jones.

C. THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO GRANT MR. JONES BAIL PENDING APPEAL.

The trial court granted a Motion to Reconsider the imposition of bail. Such an order must be based upon new facts or law, not available at the time of the initial Order, or a change of circumstances. The State did not, however, support *any* argument of change of circumstances or new evidence.

In addition, the trial court's denial of bail was an abuse of discretion. While a trial court has discretion in granting and denying bail on appeal, the trial court's discretion is governed by a finding that the defendant is a flight risk, a danger to the community, or that further delay will diminish deterrent effect of punishment. The State argued that Mr. Jones is a danger to the community and/or a flight risk by setting forth unsubstantiated, unexplained, old matters: unsubstantiated gun possession charges, unsubstantiated old warrants from Baltimore, and a 2004 bail jumping charge in Pierce County entered as a result of plea negotiations. All of these circumstances were considered by the trial court when releasing Mr. Jones pending trial.

1. The State has Not Fulfilled the Requirements for Revoking Order of Bail.

Amendments to revocation to an Order for Bail require a change of circumstances, new information, or a showing of good cause. CrR 3.2(k)(1).

A motion to amend or revoke a bail order *does not* provide litigants with an opportunity for a second bite at the apple. Generally, new evidence or law that was not available at the time of trial is required to support a motion for reconsideration.

In the case at hand, the State presented no new facts or different argument supporting a different conclusion regarding Mr. Jones' propensity to flee or danger to the community. All facts and argument were presented at the original hearing, namely the gun possession charges, the Baltimore warrant, and the bail jumping charge. Since each was presented to the Court at the original hearing, they cannot be used to support the State's current request for reconsideration.

Similarly, the rules, statutes, and case law now submitted to the Court were in existence at the time of the original hearing. Since all were available at the time of the original hearing, they cannot be the basis for a reconsideration at this point. Failure to exercise discretion and the change one's mind is not good cause to justify revocation of a bail order

2. The Trial Court Abused Its Discretion in Denying Bail On Appeal.

The setting of bail pending appeal is a matter of discretion. *State*

v. *Smith*, 84 Wn.2d 498, 505, 527 P.2d 674 (1974). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or untenable reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

At arraignment, the trial court granted Mr. Jones bail, reviewing and determining his likelihood to flee and his potential danger to the community. CrR 3.2(a)(1) and (2). Upon the entry of conviction, pending appeal, the trial court has the discretion to revoke, modify, or suspend terms of release and bail previously ordered. CrR3.2(h). However, this discretion is governed by RCW 9.95.062, RCW 9.95.065, RCW 10.64.025, and RCW 10.63.027. The trial court is required to essentially perform substantially the same analysis as at arraignment, revoking bail only when it has been established by the State that the defendant is likely to flee or presents a danger to the community.

CrR 3.2(h) specifically references RCW 9.95.062. RCW 9.95.062 presumes a trial court to stay the execution of judgment of conviction, stating that such action shall not be taken in limited circumstances. The statute states as follows, in pertinent part:

Stay of judgment – When prohibited – Credit for jail time pending appeal

(1) Notwithstanding CrR 3.2 or RAP 7.2, an appeal by a defendant in a criminal action shall not stay the execution of the judgment of conviction, *if* the court determines by a preponderance of the evidence that:

(a) The defendant is likely to flee or to pose a

danger to the safety of any other person or the community
if the judgment is stayed,

RCW 9.95.062, in pertinent part (Emphasis added).

The statute inherently places the burden upon the prosecution to establish by a preponderance of the evidence that the defendant is either currently *likely* to flee or poses a danger to the safety of any other person or the community. In the case at hand, the State asserted only what was evidenced on paper – that Mr. Jones has two gun possession convictions, “two” warrants from Baltimore, and a bail jumping conviction in Pierce County Superior Court. The State failed to affirmatively prove the warrants, and failed to inform the Court of the context of each so that the Court could have full information in determining whether these were indications that Mr. Jones was *currently likely* to flee while on appeal.

All of this information existed and was considered at Mr. Jones’ arraignment, where a low bail amount was imposed. There was no evidence presented by the State that supports a different conclusion upon appeal.

The State presented two facts in order to establish their belief that Mr. Jones was *currently likely* to flee while out on appeal: (1) Alleged two warrants from Baltimore from 2002; and (2) Bail Jumping charge, with an incident date of June 2004. The State failed to provide actual evidence of the warrants, and failed to present any evidence of the circumstances of the warrants and the bail jumping charge. Instead, the State wanted the Court to blindly accept their existence, as well as the State’s alleged

meaning of each, without any explanation.

The State presented two arguments as to why Mr. Jones was a danger to the community: (1) two old misdemeanor gun possession convictions in Baltimore and (2) the current conviction. Both fail to establish that Mr. Jones was a current danger to the community.

The State and trial court would like to use the current conviction itself as evidence of Mr. Jones' danger to the safety of any other person or the community. However, such assertion flies in the face of logical reasoning and statutory construction. The potential for bail pending appeal itself is an indication that the existence of a conviction itself does not equate to a determination that the defendant is a danger, unless included in the enumerated charges of subpart (2) of RCW 9.95.062. The listed charges in subpart (2) itself are those charges that convictions alone are indicators that the defendant is a danger to the community. The existence of those enumerated charges is also an indication that other than those charges, a conviction itself is not indicative of being a danger to the community.

In addition, by the prosecutor's reasoning, bail could never exist for criminal defendants awaiting appeal. Criminal laws are enacted because of the danger of the acts to the community. So, by the State's reasoning, any criminal conviction would suffice for such a finding. However, this is obviously not the law because the ability to obtain bail is available to defendants awaiting appeal and favored by the State Legislature.

Rather, the State must establish facts that warrant a finding that Mr. Jones continues to present a danger to the community. There are no such facts.

The State has also failed to establish that Mr. Jones is currently *likely* to flee the jurisdiction while out on bail pending appeal. The declarations of Mr. Jones' family, friends, and the bail bond company contradict such a conclusion. The State has no evidence that Mr. Jones may flee except 10-year-old warrants, which were unknown to Mr. Jones, and a five-year-old bail jumping charged that was used as a plea bargaining tool and not actually based upon Mr. Jones being a fugitive.

Regardless of the instant charges, Mr. Jones has been a solid member of the community, working at a home for mentally ill persons for nearly six years and helping young men adjust to school and learn to better themselves. There is no reason to believe that Mr. Jones will not continue to do so while out on bail. Moreover, everyone in Mr. Jones' life, including the bail bond company, have the utmost confidence that Mr. Jones is not likely to flee.

The trial court has inherent authority to deny bail on appeal upon a determination that further delay would diminish the deterrent effect of punishment. *State v. Cole*, 90 Wn.App. 445, 447-48, 949 P.2d 841 (1998). However, the trial court did not engage in such analysis or enter such a finding.

The trial court abused its discretion in revoking its Order granting bail on appeal.

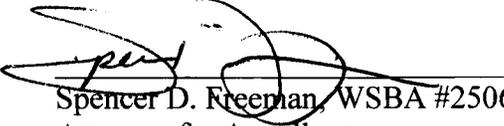
VI. CONCLUSION

The trial court abused its discretion in denying Mr. Jones' motion to sever the June 7, 2007 charge from the January 22, 2008 charge at trial. There was a substantial disparity in the strength of the two charges, the defense to each charge confused the defense of the other, the court failed to properly instruct the jury to consider evidence of the two charges separately, and the evidence of one charge would have been excluded in a separate trial of the other charge. Mr. Jones was prejudiced as it was reasonably likely that the jury was improperly influenced by the evidence of one charge in reaching a verdict on the other.

Mr. Jones was denied effective assistance of counsel at trial. His trial counsel elicited and presented evidence of other drug transactions in which the police suspected Mr. Jones was involved *and* elicited and presented evidence of past criminal convictions, including driving under the influence, drug possession, and bail jumping. All such evidence would have been otherwise inadmissible, and prejudiced Mr. Jones by destroying his credibility as well as allowing the jury to determine he had a propensity for criminal activity.

The trial court abused its discretion by revoking its own order granting bail upon appeal, as there was no evidence of a change in circumstances, that Mr. Jones was a current flight risk, danger to the community, or that the delay in punishment would have deterred the effect of punishment.

DATED this 20th day of August, 2010.


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Attorney for Appellant

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DAVON JONES,

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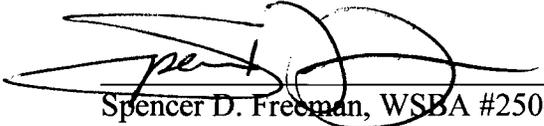
CERTIFICATE OF
SERVICE

FILED
BY
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
TACOMA, WA
AUG 20 2010

I certify that on the 20th day of August, 2010, I caused a true and correct copy of Brief of Appellant to be served by personal hand delivery on

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DATED this 20th day of August, 2010.


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