

**NO. 42734-6-II**

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

---

STATE OF WASHINGTON,

Respondent,

v.

**SCOTT E. COLLINS,**

Appellant.

---

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

The Honorable Stephen Warning, Judge

---

**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in refusing to give Mr. Collins' proposed instruction limiting the jury's consideration of drug evidence.

2. The trial court erred in failing to grant Mr. Collins' motion for a mistrial.

3. Cumulative error deprived Mr. Collins a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court abuse its discretion when it refused Mr. Collins' proposed instruction that possession of drugs should not be used to determine his credibility?

2. Did the trial court abuse its discretion when it refused to grant Mr. Collins' motion for a mistrial when, mid-trial, it was discovered that a juror knew one of the police witnesses?

3. Did cumulative error deprive Mr. Collins of a fair trial?

**C. STATEMENT OF THE CASE**

Scott Collins and his business partner, Josh Evans, wanted to open a used car lot. 2RP<sup>1</sup> ("Report of Proceedings") at 189-191, 195-96. To get their business enterprise up and running, they needed a big dual-axle truck that could haul cars to their lot. 2RP at 188-191. Mr. Collins had been looking for such a truck for some time. 2RP at 188. One day, he

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<sup>1</sup> There are two volumes of verbatim herein identified as "1RP" (Volume 1) and "2RP" (Volume 2).

was at the Kelso AM/PM and saw a truck that looked like just what he needed. 2RP at 187-88. He expressed his admiration for the truck to the man who was driving it. 2RP at 188. That man identified himself as Frank Medeiros. 2RP at 190. Medeiros said he had a similar “dually” he’d be willing to sell. 2P at 188, 194-95. He and Mr. Collins settled on a price of \$1,500 plus an additional \$300 for a fifth wheel trailer hitch. 2RP at 189.

Mr. Collins and Josh Evans each pitched in about half of the truck’s purchase price. 2RP at 189-191, 196. Mr. Collins met Medeiros back at the AM/PM. 2RP at 189. Mr. Collins gave Medeiros the money and Medeiros gave Mr. Collins the truck’s registration and title. 2RP at 191, 195. Prior to the truck deal, Mr. Collins had never met Medeiros. 2RP at 194.

Josh Evans did not testify at trial. 1RP; 2RP. Instead, the information about Josh Evans came from Mr. Collins’ testimony. 2RP 185-203.

Mr. Collins was driving the truck early on the morning of November 22, 2010, when Longview Police Officer Michael Berndt signaled him to pull over. 1RP at 167-170. Mr. Collins pulled over immediately. 1RP at 179. Mr. Collins was surprised when Officer Berndt told him the truck was reported as stolen. 2RP at 187. Mr. Collins had no

idea. 2RP at 193. Mr. Collins had the truck's keys. 1RP at 166. Officer Berndt described the truck's ignition as damaged. 1RP at 171. But Mr. Collins did not think it was damaged at all. 2RP at 199. The truck started using the keys Medeiros gave to Mr. Collins. 1RP at 166; 2RP at 199.

Officer Berndt took Mr. Collins to the police station. 1RP at 172. Officer Berndt found a small bag of methamphetamine in Mr. Collins' shirt pocket. 1RP 172-73. Mr. Collins agreed the meth was his. 2RP at 187.

The police did a brief inventory search of the truck when they impounded it. 2RP at 159. In the cab of the truck, they located the truck's insurance, registration, and title. 1RP at 164-65; 2RP at 191. There were no signatures on the title to indicate a recent sale or transfer of ownership. 2RP at 197-98. Mr. Collins believed his partner, Josh Evans, received a bill of sale from Medeiros. 2RP at 197.

Mr. Collins had personal items in the bed of the truck, to include a bed frame, blankets, and totes. 1RP at 170; 2RP at 192.

Frank Medeiros is a long haul truck driver. 1RP at 92-93. Early on the morning of November 18, 2010, he left Vancouver, Washington, for a cross-country trip to Maine. 1RP at 96-97. Medeiros owned a house in Kelso where he lived with his two pug dogs. 1RP at 93-94. Prior to

going out on the road, he arranged for a friend, Earl Mitchell, to feed and water the pugs and watch the house. 1RP at 100, 142.

Medeiros owned a white truck, specifically a Chevy Silverado. 1RP at 100-01. When he left for his trip to Maine, the Silverado was parked in his driveway. 1RP at 104, 111. He kept the insurance, registration, and title in the truck's glove box. 1RP at 112-14. The keys to the truck were on top of a bookcase in his house. 1RP at 110. Medeiros hadn't given anybody permission to use or sell the truck in his absence. 1RP at 130. He'd never met Mr. Collins. 1RP at 116.

Earl Mitchell made his first check on the house on the morning of November 19. 1RP at 143. Everything seemed to be in order. 1RP at 144. When he returned that afternoon, a basement window had been broken out and the house's interior was a mess. 1RP at 144-46. It appeared someone entered the house and rummaged through everything. 1RP at 146. The Chevy Silverado was gone. 1RP at 144.

Medeiros was contacted. 1RP at 145-46. The Silverado was reported as stolen. 1RP at 168. That was the truck that Mr. Collins was driving when he was stopped by Officer Berndt. 1RP at 169.

When Medeiros returned from the road, he immediately went and got his truck out of police impound. 1RP at 117. There was a lot of stuff in the truck bed that did not belong to him: a bed, a bedroll, bolt cutters, a

fifth wheel trailer hitch, shoes, clothes, a backpack. 1RP at 122-23. There was also damage to the truck that had not been there when Medeiros left on his trip to Maine. 1RP at 115-120. It looked to him as if someone had tried to pry open the back window and the gears on the ignition were busted. 1RP at 119-120.

Medeiros was not the person Mr. Collins bought the truck from. 2RP at 200.

The State charged Mr. Collins with possession of a stolen vehicle<sup>2</sup> and possession of methamphetamine.<sup>3</sup> CP (“Clerk’s Papers”) 5-7. Mr. Collins was not charged with burglary of Medeiros’ home. CP 5-7.

During trial, it was revealed that the State intended to call Cowlitz County Sheriff’s Deputy Jason Hammer as a rebuttal witness. 1RP at 151-52, 154-55. Deputy Hammer had not been disclosed as a prospective witness to the jury pool. 1RP at 154. After it was learned that one of the jurors grew up with Deputy Hammer, Mr. Collins unsuccessfully moved for a mistrial. 1RP at 152-56.

Mr. Collins proposed a jury instruction that told the jury “possession of drugs should not be used to determine [Mr. Collins]’ credibility.” CP 14. The trial court found the instruction to be an accurate statement of the law, but refused to give the instruction. 2RP at 218-19.

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<sup>2</sup> RCW 9A.56.068(1)

<sup>3</sup> RCW 69.50.4013(1)

The jury found Mr. Collins guilty as charged. CP 36, 37. After receiving a 57 month sentence, Mr. Collins filed a notice of appeal. CP at 44, 52-66.

**D. ARGUMENT**

**1. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT DRUG POSSESSION COULD NOT BE USED TO DETERMINE MR. COLLINS' CREDIBILITY.**

The trial court committed reversible error when it refused to instruct the jury that drug possession could not be used to determine Mr. Collins' credibility. The instructional error denied Mr. Collins a fair trial and requires reversal.

**(a) A criminal defendant is entitled to an instruction supporting his theory of the case.** A defendant "is entitled to have the jury instructed on [his] theory of the case if there is evidence to support that theory." *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010) (citing *State v. Williams*, 132 Wn.2d 248, 259–60, 937 P.2d 1052 (1997)). It is reversible error to refuse to give a proposed instruction if the instruction properly states the law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). Jury instructions are sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and, when read as a whole, they properly

inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). A trial court's refusal to give an instruction is reviewed for an abuse of discretion. *State v. Hunter*, 152 Wn. App. 30, 43, 216 P.3d 421 (2009).

**(b) The proposed instruction was a proper statement of the law.** Mr. Collins proposed the following instruction:

Whether or not the defendant was in possession of drugs should not be used by you to determine his credibility.

CP 14. Mr. Collins cited to *State v. Hardy*, 133 Wn.2d 701, 946 P.2d 1195 (1997), to support his proposed instruction. CP 14.

Hardy was convicted of robbery. *Hardy*, 122 Wn.2d at 703. His accuser testified that Hardy approached her early one morning on a Seattle street and took her jewelry. *Id.* at 705. Hardy testified that his accuser was engaged in a shoving match with another woman, jewelry fell to the ground, and he approached them to help pick up the jewelry. He did not deny that he left with the jewelry in his pocket. *Id.* at 705. Over Hardy's objection at trial, the court admitted Hardy's prior drug conviction as impeachment under ER 609(a)(1). *Id.* at 705-06.

On review, the court discussed ER 609(a)(1). ER 609(a)(1) allows for the admittance of prior felony convictions only if "the probative value of admitting this evidence outweighs the prejudice to the party against

whom the evidence is offered....” ER 609(a)(1). The court attached the following meaning to “probative.”

ER 609(a)(1) requires the prior conviction have “probative value.” When assessing probative value it is critical to understand “the sole purpose of impeachment evidence [under ER 609(a)(1) ] is to enlighten the jury with respect to the defendant's credibility as a witness.” *State v. Jones*, 101 Wn.2d 113, 118, 677 P.2d 131 (1984), *overruled in part on other grounds by State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Credibility in this context refers to truthfulness. *Jones*, 101 Wn.2d at 118–19, 677 P.2d 131.

*Id.* at 707. Relying on *Hardy*, Mr. Collins wanted the jury to understand that they could not use the mere fact of his methamphetamine possession to negatively reflect on the credibility of his trial testimony.

The trial court agreed that the proposed instruction was a correct statement of the law.

JUDGE WARNING: Yeah, I do agree that’s a correct statement of the law, at least insofar as evidence issues are concerned. From the standpoint of a specific instruction, I don’t think it’s appropriate. I think I (sic) would amount to a comment, which is the reason I didn’t give that.

2RP at 218-19.

Mr. Collins objected to the trial court’s refusal to give the instruction. 2RP at 218.

**(c) The trial court abused its discretion in refusing to give the instruction.** A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State v. Allen*,

159 Wn.2d 1, 10, 147 P.3d 581 (2006)). Here the trial court abused its discretion by finding Mr. Collins' proposed instruction was a comment on the evidence.

“A judge is prohibited by Article IV, Section 16 of the Washington State Constitution from ‘conveying to the jury his or her personal attitudes toward the merits of the case’ or instructing a jury that ‘matters of fact have been established as a matter of law.’” *State v. Levy*, 156 Wn.2d, 709, 721, 132 P.3d 1076 (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). Moreover, the court's personal feelings on an element of the offense need not be expressly conveyed to the jury; it is sufficient if they are merely implied. *Levy*, 156 Wn.2d at 721.

There was nothing about the proposed instruction that commented or conveyed to the jury Judge Warning's personal attitudes toward the merits of the case or instructed the jury that matters of fact had been established as a matter of law. Instead, all the proposed instruction did was add to the enumerated factors the court already instructed the jury they could consider when assessing a witness's testimony.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while

testifying; any personal interest that the witness might have in the outcome of the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

CP 18 (Instruction 1).

Judge Warning's characterization of the instruction as a comment on the evidence was wrong. A trial judge abuses his discretion when his discretion is based on a misapplication of the law. *State v. Grayson*, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005) (sentencing court abused its discretion by refusing to consider DOSA for an entire class of offenders).

**(d) The absence of the proposed instruction harmed Mr. Collins' case because it gave the prosecutor leeway to misapply the law.** In closing argument, the prosecutor impugned Mr. Collins' credibility specifically because of his connection to illegal drugs.

This isn't a case of him believing he is in ownership of it. He did not buy the vehicle. There is no Frank Medeiros who met him at AM/PM. There is no Josh Evans who referred a Frank Medeiros to him. Plain and simple, he stole the truck and he was caught in possession of it, with his hand in the cookie jar. *It ties in with the drugs*. I ask you to find him guilty of both charges, thank you.

2RP at 248 (emphasis added).

Had the trial court not abused its discretion and instead given Mr. Collins' proposed instruction, this is an argument the prosecutor could not

have made. It was prejudicial error not to give the proposed instruction. Mr. Collins' convictions should be reversed.

**2. THE TRIAL COURT'S REFUSAL TO DISMISS A JUROR WHO KNEW A WITNESS DENIED MR. COLLINS HIS RIGHT TO A FAIR TRIAL.**

The trial court should have granted the motion for a mistrial when it discovered that a juror was a long-time friend of State's witness Deputy Jason Hammer. The failure to grant the mistrial deprived Mr. Collins a fair trial.

**(a) Mr. Collins was constitutionally entitled to a fair trial by a jury untainted by bias.** A person accused of a crime has the unambiguous right to a trial by an impartial jury. U.S. Const. Amend. VI;<sup>4</sup> Wash. Const. Art. I, § 22<sup>5</sup>. "The right to a trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct." *State v. Tigano*, 63 Wn. App. 336, 340-42, 818 P.2d 1369 (1991), *review denied*, 118 Wn.2d 1021 (1992) (citing *Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989)).

In Washington, removal of an unfit juror is governed by statute:

It shall be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference,

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<sup>4</sup> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

<sup>5</sup> "In criminal prosecutions, the accused shall have the right to have a speedy trial by an impartial jury."

inattention or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

RCW 2.36.120. Court rules similarly direct a trial court to discharge any juror who is unfit. CrR 6.5 states that, “If at any time before submission of the case to the jury a juror is found unable to perform the duties the court shall order the juror discharged.” RCW 2.36.110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit or unable to perform the duties of a juror. *State v. Jordan*, 103 Wn. App. 221, 227, 11 P.3d 866 (2000), *review denied*, 143 Wn.2d 1015 (2001).

**(b) The trial court abused its discretion when it refused to grant a mistrial after discovering a biased juror.** Whether to grant a motion for a mistrial is a matter addressed to the sound discretion of the trial court, and that court's discretion will be overturned on appeal only for abuse of discretion. *State v. Applegate*, 147 Wn. App. 166, 175-176, 194 P.3d 1000 (2008), *review denied*, 165 Wn.2d 1051 (2009); *State v. Tigano*, 63 Wn. App. at 342. The reviewing court gives great deference to the trial court because it is in the best position to discern prejudice. *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). A trial court abuses its discretion when it bases its decision on untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). A mistrial motion should be granted only when a

“defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.” *Lewis*, 130 Wn.2d at 707. That is what happened in Mr. Collins’ case.

Here, after the second witness testified at trial, the court was alerted to an instance of implied bias on the part of an unnamed juror.<sup>6</sup> At the start of the trial, the judge told the prospective jurors the names of all persons who might be called as a witness. RP at 7, 154. The court does this so it can identify any potential bias or prejudice between a witness and a juror who might know the witness. The State did not disclose that it might call Cowlitz County Sheriff’s Deputy Jason Hammer as a witness. 1RP at 7, 154.

Deputy Hammer’s name was mentioned during trial. 1RP at 147. A juror told the bailiff he knew Hammer. 1RP 151-52. The court held an in-court conference with the juror. 1RP 152-54. During the conference, the court and the attorneys learned that the juror had grown up with Deputy Hammer and still saw him from time to time when the deputy visited his parents. 1RP at 153. The juror, though, said he could evaluate Deputy Hammer’s testimony the same as other witnesses. 1RP at 153. He had not “palled” around with Deputy Hammer for 15 years. 1RP at 153.

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<sup>6</sup> Of course the name of the juror was known to the court but the juror is never referred to by name in the record.

However, concerned about the potential for bias, Mr. Collins made a motion for a mistrial.<sup>7</sup> 1RP at 155.

A challenge for cause may be made for either implied or actual bias. RCW 4.44.170. Actual bias is defined as the existence of a state of mind which satisfies the judge that the juror “cannot try the issue impartially and without prejudice to the substantial rights of the party challenging”. RCW 4.44.170(2). Implied bias, on the other hand, arises when a juror has some relationship with either party; with the case itself; or has served as a juror in the same or a related action. RCW 4.44.180. *State v. Latham*, 100 Wn.2d 59, 63, 667 P.2d 56 (1983).

The unnamed juror had a longstanding personal relationship with Deputy Hammer. Even though it was a number of years since they had “palled around,” bias was still implied given their longstanding relationship. Moreover, the State called Deputy Hammer as a rebuttal witness. 2RP at 209. Deputy Hammer’s rebuttal testimony impeached Mr. Collins’ testimony. Contrary to Mr. Collins’ testimony, Deputy Hammer testified Mr. Collins told him it was Josh Evans who actually put him in touch with Medeiros. 2RP at 210. Deputy Hammer’s “pal”, the unnamed biased juror, was a life-long friend of Deputy Hammer. It is

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<sup>7</sup> Apparently, there were no alternate jurors selected for the trial so the jury could not be reconstituted with an alternate juror. See Supplemental Designation of Clerk’s Papers (Jury Panel, sub. nom. 27.)

human nature to want to believe your friend over that of a total stranger. The implied bias of the unnamed juror denied Mr. Collins a fair trial.

The trial court abused its discretion in refusing to grant the mistrial. Mr. Collins' convictions should be reversed.

**3. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DENIED MR. COLLINS HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.**

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. Amend. XIV; Wash. Const. Art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S.Ct.1475, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial court's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness"); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). Even if this Court decides that the trial court errors set forth above do not individually necessitate

reversal, this Court should conclude that under the cumulative error doctrine, reversal is required.

**E. CONCLUSION**

Mr. Collins' convictions should be reversed.

Respectfully submitted on May 4, 2012.



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LISA E. TABBUT, WSBA #21344  
Attorney for Scott Eugene Collins

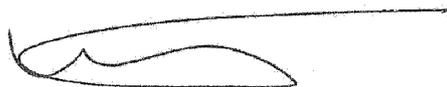
## **CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I efiled via the Court's web filing portal the Brief of Appellant with: (1) Susan I. Baur, Cowlitz County Prosecutor's Office at SasserM@co.cowlitz.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Scott E. Collins/DOC#918160, Monroe Corrections Center, P.O. Box 777, Monroe, WA 98272.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed May 4, 2012, in Mazama, Washington.



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Lisa E. Tabbut, WSBA No. 21344  
Attorney for Scott Eugene Collins

# COWLITZ COUNTY ASSIGNED COUNSEL

**May 04, 2012 - 1:04 PM**

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