

No. 43786-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**GARY ALLEN LOHR,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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**I. ISSUE**

- A. Did the trial court deny Lohr a fair trial when it denied Lohr's motion for a mistrial?

**II. STATEMENT OF THE CASE**

On December 9, 2011, around 8:00 p.m., Centralia Police Officers Adam Haggerty and Angelique Humphrey were investigating criminal activity at a house in Centralia, Washington. RP 30-32. The officers saw a red Chevy Blazer followed by a white pickup truck drive by their location. RP 31-32, 59. Officer Haggerty shouted out the license plate of the Blazer, which Officer Humphrey ran and found the tabs were expired and the registered owner was Gary Lohr. RP 32-33, 59. Officer Haggerty informed Officer Humphrey that Lohr was driving the Blazer and the officers discovered Lohr's license was suspended in the third degree. RP 59. The officers got into their patrol cars and went to look for Lohr. RP 33, 60. Officer Haggerty saw Lohr was now a passenger in the white pickup truck that was leaving the train depot. RP 33. Officer Haggerty then observed the Blazer parked in the train depot parking lot. RP 33.

Officer Haggerty requested Officer Humphrey stop the white truck and arrest Lohr. RP 34, 60. Officer Humphrey stopped the white truck. RP 60. Lohr was a passenger in the truck. RP 60-61.

Officer Humphrey arrested Lohr for driving while license suspended. RP 61. Lohr was wearing a coat that was appropriate for the season and appeared to fit him. RP 68. Officer Humphrey searched Lohr incident to the arrest and located a small plastic bindle containing a white crystalline substance in Lohr's right front jacket pocket. RP 61-62. That substance later tested positive for methamphetamine. RP 103; Ex. 3. There was also some paperwork located in the same pocket that had Lohr's name on it. RP 37, 52; Ex. 4.

The State charged Lohr with one count of Possession of a Controlled Substance – Methamphetamine on December 12, 2011. CP 1-3. Lohr was placed on conditions of release and released on the execution of an unsecured appearance bond in the amount of \$5,000. Ex. 6. One of the conditions of release was that Lohr return to court as directed. Ex. 6. The conditions of release form also states that **“my failure to appear as required constitutes the crime of Bail Jumping.”** Ex. 6 (bold original). Lohr was appointed Christopher Baum as his indigent counsel. RP 344; Ex. 6, 7. On December 22, 2011 Lohr appeared in court, with Baum, and pleaded not guilty. Ex. 8. At that hearing Lohr was given three court dates that he was required to return for: an omnibus hearing on

February 2, 2012, a trial confirmation hearing on March 1, 2012, and a jury trial the week of March 5, 2012. Ex. 8, 9. Lohr signed the criminal docket notice containing these future court dates. Ex. 9. The bottom of the criminal docket notice states:

**THE DEFENDANT SHALL APPEAR FOR ALL OF THE ABOVE SCHEDULED COURT HEARINGS. Failure to appear by the defendant is a crime, and may result in a bench warrant being issued authorizing the arrest of the defendant.**

Ex. 9 (bold original). On March 1, 2012 Lohr failed to appear for his trial confirmation hearing, a bench warrant was issued, and the trial date was stricken. Ex 10, 11, 12.

The State filed an amended information charging Lohr with Count I, Possession of a Controlled Substance – Methamphetamine, and Count II, Bail Jumping. CP 13-15. On July 20, 2012 a Notice of Withdrawal and Substitution of Attorney was filed. CP 42. Bryan Hershman also submitted a Notice of Appearance on July 20, 2012. CP 41. On July 21, 2012 Mr. Hershman signed two motions on behalf of Lohr, a motion to dismiss and a motion to suppress. CP 93-100. The State filed a response to the motion to suppress on July 23, 2012. CP 89-91. The State also filed motions in limine. CP 38-39.

The jury trial commenced on July 23, 2012. RP 1. There was a CrR 3.6 motion to suppress hearing held the morning of trial. RP 8-11. The motion was denied. RP 11. There was also a *Knapstad*,<sup>1</sup> motion to dismiss, hearing held which was also denied. RP 11-12. The trial court ruled prior to the commencement of trial that the State could not elicit evidence in its case in chief regarding Lohr's prior contacts with law enforcement and that he is a methamphetamine user. RP 12-14. The trial court also ruled that the State could not, in its case in chief, admit evidence regarding Lohr's prior use and possession of methamphetamine in response to an unwitting possession claim. RP 12. The trial court did rule if the defense opened the door, that evidence may be admissible in rebuttal. RP 12, 14.

The State called three witnesses, Officer Haggerty and Officer Humphrey and Lewis County Deputy Clerk Sherry Tyler. RP 28-102. Through Tyler the State admitted the necessary exhibits to prove Lohr's bail jumping charge. RP 80-102; Ex. 5-15. The parties stipulated that the Washington State Crime Laboratory report would be admitted into evidence and a stipulation between the parties

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<sup>1</sup> *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

regarding that laboratory report and chain of custody was read into the record. RP 103-05; Ex. 3.

Lohr called four witnesses to testify on his behalf, Billie Orr, Clarence Michael Robbins, Shyanne Lester, and Steven Merrill. RP 106, 253, 270, 276. Lohr also testified. RP 155. Orr testified that he has known Lohr since Orr was a teenager. RP 108. While Lohr was incarcerated in jail Orr observed that Lohr's house was being trashed and told Lohr's daughter about it. RP 117. Orr explained that he had been over at Lohr's house sorting clothes for the Goodwill. RP 133. There was also a guy named Steve (Merrill) who went by the nickname of Skeeter at Lohr's residence. RP 113. Orr testified that as Lohr was leaving to go with a man named Mike, Orr gave Lohr a black or dark blue coat out of a pile of clothes that he had sorted for Salvation Army. RP 113-15. Orr stated he checked the pockets, specifically checking for drug paraphernalia, and there was nothing inside of them. RP 120, 128-29. Orr searched the pockets because there was all sorts of drug paraphernalia left around Lohr's house from the people who were staying at the house while Lohr was incarcerated. RP 115-17, 137-38. When asked if he could have possibly missed a baggy the size that was found in Lohr's jacket pocket Orr stated, "I don't think so. I pretty

much - - yeah, put my hands in every pocket and pulled them out and..." RP 140. Orr also stated, "No, there's no way I would have missed it [the baggie]." RP 143. Orr also testified that Lohr's personal documents, which were also located in the jacket at the time of his arrest, were not in the pocket when he gave the coat to Lohr. RP 131.

Robbins testified that he has known Lohr for years and has known Lohr's family for about 45 years. RP 254. Lohr lived at Robbins's house for two to three weeks after Lohr got out of prison in 2011. RP 257. Robbins went to Lohr's house to give him a ride. RP 255. Robbins arrived at the house, honked the horn, and even yelled out the window, "Gary, I got to go." RP 255-56. Lohr climbed into Robbins's vehicle and told Robbins he wanted to go pick up his vehicle which was located at Lohr's wife's house. RP 256-57. Robbins testified he told Lohr the jacket he was wearing smelled. RP 258. Lohr picked up the Blazer and was headed to pick up a licensed driver for the Blazer. RP 259-61. Robbins followed Lohr. RP 259-61. Robbins stated when they arrived at the place they were going there were a couple of police officers in their police cars. RP 261. According to Robbins the police put their lights on Lohr. RP 261. Robbins continued to slowly drive past. RP 261.

Robbins drove to the train depot, Lohr exited the Blazer and climbed back into Robbins' vehicle. RP 261. According to Robbins, he drove about five blocks down the road when he was pulled over by the police. RP 261.

Lester testified that she has a lot of criminal history. RP 271. Lester explained that Lohr was a friend of Lester's mother and Lester had known Lohr for a long time. RP 272. Lester lived at Lohr's house in 2008 while Lohr was still working for Maple Lane School. RP 273. Lester also lived at Lohr's house again in 2009 after she was incarcerated at the Lewis County Jail. RP 273. Lester testified that there were other people who were trying to get their lives together living at Lohr's residence when she lived there. RP 274.

Merrill testified that he is a demolition contractor who met Lohr when Lohr worked at Maple Lane School. RP 277-78. Merrill considers Lohr a good friend. RP 279. Merrill explained he was contacted by Lohr's wife to clean up Lohr's residence after Lohr went to prison in 2010. RP 280. Merrill started cleaning up Lohr's residence in February or March of 2011. RP 281-83. Merrill testified that he took 15 loads, filling a large two and half ton truck and several vehicles, to the dump in July 2011. RP 283. According to

Merrill there was still a lot of clothes and blankets in the house. RP 283. Merrill stated that every day he worked on Lohr's house he came across some sort of paraphernalia, such as baggies, bongos and needles. RP 285. Merrill confirmed it was Orr who gave Lohr the coat as Lohr took off out the door to get a ride from Robbins. RP 288.

Lohr testified extensively. Lohr told the jury he was 66 years old and he used to be a professional drug and alcohol counselor at Maple Lane School. RP 155, 157. Lohr and his trial counsel had the following exchange:

Q: You have had some run-ins with the law?

A: Yeah, quite a few.

Q: When was your first run-in with the law that you can recall?

A: It was when I was a young man, excuse me, I - - alcohol - related stuff. I didn't have driving problems or any of that, but I had - - kind of like I would get in a fight on occasion, liquid courage. And so I quit drinking quite a few years ago, and then again recently...

RP 160-61. Lohr explained to the jury that he has an extra room in his house that he allows people to stay in and many of those people have had drug related issues. RP 161-62. Lohr stated he started using marijuana, alcohol, and prescription medications after

his daughter died around 2008 to 2009 but he did not use illegal drugs. RP 164. Lohr testified:

A: January of '09, they came to my house with warrants, they arrested me. They found marijuana, they found pills, methamphetamine, and I - - that was the start of it. That was January 9, 2009.

Q: And do you recall what you were charged with?

A: It ended up I was licensed for the marijuana in the end. I think I had a possession charge out of that arrest and a theft charge I think came out of that arrest. I was subsequently arrested a couple more times.

RP 165. Lohr admitted he had spent time in both county jail and prison and had done a 14 month stint in prison. RP 166. Lohr explained that while he was in jail his house became inhabited by people he did not know. RP 162-63, 166. Lohr got out of prison on October 24, 2011. RP 167.

Lohr testified that he called Robbins for a ride to go pick up Lohr's Blazer. RP 174. Lohr heard Robbins's truck and when he started out the door Orr handed him a coat. RP 176. Lohr explained he did not go through the pockets of the coat but he did put his Social Security paperwork in one of the coat pockets because he always carried his paperwork with him. RP 176. Lohr said after he picked up his truck he saw police at his friend's house and decided it would be best if he parked the Blazer and left the area. RP 178.

Lohr drove to the truck station, parked his Blazer, and got into Robbins's truck. RP 178. Lohr testified that when Officer Humphrey discovered the baggie of methamphetamine Lohr told her, "it's not my coat." RP 180. Lohr explained that if he would have known there were drugs in his pocket he would have thrown the drugs away. RP 178-79.

On cross-examination the following exchange took place:

Q: All right. You told counsel about a 2009 incident where you got in some trouble when a warrant was being served at your house; is that right?

A: A search warrant, yes.

Q: All right. And your testimony was that you personally were only using prescriptions and marijuana, things that you deemed to not be illegal at the time; is that right?

A: Yeah. That's what I was using.

Q: But then you told counsel that you did get in some trouble for a methamphetamine issue out of the case; isn't that right?

A: There was methamphetamines there. I wasn't using methamphetamines.

Q: Now, Mr. Lohr, I want you to be very clear about this. That incident that you got into trouble, where was that methamphetamine, according to you?

A: I don't know. I don't know where it was found. It was found in my house.

Q: Now, isn't it true, Mr. Lohr, that in fact that methamphetamine was found by law enforcement inside of a wallet in a jacket pocket of yours; isn't that correct?

A: I don't recall.

RP 230. Lohr's trial counsel objected and requested a mistrial based upon alleged prosecutorial misconduct. RP 231. The deputy prosecutor argued that Lohr opened the door. RP 232-34. The trial court ruled that it would not grant a mistrial but it would sustain the objection and give a limiting instruction. RP 236-37, 243. The trial court gave the following limiting instruction:

When we broke for lunch, Mr. Lohr was on the stand and there was some discussion going on about the 2009 methamphetamine case. You are to disregard any questions or any testimony regarding the alleged facts of the prior methamphetamine case.

RP 252.

Lohr also testified that he was told by Baum that he needed to be at trial and that was his next court date after the omnibus hearing. RP 317-18. Lohr agreed he had signed the docket notice which listed his three court dates. RP 319; Ex. 9. Lohr explained he did not believe he needed to appear for the March 1, 2012 court date but admitted that Baum did not tell Lohr the trial confirmation date was stricken. RP 335, 40.

The State called Baum as a rebuttal witness. RP 343. Baum acknowledged that he represented Lohr. RP 344. Baum explained he told Lohr that Lohr must appear at all the dates listed on the docket notice or the State would charge Lohr with felony bail jumping. RP 346. Baum testified he gave Lohr a copy of the docket notice. RP 346. Baum stated he never told Lohr that Lohr did not need to appear for any of the hearings that were set. RP 347.

The jury returned verdicts of guilty on both counts charged in the amended information. CP 13-14, 123-24. The trial court sentenced Lohr to 29 months in prison. CP 129-38. Lohr timely appeals his conviction. CP 140.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT DID NOT ERR WHEN IT DENIED LOHR'S MOTION FOR A MISTRIAL.**

Lohr argues to this Court that the trial court denied him a fair trial when it denied his motion for a mistrial. Brief of Appellant 15.<sup>2</sup> The trial court's decision to not grant Lohr's request for a mistrial

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<sup>2</sup> It should be noted that Lohr does not address the standard for review or the applicable case law regarding a trial court's denial of a defendant's motion for a mistrial. Regardless, even the caption for his argument states that the trial court denied Lohr a fair trial by denying the request for a mistrial and the State will respond accordingly.

was not in error. The trial court sustained Lohr's objection and properly issued a limiting instruction regarding the question and testimony it excluded.<sup>3</sup>

### **1. Standard Of Review.**

A trial court's decision to deny a mistrial is reviewed under an abuse of discretion standard. *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). This Court will find a trial court abused its discretion "only when no reasonable judge would have reached the same conclusion." *Rodriguez*, 146 Wn.2d at 269 (internal quotations and citation omitted).

### **2. The Trial Court Properly Denied Lohr's Request For a Mistrial.**

A trial court's granting of a mistrial is an extraordinary remedy. *Rodriguez*, 146 Wn.2d at 270. A trial court "should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can ensure that the defendant will be tried fairly." *Id.* (internal quotations and citation omitted). A reviewing court will only overturn a trial court's denial of a motion for a mistrial "when there is a substantial likelihood that the error prompting the mistrial affected the jury's verdict." *Id.* at 269-70.

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<sup>3</sup> The State is not conceding that the question was improper and will discuss that issue below.

When considering whether an irregularity affected the outcome of a trial, the reviewing court considers “(1) the seriousness of the irregularity, (2) whether it involved cumulative evidence, and (3) whether the trial court properly instructed the jury to disregard it.” *State v. Rafay*, 168 Wn. App. 734, 811, 285 P.3d 83 (2012), *citing State v. Hopson*, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Lohr asserts that the trial court should have granted the motion for a mistrial when the deputy prosecutor elicited testimony in his cross-examination of Lohr that was in violation of the trial court’s ruling from the motion in limine. Brief of Appellant 13-15. Lohr argues that the questioning so prejudiced Lohr, because it allowed the jury to consider propensity evidence, thereby denying him a fair trial. Brief of Appellant 12-14.<sup>4</sup> While the trial court did find that the deputy prosecutor’s questioning was impermissible, the trial court’s actions by sustaining the objection and giving a limiting instruction, telling the jury to disregard the questions and the answers, were appropriate remedies for any violation. RP 230, 236-37, 243, 252.

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<sup>4</sup> Lohr’s entire argument revolves around his conviction for Possession of Methamphetamine. In his conclusion section he asks this Court to “reverse the defendant’s conviction and remand for a new trial.” Lohr does not address the conviction for Bail Jumping. Therefore, the State is not addressing the bail jumping charge in its briefing to this Court.

Lohr argues that the following exchange required the trial court to declare a mistrial:

Q: All right. You told counsel about a 2009 incident where you got in some trouble when a warrant was being served at your house; is that right?

A: A search warrant, yes.

Q: All right. And your testimony was that you personally were only using prescriptions and marijuana, things that you deemed to not be illegal at the time; is that right?

A: Yeah. That's what I was using.

Q: But then you told counsel that you did get in some trouble for a methamphetamine issue out of the case; isn't that right?

A: There was methamphetamines there. I wasn't using methamphetamines.

Q: Now, Mr. Lohr, I want you to be very clear about this. That incident that you got into trouble, where was that methamphetamine, according to you?

A: I don't know. I don't know where it was found. It was found in my house.

Q: Now, isn't it true, Mr. Lohr, that in fact that methamphetamine was found by law enforcement inside of a wallet in a jacket pocket of yours; isn't that correct?

A: I don't recall.

RP 230. The deputy prosecutor did not commit misconduct by questioning Lohr in the manner that he did.<sup>5</sup> The deputy prosecutor's questioning would have been permissible as impeachment because Lohr's testimony regarding the events that led to his 2009 convictions was skewed compared to the actual facts of the case.<sup>6</sup> See *State v. Gallagher*, 112 Wn. App. 601, 310, 51 P.3d 100 (2002); *State v. Gakin*, 24 Wn. App. 681, 685-86, 603 P.2d 380 (1979); RP 161-65; ID 23-25.<sup>7</sup>

A mistrial would have been particularly warrantless under the facts of this case given the extensive introduction of prior bad act evidence, including that Lohr went to prison and had a drug problem, and throughout the trial by Lohr and his witnesses. RP 3, 5. Given Lohr's own testimony regarding that he had previously been convicted of possession of methamphetamine, his trial counsel's repeated eliciting of testimony regarding Lohr having served time in prison and the testimony of Lohr's own witness, Orr, that there was no baggie in the pocket of the jacket when he gave it

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<sup>5</sup> Lohr does not raise a prosecutorial misconduct claim.

<sup>6</sup> The State acknowledges that it did not cross-appeal the issue regarding the deputy prosecutor's questioning being permissible and is not attempting to do so here. Yet, part of the State's argument has always been that its conduct was permissible and this argument furthers the State's position that Lohr was not prejudiced.

<sup>7</sup> The State will be filing a supplemental designation of Clerk's papers to include ID 23-25, the affidavit of probable cause, statement of defendant on plea of guilty, and judgment and sentence from Lewis County case number 09-1-00742-4.

to Lohr, Lohr cannot make the requisite showing that he was so prejudiced that nothing short of a new trial would insure he would be tried fairly. RP 110, 117-18, 140, 143, 165-68, 172, 257, 280. Therefore, the trial court's decision to deny the request for a mistrial was reasonable and there was no abuse of discretion.

**a. The questioning by the deputy prosecutor was permissible due to the defense Lohr was asserting and the version of the facts Lohr gave when he testified about the 2009 incident.**

Evidence of other crimes or misconduct is not admissible to demonstrate a defendant's propensity to commit the crime they are currently charged with. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). The evidence is admissible for other purposes if the probative value of the evidence outweighs the prejudicial effect. ER 404(b); *Powell*, 166 Wn.2d at 81.

When attacking a witness's credibility, it is not permissible to use extrinsic evidence of specific instances of conduct. ER 608(b). A witness may, in the discretion of the trial court, be impeached using specific instances of conduct on cross-examination if the trial court finds the conduct is probative of the truthfulness of the witness. ER 608(b). "The cross-examiner must have a good faith basis for the inquiry, and the court, in its discretion, may require

that the basis be revealed in the absence of the jury before the cross-examination is allowed.” 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, §608.10 at 329 (2010-2011). Questions asked on cross-examination must be in good faith and with proper foundation. *State v. Briscoe*, 78 Wn.2d 338, 341, 474 P.2d 267 (1970).

Principles of fairness allow an opponent to question a witness regarding a subject that was first introduced by the proponent through that witness. *Gallagher*, 112 Wn. App. at 610. The State is also allowed the opportunity to impeach a defense raised by a defendant even though evidence sought to be introduced would be prejudicial information regarding the defendant’s participation in another crime. *Gakin*, 24 Wn. App at 685. This Court in *Gakin* explained that under those circumstances, when the defendant is raising such a defense, the highly probative nature of the evidence outweighs the prejudice. *Id.* at 686. To deny the State the ability to elicit this evidence defeats the ultimate objective of a criminal trial, “the search for the truth[.]” *Id.*

*Gallagher* was prosecuted for unlawful manufacture of methamphetamine. *Gallagher*, 112 Wn. App. at 606. Prior to trial the trial court granted *Gallagher*’s motion in limine to exclude

evidence of hypodermic needles, both used and unused, that were found in the master bedroom. *Id.* The evidence of the alleged manufacturing was found in Jason Slinker's bedroom as well as in the bathroom adjacent to the master bedroom inhabited by Gallagher. *Id.* at 605-06. During cross-examination of one of the State's witnesses, Gallagher's trial counsel inquired about the lack of various drug-related items such as large amounts of money, weapons, pagers, packaging materials, cutting agents and receipts for the sale of drugs. *Id.* 607, 609. The State asked the trial court's permission to allow it to question the witness about the syringes, arguing it refuted Gallagher's implication that there was a lack of evidence of drug activities in the home. *Id.* at 607, 609. The trial court ruled that Gallagher had opened the door to that line of questioning and allowed the State to introduce the evidence. *Id.* at 607, 609.

Gallagher alleged in his appeal that the trial court erred when it allowed the State to introduce evidence regarding the syringes in violation of its order in limine. *Id.* at 609. This Court ruled when a party opens the door, fairness dictates that the rules of evidence allow the opponent to inquire about the subject matter. *Id.* at 610. This Court ruled, "if the State had not been allowed to

ask Detective Snaza on redirect examination about the evidence found in the master bedroom and adjacent bathroom, Gallagher would have succeeded in painting a false picture that no drug-related activities took place in the home.” *Id.* This Court further explained that if the trial court had not allowed the State to elicit this information Gallagher would have been able to use the motion in limine’s limitation on the evidence as an unfair advantage to paint this false picture. *Id.*

Gakin was convicted of burglary in the second degree for breaking into Star Electric through a back door, drilling two holes near the handle of a safe, and taking items. *Gakin*, 24 Wn. App. at 682. The police followed tracks back to a residence a short distance away that was occupied by Gakin and several other people. *Id.* Gakin said he did not commit the burglary and some other occupant of the house must of committed the burglary. *Id.* at 683. The State was allowed to cross-examine Gakin regarding another burglary he had pleaded guilty to three months earlier. *Id.* In the other burglary Gakin had signed a confession that he had drilled into the safe at a Shell station. *Id.* at 684. The State inquired of Gakin that he had previously attempted to gain entry to a safe by use of a drill. *Id.* at 683. When Gakin denied the claim the State

showed Gakin his signed confession from the other burglary case.  
*Id.*

Gakin argued in his appeal the rules of evidence do not permit the admission of unrelated crimes except where such evidence shows motive, intent, identity, common plan or scheme, absence of accident or mistake, or evidence somehow relevant and necessary to prove an essential element of the crime charged. *Id.* at 684. This Court ruled an exception to the exclusionary rule exists, which allows the admission of evidence of unrelated criminal conduct when the defendant has interposed a defense to the crime charged. *Id.* at 685. Under this rule the evidence is allowed as substantive and impeachment evidence when it is necessary to refute the defense. *Id.* This Court again noted that it was principles of fairness that required this ruling because it was unfair to allow the defendant to raise a defense and not allow the State to impeach the defense. *Id.*

In the present case an integral part of Lohr's case was that he had a habit of letting drug addicts stay at his home and he implied that it had previously caused him to be convicted of a methamphetamine charge. RP 161-62, 164-65, 230, 274. Lohr admitted he had a drug problem, but was adamant that he only had

a problem with marijuana and prescription medication, not illegal drugs. RP 164-65. Lohr attempted to gain sympathy from the jury by explaining that this drug use started as a coping mechanism to deal the pain he suffered surrounding the death of his daughter. RP 3, 164. Lohr testified:

A: January of '09, they came to my house with warrants, they arrested me. They found marijuana, they found pills, methamphetamine, and I - - that was the start of it. That was January 9, 2009.

Q: And do you recall what you were charged with?

A: It ended up I was licensed for the marijuana in the end. I think I had a possession charge out of that arrest and a theft charge I think came out of that arrest. I was subsequently arrested a couple more times.

RP 165. When asked by the deputy prosecutor to clarify his sanitized version of the events surrounding the 2009 incident the following exchange occurred:

Q: All right. You told counsel about a 2009 incident where you got in some trouble when a warrant was being served at your house; is that right?

A: A search warrant, yes.

Q: All right. And your testimony was that you personally were only using prescriptions and marijuana, things that you deemed to not be illegal at the time; is that right?

A: Yeah. That's what I was using.

Q: But then you told counsel that you did get in some trouble for a methamphetamine issue out of the case; isn't that right?

A: There was methamphetamines there. I wasn't using methamphetamines.

Q: Now, Mr. Lohr, I want you to be very clear about this. That incident that you got into trouble, where was that methamphetamine, according to you?

A: I don't know. I don't know where it was found. It was found in my house.

RP 230.

This testimony by Lohr led the deputy prosecutor to ask the next question, because according to Lohr, he was not using methamphetamine but it was found somewhere in his house. This coupled by Lohr's earlier testimony regarding Lohr letting drug users stay at his home sets the stage for the argument that Lohr has been the victim of unfortunate circumstances before and even went to prison because of it, and now once again, Lohr is the victim of drug addicts who lived in his home, leaving behind their drugs which he is, now once again, charged with possessing. This is the theory of Lohr's case which he presented to the jury. In an attempt to rebut that theory and in addition show that Lohr's version of events was in fact inaccurate, the deputy prosecutor asked the following question:

Q: Now, isn't it true, Mr. Lohr, that in fact that methamphetamine was found by law enforcement inside of a wallet in a jacket pocket of yours; isn't that correct?

A: I don't recall.

RP 230. There was nothing inappropriate in regards to this question as it was necessary to show the jury Lohr's inaccurate testimony which was contrary to prior admission by him. *Gallagher*, 112 Wn. App. at 610. Further, it was necessary for the State to impeach Lohr's defense. *Gakin*, 24 Wn. App. at 685-86. The State even produced an offer of proof regarding its good faith basis for its question. ID 23-25. In the 2009 case Lohr pleaded guilty to possession of methamphetamine in which he made a written statement stating he knowingly possessed methamphetamine. ID 24. In addition to that statement, Lohr also checked the box on his statement of defendant on plea of guilty form which stated, "Instead of making a statement, I agree the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea." ID. 24, page 8.

The affidavit of probable cause stated:

During a search of the defendant's bedroom, Det. C. Buster noticed a jacket. Inside the jacket was a wallet. Inside the wallet a [sic] small baggie with crystalline powder inside. Based on his training and experience, Det. Buster recognized the substance as

methamphetamine. LOHR's credit cards, identification, and business cards were found inside the wallet.

ID. 23, page 2. Therefore, while the trial court ruled that the questions regarding the facts of the 2009 methamphetamine case were inappropriate and any discussion regarding them was to be disregarded, the State had a legitimate, and legal, basis to raise the issue. See RP 236. The solicitation of the evidence was not improper and Lohr suffered no prejudice from the State's conduct.

**b. In the alternative, the trial court's ruling sustaining the objection and issuing a limiting instruction was not in error.**

The trial court's rulings sustaining the objection to the deputy prosecutor's questioning regarding the facts surrounding the 2009 methamphetamine case, issuing a limiting instruction, and denying the mistrial requests were proper and not an abuse of its discretion.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v.*

*Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). A trial court's conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citations omitted).

In the present case the trial court, as detailed above, ruled the State's questions regarding the facts surrounding the 2009 conviction were improper. RP 236. There is nothing about this ruling that would lead a reasonable person to believe that the trial court's ruling was an abuse of discretion.<sup>8</sup> The trial court properly issued a limiting instruction for the jury to disregard any questions or testimony regarding the facts of the prior methamphetamine case. RP 252.

When evaluating if there was a substantial likelihood that the error affected the outcome of this case this Court considers three key inquiries. *Rafay*, 168 Wn. App. at 811. First, the seriousness

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<sup>8</sup> While the State may not agree with the ruling, it cannot in good faith argue that the ruling meets the abuse of discretion standard.

level of the error. *Id.* In this case the error was not that serious in light of the facts in evidence. The jury had already been repeatedly informed that Lohr had done time in prison and had been convicted of possession methamphetamine and theft. RP 3, 5, 16, 110, 117-18, 124, 140, 143, 165-68, 172. The methamphetamine was found in a jacket pocket, containing Lohr's Social Security documents, in a coat Lohr was wearing. RP 35-36, 61-62, 176; Ex. 4. Orr testified that he had given Lohr the coat to wear as Lohr was heading out the door. RP 115. Orr was asked if he could have possibly missed a baggy the size that was found in Lohr's jacket pocket. Orr stated, "I don't think so. I pretty much - - yeah, put my hands in every pocket and pulled them out and..." RP 140. Orr stated, "No, there's no way I would have missed it [the baggie]." RP 143. Finally, Orr testified that Lohr's Social Security paperwork was not in the jacket pocket when Orr gave the coat to Lohr. RP 131. All of these facts diminish the seriousness level of the error.

Second, this Court considers if the error involved cumulative evidence. *Rafay*, 168 Wn. App. at 811. In this case the error, eliciting the specific facts of the prior methamphetamine case, did not involve cumulative evidence.

Third, this Court considers if “the trial court properly instructed the jury to disregard” the error. *Id.* The trial court gave the following limiting instruction:

When we broke for lunch, Mr. Lohr was on the stand and there was some discussion going on about the 2009 methamphetamine case. You are to disregard any questions or any testimony regarding the alleged facts of the prior methamphetamine case.

RP 252. Lohr argues to this Court that the limiting instruction did not prevent the jury from using the fact that there was a prior conviction for possession of methamphetamine as evidence and was, therefore, inadequate. Brief of Appellant 15-16. Lohr introduced the evidence of the prior conviction. RP 165. The objection was to the facts surrounding the methamphetamine case. RP 230-32, 235-36. The instruction told the jury to disregard the questions and testimony relating to the alleged facts of the 2009 case. RP 252. The trial court gave the proper limiting instruction.

The trial court’s denial of Lohr’s motion for a mistrial was not an abuse of discretion. There is not a substantial likelihood that the stricken question and testimony surrounding the facts of the 2009 methamphetamine case affected the jury’s verdict. *Rodriguez*, 146 Wn.2d at 270. Further, Lohr cannot show this court that no reasonable judge would have reached the same conclusion. *Id.* at

269. This Court should affirm Lohr's conviction for possession of methamphetamine.

**V. CONCLUSION**

Lohr received a fair trial. The trial court properly denied Lohr's motion for a mistrial and Lohr's conviction for Possession of Methamphetamine and Bail Jumping should be affirmed.

RESPECTFULLY submitted this 31<sup>st</sup> day of May, 2013.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

# LEWIS COUNTY PROSECUTOR

**May 31, 2013 - 1:59 PM**

## Transmittal Letter

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Case Name: State of Washington vs. Gary Allen Lohr

Court of Appeals Case Number: 43786-4

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