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**Court of Appeals, Div. II,
of the State of Washington**

State of Washington,

Respondent,

v.

Richard Alan Lucas, Jr.,

Appellant.

Brief of Appellant

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1. Introduction

Lucas has been railroaded through the criminal justice system. His attorneys have failed to represent his interests, and judicial officers have shown bias against him. Due to this mistreatment, Lucas has lost all faith and trust in the system and in his appointed attorneys.

Lucas' mistreatment at the hands of the criminal justice system came to a head when, in his second trial on these charges (a mistrial having been declared during jury selection in the first trial), the trial court judge failed to investigate his own prior, disqualifying statement until after a jury had been selected and sworn in. Only after jeopardy attached did the judge admit his disqualification and declare a mistrial. At this point, double jeopardy should have barred a third trial.

A third trial was held anyway, leading to conviction on all three counts. This Court should vacate the convictions on double jeopardy grounds. Alternatively, this Court should remand for retrial of the bail jumping charge and for resentencing with a corrected offender score.

2. Assignments of Error

Assignments of Error

1. The trial court erred in failing to investigate the grounds for Lucas' motion to recuse the trial judge in the second trial.
2. The trial court erred in denying Lucas' motion to recuse.
3. The trial court erred in failing to recuse itself immediately, without motion of any party, when it discovered that its impartiality could reasonably be called into question.
4. The trial court's declaration of a mistrial after the jury had already been sworn was not justified.
5. The trial court erred in holding a third trial.
6. The trial court erred in excluding Lucas' testimony regarding his conversation with his attorney on March 2, 2017.
7. The trial court erred in sentencing Lucas with an offender score of nine.

Issues Pertaining to Assignments of Error

1. Was the third trial barred by double jeopardy?
(assignments of error 1 through 5)
2. Did the trial court err in excluding as hearsay Lucas' testimony regarding a conversation with his attorney when the testimony was offered to show its effect on Lucas, not for the truth of the matter asserted?
(assignment of error 6)
3. Did the trial court err in sentencing Lucas with an offender score of nine when his prior felony convictions

should have washed out under RCW 9.94A.525(2)(c)?
(assignment of error 7)

3. Statement of the Case

3.1 Early in the case, Lucas missed a required hearing due to misinformation from his appointed attorney.

Richard Lucas was charged with Possession of a Stolen Vehicle and with Making or Possessing Motor Vehicle Theft Tools. CP 1. He was appointed an attorney for his defense, Guarav Sharma of the Pierce County Department of Assigned Counsel. CP ?? (Notice of Appearance)¹ The Omnibus hearing was set for March 2, 2017. Trial Ex. 6.

Lucas came to the Pierce County Courthouse on March 2 and went into Courtroom 260. RP, Jan. 30, 2018, at 179-80.² He was in the courtroom for about an hour. RP, Jan. 30, 2018, at 180. He spoke with his attorney, Mr. Sharma. RP, Jan. 30, 2018, at 181. After speaking with Sharma, Lucas believed that the omnibus hearing would be held March 15. RP, Feb. 1, 2018, at 241. Sharma told Lucas that he could leave and to come back

¹ Clerk's Papers cited as ?? were designated at the time of the filing of this brief. Lucas will file an amended brief with corrected references after the supplemental clerk's papers are filed.

² The verbatim reports for this appeal are not correctly numbered by volume and are not sequentially numbered. This brief will cite to the reports by date and page number.

on March 15. RP, Jan. 30, 2018, at 181. Believing he was free to go, Lucas left. RP, Jan. 30, 2018 at 181.

The trial court issued a bench warrant on the grounds that Lucas had failed to appear. Trial Ex. 7; CP ?? (Order for BW), ?? (BW). When Lucas came to the courthouse on March 15, he learned of the bench warrant and had a hearing set to quash the warrant. CP ?? (Scheduling Order); RP, Feb. 1, 2018, at 241. The trial court quashed the warrant. CP ?? (Order Quashing).

At the rescheduled omnibus hearing, Sharma moved to withdraw from the case. CP ?? (clerk's minutes). The trial court appointed new counsel. CP ?? (DQ of counsel). The State amended the Information to add a charge for Bail Jumping. CP 1-2.

3.2 The trial court declared a mistrial during jury selection for Lucas' first trial.

Lucas appeared for trial on October 2, 2017. CP ?? (minute entry). During jury selection that afternoon, the trial court declared a mistrial. CP ?? (minute entry). Because of the mistrial, Lucas requested a new attorney. CP ?? (Order of substitution).

3.3 Lucas was admitted to drug court, but elected to opt-out, prompting a troubling comment from Judge Philip K. Sorensen.

Lucas was admitted to drug court in November 2017.

CP 8. As permitted by the drug court program, Lucas elected to opt out at his first hearing. CP 19. The trial court accepted his election and returned him to the ordinary trial track. CP 20; *see* CP 21. Upon accepting Lucas' election to opt out, Judge Philip K. Sorensen advised Lucas, "You're going to be back on the trial track, which means that they [the State] are going to be—**hopefully**—seeking to prosecute you to the fullest extent of the law." Trial Ex. 18.³

3.4 Judge Sorensen refused to recuse himself from presiding over Lucas' second trial.

Judge Sorensen presided over Lucas' second trial. RP, Jan. 16, 2018, at 1. Lucas filed a Notice of Disqualification. CP 22. Judge Sorensen declined to step down because he had already made discretionary rulings in the case in connection with the drug court proceedings. RP, Jan. 16, 2018, at 4-5.

Lucas requested that Judge Sorensen recuse himself due to the judge's statement during the drug court opt-out hearing. RP, Jan. 16, 2018, at 6. Lucas urged the judge to review the

³ Exhibit 18 was played during the second trial (on Jan. 18, 2018) but was not transcribed as part of the VRP. Lucas has designated Exhibit 18 as part of the record for this appeal. It should be available for this Court to listen to Judge Sorensen's words.

recording of the drug court hearing. RP, Jan. 16, 2018, at 6.

The judge refused to review the recording and denied the motion. RP, Jan. 16, 2018, at 7.

3.5 After swearing in the jury, Judge Sorensen reviewed his recorded statements from drug court and recused himself, declaring a mistrial.

At the end of the first day of trial, a jury was selected and sworn in. RP, Jan. 16, 2018, at 25. The next morning of trial, the trial court played the recording of Lucas’ opt-out hearing from drug court (marked by the court as Exhibit 18). RP, Jan. 18, 2018, at 37; Trial Ex. 18. As noted above, Judge Sorensen had advised Lucas, “You’re going to be back on the trial track, which means that they [the State] are going to be—**hopefully**—seeking to prosecute you to the fullest extent of the law.” Trial Ex. 18.

After hearing the recording—and especially that one word, “hopefully”—Judge Sorensen recognized there was an appearance of fairness problem that would require him to recuse himself. RP, Jan. 18, 2018, at 38. Judge Sorensen declared a mistrial and dismissed the jury. RP, Jan. 18, 2018, at 38-39.⁴

⁴ Although the record indicates that defense counsel conferred with Lucas, Lucas intends to file a Personal Restraint Petition in which he will testify that his attorney did not advise Lucas of his rights at this point and did not seek Lucas’ consent to any course of action.

3.6 At the third trial, Lucas was found guilty of all three counts.

A third trial was held two weeks later with a new judge and new jury. *See* RP, Jan 29, 2018. At this point, Lucas had lost all confidence and trust in his attorney, who repeatedly refused to take actions that Lucas believed were in his best interests. *See* RP, Jan. 29, 2018, at 12-15. The trial court required Lucas to proceed with his attorney. RP, Jan. 29, 2018, at 14-15.

3.6.1 Deputy Roberts testified that he discovered Lucas driving a stolen car with many sets of shaved keys.

Deputy Charles Roberts testified for the State. RP, Jan. 30, 2018, at 26. He testified that he saw a man driving a beige Nissan Sentra, who he later recognized as Lucas. RP, Jan. 30, 2018, at 32-34, 42. He followed the Nissan and ran the license plate. RP, Jan. 30, 2018, at 35. Before a return came back on the plates, the Nissan pulled into a driveway. RP, Jan. 30, 2018, at 38.

Roberts drove past the driveway about half a block. RP, Jan. 30, 2018, at 91. The return on the plates came in, showing that the license plates were stolen. RP, Jan. 30, 2018, at 40. Roberts did a three-point turn and drove back to the driveway. RP, Jan. 30, 2018, at 91. After he pulled up to the driveway, Roberts encountered Lucas walking past the rear of the Nissan. RP, Jan. 30, 2018, at 41.

Roberts ordered Lucas to get in the car. RP, Jan. 30, 2018, at 44. Lucas complied. RP, Jan. 30, 2018, at 45. After Lucas got in the car, Roberts observed a large set of keys in Lucas' hand. RP, Jan. 30, 2018, at 45. Lucas didn't have the keys until he got into the car. RP, Jan. 30, 2018, at 106. Roberts arrested Lucas. RP, Jan. 30, 2018, at 46. Roberts verified that the vehicle itself had been reported stolen. RP, Jan. 30, 2018, at 47.

Roberts impounded the car. RP, Jan. 30, 2018, at 47-48. When he later searched the vehicle, Roberts discovered multiple large sets of shaved keys. RP, Jan. 30, 2018, at 50. Roberts admitted that he did not closely watch the impound tow truck driver and that the driver had moved some of the keys. RP, Jan. 30, 2018, at 49, 94-95. Roberts testified regarding the use of shaved keys in stealing cars. RP, Jan. 30, 2018, at 28.

3.6.2 Lucas testified that he was walking to work and happened to be in the wrong place at the wrong time.

Lucas' defense was that he was in the wrong place at the wrong time. Lucas had been walking down that particular road heading to a friend's house to do some work. RP, Jan. 30, 2018, at 163-64. The road had no sidewalk, so at one point he had to walk behind a tall hedge of bushes that lined the roadway, to get out of the path of oncoming cars. RP, Jan. 30, 2018, at 168-69.

While Lucas was behind the hedge, a car pulled into the driveway ahead of him. RP, Jan. 30, 2018, at 171. A man got out of the car and sprinted to the backyard of the house. RP, Jan. 30, 2018, at 171-72. Lucas thinks he heard a chain link fence rattle. RP, Jan. 30, 2018, at 171.

Lucas continued on his way and had just passed the car when Roberts pulled up to the driveway and contacted him. RP, Jan. 30, 2018, at 172-73. Roberts ordered him to get into the Nissan. RP, Jan. 30, 2018, at 176. Lucas was confused by the order, but got in the car because he didn't want any problems. RP, Jan. 30, 2018, at 176. Lucas discovered some keys on the driver's seat, so he picked them up so he could sit in the car as ordered. RP, Jan. 30, 2018, at 178.

3.6.3 The jury found Lucas guilty of all three charges.

On the third day of trial, the State sought to admit rebuttal evidence related to the bail jumping charge. RP, Feb. 1, 2018, at 189-91. The trial court admitted the evidence. RP, Feb. 1, 2018, at 197-98. Lucas felt betrayed by his attorney and by the court system. *See* RP, Feb. 1, 2018, at 201-03.

After a recess to allow Lucas to discuss things with his attorney, Lucas did not return to the courtroom. RP, Feb. 1, 2018, at 205-06. The trial court allowed time to investigate Lucas' whereabouts. *See* RP, Feb. 1, 2018, at 225. The trial court

made a preliminary finding that Lucas voluntarily waived his right to be present. RP, Feb. 1, 2018, at 227. The trial was concluded, and the jury returned a guilty verdict on all three charges. *See* RP, Feb. 2, 2018, at 39; CP 49-51.

3.7 Lucas was sentenced with an offender score of nine.

Lucas did not stipulate to his criminal history. RP, Jun. 15, 2018, at 46. Lucas believed that his prior felonies washed out under RCW 9.94A.525(2)(c). *See* CP ?? (letter). His last felony conviction had been in 2006. RP, Jun. 15, 2018, at 52; CP 58. He was unable to clear a driver's license suspension and had some subsequent misdemeanors for driving while suspended. RP, Jun. 15, 2018, at 52; CP 57-58; Sent. Ex. 9. He went more than five years, from Mar. 24, 2011, to Jan. 25, 2017, without a conviction of any kind. CP 57-58. His Jan. 25, 2017, conviction was for driving suspended in the third degree, a misdemeanor, for which he received no jail time and only a \$400 fine. Sent. Ex. 10, p. 4.

However, Lucas' attorney disagreed with him and told the trial court that the prior felonies did not wash. RP, Jun. 15, 2018, at 48. The trial court agreed with the attorney and sentenced Lucas with an offender score of nine. *See* RP, Jun. 15, 2018, at 49.

4. Argument

Lucas' third trial violated double jeopardy. Jeopardy attached when the jury for the second trial was sworn in. When the trial court subsequently declared a mistrial, a retrial was not justified. Lucas had given the trial court judge the opportunity to recuse himself before jeopardy attached, but the judge refused. The subsequent mistrial was without Lucas' consent and was not justified because of the trial court's failure to timely consider the judge's disqualification. This Court should reverse the convictions and dismiss the charges.

If this Court finds the retrial was justified, there were nevertheless errors that require reversal. The trial court erred in excluding, as hearsay, Lucas' testimony regarding Mr. Sharma telling him that he was free to leave the courthouse and return on March 15. This testimony negated the element of knowledge for the bail jumping charge. It is reasonably probable that this testimony would have created reasonable doubt on that charge. This Court should reverse the conviction for bail jumping and remand for a new trial.

The trial court also erred in finding that Lucas' prior felony convictions did not wash and in sentencing him with an offender score of nine. This Court should reverse and remand for resentencing with the correct offender score.

4.1 Lucas' convictions must be vacated and the charges dismissed because the third trial violated double jeopardy.

Both the fifth amendment to the United States Constitution and Article I, section 9 of the Washington Constitution provide the fundamental guarantee that “no person shall be ... twice put in jeopardy for the same offense.” Const., art. I, § 9; U.S. Const., Amend. V; *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). “Washington’s double jeopardy clause is coextensive with the federal double jeopardy clause and is given the same interpretation the Supreme Court gives to the Fifth Amendment.” *Turner*, 169 Wn.2d at 454.

The constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense... The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

State v. Eldridge, 17 Wn. App. 270, 275, 562 P.2d 276 (1977) (quoting *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957)).

The double jeopardy clauses protect not only against a second prosecution for the same offense after conviction or acquittal, but also the right of the defendant to have his trial completed by a particular tribunal. *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982). Once a jury is selected and sworn, the defendant has the right to have his guilt or innocence determined by **that jury**. *Id.*

There are good reasons for this protection. A second prosecution following a discontinued trial prolongs the ordeal of the accused by adding to the financial and emotional burden he must shoulder while his guilt or innocence is determined. Moreover, exposure to a second tribunal may even increase the chances of an innocent defendant's being convicted.

Jones, 97 Wn.2d at 162. The remedy for a double jeopardy violation is vacating the conviction and dismissing the charges. *In re Francis*, 170 Wn.2d 517, 532, 242 P.3d 866 (2010).

4.1.1 This Court reviews double jeopardy claims de novo.

This Court reviews claims of constitutional error, including double jeopardy claims, de novo. *State v. Fuller*, 185 Wn.2d 30, 34, 367 P.3d 1057 (2016). Manifest error affecting a constitutional right may be argued for the first time on appeal. RAP 2.5(a). An error is manifest if it is plausible that the error had practical and identifiable consequences to the trial. *Matter of Det. of Monroe*, 198 Wn. App. 196, 201, 392 P.3d 1088 (2017).

Here, if the third trial was barred by double jeopardy, reversal is required because there could not have been a third trial in which to convict Lucas. This Court should review this claim of manifest constitutional error.

4.1.2 Double jeopardy bars retrial after a mistrial that was improperly declared.

The beginning point of any analysis of a double jeopardy claim is to determine whether jeopardy has attached. *Eldridge*, 17 Wn. App. at 275. Jeopardy attaches once a jury is selected and sworn. *Id.* at 276. “Where a jury has been impaneled and sworn to try the cause, the defendant has the right to have his case determined by that jury; and a discharge of that jury, without his consent, has the same effect as an acquittal, unless such discharge was necessary in the interest of the proper administration of public justice.” *Jones*, 97 Wn.2d at 162.

A trial court’s discretion to declare a mistrial after jeopardy has attached should be exercised only when manifestly necessary to serve the ends of public justice. *Eldridge*, 17 Wn. App. at 278. Where a mistrial is manifestly necessary, retrial is not barred. *Id.* However, bad faith negates manifest necessity. *State v. Graham*, 91 Wn. App. 663, 670, 960 P.2d 457 (1998). “Careful scrutiny of a mistrial is required where there is evidence of bad faith conduct by judge or prosecutor or there is

any reason to believe the superior resources of the State are being used to harass or achieve a tactical advantage over the accused.” *State v. Jones*, 26 Wn. App. 1, 5, 612 P.2d 404 (1980). When a mistrial is improperly declared, it operates as an acquittal, barring retrial. *Jones*, 97 Wn.2d at 162.

4.1.3 The second mistrial was improperly declared, barring a third trial.

The trial court’s declaration of the second mistrial in this case is deserving of careful scrutiny due to bad faith conduct of the judge. At the opening of the second trial, Lucas requested Judge Sorensen to recuse due to statements that the judge had made at a prior hearing in drug court. RP, Jan. 16, 2018, at 6. Lucas urged the judge to review the recording of the drug court hearing. RP, Jan. 16, 2018, at 6. The judge refused to review the recording and denied the motion. RP, Jan. 16, 2018, at 7. The trial court’s refusal to investigate the grounds for disqualification was the beginning of the kind of bad faith conduct that negates a finding of manifest necessity.

At the end of the first day of trial, a jury was selected and sworn in. RP, Jan. 16, 2018, at 25. At this point, the landscape changed. Lucas’ motion was no longer on the table because it had been denied prior to jury selection. With a jury impaneled, Lucas now had the right to have his case decided by that jury,

despite his concerns about the judge. The judge's subsequent recusal did not come at Lucas' request.

The manner of the judge's recusal on the next morning of trial continued the judge's bad faith conduct. Although recusal was absolutely required under the Code of Judicial Conduct, Judge Sorensen did not immediately recuse himself. "A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." CJC 2.11. "A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed." CJC 2.11, Comment [2]. Judge Sorensen should have immediately recused himself on his own motion.

Instead, the judge polled the parties for comment. RP, Jan. 18, 2018, at 37. After allowing Lucas' counsel to briefly confer with Lucas, Judge Sorensen solicited a motion to recuse from Lucas' attorney, apparently hoping that Lucas would consent to a mistrial: "Mr. Maltby, I will tell you right now that if Mr. Lucas wants me to, I'm going to recuse myself." RP, Jan. 18, 2018, at 37. Maltby, without much choice at that point, responded, "That's what I'm going to ask." RP, Jan. 18, 2018, at 38. Only then did Judge Sorensen declare a mistrial.

Judge Sorensen's handling of the situation was in bad faith. Knowing that he was required to recuse himself without a

motion from either party, he nevertheless sought to undermine Lucas' double jeopardy rights by soliciting a motion that Lucas should not have had to make.

This is the sort of bad faith that negates manifest necessity. Even if the judge had no choice but to recuse, he can and should have done so before jeopardy attached. He should not have taken advantage of his superior position to manufacture an excuse for the late declaration of mistrial. The judge's actions left Lucas with an impossible choice: either 1) request recusal of the tainted judge but face the uncertainty of a third trial before a jury of unknown composition; or 2) elect to proceed with a known jury but a tainted judge. To require Lucas to make such a choice is patently unjust. His counsel's renewed motion to recuse should not justify retrial after jeopardy had already attached.

Even if counsel's renewed motion could operate to waive Lucas' right to protection against double jeopardy, it should not do so here because it was the result of ineffective assistance of counsel. Either counsel made the motion against Lucas' wishes or counsel failed to properly advise Lucas of the consequences of his choice.

There was no reason for Lucas to renew his motion to recuse. The judge was required to do so with or without a motion. For Lucas' counsel to renew the motion was deficient performance. To the extent it may have waived double jeopardy,

it was prejudicial to Lucas' interests. Had Lucas been properly advised, he would not have renewed the motion. The judge would have recused. A third trial would have been barred by double jeopardy.

Retrial in this case was not justified. Judge Sorensen's recusal was required, but was unnecessarily and improperly delayed until after jeopardy had attached. Lucas was entitled to an unbiased judge, but he was also entitled to a trial in front of the jury that had been impaneled. The double jeopardy clauses and principles of due process cannot require Lucas to have to choose between the two. Because retrial was not possible without depriving Lucas of a valuable right, retrial should have been barred.

This Court should hold that double jeopardy barred the third trial. This Court should vacate the convictions and should dismiss the charges.

4.2 The trial court erred in excluding Lucas' testimony regarding the bail jumping charge.

Even if this Court does not reverse on double jeopardy grounds, reversal is still necessary to correct other errors committed by the trial court. The trial court erred in excluding Lucas' testimony that his attorney told him that he could leave the courthouse on March 2 and come back for the omnibus

hearing on March 15. The testimony was not hearsay and should have been admitted. This error was prejudicial and requires remand for a new trial on the bail jumping charge.

4.2.1 Whether a statement is hearsay is reviewed de novo.

This Court reviews de novo whether a statement was inadmissible hearsay. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006). Although other evidentiary rulings may be reviewed for abuse of discretion, whether a statement meets the definition of hearsay is a question of law that is reviewed de novo. *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 688-89, 370 P.3d 989 (2016). “The reason we do not review for an abuse of discretion is because ER 802 explicitly states that hearsay evidence is not admissible except as provided by the hearsay exception rules. The rules do not give trial courts discretion to admit inadmissible evidence.” *Id.*

4.2.2 The trial court erred in excluding Lucas’ testimony regarding conversations with his attorney because the statements were not hearsay.

In defense of the bail jumping charge, Lucas attempted to testify that he did, in fact, appear for court that day (March 2, 2017) but left after his lawyer told him that he could leave and come back for the next hearing on March 15. The State objected

on hearsay grounds. The trial court sustained the objection and excluded Lucas' testimony. RP, Jan. 30, 2018, at 180-82.

The trial court was wrong. Lucas' testimony was not hearsay. It was admissible. It was material to his defense. This Court should reverse for a new trial on the bail jumping charge.

Hearsay is an out-of-court statement by a declarant that is offered in evidence to prove the truth of the matter asserted by the declarant in the out-of-court statement. ER 801. A statement offered for some other purpose, such as to prove the effect that the statement had on the listener, is not hearsay because it is not offered to prove the truth of the statement. *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) ("A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement").

Lucas' testimony about what his lawyer told him was not offered to prove the truth of the lawyer's statement. It was not offered to prove that Lucas was, in fact, free to go on March 2, or that the omnibus hearing was, in fact, scheduled for March 15. Rather, it was offered to show the effect of the statements on Lucas' state of mind, negating the element of knowledge.

In order to convict Lucas of bail jumping, the State had the burden of proving that Lucas had knowledge that he was required to personally appear before the court. *See* CP 44. After Lucas' attorney told him he was free to leave on March 2 as long

as he came back for the next hearing on March 15, Lucas no longer had knowledge of a requirement to appear on March 2. As far as Lucas knew at that point, either he had fulfilled the requirement by showing up and talking to his lawyer, or he had been excused from appearing that day. Either way, he did not have the knowledge required to be guilty of bail jumping.

Lucas' attempted testimony went as follows:

MR. MALTBY: Okay. Why did you -- What made you think you could leave, or did you think you could leave?

MR. LUCAS: I thought I could leave because my lawyer said -- he told me to come back on the 15th and --

MR. LEECH: Objection; hearsay.

THE COURT: Hold on. There's an objection. The objection is sustained.

MR. LUCAS: Huh?

THE COURT: The objection is hearsay. The objection is sustained.

MR. LUCAS: Hearsay?

THE COURT: You are not to answer the question.

...

MR. MALTBY: So you talked to your lawyer, and then you what?

MR. LUCAS: I left. He said it was okay to go.

MR. LEECH: Objection.

THE COURT: The jury will disregard.

MR. LEECH: Move to strike.

THE COURT: Objection sustained. The jury will disregard.

VRP, Jan. 30, 2018, at 180-82.

It makes no difference to Lucas' defense whether he was, in fact, free to leave on March 2, or whether his next required appearance was, in fact, on March 15. The truth of the matter asserted by his lawyer was irrelevant. What was relevant—and was the purpose for Lucas' testimony—was the effect that the statement had on Lucas' knowledge. After hearing the lawyer's statement, Lucas did not have knowledge of a requirement that he stand before the judge that day. At the very least, this would have been sufficient to raise reasonable doubt as to his guilt on the bail jumping charge.

Because Lucas' testimony was offered for a valid purpose other than proving the truth of the matter asserted, the lawyer's statements were not hearsay. Under the proper legal standard, the trial court should have overruled the State's objection and admitted the testimony. The trial court abused its discretion in excluding the statements. This Court should reverse and remand for a new trial on the bail jumping charge.

The State may argue that this error is harmless. As a general rule, evidentiary error is grounds for reversal only if it

results in prejudice. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Under this harmless error standard, an error is prejudicial—and therefore grounds for reversal—if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). The trial court’s error was prejudicial.

Without Lucas’ testimony about his conversation with his attorney, Lucas was unable to explain to the jury that he did not have knowledge that he was required to appear. He was also unable to explain to the jury how the transcript of the warrant quash hearing was entirely consistent with his version of events.

At the March 21 warrant quash hearing, Lucas’ then-attorney informed the court, “Mr. Lucas tells me that he believed that the omnibus hearing date, or omnibus date, was set for March 15th.” RP, Feb. 1, 2018, at 241. “Your Honor, Defense notes that Mr. Lucas did appear on pretrial date. It sounds like he made an honest mistake.” RP, Feb 1, 2018, at 242.

Contrary to the State’s arguments at trial, these statements do not contradict Lucas’ story. He came to court on March 2. His lawyer, Mr. Sharma, told him he could go; the next hearing would be March 15. Lucas understood this to mean that the omnibus hearing would be held on March 15. As it turned out, Sharma was wrong. Lucas appears to have made an honest

mistake based on his lawyer's incorrect statement. The statements from the warrant quash hearing are entirely consistent with the story Lucas was trying to tell with the erroneously excluded testimony.

Lucas should have had the opportunity to explain this to the jury. But, because the judge erroneously excluded Lucas' testimony as hearsay, Lucas could not address the issue in closing argument. Without this testimony and explanatory argument to the jury, Lucas was unable to present his defense to the charge. If he had been able to make his defense, it is reasonably probable that the jury would have found reasonable doubt on the knowledge element. The trial court's error was not harmless. This Court should reverse and remand for a new trial on the bail jumping charge.

4.3 The trial court erred in sentencing Lucas with an offender score of nine, because his prior felonies should have washed out under RCW 9.94A.525(2)(c).

In calculating an offender score, prior class C felony convictions are not counted if the offender has gone five years without any criminal convictions. RCW 9.94A.525(2)(c). Offender score calculations are reviewed de novo. *State v. Powell*, 172 Wn. App. 455, 459, 290 P.3d 353 (2012).

Lucas' last felony conviction was in November 2006. RP, Jun. 15, 2018, at 52; CP 58. He was unable to clear a driver's

license suspension and had some subsequent misdemeanors for driving while suspended. RP, Jun. 15, 2018, at 52; CP 57-58; Sent. Ex. 9. His conviction of DWLS 1 on Mar. 24, 2011, was a few months before he had reached the five-year mark.

But Lucas **did** complete five years without a conviction after that DWLS 1. He went more than five years, from Mar. 24, 2011, to Jan. 25, 2017, without a conviction of any kind. CP 57-58. His Jan. 25, 2017, conviction was for driving suspended in the third degree, a misdemeanor, for which he received no jail time and only a \$400 fine. Sent. Ex. 10, p. 4.

Because Lucas spent five consecutive years in the community without a conviction, his prior felonies should have washed out. This would have resulted in an offender score of zero. This Court should reverse and remand for resentencing.

5. Conclusion

The third trial in this case violated double jeopardy. Jeopardy attached when the jury for the second trial was selected and sworn. The judge's declaration of a mistrial after jeopardy attached was not justified due to the judge's bad faith in handling his disqualification. This Court should vacate the convictions and dismiss the charges.

If this Court considers the mistrial justified, errors in the third trial require remand. The trial court erred in excluding

Lucas' testimony on the bail jumping charge. The trial court also erred in sentencing Lucas with an offender score of nine. This Court should reverse and remand for a new trial on the bail jumping charge and for resentencing with a corrected offender score.

Respectfully submitted this 24th day of December, 2018.

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Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on December 24, 2018, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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I further certify that on December 26, 2018, I served the Brief of Appellant and a copy of RAP 10.10 on the Appellant, Richard Lucas, by depositing a copy in the U.S. mail, postage paid, to the following address:

Richard Lucas, Jr., #2018270012
Pierce County Jail
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Tacoma, WA 98402

DATED this 24th day of December, 2018.

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