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

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State of Washington,

Respondent,

v.

Richard Alan Lucas, Jr.,

Appellant.

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**Reply Brief of Appellant**

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## **1. Reply Argument**

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

In his opening brief, Lucas argued that his convictions should be vacated because his third trial violated the constitutional prohibition against double jeopardy. Br. of App. at 12-18. Jeopardy attached once the jury for the second trial was selected and sworn, and Lucas had the right to insist on his right to have the case determined by that jury. Br. of App. at 13-14 (quoting *State v. Jones*, 97 Wn.2d 159, 641 P.2d 708 (1982) and *State v. Eldridge*, 17 Wn. App. 270, 562 P.2d 276 (1977)). Even though Lucas adequately advised the judge of the grounds for recusal before jeopardy attached, the judge refused to investigate until after the jury panel was sworn, and even after realizing recusal was required did not recuse himself until after he had enticed Lucas' counsel to request it, against Lucas' interests. Br. of App. at 15-18.

Upon discovering his own disqualifying comments, the judge had a duty to recuse himself immediately upon his own motion. Had he immediately investigated and recused himself, a retrial might have been justified. But the course of action the judge chose failed to respect Lucas' constitutional rights of due process and protection against double jeopardy. Due to the

judge's mishandling of the situation, this Court should hold that the third trial was not justified. This Court should reverse, vacate the convictions, and dismiss the charges.

The State attempts to excuse the judge's conduct on multiple grounds, each of which should be rejected by this Court.

Lucas did not invite the judge's failure to recuse himself before the jury was impaneled. Lucas provided all the factual support he could for his initial motion to recuse. Lucas' attorney only half-heartedly presented the motion, requiring Lucas himself to speak up for his own interests:

MR. MALTBY: ... Beyond that and on behalf of Mr. Lucas, he indicates that things he heard at the drug court hearing would suggest that he believes that you could not be fair and impartial.

THE COURT: I don't know what that means.

MR. MALTBY: Well, perhaps you could --

THE DEFENDANT: There's tapes of it.

MR. MALTBY: What it means is that he believes he heard things that you said -- and I'm not sure exactly what -- but he suggests that based on things that he heard, he believes that you couldn't be impartial and fair.

THE DEFENDANT: He said, "I hope that you get charged or you get with the full extent of the law -- you get charged to the full extent of the law." That's what he said to me.

MR. MALTBY: Well --

THE DEFENDANT: Go get the tapes, man. I heard him.

RP, Jan. 16, 2018, at 5-6.

Lucas himself had no ability to obtain and present a transcript of the earlier hearing when his attorney was working at cross-purposes to him, only begrudgingly representing him, and seeking to withdraw at every opportunity, including immediately after the judge denied the motion to recuse. RP, Jan. 16, 2018, at 7-8; *see also* RP, Jan. 29, 2018, at 12 (Lucas notes that Maltby will not cooperate with requests); RP, Jun. 15, 2018, at 45 (trial court allowed Maltby to withdraw just prior to sentencing). The record suggests that Lucas and his attorney did not even know that Judge Sorensen would be presiding at the trial until that morning. *See* CP 22; RP, Jan. 16, 2018, at 4 (Notice of Disqualification filed that morning).

Lucas did the best he could: he told the trial court exactly what to look for and where to find it. Lucas did not invite the trial court's refusal to investigate and recuse before jeopardy attached.

The judge did not do Lucas any favors with his delayed investigation into the grounds for recusal. Contrary to the State's arguments, Judge Sorensen was not only **required** to investigate and recuse himself—he was required to do so **immediately** after the issue was brought to his attention. “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]. When Lucas reasonably questioned the judge's impartiality, testifying to what he heard and calling the court's attention to where it could be found in the record, the judge had a duty to **immediately** investigate and determine whether he also had a duty to recuse himself—especially where putting it off would cause jeopardy to attach once the jury was empaneled.

It was the judge's **duty** to determine whether he could continue to preside over the trial. His delayed exercise of that duty was not some kind of favor to Lucas, as the State would have this Court believe. The judge did not "go out of his way" to protect Lucas' fair trial rights when he denied the motion and refused to investigate in a timely manner. His deliberate delay resulted in jeopardy attaching. Then, rather than recusing immediately as was his duty, the judge enticed Maltby to consent to the mistrial even though doing so was not in Lucas' interest. Far from seeking to protect Lucas' fair trial rights, the judge's conduct directly **undermined** Lucas' right against double jeopardy.

By the time the judge actually recused, Lucas' motion was no longer in play. It had been denied before the jury was selected. It was not "preliminarily denied." It was denied. Period. After the jury was empaneled, Lucas' rights and interests changed. He had the right to proceed with the jury that had been selected and not request the judge's recusal. Lucas cannot be bound to a motion that he made under different circumstances that had already been denied. Lucas' original motion cannot serve as consent to the late-declared mistrial.

The State's claim that the judge investigated the matter "at the first available recess" is incorrect. Lucas raised the issue first thing on the morning of the first day of trial. RP, Jan. 16, 2018, at 4-6. The judge could easily have called a recess that morning before bringing the jury into the courtroom. In fact, a 25-minute recess **was taken** that morning to allow Mr. Maltby to handle some matters in other courtrooms, during which the judge could have investigated. RP, Jan. 16, 2018, at 20, 23. After Maltby returned, another recess was taken before the prospective jurors were brought in. RP, Jan. 16, 2018, at 25. Jury selection took the rest of the day, during which time there was likely at least one afternoon recess, if not more. *See* RP, Jan. 16, 2018, at 25, 29-30. Yet it was not until day two of trial, two days later, that the judge obtained the recording and listened to it in open court. *See* RP, Jan. 18, 2018, at 34 ("I've arranged to

have that transcript prepared. We can listen to it. Actually, it's the audio recording. It's not a transcript. We can listen to it if you'd like to.”).

The judge's delay was inexcusable. Despite ample opportunities, the judge refused to investigate until after jeopardy had attached. It was the kind of bad faith conduct that requires this Court's careful scrutiny. “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.

This mistrial was improperly declared. This Court should reverse, vacate the convictions, and dismiss the charges.<sup>1</sup>

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<sup>1</sup> The State notes that many of the facts that support Lucas' ineffective assistance argument are outside the record in this direct appeal. *See, e.g.*, Lucas' Statement of Additional Grounds for Review. Lucas has filed a Personal Restraint Petition, in which he has testified to these additional facts. Lucas intends to request that this Court consolidate his PRP with this direct appeal. At the very least, the record on direct appeal demonstrates that Mr. Maltby was an unwilling advocate who failed to support a meritorious argument for Judge Sorensen's recusal and failed to protect Lucas against double jeopardy. Lucas should not be held responsible for Maltby's actions and inactions and should be granted relief from the judge's errors.

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

In his opening brief, Lucas argued in the alternative that even if the third trial was valid, the trial court erred in excluding his testimony regarding his conversation with his attorney in relation to the bail jumping charge. Br. of App. at 18-24. The attorney's statements were not hearsay because they were not offered to prove that Lucas was actually free to leave on March 2, but rather to prove that Lucas did not **knowingly** miss a required court appearance. Br. of App. at 20-22. The trial court's error in excluding the statements was not harmless because it deprived Lucas of the ability to negate the required element of knowledge. Br. of App. at 23-24. Had Lucas been able to present this testimony and explain it in closing, there is reasonable probability that the jury would have found reasonable doubt on the knowledge element. This Court should reverse and remand for a new trial on the bail jumping charge.

The State appears to concede that the statements would not be hearsay if offered for the purpose of negating knowledge. Nevertheless, the State asks this Court to excuse the error on the grounds that Lucas' attorney failed to explain the purpose. Under de novo review, there is no reason for this Court to defer to the trial court. With the State's objection, the trial court was called upon to determine as a matter of law whether the

statements were hearsay. The State bore the burden of demonstrating that the statement was inadmissible. The State did not explain how the statement could have been hearsay. The trial court did not give Lucas any opportunity to respond. The trial court simply excluded the statements as a knee-jerk reaction.

The trial court's ruling was legal error, pure and simple. Contrary to the practice that all-too-often prevails in the trial courts, an out-of-court statement is not automatically hearsay. These statements were not offered to prove the truth of the matter asserted and therefore were not hearsay. The truth of the statements was irrelevant. The only possible, relevant purpose for them was to show their effect on Lucas, to negate the element of knowledge. The statements were admissible, as a matter of law. This Court should reverse.

The trial court's error was not harmless. The statements, if admitted, would have demonstrated that Lucas had reasonable grounds to believe that he was not required to appear that day or that he had satisfied his obligation by speaking to his attorney. This testimony would have been more persuasive than Lucas merely saying he was left with the impression that he was not required to appear. Lucas' defense was greatly hampered by this exclusion.

To the extent Lucas' counsel failed to elicit testimony of Lucas' state of mind after speaking with the attorney and failed to explain in closing the consistency between Lucas' testimony and the statements from the warrant quash hearing, it was the result of ineffective assistance of counsel. Counsel's failure to get this key testimony admitted and to argue Lucas' defense to the jury in closing was both deficient and prejudicial. These things were at the essence of Maltby's role as Lucas' counsel, and he failed to perform. The trial court's error and Maltby's ineffective assistance combine to justify reversal by this Court.

**1.3 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).**

Lucas' opening brief also argued that his prior felonies should have washed out, reducing his offender score to zero. Br. of App. at 24-25. Lucas completed more than five years without a conviction of any kind, from Mar. 24, 2011, to Jan. 25, 2017. CP 57-58.

The five-year period required for a wash-out begins on the date of last release from confinement pursuant to a **felony**. RCW 9.94A.525(2)(c). Lucas' DWLS conviction on March 24, 2011, broke the five-year period from his last release from a felony, but because it was not itself a felony, a new five-year period began immediately because he was not being confined pursuant to a

felony. Because Lucas went five years without a conviction after the DWLS, the prior felonies should have washed out.

## **2. 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 26<sup>th</sup> day of April, 2019.

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## **Certificate of Service**

I certify, under penalty of perjury under the laws of the State of Washington, that on April 26, 2019, 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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## Transmittal Information

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