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No. 52022-2-II
(consolidated with No. 53242-5-II)

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

State of Washington,

Respondent,

v.

Richard Alan Lucas, Jr.,

Appellant/Petitioner.

Reply Brief in Support of Personal Restraint Petition

Kevin Hochhalter
WSBA # 43124
Attorney for Appellant

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com

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1. Objections to Response; Motion to Strike

The State's Response relies in large part on inadmissible evidence. Lucas objects and moves to strike the inadmissible evidence, as detailed below.

1.1 The Court should strike the Declaration of Teresa Chen and all other inadmissible hearsay.

The Declaration of Teresa Chen, submitted by the State with its Response, is inadmissible hearsay. Resp. App. at 17-18. The entire purpose of the declaration is to relate out-of-court statements allegedly made by Guarav Sharma to Ms. Chen regarding the bail jumping charge against Lucas.

Hearsay is an out-of-court statement that is offered in evidence to prove the truth of the matter asserted in the statement. ER 801(c). A "statement" under the rule includes both verbal assertions and non-verbal conduct that is intended by the person as an assertion. ER 801(a). Hearsay is inadmissible. ER 802.

It is indisputable that the statements offered in the Declaration are "statements" made by a "declarant" (Mr. Sharma) other than while testifying under oath. It is equally indisputable that the statements are being offered to prove the truth of the matters asserted. The State uses the statements, and inferences therefrom, to argue that Lucas is lying when he

says he spoke with Sharma on March 2nd. Resp. to PRP at 12-13. Because the statements are being offered to prove the truth of the matters asserted, they are hearsay and inadmissible. The Court should strike the Declaration of Teresa Chen.

1.2 The Court should strike all factual assertions based on comments made by the prosecutor at trial.

Throughout the Response, the State cites to the Verbatim Report of Proceedings from the direct appeal to support its factual assertions. However, many of the cited passages are not factual evidence, but are instead argumentative commentary made by the prosecutor at trial. In many instances, the prosecutor's comments are pure speculation. None of the prosecutor's comments are based on personal knowledge. Some relate hearsay statements of others. Speculation and statements not based on personal knowledge are inadmissible. ER 602.

The Court should strike or at least disregard the following assertions of fact in the Response, which are not supported by admissible evidence: Resp. to PRP at 5, the final paragraph, lines 2-5; Resp. to PRP at 6, the final paragraph, lines 3-4 and 6-7; and Resp. to PRP at 10, the final paragraph, lines 1 and 6-7. The Court should also be vigilant and disregard any other factual assertions that are not supported by the record.

2. Reply Argument

2.1 Standard of Review

Both direct appeals and personal restraint petitions have advantages and disadvantages to the appellant/petitioner. *In re Ramos*, 181 Wn. App. 743, 748, 326 P.3d 826 (2014). By bringing both concurrently, the appellant/petitioner gets the best of both worlds. *Id.* at 748-749. The Court may consider additional evidence presented in the PRP while still applying the more favorable standards of review for a direct appeal. *Id.* The Court may grant the relief requested outright or may remand to superior court for an evidentiary hearing on matters outside the appellate record. *See State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981).

2.2 Lucas' convictions must be vacated and the charges dismissed because the third trial violated double jeopardy. Judge Sorensen committed misconduct in failing to live up to his duties.

In his opening brief on direct appeal, 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. He addressed this issue further in his Personal Restraint Petition, labeling it “Judicial misconduct by Judge Sorensen.” PRP at 2-5.

On direct appeal, Lucas argued that 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; PRP at 3-4.

For purposes of double jeopardy analysis, bad faith by a judge or prosecutor negates the "manifest necessity" for a mistrial, barring a retrial on the same charges. *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). Even merely negligent behavior negates "manifest necessity" when there was a reasonable alternative remedy instead of declaring a mistrial. *State v. Eldridge*, 17 Wn. App. 270, 277-78, 562 P.2d 276 (1977).

Judge Sorensen had a duty to recuse himself, on his own motion, before empaneling the jury. “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]. His failure to live up to this duty, even if merely negligent, negated any “manifest necessity” for the mistrial.

Judge Sorensen had reasonable alternatives to declaring a mistrial. First, he can and should have investigated Lucas’ allegations. Contrary to the State’s arguments, Lucas was not asking the judge to conduct an independent investigation or to examine factual information that was outside the record. Lucas informed the judge of the content of the judge’s prior statement that was grounds for recusal, and he told the judge where it could be found **in the record** of the drug court opt-out hearing. RP, Jan. 16, 2018, at 5-6. Lucas himself had no ability to obtain and present a recording or transcript of the earlier hearing when his attorney was working at cross-purposes to him. The information Lucas provided was sufficient. Judge Sorensen should have examined the record to determine whether it supported Lucas’ motion.

The State attempts to justify the judge's failure to consult the record by arguing that Lucas was not credible. And yet, in this instance, Lucas was exactly right about what Judge Sorensen had said, when he said it, and where it could be found. Additionally, the State's argument cannot justify Judge Sorensen in disbelieving Lucas because it is based almost entirely on conduct that either had not happened yet (*e.g.*, Resp. to PRP at 11 (describing events that happened after the third trial began)) or was otherwise outside the knowledge of Judge Sorensen (*e.g.*, Resp. to PRP at 10 (the prosecutor's speculation as to Mr. Sharma's personal reasons for withdrawing)). "Being a difficult customer" is not the same as being a liar, and even liars and "difficult customers" are entitled to due process. When Lucas identified his concerns, in the record, Judge Sorensen had a duty to consult the record and to recuse himself after confirming that Lucas was correct.

Judge Sorensen had a second alternative to mistrial. Having failed to timely investigate and recuse himself before the jury was sworn, Judge Sorensen can and should have notified Lucas that if Lucas renewed his motion to recuse, he would be waiving his constitutional right to proceed with the jury that had been impaneled. "The only means by which such an individual constitutional right in Washington may be relinquished is by a voluntary, knowing, and intelligent waiver."

City of Seattle v. Klein, 161 Wn.2d 554, 556, 166 P.3d 1149 (2007). Waiver is most clearly shown “by a demonstration in the record that the trial judge questioned the defendant about his understanding [of the right] and his intentions [to voluntarily waive it].” *State v. Sweet*, 90 Wn.2d 282, 287, 581 P.2d 579 (1978). Trial judges regularly question defendants on the record in this manner prior to permitting them to waive constitutional rights. Judge Sorensen had a duty to do so here.

Of course, even this second alternative would have placed Lucas in an impossible position, being forced to waive either his right to an impartial judge or his right to complete his trial before the impaneled jury. Lucas should not have been forced to sacrifice one constitutional right in order to preserve another. This impossible position—regardless of whether Judge Sorensen created it by acting in bad faith or merely negligently—should negate any “manifest necessity” and should have been a bar to a retrial, on double jeopardy grounds.

Judge Sorensen’s failure to consult the record and recuse himself in a timely manner was misconduct. Whether it was bad faith or merely negligent, it negates any “manifest necessity” in declaring a mistrial. Double jeopardy barred a retrial. This Court should reverse, vacate the convictions, and dismiss the charges with prejudice.

2.3 Lucas received ineffective assistance of counsel.

A defendant can obtain relief for ineffective assistance of counsel by showing that counsel's performance fell below an objective standard of reasonableness and that the defendant was prejudiced by the deficient performance. *State v. Linville*, 191 Wn.2d 513, 518, 423 P.3d 842 (2018) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Claims of ineffective assistance of counsel present mixed questions of law and fact and are reviewed de novo. *Linville*, 191 Wn.2d at 518.

Lucas was prejudiced by ineffective assistance of at least two of his attorneys. First, Guarav Sharma gave Lucas incorrect information about hearing dates, leading directly to the bail jumping charge against him. At trial, Michael Maltby failed to argue that Lucas' trial testimony about the conversation with Sharma was not hearsay. His failure to get the testimony admitted opened the door to harmful rebuttal testimony from the State. Then Maltby failed to argue to the jury that the rebuttal testimony was actually consistent with Lucas' story. Additionally, at the second trial, Maltby failed to present Lucas' meritorious motion for recusal and failed to advise Lucas of his rights after the jury was impaneled. Finally, during the third trial, Maltby assaulted Lucas in open court, angrily throwing a crumpled paper at Lucas in full view of the jury. Each of these

errors caused prejudice, and all of them together cumulatively resulted in an unfair trial.

2.3.1 Sharma misled Lucas into failing to appear at a required hearing.

In his Petition, Lucas testified that on March 2, 2017, he went to the courthouse for his scheduled hearing, where he met with Mr. Sharma. PRP at 5. Sharma told Lucas that Lucas could leave and return for the omnibus hearing on March 15. PRP at 5. Believing this meant he had fulfilled his obligation for the day, Lucas left. PRP at 5-6, 9-10; RP, Jan. 30, 2018, at 180-82.

This is the only admissible evidence of the conversation between Lucas and Sharma. As Lucas argued in the direct appeal, his testimony about the conversation is not hearsay because it is not offered to prove the truth of what Sharma told him. Br. of App. at 20-22. The State's "evidence," on the other hand, comes entirely from out-of-court statements by Sharma that **are offered to prove the truth** of the matters asserted and from speculative comments made by the prosecutor without personal knowledge. *See* Parts 1.1 and 1.2, above. The State's evidence is not admissible.

Additionally, Lucas' story is consistent with the subsequent statements of Lucas' temporary counsel in seeking to quash the warrant, that Lucas made an honest mistake and

thought that the omnibus hearing was set for March 15. Br. of App. at 23-24.

Sharma's subsequent withdrawal is also consistent with Lucas' story. Sharma could not even face Lucas or admit his mistake to him. *See* PRP at 6. It is reasonable to infer that Sharma believed that he could not continue to represent Lucas after having made such a big mistake. *See* PRP at 6. Citing an unspecified conflict of interest, Sharma requested to withdraw.

Given the admissible evidence in the record, the only reasonable conclusion is that Sharma did, in fact, give Lucas incorrect information that led Lucas to leave without appearing and resulted directly in the bail jumping charge. The State argues that if this was true, surely Sharma would have done something to correct the error and prevent the bail jumping charge—continue the hearing, inform the court, or advise the prosecutor. But this is exactly the problem. Sharma made the mistake, and then did nothing to correct it. As the State acknowledges, there is no reason for such deficient performance. Sharma's deficient performance cannot be excused. It directly prejudiced Lucas by causing the bail jumping charge to be brought against him—a charge that he was unable to defend due to further ineffective assistance from Mr. Maltby.

2.3.2 Maltby failed to argue that Lucas' testimony regarding Sharma was not hearsay.

At trial on the bail jumping charge, Maltby failed to argue that Lucas' testimony regarding Sharma was not hearsay. RP, Jan. 30, 2018, at 180-82. The judge excluded the statements and instructed the jury to disregard. RP, Jan. 30, 2018, at 180-82. Maltby failed to ask any follow-up questions to get the essential message of Lucas' story—that after speaking with Sharma he believed he no longer had an obligation to appear before a judge that day—admitted into evidence. RP, Jan. 30, 2018, at 180-82; PRP at 10.

The State is incorrect when it argues that Maltby's performance was not deficient because he succeeded in delaying the judge's evidentiary ruling in motions in limine, allowing Lucas' testimony to be heard by the jury before it was excluded. This performance is still deficient.

Maltby delayed the judge's ruling on the motion in limine by saying he needed time to think out his response, but then when the time came for Lucas' testimony, Maltby had no response for the State's incorrect hearsay objection. As Lucas demonstrated in the direct appeal briefs, the statements were not hearsay and should have been admitted. It was an argument that any competent lawyer could have made, but Maltby said

nothing. There was no strategic reason to allow the objection to be sustained without argument.

When judge excluded the evidence and instructed the jury to disregard it, Maltby had no plan to get the gist of the testimony—that Lucas believed he had no more obligation to appear that day—admitted around the hearsay rule. He apparently hadn't coached Lucas prior to his testimony on how to answer questions to avoid implicating the rule (*e.g.*, “don't tell us what Sharma said, only tell us what you understood.”). Despite his earlier statement that he needed time to consider his response to an objection he knew would be coming, Maltby was not prepared with any response at all, even though there were multiple meritorious options for him to pursue.

It is not enough that the jury heard Lucas' words before the judge ruled to exclude them. The judge instructed the jury to disregard. Juries are presumed to follow such curative instructions, and the statements were not of such an impactful nature that the jury would not be able to comply. *See State v. Babcock*, 145 Wn. App. 157, 164, 185 P.3d 1213 (2008).

Maltby's failure to make reasonable arguments and efforts to admit Lucas' testimony on the bail jumping charge was deficient performance. It prejudiced Lucas by opening the door to harmful rebuttal evidence by the State, while simultaneously

handcuffing Lucas from making effective arguments to reduce the prejudicial effect of the rebuttal evidence.

2.3.3 Maltby's failure to get the statements admitted opened the door to admission of the transcript.

Due to Maltby's failure and the judge's erroneous rulings, the only evidence that the jury could consider would be that Lucas went to the courthouse, spoke with his attorney, and then left. The State chose to present rebuttal evidence, hoping to prove that Lucas didn't actually show up that day at all. *See* RP, Feb. 1, 2018, at 189-90, 192.

The State presented transcripts from the March 21 warrant quash hearing, at which Lucas' temporary 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. The State spun this rebuttal evidence as proof that Lucas never showed up at all, because he always thought the date was March 15th. RP, Feb. 1, 2018, at 282-83. The State hammered this point home to the jury and then used it to impeach Lucas' credibility on the other charges as well. RP, Feb. 1, 2018, at 283-84.

The State's response brief misunderstands Lucas' argument on this point. *See* Resp. to PRP at 17. Lucas is not arguing that Maltby should have prevented him from making an inconsistent statement (indeed, Lucas' testimony was not inconsistent with the transcript at all). Lucas is arguing that Maltby's failure to get Lucas' full story admitted into evidence simultaneously opened the door to the State's rebuttal evidence and hampered Lucas from defending against that evidence by showing that it was actually consistent with his testimony.

2.3.4 Maltby failed to explain to the jury how the transcript was consistent with Lucas' story.

The difficulty in explaining the consistency without Lucas' full testimony is evident in Maltby's struggle to do so in closing argument. RP, Feb. 1, 2018, at 301. His argument was, "It's not quite that clear." RP, Feb. 1, 2018, at 301. But he failed to walk the jury through the connections between the transcript (Lucas thought it was on the 15th) and Lucas' testimony (came on the 2nd, left, then came back on the 15th). RP, Feb. 1, 2018, at 301. Maltby's argument was rambling, unclear, and unconvincing.

Had Maltby competently argued against the hearsay objections or otherwise found a way to admit Lucas' full story—that after speaking with his lawyer he understood that he had no further obligation to appear before a judge on the 2nd and

instead should come back on the 15th—he could have made a much more compelling argument that the transcript was, in fact, consistent with Lucas’ story. *See* Br. of App. at 23-24. He could have argued that because Lucas believed on March 2nd that he had no more obligation to appear that day, the element of knowledge had not been proven beyond a reasonable doubt. *See* Br. of App. at 22.

But even given the evidence he had to work with (limited by his own deficient performance), Maltby’s arguments were deficient and prejudiced Lucas. Had Maltby performed competently, there is a reasonable probability that the jury could have found Lucas not guilty of bail jumping because the element of knowledge was not proven beyond a reasonable doubt.

2.3.5 Maltby failed to present Lucas’ meritorious motion to recuse Judge Sorensen.

Maltby’s performance was also deficient at the second trial. Even though Lucas was absolutely correct about Judge Sorensen’s statements at drug court, Maltby only half-heartedly mentioned the statements, as an aside, without providing any detail, and giving the impression that he himself did not even believe that the statements existed. RP, Jan. 16, 2018, at 6. Maltby’s deficient presentation of what proved to be a meritorious motion caused Lucas to speak up on his own behalf

to clearly spell out what Sorensen said, which would be reflected in the recordings of the drug court hearing. RP, Jan. 16, 2018, at 6.

Lucas' memory proved true. Ex. 18 (recording of the drug court hearing). Had Maltby presented the motion competently, there is a reasonable probability that Judge Sorensen would have sought out and listened to the recording before impaneling the jury.

2.3.6 Maltby failed to advise Lucas of his rights after the jury was impaneled at the second trial.

After the jury was impaneled, Lucas' situation changed. Jeopardy had attached, and Lucas had the right to insist on going forward with the jury that had been selected. *See* Br. of App. at 15-18. Had he done so, the judge would still have had a duty to recuse himself, without a motion of a party. Br. of App. at 16 (quoting CJC 2.11). Because Lucas would not be requesting the recusal, he would not be waiving his double jeopardy rights, and a subsequent retrial would have been barred. Br. of App. at 16-18.

Maltby failed to recognize the changed landscape. After the recording of Judge Sorensen's statement was played, Maltby spoke with Lucas in the hall. PRP at 3. "The only thing he said to me was that he was going to ask the judge to recuse. He didn't

explain to me what my rights were. He didn't explain the significance of the fact that the jury had already been sworn in. He didn't ask me if I wanted the judge to recuse or if I wanted to keep going with the jury that had been selected. He didn't ask for my consent for what he was about to do." PRP at 3.

Without explaining to Lucas his rights and the choice he had before him, Maltby asked the judge to recuse. PRP at 4; RP, Jan. 18, 2018, at 37-38. Moving to recuse the judge was against Lucas' interests because it would have the effect of waiving his double jeopardy rights. Doing so was deficient performance that prejudiced Lucas. If Maltby had recognized the situation and properly advised Lucas, he would not have asked the judge to recuse. Instead, he would have preserved Lucas' double jeopardy rights, and a retrial would have been barred.

2.3.7 Maltby assaulted Lucas in front of the jury during the third trial.

During the third trial, Maltby assaulted Lucas in front of the jury by angrily throwing a crumpled paper at Lucas' face. PRP at 7. Lucas had written down what he perceived as contradictions in Deputy Roberts' testimony and asked Maltby to address these contradictions in cross-examination. PRP at 7. "Mr. Maltby read the paper and then, in full view of the judge

and jury, crumpled up the paper and threw it in my face, saying, 'I'm going to do this my way.'" PRP at 7.

There is no excuse for such an outburst by an officer of the court. It leaves an indelible impression on the minds of the jurors: Lucas is such a bad guy that even his lawyer hates him. His lawyer doesn't trust him. He must be asking his lawyer to be dishonest. Surely we can't trust Lucas. He must be guilty. Where Lucas' entire defense depended on the credibility of his own testimony, this inexcusable outburst by Maltby was devastating.

The State's argument that the outburst must not have occurred because it is not in the record is not convincing. Although some of Lucas' outbursts were reflected in the transcript, many other exchanges were not. The court reporter had some sensitivity to what should be confidential attorney-client conversations, and recorded many exchanges as, "discussion off the record."

Such was the case here. The court reporter correctly did not record Lucas' comments to Maltby, asking him to cross-examine Deputy Roberts on the points listed on the paper. The reporter also correctly did not record Maltby's response, "I'm going to do this my way." It was a confidential attorney-client conversation. Even if it was audible, it was proper for the court reporter not to record it in the transcript.

It is also of note that the written transcript is intended to capture what was **spoken** in the courtroom, not the actions of the participants. This is why witnesses are always instructed to give an audible “yes” or “no,” rather than nodding or shaking their heads—because the court reporter needs an audible word to record in the transcript. There would be no reason for the court reporter to record Maltby’s action in throwing the crumpled paper at Lucas.

There is no reason in the record to disbelieve Lucas’ testimony about the crumpled paper. Maltby did not like representing Lucas. Lucas was a difficult client for him, though at least partly as a result of Maltby’s own failures and the failures of other attorneys before him. As Lucas testifies in his PRP, Maltby apparently had no interest in truly fighting for Lucas’ interests. *See* PRP at 6-11. Maltby took every opportunity to seek to withdraw. He refused to take actions that Lucas believed were in his interests, both before and during the trial. He failed to make meritorious motions, failed to properly advise Lucas to protect his rights, and failed to make simple arguments on key points that could have changed the outcome. To cap it all off, he demonstrated his unfaithfulness for all to see by angrily throwing the crumpled paper in Lucas’ face, saying, “I’m going to do this my way.”

Maltby's deficient performance throughout the case prejudiced Lucas. Some of Maltby's errors, detailed above, were themselves enough to prejudice Lucas. All of them added together prejudiced Lucas' right to a fair trial.

3. Conclusion

The third trial violated double jeopardy. This Court should reverse, vacate the convictions, and dismiss the charges with prejudice.

In the alternative, Lucas was prejudiced by ineffective assistance of counsel. This Court should reverse the convictions and remand for a new trial. If an evidentiary hearing is needed on matters outside the appellate record, this Court should remand to the trial court for that purpose.

Respectfully submitted this 11th day of October, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on October 11, 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.

Teresa Chen
Pierce County Prosecutor
930 Tacoma Ave S, Rm 946
Tacoma, WA 98402-2102
teresa.chen@piercecountywa.gov
PCpatcecf@piercecountywa.gov

SIGNED at Lacey, Washington, this 11th day of October, 2019.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008

OLYMPIC APPEALS PLLC

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Reply in support of Personal Restraint Petition

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com
Address:
4570 AVERY LN SE STE C-217
LACEY, WA, 98503-5608
Phone: 360-763-8008

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