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COA NO. 52251-9-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ALLEN JONES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable David Edwards, Judge

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REPLY BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
1. JONES WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY WHEN JURORS LEARNED OF PRIOR DRUG ACTIVITY, THE CIRCUMSTANCES OF WHICH TAINTED THE JURY VENIRE.....	1
2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF JONES'S PRIOR CONVICTIONS TO UNDERMINE HIS CREDIBILITY UNDER ER 609.....	4
a. The prior conviction evidence was not probative of credibility and unfairly prejudicial, and the trial court failed to articulate why it wasn't .....	4
b. There is a reasonable probability the error prejudiced the outcome because the case came down to the competing claims of Jones and the State's prime witness against him... ..	7
B. <u>CONCLUSION</u> .....	8

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

<u>City of Puyallup v. Pierce Cty.,</u> __ Wn. App. 2d. __, 438 P.3d 174 (2019).....	7
<u>Coggle v. Snow,</u> 56 Wn. App. 499, 784 P.2d 554 (1990).....	2
<u>In re Electric Lightwave, Inc.,</u> 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).....	4
<u>In re Marriage of Littlefield,</u> 133 Wn.2d 39, 940 P.2d 1362 (1997).....	3
<u>State v. Allen,</u> 159 Wn.2d 1, 147 P.3d 581 (2006).....	1
<u>State v. Arredondo,</u> 188 Wn.2d 244, 394 P.3d 348 (2017).....	2
<u>State v. Begin,</u> 59 Wn. App. 755, 801 P.2d 269 (1990), <u>disapproved of by</u> <u>State v. Hardy,</u> 133 Wn.2d 701, 946 P.2d 1175 (1997) .....	5-6
<u>State v. Calegar,</u> 133 Wn.2d 718, 947 P.2d 235 (1997).....	6-7
<u>State v. Curry,</u> 191 Wn.2d 475, 423 P.3d 179 (2018).....	2
<u>State v. Dye,</u> 178 Wn.2d 541, 309 P.3d 1192 (2013).....	3
<u>State v. Hardy,</u> 133 Wn.2d 701, 946 P.2d 1175 (1997).....	6-7

**TABLE OF AUTHORITIES**

Page

WASHINGTON CASES

State v. Jones,  
101 Wn.2d 113, 677 P.2d 131(1984),  
overruled in part on other grounds by  
State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991) ..... 6

State v. King,  
75 Wn. App. 899, 878 P.2d 466 (1994),  
review denied, 125 Wn.2d 1021, 890 P.2d 463 (1995) ..... 4, 6

State v. Mason,  
160 Wn.2d 910, 162 P.3d 396 (2007)..... 2

State v. Millante,  
80 Wn. App. 237, 908 P.2d 374 (1995),  
review denied, 129 Wn.2d 1012, 917 P.2d 130 (1996) ..... 4-7

State v. Sisouvanh,  
175 Wn.2d 607, 290 P.3d 942 (2012)..... 3

OTHER AUTHORITIES

ER 609 ..... 4-5

ER 609(a)(1) ..... 4

ER 609(a)(2) ..... 4

A. ARGUMENT IN REPLY

1. **JONES WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY WHEN JURORS LEARNED OF PRIOR DRUG ACTIVITY, THE CIRCUMSTANCES OF WHICH TAINTED THE JURY VENIRE.**

Jones's motion for mistrial was based on a claim that the venire was tainted by a pool member's disclosure that he knew Jones from a past drug life when he was an addict. 1RP 28-29. The parties dispute the proper standard of review, with the State advocating for an abuse of discretion standard. Brief of Respondent (BOR) at 2.

Rulings on mistrial motions are generally reviewed for abuse of discretion. State v. Allen, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). While defense counsel asked for a "mistrial," 1RP 30, that is an imprecise use of the term in the context of this case. The jury had not yet been selected and sworn. No evidence had been taken; no witness examined. Contrary to the State's assertion (BOR at 2), voir dire had not even been finished. 1RP 23, 28-29. In substantive terms, the trial had not yet started. Really, the request for a "mistrial" due to a tainted jury venire amounts to nothing more than a request that the tainted venire be replaced with an untainted one. For this reason, analyzing Jones's claim as a mixed question of law and fact grounded in his tainted venire claim makes more sense.

If the trial court's decision is reviewed for abuse of discretion, the State's description of when that standard is met must be addressed. The State says a trial court abuses its discretion only "when no reasonable judge would have reached the same conclusion." BOR at 2. Although this phrase is sometimes bandied about, the abuse of discretion standard is more nuanced than suggested by the phrase.

"[T]o say an abuse of discretion exists when 'no reasonable man, woman or judge' would have taken the view adopted by the trial court is not accurate" because it improperly focuses on the "reasonableness of the decision-maker" rather than the reasonableness of the decision. Coggle v. Snow, 56 Wn. App. 499, 506, 784 P.2d 554 (1990). "A trial judge afforded discretion is not free to act at whim or in boundless fashion, and discretion does not allow the trial judge to make any decision he or she is inclined to make." State v. Curry, 191 Wn.2d 475, 484, 423 P.3d 179 (2018) (citing Coggle, 56 Wn. App. at 504-05).

Saying no reasonable judge would have ruled as the trial court did is just another way of saying "we must find the decision is 'unreasonable or is based on untenable reasons or grounds.'" State v. Arredondo, 188 Wn.2d 244, 256, 394 P.3d 348 (2017) (quoting State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007)). Thus, a trial court abuses its discretion "if any of the following is true: (1) The decision is 'manifestly unreasonable,'

that is, it falls 'outside the range of acceptable choices, given the facts and the applicable legal standard'; (2) The decision is 'based on untenable grounds,' that is, 'the factual findings are unsupported by the record'; or (3) The decision is 'based on untenable reasons,' that is, it is 'based on an incorrect standard or the facts do not meet the requirements of the correct standard.'" State v. Dye, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013) (quoting In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). A trial court's decision is also based on untenable reasons when it is based on the wrong legal standard. State v. Sisouvanh, 175 Wn.2d 607, 623, 290 P.3d 942 (2012).

Here, the trial court did not apply the trial irregularity standard or any legal standard whatsoever. It simply ruled "Motion denied," without explanation for why it was denied. 1RP 29. The court's decision does not meet the requirements of the correct legal standard as set forth in the opening brief. The trial court's decision also fell outside the range of acceptable choices, given the facts and applicable legal standard set forth in the opening brief.

**2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING EVIDENCE OF JONES'S PRIOR CONVICTIONS TO UNDERMINE HIS CREDIBILITY UNDER ER 609.**

- a. The prior conviction evidence was not probative of credibility and unfairly prejudicial, and the trial court failed to articulate why it wasn't.**

In arguing Jones's prior convictions for unlawful possession of a firearm were admissible for impeachment under ER 609, the State relies on State v. Millante, 80 Wn. App. 237, 908 P.2d 374 (1995), review denied, 129 Wn.2d 1012, 917 P.2d 130 (1996). BOR at 20. Its reliance is misplaced. There is no good law supporting the State's argument.

In Millante, the trial court admitted four prior convictions to impeach the defendant under ER 609: an attempted robbery, a first degree assault and two second degree burglaries. Millante, 80 Wn. App. at 244. There was no dispute that the attempted robbery was properly admitted as a crime of dishonesty under ER 609(a)(2). Id. Rather, the challenge on appeal was to the admissibility of the other three convictions, which were admitted under ER 609(a)(1). Id.

The Court of Appeals recognized admissibility of these convictions turned on which of two competing lines of cases represented the correct view of the law. The defendant relied on State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021, 890 P.2d 463

(1995) for the proposition that "the trial court must identify the specific nature of a prior conviction that gives it probative value." Id. at 246. "A contrary view" was expressed in State v. Begin, 59 Wn. App. 755, 760, 801 P.2d 269 (1990), which held "prior felonies of whatever nature have 'at least some' probative value because they are evidence of nonlaw-abiding character and, hence, demonstrate a propensity to commit perjury." Millante, 80 Wn. App. at 246. The Millante court chose not to resolve the conflict and did not decide whether the trial court properly admitted the convictions under the Begin rationale. Id. Instead, it simply held any error was harmless. Id.

For the State to now claim the Court of Appeals in Millante "upheld" the trial court's decision is therefore misleading. BOR at 21. Millante did not decide the issue of admissibility, leaving that question for another day. Appellate courts do not rely on cases that fail to specifically decide an issue. In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994).

The State's citation to Millante is nonetheless telling. Like a moth to the flame, the State's ER 609 argument is irresistibly drawn to the discredited reasoning of Begin. The State thus argues Jones's unlawful possession of firearm convictions show his disregard for the law, which

raises a concern that he will not testify truthfully under oath. BOR at 19. That is Begin reasoning. History has not been kind to Begin.

We now know what was not known at the time Millante was decided. In 1997, the Supreme Court in State v. Hardy, 133 Wn.2d 701, 708, 946 P.2d 1175 (1997) expressly disapproved of Begin to the extent it suggested "all criminal convictions go to truthfulness or that every criminal act is evidence of an untruthful personality." That same year, the Supreme Court in State v. Calegar, 133 Wn.2d 718, 726-27, 947 P.2d 235 (1997) thoroughly rejected the reasoning used in Begin and embraced King as the correct view of the law. The Supreme Court described Begin as "clearly an aberration that directly conflicts with Jones." Id. at 727. Per Jones, "[s]imply because a defendant has committed a crime in the past does not mean the defendant will lie when testifying." State v. Jones, 101 Wn.2d 113, 119, 677 P.2d 131(1984), overruled in part on other grounds by State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991)).

The State says evidence of Jones's prior convictions was "necessary to give the jury a way to weigh the credibility of [Jones]." BOR at 21. But the trial court was unable to "articulate how the specific nature of the prior felony makes it one of the few offenses not involving dishonesty or false statement that nevertheless has probative value." King 75 Wn. App. at 899. The trial court failed to articulate "exactly how"

Jones's prior firearm convictions were probative of his truthfulness. Hardy, 133 Wn.2d at 712. The court therefore erred in admitting the evidence.

The State complains its witness, McGuire, was examined on his prior drug use and therefore the State needed to use Jones's prior, non-drug related convictions against him. BOR at 20. Other than Millante, the State cites no authority for this argument. As argued, Millante does not support the State's position. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." City of Puyallup v. Pierce Cty., \_\_ Wn. App. 2d \_\_, 438 P.3d 174, 184 (2019).

- b. There is a reasonable probability the error prejudiced the outcome because the case came down to the competing claims of Jones and the State's prime witness against him.**

The State makes no argument the error is harmless. This is understandable. The case came down to McGuire's word against Jones's word about who possessed the backpack containing the drugs. Given the inferences the State asked the jury to make in deciding the issue of possession, it is reasonably probable that the fact that Jones "was a convicted felon tipped the balance against him and therefore determined the outcome of the trial." Calegar, 133 Wn.2d at 729.

**B. CONCLUSION**

For the reasons stated above and in the opening brief, Jones requests reversal of the conviction.

DATED this 22<sup>nd</sup> day of May 2019

Respectfully Submitted,

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