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COA NO. 52251-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH ALLEN JONES,

Appellant.

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

The Honorable David Edwards, Judge

BRIEF OF APPELLANT (AMENDED)

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A. ASSIGNMENTS OF ERROR

1. The court erred in denying appellant's motion for mistrial based on information disclosed during jury selection.

2. The court erred in admitting evidence of appellant's prior convictions under ER 609.

3. Cumulative error deprived appellant of his due process right to a fair trial.

Issues Pertaining to Assignments of Error

1. Appellant stood trial on a charge of possession with intent to deliver a controlled substance. During voir dire, a member of the jury venire disclosed that he knew appellant from a former life, at a time that he was addicted to drugs. Some venire members said they could not be impartial while others cursorily maintained they could. Did the court's refusal to grant a mistrial and secure an untainted venire violate appellant's constitutional right to a fair and impartial jury?

2. Whether the court erred in admitting evidence of appellant's prior unlawful possession of firearm convictions under ER 609 because the prior convictions were irrelevant to appellant's credibility in testifying in his own defense?

3. Whether the combination of errors specified above violated appellant's due process right to a fair trial under the cumulative error doctrine?

B. STATEMENT OF THE CASE

1. Jury selection: a juror knew Jones from a past life, when the juror was addicted to drugs.

At the beginning of voir dire, the judge informed the venire that Joseph Jones was charged with the crime of possession with intent to deliver heroin. 1RP¹ 17. The judge asked if anyone knew Jones. 1RP 22. Juror 33 indicated he did. 1RP 22. The prosecutor asked him how long he had known Jones. 1RP 22. Juror 33 replied "I have known him from a past life. I once was addicted to drugs and things --." 1RP 22. The judge asked if his prior relationship with Jones would interfere with his ability to be a fair and impartial juror in this case. 1RP 22-23. Juror 33 answered "probably." 1RP 23. The judge excused Juror 33. 1RP 23. Defense counsel said he had a motion, which the judge said would be considered later. 1RP 23.

After the judge finished his preliminary questions, defense counsel moved for a mistrial. 1RP 28-29. With reference to juror 33's statement, counsel explained "this is a drug case, and he is accused of possessing with intent to deliver heroin, I think that prejudices the jury right off the bat. I

¹ This brief cites to the verbatim report of proceedings as follows: 1RP - two consecutively paginated volumes consisting of 12/12/17, 12/13/17; 2RP 12/12/17 (afternoon session); 3RP 4/20/18.

don't think I can unwind the clock, and I don't think there is any curative action the Court could take to fix that problem." 1RP 29. The jury was tainted. 1RP 29. The judge simply responded, "Motion denied." 1RP 29.

During voir dire, the prosecutor asked if anyone thought all drugs should be decriminalized and whether police should refrain from going after "cases like this" until more serious crimes are solved. 1RP 30, 33. Many jurors disagreed. 1RP 33-42. Juror 11² shared her story of how her son went through heroin addiction and "so it builds up a sort of resentment, you know, for what it does to people's lives." 1RP 34. Juror 24 said she was glad marijuana was legalized, but "there is a difference in drugs and their effect on society and . . . heroin has more crime." 1RP 36. An unidentified juror followed up, saying heroin is more addictive and causes "greater harm to society and family members." 1RP 36. Juror 13 said she had a "family who have been running from addictions" and the laws need to be obeyed. 1RP 37. Juror 32 said "heroin killed my wife's niece" and had seen "a lot of friends involved, took a lot of friends down." 1RP 39. Juror 52 said "I have 17 years clean now, and I do believe heroin is a killer. I have lost a lot of my friends, family, it's just -- is unbelievable how many it's taken out. And yeah, I definitely think it needs to be illegal, and people need to face the consequences of doing things like that." 1RP 39.

² During voir dire, jurors were sometimes addressed by name. Their respective numbers are found by looking at the jury master list. CP 54-55.

The litany continued. Juror 48 said street drugs "ruin a lot of lives, and a lot of families. The laws need to be enforced and need to try to get the street drugs off the street." IRP 41. An unidentified juror said, "heroin will kill you." IRP 41. Juror 71 believed all drugs should be illegal, saying "I have lost a lot of family, friends, loved ones." IRP 42. Juror 72 said she has "always been very afraid of heroin and being addicted, and I see how I seems like a very big issue in Grays Harbor, and so I think it's bad. Heroin is bad." IRP 43. Juror 77 said "I don't think any of it should be legal, especially the remark that heroin, that was -- I just think that's wrong. This case will be every bit as much important. It affects lives." IRP 44. Juror 78 said drugs other than marijuana "ruins lives, you have heard it from a lot of people here, it ruins lives, kills people, splits families up. It's just, I just wish they would wipe them all out." IRP 44.

Defense counsel asked "did everybody hear what juror Number 33 said? I see a couple people nodding their head. He made a comment about knowing my client. Okay. Don't repeat it. Okay. What I want to ask you, is, would that comment cause you difficulty in being impartial in this case, or how is it going to affect you?" IRP 46. Counsel then said, "I am just going to go down the line," and started eliciting responses from jurors. IRP 46. Seven jurors (5, 11, 26, 29, 32, 48, 71, 77) affirmed that hearing the comment affected their ability to be impartial. IRP 46-48, 50-51. Juror 5, for example, answered "Oh, yeah" to whether it would affect him, explaining "I think that

there was a conclusion to that statement, and that there was a history." IRP 46. Other jurors (4, 13, 14, 15, 20, 23, 25, 28, 30, 31, 47, 49, 52, 66, 72, 73, 78) indicated they could be impartial. IRP 46.³ One juror, 72, said "It did affect me but I believe I can be impartial and take facts." IRP 50.

Counsel moved to excuse the jurors that said they could not be impartial (5, 11, 26, 29, 48, 71 and 77). IRP 51. Without ruling, the judge addressed those who expressed concern about having an ability to be fair and impartial as a result of the juror's comment. IRP 51. The judge said those selected to serve would take an oath to decide the case based only on the evidence presented. IRP 52. The juror's comment was "not something that you should give any consideration to." IRP 52. The judge continued: "So, I am going to ask each of you who had, in response to Mr. Baum, indicated that concern about being fair and impartial to consider what I just told you, and to

³ Juror 4 answered "no" to whether it would affect her ability to be impartial. IRP 46. Juror 13 said "I don't think it would make a difference." IRP 47. Juror 14 said "I can be impartial." IRP 47. Juror 15 said "no" to whether it would affect his ability to be impartial. IRP 47. Juror 20 said "it would not affect me in any way." IRP 47. Juror 23 said "I don't believe that it would bear on the case from what I heard the case was. I feel like I can be impartial." IRP 47-48. Juror 25 said "I could be impartial." IRP 48. Juror 28 said "everybody has 18 got a past. And what we need to look at, is the situation at hand, and the evidence that's presented. . . . So, I think I can do it, impartial." IRP 48. Juror 30 said "I don't think it would affect my decision." IRP 49. Juror 31 said "I don't think it affects my opinion." IRP 49. Juror 47 answered "yes" to "you can still remain impartial?" IRP 49. Juror 49 said it "shouldn't be a problem." IRP 50. Juror 52 said he "can do it with no problem" IRP 50. Juror 66 said "I can be impartial." IRP 50. Juror 73 said "I kind of knee-jerk at first, but then weighing the facts, and I feel I can be impartial." IRP 51. Juror 78 said "I think I could still be impartial." IRP 51.

answer again, whether or not you believe you can be fair and impartial. So, of the jurors whose numbers were identified by Mr. Baum, if you still believe that the comment made by the juror who was excused, would interfere with your ability to be fair and impartial, please raise your hand." Four jurors, 11, 26, 32, and 71, raised their hand and were excused. 1RP 53.

Defense counsel exercised peremptory challenges to jurors 28, 29, 48, 52, 73 and 77. CP 55. These were the jurors that initially said they could not be impartial but did not raise their hand in response to the judge's question. 1RP 48-51. Those who heard the unfortunate comment, earlier indicated they could be impartial, and were ultimately empaneled to try Jones's case included jurors 14, 23, 25, 30, 31, 47, 49, 72 and 78. CP 55.

2. Trial evidence: divergent stories

Aberdeen police initiated a traffic stop of a car driven by Andrew McGuire because Jones, the passenger, was not wearing a seatbelt and McGuire had a suspended license. 1RP 70-73; 2RP 7-9.⁴ From 100 feet away, Sergeant Snodgrass looked back over his shoulder from his parked vehicle and claimed to see Jones move his right arm and lean forward before the stop took place. 1RP 74; 2RP 50-51. After police activated emergency lights, McGuire continued to drive but was eventually boxed in. 1RP 80, 84; 2RP 8-11.

⁴ The vehicle, which McGuire regularly drove, was in his wife's name. 2RP 62, 69.

Police had Jones step out of the car. 1RP 77, 87. Jones complied with the directive and was fully cooperative. 1RP 83; 2RP 13. While standing outside the door, an officer saw a zipper pack near the passenger seat. 1RP 77; 2RP 16, 20-21. A baggie containing a white, crystalline substance, suspected to be methamphetamine, stuck out of the pack. 1RP 77-78. There was also a larger amount of white crystalline substance near the arm rest between the driver and passenger seat. 1RP 78. Pills were in various locations. 2RP 36-37, 42, 61. A digital scale, a box, and some baggies were found on the rear seat. 2RP 25, 40-41.

Police also observed a backpack in the passenger footwell. 2RP 16. It smelled like vinegar, consistent with the smell of heroin. 2RP 44-45. McGuire and Jones were taken into custody. 2RP 21. McGuire was "incredibly nervous," visibly shaking" and "sweating profusely." 2RP 23, 58-59.

A search warrant was obtained for the backpack. 2RP 100. Baggies containing a brown, tar-like substance were inside. 2RP 102-03. Also inside: baggies containing a white crystalline substance, about 100 baggies of the type frequently used to package narcotics, two digital scales, drug paraphernalia and five cell phones. 1RP 112, 120-26; 2RP 104-05. Police did not find anything in the backpack with Jones's or McGuire's

name on it. 1RP 129. Instead, items with the name "Wayne Giberson" were found inside. 1RP 128-29.

A forensic scientist analyzed one of the baggies containing the brown substance and identified it as heroin. 2RP 114-16. The gross weight of all six bags was 84 grams. 2RP 115. The analyst identified the crystalline substance from the backpack as methamphetamine. 2RP 117-19.

The State charged Jones with one count of possession of a controlled substance, heroin, with intent to deliver. CP 1. It did not charge Jones with any other offense and did not charge McGuire at all.

McGuire testified for the State. According to McGuire, Jones had a backpack with him when McGuire picked him up in his car that day. 2RP 69-70. Jones asked if he wanted to get loaded and if he knew where to "get rid of some shit." 2RP 71. McGuire assumed he meant drugs. 2RP 71. McGuire was an addict at the time. 2RP 72. He used heroin that day and was under its influence. 2RP 72, 88-89. While driving, Jones pulled out some white powder and a lock box from the backpack. 2RP 73-74. They were in the car together for about five minutes before they encountered the police. 2RP 87. They panicked, and Jones tried to stuff the items into the backpack. 2RP 74. McGuire was afraid he could be

charged with whatever Jones had. 2RP 75. Jones told him "don't be saying this shit is mine." 2RP 75.

McGuire claimed ownership of two pill bottles in the car. 2RP 91-92. He took Suboxone pills for his heroin addiction.⁵ 2RP 76. McGuire denied any other drugs recovered from the car belonged to him. 2RP 84, 94. He denied knowing what was in the backpack. 2RP 85. He testified he did not know what drugs Jones had in the car. 2RP 96.⁶

Jones testified in his own defense. By his testimony, Jones asked McGuire for a ride to his girlfriend's place. 1RP 144-45. They drove about a block before police stopped them. 1RP 145. He moved his arm around because he was struggling to put his seatbelt on. 1RP 148. He denied leaning forward. 1RP 151. Jones acknowledged he had been a drug addict and would not have been around "these people" if he "wasn't out messing around." 1RP 150. By "these people," he meant McGuire. 1RP 150. Still, Jones was adamant that he did not bring the backpack into the car. 1RP 148. Rather, the backpack was already on the passenger side footwell when he entered the car. 1RP 146-47. He did not bring any controlled substances into the car and did not know they were there. 1RP

⁵ McGuire told police he had a Suboxone strip. 2RP 42.

⁶ But when detained by police, McGuire asked if he was going to get charged for meth. 2RP 96. McGuire suspected the white substance in the bag that Jones pulled out was meth. 2RP 96.

148-49. He denied making any statement to McGuire about offering him drugs or that he brought "the stuff." 1RP 148. On cross-examination, the prosecutor elicited from Jones that he had two prior convictions for unlawful possession of a firearm. 1RP 153.

3. Outcome

The jury returned a guilty verdict. CP 22. The court denied Jones's request for a Drug Offender Sentencing Alternative and imposed a 120-month sentence, the top of the standard range. 3RP 5, 11-12; CP 35. Jones appeals. CP 45.

C. ARGUMENT

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.

The jury was tainted from the start. During voir dire, a prospective juror disclosed he knew Jones from a past drug life when he was an addict. 1RP 22. This, in a case where the charge was possession with intent to deliver heroin. The disclosure invited jurors to consider that Jones had a propensity to commit the type of crime for which he stood trial. Defense counsel's request for a mistrial was summarily denied. As voir dire continued, a number of jurors proclaimed they could not be impartial based on what they heard. Many jurors expressed dismay at the dangers

of heroin, which ripped apart friends and family. One juror described heroin as a big problem in the county. Under the circumstances, the court's attempt to remedy the disclosure without replacing the venire failed. The mistrial motion should have been granted. The conviction should be reversed.

a. The question of whether Jones's right to a fair and impartial jury was violated is an issue of constitutional law reviewed de novo.

When a defendant's constitutional right to a fair and impartial jury is in question, Division Two of this Court has employed a de novo standard of review. State v. Johnson, 125 Wn. App. 443, 457, 105 P.3d 85 (2005). Recently, Division Two addressed a claim that the right to a fair trial by an impartial jury was violated because of prospective jurors' statements concerning their own prior experiences with child molestation tainted the entire jury venire. State v. Strange, 188 Wn. App. 679, 684-85, 354 P.3d 917, review denied, 184 Wn.2d 1016, 360 P.3d 818 (2015). This Court reviewed the claimed error de novo because it was an issue of constitutional law. Id. at 685.

This approach is in keeping with the general principle that issues of constitutional law are review de novo. See State v. Siers, 174 Wn.2d 269, 273-74, 274 P.3d 358 (2012) ("We review allegations of constitutional violations de novo."); State v. Murray, 190 Wn.2d 727, 732,

416 P.3d 1225 (2018) ("we . . . review questions of constitutional law de novo."); State v. Buckman, 190 Wn.2d 51, 57, 409 P.3d 193 (2018) (although denial of CrR 7.8 motion normally reviewed for abuse of discretion, request for plea withdrawal was "based on a claimed constitutional error and resulting prejudice—both of which are issues that we review de novo.").

Division One, however, has used an abuse of discretion standard for reviewing the denial of a motion for mistrial in the context of improper information disclosed to the venire. State v. Young, 129 Wn. App. 468, 473, 119 P.3d 870 (2005), review denied, 157 Wn.2d 1011, 139 P.3d 350 (2006).

Perhaps it is better to treat a tainted venire claim as a mixed question of law and fact. "[T]he standard of review typically 'depends—on whether answering it entails primarily legal or factual work.'" In re Dependency of E.H., 191 Wn.2d 872, 895, 427 P.3d 587 (2018) (quoting U.S. Bank Nat'l Ass'n ex rel. CWC Capital Asset Management LLC v. Vill. at Lakeridge, LLC, __ U.S. __, 138 S. Ct. 960, 967, 200 L. Ed. 2d 218 (2018)). Mixed questions of law and fact present themselves when the reviewing court is "required to apply legal principles to a particularized set of factual circumstances." State v. Samalia, 186 Wn.2d 262, 269, 375 P.3d 1082 (2016). "The constitutional nature of the issue 'favors de novo review

even when answering a mixed question primarily involves plunging into a factual record." E.H., 191 Wn.2d at 895 (quoting U.S. Bank, 138 S. Ct. at 967 n.4).

A tainted jury venire implicates the constitutional right to a fair and impartial jury. Strange, 188 Wn. App. at 684-85. Even though resolution of the issue requires examination of the underlying facts, the constitutional nature of the issue should be reviewed de novo. In Irvin v. Dowd, 366 U.S. 717, 723, 81 S. Ct. 1639, 1643, 6 L. Ed. 2d 751 (1961), for example, the U.S. Supreme Court reviewed the issue of whether venire members had a fixed opinion of guilt, in violation of the right to a fair and impartial jury, as a mixed question of fact and law. In that situation, constitutional principles are applied to the facts, and it is for the appellate court to evaluate the voir dire testimony of impaneled jurors. Id.

"Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts." Samalia, 186 Wn.2d at 269 (quoting Tapper v. Emp't Sec. Dep't, 122 Wn.2d 397, 403, 858 P.2d 494 (1993)). Whether a constitutional violation has occurred is reviewed de novo, with deference given to the trial court's factual findings, when appropriate.

E.H., 427 P.3d at 597 (reviewing de novo whether due process required appointment of attorney).⁷

The trial court here found no facts, so there is no deference to be given in this regard. See State v. Fire, 100 Wn. App. 722, 723, 998 P.2d 362 (2000) ("Although appellate courts defer to a trial judge's determinations of a potential juror's credibility, character, mental habits, and demeanor, there is no indication in the record that the trial judge made any such determinations in this case."), rev'd on other grounds, 145 Wn.2d 152, 34 P.3d 1218 (2001). What's left is an issue of constitutional law: whether the failure to replace the venire violated Jones's right to a fair and impartial jury.

⁷ See also State v. Lopez, 190 Wn.2d 104, 116-17, 410 P.3d 1117 (2018) (ineffective assistance of counsel claims present a mixed question of law and fact; a trial court's factual findings made in the course of deciding an ineffective assistance issue are reviewed for substantial evidence, but the ultimate conclusion of whether counsel's performance was ineffective constitutes an application of law to established facts and thus is a mixed question of fact and law reviewed de novo); In re Pers. Restraint of Cross, 180 Wn.2d 664, 680-81, 327 P.3d 660 (2014) (claimed Miranda violation reviewed as mixed question of law and fact; trial court's findings of fact are reviewed for substantial evidence but legal conclusions derived from those findings are reviewed de novo), abrogated on other grounds by State v. Gregory, 427 P.3d 621 (2018); State v. Davila, 184 Wn.2d 55, 74-75, 357 P.3d 636 (2015) (mixed standard of review for Brady claims: the trial court's legal conclusions about materiality are reviewed de novo, but its underlying factual findings are reviewed for substantial evidence in the record).

- b. **The disclosure of Jones's past during voir dire tainted the venire and the trial court wrongly denied Jones's request for a mistrial based on the disclosure.**

Every defendant is guaranteed the right to a fair and impartial jury. State v. Davis, 141 Wn.2d 798, 824, 10 P.3d 977 (2000); Mach v. Stewart, 137 F.3d 630, 633 (9th Cir. 1997); U.S. Const. amend. VI, XIV; Wash Const. art. I, §§ 3, 22. A trial by a jury, one or more of whose members is biased or prejudiced, is not a constitutional trial. State v. Parnell, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), abrogated on other grounds by State v. Fire, 145 Wn.2d 152, 34 P.3d 1218 (2001).

Nine jurors who were ultimately empaneled heard juror 33's statement and said they could be impartial: 14, 23, 25, 30, 31, 47, 49, 72 and 78. But "jurors may not fully appreciate or accurately state the nature of their own biases." State v. Munzanreder, 199 Wn. App. 162, 182, 398 P.3d 1160 (2017) (quoting State v. Saintcalle, 178 Wn.2d 34, 78, 309 P.3d 326 (2013) (Gonzalez, J., concurring)), review denied, 189 Wn.2d 1027, 406 P.3d 280 (2017). "Just as most potential jurors will not respond affirmatively if asked, 'Are you biased?' few will fail to respond affirmatively to a leading question asking whether they can be fair and follow instructions." Fire, 100 Wn. App. at 728 (citing LaFave et. al, Criminal Procedure, § 22.3(c), at 308 (2d ed. 1999) ("[I]t is 'unlikely that a prejudiced juror would recognize his [or her] own personal prejudice-or

knowing it, would admit it."); see also Irvin, 366 U.S. at 728 ("No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father.").

Here, defense counsel attempted to ascertain the depth of the taint by asking jurors "would that comment cause you difficulty in being impartial in this case, or how is it going to affect you?" IRP 46. A series of jurors gave perfunctory, terse answers to the question. A number of them said they could be impartial without elaboration. IRP 46-51. That is not good enough in a case like this. Juror 33's inflammatory comment exposed other jurors to Jones's history of involvement in the drug world, either as a user or a dealer, in a case where Jones was on trial for committing a drug offense.

Juror 33's comment was akin to forbidden propensity evidence. To jurors, propensity evidence is tempting because it is logically relevant. State v. Holmes, 43 Wn. App. 397, 400, 717 P.2d 766 (1986). It is a common juror assumption that "since he did it once, he did it again." State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990), review denied, 116 Wn.2d 1020, 811 P.2d 219 (1991), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal

'presumption of innocence' is stripped away." State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987), abrogated on other grounds by State v. Lough, 125 Wn.2d 847, 889 P.2d 487 (1995). "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999). Evidence of a crime that is similar or identical to the one charged can be extremely prejudicial because it is likely jurors will conclude the defendant had a propensity for committing that type of crime. State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993), review denied, 123 Wn.2d 1031, 877 P.2d 694 (1994).

The juror's comment was not evidence in the formal sense of the term, but it nonetheless carried prejudicial impact in showing the juror had some special, out-of-court knowledge about Jones's past. Juror 33 had just taken an oath to respond truthfully to voir dire questions, and he had no apparent reason to lie about the matter. IRP 15. "A juror is presumed to be biased when he or she is apprised of such inherently prejudicial facts about the defendant that the court deems it highly unlikely that the juror can exercise independent judgment, even if the juror declares to the court that he or she will decide the case solely on the evidence presented." Willio v. Maggio, 737 F.2d 1372, 1379 (5th Cir. 1984).

The comment linked to Jones's drug past is inherently prejudicial in part because it became apparent during voir dire that jurors viewed heroin as a scourge ravaging the county, destroying families and friends. 1RP 34-44. In light of these understandable passions, it would be tempting for jurors to want to make an example of Jones by finding him guilty, viewing him as a dealer in death. Jones stood trial for the crime of possession with intent to deliver, i.e., drug dealing. The disclosure of Jones's past allowed jurors to infer he had a propensity to commit drug crimes in a case where jurors expressed anger at those who dealt drugs and destroyed people's lives. The jury pool was tainted by the juror's comment.

"A juror's natural inclination is to reason that having previously committed a crime, the accused is likely to have reoffended." Bacotgarcia, 59 Wn. App. at 822. "Even if 'only one juror is unduly biased or prejudiced,' the defendant is denied his constitutional right to an impartial jury." Mach, 137 F.3d at 633 (quoting United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979)). "Not only should there be a fair trial, but there should be no lingering doubt about it." Parnell, 77 Wn.2d at 508. A lingering doubt persists concerning whether the jury that tried Jones's case was impartial after hearing the comment. The judge should have declared

a mistrial to ensure a fair trial. There is no indication in the record that doing so would have posed the slightest inconvenience to anyone.

Proceeding with a jury panel tainted by information it should not have heard is structural error. United States v. Iribe-Perez, 129 F.3d 1167, 1171-1172 (10th Cir. 1997) (information shared with panel that defendant had intended to plead guilty structural error requiring reversal). In Mach, the Ninth Circuit viewed such taint as structural error but ultimately declined to decide the matter because reversal was required even under harmless error review. Mach, 137 F.3d at 633-634. Its reasoning is nonetheless instructive. The jury's exposure during voir dire to an intrinsically prejudicial statement, when it occurs before the trial begins, results in the swearing in of a tainted jury and severely infects the process from the very beginning. Id. at 633. Such an error cannot be quantitatively assessed in the context of other evidence presented, as with ordinary trial errors, "because all of the 'other evidence' presented during the case was received by a jury that was biased from the outset." Id.

So it is in Jones's case. Before trial started and evidence was heard, the jury was exposed to inherently prejudicial information, thereby biasing the jury against Jones from the start. There is no meaningful way to isolate the prejudicial impact of the error because it corrupts the integrity of the trial process itself. Structural errors "infect the entire trial process"

and deprive the defendant of "basic protections," without which "no criminal punishment may be regarded as fundamentally fair." Neder v. United States, 527 U.S. 1, 8-9, 119 S. Ct. 1827, 1833, 144 L. Ed. 2d 35 (1999) (quoting Brecht v. Abrahamson, 507 U.S. 619, 630, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) and Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). The remedy for structural error is automatic reversal. Id. at 7.

Even if the error is not structural, the trial court erred in denying the motion for mistrial and reversal is still required because there is a substantial likelihood the error affected the verdict. Improper disclosure of information to the jury venire has been analyzed as a trial irregularity. Young, 129 Wn. App. at 470, 472-73 (involving trial court's mistaken disclosure of the nature of the prior conviction to the jury). Under that analytical framework, the reviewing court examines "(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." Id. at 473.

The irregularity here is serious because it implicated Jones in past behavior similar to that for which he stood trial. Juror 33 said he had been addicted to drugs and knew Jones from that life. 1RP 22. The unmistakable inference is that Jones was a drug user or was Juror 33's drug dealer. Jones

was on trial for possession of a controlled substance with intent to deliver. "[T]he risk that the verdict will be improperly based on considerations of the defendant's propensity to commit the crime charged . . . is especially great when the prior offense is similar to the current charged offense." Young, 129 Wn. App. at 475.

The second factor, whether the statement was cumulative, also cuts against the trial court's ruling, since Juror 33's statement was not cumulative or repetitive of other evidence. See State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (non-cumulative evidence weighs in favor of mistrial). While Jones acknowledged associating with people in the drug world at the time of the event for which he stood trial (1RP 150), juror 33's comment was temporally open ended in referring to a "past life." 1RP 22. It suggested Jones was involved in drugs long before the charged conduct at issue.

As for the third factor, the trial court told jurors that responded to defense counsel that "the comment made by the juror who was excused is not something that you should give any consideration to." 1RP 52. But such oral instruction is not necessarily effective in curing the problem. "While it is presumed that juries follow the court's instruction to disregard testimony, . . . no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely

impress itself upon the minds of the jurors.'" Escalona, 49 Wn. App. at 255 (quoting State v. Miles, 73 Wn.2d 67, 71, 436 P.2d 198 (1968)).

In Escalona, for example, an instruction to disregard improper evidence was deemed ineffectual. Escalona, 49 Wn. App. at 255-56. In that case, the defendant was charged with second degree assault with a deadly weapon — a knife. Id. at 252. A witness testified that the defendant had stabbed someone before. Id. at 253. The judge ordered the statement stricken, instructed the jury to disregard the testimony, and denied the motion for mistrial. Id. The Court of Appeals concluded "despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact." Id. at 256. It reversed the conviction, reasoning "the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the witness's] statement." Id.

Similarly, the irregularity in Jones's case is serious, the State's case turned on a credibility determination, and the improper information had logical, if not legal, relevance to the charged crime. Under these circumstances, the court's instruction did not cure the irregularity and a new trial is required.

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

The trial court erred in admitting evidence of prior firearm-related convictions under ER 609(a) to impeach Jones. These prior convictions were irrelevant to his credibility and prejudice outweighed any probative value. Reversal is required because there is a reasonable probability the error affected the verdict.

a. Defense counsel pointed out the prior convictions had nothing to do with Jones's truthfulness, but the court was unimpressed.

The State wanted to admit evidence of Jones's two prior unlawful possession of firearm convictions under ER 609. 1RP 95-98, 105. Defense counsel objected, arguing the convictions were not probative of veracity and unfairly prejudicial. 1RP 98-102. The trial court admitted the prior conviction evidence. 1RP 103-05.

The court determined Jones had a significant criminal history, the conviction was not remote in time (2011), it was a serious felony, and Jones was not a juvenile at the time of the prior offense. 1RP 103-04. The court further determined "there is just no doubt in this case that credibility is going to be central to the decision that the jury makes in this case," i.e., whether the backpack containing the controlled substances belong to

McGuire or Jones. 1RP 104. Turning to the impeachment value of the prior crime, the court said: "If we weigh impeachment value solely upon ER 609(a)(2), [an] argument can be made that it doesn't have high impeachment value, because it does not involve a crime of dishonesty or false statement. But I believe there is impeachment value to that crime." 1RP 104. After ruling the State would be permitted to cross-examine Jones about his prior 2011 conviction, the State said there was an additional unlawful firearm possession conviction within the 10-year period. 1RP 104-05. Without further explanation, the court permitted the State to use this second conviction as well. 1RP 105.

On cross-examination, the State accordingly elicited from Jones that he had been convicted of second degree unlawful possession of a firearm on February 2, 2009 and again on August 8, 2011. 1RP 153. The jury was instructed: "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation." CP 18 (Instruction 8).

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

ER 609 governs use of prior convictions for impeachment purposes.

ER 609(a) provides:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

Crimes of dishonesty are per se admissible under ER 609(a)(2) if they are less than 10 years old. State v. Ray, 116 Wn.2d 531, 545, 806 P.2d 1220 (1991). As recognized by the trial court and the State, ER 609(a)(2) does not apply to an unlawful possession of firearm conviction because it is not a crime of "dishonesty or false statement." 1RP 95, 104.

The inquiry for such convictions focuses on ER 609(a)(1), which allows admittance of prior felony convictions only if "the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered." State v. Hardy, 133 Wn.2d 701, 707, 946 P.2d 1175 (1997). Prior convictions are "only 'probative' under ER

609(a)(1) to the extent they are probative of the witness's truthfulness." Id. at 707-08.

"Simply because a defendant has committed a crime in the past does not mean the defendant will lie when testifying," and "few prior offenses that do not involve crimes of dishonesty or false statement are likely to be probative of a witness' veracity." State v. Jones, 101 Wn.2d 113, 119-20, 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)). "[P]rior convictions not involving dishonesty or false statements are not probative of the witness's veracity until the party seeking admission thereof shows the opposite by demonstrating the prior conviction disproves the veracity of the witness." Hardy, 133 Wn.2d at 708. It was the State's burden, then, to show how Jones's prior unlawful possession of firearm convictions disproved his veracity as a witness. The State abjectly failed in this endeavor, and the trial court failed in holding the State to its burden.

The Supreme Court in Hardy expressly rejected the notion "all criminal convictions go to truthfulness or that every criminal act is evidence of an untruthful personality." Hardy, 133 Wn.2d at 708. Hardy disapproved of State v. Begin, 59 Wn. App. 755, 759-60, 801 P.2d 269 (1990), which had declared all prior felonies "are evidence of non-law-abiding character" and thus probative under ER 609(a)(1). Hardy, 133

Wn.2d at 708. The Supreme Court in State v. Calegar, 133 Wn.2d 718, 726-27, 947 P.2d 235 (1997) likewise rejected Begin as an "aberration that directly conflicts with Jones." The State relied on Begin to justify admission of Jones's prior convictions. 1RP 95. Begin has not been good law for over 20 years.

"Although the decision of whether to admit a prior conviction is a matter of discretion for the trial court, the court 'must bear in mind at all times that the sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant's credibility as a witness.'" Calegar, 133 at 723 (quoting Jones, 101 Wn.2d at 118). A trial court abuses its discretion when applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

Before admitting a prior offense under ER 609(a)(1), the trial court is required to balance the following factors on the record: "(1) the length of the defendant's criminal record;(2) the remoteness of the prior conviction; (3) the nature of the prior crime; (4) the age and circumstances of the defendant; (5) the centrality of the credibility issue; and (6) the impeachment value of the prior conviction." Calegar, 133 Wn.2d at 722. Further, the trial court must conduct an on-the-record analysis of probative

value versus prejudicial effect, which "requires an articulation of exactly how the prior conviction is probative of the witness's truthfulness." Hardy, 133 Wn.2d at 712. "The State bears the burden of proving that the probative value of the prior conviction outweighs any undue prejudice." Calegar, 133 Wn.2d at 722.

Here, the trial court went through the factors, but it failed to conduct an analysis of probative value versus prejudicial effect on the record. 1RP 103-04. It failed to articulate "exactly how" Jones's prior convictions were probative of his truthfulness. Hardy, 133 Wn.2d at 712. It simply said "I believe there is impeachment value to that crime." 1RP 104. That is not analysis. That is not articulation. It is empty verbiage. The proper inquiry under ER 609(a)(1) is whether the prior conviction "shows the witness is not truthful." Hardy, 133 Wn.2d at 708. Prior convictions admitted under ER 609(a)(1) "must . . . have some relevance to the defendant's ability to tell the truth." Calegar, 133 Wn.2d at 723. The State made no showing that the specific nature of the crime of unlawful possession of a firearm was probative of Jones's ability to tell the truth on the witness stand. There is nothing inherent in ordinary unlawful possession of firearm convictions to suggest the person convicted is untruthful. See Hardy, 133 Wn.2d at 709-10 (applying same reasoning to drug convictions).

"It is imperative the court state, on the record, how the proffered evidence is probative of veracity to allow appellate review." Id. at 709. The trial court here did not do so. The trial court must "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." State v. King, 75 Wn. App. 899, 913, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021, 890 P.2d 463 (1995). The trial court here did not do so. The court abused its discretion because it failed to adhere to the requirements for admission of prior conviction evidence under ER 609(a)(1). See Hardy, 133 Wn.2d at 713 ("The trial court erred when it admitted Hardy's prior drug conviction as neither the State nor the trial court articulated how it was probative of Hardy's veracity.").

- c. **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 prejudicial effect of bringing evidence of previous convictions before the jury has long been recognized. State v. Alexis, 95 Wn.2d 15, 18, 621 P.2d 1269 (1980). "It is obvious that evidence of former convictions is so prejudicial in its nature that its tendency to unduly influence the jury in its deliberations regarding the substantive offense outweighs any legitimate probative value it might have in establishing the probability that the defendant committed the crime charged. The same

prejudicial effect exists when the admission of evidence of a conviction is for the purported purpose of helping the jury assess defendant's credibility as a witness." Id. (quoting State v. Nass, 76 Wn.2d 368, 371, 456 P.2d 347 (1969)).

Reversal is required when there is a reasonable probability the erroneous admission of ER 609 evidence affected the outcome. Calegar, 133 Wn.2d at 727. In making that determination, appellate courts look to the importance of the witness's credibility and the possible effect of prior conviction evidence on the jury. Hardy, 133 Wn.2d at 712. Jones's credibility was important because it was his word against McGuire's as to whether the backpack containing the drugs belonged to him. McGuire testified Jones brought the backpack containing the heroin with him into the car. 1RP 69-70, 85, 96. Jones testified the backpack was already there when he got in the car, and that it was not his. 1RP 146-49. The trial court recognized "there is just no doubt in this case that credibility is going to be central to the decision that the jury makes." 1RP 104. The court unwittingly confirmed the prejudicial nature of its own ruling. "Cases finding ER 609(a)(1) errors harmless have turned on the fact that the defendant had other prior convictions that *were* properly admissible—a factor not present here." Calegar, 133 Wn.2d at 728. Under these

circumstances, there is a reasonable probability that this improper impeachment affected the jury's determination.

3. CUMULATIVE ERROR DEPRIVED JONES OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL.

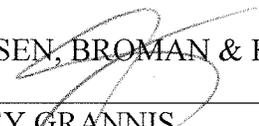
Every defendant has the due process right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007). As discussed above, an accumulation of errors affected the outcome and produced an unfair trial here. These errors include (1) failure to grant a mistrial and replace the tainted jury venire (section C.1., supra); and (2) admission of prior convictions under ER 609 (C.2., supra). These two errors both involved Jones's criminal past. The jury never should have heard of a past life in drugs and never should have been invited to doubt Jones's veracity based on his prior convictions.

D. CONCLUSION

For the reasons stated, Jones requests reversal of the conviction.

DATED this 14th day of March 2019

Respectfully Submitted,


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