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NO. 53173-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JARROD AIRINGTON,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When the court allowed the jury to learn of Jarrod Airington's thirty years of criminal history, including his juvenile history, it deprived Mr. Airington of his right to a fair trial. At trial, the prosecution wanted to establish dominion and control of a room where the police found drugs by providing the jury with a judgment and sentence of Mr. Airington's found in the room. This evidence was unnecessary, as many other documents of Mr. Airington's were found there. Impossible for the jury to ignore, learning of Mr. Airington's criminal history deprived him of a fair trial.

The court also prevented Mr. Airington from presenting his defense when it stopped Mr. Airington from introducing evidence that the prosecution's central witness intended to lie to ensure Mr. Airington's conviction. This preclusion prevented Mr. Airington from receiving a fair trial.

The court likewise erred when it failed to declare a mistrial when, after Mr. Airington completed his defense, the complaining witness was called by the prosecution for the

first time. Mr. Airington made multiple efforts to interview this witness before trial. This witness's late appearance was unfair to Mr. Airington, who was forced to alter his trial strategy. The court should have ordered a new trial.

B. ASSIGNMENTS OF ERROR

1. The court deprived Mr. Airington of his right to a fair trial when it allowed the prosecution to introduce Mr. Airington's criminal history by allowing the jury to see the contents of a judgment and sentence from a previous case.

2. The court deprived Mr. Airington of his right to present a defense when it prevented him from introducing evidence that the prosecution's central witness was willing to lie to get a deal from the prosecutor and to ensure Mr. Airington's conviction.

3. The court deprived Mr. Airington of his right to a fair trial when it allowed the prosecution to call a central witness who had been unavailable to Mr. Airington, despite many efforts, after Mr. Airington presented his defense.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth amendments of the United States Constitution and Article I, section 22 of the Washington state constitution guarantee a person charged with a crime of the right to a fair trial. Central to this right is that a person accused of a crime will be convicted for what they did and not for their prior acts. This rule requires trial courts to carefully screen the jury from prior convictions, which may only be introduced for limited purposes. When the prosecution presented a prior judgment and sentence to the jury so it could establish dominion and control of a room where drugs were found, the jury discovered Mr. Airington's thirty years of criminal history, including convictions for charges like those in this case. Did the court's error in allowing the jury to discover Mr. Airington's prior criminal history deprive him of his right to a fair trial, requiring reversal of his conviction?

2. Fundamental to the right to present a defense is the right to cross-examine witnesses on their biases and

credibility. Challenging a witness who has an interest in the outcome of the case, because they have made a deal with the government in exchange for their testimony, is a classic defense to incentivized testimony. Here, a central witness who cooperated with the government told the defense witness about his willingness to lie to ensure he got the deal he made with the government and to see Mr. Airington convicted. The trial court mistakenly precluded the presentation of this evidence because it thought the examination did not comply with the rules for a prior inconsistent statement. Mr. Airington was not attempting to introduce a prior inconsistent statement but was rather impeaching the witness's credibility, which did not require compliance with the rule on prior inconsistent statements. Does the court's error in precluding Mr. Airington from presenting his defense require a new trial?

3. The Sixth Amendment of the United States Constitution and Article I, Section 22 of the state constitution require attorneys to provide effective assistance of counsel.

This obligation requires attorneys to investigate their cases. Here, Mr. Airington's attorney made many efforts to investigate Mr. Airington's case. When he was unable, he sought the court's aid by securing an order for a deposition. The witness who he attempted to interview never made himself available before trial. It was only after Mr. Airington presented his defense that the witness appeared for trial. Mr. Airington's attorney declared he was not ready to proceed and asked for a mistrial. Does the court's error in not granting a mistrial, where Mr. Airington's attorney was not prepared to cross-examine the complaining witness, require a new trial?

D. STATEMENT OF THE CASE

Well before the start of Jarrod Airington's trial, his attorney tried to interview Brandon Craven, who alleged Mr. Airington kidnapped and assaulted him. RP 6.¹ Mr. Craven, however, would not make himself available. As a result, Mr. Airington sought the court's help, requesting an order for a

¹ The transcripts contained in volumes I-III are referenced by page number only. Because the remainder of the transcripts are not in sequential order, they will be referred to by both the hearing date and page number.

deposition, requiring him to waive his speedy trial rights. *Id.*
The court granted the request. RP 7-8.

The order did not help Mr. Airington locate Mr. Craven. Mr. Airington returned to court, alerting it of his inability to interview this essential witness. 2/29/19 RP 25. Mr. Airington asked that the government not be allowed to proceed until Mr. Airington could interview Mr. Craven. *Id.* The court found interviewing Mr. Craven to be “material and essential” to preparing for trial but did not grant this request, allowing the case to proceed. 2/19/19 RP 29, 32-33.

When the prosecution answered ready for trial, Mr. Airington asked the court to preclude the government from proceeding on the charges relating to Mr. Craven. RP 20. This request was denied. *Id.* At trial, Mr. Airington faced serious charges, including kidnapping in the first degree, assault in the second degree, unlawful possession of a controlled substance with an intent to deliver, and unlawful possession of a firearm in the first degree. CP 89.

Before trial, Mr. Airington entered into a stipulation, agreeing there was sufficient proof to establish the necessary predicate felony needed for the prosecution to prove unlawful possession of a firearm. RP 11.

Once trial started, Mr. Airington alerted the court a document the government intended to introduce to establish dominion and control of a room where drugs were found was a previous judgment and sentence, entered when Mr. Airington pled guilty to his last felony offense. RP 265. Mr. Airington asked the court to preclude this document. RP 266. It was cumulative, as there were many other documents the government could use to establish dominion and control. RP 266-67. It was also prejudicial, as it would alert the jury to Mr. Airington's criminal history, along with the 60-month sentence he served for his last offense. RP 266.

The court denied Mr. Airington's request to preclude the prosecution from allowing the jury to see this document. RP 267. The court stated the jury already knew Mr. Airington had criminal history. RP 267. It was not like, the court

suggested, Mr. Airington was “an 18-year-old kid that’s never been down the road before.” RP 267. The prosecution then introduced the judgment and sentence into evidence. RP 277.

Mr. Craven did not initially appear for trial, nor was it anticipated he would. RP 105. Thus, the prosecution’s central witness in its case-in-chief was Thomas Seward, who admitted to committing the crimes with Mr. Airington. RP 160. Mr. Seward was offered a gross misdemeanor in exchange for his testimony. RP 178. During the cross-examination of Mr. Seward, Mr. Airington impeached Mr. Seward with the deal he made in exchange for his testimony. RP 178, 189. In addition to charges relating to the potential kidnap and assault of Mr. Craven, Mr. Seward was also able to avoid firearm and drug-related charges. RP 179-80.

At the close of the prosecution’s case, Mr. Airington moved for dismissal of the charges relating to Mr. Craven, which were counts one and two of the information. RP 384. Mr. Airington asserted that evidence was insufficient without

the testimony of Mr. Craven. *Id.* The trial court denied Mr. Airington's motion. RP 384-85.

Mr. Airington presented his own case. RP 386. Mr. Airington intended to impeach Mr. Seward with a witness who Mr. Seward had told that he was prepared to lie to get the deal he got and to make sure Mr. Airington was found guilty. RP 388. Relying on the prior inconsistent statement rule, the court precluded Mr. Airington from introducing this evidence. RP 394.

After Mr. Airington completed his case-in-chief, the government told the court it intended to recall an officer and then possibly play phone calls Mr. Airington made from the jail. RP 431. After the officer's testimony, the court broke for the day. RP 443. The court told the jurors there would be a "relatively brief" amount of evidence the next day before the jury heard the instructions and closing arguments. RP 444.

The next day, however, Mr. Craven appeared to testify. RP 453. Mr. Airington's attorney asked the court for a mistrial, as he was unprepared for this change in his strategy.

RP 457. He told the court Mr. Craven's appearance made it impossible for him to provide effective assistance to Mr. Airington. *Id.* The court denied Mr. Airington's motion, providing him with about two and a half hours to interview Mr. Craven and prepare his cross-examination. RP 464-65.

Mr. Airington was found guilty of the charged offenses. CP 31-35. At sentencing, the court imposed an exceptional sentence of 434 months, or just over 36 years. CP 15.

E. ARGUMENT

- 1. Mr. Airington was deprived of his right to a fair trial when the court allowed the jury to see his entire criminal history.**

The court deprived Mr. Airington of his right to a fair trial when it allowed the prosecutor to introduce a judgment and sentence from a previous conviction that contained all of Mr. Airington's criminal history, to establish Mr. Airington's dominion and control over drugs found in a home. U.S. Const. amends. VI, XIV; Const. art. I, § 22. This violation of Mr. Airington's right to a fair trial requires reversal of his conviction.

Evidence of a defendant's prior act evidence is not admissible except for limited purposes. *State v. Gunderson*, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014) (citing ER 404(b)); see also *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937 (2009). The presumptive rule of exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged acts. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953).

Our Supreme Court has warned that prior act evidence, which includes criminal history, prejudices an accused even if minimally relevant, "where the minute peg of relevancy [is] entirely obscured by the dirty linen hung upon it." *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)).

This observation is especially true for criminal history. Consistently, state and federal courts acknowledge the inherent prejudice of prior criminal history. *Old Chief v. United States*, 519 U.S. 172, 191-92, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997); *State v. Johnson*, 90 Wn. App. 54, 63, 950

P.2d 981 (1998). Even when admissible, courts take efforts to limit the prejudicial effect of criminal history, as the prejudice of it is so high. *Old Chief*, 519 U.S. at 191-92.

In Washington, ER 609 limits when prior history can be used, which is generally when it is relevant to attack the credibility of a witness. ER 609(a). Even so, our courts recognize that even with a limiting instruction, a jury is more likely to convict a person when they learn the person has criminal history. Harry Kalven & Hans Ziesel, *The American Jury* 146, 160–69 (1966). It is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again. The prejudice is even greater when the prior conviction is similar to the crime for which the defendant is being tried. *State v. Pam*, 98 Wn.2d 748, 760, 659 P.2d 454 (1983) (Utter, J., concurring).

Mr. Airington tried to limit the effect of his history. He stipulated to having a prior conviction, which was a predicate for unlawful possession of a firearm. RP 13. He also chose not to testify. Even so, the prosecutor was able to circumvent the

rules that limit when a jury can know about criminal history by introducing an old judgment and sentence containing all of Mr. Airington's criminal history to show dominion and control of a room where drugs were found. RP 265. This end-run around ER 609 and *Old Chief* deprived Mr. Airington of his right to a fair trial. Reversal is required.

a. Allowing a jury to know about a person's prior criminal history is inherently prejudicial.

“There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial[.]” *State v. Smith*, 103 Wash. 267, 268, 174 P. 9 (1918).

Washington court rules limit when an accused person's criminal history can be used in their trial. ER 609(a) allows jurors to hear about criminal history for credibility purposes. This rule is narrowly construed because of the danger of injustice associated with admitting evidence of a criminal defendant's past convictions. *State v. Garcia*, 179 Wn.2d 828, 847, 318 P.3d 266 (2014).

Prior history can also be used when the prior conviction is an element of an offense. But even when a prior conviction is an element of a crime, courts are required to accept a stipulation to that element when the defense offers it. *Old Chief*, 519 U.S. at 191-92. By restricting the evidence to proof of felon status, the court avoids the danger of unfair prejudice that substantially outweighs the probative value of knowing about the nature of the prior conviction. *Id.* at 191. “The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that [the legislature] thought should bar a convict from possessing a gun.” *Id.* at 190-91.

Washington follows the *Old Chief* rule. *Johnson*, 90 Wn. App. at 63; *State v. Taylor*, 193 Wn.2d 691, 697, 444 P.3d 1194 (2019). In *Johnson*, which involved a prosecution for two assaults and unlawful possession of a firearm by a convicted felon, reversal was required when the trial court admitted the underlying conviction in a firearm possession case. *Id.* at 62.

Relying on *Old Chief*, this Court reversed Johnson’s conviction because the trial court admitted a prior rape conviction to prove the elements of a past felony conviction, even though Johnson proffered a stipulation to “a prior felony conviction.” *Id.* at 62-63. This Court held the probative value of the conviction was negligible in light of the stipulation, while the unfair prejudice was significant. *Id.* at 63. Reversal was required. *Id.*

This Court applied a similar analysis in *State v. Young*, 129 Wn. App. 468, 471, 119 P.3d 870 (2005). In *Young*, the trial court inadvertently disclosed Young’s prior conviction for assault in the second degree to the jury. *Id.* Like here, Young was charged with many serious crimes, along with unlawful possession of a firearm. *Id.* at 470. In reversing Young’s conviction, this Court held that there was a significant risk the jury would base its decision to convict Young on its emotional response to his convictions, rather than a rational response to the evidence. *Id.* at 468.

Washington courts have been clear that courts must limit when juries learn of prior criminal history. This limitation is essential to ensure a person accused of a crime receives a fair trial.

b. The court allowed the prosecutor to introduce evidence of Mr. Airington's prior criminal history.

At trial, the prosecution sought to introduce a judgment and sentence the police found in the house where the police alleged Mr. Airington possessed controlled substances to establish his dominion and control over drugs found in that room. RP 265.

Mr. Airington asked to exclude the old judgment and sentence because it included Mr. Airington's criminal history and also notified the jury Mr. Airington was recently released from a five-year sentence. RP 266.

The trial court recognized how "powerful" the judgment and sentence evidence would be for the prosecution. RP 267. The trial court dismissed Mr. Airington's worry of prejudice, stating,

The jury already knows that he has a criminal history. It's not like they think they're dealing with, you know, an 18-year-old kid that's never been down the road before.

RP 267.

The court found the judgment and sentence to be relevant and its probative value outweighed its prejudicial effect. RP 267. The court left it to the government to decide whether it wanted to introduce the judgment and sentence in its case. *Id.*

When the prosecution offered the judgment and sentence into evidence, the court admitted the document, again over Mr. Airington's objection. RP 277. The prosecution made no attempts to redact the information, which included all of Mr. Airington's history and the five-year sentence the court imposed in that case.

The history was significant. It included the following:

Crime	Sentence Date
Solicitation to possess heroin with the intent to deliver	5/20/16
Unlawful possession of a firearm in the second degree	6/13/11

Assault in the fourth degree (domestic violence)	7/12/10
Unlawful possession of a weapon	9/17/09
Possession of a dangerous weapon	4/15/03
False statement to a public servant	4/14/03
Possession of methamphetamine	7/29/03
Possession of a short-barreled shotgun	7/29/03
Unlawful possession of a firearm in the first degree	7/29/03
Resisting arrest	7/18/01
Possession of stolen property in the second degree	4/23/01
Unlawful possession of a firearm in the second degree	4/5/99
Possession of methamphetamine	3/3/97
Malicious mischief in the third degree	10/13/94
Resisting arrest	10/13/94
Assault in the fourth degree	5/16/95
Obstructing Justice	4/7/94
Felon in possession of a firearm	7/17/95
Possession of methamphetamine	7/17/95
Assault in the fourth degree (domestic violence)	5/3/94
Assault in the fourth degree	3/22/99
Criminal trespass in the second degree	12/6/91
Escape in the first degree (juvenile)	8/26/88
Taking a motor vehicle without permission (juvenile)	9/7/88

Burglary in the second degree (juvenile)	7/14/87
Vehicle prowl (juvenile)	7/14/87
Robbery in the second degree (juvenile)	5/29/86
Simple assault (juvenile)	7/29/86
Malicious mischief in the third degree (juvenile)	5/29/86

It was not necessary for the jury to see a judgment and sentence containing Mr. Airington’s criminal history. Many other documents were used to establish dominion and control. RP 278-27. These included papers from the Grays County Courthouse, a certificate of recognition from the White Bison Wellbriety program, credit card bills, a Safeco insurance card, a temporary identification card, a DOC identification card, and a picture of Mr. Airington. RP 278-9.

The judgment and sentence was not necessary to establish dominion and control, as it served only to prejudice Mr. Airington and his ability to defend himself.

c. Allowing the jury to hear about Mr. Airington’s prior history deprived Mr. Airington of his right to a fair trial.

By giving the jury a copy of Mr. Airington’s criminal history, the trial court deprived Mr. Airington of his right to a

fair trial. *Johnson*, 90 Wn. App. at 63; *Old Chief*, 519 U.S. 191-92. His conviction must be reversed.

Allowing the government to use the judgment and sentence was unfair. ER 404(b); *Young*, 129 Wn. App. at 473. By looking at this document, the jury learned that Mr. Airington's criminal history dated to his childhood, beginning in 1986. CP 13. Mr. Airington's juvenile history includes a robbery, a burglary, an escape, and other misdemeanor and felony offenses. CP 12-13. Mr. Airington's adult criminal history includes 12 felonies and 12 misdemeanors. CP 11-13. The felony convictions include firearm and drug offenses, similar to those charged in this case. *Id.*

Even if Mr. Airington had testified, most of his history would have been precluded. ER 609 limits when prior history can be used. Crimes old than ten years should generally be inadmissible, as should juvenile adjudications. ER 609(b) and (d). Felonies that are not crimes of dishonesty should only be admitted after the court determines their probative value is not outweighed by their prejudicial effect. ER 609(a). Under

this analysis, the only crimes that should have been allowed, if Mr. Airington had testified, were a false statement conviction and one for possession of stolen property. His other current felonies were for charges similar to those charged here, and even if Mr. Airington had testified, would likely have been precluded. Almost all of Mr. Airington's history would have been precluded had he chosen to testify.

Providing the judgment and sentence to the jury was also cumulative. ER 403. ER 403 provides that relevant evidence may be excluded if it is cumulative. *State v. Dixon*, 159 Wn.2d 65, 80, 147 P.3d 991 (2006). The prosecution offered the judgment and sentence to establish Mr. Airington's dominion and control over a room in a shared house. RP 265. At the same time, the prosecution offered multiple other documents to establish Mr. Airington's connection to this room, including an identification card. RP 278-9. There was no need for the prosecution to use the judgment and sentence. To preserve Mr. Airington's right to a

fair trial, the court should have excluded the judgment and sentence from the jury's view.

d. The court's error requires reversal.

When jurors learn of prior criminal history, their response to the evidence is more emotional than rational. *Young*, 129 Wn. App. at 468. As such, courts have ruled it is prejudicial for jurors to learn about the underlying nature of criminal convictions, even when it is relevant to an element of the current offense. *Johnson*, 90 Wn. App. at 63; *Old Chief*, 519 U.S. 191-92.

Excluding prior criminal history is especially critical where the defense is based on credibility. To convict Mr. Airington, the jury had to believe witnesses with credibility problems. The prosecution's primary witness had significant substance abuse issues, which may have affected his memory and ability to relay what had happened to him. RP 118, 120, 479. Most of the other witnesses offered by the prosecution had an incentive to testify, as they received reduced charges and sentences in exchange for their testimony. RP 180.

Because Mr. Airington exercised his right to remain silent, the only characteristic the jury knew about him was his three decades of criminal history. CP 11-13. It would have been impossible for the jury to ignore this history.

Under these circumstances, Mr. Airington could not receive a fair trial. *Kalven* at 160–69. This Court should hold this error was not inconsequential to the jury’s deliberations. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). As such, the prosecution cannot demonstrate the error was harmless beyond a reasonable doubt. *Id.* (citing *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). This Court should, therefore, reverse Mr. Airington’s conviction and order a new trial.

2. The trial court deprived Mr. Airington of his right to present a defense when the court erroneously ruled an impeachment witness could not testify.

“[I]n plain terms the right to present a defense [is] the right to present the defendant’s version of the facts as well as the prosecution’s to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (quoting *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

Central to Mr. Airington's defense was that the government's only eyewitness, Mr. Seward, could not be believed. RP 388. When Mr. Airington attempted to impeach Mr. Seward through the testimony of a witness Mr. Seward told he was willing to lie to escape from his own charges, the court precluded Mr. Airington from presenting this evidence, applying the standard for prior inconsistent statements. RP 388, 394. Prohibiting Mr. Airington from impeaching Mr. Seward violated Mr. Airington's right to present a defense. U.S. Const. amends. VI, XIV; Const. art. I, § 22.

The court precluded Mr. Airington from introducing this statement because his lawyer did not confront Mr. Seward with the statement. RP 394. But Mr. Airington was not attempting to introduce a prior inconsistent statement. *See* ER 613. Instead, Mr. Airington was trying to impeach Mr. Seward's credibility. RP 388. The witness would have testified

Mr. Seward told him he was willing to lie to get the deal he got and to see Mr. Airington convicted. *Id.* Confrontation is only required to impeach with a prior inconsistent statement, which was not the case here. ER 613.

a. By precluding Mr. Airington from impeaching a central witness, the court deprived him of his right to present a defense.

When the court denied Mr. Airington the right to impeach a witness, it deprived Mr. Airington of his right to present a defense. Mr. Airington had a fundamental right to impeach the prosecution's key witness. *Davis v. Alaska*, 415 U.S. 308, 316–18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In *Davis*, a “crucial witness for the prosecution” was on probation. *Id.* 310-311. Davis sought to cross-examine the witness with his record, to show his motive to shift suspicion onto other suspects and that he may have been under “undue pressure from the police.” *Id.* at 311.

The trial court in *Davis* excluded evidence of the witness's juvenile record, and the United States Supreme Court held this was an error. 415 U.S. at 316-318. The

Supreme Court held Davis was deprived of his right to cross-examine the witness because he could not raise the inference that the witness was biased or under undue influence. *Id.* at 318.

Like *Davis*, Mr. Airington should have been able to show Mr. Seward's motive for testifying. Without demonstrating Mr. Seward's willingness to lie, Mr. Airington's arguments that Mr. Seward was biased were entirely speculative. *Davis*, 415 U.S. at 317.

The court's decision to preclude Mr. Airington from presenting evidence of bias deprived Mr. Airington of his right to defend himself. *Davis*, 415 U.S. at 316–18. Because it cannot be demonstrated this error was harmless beyond a reasonable doubt, reversal is required.

b. Impeaching one of the government's central witnesses was central to Mr. Airington's defense.

The only eyewitness called by the government in its case-in-chief was Mr. Seward. Mr. Seward agreed to testify after the government made a deal with him to reduce his charges to a gross misdemeanor. RP 180.

Mr. Airington wanted to show that Mr. Seward intended to lie during his testimony. RP 388. He called a witness who was prepared to tell the jury Mr. Seward said he was ready to lie to anybody to get off the charges and to make sure Mr. Airington was convicted of the charged crimes. RP 388. Citing ER 801, the court determined the testimony was inadmissible. RP 391.

c. The court's error requires reversal of Mr. Airington's conviction.

The court's decision to preclude Mr. Airington's impeachment witness was made in error. A person accused of a crime has a constitutional right to impeach a prosecution witness with bias evidence. *Davis*, 415 U.S. at 316–18. It is reversible error to deny a defendant the right to establish the chief prosecution witness's bias by an independent witness. *State v. Jones*, 25 Wn. App. 746, 751, 610 P.2d 934 (1980). An error in excluding evidence of bias is presumed prejudicial. *Johnson*, 90 Wn. App. at 69. Reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not

taken place. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002).

In precluding the testimony, the court mistakenly applied the rule for out-of-court statements. First, an out-of-court statement is admissible if it is offered to impeach the testimony of another witness. ER 607. Impeachment evidence is relevant if it tends to cast doubt on the credibility of the person being impeached, and the credibility of the person being impeached is a fact of consequence to the action. *State v. Allen S.*, 98 Wn. App. 452, 459–60, 989 P.2d 1222 (1999).

The impeachment of Mr. Seward falls squarely under these conditions. It was offered to call into question the credibility of Mr. Seward, whose credibility was a fact of consequence to Mr. Airington's case. RP 388.

Importantly, the impeachment evidence was not offered as a prior inconsistent statement, as the trial court thought. RP 394. Unlike a prior inconsistent statement, this type of impeachment does not require confrontation. For a prior inconsistent statement to be admissible as substantive

evidence, it must comply with ER 801(s)(1)(i). The court made a mistake in applying this rule to preclude Mr. Airington's witness from testifying.

Mr. Airington had a constitutional right to impeach Mr. Seward with bias evidence. *Davis*, 415 U.S. at 316–18. By prohibiting him from impeaching this witness with his motive to lie, the court deprived Mr. Airington of his right to present a defense. *Jones*, 25 Wn. App. at 746.

This error is presumed prejudicial. *Johnson*, 90 Wn. App. at 69. Mr. Seward's testimony was critical to the government's case, as he was an independent witness called to corroborate the complainant's version of the events. Without his testimony, it would have been difficult for the government to prove its case. But Mr. Seward had multiple reasons not to tell the truth. The jury was entitled to know of his motivations. By precluding Mr. Airington from impeaching Mr. Seward with the reasons for his testimony, the court deprived Mr. Airington of his right to present a

defense. Correction of this error requires reversal of Mr. Airington's conviction.

3. Mr. Airington was deprived of his right to a fair trial when the trial court allowed the government to present its chief witness after Mr. Airington completed his case.

The chief witness in the government's case, Brandon Craven, did not appear for trial until after Mr. Airington presented his case. RP 478. Over Mr. Airington's objection, the court allowed the government to reopen its case and to allow Mr. Craven to testify. RP 457. This decision materially altered Mr. Airington's defense, causing him prejudice. This Court should now hold Mr. Airington was deprived of his right to a fair trial, reverse his conviction, and order a new trial.

a. Mr. Airington made significant efforts before the trial commenced to interview Mr. Craven.

About two months before trial, Mr. Airington sought the court's assistance in interviewing the prosecution's chief witness, Brandon Craven. RP 6. The court granted Mr. Airington's motion for a deposition. RP 7-8.

The deposition never occurred. Just before trial, Mr. Airington moved to dismiss the charges relating to Mr. Craven, because Mr. Craven had not been made available to the defense. 2/19/19 RP 25. The court agreed with Mr. Airington that interviewing Mr. Craven would be “material and essential” in the preparation of the defense case. 2/19/19 RP 29. The court, nonetheless, did not dismiss the charges relating to Mr. Craven or provide Mr. Airington with any other relief before the trial started. 2/19/19 RP 32-33.

When the trial began, Mr. Airington again expressed his concerns with going forward without having interviewed Mr. Craven, objecting to the court allowing the government to proceed without its chief witness. RP 20. The court overruled Mr. Airington’s objection. *Id.*

At the close of the prosecution’s case, because Mr. Craven had not appeared, Mr. Airington moved for dismissal of the charges related to him. RP 384. The court denied his motion. RP 384-85.

b. Mr. Craven appeared for trial after Mr. Airington presented his case and rested.

Mr. Airington presented evidence in his defense. RP 386. This evidence included an impeachment witness and a witness to the events the prosecution claimed constituted a crime. RP 386, 401. Mr. Airington then rested. RP 430.

The government presented rebuttal testimony. Before presenting evidence, the prosecution stated it intended to recall a police witness and then play jail phone calls between Mr. Airington and a witness. RP 431. The prosecution made no mention that it intended to call Mr. Craven.

When the court excused the jury for the day during the prosecution's rebuttal, the court told the jury the government had a "relatively brief" presentation left for the next day. RP 444.

The next day, the prosecution told the court it now intended to call Mr. Craven, as opposed to the brief presentation it promised the jury. RP 453-54.

Mr. Airington moved for a mistrial. RP 457. He told the court Mr. Craven's appearance blindsided him. RP 457. Mr.

Airington's attorney stated he was not prepared to defend Mr. Airington under these changed circumstances. *Id.* He believed that without a mistrial, he would be providing his client with ineffective assistance of counsel. *Id.*

The Court denied Mr. Airington's motion for a mistrial. RP 464. Instead, the court provided Mr. Airington with two and a half hours to interview Mr. Craven and prepare his cross-examination. RP 463.

c. The trial court abused its discretion when it allowed the prosecution to reopen its case and prevented Mr. Airington from receiving a fair trial.

Trials cannot be conducted by ambush. *State v. Hickman*, 135 Wn.2d 97, 111, 954 P.2d 900 (1998) (quoting *State v. Stacy*, 43 Wn.2d 358, 367, 261 P.2d 400 (1953)). The outcome of a criminal trial cannot be a "matter of luck" or "misadventure." *Id.*

Likewise, all persons who are accused of a crime have the right to effective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 96, 225 P.3d 956 (2010). This right is "fundamental to, and implicit in, any meaningful modern concept of ordered

liberty.” *Id.* Effective assistance of counsel requires counsel to be prepared, which includes conducting a meaningful investigation. *Id.* at 96. The remedy for ineffective assistance, when it occurs during a trial, is remand for a new trial. *State v. Estes*, 188 Wn.2d 450, 468, 395 P.3d 1045 (2017).

Our courts have held that, generally, the decision of a trial court to allow the government to reopen its case is analyzed as an abuse of discretion. *State v. Brinkley*, 66 Wn.App. 844, 848, 837 P.2d 20 (1992). But where the defendant’s attorney is unable to perform the obligations of counsel, the question becomes whether the accused received a fair trial. *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018) (citing U.S. Const. amends. VI and XIV; Const. art. I, § 22); *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Court practice that threatens the fairness of a trial is closely scrutinized. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *Holbrook v. Flynn*, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). Here,

Mr. Airington's attorney made clear he would provide his client with ineffective assistance of counsel if he was forced to proceed with the trial, with Mr. Craven now called as a witness. RP 457.

Mr. Craven's late appearance severely impacted Mr. Airington's trial strategy. Without Mr. Craven, Mr. Airington could focus on the unreliability of the other witnesses, especially Mr. Seward. Even without the precluded impeachment evidence, Mr. Seward's credibility was a serious issue, as he had been allowed to plead guilty to a gross misdemeanor in exchange for his testimony. RP 178, 180.

Incentivized testimony like Mr. Seward's is unreliable, as the witness who is testifying for the government has so much at stake. George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 Pepp. L. Rev. 1, 54 (2000). The testimony is also difficult to challenge, as the witness understands the importance of telling a consistent story that implicates the person accused of a crime. Peter A.

Joy, *Brady and Jailhouse Informants: Responding to Injustice*, 57 Case W. Res. L. Rev. 619, 644 (2007).

Impeaching a witness like Mr. Seward with his decision to cooperate is a classic tool to prove bias. *Gunderson*, 181 Wn.2d at 931. It can provide a complete basis for a defense at trial. *Id.*

Once Mr. Craven appeared, however, this strategy was no longer effective. Mr. Craven was able to corroborate Mr. Steward's version of what occurred. RP 487. Indeed, the timing made his appearance even more compelling. Already, the court told the jury they would hear very little additional evidence when they returned to court. RP 444. Instead, the complaining witness appeared to describe what happened to him. This is not a minor thing.

Mr. Airington's attorney was correct when he told the court Mr. Craven's late appearance would hamper Mr. Arington's defense. RP 457. At the very least, the court needed to grant the motion for a mistrial and allow Mr.

Airington to present a defense consistent with the evidence presented by the prosecution.

Instead, Mr. Airington was provided with just over two hours to alter his defense, which had substantially changed. RP 464-65. Mr. Craven was a “material and essential” witness who the court recognized as critical to interview before the start of the trial. 2/19/19 RP 29. Mr. Airington made multiple attempts to do so. RP 7-8, 2/29/19 RP 25, RP 20. It was unfair to prevent Mr. Airington from preparing his case for trial and presenting a theory consistent with his theory of the case. Because this unfairness prevented Mr. Airington from receiving a fair trial, this Court should reverse his conviction and remand his case for a new trial.

F. CONCLUSION

The trial court erred when it allowed the jury to hear about Mr. Airington’s criminal history. It also erred when it deprived him of the opportunity to cross-examine a witness on his biases. It further erred by not declaring a mistrial when

the prosecution's key witness unexpectedly appeared for trial after all of the other evidence was presented.

Mr. Airington asks this Court to reverse his convictions.

DATED this 2nd day of March 2020.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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

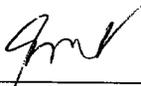
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 53173-9-II
)	
JARROD AIRINGTON,)	
)	
APPELLANT.)	

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