

FILED
Court of Appeals
Division II
State of Washington
8/20/2020 4:02 PM

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

REPLY BRIEF OF APPELLANT

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

A. ARGUMENT IN REPLY..... 1

1. The remedy for allowing the jury to view Mr. Airington’s entire criminal history is reversal. 1

 a. There are limited and clearly defined times when a jury may learn of a defendant’s criminal history, none of which apply here. 2

 b. Proof of dominion and control is an insufficient justification for depriving Mr. Airington of his right to a fair trial, especially where the evidence proffered was cumulative and unnecessary. 5

 c. The government’s new argument that showing the jury Mr. Airington’s criminal history was necessary as part of the res gestea of this case should also be rejected. 7

 d. The trial court’s error affected the outcome of Mr. Airington’s trial. 11

 e. Mr. Airington objected to the use of his criminal history, agreed to an Old Chief stipulation, and specifically asked to exclude the contested document. 13

 f. Reversal is required to restore Mr. Airington’s right to a fair trial..... 15

2. The remedy for depriving Mr. Airington of his ability to impeach a core witness with his bias and willingness to lie is reversal...... 15

3. The remedy for allowing the government to present on rebuttal a material witness Mr. Airington had been unable to contact before trial is reversal. 20

B. CONCLUSION 24

TABLE OF AUTHORITIES

United States Supreme Court

Chapman v. California, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) 15

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)..... 16, 17

Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)..... 23

Old Chief v. United States, 519 U.S. 172, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997) 3, 4

Taylor v. Illinois, 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)..... 16

Washington Supreme Court

State v Towessnute, ___ Wn.2d ___, ___ P.3d ___, S. Ct. Order No. 13083-3 (July 10, 2020) 14

State v. Berhe, 193 Wn.2d 647, 444 P.3d 1172 (2019)..... 13

State v. Brush, 183 Wn.2d 550, 554, 353 P.3d 213, 216 (2015) 4

State v. Coristine, 177 Wn.2d 370, 300 P.3d 400 (2013) 15

State v. Emmanuel, 42 Wn.2d 1, 253 P.2d 386 (1953) 3

State v. Garcia, 179 Wn.2d 828, 318 P.3d 266 (2014)..... 4

State v. Gunderson, 181 Wn.2d 916, 337 P.3d 1090 (2014) 2, 22

<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	21
<i>State v. Lopez</i> , 190 Wn.2d 104, 410 P.3d 1117 (2018)	22
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995)	14
<i>State v. Pam</i> , 98 Wn.2d 748, 659 P.2d 454 (1983)	4
<i>State v. Smith</i> , 103 Wash. 267, 174 P. 9 (1918)	3
<i>State v. Stacy</i> , 43 Wn.2d 358, 261 P.2d 400 (1953).....	21

Washington Court of Appeals

<i>State v. Dillon</i> , 12 Wn. App. 2d 133, 456 P.3d 1199, <i>review denied</i> , 195 Wn.2d 1022 (2020)	8
<i>State v. Engberg</i> , 13 Wn. App. 2d 1015, 2020 WL 1911437 (Div. I, Apr. 20, 2020)	9
<i>State v. Grier</i> , 168 Wn. App. 635, 278 P.3d 225 (2012)	8
<i>State v. Johnson</i> , 90 Wn. App. 54, 950 P.2d 981 (1998)	3, 19
<i>State v. Jones</i> , 25 Wn. App. 746, 610 P.2d 934 (1980).....	19
<i>State v. Lillard</i> , 122 Wn. App. 422, 432, 93 P.3d 969 (2004).....	8, 11
<i>State v. Spencer</i> , 111 Wn. App. 401, 45 P.3d 209 (2002).....	19
<i>State v. Young</i> , 129 Wn. App. 468, 119 P.3d 870 (2005)	10, 12

Decisions of Other Courts

Bertholf v. State, 298 Ga. App. 612, 680 S.E.2d 652, 653
(2009)..... 9, 10

Massey v. United States, 407 F.2d 1126 (9th Cir. 1969) 17

Rules

ER 404 2

ER 609 4, 12

RAP 1.2..... 14, 15

Constitutional Provisions

Const. art. I, § 22 2, 22

U.S. Const. amend. VI 16

U.S. Const. amend. XIV 2, 22

Other Authorities

Fessinger, Melanie, et al., *Informants v. Innocents: Informant
Testimony and Its Contribution to Wrongful Convictions*, 48
Cap. U.L. Rev. 149 (2020) 18

Natapoff, Alexandra, *Beyond Unreliable: How Snitches
Contribute to Wrongful Convictions*, 37 Golden Gate U.L.
Rev. 107 (2006) 18

Warden, Rob, *NW. Univ. Sch. of Law Ctr. On Wrongful
Convictions, The Snitch System* (2004) 18

Washington Innocence Project, *Causes of Wrongful
Convictions*..... 18

A. ARGUMENT IN REPLY

The government asks this Court to uphold Jarrod Airington's convictions. This Court should instead hold that Mr. Airington's right to a fair trial was denied by the trial court's decisions to allow Mr. Airington's entire criminal history to be used by the government to prove its case. It should also find that Mr. Airington's right to present a defense was denied when the court precluded him from presenting evidence to show the bias of the government's witness. Finally, Mr. Airington's right to a fair trial was denied when the court allowed the government to present a witness that Mr. Airington had sought for months before trial but did not appear until rebuttal. The remedy for these errors is the reversal of Mr. Airington's convictions and a new trial.

1. The remedy for allowing the jury to view Mr. Airington's entire criminal history is reversal.

In its brief, the government tries to focus this Court on anything other than the question of whether the fundamental right to a fair trial is denied when a person's criminal history is laid bare before the jury without good cause. Respondent's

Brief at 17. The unequivocal answer to this question is that courts must do all they can to ensure criminal charges are determined on their facts and not on the defendant's criminal history. Because the trial court did not protect Mr. Airington's right to a fair trial, the reversal of his convictions is required.

When the trial court overruled Mr. Airington's objection to exclude from evidence his judgment and sentence, it permitted the jury to see Mr. Airington's full criminal history. The prosecution's arguments that this document was necessary for the government to establish dominion and control and for *res gestae* purposes must be rejected. Instead, this Court should follow well-adopted principles and hold that this error deprived Mr. Airington of his right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22.

a. There are limited and clearly defined times when a jury may learn of a defendant's criminal history, none of which apply here.

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)). This rule 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).

Every court in the country limits the use of criminal history to limited purposes, such as when it is necessary to prove an element of an offense or to impeach a testifying defendant. *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). As the government's Brief makes plain by the lack of support for its argument, no precedent permits criminal history to be used for the purposes the government tries to justify here.

There is a good reason why no court has ever allowed what the prosecutor asks this Court to condone. "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). Juries cannot erase criminal history from their minds, and it is difficult for

them not to think that a person who has committed a crime once is more likely to do so again. *State v. Pam*, 98 Wn.2d 748, 760, 659 P.2d 454 (1983) (Utter, J., concurring).

Because of the danger inherent in allowing the jury to learn about criminal history, courts have limited when it may be used. It may be used to impeach the credibility of a testifying defendant. Even then, the rule is strictly construed because of the “danger of injustice” associated with admitting criminal history. *State v. Garcia*, 179 Wn.2d 828, 847, 318 P.3d 266 (2014); *see also* ER 609(a).

Even when it is an element of a crime, courts work to ensure the impact of criminal history is limited. *Old Chief*, 519 U.S. at 191-92. Because this danger is so great, failure to stipulate is ineffective assistance. *Id.* Sentencing enhancements that focus on criminal history are also frequently separated from the main trial for the same reason. *See, e.g., State v. Brush*, 183 Wn.2d 550, 554, 353 P.3d 213, 216 (2015).

This error could have been avoided. The government recognizes there was ample other evidence it could have used to eliminate this error. Respondent's Brief at 13. Many documents were recovered from Mr. Airington's room, along with the judgment and sentence. RP 265. In his objection, Mr. Airington asked only that the judgment and sentence be removed from this group of documents. RP 266-67. Had the court done this, it would have eliminated this error.

Instead, the court decided that it was permissible for the jury to learn of Mr. Airington's criminal history because, as the court stated, it was not like Mr. Airington was "an 18-year-old kid that's never been down the road before." RP 267. This reasoning must be rejected. This Court should hold that allowing the jury to know of Mr. Airington's criminal history deprived him of a fair trial.

b. Proof of dominion and control is an insufficient justification for depriving Mr. Airington of his right to a fair trial, especially where the evidence proffered was cumulative and unnecessary.

The government argues that providing the jury with Mr. Airington's criminal history was necessary to establish

dominion and control. Respondent's Brief at 22. This argument must be rejected. There was there ample other evidence to establish dominion and control. Excising Mr. Airington's history would have acted only to preserve his right to a fair trial.

Mr. Airington's request to excise his criminal history from the documents shown to the jury would not have impaired the government's case. Mr. Airington only asked the court to preclude this one document, from the packet found in his room. RP 266. Not only was this document so prejudicial as to deprive Mr. Airington of his right to a fair trial, but it was cumulative. RP 266-67. By seeing this document, the jury learned of Mr. Airington's history as well as his release from a 60-month sentence. RP 266.

The government's argument reversing Mr. Airington's conviction to preserve his right to a fair trial would "encourage drug dealers to keep records of their criminal history with their drugs, specifically to confound use of those documents to prove possession" is without merit.

Respondent's Brief at 28. Mr. Airington never suggested the other documents found with the judgment and sentence could not go to the jury. RP 266-67.

And the idea that coupling a judgment and sentence with drugs to hamper the government is just not what happened here, nor was it Mr. Airington's request at trial. RP 266-67. It is hard to imagine a circumstance where the hypothetical suggested by the prosecutor could happen. This argument should be rejected. It is a red herring designed to distract from the issue in this case, which is whether the jury should have been allowed to see Mr. Airington's complete criminal history. The only answer to that question is no.

c. The government's new argument that showing the jury Mr. Airington's criminal history was necessary as part of the res gestea of this case should also be rejected.

The government now suggests Mr. Airington's criminal history was necessary as part of the res gestea of this case. Respondent's Brief at 24. This argument does not appear to have been made at the trial, and it should be rejected here.

Res gestea is other act evidence that is inseparable from the charged act. This rule only allows evidence to be admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime. *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). Res gestae evidence characterizes evidence that occurs before the crime charged or immediately after and explains the context of the crime charged. *State v. Dillon*, 12 Wn. App. 2d 133, 151, 456 P.3d 1199, *review denied*, 195 Wn.2d 1022 (2020).

The government cites *State v. Grier* to make this argument. Respondent's Brief at 24 (citing *State v. Grier*, 168 Wn. App. 635, 645, 278 P.3d 225 (2012)). In *Grier*, the court allowed evidence that showed the defendant brandishing a gun and acting belligerently before the shooting and was relevant to show a continuing course of action and set the stage for the shooting. *Grier*, 168 Wn. App. at 648. Here, the page of criminal history found in the house where the drugs were found did not "set the stage" or provide additional

context about the crimes charged. *Grier* does not support the government's argument.

The government also relies on an unpublished case. Respondent's Brief at 25. In that case, the prior act evidence was found to be admissible to prove an essential element of the charged crime. *State v. Engberg*, 13 Wn. App. 2d 1015, 2020 WL 1911437 (Div. I, Apr. 20, 2020) (unpublished).¹ Unlike here, the prior act evidence was part of the incident, setting the stage for why the assault occurred. It does not provide this Court with any additional basis for why the government should be allowed to provide the jury with Mr. Airington's criminal history.

There is no precedent for what the government is asking this Court to condone in Washington. The government attempts to use one case from another state to justify its position. Respondent's Brief at 25 (citing *Bertholf v. State*, 298 Ga. App. 612, 612, 680 S.E.2d 652, 653 (2009)). *Bertholf* does not justify the unfettered use of criminal history as

¹ This case is unpublished and not cited for its precedential value. GR 14(a).

occurred here. Instead, the defendant's conviction was reversed because the government improperly used a withdrawn guilty plea for impeachment. *Bertholf*, 298 Ga. App. at 616.

The government cites to *Bertholf's* sanctioning of the police reliance on the defendant's offered statement that he had prior history to warrant a search of his car. *Bertholf*, 298 Ga. App. at 616. It is questionable whether this would be admissible in Washington. Assuming it is, the defendant's statement during a traffic stop is not the equivalent of a document containing all of Mr. Airington's criminal history. *Bertholf* does not help this Court.

Instead, this Court should be guided by *State v. Young*, which the government does not address in its brief. In *Young*, this Court applied a similar analysis to what it must do here. 129 Wn. App. 468, 471, 119 P.3d 870 (2005). 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. Reversal was required.

Mr. Airington's criminal history was not inseparable from the charged act. The document containing Mr. Airington's criminal history does not complete the story of any crime or provide the immediate context for events close in both time and place to the charged offense. *Lillard*, 122 Wn. App. at 432. This argument, presented here for the first time, should be rejected.

d. The trial court's error affected the outcome of Mr. Airington's trial.

The government asks this Court to find that the trial court's error was harmless because it is unlikely that the jury relied on it in its deliberations. Respondent's Brief at 28-29. This argument must also be rejected.

To be clear, this case was about credibility. 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. All of the witnesses were deeply involved in criminal activity. Without believing these witnesses, the government would not have been able to prove its case.

When jurors learn of prior criminal history, their response to the evidence is more emotional than rational. *Young*, 129 Wn. App. at 468. When the jury learned of Mr. Airington's criminal history, it knew of his continuous contact with the criminal justice system since he was a youth. Mr. Airington's criminal history began in 1986. It includes multiple drug-related crimes, weapon possessions, assaults, and theft-related offenses. Most of this history would not have been admissible, even if Mr. Airington had testified. ER 609(a). This history is impossible to ignore, which is why this Court has created so many barriers to allowing the unfettered use of criminal history in a person's trial.

Further, the prosecutor speculates that the jury may not have looked at this document, and therefore its improper

admission was harmless. Respondent's Brief at 29. This argument denigrates the role of the jury. Jurors are instructed to consider all the evidence presented in a case, as they were here. RP 528 ("It is your duty to decide the facts in this case based upon the evidence presented to you during this trial.") Courts do not invade the province of the jury, absent evidence of misconduct. *State v. Berhe*, 193 Wn.2d 647, 658, 444 P.3d 1172 (2019). This Court should assume the jury did its duty by considering all of the evidence presented to it, including Mr. Airington's criminal history.

- e. Mr. Airington objected to the use of his criminal history, agreed to an *Old Chief* stipulation, and specifically asked to exclude the contested document.

Finally, this Court should reject the government's argument that this error is not preserved. Respondent's Brief at 18. Before the judgment and sentence was introduced, Mr. Airington specifically asked that it be excluded. RP 266. Recognizing how "powerful" this evidence was, the court overruled the objection. RP 267.

Mr. Airington took other steps to exclude his history. He provided the court with an *Old Chief* stipulation to ensure the jury would only learn that he had a qualifying offense for the weapons possession charge, avoiding the prejudice that resulted from the jury learning of the underlying charges for his qualifying offenses. RP 11.

Further, the Rules of Appellate Procedure are “liberally interpreted to promote justice and facilitate the decision of cases on the merits.” RAP 1.2(a). Violations should not prevent a court from reaching an issue’s merits unless a party is prejudiced or the violation greatly inconveniences the court. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995); *see also State v Towessnute*, ___ Wn.2d ___, ___ P.3d ___, S. Ct. Order No. 13083-3, 4 (July 10, 2020)² (“Under the Rules of Appellate Procedure RAP 1.2(c), this court may act and waive any of the RAP ‘to serve the ends of justice.’”)

²<http://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/130833%20Supreme%20Court%20Order.pdf>

This Court should find that Mr. Airington's objections adequately preserved this issue and, if not, that RAP 1.2 allows this Court to reach the merits of this issue.

f. Reversal is required to restore Mr. Airington's right to a fair trial.

Once the jury saw Mr. Airington's criminal history, his right to a fair trial was compromised. This error was not inconsequential to the jury's deliberations. *State v. Coristine*, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The prosecution cannot demonstrate the error was harmless beyond a reasonable doubt, and this Court should reverse Mr. Airington's convictions. *Id.* (citing *Chapman v. California*, 386 U.S. 18, 22, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

2. The remedy for depriving Mr. Airington of his ability to impeach a core witness with his bias and willingness to lie is reversal.

The government argues that the trial court did not err when it precluded the government's evidence in the defense case. Respondent's Brief at 31. This Court should rule otherwise and hold that the fundamental right to present witnesses to establish a defense was violated when the court

prevented Mr. Airington from calling a witness to challenge the government's primary witness. *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988). This error also requires the reversal of Mr. Airington's conviction.

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); U.S. Const. amend. VI. The government argues that *Davis* is not helpful in this analysis. Respondent's Brief at 33. In *Davis*, the defendant was precluded from impeaching a core witness. *Id.* at 315. The Court held that the Confrontation Clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness with confidential juvenile adjudications of delinquency. *Id.* at 309.

Like here, the court precluded Mr. Airington from using impeachment evidence to test the credibility of the witness. Without showing that the witness was willing to lie, Mr.

Airington's arguments that the witness was biased were entirely speculative. *Davis*, 415 U.S. at 317. This deprived Mr. Airington of his right to a fair trial.

The government argues that *Massey v. United States*, compels a different result. Respondent's Brief at 34-25. (citing *Massey*, 407 F.2d 1126, 1127-28 (9th Cir. 1969)) But *Massey* centers on a statement the witness was alleged to have made. Under those circumstances, impeachment is not proper without first confronting the witness about the statement. This is not what Mr. Airington was attempting to do. Instead, Mr. Airington called the witness to demonstrate Thomas Seward's willingness to lie. This did not require confrontation by Mr. Airington before he could use the impeachment evidence. The court's decision to preclude Mr. Airington's impeachment witness was made in error.

The government argues that Mr. Seward was not an important witness and that impairing Mr. Airington's ability to impeach him was harmless. Respondent's Brief at 36. This argument should be rejected. False informant testimony is a

leading cause of wrongful convictions. Melanie Fessinger, et al., *Informants v. Innocents: Informant Testimony and Its Contribution to Wrongful Convictions*, 48 Cap. U.L. Rev. 149, 150 (2020). Incentivized testimony also results in an unbalanced system, where witnesses sometimes testify to satisfy their end of the bargain, rather than to tell the truth. Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U.L. Rev. 107, 112 (2006).

Perjured informant testimony is the leading cause of wrongful convictions in capital cases, present in 46.0% of the death row cases resulting in exonerations between 1973 and 2004. Rob Warden, *NW. Univ. Sch. of Law Ctr. On Wrongful Convictions, The Snitch System*, 3 (2004). In Washington, 61% of exonerated cases involve perjured informant testimony. Washington Innocence Project, *Causes of Wrongful Convictions*.³

³ <https://wainnocenceproject.org/causes/>

Until Mr. Craven showed, Mr. Seward provided the only direct evidence of this crime. Studies show that a jury will give the testimony of an incentivized witness greater weight than they are due, making the need for impeachment critical. Mr. Seward presented as the only independent witness. In a case involving credibility, this Court cannot be confident that the trial court's decision to restrict cross-examination did not affect the outcome of this case.

Instead, this Court should hold that the trial court's error required a new trial. 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). This Court should reject the government's argument and hold that

depriving Mr. Airington of his right to present evidence of bias deprived him of his right to a fair trial.

3. The remedy for allowing the government to present on rebuttal a material witness Mr. Airington had been unable to contact before trial is reversal.

Had Braden Craven made himself available for interviews and testified in the government's case-in-chief, no error would have occurred. But when Mr. Craven appeared after Mr. Airington had presented his case, the right thing for the trial court to do was to preclude his testimony or to declare a mistrial. This Court should now hold Mr. Airington was deprived of his right to a fair trial, reverse his conviction, and order a new trial.

Mr. Airington made great efforts to locate and interview Mr. Craven before trial. Two months before trial, Mr. Airington sought the court's assistance in interviewing Mr. Craven, which the court gave by ordering a deposition. RP 6, 7-8. He made a motion to dismiss because his inability to find Mr. Craven made it impossible to prepare for trial.

2/19/19 RP 25. When Mr. Craven did appear, Mr. Airington moved for a mistrial, which the court denied. RP 464.

Rather than allow Mr. Airington to present a defense he had worked on before trial, he was forced to adapt after he had presented his case. This Court does not condone trial by ambush, even if the ambush is not intentional. *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.*

Mr. Airington was given two hours to determine how to defend himself against the person who claimed Mr. Airington had assaulted. 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.

Without Mr. Craven, this case involved the testimony of an incentivized witness. This testimony is difficult to

challenge, but there is a clear argument an incentivized witness should not be believed because of their interest in the outcome of the case. *Gunderson*, 181 Wn.2d at 931.

Once Mr. Craven appeared, this strategy was no longer viable, as Mr. Craven could corroborate Mr. Seward's story. The timing made Mr. Craven's story more compelling. The court told the jury they would hear little additional evidence when they returned to court. RP 444. Instead, they heard from the man who claimed to have been injured by Mr. Airington. Allowing Mr. Craven to testify without ordering a new trial was an error.

It was unfair to prevent Mr. Airington from preparing his case for trial and presenting a theory consistent with his theory of the case. *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). 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. *Estelle v.*

Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976).

This trial was short, with very few witnesses. The parties could have started again almost immediately. If the court had ordered a mistrial, Mr. Craven could have testified before Mr. Airington presented his case. Starting again would have allowed Mr. Airington to prepare for trial and defend himself. 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. Had Mr. Airington even had an indication Mr. Craven was going to arrive for trial during the rebuttal, he would have prepared differently.

This Court cannot be confident that the late arrival of Mr. Craven did not deprive Mr. Airington of his right to a fair trial. The trial court erred when it did not order a mistrial. The remedy for this error is to order a new trial.

B. CONCLUSION

For the errors detailed in his opening brief and expanded on here, Mr. Airington asks this Court to reverse his convictions and order a new trial.

DATED this 20th day of August 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 29335)
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.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF AUGUST, 2020, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|---|---|--|
| <input checked="" type="checkbox"/> JASON WALKER, DPA
[jwalker@co.grays-harbor.wa.us]
GRAYS HARBOR CO. PROSECUTOR'S OFFICE
102 W. BROADWAY AVENUE, ROOM 102
MONTESANO, WA 98563-3621
[appeals@co.grays-harbor.wa.us] | ()
()
<input checked="" type="checkbox"/> | U.S. MAIL
HAND DELIVERY
E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> JARROD AIRINGTON
738595
WASHINGTON STATE PENITENTIARY
1313 N. 13 TH AVE
WALLA WALLA, WA 99362 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF AUGUST, 2020.



X _____

WASHINGTON APPELLATE PROJECT

August 20, 2020 - 4:02 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53173-9
Appellate Court Case Title: State of Washington, Respondent v. Jarrod A. Airington, Appellant
Superior Court Case Number: 18-1-00472-4

The following documents have been uploaded:

- 531739_Briefs_20200820160225D2946293_1522.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.082020-02.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- greg@washapp.org
- jwalker@co.grays-harbor.wa.us
- ksvoboda@co.grays-harbor.wa.us
- wapofficemai@washapp.org

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Travis Stearns - Email: travis@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20200820160225D2946293