

**FILED**

NOV 08 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

**NO. 28798-0-III**

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**RESPONDENT,**

**v.**

**JASON BLAIR LATIMER,**

**APPELLANT.**

---

**RESPONDENT'S BRIEF**

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**D. ANGUS LEE  
PROSECUTING ATTORNEY**

**By: Edward A. Owens  
WSBA #29387  
Chief Deputy Prosecuting Attorney**

**By: Alexander F. Freeburg  
APR Rule 9**

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## **IDENTITY OF THE RESPONDENT**

The State of Washington was the Plaintiff in the Superior Court and is the Respondent herein. The State is represented by the Grant County Prosecutor's Office.

## **RELIEF REQUESTED**

The State respectfully requests that this Court deny the Appellant's appeal and find no error.

## **ISSUES**

1. Evidentiary Rulings
  - a. Did the court abuse its discretion when it excluded evidence of the specifics of the victim's felony history under ER 404?
  - b. Did the court abuse its discretion when it excluded evidence of the specifics of the victim's felony history under ER 609?
  - c. Even if the court's evidentiary rulings were error, was that error harmless?
2. Confrontation Clause Ruling
  - a. Did the court's exclusion of the specifics of the victim's felony history violate the defendant's Sixth Amendment Right to Confrontation?
  - b. Even if the court's ruling was in violation of the defendant's Sixth Amendment rights, did the overwhelming untainted evidence support the defendant's conviction?

## STATEMENT OF THE CASE

After six days of trial, the jury found Jason Latimer guilty of First Degree Assault for the shooting of Arturo Mendoza and guilty of Second Degree Assault of Adel Cariveau for threatening her with a pistol. Clerk's Papers ("CP"), 15-17. Both counts carried the firearm enhancement. *Id.*

### ***Summary of the Facts of the Assault***

At the time of the shooting, Mr. Latimer was in a relationship with Ms. Cariveau. Verbatim Report of the Proceedings ("RP") 10/22/08, 85.<sup>1</sup> However, Cariveau spent the night before the shooting with the family of her ex-boyfriend, Mr. Mendoza. RP 10/22/08, 90. The next morning, March 23, 2008, Cariveau left Mendoza's parents' home in George and drove to Soap Lake to drop off Mendoza. RP 10/22/08, 91. During the drive, she called and texted with the defendant, Latimer. RP 10/22/08, 93. The two argued and she didn't tell him that she was with Mendoza. RP 10/22/08, 95.

When they arrived in Soap Lake, they saw Latimer in his van turning into the oncoming lane. RP 10/22/08, 96-102. As they passed him, Latimer saw Cariveau and Mendoza and flashed his gun. RP 10/22/08,

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<sup>1</sup> The verbatim report of the proceedings consists of a number of different dates. For ease of reference they will be referred to as follows throughout the State's brief: RP 6/30/08; RP 10/20/09; RP 10/21/09; RP 10/22/09; RP 10/23/09; RP 12/21/09.

102-104. Latimer turned in pursuit of them through Soap Lake. RP 10/22/08, 105-107. The cars appeared to reach speeds of 45-50 miles per hour. *Id.* Cariveau slowed her car to pull a U-turn and Latimer overshot them. *Id.* Cariveau pulled away and turned into a parking lot to escape. *Id.* Latimer caught up to them in his van. He drove close against her car, boxing her in. RP 10/22/08, 108. Latimer jumped from his van and approached the car brandishing a pistol. *Id.* He appeared angry and agitated to a bystander, Michael Lidbetter. RP 10/22/08, 47.

Cariveau got out of her vehicle and began to argue with Latimer. RP 10/22/08, 108. Latimer went around to the passenger side of Cariveau's vehicle, where Mendoza was sitting, and began to hit the side of the vehicle. RP 10/22/08, 110. He came over to Cariveau and struck her once with his hand. RP 10/22/08, 111. He went back to the passenger side and kicked in the window, sending glass onto Mendoza. RP 10/26/08, 25, 26. He had his arm outstretched. RP 10/22/08, 114. Cariveau heard a click and then a bang. *Id.* Latimer had shot Mendoza. The bullet passed through his arm and lodged in Mendoza's kidney, where it remains. RP 10/26/08, 27, 30. Mendoza moved to the driver's seat and used his cell phone to call 911 and alert dispatch to the fact he had been shot and was driving himself to the hospital in Ephrata. RP 10/26/08, 28, 29.

Latimer left the scene in his van. RP 10/22/08, 116.

### ***Summary of Trial Arguments and Court Rulings***

At trial, defense counsel argued self-defense, alleging that Latimer feared Mendoza, a convicted felon. RP 10/21/08, 12-13. Counsel proposed that it was Mendoza who had the gun and that Mendoza was in fact struggling to assemble it while sitting in the passenger seat. *Id.* Counsel argued that Latimer, seeing the gun, decided to break the passenger window and disarm Mendoza in self-defense. *Id.* In the struggle to disarm Mendoza, the defense alleged that Latimer inadvertently shot him. *Id.*

To buttress its argument, defense sought to introduce under ER 404 and 609 evidence that Latimer knew of Mendoza's dangerous reputation. RP 10/21/08, 12-39. Specifically, the defense sought to introduce the fact that Mendoza was prohibited from owning or possessing guns as a felon, and had been convicted of unlawful possession of a gun. *Id.* The defense would argue that since Mendoza was not legally allowed to possess a gun on the day of the incident, he had extra motivation to lie about possessing the gun to the investigating officers and to the jury.

The trial court considered at length whether evidence of the unlawful possession of a firearm crime would be admitted under 404(b) or ER 609. RP 10/21/08, 10-39. The court ruled that the specific conviction for unlawful possession of a firearm 2<sup>nd</sup> degree would not be admissible under ER 404(b) to show motive, as all the examples it reviewed in 5D Karl

Tegland, *Courtroom Handbook on Washington Evidence* 229-231 (2007-2008 Ed., West 2007) focused on motive to commit the crime, not motive to lie. *Id.* The court ruled that the specific felony conviction would not be admissible under ER 609 to impeach the witness's credibility.

Upon losing the motions on ER 404 and ER 609 grounds, the defense then moved to admit the specific conviction under the Confrontation Clause. RP 10/22/08, 9. The defense argued that the Confrontation Clause of the U.S. Constitution permits the defendant to probe the felony history of State witnesses, even where the Rules of Evidence prohibit such inquiry. The defense offered *State v. McDaniel*, 83 Wn. App. 179, 920 P.2d 1218 (1996) as an example. RP 10/22/08, 9-11; 74-77. Upon argument and briefing by the parties, the trial court ruled that Latimer would be allowed to introduce evidence that the victim, Mendoza, was a felon and was prohibited from owning firearms at the time of the incident. RP 10/23/08, 10. However, the trial court ruled that the parties would not be able to examine Mendoza on the conviction itself, but must limit examination to his status as a convict and the consequent prohibition against owning a firearm *Id.* The parties were not allowed to refer to Mendoza as a felon. RP 10/23/08, 16.

During trial, the State on direct examination elicited the fact that Mendoza was prohibited from owning or possessing a firearm on the day

he was shot. RP 10/26/08, 11-13. On cross examination, defense asked whether Mendoza was aware that he “couldn’t possess or own a gun on that day”. RP 10/23/08, 58.

Upon Latimer’s conviction, defense brings this timely appeal.

## **ARGUMENT**

***1. The court properly interpreted ER 404 and ER 609, thus its rulings are reviewed for abuse of discretion. The court did not abuse its discretion when it denied the defendant’s motion to introduce the specifics of the victim’s felony history.***

*a. Standard of review for evidentiary rulings.*

Generally, the trial court’s interpretation of the rules of evidence is reviewed *de novo*. *State v. O’Connor*, 155 Wn.2d 335, 119 P.3d 806 (2005); *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (The court’s interpretation of ER 404(b) is reviewed *de novo*.) So long as the trial court properly interprets ER 404(b), its evidentiary rulings are reviewed for abuse of discretion. *Fisher*, 165 Wn.2d at 747. A trial court abuses its discretion where its decisions are manifestly unreasonable. *Id.* Similarly, where the court allows impeachment of a witness by prior felony under ER 609, the ruling is reviewed for abuse of discretion. *State v. Teal*, 117 Wn. App. 831, 844, 73 P.3d 402 (2003). (The court’s interpretation of ER 609 is reviewed for abuse of discretion.)

b. *The Court's ruling to exclude the prior conviction under ER 404 was proper.*

Under ER 404(b), evidence of other crimes, wrongs, or acts is presumptively inadmissible to prove character and show action in conformity therewith. *State v. Powell*, 126 Wn.2d 244, 258, 893 2d 615 (1995). Character evidence, however, is admissible for other purposes such as motive, intent, or absence of mistake or accident. *Id.* If the trial judge determines one of the “other purposes” is applicable, the judge is required to identify the purpose for which the evidence would be admitted and determine whether the evidence was “relevant or necessary to prove an essential ingredient of the crime charged.” *Powell*, 126 Wn.2d at 258. As such, ER 404(b) is read in conjunction with ER 403’s relevancy requirement. *Fisher*, 165 Wn.2d 745.

Here, defense sought to admit the victim’s felony conviction for unlawful possession of a firearm to show the victim’s motive to lie about possessing a firearm on the day he was shot. The trial court identified the victim’s motive to lie as an exception to the 404(b) rule and weighed the probative value and prejudicial effect on the record, stating “[A]gain, keep in mind that what we’re addressing is testimony today and whether he’s aware today when he testifies if he has a motive to lie about whether he

possessed a firearm on that date.” RP 10/23/10, 16. As ER 404 allows character evidence to show motive, the trial court properly interpreted ER 404 and thus its ruling should be reviewed for abuse of discretion.

The trial court ruled that ER 404(b) did not permit the defense to discuss the victim’s felony history to demonstrate the victim’s motive to lie. RP 10/21/08, 23, 24. The cases provided in Tegland’s *Courtroom Handbook on Washington Evidence* governing the admission of character evidence under ER 404(b) did not include introducing the victim’s felony history to show motive to lie. The court determined that such motive to lie issues better fit under ER 609 and impeachment of credibility through a felony conviction. *Id.* This is the correct interpretation of ER 404(b), which addresses character or trait of a character, not motivation to lie.

Because the trial court correctly interpreted ER 404(b), its ruling should be upheld. Because the trial court relied on Tegland’s treatise to carefully consider the dearth of case law linking ER 404(b) and motive to lie, its ruling was not an abuse of the trial court’s discretion.

c. *The Court’s ruling under ER 609 was proper.*

ER 609 allows the introduction of felony convictions to impeach a witness’s credibility if the crime is one of dishonesty or if the probative value outweighs the prejudice to the witness. The court determined that an

unlawful possession of firearm conviction is not a crime of dishonesty.<sup>2</sup> The trial judge then looked again to Tegland's *Courtroom Handbook on Washington Evidence* for cases weighing the probative nature and prejudicial effect of admission of the witness's felony history. RP 10/21/10, 11. All eight cases the court reviewed looked to whether the conviction was probative of witness's character for truthfulness, *not the witness's motive when testifying*. However, here the defense counsel did not offer the conviction to show character for truthfulness but to show motive to lie. *Id.* Further, in this case the burden is on the defense to show that the conviction is more probative than prejudicial, making the defense's novel argument even less persuasive.

The trial court decided, that even if ER 609 allowed felony convictions to show motive (an interpretation unsupported in case law), admitting this specific felony conviction was not any more probative than admitting his status as a felon, while being unduly prejudicial. RP 10/21/10, 11, 29-32. Further the offense was remote in time. *Id.* The court was correct: it would be prejudicial since both crimes involved firearms, yet it would not be probative of his credibility, as it wasn't a crime of dishonesty. The defense was not able to meet its burden to show the

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<sup>2</sup> It should be noted that the defense does not allege that this ruling was in error thereby waiving any review of the Court's ruling on whether unlawful possession of a firearm is a crime of dishonesty.

probative value outweighed the prejudicial effect. Accordingly, the trial court properly excluded the discussion of the facts of his conviction under ER 609.

*d. Even if the court's evidentiary rulings were error, the error was harmless.*

Even assuming the failure to admit evidence of the specific felony conviction was error, the error was harmless. An error of an evidentiary nature can be harmless if, within reasonable probability, it did not materially affect the verdict. *State v. Zwicker*, 105 Wn.2d 228, 243, 713 2d 1101 (1986).

Latimer was convicted because the witnesses present at the scene saw him shoot Mendoza. The bystander, Lidbetter, saw him kick in Cariveau's car window, point at the sitting passenger and immediately heard a gunshot. Cariveau and Mendoza both actually saw the gun and testified to the exact same sequence of events. If the jury were afforded greater opportunity to probe the recesses of the victim's criminal history, perhaps they would feel more prejudice towards Mendoza and less sympathy for the bullet he carries in his kidney. The direct evidence, however, would remain the same. There was no error here and there is no need for a new trial.

**2. *The Right to Confrontation does not encompass the right to probe the specifics of the victim's felony history without corroborative evidence to support the defense theory.***

*a. The Right to Confrontation is limited by considerations of relevance.*

U.S. Const. Amend. VI. and WA Const. art. 1 § 22 provide defendants with the right to confront and cross-examine adverse witnesses. *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996); *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105 (1974).

The right to confrontation is not absolute. The right to confront witnesses is subject to the following limitations: (1) the evidence must be relevant; and (2) the defendant's right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial that it disrupts the fairness of the fact-finding process. *State v. Reed*, 101 Wn. App. 704, 709, 6 P.3d 43 (2000); *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983), ER 401, ER 403. There is no constitutional right to admission of irrelevant evidence. *State v. O'Connor*, 155 Wn.2d 335, 349 (2005) (citations omitted).

Accordingly, relevancy is the threshold analysis for confrontation clause issues. Relevant evidence is any evidence which tends to make a material fact more or less likely. ER 403. If the defendant shows that the

evidence is minimally relevant, the evidence must be admitted unless the State can demonstrate a compelling state interest for excluding the evidence. *State v. Reed*, 101 Wn. App. 704. As a practical matter it is easier for the defense to demonstrate to the court that the evidence sought is minimally relevant if the evidence is intended to rebut an uncorroborated claim in the State's case. Courts will not permit the defendant to use the Confrontation Clause to make irrelevant or baseless challenges.

Several cases provide guidelines for consideration for courts weighing relevancy and the Confrontation Clause. The case *State v. Reed* involved a "see-pop" drug bust, in which a concealed officer used binoculars to view drug transactions in downtown Seattle. The officer was the State's only witness with direct evidence of the transaction and was critical to the State's case. The defense wanted to cross-examine him on his vantage point. The fact that there were no other witnesses to the transaction was determinative in the court's analysis of the Confrontation Clause. The *Reed* court found that denying the defendant the right to cross-examine the only eyewitness did violate the Confrontation clause but limited its holding stating: "We do not hold that under no circumstances may a trial court preclude disclosure of an officer's vantage point. *Where no question is raised about a surveillance officer's ability to*

*observe or where a contemporaneous videotape provides the relevant evidence, a defendant's constitutional rights may not be implicated.*" (emphasis added) *Id.* at 716. The court went on, "But here, while Reed was not totally precluded from cross-examining Officer Jokela, the State cannot justifiably withhold the surveillance location in light of the fact that there was no evidence corroborating Officer Jokela's account of the alleged transaction." *Id.* At 716.

Unlike *Reed*, this case does not involve the only eyewitness. Other witnesses corroborate Latimer's testimony, notably Lidbetter and Cariveau. Here, Cariveau, Mendoza and Lidbetter, a bystander, all saw Latimer kick in the car window and shoot Mendoza. No witness saw Mendoza with a pistol. No witness saw Latimer attempt to disarm Mendoza in self-defense and shoot him in the struggle. The fact that Mendoza had an unlawful firearm conviction is not relevant to whether Cariveau saw Latimer with a gun, or whether Lidbetter saw him point at the car window and immediately heard a gunshot.

Further, unlike *Reed*, the trial court's instruction in no way limited the defense cross-examination of Mendoza's accounting of events. The instruction only limited the defense from disturbing the sleeping dogs of a four-year old felony conviction on an unrelated matter.

The defense cites *State v McDaniel*, a case the court analyzed at length, as a case in which the defense successfully pressed the Confrontation Clause argument to cross-examine a witness on prior bad acts. Yet the facts in *McDaniel* are far different. *McDaniel* involved a witness that perjured herself in a related civil proceeding. 83 Wn. App. 179, 187 (1996). There, the appellate court determined “the question for the jury was whether she would lie under oath for her own purposes in the criminal proceeding. The subject matter of the prior false testimony is less important than the fact of that false testimony and the motivation for that false testimony.” *Id.* Unlike *McDaniel*, Mendoza never made a false statement under oath in related proceedings. The court did not limit the defense from questioning Mendoza on whether he lied under oath in a related matter; the court limited the defense from asking him whether he unlawfully possessed a firearm four years prior to the incident. Unlawful possession of a firearm is not even a crime of dishonesty. Accordingly, there was not the same basis to impeach Mendoza’s credibility with his prior conviction.

In its partial grant of the motion to admit “sanitized” evidence of the prior conviction under the Confrontation Clause, the trial court returned to the same relevancy analysis used in the evidentiary rulings. The court observed that while Mendoza’s felony conviction for unlawful

possession of a firearm prohibited him from owning or possessing a gun, *any felon is prohibited from owning a gun*. Therefore, any felon would have the same motive to lie about firearm possession. Even if the felony conviction itself was minimally relevant, the specific conviction for unlawful possession was not relevant. Discussion of the conviction would prejudice the jury and distract from the eyewitness testimony that Latimer shot Mendoza. The court stated:

“Really what Mr. Perry [defense counsel] is arguing is that this conviction of unlawful possession of a firearm put the victim on notice that he shouldn’t be possessing firearms so then he had a more enhanced notice to lie...But, actually, once could say any prior felon of a – of a victim in this case would put him on notice that he’s not to use or posses a firearm. By statute convicted felons are advised at sentencing or when they take their plea they are prohibited from possessing a firearm.

So this argument that there’s extra notice to the victim that he shouldn’t possess firearms by virtue of his prior conviction of not just a felony but in specific – particularly unlawful possession of a firearm 2<sup>nd</sup> degree is not particularly persuasive because he’s not to possess a firearm for any felony.”

RP 10/21/08, 17-18.

Here, the trial court is deep in the weeds of the correct relevancy analysis and found no basis for the defense’s contention that the unlawful possession of a firearm was relevant to the jury’s evaluation of Mendoza’s testimony. As it was not relevant, the Confrontation Clause does not entitle the defense to dissect Mendoza’s past for the jury’s consideration. This appeal should be denied.

b. *Even if there was error, such error was harmless.*

Even if the Confrontation Clause stretched to encompass an examination of the victim's unrelated felony history, the trial court's exclusion of Mendoza's specific felony conviction is harmless. The *McDaniel* court stated, "A violation of a defendant's rights under the confrontation clause is constitutional error. Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. In determining whether constitutional error is harmless, Washington courts use the 'overwhelming untainted evidence test,' under which appellate courts look only to the untainted evidence to decide if it is so overwhelming that it necessarily leads to a finding of guilt." 83 Wn. App. 179, at 187, 188. (internal citations omitted). The *McDaniel* court went on to analyze that without the victim's testimony there was not overwhelming evidence of the identity of the attacker. *Id.* In contrast, Cariveau and Lidbetter confirm that Latimer kicked in the car window and shot Mendoza. Mendoza and Latimer both took the stand. The jury also heard from police officers and medical experts. The irrelevant evidence excluded (the unlawful firearm conviction) pales in comparison to the overwhelming evidence of guilt before the jury. The exclusion of this conviction in no way affected the outcome of the case.

As such, the evidence before the jury is overwhelming and the conviction should be upheld.

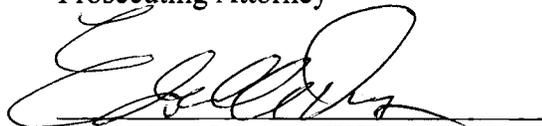
**CONCLUSION**

The rules of evidence and the Constitution do not permit the defendant to dissect the victim's irrelevant felony history at trial. This appeal should be denied.

Dated this 5<sup>th</sup> day of November 2010.

Respectfully submitted,

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STATE OF WASHINGTON

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DIVISION III

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|----------------------|---|------------------------|
| STATE OF WASHINGTON, | ) |                        |
|                      | ) |                        |
| Respondent.          | ) | No. 28798-0-III        |
|                      | ) |                        |
| v.                   | ) |                        |
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| JASON BLAIR LATIMER, | ) | DECLARATION OF MAILING |
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| Appellant.           | ) |                        |
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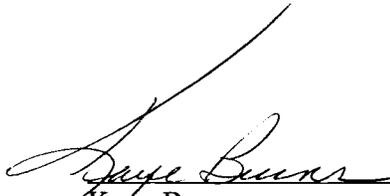
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant and his attorney containing a copy of the Respondent's Brief in the above-entitled matter.

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Dated: November 5, 2010.



\_\_\_\_\_  
Kaye Burns

Declaration of Mailing.