NO. 42938-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

JEFFERY MONTGOMERY AND REX MCNICOL,

Appellants.

BRIEF OF RESPONDENT

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II. STATEMENT OF THE CASE

A. Facts

On January 21, 2009 at 5:23 p.m., twelve-year-old J.A. called 911. RP 313; Ex. 10. J.A. told 911 that he lives with his mother Doris Resch and her boyfriend Robert Barham. RP 313; Ex. 10. J.A. said Resch and Barham are chronic meth users, and that Barham is a convicted felon and

had a rifle hidden in the bedroom closet. RP 313-14; Ex. 10. Appellants, Pierce County sheriff's deputies Jeff Montgomery and Rex McNicol, were dispatched to the caller's home at 5:34 p.m. RP 314; Ex. 10. On route, Appellants confirmed Barham's conviction was for a felony drug crime. Ex. 2, p. 6; RP 424; Ex. 14, pp. 2-3. Montgomery also knew there may have been a meth lab at that home in the past. RP 424; Ex. 14 p. 3. After a firearm was retrieved from the home Barham was arrested and transported to the jail at 7:07 p.m. RP 314; Ex. 10.

At 7:20 p.m. Montgomery began writing a police report regarding the aforementioned events. RP 308, 400. Before or during the course of preparing the report Montgomery spoke with McNicol about the incident. RP 399; Ex. 2, p. 46. In his report, Montgomery wrote that he knew Barham was a convicted felon and that he admitted to having a rifle in the closet. Montgomery made numerous statements in his report detailing that both he and McNicol entered the home to retrieve the rifle from Barham. Specifically, and in this order, Montgomery wrote:

1. "Barham admitted to having the rifle and took Deputy McNicol in the house to get the rifle."
2. "I walked in the house and grabbed the rifle from Deputy McNicol."
3. "Deputy McNicol walked Barham outside where he told him he

was under arrest for unlawful possession of a firearm."

4. "I went back in the house and spoke with [J.A.] and his mother, Doris Resch."

Ex. 1, p. 6.

On March 16, 2010 McNicol and Montgomery met with Pierce County Deputy Prosecutor Kawyne Lund in preparation for a suppression hearing that took place later that day. RP 117. Lund told the deputies that Barham's attorney was trying to suppress the firearm by arguing that their entry into the Barham's home on January 21, 2009 was unlawful. RP 188.

After the meeting, the parties proceeded to court for the suppression hearing. McNicol testified first after being sworn in. Ex. 2, p. 3.[1] He testified that on January 21, 2009 dispatch contacted him regarding a welfare check. Ex. 2, pp. 4-5. Dispatch informed him that a twelve-year old boy had called to report that he was afraid to be in the home because his mother's boyfriend was a felon and had a firearm in the home. Ex. 2, p. 5. On route to the home, McNicol and Montgomery learned the felony conviction was for a drug crime. Ex. 2, p. 6.

McNicol testified that he arrived at the home and contacted Barham. Ex. 2, p. 8. He testified that while standing on the porch, he

[1] Page numbers for exhibits 2 and 3 refer to page numbers located in the bottom right hand corner of the page, not to the larger page numbers located in the bottom center of the page.

explained to Barham that he knew he was a convicted felon and that dispatch advised him there was a gun in the home. Ex. 2, p. 8. McNicol testified that he believed the deputies did not have the right to enter the home to retrieve the gun. Ex. 2, p. 23. McNicol claimed that after Barham acknowledged he was a felon and that he had a gun, he allowed Barham to retrieve the gun from the back of the home and bring it to him while he waited on the front porch. Ex. 2, p. 9. McNicol acknowledged he had read Montgomery's report prior to testifying.

Montgomery was sworn in and testified next. Ex. 3, p. 38. He testified that he was dispatched to the Barham home for a welfare check after twelve-year old J.A. called to report he was living with a convicted felon who had a firearm in the home. Ex. 3, pp. 41-43. Prior to arriving, Montgomery confirmed that Barham had a felony drug conviction. Ex. 3, pp. 43, 50. Like McNicol, Montgomery repeatedly claimed that Barham brought the rifle to McNicol who remained on the porch and that Montgomery then went onto the porch to retrieve it from McNicol. Ex. 3, pp. 46-47, 57-60, 81.[2] Montgomery repeatedly claimed that every

[2] Montgomery's claim on appeal that he was having "a hard time recalling the details of the encounter" during the suppressing hearing is grossly exaggerated. Montgomery's brief at 4. At the beginning of his testimony Montgomery had to jog his memory to recall what information he received on the CAD. Ex. 3, p. 42. However, for the remainder of the testimony he never expressed any hesitation, doubt or uncertainty as he repeatedly and emphatically testified that neither deputy entered the home to retrieve the firearm. See exhibit 3 in its entirety.

reference in his report saying he and McNicol entered the home was a mistake. Ex. 3, pp. 46-47, 57-60, 81. Montgomery and McNicol were the only two deputies who responded to the Barham home on January 21, 2009, and they were the only two witnesses the State called to testify in the suppression hearing. RP 116, 146.

On May 14, 2010, based on the deputies' testimony, Pierce County Superior Court Judge Rosanne Buckner signed findings of facts and conclusions of law suppressing the seized firearm. RP 146-47. Within a day or two thereafter, Deputy Prosecutor Lund reported the inconsistencies between the police report and the deputies' testimony to the Pierce County Sheriff's Office. RP 148. On June 3, 2010, Detective Sergeant Ben Benson was assigned to investigate whether Montgomery and McNicol had lied during the suppression hearing. RP 306.

On June 8, 2010 Detective Benson separately interviewed Montgomery and McNicol regarding the events of January 21, 2009 and March 16, 2010. RP 322. McNicol acknowledged that he went to the Barham home for a welfare check after a child called dispatch to say he was afraid because drugs were being used in the home and his mom's boyfriend was a convicted felon who had a firearm in the home. RP 324. McNicol acknowledged that he and Montgomery discussed the incident in question on the evening it took place. RP 326. McNicol told Benson he

believed the deputies did not have the right to enter the home to retrieve the gun, and he thought that they would lose the suppression motion. RP 327; See also, Ex. 2, p. 23, in which McNicol testified at the suppression hearing that he did not feel the deputies had the right to enter the home.

Detective Benson also interviewed Montgomery on June 8, 2010. [3] When asked about his testimony at the suppression hearing, Montgomery initially claimed he didn't know whether he and McNicol had entered the home to retrieve the rifle or whether they had allowed Barham to bring it out to them. Ex. 14, p. 3. Detective Benson pointed out to Montgomery that when he testified at the suppression hearing he never said he couldn't remember how they came in possession of the firearm, but instead insisted repeatedly and with certainty that Barham had brought the firearm out to them. Ex. 14, pp. 5, 9, 10. Montgomery acknowledged that was true. Ex. 14, pp. 5, 9. At trial, Montgomery again confirmed that was true. RP 411, 422.

Montgomery told Benson that the thought of allowing a convicted felon to enter a home to retrieve a gun while deputies waited outside sounded "ridiculous" to him, and that such a scenario "doesn't make any

[3] A redacted version of that recorded interview was admitted and played for the jury without objection, and a transcript of the recording was submitted to the court to preserve for appellate review. Boxes drawn around portions of the transcript show what parts of the recording were redacted. RP 329-32. Ex's 14 and 15.

sense at all." Ex. 14, p. 8. Montgomery ultimately admitted that he knew the deputies had entered the home to retrieve the firearm, that the statements he had written in his report were true, and that what he testified to at the suppression hearing was false.[4] Ex. 15, p. 7.

B. Procedure

Appellants were charged with perjury in the first degree. CP 1-2, 325-26. Appellants moved pretrial to admit Barham's 2003 felony drug conviction which was the underlying felony which led to the unlawful possession of a firearm arrest. They also moved to admit a 2000 attempted possession of stolen property conviction which was over ten years old. RP 88. The trial court admitted the felony drug conviction, and excluded the attempted possession of stolen property conviction. RP 93.

All parties agreed to use a juror questionnaire that had been jointly requested by Appellants. RP 9/12/11 at 6, 9-10. All juror questioning was conducted in an open courtroom. RP 9/15/11 at 3-4. After voir dire was completed, the court asked the parties if anyone objected to sealing the questionnaires. RP 9/15/11 at 3-4. All parties agreed to seal the questionnaires. RP 9/15/11 at 3-4. The court conducted an on-the-record

[4] Montgomery was asked if he knew that what he was testifying to [at the suppression hearing] was inaccurate to which he replied "[t]he bottom line, yeah, cause here I had the report, and that's, I wrote it, and that's what I recall happening." "And you testified to something different?" "Yes." Ex. 15, p. 7.

Bone-Club analysis.[5] RP 9/15/11 at 3-4. The judge then sealed the questionnaires, and announced he would unseal them if requested to do so. RP 9/15/11 at 4.

McNicol and Montgomery were tried as codefendants on charges of perjury in the first degree. A jury found them both guilty as charged. CP 274, 372. Timely appeals followed and were consolidated. CP 310, 387. Each Appellant filed his own brief raising three identical claims; insufficient evidence to convict, erroneous exclusion of a witness's prior conviction and improper sealing of juror questionnaires. McNicol raised a fourth claim of ineffective assistance of trial counsel. Respondent, State of Washington, files this one brief in response to all claims.

III. LAW AND ARGUMENT

A. The evidence presented at trial was sufficient to prove beyond a reasonable doubt that Montgomery and McNicol committed perjury.

Appellants claim that the evidence presented at trial was insufficient to prove they committed perjury because the testimony of

[5] Pursuant to State v. Bone-Club, a court must consider five factors before considering a courtroom closure motion. The factors are: (1) The proponent of the closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right; (2) Anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) The court must weigh the competing interests of the proponent of closure and the public; (5) The order must be no broader in its application or duration than necessary to serve its purpose. 128 Wn.2d 254, 906 P.2d 325 (1995).

State witness Robert Barham was not credible. Because credibility determinations are for the jury to decide, their argument fails.

On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the required elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 50 (1979): State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of evidence "admits the truth of the State's evidence and all inferences that can reasonably be drawn from it." State v. Herman, 138 Wn. App. 596, 602, 158 P.3d 96, 99 (2007), citing State v. McNeal, 145 Wn.2d 352, 360, 37 P.3d 280 (2002).

A person is guilty of perjury in the first degree if 1) in any official proceeding 2) he makes a materially false statement 3) which he knows to be false 4) under an oath required or authorized by law. RCW 9A.72.020(1). To prove perjury, the State must present:

1. The testimony of at least one credible witness which is positive and directly contradictory of the defendant's oath; and

2. Another such direct witness or independent evidence of corroborating circumstances of such character as clearly to turn the scale and overcome the oath of the defendant and the legal presumption of innocence.

State v. Olson, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979).

1. The State presented the testimony of two witnesses that contradicted Appellants' testimony, and the jury's determination regarding their credibility cannot be challenged on appeal.

As set forth above, testimony from two witnesses contradicting a defendant's statement satisfies the proof requirements of perjury. Appellants' argument that Barham's testimony was not credible is factually inaccurate and legally irrelevant.

Appellants' argument that the jury should have discredited Barham's testimony is without merit because the jury was presented with ample information that demonstrated his credibility, and because his testimony was strongly corroborated by other evidence. By all accounts, when Barham was contacted at his home by Appellants he immediately and candidly admitted that he was a convicted felon in possession of a firearm, notwithstanding that those statements would lead to his arrest. RP 232-35; Ex. 1, p. 6; Ex. 2, p. 8.

When Resch was contacted by Detective Benson he did not tell her what he was investigating or what information he was there to obtain.

RP 268. He simply asked her what occurred when Montgomery and McNicol came to the home on January 21, 2009. RP 268. In response, Resch told Benson what occurred and her statements to him and at trial were that Montgomery and McNicol both entered the home to retrieve the firearm. RP 257.

Appellants admit that Resch is a second direct witness to the events in question. Unable to discredit her they instead seek to use her testimony to buttress their argument that Barham was not credible because his testimony did not one hundred percent match hers. This argument fails because resolving issues of conflicting testimony, credibility of witnesses and persuasiveness of the evidence lies within the province of the jury. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Notably, in rejecting a motion to dismiss made at the conclusion of the State's case in chief the trial court found that Barham and Resch's testimonies were consistent regarding the material issue of whether Appellants entered the home. RP 384. The trial judge also noted the common belief that perfectly consistent testimonies are considered more suspect than those involving minor discrepancies.[6] Appellants' attempt on appeal to discredit

[6] "It's often said that if it was an exact mirror image of each other's testimony, you'd actually have more concern than if they [sic] were discrepancies, but I agree with the State. In regards to the issue of whether they entered that house, both of them were very consistent in regards to the fact that they officers didn't stay out on the porch and that they, in fact, entered the home. RP 384.

Barham's testimony based on minor and inconsequential inconsistencies between his and Resch's testimonies should be rejected.

Additionally, Barham's testimony was strongly corroborated by other witnesses and pieces of evidence in addition to Resch. Barham's testimony that the deputies entered the home to retrieve the gun matched what Montgomery had written in the police report; a report Montgomery later told Detective Benson was the truth. Ex. 15, p. 7.

Barham's testimony is further supported by Montgomery's statements to Benson that the thought of allowing a convicted felon to retrieve a gun unattended sounded "ridiculous" to him, that in his experience McNicol would have never done such a thing and that in the two years they have worked together he had never seen him do something like that. Ex 14, pp. 6, 8, 11.

Barham's testimony is also bolstered by the testimony of Detective Benson. Benson went to the Barham home and observed that a deputy standing at the front door could not have seen the bedroom that Barham supposedly entered alone to retrieve the gun from. RP 315-17. Benson testified at length regarding the training of Pierce County sheriff's personnel. RP 317-19. Benson testified that it would never be acceptable to let a convicted felon enter a home to retrieve a gun on his own, no matter how cooperative the suspect was being. RP 319.

More importantly, Appellants' argument that Barham was not credible is irrelevant because "credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), citing State v. Casbeer, 48 Wn. App. 539, 740 P.2d 335, (1987). Here, the jury received not only the general jury instruction that they are the sole judges of the credibility of each witness, but also the specific jury instruction notifying them of the specific requirements regarding credible witnesses which apply to perjury charges. CP 254, 270. This Court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415–16, 824 P.2d 533 (1992). Therefore, the jury's determination that sufficient credible witnesses were presented to prove that Appellants committed perjury must be affirmed.

2. Sufficient evidence was presented at trial to affirm the jury's verdict that Montgomery committed perjury.

A defendant's admissions or contradictory statements are sufficient to corroborate the testimony of a single witness, and together support a conviction for perjury. State v. Buchanan, 79 Wn.2d 740, 489 P.2d 744 (1971). For Montgomery, such evidence exists, both in the form of an admission and in the form of his contradictory statements. Specifically,

the testimony of either Barham or Resch in addition to Montgomery's confession to Benson constitutes sufficient evidence to sustain a finding of perjury. Ex. 15, p. 7.

Additionally, Montgomery would be guilty of perjury even if he had not ultimately confessed because his contradictory statements are sufficient to corroborate the testimony of a single witness, either Resch or Barham. Montgomery first testified at the suppression hearing that he remembered Barham bringing the gun out of the home. Ex. 3, pp. 46-47, 76, 79, 80, 81, 82, 103. He later told Benson he didn't remember how the gun was retrieved, and that he was just basing his suppression hearing testimony on what McNicol had told him had occurred. Ex. 14, pp. 3, 4, 14. If Montgomery's statements to Benson are to be believed then his suppression hearing testimony claiming he remembered the events when in fact he did not constitutes perjury.

The police report Montgomery authored the same day as Barham's arrest which repeatedly contradicted his testimony at the suppression hearing fourteen months later also provides independent and corroborating evidence that he committed perjury. Montgomery claims that the police report does not provide "substantive evidence" that he committed perjury. His argument is without merit because the plain and inescapable evidentiary value of the report is that is shows what Montgomery wrote

about the events just hours after they occurred. The evidentiary value of that report does not hinge on which evidence rule the document was admitted under.[7]

3. Sufficient evidence was presented at trial to affirm the jury's verdict that McNicol committed perjury.

McNicol argues there was insufficient evidence supporting his conviction because he did not author the police report, and because, unlike Montgomery, he never admitted that he lied at the suppression hearing. His argument fails, because as stated above his conviction should be sustained based on the jury's acceptance of Barham and Resch testimony. Furthermore, his attempts to distance himself from the police report are unconvincing given that both he and Montgomery admitted to discussing the call prior to or during Montgomery's writing of the report. RP 326; Ex. 3, p. 46.

McNicol admitted that during the fourteen months between his visit to the Barham residence and his testimony at the suppression hearing he responded to hundreds of other calls. RP 455-56. He maintained that despite that time passage and the hundreds of intervening calls he

[7] The report was properly admitted because it showed what Montgomery wrote about the Barham incident the same day it occurred. As such, Montgomery's argument that portions of the police report that contain the statements of others should not have been admitted into evidence is without merit. Furthermore, even if that argument were considered it would be irrelevant because statements made by others bear no connection to the question of whether or not Montgomery committed perjury.

remembered allowing Barham to retrieve the firearm. RP 455, 464-65. The jury was free to determine that McNicol's explanation was not credible.

The distance from the front door of Barham's home to the bedroom where the gun was located is approximately fifty feet. RP 237. Due to the configuration of Barham's residence a person standing on the porch of the home, even if leaning in, cannot see the bedroom where the firearm was located. RP 315-17, 237-38. Prior to arriving at the Barham home McNicol knew that meth was possibly being used, that there was a firearm there and that Barham was a convicted felon. RP 458. McNicol was further forced to admit that he has encountered meth users before and they can act unpredictably, erratically and violently, and that meth plus guns can easily turn into a deadly situation. RP 465-66.

The jury heard extensive testimony from Benson regarding the training that Pierce County sheriff's personnel undergo regarding officer safety, and that it would never be acceptable to let a convicted felon enter a home to retrieve a gun on his own or to lose sight of him. RP 317-19. The jury heard Benson's interview of Montgomery in which Montgomery said that in his experience McNicol would have never allowed Barham to retrieve the gun on his own, and that in the two years they have worked

together he had never seen him do something like that.[8] Ex. 14, pp. 6, 11. McNicol had approximately thirty-years of law enforcement experience. RP 442, 464-65. With that in mind, his claim that he allowed Barham to retrieve the gun on his own because Barham was "very polite" is unbelievable on its face and wholly discredited by Benson's testimony, Montgomery's statements, and by the surrounding circumstances. RP 468.

McNicol also had a substantial motive to lie at the suppression hearing, because notwithstanding the prosecutor's belief that the entry into the home was lawful McNicol thought it was not. Indeed, even after the prosecutor's assurances McNicol testified at the suppression hearing that he did not believe the deputies had the right to enter the home to retrieve the gun. Ex. 2, p. 23. He subsequently told Benson the same thing. RP 327. McNicol's belief demonstrates a strong motive to lie. Additionally, his testimony at trial further exposed him as a man willing to tailor his testimony to address unfavorable circumstances in a transparent attempt to benefit himself.

For example, McNicol told Benson on June 8, 2010 that he reviewed the police report in the car while he and Montgomery drove to

[8] Montgomery told Benson "I can't imagine he would have let him go get the gun by himself," and explained that "to even think about that is, is ridiculous, that that's what happened." Ex. 14, p. 13; Ex. 15, p. 7

the courthouse together for the suppression hearing, and then told Montgomery the report was inaccurate. RP 327. McNicol was present at trial when Montgomery's June 8, 2010 recorded interview was played for the jury. During that interview Montgomery told Benson the men never discussed the case in the car, and that it wasn't until they were sitting outside the courtroom that McNicol asked to see the report and then told Montgomery it was wrong. Ex. 14, pp. 4, 16; Ex. 15, p. 4. Montgomery confirmed this when he testified at trial. RP 402.

After hearing this, McNicol testified at trial that although he told Benson he read the report in the car he now suddenly remembered he did not do read it until he was in the hallway waiting for the suppression hearing to begin. RP 443-44. On cross, McNicol was confronted with the fact that he was now claiming that his recollection of the events of March 16, 2010 were better eighteen months after the event in question than they were when he talked with Benson two months after the event. RP 453-55. At that point McNicol hedged and said he was not sure when he told Montgomery the report was wrong. RP 455.

The discrepancy as to when McNicol allegedly realized the report was wrong is significant, because McNicol claimed he told the prosecutor the report was wrong upon learning that the defense was challenging their right to enter the home. This could have only occurred if he had read the

report prior to meeting with the prosecutor. Prosecutor Lund testified she did not know the men were going to say they didn't enter the home until they testified to that on the stand. Although Montgomery and McNicol were together at all times - in the car, in the prosecutor's office and in the hallway prior to the suppression motion - Montgomery never alleged that he or McNicol advised the prosecutor the report was wrong. McNicol's transparent and self-serving attempt to alter his recollection to support his false claim that he told the prosecutor the report was wrong served only to highlight his willingness to alter his testimony to further his own goals.

4. When viewed in the light most favorable to the State, any rational trier of fact could have found Appellants guilty of perjury.

The State presented two witnesses who contradicted Appellants' version of the January 21, 2009 events. Appellants' testimony fourteen months later was completely contrary to the contemporaneously written report. The new testimony that neither of them entered the home to retrieve the gun came moments after the prosecutor advised them that the defense was seeking to suppress the firearm by claiming their entry into the home was unlawful.

They jury evaluated the credibility of Appellants' claim that their memory was better fourteen months after the event than on the day the report was written. The jury assessed the believability of the incredible

explanation that two experienced law enforcement officers allowed a convicted meth-using felon to enter a home to retrieve a firearm from a bedroom that could not be seen from the doorway while they waited outside. The jury made a reasonable and therefore unchallengeable determination that the deputies' testimony was not credible.

While there are established criteria as to the form of the evidence which must be submitted to a jury to prove perjury, those requirements in no way alter the standard of proof by which all criminal charges must be proven. State v. White, 31 Wn. App. 655, 660, 644 P.2d 693 (1982). That standard remains proof beyond a reasonable doubt. Id. The evidence the State presented to prove perjury was well beyond what is necessary to sustain the convictions. Viewing the evidence in the light most favorable to the State, with all reasonable inference drawn in favor of the State and interpreted most strongly against the defendants, a rational trier of fact could have found that s committed perjury in the first degree.

B. The trial court properly refused to admit Barham's stale conviction for attempted possession of stolen property in the second degree.

1. Where a conviction is over ten years old a trial court may exclude it under ER 609(b) without balancing probative value against prejudicial effect.

Appellants moved at pretrial to admit Barham's 2003 felony drug conviction which was the basis for the unlawful possession of a firearm

charge, and an attempted possession of stolen property in the second degree conviction ("attempted PSP2") which occurred in 2000. RP 88. Barham pled guilty to the attempted PSP2 charge on March 7, 2001 and was sentenced to ten days with credit for time served. RP 90.

The admission of prior convictions for impeachment purposes is governed by Evidence Rule 609. The rule provides:

> **(a) General Rule.** For the purposes of attacking the credibility of a witness in a criminal or civil case, evidence that that witness had been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.
>
> **(b) Time Limit.** Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

Appellants conceded at trial that the attempted PSP 2 conviction was beyond the ten-year time period set forth in ER 609(b), and was therefore inadmissible unless "the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial

effect." RP 92. See State v. Russell, 104 Wn. App. 422, 432, 16 P.3d 664 (2001) (under ER 609(b) the ten period ends when the conviction is admitted at trial). Appellants argued that the conviction should nonetheless be admitted because the credibility of the witnesses was an especially important consideration for the jury. RP 92.

The State replied that although a drug conviction would not normally be admissible it should be admitted in this case because it was part and parcel of the fact pattern the jury would hear about. The State further noted that a jury instruction advising the jurors that they could consider evidence of a prior conviction to assess witness credibility was in order.[9] RP 92. Regarding the attempted PSP 2 conviction, the State argued that the defense had failed to meet its burden of providing a compelling reason to overcome the presumptive inadmissibility of a conviction beyond the ten-year time limit. RP 92.

The court admitted the felony drug conviction and excluded the attempted PSP 2 conviction, explaining that "[t]he fact that he has been convicted of a drug offense, which is typically not allowed, I think will give the defense plenty of opportunity to question his credibility." RP 93.

Appellants assert that the trial court was required to conduct an on-

[9] The jury received WPIC 5.06 advising them "[y]ou may consider evidence that a witness has been convicted of a crime only in deciding what weight or credibility to give to the testimony of the witness, and for no other purpose." CP 259.

the-record balancing test weighing the probative value of the attempted PSP 2 conviction against its prejudicial effect. Appellants misconstrue ER 609(b) because a careful reading of the rule shows that a balancing test must only be conducted before admitting evidence of a conviction more than ten years old. No such balance is required for excluding a post ten-year conviction.

ER 609(b) provides that a conviction which is over ten years old is inadmissible "unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Under the plain text of the rule remote convictions are per se inadmissible unless the court engages in a balancing test the result of which overcomes the presumption of inadmissibility.

Nothing in the rule requires that a balancing test be done when evidence of an over ten year old conviction is excluded. Since Washington courts have not yet directly addressed this question[10] this

[10] The only reference the State could find is a statement in State v. Russell that "[a] trial court is always required to balance on the record when a conviction is more than 10 years old, regardless of whether the conviction involves dishonesty or false statement." 104 Wn.App. 422, 16 P.3d 664 (2001). The Russell court made this statement in rejecting the State's argument that crimes of dishonesty are automatically admissible for impeachment purposes regardless of age, and that therefore no balancing test need be done for dishonesty crimes. Thus, while use of the word "always" refers to both dishonesty and false statement, it is not clear if the Russell court was also holding that a court was required to perform a balancing test for both admission and exclusion of stale impeachment evidence under ER 609(b).

Court should look to federal law interpreting Washington's ER 609 rule since the rule was adopted verbatim from Federal Rule of Evidence 609. State v. Burton, 101 Wn.2d 1, 4-6, 676 P.2d 975 (1984) overruled on other grounds, State v. Jones, 101 Wn.2d 113, 117, 667 P.2d 131 (1984), State v. Smith, 97 Wn.2d 856, 859, 651 P.2d 207 (1982).

The Fifth Circuit, looking at just this question, interpreted ER 609(b) to require that a balancing test be conducted only when a conviction over ten years old is admitted, not when it's excluded. The Court explained:

> We read Rule 609(b) to say that the probative value of a conviction over ten years old is outweighed by its prejudicial effect. The general rule is inadmissibility. It is only when the court admits evidence of a conviction over ten years old that the court must engage in a balancing on the record.

United States v. Estes, 994 F.2d 147, 149 (5th Cir. 1993). See also, United States v. Avants, 467 F.3d 433, 448 (5th Cir. 2004) (holding that "[T]his balancing requirement applies only when over-age convictions are admitted; in other words, it is not required when they are excluded.")

The Fifth's Circuit holdings conform with the plain text of ER 609(b) which makes no mention of a need to balance interests prior to excluding evidence. This interpretation is consistent with the rule's recognition that remote convictions are irrelevant to credibility unless the

proponent of admitting the conviction can make an exceptional showing that the inherent prejudice which attaches to conviction evidence is substantially outweighed by probative value. State v. Jones, 117 Wn. App. 221, 233, 70 P.3d 171 (2003). Because the trial court was permitted to exclude Barham's conviction under 609(b) based solely on the age of the conviction Appellants' challenge fails.

Appellants further assert that ER 609(b) required the trial court to consider the non-exclusive factors set forth in State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980), and State v. Rivers, 129 Wn.2d 697, 706, 921 P.2d 495 (1996). These factors are: (1) the length of the defendant's criminal record; (2) remoteness of the prior conviction; (3) nature of the prior crime; (4) the age and circumstances of the defendant; (5) centrality of the credibility issue; and (6) the impeachment value of the prior crime.

Appellants misconstrue these cases because consideration of these factors applies only when evaluating whether a conviction should be admitted under ER 609(1)(a). Appellants have failed to identify any cases, and the State has been unable to find any, which require that these factors be addressed when evaluating whether to admit an over-aged conviction under ER 609(b).

Given that factor two, the remoteness of the conviction, is already encompassed by 609(b) it would be nonsensical to construe the

Alexis/Rivers factors as applying to an analysis conducted under 609(b). Appellants' assertion that Alexis and Rivers apply to convictions evaluated under 609(b) is further questionable because two of the factors, the length of the defendant's criminal record and the age and circumstances of the defendant, only apply when the State is seeking to admit a defendant's conviction.

This Court should reject Appellants' invitation, made with no authority, to require trial courts to conduct a balancing test and to weigh the factors set forth in Alexis and Rivers when addressing a motion to admit a conviction under ER 609(b).

2. The trial court did not abuse its discretion when it excluded Barham's stale conviction where Defendants failed to meet their burden of providing specific facts or circumstances to overcome the presumption of inadmissibility under ER 609(b).

A trial court's rulings regarding prior convictions under ER 609 are reviewed for an abuse of discretion. State v. Rivers, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996), citing State v. King, 75 Wn.App. 899, 910, n. 5, 878 P.2d 466 (1994), review denied, 125 Wn.2d, 890 P.2d 463 (1995). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Absent an abuse of discretion,

a reviewing court will not disturb a trial court's ruling. State v. Russell, 125 Wn.2d 24, 78, 882 P.2d 747 (1994).

If a conviction is outside the ten-year time period set forth in 609(b), the party moving to admit the conviction bears the burden of demonstrating that the probative value of the conviction outweighs the inherent prejudice of the prior conviction. State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984). Even if this court were to hold that the non-exclusive Alexis/Rivers factors apply to convictions reviewed under ER 609(b) these factors weigh heavily against admitting Barham's attempted PSP2 conviction.

Washington courts have recognized the inherent prejudice of admitting prior convictions, and the strong tendency of prior convictions to mislead juries. State v. Newton, 109 Wn.2d 69, 76, 734 P.2d 254 (1987). Convictions which fall under ER 609(b) are especially disfavored because stale convictions are rarely relevant in assessing a witness' credibility. State v. Gomez, 75 Wn. App. 648, 652, 880 P.2d 56 (1994). Therefore, the prejudicial effect of admitting over-aged convictions will almost always outweigh their probative value." Id.

The rule that convictions which are more than ten years should be admitted very rarely and only in the most exceptional circumstances applies with equal force to crimes of dishonesty as it does to other crimes.

See, State v. Jones, 117 Wn. App. 221, 70 P.3d 171 (2003); State v. Russell, 104 Wn. App. 422, 437-38, 16 P.3d 664 (2001); United States v. Bensimon, 172 F.3d 1121, 1126 (9th Cir. 1999). The prejudicial effect of admitting prior convictions to assess credibility applies equally to witnesses as it does to criminal defendants. Newton, 109 Wn.2d at 76.

Appellants rely almost exclusively on the argument that the importance of Barham's testimony justifies the admission of his over-aged conviction. This argument fails, because it has been rejected by both Washington courts and by the Ninth Circuit. For instance, in State v. Jones, 117 Wn. App. at 233, Defendant argued that a witness' twenty-year-old forgery conviction should have been admitted for impeachment purposes because the witness at issue was the State's key witness, and that excluding the conviction violated his constitutional right to confrontation. As in the instant case, Jones argued that "without his testimony, the State had no case. " Id. The reviewing court rejected this argument, explaining that convictions that are over ten years old, even those involving crimes of dishonesty are presumed to be irrelevant and are therefore generally inadmissible. Id., citing State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The court explained:

> Under ER 609(a) and (b) a conviction for a crime of dishonesty that occurred more than 10 years ago is presumed to be inadmissible for the purposes of attacking

> the credibility of a witness. Thus, the evidence is presumed to be irrelevant to credibility, absent specific facts or circumstances from which the trial court can determine, in the interest of justice that the convictions has probative value that outweighs its prejudicial effect. ... [T]here is no indication in the record of any specific facts or circumstances by which the trail court could determine that the evidence was nevertheless relevant to Spragg's credibility as a witness at all, let alone that its probative value outweighed its prejudicial effect.

Jones, 117 Wn.App. at 233.

Similarly in U.S. v. Bensimon, 172 F.3d 1121, the Ninth Circuit held that the trial court abused its discretion when it admitted the defendant's seventeen-year old mail fraud conviction. The trial court had accepted the government's argument that "the probative value of impeachment evidence is enhanced where the defendant's testimony is pitted against that of the government witnesses, thereby making the credibility of the defendant an important issue." Id. at 1126. The Ninth Circuit explicitly rejected that analysis, noting that "the probative value of a prior conviction may not be determined by how important the defendant's credibility is to the opposing party." Id., citing American Home Assurance Co. v. American President Lines, Ltd., 44 F.3d 774 (9th Cir. 1994). See also, State v. Moore, 44 Wn. App. 55, 61, 651 P.2d 765 (1982) (trial court's reliance on centrality of defendant's credibility in determining prior conviction's admissibility was abuse of discretion).

As in Jones and Bensimon, Appellants' bare assertion, unsupported by any specific facts or circumstances to demonstrate that a stale conviction would sufficiently bear on a witness' credibility so as to overcome the presumption of prejudice of admitting the conviction, does not meet the requirement for admissibility contained in ER 609(b).

The moving party "bears the burden of affirmatively showing some probative value." Jones, 101 Wn.2d at 123, citing U.S. v. Gross, 603 F.2d 757 (9th Cir. 1979). "By its terms, ER 609(b) requires a finding that probative value outweighs unfair prejudice not just slightly, but substantially." Russell, 104 Wn.App. at 435. Here, the probative value of Barham's ten year old gross misdemeanor conviction was minimal, if it existed at all.

The trial judge noted that the jury was already going to learn that Barham had been recently convicted of a felony, and this fact weighed against admitting a second and presumptively inadmissible conviction. RP 93. The trial court's reasoning is firmly supported by a long line of cases which have repeatedly recognized that admission of cumulative prior convictions should be avoided because of the inherent increased prejudicial effect which occurs when multiple convictions are admitted. See, e.g., Jones, 101 Wn.2d at 121-122; Gomez, 75 Wn. App. at 648.

More generally, the existence of other impeachment evidence weighs heavily against admitting prior conviction evidence. State v. Alexis, 95 Wn.2d 15, 20, 621 P.2d 1269 (1981); State v. Millante, 80 Wn. App. 237, 246, 908 P.2d 374 (1995); State v. Martinez, 38 Wn. App. 421, 685 P.2d 650 (1984). Martinez is illustrative. In Martinez, the defendant sought to admit an assault victim's eighteen-year-old conviction for passing a bad check. Id. at 422. The victim was an alcoholic, had consumed a large amount of alcohol prior to being stabbed, and had provided inconsistent versions of how the assault occurred. Id. at 424. The court held that encouraging witnesses to come forward and testify was a legitimate reason for excluding old convictions pursuant to ER 609(b), and that this interest outweighed the defendant's minimal interest in admitting an over-aged conviction. Id. The court noted that this was particularly true when, as here, other impeachment evidence existed. Id.

As in Martinez, Appellants had substantial material with which to impeach Barham. In addition to hearing about a felony drug conviction that would normally be inadmissible, the jury was also told that Barham was arrested and charged with the felony crime of unlawful possession of a firearm in the first degree, that a meth lab had been previously located at his home, that a twelve-year-old child living the home called 911 to report that he was afraid of Barham, and that Barham was a chronic meth user.

The trial court did not abuse its discretion when it held that in light of other impeachment evidence Barham's stale conviction should be excluded.

The potential prejudicial effect of admitting Barham's stale conviction was substantial. Aside from the inherent prejudice that attaches to the admission of any conviction, here sixteen of the fifty jurors disclosed that they had been the victim of a stolen property offense. RP 91. Admitting Barham's conviction for the same type of crime would have been especially prejudicial, fueling juror's personal and irrelevant dislike of him rather than providing legitimate information upon which to objectively assess his credibility. During the argument regarding Barham's convictions, neither the defendants nor the court took issue with the State's observation that voir dire had vividly demonstrated that the jurors already viewed the credibility of law enforcement officers far more highly than that of criminals. RP 91, 93. Given that jurors were already going to learn about Barham's many brushes with the law, including a felony conviction, any additional evidence regarding a stale conviction would have been particularly prejudicial.

A trial court has wide discretion in determining whether the probative value of evidence outweighs its potential prejudicial impact. State v. Coe, 101 Wn.2d 772, 782, 684 P.2d 668 (1984). The trial court's

ruling is firmly in line with well-established case law regarding the inadmissibility of old convictions under ER 609(b). In light of all the impeachment evidence already admitted against Barham, and Appellants' failure to make any meaningful showing that admission of a second and over-aged conviction was "supported by specific facts and circumstances" which "substantially outweighs its prejudicial effect," the trial court did not abuse its discretion in excluding Barham's attempted PSP2 conviction.

3. In light of the plentiful impeachment evidence admitted against Barham, Montgomery's right to meaningfully cross exam him was not violated by the trial court's decision to exclude a stale gross misdemeanor conviction.

Montgomery's claim that his right to cross exam Barham was violated is without merit. Exclusion of a State witness's prior conviction under ER 609(b) does not curtail a defendant's Sixth Amendment right to confront witnesses. State v. Martinez, 38 Wn. App. at 422-25. Crimes of dishonesty which are over ten years old are presumed to be irrelevant. Bensimon, 172 F.3d at 1126. Such convictions are therefore inadmissible absent some extraordinary showing because "the Sixth Amendment does not entitle a defendant to present irrelevant evidence." Id. at 233, citing State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). A defendant's ability to use other impeachment evidence may justify limiting cross examination. State v. Barnes, 54 Wn. App. 536, 551, 774 P.2d 547

(1989). Plentiful impeachment evidence was already admitted against Barham, thereby further diminishing any argument that his stale conviction should have been admitted. With all that in mind, Appellants' claim that they were denied a meaningful opportunity to cross examine Barham strains credulity.

4. Any error was harmless error.

Montgomery errs in claiming that the exclusion of an ER 609(b) conviction should be reviewed under a constitutional harmless error analysis because it implicates the right to cross examination. The Washington State Supreme Court has already held that evidentiary rulings on the admissibility of evidence under ER 611 governing cross examination is reviewed for an abuse of discretion. State v. Rivers, 129 Wn.2d 697, 709, 921 P.2d 495 (1996); State v. Young, 89 Wn.2d 613, 628, 574 P.2d 1171, cert.denied., 439 U.S. 870 (1978). The proper standard of review is that an alleged ER 609 error is reviewed under a nonconstitutional harmless error standard. State v. Brown, 113 Wn.2d 520, 554, 782 P.2d 1013 (1989). Applying this standard, an erroneous ER 609 ruling does not constitute reversible error "unless, within reasonable probabilities, had the error not occurred, the outcome of the trial could have been materially affected." Id., Accord State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997). The error claimed here was

harmless because the impeachment value of Barham's aged conviction was inconsequential, and because there was substantial evidence upon which to convict both Appellants.

The impeachment evidence admitted against Barham included a felony drug conviction, his felonious possession of a firearm, allegations of chronic meth use, and the prior existence of a meth lab in his home. Appellants have failed to explain how an over ten-year-old gross misdemeanor conviction would provide any significant impeachment value beyond the abundance of impeachment evidence the jury already received. In light of all the impeachment evidence admitted against Barham there was no reasonable provability that admitting a second conviction, especially an old one, would have materially affected the trial. As such, any error was harmless.

Also, contrary to Appellants' claim, the trial was not a swearing contest between Appellants and Barham. Barham was one of several witnesses called for the State, which along with many other pieces of evidence established Appellants' guilt.

Ms. Resch, a witness whom neither Appellant has discredited, also testified that both Appellants entered the house to retrieve the gun. Detective Benson provided extensive testimony regarding officer safety. He testified that an officer standing at the door of Barham's home could

not have seen Barham retrieve the gun from the bedroom and that no Pierce County sheriff's deputy would ever allow an unattended felon out of his sight to retrieve a gun. Benson took a recorded statement from Montgomery which was played for the jury. In that statement Montgomery admitted that his statements in his police report that both deputies had entered the home were accurate, and that he lied under oath when claiming otherwise.

McNicol's claim that he allowed a convicted felon to leave his sight and retrieve a gun unattended was incredible on its face, and doubly so given that Montgomery testified that he had never seen McNicol do such a thing and couldn't image that he ever would. McNicol's claim that he remembered the events that took place at the Barham home fourteen months later without the assistance of any notes and in the face of a supposedly inaccurate police report was equally incredible. McNicol's motive to lie was firmly established by the fact that he did not believe he had the right to enter the home to retrieve the gun, and did not tell Montgomery the police report was supposedly wrong until after the prosecutor told him the defense was seeking to suppress the gun based on the allegedly unlawful entry.

Appellants grossly exaggerate the importance of Barham's testimony and the minimal effect, if any, that admission of his stale

conviction would have had on the jury. Given the inconsequential value of that stale conviction, and the overwhelming weight of other evidence, there is no reasonable probability that admission of Barham's gross misdemeanor would have materially affected the outcome of the trial. Thus, any error in excluding Barham's stale conviction was harmless.

C. McNicol received effective assistance of counsel.

McNicol claims he received ineffective assistance of counsel because his counsel joined the codefendant's written motions instead of filing separate ones, and because he asked the trial court to sentence him to electronic home monitoring instead of jail. McNicol's challenge fails because he can show neither inadequate representation nor prejudice.

1. McNicol's trial counsel performed at an objective standard of reasonableness.

A claim of ineffective assistance of counsel is reviewed de novo. In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). To demonstrate ineffective assistance of counsel, McNicol must prove both that his attorney's performance was: (1) deficient, i.e., that it fell below an objective standard of reasonableness; and (2) the deficiency resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under

Strickland v. Washington, 466 U.S. 668, 684–86, 104 S. Ct. 2052 (1984), courts ascertain prejudice by asking whether the defendant received a fair trial. State v. Carter, 56 Wn. App. 217, 224, 783 P.2d 589 (1989). This standard is "highly deferential and courts will indulge in a strong presumption of reasonableness." Id. at 226. Deference is given to trial counsel's performance in order to "eliminate the distorting effects of hindsight." In re Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). Reviewing courts presume that counsel's conduct constituted sound trial strategy. Id. As such, decisions regarding trial strategy or tactics will not establish deficient performance by counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

"The reasonableness of trial counsel's performance is reviewed in light of all the circumstances of the case at the time of counsel's conduct." Garrett at 518. "Competency of counsel is determined based upon the entire record below." State v. Townsend, 142 Wn.2d 838, 15 P.3d 145 (2001), citing State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969). McNicol's trial counsel filed an omnibus application seeking additional materials beyond what had already been supplied in discovery. CP 6-7. He argued numerous motions before the court and vigorously cross-examined State

witnesses. RP 25-51, RP 76-99, 266-70, 293-98, 354-358, 377-79, 434-53, 538-58. He presented the testimony of his client, and an opening statement and closing argument which presented a clear and coherent defense of his client. RP 103, 183-201, 222-26, 377-79. McNicol's assertion that his counsel was "asleep at the wheel" is belied by the fact that it was his counsel, not Montgomery's, that succeeded in admitting previously excluded impeachment evidence against a State's witness after persuading the court that the door to such evidence had been opened. RP 216-21. McNicol is unable to demonstrate that his trial counsel's performance was deficient. His ineffective assistance of counsel claim fails.

2. McNicol was not prejudiced by his counsel's decision to join Montgomery's written motions.

McNicol claims he received ineffective assistance of counsel because his trial counsel joined written motions filed by the codefendant instead of submitting separate ones. McNicol's argument fails because he cannot demonstrate that his counsel's decision to join the codefendant's written motions instead of separately filing his own prejudiced him in any way.

Montgomery's counsel filed a Knapstad motion and motions in limine. . McNicol's counsel joined these motions. CP 9; RP 7, 28-29.

The facts which led to these charges and which were litigated in motions and at the trial were identical except for the fact that McNicol did not author the police report. Accordingly, the State filed identical trial briefs for both codefendants. CP 203.

McNicol has failed to demonstrate how joining Montgomery's motions instead of filing his own shows that counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by this strategy. Given that Appellants were charged out of the identical fact pattern there is nothing ineffective or even unusual about the attorneys agreeing to file one joint set of motions. Indeed, although Appellants filed separate briefs on appeal they identified the exact same three issues and relied on the same set of authorities, with McNicol simply adding a fourth ineffective assistance of counsel claim. Both Appellants lost their CrR 3.5 and Knapstad motions, and McNicol has not identified a deficiency by his trial counsel which would have affected the outcome of the trial. CP 276-81.

3. McNicol was not prejudiced by his counsel's strategic decision to argue against a jail sentence by suggesting that he be sentenced only to electronic home monitoring instead.

McNicol also takes issue with his trial counsel's recommendation that he be sentenced to ninety days electronic home monitoring under the

first time offender sentencing alternative. He claims his counsel made the recommendation without consulting him and that this somehow supports his ineffective assistance of counsel claim. McNicol's complaint fails for two reasons. Firstly, decisions regarding strategy or tactics do not establish deficient performance by counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Secondly, McNicol's complaint fails because there is nothing to support his claim that he would have received a lesser sentence had his counsel performed differently. On the contrary, McNicol received the same sentence as the codefendant, despite the State's argument that he should be sentenced more harshly because he was a senior officer who led his less experienced partner astray.[11]

McNicol complains that his counsel recommended ninety days of electric home monitoring, and did so without consulting him. McNicol's complaint is misleading because it leaves out three important facts. Firstly, McNicol refused to communicate with his trial counsel after he was found guilty, thereby forcing his counsel to proceed without McNicol's input. RP 624. Secondly, his trial counsel had to represent

[11] The standard sentencing range for both defendants was 6-12 months. The State recommended 8 months of jail for Montgomery and 12 months of jail for McNicol. RP 612. Defendants were each sentenced under the first time offender sentencing alternative to 90 days jail, with 6 days to be served in jail, 8 days to be converted to 40 hours of community service, and the remainder to be done on electronic home monitoring. RP 629-30.

him at sentencing because the new attorney McNicol had hired at the last minute was not prepared to do so. RP 605, 609. Thirdly, his counsel was arguing for electronic home monitoring in an effort to avoid a jail sentence. RP 621-25.

Despite McNicol's displeasure after the guilty verdict, his counsel continued to work hard for him by filing a sentencing memorandum and by making numerous persuasive arguments at sentencing. CP 290-93; RP 621-25. Reviewing courts presume that counsel's conduct constituted sound trial strategy. Rice, 118 Wn.2d at 888. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Here, trial counsel's suggestion for a ninety-day electric home monitoring sentence was a legitimate strategy to try and avoid the 12 month jail sentence the State was urging. RP 621-25. Given that McNicol received the same sentence as the codefendant his ineffective assistance of counsel argument fails as there is no reasonable possibility that he would have received a lesser sentence had his counsel performed differently.

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D. Where all parties agreed to use a juror questionnaire proposed by the defense, all juror questioning occurred in an open courtroom, all parties agreed to preliminary seal the questionnaires after voir dire was completed, and the trial judge announced he would unseal the questionnaires if requested to do so, the public's right to an open trial was not violated.

1. Factual background

On September 12, 2011 defense counsel proposed using a juror questionnaire. RP 9/12/11 at 6, 10. The State had no objection. RP 9/12/11 at 9-10. The trial judge attached instructions to the juror questionnaires notifying the jurors that the questionnaires would be sealed in the court file and would only be disclosed pursuant to a court order. RP 9/12/11 at 18-20. The trial judge asked his assistant to tell jury administration to bring fifty jurors to the courtroom. He made the following announcement immediately thereafter:

> Folks who are in the gallery, you're obviously welcome. This is an open courtroom.

RP 9/12/11 at 15.

The courtroom remained open to the public during general and individual voir dire, and throughout the trial. RP 9/12/11 at 21.

On September 15, 2011 after jury selection had been completed, the trial judge advised the attorneys that he was going to conduct a hearing to address the potential sealing of the juror questionnaires. RP 9/15/11 at

3-4. The judge asked all counsel if there was any objection to sealing the questionnaires. RP 9/15/11 at 3-4. All counsel replied they had no objection. RP 9/15/11 at 3. The court then proceeded to consider the Bone-Club factors. After doing so, it made the following announcement:

> [T]his Court would for appellate purposes – if necessary, the Court would have no hesitation in unsealing them for some legal purpose that's related to your case. Preliminary I will seal them just because of the confidentiality, but I want all parties to know that I would certainly consider an order unsealing if necessary to pursue justice in either the State's case or defense case.
>
> RP 9/15/11 at 4.

The court then preliminarily sealed the questionnaires. RP 9/15/11 at 4.

2. In accordance with this Court's precedent a Bone Club Analysis was not required.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution each guarantee a criminal defendant the right to a "public trial by an impartial jury." State v. Momah, 167 Wn.2d 140, 147, 217 P.3d 321 (2009). Additionally, article I, section 10 of the Washington Constitution states that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." State v. Russell, 141 Wn. App. 733, 738-39, 172 P.3d 361 (2007). "Article I, sections 10 and 22 serve complementary and interdependent functions in assuring fairness of our judicial system[.]" Momah, 167 Wn.2d at 148. .

The right to a public trial extends to jury selection. Id. However, that right is not absolute. Id.

When considering whether or not to grant a closure motion, the court must conduct a five-step analysis. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). Whether a defendant's right to a public trial has been violated is a question of law that is reviewed de novo. State v. Momah, 167 Wn.2d 140, 217 P.3d 321 (2009), citing State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995).

Appellants argue that this Court should follow Division One's opinion in State v. Tarhan/Beskurt,[12] 159 Wn. App. 819, 246 P.3d 580, review granted, 172 Wn.2d 1013, 259 P.3d 1109 (2011), which held that a trial court may not seal juror questionnaires without first conducting a Bone-Club analysis. Appellants further urge this court to reject *Tarhan Beskurt's* holding that the remedy for failure to conduct a Bone-Club analysis is remand to the trial court to reconsider the sealing order because the error is not structural.

Appellants fail to make any mention that this Court has repeatedly and consistently held that a trial court need not conduct a Bone-Club

[12] Tarhan and Beskurt were codefendants consolidated on appeal. Some opinions refer to the case as State v. Tarhan while others refer to the case as State v. Beskurt. Regardless of the name, the cite is 159 Wn.App. 819, 246 P.3d. 580, review granted, 172 Wn.2d 1013 (2011). To minimize confusion, this brief will refer to the case as State v. Tarhan/Beskurt.

analysis prior to sealing juror questions. See, e.g., In re Pers. Restraint of Stockwell, 160 Wn. App. 172, 180-81, 248 P.3d 576 (2011) (assuming, without deciding, that sealing jury questionnaires implicated defendant's right to public trial, trial court's failure to consider Bone-Club factors was not structural error); State v. Smith, 162 Wn. App. 833, 848, 262 P.3d 72 (2011) (sealing juror questionnaires after voir dire does not constitute a courtroom closure); State v. Chouap, No. 41426-1-II, 2012 WL 3295551 (Wash. Ct. App. Aug. 14, 2012) (no error where trial court sealed juror questionnaires without first considering Bone Club factors).[13]

In State v. Chouap, a defendant asked this Court to follow Tarhan/Beskurt to find that the trial court erred when it failed to conduct a Bone-Club analysis prior to sealing juror questionnaires. Chouap, 2012 WL 329551 at *11. This Court expressly rejected Defendant's argument and held that since both parties agreed to use a juror questionnaire, questioned jurors in an open courtroom, and agreed to seal the questionnaires, no error occurred. Id. at *11. This Court emphasized that it was rejecting Tarhan/Beskurt, and basing its holding on its own precedents established in Stockwell and Smith.[14] Id. at *11.

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[13] This Court issued State v. Chouap on 8/14/12 after Appellants filed their briefs. In re Pers. Restraint of Stockwell and State v. Smith were issued before Appellants filed their briefs.

[14] In State v. Smith, this Court explicitly declined to follow Division One's opinion in State v. Coleman, 151 Wn. App. 614, 214 P.3d 158 (2009), which held that the

As was the case in Chouap, Stockwell and Smith, Appellants here agreed to use a juror questionnaire, utilized information from the questionnaires during a voir dire process that occurred in an open courtroom, and agreed to seal the questionnaires after voir dire was completed. Appellants benefitted from the increased candor of jurors which comes when they are told their answers will be sealed. Smith, 162 Wn. App. at 837, citing Stockwell, 160 Wn. App. at 180. The public's right to open information was also ensured as the questionnaires were used to assist in questioning jurors, and all questioning occurred in an open courtroom. Smith, 162 Wn. App. at 847-48, citing Stockwell, 160 Wn. App. At 183. The trial court followed well-established Division Two precedent when it sealed the juror questionnaires. There was no error.

3. The trial court conducted a Bone-Club Analysis even though it was not required to do so.

Even if this Court were to break with its precedent and find that the agreed sealing of juror questionnaires should be preceded with a consideration of the Bone-Club factors that procedure was followed in this case. The five Bone Club factors are:

1. The proponent of the closure or sealing must make some showing [of a compelling interest], and where that need is based on a right

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trial court was required to conduct a Bone-Club analysis before sealing juror questionnaires, and that failure to do so required a remand to the trial court to do so as the error was not structural. Smith, 162 Wn.App. at 848, fn. 9.

other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.

2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

Here, the trial court announced it was conducting a hearing prior to sealing the questionnaires. RP 9/15/11 at 3-4. In considering Bone-Club factor one, the court identified the need for juror privacy given the nature of the information presented in the questionnaires and found that the need for confidentiality weighed towards a preliminary sealing of the questionnaires. RP 9/15/11 at 3-4. Regarding factor two, anyone present had the opportunity to object and no one did. Regarding factor three, the proposed method of curtailing open access was the least restrictive means of protecting juror privacy. RP 9/15/11 at 3-4. All jurors were questioned in an open courtroom and Appellants used the questionnaires during this process. The courtroom was never closed and no one was ever excluded from watching voir dire. Regarding factor four, the court weighed the

competing interests of closure, stating it was balancing "the public's right to know versus the confidentially of juror information that they give." RP 9/15/11 at 4. Regarding factor five, the order was no broader in its application or duration than necessary to serve its purpose. All jurors were questioned in an open courtroom, and the court announced it would not hesitate to unseal the questionnaires "for some legal purpose that's related to [the] case" or if it was "necessary to pursue justice[.]" RP 9/15/11 at 4.

The trial court engaged in a Bone-Club analysis prior to sealing the questionnaires even though it was not required to do so.[15] Therefore, under all existing Washington case law the trial court did not err.

4. The remedy for error, if any occurred, is remand to the trial court to reconsider the sealing order

In State v. Tarhan/Beskurt, as noted above, Division One held trial courts must conduct a Bone-Club analysis before sealing juror questionnaires. 159 Wn. App. 819 (2011). But Tarhan/Beskurt also

[15] In State v. Momah,167 Wn.2d 140, 217 P.3d 321 (2009), the Court held that not all violations of a public trial constitute structural error requiring reversal of a conviction. On the same day the Court issued State v. Strode, 167 Wn.2d 222, 217 P.3d 310 (2009), finding that the appropriate remedy for a public trial right violation in that case was reversal because the error was structural. Montgomery contends the different remedies between Momah and Strode can be explained by the fact that in Momah the trial court engaged in something equivalent to a Bone-Club analysis, whereas in Strode no such procedure occurred. Montgomery's brief at 24-25. At least one other court has interpreted the legal distinction separating the two cases the same way. See State v. Paumier, 155 Wn. App. 673, 683, 230 P.3d 212 (2010). Here, the trial court conducted a Bone-Club analysis, or at the very least a Bone-Club equivalent analysis. Consequently, even under Montgomery's analysis any alleged error here was not structural.

found that failure to do so violates only the public's right to an open trial not the defendant's right, and that failure to conduct the test is not structural error. *Id.* at 834. Accordingly, if this Court were to follow *Tarhan/Beskurt* the appropriate remedy would be remand to the trial court for reconsideration of the sealing order in light of the *Bone-Club* factors. *Id.*

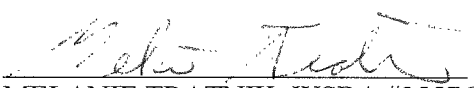
No Washington court has ever found that a trial court's sealing of juror questionnaires after voir dire constitutes a structural error warranting reversal. Here, the trial court has already stated that it would not hesitate to unseal the questionnaires if requested to do so. Here, there was no error, and even if error occurred the proper remedy would be to remand to the trial court to reconsider its sealing order.

IV. CONCLUSION

For the foregoing reasons, the State requests that this Court affirm Appellants' convictions.

RESPECTFULLY SUBMITTED this 5th day of October, 2012.

ROBERT M. MCKENNA
Attorney General



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