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COURT OF APPEALS  
DIVISION II

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NO. 37857-4-II

STATE OF WASHINGTON

BY 

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

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STATE OF WASHINGTON,

Respondent,

v.

JAMES ROSHON HUGHES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda CJ Lee

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his constitutional right to a speedy trial.
2. Appellant was denied his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. Was appellant denied his constitutional right to a speedy trial where appellant remained incarcerated for six months, did not personally cause any of the delay, persistently asserted his right to a speedy trial by objecting to the numerous continuances granted by the trial court, and his defense was prejudiced by the delay?
2. Was appellant denied his right to effective assistance of counsel where defense counsel allowed the State to impugn appellant's credibility on cross-examination by asking appellant during direct examination about prior convictions which the State could not have otherwise raised because the State had not proven the convictions?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

On November 28, 2007, the State charged appellant, James Roshon Hughes, with one count of robbery in the first degree. CP 1; RCW 9A.56.190, 9A.56.200(1)(a)(i)(ii). On January 9, 2008, the court continued the trial date set for January 14, 2008 to February 26, 2008. CP 4. On February 26, 2008, the court continued the trial date to February 27, 2008. CP 7. On February 27, 2008, the court continued the trial date to March 12, 2008. CP 8. On March 12, 2008, the court continued the trial date to March 19, 2008. CP 9. On March 19, 2008, the court continued the trial date to April 2, 2008. CP 10. On April 2, 2008, the court continued the trial date to April 3, 2008. CP 11. On April 3, 2008, the court continued the trial date to April 7, 2008. CP 12. On April 7, 2008, the court continued the trial date to April 8, 2008. CP 13. On April 8, 2008, the court continued the trial date to April 21, 2008. CP 14. On April 21, 2008, the court continued the trial date to May 1, 2008. CP 18. On May 1, 2008, the court continued the trial date to May 5, 2008. CP 19.

The trial commenced on May 5, 2008 and the State corrected the information on May 6, 2008, changing the allegation that “the defendant

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<sup>1</sup> There are eight volumes of verbatim report of proceedings: 1RP - 01/09/08, 02/27/08, 03/12/08, 03/19/08, 04/02/08, 04/03/08, 04/21/08, 05/01/08; 2RP - 04/07/08; 3RP - 04/08/08; 4RP - 05/05/08; 5RP - 05/06/08; 6RP - 05/07/08; 7RP - 5/08/08; 8RP - 06/06/08.

was armed with a deadly weapon or displayed what appeared to be a firearm or other deadly weapon, to-wit: a vehicle hammer and/or a handgun” to “the defendant displayed what appeared to be a firearm or other deadly weapon.” CP 21. On May 8, 2008, a jury found Hughes guilty as charged. CP 94, 95, 96. On June 6, 2008, the court sentenced Hughes to 70 months in confinement and 18 to 36 months of community custody. CP 102-03.

3. Substantive Facts

a. Time for Trial

On January 9, 2008, defense counsel moved to continue the trial set for January 14, 2008 to February 26, 2008, claiming that the continuance was necessary to investigate whether a mall surveillance video could be obtained which might be helpful to Hughes’ defense. 1RP 3-4. The court granted the continuance over Hughes’ objections. 1RP 4. No video was presented as evidence at trial. On February 26, 2008, the court continued the trial to February 27, 2008 because no courtrooms were available. Hughes was not present and the hearing was not held on the record. CP 7. On February 27, 2008, over Hughes’ objection, the court continued the trial to March 12, 2008 because defense counsel was in another trial. 1RP 6-7. On March 12, 2008, over Hughes’ objection, the court continued the trial to March 19, 2008 because the prosecutor was in

another trial. 1RP 8-9. On March 19, 2008, over Hughes' objection, the court continued the trial to April 2, 2008 because the prosecutor was in another trial. 1RP 11-12. On April 2, 2008, without Hughes present, the court continued the trial to April 3, 2008 because no courtrooms were available. 1RP 13-16. On April 3, 2008, without Hughes present, the court continued the trial to April 7, 2008 because no courtrooms were available. 1RP 17-19. On April 7, 2008, without Hughes present, the court continued the trial to April 8, 2008 because no courtrooms were available. 2RP 3-4. On April 8, 2008, over Hughes' objection, the court continued the trial to April 21, 2008 because the State's "key witness" was unavailable. 3RP 9-14. On April 21, 2008, without Hughes present, the court continued the trial to May 1, 2008 because of scheduling conflicts. 1RP 20-24. On May 1, 2008, over Hughes' objection, the court continued the trial to May 5, 2008 because the prosecutor was going on vacation so he filed an affidavit of prejudice to take advantage of the 5-day excluded period. 1RP 25-31.

b. Trial Testimony

Richard Peloquin testified that he was employed as a loss prevention officer for Old Navy at the Tacoma Mall in November 2007. 5RP 56-58. On the afternoon of November 27, 2007, Peloquin noticed Hughes in the men's department carrying an empty plastic white bag, "I

could see that he had a bag from a retailer that wasn't in the mall." 5RP 58-60. Peloquin began watching Hughes and saw him select five or six pairs of cargo pants and put them in the bag. 5RP 60. Peloquin caught the attention of the assistant manager, Jolene Clampett, who was nearby and pointed out Hughes. 5RP 61. When Clampett walked over to Hughes and asked him if he needed assistance, he appeared nervous and held his bag close to his chest. 5RP 61-63. Clampett talked with Hughes for about three to four minutes then Hughes continued to look around the men's department. After four or five minutes, he selected two dress shirts and a couple pairs of socks and put them in his bag. 5RP 63-64. Hughes made his way past the cash registers without paying for the merchandise and went out the door into the mall. 5RP 64-65.

Hughes headed toward the closest exit near Ben Bridge Jewelers, walking at a pretty steady pace. 5RP 68-69. Peloquin followed Hughes around the corner of the Ben Bridge store and confronted him, "I said, 'Hey,' and he turned around and stopped. There was no physical contact at any time." 5RP 69-70. Peloquin displayed his badge, identified himself as a loss prevention officer for Old Navy, and told Hughes that he needed to recover the stolen merchandise. 5RP 69-70. Hughes looked at Peloquin and lifted up his jacket and Peloquin saw "a little bit of a black handle, looked to be a gun." 5RP 70. Hughes had it tucked in his pants,

“Basically, it looked to me like a Glock, is what the handle looked like. It could have possibly been a knife, but the direction that I had of it and the way that he was clocking his hand, it was hard for me to see it, but it did look like the handle of a nine millimeter.” 5RP 71-72.

Peloquin thought Hughes “was basically going to pull it out and push it into my chest or possibly pull the trigger,” so he put up his hands and backed up. 5RP 73. Hughes turned around and ran toward the exit door and Peloquin saw him cutting across the parking lot. 5RP 73-74. He called 911 and the dispatcher said that officers were on their way to the mall. 5RP 75. Peloquin walked outside and saw Hughes running toward the street. Hughes stopped, turned around, and started running again when he saw Peloquin. 5RP 76. Peloquin heard sirens as Hughes ran up a hill into a wooded area. 5RP 76. When the officers arrived, Peloquin pointed in the direction where he last saw Hughes and the officers told him to return to Old Navy and wait. 5RP 77. He received a phone call thereafter asking him to come down to the location where officers had apprehended Hughes. Peloquin identified Hughes who looked like he had sustained a dog bite. The police never recovered the merchandise or a weapon. 5RP 77-78.

During cross-examination, Peloquin referred to a report that he wrote about 45 minutes after the incident. 5RP 79-80. Peloquin admitted

that statements in his report conflicted with his trial testimony. 5RP 80-81. Peloquin had written in his report that Hughes “lifted up his jacket and pulled out what looked to be a gun,” but he acknowledged that Hughes actually never pulled anything out of his jacket. 5RP 80. Peloquin did not obtain any statements from the people in Ben Bridge Jewelers who witnessed his interaction with Hughes. 5RP 82-83.

Officer Stephen O’Keefe testified that he responded to a call from dispatch involving a robbery investigation at the Old Navy store in the Tacoma Mall. 5RP 115-16. As O’Keefe approached the mall, he saw Peloquin waving his arms so he pulled over. Peloquin identified himself and told O’Keefe that the Old Navy store had just been robbed. Peloquin described the suspect and pointed in the direction where the suspect ran up a steep hill. 5RP 119-20. Peloquin said he believed the suspect was armed so O’Keefe called other officers to the scene for containment and notified the K-9 Unit. 5RP 119-20. Deputy Sargent arrived with his dog and they started up the hill into a heavily wooded area covered with brush and thick blackberry vines. 5RP 122-24. They found and subdued Hughes who was bitten by the K-9 and suffered a superficial wound. 5RP 124, 127. O’Keefe arrested Hughes and transported him down to the bottom of the hill. 5RP 124, 127. Before an officer took Hughes to the hospital to have the dog bite treated, O’Keefe advised Hughes of his

*Miranda* rights. 5RP 127-28. Hughes demanded to know the charges against him so O'Keefe told him, "Robbery." 5RP 131. Hughes responded, "Robbery, that's bullshit. This is just a shoplift. I didn't use no gun. I just stole some pants." 5RP 131.

O'Keefe and two other officers searched the area for about 20 to 25 minutes but did not find the merchandise or a weapon. 5RP 126. When O'Keefe searched Hughes, he found a emergency vehicle escape hammer in Hughes' jacket pocket. 5RP 134. O'Keefe did not offer to have Hughes provide any type of handwritten statement in his defense. 5RP 133-34.

Deputy Winthrop Sargent, of the Pierce County Sheriff's K-9 unit, testified that he was called to assist the police in apprehending a robbery suspect. 5RP 91-92, 96. Sargent brought his dog to the scene and reported to Officer O'Keefe. 5RP 95-96. They followed the K-9 up the hill and through the brush and woods. 5RP 100. The K-9 found Hughes lying in the brush and bit his arm. Sargent ordered Hughes to show his hands and he complied so Sargent called his dog back. The K-9 let Hughes go and returned to Sargent. 5RP 101. A fire department medic arrived and attended to Hughes' wound which did not appear serious. 5RP 104. Sargent did not question or search Hughes. O'Keefe took Hughes into custody. 5RP 108-09.

James Hughes testified that he was in the Old Navy store shoplifting because he did not have a job and “[t]hings just kind of got pretty tough for me.” 6RP 146. Hughes acknowledged that he had been convicted of shoplifting in the past. 6RP 146. He was living with his girlfriend and an argument prompted him to leave and rent a motel room. Hughes did not bring any clothes with him so he went to Old Navy and took a pair of pants, a shirt, and two pairs of socks. 6RP 147. He put the pants and shirt in a bag and stuck the socks in his waistband. 6RP 148-49. Hughes left the store without paying and ran out the exit door of the mall. 6RP 150-51. When he got to the parking lot, he heard someone say, “Hey, you,” so he kept running. 6RP 151. Hughes denied threatening Peloquin or carrying a firearm. 6RP 154. He tossed the stolen merchandise before he headed up the hill and hid. 6RP 155. Hughes gave himself up when the K-9 found him and bit him on the back of his right arm. 6RP 157.

C. ARGUMENT

1. HUGHES WAS DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL WHERE HE REMAINED INCARCERATED FOR SIX MONTHS, DID NOT PERSONALLY CAUSE ANY OF THE DELAY, PERSISTENTLY OBJECTED TO THE NUMEROUS CONTINUANCES GRANTED BY THE TRIAL COURT, AND HIS DEFENSE WAS PREJUDICED BY THE DELAY.

Reversal and dismissal with prejudice is required because Hughes was denied his constitutional right to a speedy trial where he remained in custody for six months before his trial, did not personally cause any of the delay, persistently asserted his right to a speedy trial by objecting to the numerous continuances granted by the trial court, and his defense was prejudiced by the delay.

A criminal defendant's right to a speedy trial is guaranteed by both our federal and state constitutions. U.S. Const. amend. VI; Const. art. I, section 22 (amend. 10). Generally, no set time is applicable and appellate courts examine the facts to determine whether a reasonable time has elapsed. State v. Whelchel, 97 Wn. App. 813, 824, 988 P.2d. 20 (1999). The right to a speedy trial afforded by the Sixth Amendment attaches when a charge is filed or an arrest made that holds one to answer a criminal charge, whichever occurs first. State v. Corrado, 94 Wn. App. 228, 232, 972 P.2d 515 (1999).

When determining whether a defendant's constitutional right to a speedy trial has been violated, the court balances four interrelated factors: the length of the delay, the reason for the delay, the defendant's assertion of the right, and the prejudice to the defendant. State v. Iniguez, 143 Wn. App. 845, 855, 180 P.3d 855 (2008), review granted, 164 Wn.2d 1025, 195 P.3d 958 (2008); Barker v. Wingo, 407 U.S. 514, 530, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). The factors must be considered together "with such other circumstances as may be relevant." Barker, 407 U.S. at 533. The actual determination of a violation of the constitutional speedy trial right "necessitates a functional analysis of the right in the particular context of the case." Id. at 522.

When balancing the Barker factors here, the record substantiates that Hughes was denied his constitutional right to a speedy trial. Hughes was arrested on November 27, 2007 and remained in custody until his trial began on May 5, 2008. CP 1; 5RP 2. Hughes was charged with first degree robbery for allegedly stealing merchandise and displaying what appeared to be a weapon. CP 21. Hughes' case did not pose any novel or complex issues and the trial involved only three State witnesses and Hughes' testimony. 6RP 55-138, 7RP 145-230. As the United States Supreme Court reasoned, because of the imprecision of the right to speedy trial, the length of delay that will provoke an inquiry is necessarily

dependent upon the peculiar circumstances and complexity of the case. Barker, 407 U.S. at 530-31. Accordingly, given the straightforward nature of Hughes' case, the six-month delay was unreasonable and presumptively prejudicial, particularly in light of the fact that Hughes objected at the hearing for the first continuance and objected at every continuance hearing thereafter where he had an opportunity to do so. CP 4, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19.

Closely related to the length of delay is the reason for the delay and different weights should be assigned to different reasons. Barker, 407 U.S. at 531. "Even if the reason for delay is neutral, rather than improper, 'the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.'" Iniguez, 143 Wn. App. at 856 (citing Barker, 407 U.S. at 531). The record reflects that most of the delay was due to scheduling conflicts and unavailability of courtrooms. CP 4, 7, 8, 9, 10, 11, 12, 13, 14, 18, 19. However, as in Iniguez, 143 Wn. App. at 856, 959, where Division Three of this Court concluded that Iniguez's constitutional right to a speedy trial was violated, Hughes was not personally responsible for any of the delay. Consequently, the reasons for the delay weighs against the State.

Importantly, the "defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the

defendant is being deprived of the right.” Barker, 407 U.S. at 531-32. “The timeliness, vigor, and frequency with which the right to a speedy trial is asserted are probative indicators of whether a defendant was denied needed access to a speedy trial over his objection.” Id. at 528-29. The record reflects that the court granted eleven continuances and Hughes asserted his right to a speedy trial by making an objection at all the hearings where he had an opportunity to object. 1RP 3-4, 1RP 6-7, 1RP 8-9, 1RP 11-12, 3RP 9-14; 1RP 25-31. Hughes was not brought to court during the other continuance hearings and was therefore denied his right to voice an objection. CP 7; 1RP 13-16, 1RP 17-19, 2RP 3-4, 1RP 20-24. The record substantiates that Hughes steadfastly objected to the continuances and his objections were ignored in violation of his right to a speedy trial. “Delay which occurs after a speedy trial is demanded should be scrutinized with particular care.” Iniguez, 143 Wn. App. at 857 (citing Cain v. Smith, 686 F.2d 374, 382 (6<sup>th</sup> Cir. 1982)).

“Although not essential to finding a violation of speedy trial rights, prejudice is a major consideration.” Corrado, 94 Wn. App. at 233. Prejudice “should be assessed in the light of the interests . . . the speedy trial right was designed to protect.” Barker, 407 U.S. at 532. These interests include: (1) preventing oppressive pretrial incarceration, (2) minimizing the anxiety and concern of the accused, and (3) limiting the

possibility that the defense will be impaired. *Id.* “[C]onsideration of prejudice is not limited to the specifically demonstrable” and “affirmative proof of particularized prejudice is not essential to every speedy trial claim.” *Doggett v. United States*, 505 U.S. 647, 655, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992).

Hughes has clearly met the first two interests because he languished in jail until his trial, suffering from anxiety and concern during the six-month delay. The record further substantiates that the delay affected Hughes’ ability to recollect what happened, which consequently impaired his defense because his uncertainty undermined his credibility. It is apparent from Hughes’ testimony at trial that the delay dimmed his memory because he could not remember what day of the week the incident occurred, he was unsure about how many pairs of socks he eventually took from Old Navy, he said he could not recall having contact with Peloquin, he was uncertain about which coat pocket had the emergency vehicle hammer, he could not remember the price of the pants that he took, he could not remember where he threw away the bag with the stolen merchandise, and he could not remember which officer arrested him. 6RP 146, 148, 152, 177-78, 179-80, 192-94, 208, 220, 227. Undoubtedly, the November 27, 2007 incident would have been fresh in his mind but for the delay. In light of the importance of his testimony, Hughes was clearly

prejudiced by the unreasonable and unnecessary delay which impaired his memory to the detriment of this defense.

Upon balancing the related Barker factors and considering the particular circumstances of this case, reversal and dismissal with prejudice is required because Hughes was denied his fundamental right to a speedy trial specifically affirmed in the Constitution.

2. HUGHES WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL ALLOWED THE STATE TO IMPUGN HUGHES' CREDIBILITY ON CROSS-EXAMINATION BY ASKING HUGHES DURING DIRECT EXAMINATION ABOUT PRIOR CONVICTIONS WHICH THE STATE COULD NOT HAVE OTHERWISE RAISED BECAUSE THE STATE HAD NOT PROVEN THE CONVICTIONS.

Hughes was denied his right to effective assistance of counsel where defense counsel allowed the State to impugn Hughes' credibility on cross-examination by asking Hughes during direct examination about prior convictions which the State could not have otherwise raised because the State had not proven the convictions. Reversal is required because counsel's performance was deficient and Hughes was prejudiced as a result of counsel's deficient performance.

Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v.

Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend VI; Wash. Const. art I, sec 22. See also, Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)(the substance of this guarantee is to ensure that the accused is accorded a fair and impartial trial).

To establish ineffective assistance of counsel, a defendant must show first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. at 687. Counsel's performance is deficient when it falls below an objective standard of reasonableness and prejudice occurs when, except for counsel's errors, there is a reasonable probability that the outcome would have been different. In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

There is a strong presumption that counsel's conduct is not deficient. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

At the start of trial on May 5, 2008, the State informed the court that Hughes had a theft in the second degree conviction in 2007 and asserted that the conviction was admissible under ER 609 for impeachment purposes because it constituted a crime of dishonesty. 4RP 3. The State also informed the court that Hughes had a theft in the third degree conviction in 2001, two shoplifting convictions in 2005, a shoplifting conviction in 2006, and an attempted theft in the third degree conviction in 2007. 4RP 4. The State asserted that the convictions were also crimes of dishonesty and admissible “if the State can produce sufficient documentation that establishes that the defendant is the person who committed them before he takes the stand. And if I cannot, then I will not refer to them, and I will bring that documentation to Mr. Shaw’s attention and the Court’s attention.” 4RP 4. The court ruled that 2007 theft in the second degree conviction was admissible and reserved ruling on the other convictions. 4RP 6. The court entered an order on its oral ruling on May 7, 2008. CP 66-68.<sup>2</sup>

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<sup>2</sup> The order states that the convictions on which the court reserved ruling “shall not be mentioned, however, unless the State has obtained sufficient documentation to establish proof of the conviction itself and the defendant’s identity as the person who committed it, and has provided such information to defense counsel, prior to the defendant taking the stand to testify, and has raised the issue again to the court outside the presence of the jury.” CP 67 (attached as an appendix).

The State did not raise the issue of Hughes' other convictions or provide documentation of the convictions before Hughes testified. Nonetheless, during direct examination, defense counsel asked Hughes about his past convictions:

Q. Okay. In fact, Mr. Hughes, you have been convicted of shoplifting in the past, have you not?

A. Yes.

Q. In 2006 and 2005 in the City of Tacoma; is that correct?

A. Yes.

Q. In fact, it's been a rather rough last five or six years for you; correct?

A. Yes, it has.

Q. You had a theft in the second degree in 2007 in King County; is that correct?

A. Yes.

6RP 146.

Following direct examination, the State requested a side bar and argued that because Hughes admitted to shoplifting convictions in 2005 and 2006, "that obviates the need for me to prove further the convictions themselves. I believe it allows me to go into those convictions on cross-examination." 6RP 160. The court ruled that the State could clarify what Hughes had already testified to on direct examination. 6RP 163-64.

The State proceeded with cross-examination:

Q. Mr. Hughes, I want to start by clarifying what you testified to about your criminal history. You said you had a felony second degree theft in King County earlier in 2007?

A. Yes.

Q. A couple of months, few months before the incident at Old Navy?

A. Yes.

Q. And you had a 2006 shoplifting conviction from Tacoma Municipal Court?

A. Yes, I do believe so.

Q. In 2005, a conviction of shoplifting in Tacoma Municipal Court?

A. Yes, I do believe so.

Q. And actually, in 2005, there were two separate incidents where you were convicted of shoplifting in Tacoma Municipal Court?

A. Yes, sir.

Q. So **four times** you've been convicted for stealing things?

A. Yes, sir.

6RP 164-65 (emphasis added).

The record substantiates that pursuant to the court's ruling, the State would have been able to only introduce evidence of Hughes' 2007

conviction for second degree theft because the State did not raise the issue of Hughes' other convictions or provide documentation of those convictions before he testified. Defense counsel therefore had no tactical reason for questioning Hughes about his shoplifting convictions in 2005 and 2006. As a consequence of defense counsel's inexplicable direct examination, the State was allowed to cross-examine Hughes about three other convictions and draw the jury's attention to the fact that Hughes had four past convictions. Furthermore, the State emphasized during closing argument that when the jury weighs credibility, it "should consider that the defendant is a four-time convicted thief." 6RP 259. The State underscored that, "Those are called crimes of dishonesty. Those are crimes that allow you to determine, 'Hey, you know, when James Hughes raises his hand and says, I swear to tell the truth, the whole truth and nothing but the truth, that he might not take it the same way as Richard Peloquin does when he takes that same oath.'" 6RP 259.

It is evident that the focus on Hughes' past convictions damaged his credibility, which was detrimental to his defense because credibility was a critical aspect of the case. The outcome of the case hinged on whether the jury believed Hughes or Peloquin because no weapon was found. 5RP 126. Consequently, defense counsel's questioning about

multiple convictions, which opened the door and allowed the State to attack Hughes' honesty, led to the demise of his defense.

The record reflects that Peloquin's testimony raised reasonable doubt. He admitted that "it was hard" for him to see what Hughes had tucked in his pants and it looked like a gun but could have been a knife. 5RP 71-72. He admitted that statements in his incident report conflicted with his trial testimony. 5RP 80-81. Furthermore, he admitted that he failed to obtain any statements from the people gathered in Ben Bridge Jewelers who witnessed his interaction with Hughes. 5RP 82-83. In light of Peloquin's dubious testimony, there is a reasonable probability that the outcome of the trial would have been different but for defense counsel's performance which fell below an objective standard of reasonableness.

Reversal is required because defense counsel's performance was deficient and Hughes was prejudiced by his deficient performance. Strickland, 466 U.S. at 687.

D. CONCLUSION

For the reasons stated, and as justice requires, this Court should reverse and dismiss with prejudice, or in the alternative, reverse and remand for a new and fair trial.

DATED this 29<sup>th</sup> day of May, 2009.

Respectfully submitted,

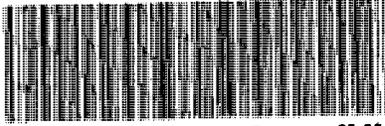


VALERIE MARUSHIGE

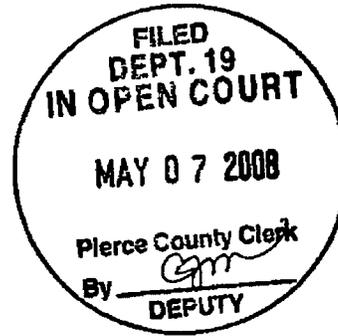
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Attorney for Appellant, James Rashon Hughes

# APPENDIX



07-1-05989-7 20727007 ORRE 05-09-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

JAMES ROSHON HUGHES,

Defendant.

CAUSE NO. 07-1-05969-7

ORDER REGARDING CRIMINAL  
CONVICTIONS OF DEFENDANT

Beginning on May 5, 2008, this matter came on for trial, the Honorable Linda CJ Lee, presiding. The State was represented by Deputy Prosecuting Attorney John M. Neeb, and the defendant was present and represented by his attorney, David Shaw.

Prior to trial, the court heard a motion in limine relating to the defendant's history of criminal convictions. The court heard the arguments of counsel and is familiar with the applicable rule, ER 609, and relevant case law on the subject. At the conclusion of the motion, the court entered an oral ruling on the issue, and now, being fully advised in this matter, the court hereby reduces its ruling to these written orders:

**IT IS HEREBY ORDERED** that the defendant's 2007 felony conviction for Theft 2 is admissible for impeachment purposes under ER 609 if the defendant testifies at trial.

**IT IS FURTHER ORDERED** that the defendant's 1999 felony convictions for Violation of Protection Order - Assault and Assault 3 and his 2002 felony conviction for Assault 2

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are inadmissible under ER 609. Those convictions shall not be referred to in any manner and/or for any reason during trial unless the court has changed this ruling in advance of the matter being raised in front of the jury.

**IT IS FURTHER ORDERED**, regarding the defendant's misdemeanor and gross misdemeanor criminal history, that the defendant's 2001 conviction for Theft 3, his 2005 conviction for Shoplift, his 2005 conviction for Shoplift, his 2006 conviction for Shoplift, and his 2007 conviction for Attempted Theft 3 are crimes of dishonesty and are admissible for impeachment purposes under ER 609 if the defendant testifies at this trial. Those convictions shall not be mentioned, however, unless the State has obtained sufficient documentation to establish proof of the conviction itself and the defendant's identity as the person who committed it, and has provided such information to defense counsel, prior to the defendant taking the stand to testify, and has raised the issue again to the court outside the presence of the jury.

**IT IS FURTHER ORDERED**, regarding the defendant's misdemeanor and gross misdemeanor criminal history, that the defendant's 1999 convictions for Attempted Assault 3 and Assault 4, his 1999 conviction for Criminal Assault (DV), his 2001 conviction for Criminal Attempt, his 2002 conviction for Obstruction, his 2002 conviction for False Statement, his 2004 conviction for Assault 4 (DV), his 2004 convictions for VNCO and Harassment, and his 2007 conviction for DWLS are inadmissible under ER 609. Those convictions shall not be referred to in any manner and/or for any reason during trial unless the court has changed this ruling in advance of the matter being raised in front of the jury. .

**FINALLY, IT IS HEREBY ORDERED** that if either party believes the other has violated any of the above orders, or if either party believes the door has been opened to evidence

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excluded by this order, that party shall first raise the issue in a hearing held outside the presence of the jury.

The court's oral rulings on these motions were given in open court in the presence of the defendant on May 5, 2008.

This order was signed in open court this 7<sup>th</sup> day of May, 2008.

[Signature]  
JUDGE LINDA CJ LEE

Presented by:

Approved as to form:

[Signature]  
JOHN M. NEEB  
Deputy Prosecuting Attorney  
WSB # 21322

[Signature]  
DAVID SHAW  
Attorney for Defendant  
WSB # 13994

