

COURT OF APPEALS
DIVISION II

No. 39998-9

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STATE OF WASHINGTON
BY 
DEPUTY

DIVISION II OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DAVON JONES,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR PIERCE COUNTY

Cause No. 08-1-00390-8

REPLY BRIEF OF APPELLANT

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ORIGINAL

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I. ARGUMENT

A. TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR SEVERANCE.

Although Davon Jones requested the Court on two separate occasions to sever the criminal charges, including at pretrial and at trial, the State argues that Mr. Jones waived such argument on appeal by supposedly failing to renew his pretrial motion. In fact, Mr. Jones did renew the motion at trial.

The State further argues that all factors weigh in favor of a joint trial, including the fact that evidence of the two charges would be cross-admissible. It is clear that the factors weigh in favor of severance, and any argument that the evidence would be cross-admissible is disingenuous.

1. Objection of Severance Was Properly Preserved.

The State is correct in its recitation that CrR 4.4(a)(2) requires that a pre-trial motion to sever to be renewed, otherwise severance is waived. However, the State is incorrect that Mr. Jones failed to renew his severance motion.

A defendant may make a pre-trial motion to sever under CrR 4.4(a)(1), but “must renew the motion *at trial* or it is waived under CrR 4.4(a)(2).” *State v. Ben-Neth*, 34 Wn.App. 600, 606, 663 P.2d 156 (1983) (emphasis added). Neither the Court rule nor the appellate courts interpreting the rule require that the motion be renewed at a certain moment in the trial proceedings. Rather, just that the motion be renewed at the trial.

Mr. Jones made a pre-trial motion to sever the criminal charges on October 12, 2009. The motion was denied. Mr. Jones then renewed his motion at trial in front of the trial judge.

Mr. Jones complied with CrR 4.4(a)(2) and renewed his motion to sever at trial. He did not waive his request to sever the charges.

2. Mr. Jones Has Established that All Factors Weigh in Favor of Severance.

Appellate Courts in Washington have long recognized that joinder of criminal charges is inherently prejudicial. *State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968), *vacated in part*, 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972).

A criminal defendant must be protected from (1) embarrassment or confoundment in presenting separate defenses; (2) the jury's use of evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; and (3) the jury use of cumulative evidence of the various crimes charged and finding guilt when, if considered separately, it would not so find. *Smith*, 74 Wn.2d at 755.

In order to determine whether the prejudicial aspects of joinder are mitigated or neutralized, the Court must consider (1) the strength of State' evidence on each charge; (2) clarity of defenses; (3) whether jury is properly instructed; and (4) cross-admissibility of evidence. *State v. Harris*, 36 Wn.Ap.. 746, 750,

677 P.2d 202, *Citing State v. Smith*, 74 Wn.2d 744, 446 P.2d 571 (1968).

The State argues that the State's evidence on each count was equally strong; defenses asserted were consistent; the jury was properly instructed; and the evidence of each could be cross-admissible under ER 404(b).

The State's arguments ignore important issues and facts contained within the record. First, there is substantial disparity between the strength of evidence of each charge as Mr. Jones' presence and actions in one charge, Count III, rested *solely* upon the credibility of a strung-out confidential informant whose account is contradicted by the recording of the incident. Second, the defenses in each count were materially different, with one defense requiring an admission of possession. Third, the Court did not instruct the jury that evidence from one count cannot be used to determine guilt on the other count. Fourth, evidence from each count would be clearly inadmissible at a separate trial of the other count, and the State's assertion of case law supporting its position is disingenuous.

a. Disparity in Strength of State's Evidence in Each Count.

The State argues that the strength of evidence for each of the two criminal counts was "equally strong." Specifically, the State cites the fact that Count III and County VII contained equally strong evidence because the former was supported by eye-witness testimony and the latter was supported by a drug detection dog and

subsequent search pursuant to a search warrant. However, the State's argument wrongfully presumes solid credibility of the eyewitness, a strung-out confidential informant attempting to avoid a 20 month prison sentence.

The State is correct that by *the time of her testimony*, Ms. Richards, the confidential informant, was finished with her informant contract. However, the State's argument completely ignores that *at the time of her involvement and original statements to the police*, Ms. Richards was working towards avoiding spending 20 months in prison. Further, she was working towards building a relationship with the Tacoma Police Department wherein she would actually profit monetarily from an ongoing role as a confidential informant. In fact, Ms. Richards had motivation to implicate as many people as she could in alleged drug transactions.

Since Ms. Richards could only stay away from drugs, such as heroin and crack, for only a day or two, her motivation clearly reached the level of lying to achieve her goals.

In addition, the State misrepresents evidence in the record. The State indicates that Ms. Richards was never out of the sight of the police after she was searched and until she returned with drugs in hand. Not true. In fact, she was out of sight of the police.

Most importantly, however, is that Ms. Richards testimony regarding Mr. Jones supposed involvement is *not* supported by the only unbiased clear evidence in the case – the audio recording of the transaction. Ms. Richards says that David Jones asked his brother, Davon, for more drugs in front of Ms. Richards – and

Davon counted out drugs he allegedly provided David. Yet, on the audio recording of the transaction, there is no evidence whatsoever supporting Ms. Richards testimony. In fact, the recordings support the testimony of David and Davon Jones – that Davon had left the car to go into a store before Ms. Richards and David conducted the transaction.

Ms. Richards' credibility is seriously suspect *and* the audio recordings do not support her allegation of Mr. Jones' involvement. Since the *only* evidence in Count III against Mr. Jones is Ms. Richards testimony, the disparity between the strength of the two counts is clear. On the one hand, Mr. Jones is found in a car with drugs. On the other hand, a strung-out junkie with reasons to lie to stay out of prison and keep a drug habit going is the *only* evidence against Mr. Jones.

b. Clarity of Defenses

The State asserts that the defense asserted to each count were identical. In fact, they are not. The defense of unwitting possession in Count VII is an affirmative defense, inherently requiring the admission of possession. The admission of possession of one count is contradictory to a general denial in the other count.

There was a likelihood of confusion of defenses to the two criminal charges.

c. Trial Court Did Not Properly Instruct Jury

Since the Court instructed the jury to not consider the verdict on one count when determining the verdict on any other count, the State asserts that this instruction is sufficient to ensure that the jury not consider evidence supporting one count when determining the other count. The State's deputy prosecutor vitiated any effectiveness of the instruction during closing arguments. The prosecutor specifically referenced occurrences from the January 22, 2008 incident, Count VII, when arguing that the State had proven Count III beyond a reasonable doubt. RP 337.

The reference to evidence from Count VII when arguing the elements of Count III invited the jury to consider the evidence from County VII when determining guilt on Count III, and vice versa.

In *State v. Harris*, 36 Wn. App. 746, 677 P.2d 202 (1984), the Court was faced with the same situation, when the prosecutor invited the jury to consider evidence from one crime to support a finding for a separate count. The Court specifically determined that such argument was improper and created actual prejudice against the defendant in the joining of the charges at trial.

The Court's instructions to the jury were insufficient in preventing the jury from considering evidence from one count when determining guilt on the other count.

d. Evidence Would Not Be Cross Admissible.

When evidence of one crime *would not be admissible* in a separate trial of another, it is an abuse of discretion for a trial court to deny a defendant's motion to sever. *State v. Harris*, 36 Wn. App. 746, 752, 677 P.2d 202 (1984).

It is absolutely clear that evidence regarding the separate drug charges levied against Mr. Jones would not be admissible at separate trials.

The State's presentation of merely one case in support its assertion that the evidence would be cross admissible is, in all due respect, disingenuous, and a recitation of the ruling without consideration of the facts. The State presents only *State v. Thomas*, 68 Wn.App. 268, 272-74, 843 P.2d 540 (1992), where in evidence of a drug transaction an hour before a second transaction at the same location was deemed admissible at trial for the second transaction. The evidence was permitted because it was evidence from the exact same time period as the arrest and established the defendant's intent *at that time*.

Thomas cannot be applied to the instant case, where the alleged drug transactions were seven months apart, in completely different locations, in completely different cars, and surround completely difference people.

There is no valid argument that an exception be made to ER 404(b), prohibiting evidence other crimes, wrongs or acts is not admissible to prove that a person acted in conformity therewith.

The primary concern regarding joinder of charges at trial is whether the jury can reasonably be expected to compartmentalize the evidence so that evidence of one crime does not taint the jury's consideration of another crime. *State v. Bythrow*, 114 Wn.2d 713, 720-21, 790 P.2d 154 (1990), quoting *United States v. Johnson*, 820 F.2d 1065, 1071 (9th Cir. 1987).

The State asserts that the length of trial and simplicity of the issues mandate a conclusion that the jury could compartmentalize the evidence of each crime. However, the cases against Mr. Jones are absolutely distinct from the facts in *Bythrow*. One count against Mr. Jones involved only testimony from a confidential informant, strung out, with substantial motivation to lie, and whose testimony is unsupported by the audio recordings. At some point, we must recognize the reality of human nature and perception. The evidence of drug possession seven (7) months later has to effect the jury's determination of the credibility of the confidential informant. To think otherwise is to completely ignore human nature. A jury may be able to compartmentalize to a degree, but we cannot expect them to fully check their socialized human nature at the door of the jury room.

Regardless of the Court's determination of the other factors, the fact that the evidence of the separate counts would not be admissible at separate trials requires a finding that the trial court abused its discretion in denying Mr. Jones' two motions for severance.

**e. Weighed Against Judicial Economy,
Severance Required.**

The State argues that there was little, if any, prejudice against Mr. Jones by trying the two separate charges to the same jury. From a practical standpoint, this position is simply wrong. Any reasonable doubt that existed regarding either of the charges was extinguished by the presentation of evidence of the other charge. To conclude otherwise is to completely ignore any reality of human nature.

The credibility of Ms. Richards was seriously in question. However, any jury would likely be more inclined to find her credible based upon evidence that seven (7) months later, Mr. Jones was detained in a car that contained the same contraband Ms. Richards alleged Mr. Jones to have been involved. Likewise, regarding Count VII, a jury would be less likely to determine unwitting possession based upon the presentation of evidence that Mr. Jones was alleged to have been involved with a drug transaction seven (7) month prior.

The inherent practical effect of the presentation of evidence of the two different crimes at a joint trial is obvious. A contrary conclusion is to determine that cases are tried in a vacuum, absent human nature. This is especially true when the evidence from each separate charge *would not* be cross admissible.

The State further argues that judicial economy is served by joint trial because (1) the incidents were part of same continuing investigation; (2) involved the same defendant; (3) the same group

of police officers; (4) *required duplication of virtually all of the testimony; and (5) nearly all of the State's witnesses would have testified in each trial.* The State's assertions are incorrect.

First, Davon Jones was not the target of the investigation, but a collateral finding based solely upon the strung-out confidential informant's attempts to avoid a 20 month sentence. Second, of course they involved the same defendant – that was the reason for the motion to sever the charges and not a factor in determining judicial economy balances against the defendant's rights.

Most importantly, the State completely misrepresents the need for presentation of duplicate testimony and witnesses if there were two trials. In total, the State called six (6) witnesses to testify at trial: Kenneth Bowers, Barry McColeman, Maude Kelleher, Jennifer Richards, William Brand, and Kenneth Smith. Of the six (6) witnesses, only one testified regarding both charges, Officer Kenneth Bowers.

The remaining five witnesses testified *only and specifically to one charge.* Officer Barry McColeman testified specific and solely regarding Count III, and his role in the video/audio recording of the June 2007 transaction. RP 135-146.

Maude Kelleher testified specific to and solely regarding Count III, and the proximity of the June 2007 transaction to a school bus zone. RP 147-148.

Jennifer Richards testified specific to and solely regarding Count III, and her role as the confidential informant for the June 2007 transaction.

Officer William Brand testified specific to and solely regarding Count VII, and his role and the K-9 officer and search of the car in January 2008. RP 222-241.

Officer Kenneth Smith testified specific to and solely regarding Count VII, and his role in arresting Mr. Jones in January 2008.

While Officer Kenneth Bowers testified regarding both Count III and Count VII, the bulk of his testimony centered around Count III, the June 2007 transaction. Officer Bowers' testimony is presented in RP 39-131. The portions of the record devoted to his testimony regarding Count III are: RP 39-79; 100-117; 120-131. In stark contrast, the portions of the record devoted to his testimony regarding Count VII are: RP 80-100.

It is curious that the State claims that the two trials would require duplicate testimony and all witnesses to testify twice, when it clearly is not true. In fact, there would have been no duplicate testimony, five of the six witnesses would not have testified twice, and the one witness that would testify in both trial would only provide minimal testimony in a separate trial on Count VII.

The only resource that would have doubled would have been the use of a second jury. While judicial economy is recognized as being important, when the *only* saving by have one trial is the use of a second jury, and each trial would be just a few days, it cannot be so important as to sacrifice a fair trial.

B. MR. JONES' A DEFFICIENT CONDUCT WAS THE SOLE CAUSE OF THE ADMISSION OF INADMISSBLE HIGHLY PREJUDICIAL EVIDENCE OF OTHERWISE INADMISSIBLE CRIMINAL CONDUCT, INCLUDING OTHER DRUG ALLEGATIONS AND PRIOR CRIMINAL CONVICTIONS AND ARRESTS.

The Sixth Amendment of the United States Constitution entitles a defendant to “effective” assistance of counsel acting on his or her behalf. A claim of ineffective assistance of counsel requires the Court to consider the entire record and determine (1) whether defense counsel’s performance was deficient and (2) whether the performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Defense counsel’s performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). A presumption of effective conduct is sufficiently rebutted when there is no legitimate tactic explaining counsel’s conduct. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Prejudice occurs when there is a reasonable probability that the outcome would have differed but for the deficient performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The fundamental question is whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland* at 686.

The State attempts to carve “trial strategies” or “trial tactics” out of Mr. Jones’ trial counsel’s clear deficiencies at trial. In doing so, the State ignores that the strategies or tactics must be *legitimate*. Mr. Jones’ trial attorney’s actions at trial were to sole and direct cause of the jury learning of Mr. Jones’ previous felony drug charges, later plead to misdemeanors, and bail jumping convictions during the felony drug charges. Further, the trial attorney was the direct cause of the jury’s knowledge of the police’s beliefs in Davon’s involvement throughout the criminal investigation, the police’s belief in his involvement in a May 2007 transaction, the presence of the same car at the May 2007 transaction, and allegations of Davon’s “usual” actions in the drug transactions.

1. Prior Criminal History

The issues surrounding the admission of evidence of Mr. Jones’ criminal history center around elicited evidence of Davon’s prior criminal prior drug charges and convictions; failure to object to the State’s further cross examination of Davon’s criminal history; and failure to object to the introduction of copies of Davon’s plea agreement in prior drug case, including marijuana and bail jumping convictions and the initial felony drug charge.

Regarding elicited evidence of Mr. Jones prior criminal convictions, the State concentrates solely on Mr. Jones’ statements pertaining to driving changes, completely ignoring his trial counsel’s question: “[H]ave you ever been arrested for or convicted of a drug crime.” RP 300. In fact, the State’s entire

analysis is specific to Mr. Jones' statements regarding his driving convictions.

The question regarding arrest or conviction of drug crimes has nothing to do with misdemeanor driving convictions, and can no way be deemed to rehabilitate Mr. Jones' statements about being arrest for driving with a suspended license and without interlock device. In fact, knowing that a defendant has been arrested for and convicted of drug offenses, there is virtually *never* a reason to ask the question Mr. Jones' trial counsel asked.

The State wants to paint the picture that Mr. Jones' defense was that he was a previous drug user that was not a drug dealer. Nowhere in the record, including defendant's closing argument, is this theory offered by the defense. The State's contention of the defense theory is nonsensical and unsupported by the record.

There is no legitimate trial strategy for the question to be asked. None. The State attempts to distinguish the controlling cases on this issue, *State v. Saunders*, 91 Wn.App. 575, 958 P.2d 364 (1998), because counsel in *Saunders* asked if the defendant had been previously convicted of a "similar offense," as opposed to Mr. Jones' counsel who asked "[H]ave you ever been arrested for or conviction of drug crimes." The difference between "similar offense" and "drug crimes" is not one that has any bearing on the instant matter.

The question was irresponsible, without valid reason and in complete disregard for opening the door for the State to follow up with more questions regarding previous drug arrests and convictions. Trial counsel's question did not "minimize" Mr.

Jones' state about his driving charges, and there is no logical legitimate argument that a specific question pertaining to drug crimes would assist in minimizing driving offense at a trial for new drug charges.

In fact, the State's follow up on the question regarding prior drug convictions presented further problems for Mr. Jones, allowing further extensive cross examination regarding prior convictions and admission of evidence pertaining to Mr. Jones' plea agreements for a marijuana charge and accompanying bail jumping amended from possession with intent to deliver. RP 259, 300-07, 310, 315-15, 319-20.

The State specifically inquired about the original charge of possession with intent to deliver that was amended to a misdemeanor possession. Mr. Jones trial counsel *only* argued against questioning about bail jumping charges, failing to object to questioning about the originally filed drug charges. RP 303-307.

Subsequently, Mr. Jones' trial counsel did not object to the admission of Mr. Jones' plea agreements or judgment and sentence regarding the drug and bail jumping convictions. RP 316.

Therefore, by the time the trial was over – as a direct and sole result of Mr. Jones' trial counsel's question “[H]ave you ever be arrested for or convicted of a drug crime” – the jury learned not only that Mr. Jones had been convicted of misdemeanor marijuana possession, but that he had originally been arrested and charged with possession *with intent to deliver* AND that he had been charged with multiple counts of bail jumping on the felony drug charge and plead guilty to one of the bail jumping charges. To

make matters worse, the jury not only *heard* of the charges and convictions, but the charging documents, plea agreements, and judgment/sentence were admitted into evidence, further compounding the jury's review of the issues.

All of this stemmed from trial counsel's question that was not just ill-advised, but clearly falling far below the objective standard of reasonableness. Like *Saunders*, there was no reasonable or legitimate reason for the question, and the answer caused and permitted an onslaught of further questions and evidence far beyond the misdemeanor marijuana conviction. Issues and evidence pertaining to the drug charges and convictions have nothing whatsoever to do with the misdemeanor driving charges mentioned by Mr. Jones, as suggested by the State.

The prejudice from the admissions of evidence of Mr. Jones' past drug arrests and convictions is clear. A jury would use the evidence of these incidents, combined with evidence of bail jumping, to conclude that he acted in conformity on the dates of the charged crimes. There would no other use for such evidence. For the same reason that ER 404(b) prevents use of such evidence, it clearly prejudiced Mr. Jones at trial.

When viewed against the evidence in the record, the prejudicial effect of the improperly elicited evidence is further clarified. Regarding Count III, the only evidence that Davon Jones was involved in a drug transaction was that of Ms. Richards, a strung-out junkie that was trying to avoid 20 months in prison. The audio/video of the alleged transaction did *not* support her testimony – as statements supposedly made regarding Davon's

alleged involvement did not exist. With Ms. Richards' credibility in serious question – the prejudicial effect of the prior arrest and conviction evidence would likely sway the jury.

Regarding Count VII, Mr. Jones was pulled over in his sister's car, with drugs ultimately detected by a K-9 detection dog. Mr. Jones testified he did not know that the drugs were hidden in the car, as he had recently borrowed it. There was conflicting testimony at trial as to whether Mr. Jones admitted that the drugs were his – only one officer states that he heard such a confession. Thus, the credibility of Mr. Jones was the focal issue for Count VII.

All evidence pertaining to Davon's prior arrests, charges, and convictions are clearly inadmissible pursuant to ER609(a)(1). None of the evidence pertains to crimes of dishonesty. Any probative value is clearly outweighed by the prejudicial value of the evidence. Importantly, such evidence is inherently prejudicial as Mr. Jones was a witness and it shifts the jury focus from the merits of the charge to the defendant's general propensity for criminality. *Saunders* at 580, *citing State v. Hardy*, 133 Wn.2d 701, 709-10, 946 P.2d 1175 (1997).

Trial counsel's question "Have you ever been arrested for or convicted of a drug crime" had no legitimate purpose towards trial strategy or trial tactics. All the evidence elicited and admitted as a result of this improper question clearly prejudiced Mr. Jones, as the jury was then aware of prior drug convictions and felony drug distribution charges and left only to conclude that Mr. Jones was acting in conformity in the counts presented at trial.

2. Prior Investigated Drug Transactions

The issues pertaining to evidence presented regarding the police's investigation of Davon Jones, for uncharged suspected criminal activity, includes failure to object and elicited testimony regarding the officer's belief of Davon Jones' presence at a May 14, 2007 drug transaction wherein David Jones said he had to contact his brother (Davon) for more drugs; trial counsel's offer into evidence of a video of the May 14, 2007 drug transaction showing the same car Davon was driving on June 7, 2007 (Count III); and trial counsel's failure to object to State witnesses' testimony regarding Davon Jones' "usual" actions in drug transaction.

In each instance, Mr. Jones' trial counsel's performance fell below an objective standard of reasonableness. There was absolutely no legitimate trial strategy or tactic to elicit or permit admission of such evidence – each having to do with suspicion of Mr. Jones' criminal activity other than the charged crimes. The prejudicial effect of each is clear - the jury's consideration of such evidence can only be to infer guilt with regard to the charged crimes.

Mr. Jones' trial counsel fully opened the door to the presentation of evidence pertaining to a May 14, 2007 alleged drug transaction when she asked the question "And throughout the entire time for that investigation the only information that you have that Davon Jones was involved in any activity was on June 7, 2007; is that true?" The State actually objected to the question, and trial counsel *argued for the objection to be overruled*. RP 109.

The officer answered outlining that he had developed information previous to June 2007 that he believed established Davon was involved in other transactions.

The State asserts that the question was a legitimate trial tactic or strategy in response to the officer's earlier testimony that Davon was a potential target on June 7, 2007 because of information from the informant. RP 49. The State's point is that after the officer's direct examination, the jury may have been left with the impression that Mr. Jones was involved in previous drug transactions. It is a curious trial strategy to follow up testimony that could give an impression of other similar criminal activity with questions that permit the officers to explain *why* such activity was suspected.

Virtually every criminal defense attorney would recognize and advise that such questions presented by trial counsel would result in an officer's explanation of prior suspected activity, *and* open the door to the State's further examination. Even more shocking in the instant matter is that trial counsel already had the May 14, 2007 video, and knew of the police's suspicions.

Not only did trial counsel's question elicit the officer's belief of Mr. Jones's prior involvement, but enabled the officer to testify regarding a May 14, 2007 transaction wherein Davon's brother, David, reportedly told the confidential informant that he needed to get more drugs from his brother (Davon), and shortly after a black suburban drove to the location, the same suburban as involved in the June 7, 2007 charge. RP 117-18. Trial counsel's

questions permitted the jury to hear about a prior transaction with nearly the same facts alleged in Count III.

While it may be legitimate trial strategy to undercut witness' credibility, in order to actually be legitimate, the trial strategy must conceivably work towards that end. There was no way that trial counsel's question would undercut the officer's testimony. While she may have established that the only time the officer personally *saw* Mr. Jones was on June 7, 2007 allegation, the question of whether the officer had "information" permitted the officer to outline all reasons for suspected criminal activity other than the charged crimes.

While the officer admitted that they could not physically see the driver of the suburban on May 14, 2007, the officer was able to explain that the suburban arrived in response to David Jones stating that he had to call his brother (Davon). The officer was able to explain to the jury why Davon was suspected in May 14, 2007.

Asking an officer about "information" does *not* undercut his credibility, but allows the officer the clear cut opportunity to bolster his belief that the defendant is a criminal. The question cannot be deemed to support a legitimate trial strategy.

Trial counsel's offer into evidence the video of the May 14, 2007 had absolutely no *legitimate* trial strategy at all. The officer already testified that they could not see into the truck to see the driver. There was no need to admit the video. In addition, it permitted the confidential informant to testify that Davon Jones usually drove the suburban.

Trial counsel's performance elicited and permitted testimony and evidence that the police believed prior to June 7, 2007, Davon was a co-conspirator in drug distribution, that the police believed Davon was involved in a May 14, 2007 transaction, that Davon's brother called him to the scene on May 14, 2007 and a short while later a black suburban arrived, the same one Davon was driving on June 7, and that Davon usually drives that car.

All of this testimony was the result of trial counsel's question about whether the police suspected Davon's involvement prior to June 7, 2007. The question presented was so obviously going to result in the onslaught of otherwise impermissible evidence, that there could not have been a legitimate trial strategy or tactic to the question. The State's assertion that the question was legitimately used to undercut the officer's credibility is nonsensical, and virtually every criminal attorney would advise against such a question, knowing the results.

The prejudice of the admissions of evidence of the police's suspicions of prior drug transactions and Davon's involvement in a May 14, 2007 transaction is clear. The evidence can only influence a jury to believe that Davon is involved in ongoing criminal activity, and therefore must have been on June 7, 2007 and January 22, 2008. Thus, any arguments pertaining to the confidential informant's credibility or Mr. Jones' unwitting possession would be destroyed by the presentation of such evidence.

3. Aggregate of Trial Counsel's Conduct

Defense counsel's insufficient performance resulted in prejudice to Davon Jones as there is a reasonable probability and likelihood that the outcome would have been different but for the introduction of inadmissible prior transaction and criminal history evidence. *See Strickland*, 466 U.S. at 694, *see also Hardy*, 133 Wn.2d at 712-13. The prejudicial effect of trial counsel's performance at trial is clear.

As a direct result of trial counsel conduct, which fell below objective reasonableness standard, the jury learned: that Mr. Jones had been previously charged with possession of drugs with intent to deliver, charged and convicted of bail jumping what facing felony drug charges, convicted of drug possession, had been told by an informant that Mr. Jones was a co-conspirator in drug distribution, that the police suspected Mr. Jones' involvement in a May 14, 2007 drug transaction, and that Mr. Jones had been called to the May 14, 2007 transaction and a car he was known to drive arrived in response.

This onslaught of prejudicial evidence at the result of trial counsel's deficient conduct would all have otherwise been inadmissible. However, trial counsel's conduct either actually elicited the evidence or opened the door to the admission of this evidence. For the exact reasons that such evidence is inadmissible pursuant to ER 404(b) and ER 609(a)(1), this evidence prejudiced Mr. Jones.

Mr. Jones' attacks on the credibility of Ms. Richards, the confidential informant, were rendered meaningless by the amount of evidence his counsel presented regarding his other alleged involvement with drug transactions. Likewise, Mr. Jones' defense of unwitting possession was completely thwarted by this otherwise inadmissible evidence presented by his counsel.

The prejudice is obvious and severe. Each act and/or question by his trial counsel which elicited or permitted the admission of the inadmissible evidence was *not* a legitimate trial tactic or strategy. Any assertion otherwise stretches logic well past the confines of reason. Not only with the questions or acts of trial counsel so obviously fail to accomplish what the State alleges to be "legitimate strategy" or "tactic," but the resulting damage of the questions and acts was so obvious and so severe that ignoring the highly likely damage and pursuing the questions falls below the objective standard of reasonableness.

There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *See Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984).

II. CONCLUSION

Mr. Jones did not waive his argument for severance. As required by the court rules, he renewed his pretrial motion at trial, both of which were denied.

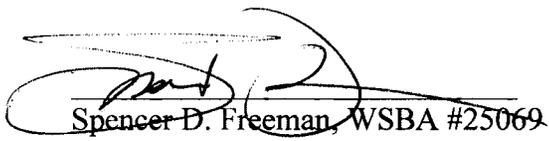
The trial court erred in denying the motions for severance as none of the prejudicial aspects of joinder were mitigated or

neutralized. Importantly, the lack of cross-admissibility of evidence between the charges resulted in extreme prejudice to Mr. Jones at trial.

Mr. Jones' was denied effective assistance of counsel. As a result of actions and questions without legitimate trial strategy or tactic, his counsel directly caused the jury to learn of prior drug distribution arrests, prior drug convictions, bail jumping charges and convictions, and the police's suspicions of his alleged involvement in other uncharged criminal activity.

As a result, Mr. Jones did not receive a fair trial. Therefore, it is respectfully requested that for all reasons contained herein, the convictions be vacated and the matter remanded for a new trial, separate trials on each count.

DATED this 22nd day of February, 2011


Spencer D. Freeman, WSBA #25069
Attorney for Appellant

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON,
Respondent,
vs.
DAVON JONES,
Appellant.

Case No.: 39998-9

CERTIFICATE OF
SERVICE

I certify that on the 24th day of February, 2011, I caused a true and correct copy of *Reply Brief of Appellant* to be served by hand delivery to

on:

Pierce County Prosecuting Attorney's Office
Counsel for Respondent
930 Tacoma Ave South, Rm 946
Tacoma, WA 98402

and to:

Division II of the Court of Appeals
for the State of Washington
950 Broadway # 300
Tacoma, WA 98402-4454

DATED this 24th day of February, 2011.



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ORIGINAL