

**Court of Appeals No. 41638-7**

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

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**STATE OF WASHINGTON**

**Plaintiff/Respondent,**

**v.**

**JOSEPH CORTEZ JONES,**

**Defendant/Appellant.**

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**BRIEF OF APPELLANT**

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**Appeal from the Superior Court of Pierce County,  
Cause No. 10-1-01468-7  
The Honorable KITTY-ANN van DOORNINCK, Presiding  
Judge**

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## **I. ASSIGNMENTS OF ERROR**

1. Mr. Jones was denied his right to a fair trial.
2. Mr. Jones received ineffective assistance of counsel.
3. The prosecutor committed misconduct.
4. Mr. Jones' was denied his Sixth Amendment confrontation rights.
5. There was insufficient evidence to convict Mr. Jones of first degree burglary
6. The trial court exceeded its sentencing authority.
7. The trial court erred in denying Mr. Jones' post-trial motion.

## **II. ISSUES PRESENTED**

1. Did ineffective assistance of counsel, prosecutorial misconduct, trial irregularities, and admission of inadmissible evidence deprive Mr. Jones of a fair trial? (Assignments of Error No. 1, 2, 3, 4, and 5).
2. Was it ineffective assistance for Mr. Jones' counsel to fail to call witnesses whose testimony would have corroborated the testimony of Mr. Jones where the dispositive issue at trial was the credibility of Mr. Jones and Mr. Barrows? (Assignments of Error No. 1, 2).
3. Was it ineffective assistance for Mr. Jones' counsel to elicit highly prejudicial testimony in the form of improper opinions and fail to ask the court to strike the testimony and admonish the jury to disregard it? (Assignments of Error No. 1, 2)
4. Was it ineffective assistance for Mr. Jones' counsel to fail to object when the prosecutor repeatedly made statements vouching for Mr. Barrow's credibility during closing

argument which were not based on any inferences from the evidence? (Assignments of Error No. 1, 2).

5. Was it prosecutorial misconduct to repeatedly vouch for the credibility of a witness? (Assignments of Error No. 1, 3).
6. Was it prosecutorial misconduct to encourage the jury to convict on the basis of facts not in evidence? (Assignments of Error No. 1, 3).
7. Was it prosecutorial misconduct to misstate the law to the jury? (Assignments of Error No. 1, 3).
8. Was Mr. Jones denied a fair trial where the court admitted a 911 recording of testimonial statements of Monique Young where Mr. Jones had no opportunity to interview her before trial and no opportunity to cross-examine Ms. Young at trial? (Assignments of Error No. 1, 4).
9. Was there insufficient evidence to convict Mr. Jones of first degree burglary where the only testimony regarding whether Mr. Jones lawfully entered Ms. Young's apartment was that he had a key to the apartment but forcibly entered it? (Assignment of Error No. 5).
10. Did cumulative error deny Mr. Jones a fair trial where the jury was exposed to inadmissible hearsay which bolstered the credibility of the State's witnesses, Mr. Jones' trial counsel failed to object to improper witness testimony and improper closing argument by the prosecutor, and the prosecutor made improper closing argument? (Assignments of Error Nos. 1, 2, 3, 4, and 5).
11. Did the trial court exceed its sentencing authority where it imposed a variable period of community custody, contrary to RCW 9.94A.701? (Assignment of Error No. 6).
12. Did the trial court abuse its discretion in denying Mr. Jones' post trial motion for relief from judgment where its decision was based upon untenable grounds and reasons? (Assignment of Error No. 7).

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

On April 1, 2010, Joseph Cortez Jones and Monique Young were involved in an intimate relationship in which Mr. Jones stayed at Ms. Young's apartment and Ms. Young stayed at Mr. Jones' house, and each had a key to the other's residence. 10/12/10 RP 122; RP 133. Mr. Jones was financially responsible for Ms. Young. 10/12/11 RP 134.

Because Ms. Young had no car, Mr. Jones routinely drove her to work. 10/12/11 RP 123. On April 1, 2010, without calling her in advance, Mr. Jones went to Ms. Young's apartment with the intention of giving her a ride to work that evening. *Id.*; RP 124. It was not Mr. Jones' habit to call before going to Ms. Young's apartment: he "just pretty much showed up." 10/12/10 RP 124.

Mr. Jones testified that he first knocked on Ms. Young's door, but heard nothing from inside, so he placed his key in the lock, and then "heard something back there," but didn't know if it was Ms. Young "or a guy or the TV[.]" *Id.* Mr. Jones began to open the door when Donald Ramsey Barrows "pushed it shut." *Id.*, RP 125.

Mr. Jones testified that he "got upset and . . . pushed the door," then entered the apartment (RP 125), and "before [Mr. Jones] could even

like stand straight up [Mr. Barrows] basically hit me, struck me two times in the face.” 10/12/10 RP 126.

Mr. Barrows was a friend of Ms. Young, having met her at her work. RP 38. He specifically testified that he was not in a “boyfriend/girlfriend relationship” with Ms. Young. 10/12/10 RP 39.

Ms. Young called Mr. Barrows on April 1, 2010 and asked him to give her a ride to work that evening. 10/12/10 RP 41. Mr. Barrows testified that he had been in Ms. Young’s apartment for 10-15 minutes when Mr. Jones knocked on the door. 10/12/10 RP 42, RP 43. Mr. Barrows stated that he walked over to the locked door to see what was going on “and then the door came down” (10/12/10 RP 43) because Mr. Jones “kicked it.” 10/12/10 RP 44. Mr. Barrows stated that the door “came flat down where it hit me in the face,” and that Mr. Jones “came straight toward me and we got into a fight.” 10/12/10 RP 44-45.

Mr. Jones and Mr. Barrows both testified that they fought with each other immediately upon Mr. Jones’ entrance into Ms. Young’s apartment. *See* 10/12/10 RP 45; 10/12/10 RP 126. Mr. Barrows testified that Mr. Jones “had both hands around my neck and I was just gasping for air and I couldn’t really talk or anything, just passed out.” 10/12/10 RP 49. Mr. Jones testified that he had only one hand on Mr. Barrows’ throat

to hold Mr. Barrows off, and that he “never had two hands on his neck.”  
10/12/10 RP 128.

After the fighting stopped, Ms. Young placed a call to 911.  
10/12/10 RP 129-130. Mr. Jones saw and heard Ms. Young on the phone  
with the police as he walked past her in the apartment parking lot, then got  
into his car and left. 10/12/10 RP 129-130. When the investigating  
officer arrived at Ms. Young’s apartment, Mr. Barrows was in the  
bedroom with an ice pack on his face. 10/12/10 RP 110. Although  
paramedics had been called by the investigating officer, Mr. Barrows  
refused to go to the hospital. 10/12/10 RP 115.

The State issued a material witness warrant for Ms. Young on  
October 1, 2010, but was not able to locate her, and she did not testify at  
trial. 10/11/10 RP 7.

#### **B. Procedural Background**

On April 5, 2010, Mr. Jones was charged with one count of  
burglary in the first degree and one count of assault in the second degree  
by recklessly inflicting substantial bodily harm in violation of RCW  
9A.36.021(a)(a), and in the alternative, of assault by strangulation, in  
violation of RCW 9A.36.021(1)(g). CP 1-2.

Both the State and Mr. Jones filed Motions in Limine regarding the  
admissibility of the 911 recording. The State argued that the tape was

admissible under ER 803(a)(1) (present sense impression) and/or ER 803(a)(2) (excited utterance). CP 9-10. The State also argued that the 911 recording was admissible under *State v. Ohlson*, 162 Wn.2d 1, 178 P.3d 1273 (2007) because the statements made by Ms. Young during the recording were nontestimonial. CP 10-12.

Mr. Jones argued in his Motions in Limine that the 911 recording should not be admitted without the State laying a proper foundation and presenting proper authentication. CP 18.

On October 13, 2010, Mr. Jones was found guilty of burglary in the first degree (CP 84) and guilty of assault by recklessly inflicting substantial bodily harm. CP 85.

After trial but before sentencing, trial counsel Paula Olson withdrew and Bryan G. Hershman substituted as counsel for Mr. Jones. CP 100.

On December 17, 2010, Mr. Jones filed a Motion re: Arrest of Judgment, per CrR 7.4, and New Trial per CrR 7.6, and Relief from Judgment, per CrR 7.8 (CP 121-128), together with a Declaration from Monique Young. CP 129-130. Ms. Young stated in her Declaration that Mr. Jones had a key to her apartment; that they cohabited together; that Mr. Jones paid for the apartment for her; that Mr. Jones had come and gone from the apartment for three years prior to the incident; that Mr.

Jones usually drove her to work; that because they had an argument, she was not sure whether Mr. Jones would pick her up, so she called Mr. Barrows to drive her to work on the day of the incident; that Mr. Jones did not know Mr. Barrows would be at the apartment; that Mr. Jones opened the apartment door with his own key; that “the door opened about 1-1/2 feet, at which point, Donald Barrows attempted to slam the door in Mr. Jones’s face”; that Mr. Jones was taken “completely off guard, and he reflexively slammed open the door”; that Mr. Barrows “slugged Mr. Jones in the face (2 times)”; and that “Mr. Jones immediately defended himself, and hit Donald Barrows several times, and the event was over”; that Donald Barrows lied on the stand in a number of ways; and that Mr. Barrows told her that he “was going to do everything, include lie, to get Mr. Jones sent to prison.” CP 129-130.

The Court stated that she had “just looked at” Mr. Jones’ Motion, but was “going to deny your motion for a new trial, all that other stuff.” 12/17/10 RP 193. The Court also stated, “Let’s sentence him. If you want to then set a motion and do an order transporting him back, we can do that at a time that’s convenient for everybody involved.” *Id.*

On December 17, 2010, Mr. Jones was sentenced to 75 months and ordered to pay costs and \$2,100 restitution, followed by a variable period of community custody. CP 107-120.

A Scheduling Order was also entered on December 17, 2010, setting Mr. Jones' post-trial Motion for March 4, 2011. CP 175. On May 2, 2011, another scheduling Order for a hearing on the Motion was entered, setting the Motion for May 27, 2011. CP 176. The hearing on the Motion was finally held on June 17, 2011, at which time declarations from Marcia Lane and Joanna Juarez supporting the Motion and corroborating Mr. Jones' trial testimony were submitted. CP 165-167; CP 170. The Court ruled:

Probably not a surprise, I'm going to deny your motion. There was much discussion about the material witness warrant and the attempts to get the witness and the statements that she had made to the police at the time. And I don't know whether it was a trial tactic or what it was, in terms of not having her appear, but it was clear to me that the defendant did not want her to appear for trial. That's my impression at the time. I'll just share that for the record.

He was found guilty on October 13<sup>th</sup> and I believe we had sentencing December 17<sup>th</sup> and I'll note that it's many, many months later, and to have friends and family come forward is difficult, in terms of credibility, for me to believe much.

Anyway, I'm denying the motion today and obviously you have your remedy at the Court of Appeals.

6/17/11 RP 10-11; CP 163.

#### **IV. ARGUMENT**

##### **A. MR. JONES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL**

To prove ineffective assistance of counsel, a defendant must show that defense counsel's performance was deficient, and that this deficient performance prejudiced him. *State v. Hendrickson*, 129 Wn.2d 61, 77–78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70 (2006). 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 (1998). “Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *State v. Powell*, 150 Wn.App. 139, 153, 206 P.3d 703 (2009).

Courts presume that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Claimed deficient performance cannot be based on matters of legitimate trial strategy or tactics. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

*Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069.

1. Mr. Jones' trial counsel's failure to call Monique Young and Marcia Lane to testify fell below an objective standard of reasonableness.

At the hearing on Mr. Jones' post trial Motion, the prosecutor stated that when she spoke with Monique Young on September 1, 2010, (more than a month before trial), Ms. Young told her that "the defendant, her boyfriend, was defending himself from Mr. Barrows and that Mr. Barrows was the initial aggressor," and that Ms. Young had "previously provided that information to the defendant's attorney of record, Paula Olson." 6/17/11 RP 7.

Ms. Lane stated in her Declaration that she was "never contacted by anyone about testifying in this case, nor did anyone try to take a statement from me." CP 171.

Ordinarily, the decision whether to call a witness is a matter of trial tactics and will not support a claim of ineffective assistance. *State v. Kolesnik*, 146 Wn.App. 790, 812, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050, 208 P.3d 555 (2009). However, if the failure to call witnesses was unreasonable and resulted in prejudice or if there is a reasonable probability that, had the lawyer presented the witnesses, the outcome of the trial would have been different, a failure to call witnesses

will support a claim of ineffective assistance of counsel. *State v. Sherwood*, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

In this case, trial counsel had been told by Ms. Young more than a month before trial that Mr. Jones acted in self defense and that Mr. Barrows was the initial aggressor. Ms. Young's pre-trial comments to the prosecutor corroborated Mr. Jones' version of the events that occurred in Ms. Young's apartment. Mr. Jones' trial counsel had the ability to present Ms. Young's testimony at trial. Ms. Young's testimony was not only "material," but critical in this case, where the main issue was the credibility of Mr. Jones and Mr. Barrows. It was unreasonable for defense counsel to fail to call Ms. Young to testify at trial.

Trial counsel also failed to call Marcia Lane, who is Ms. Young's sister, and whose testimony would also have corroborated that of Mr. Jones. *See* CP 165-167. As with Ms. Young, it was unreasonable of Mr. Jones' trial counsel to fail to present the testimony of Marcia Lane at trial. The first prong of showing ineffective assistance of counsel is satisfied.

The second prong of establishing ineffective assistance of counsel requires a showing of prejudice or a showing that there is a reasonable probability the outcome of the trial would have been different if Ms. Young had testified. In this case, where the jury's determination of the credibility of Mr. Jones and Mr. Barrows was the dispositive issue, Mr.

Jones' testimony was uncorroborated because his trial counsel called no witnesses. The State presented the investigating officer, who (improperly and without objection from defense counsel) vouched for Mr. Barrow's credibility by stating that "the evidence at the scene was consistent with the stories that I received from the victim." 10/12/10 RP 116.

The testimony of Mr. Jones was also consistent with the evidence observed by the investigating officer, as the testimony of Monique Young and Marcia Lane would have been. There is a reasonable probability that, had the jury heard the testimony of Ms. Young and Ms. Lane, the jury would have decided it was Mr. Barrows -- not Mr. Jones -- who was lying about the fight that occurred in Ms. Young's apartment.

Ms. Young and Ms. Lane would have testified that Mr. Jones was paying the rent for the apartment, had his own key to the apartment, had Ms. Young's permission to enter the apartment, and that he came and went without prior arrangements. RP 129-130; RP 165-167. The testimony of Ms. Young would have established that Mr. Jones struck Mr. Barrows not as the first aggressor, but in self-defense. Because the jury did not hear that testimony, it is impossible to say that Mr. Jones' trial was fair, especially considering the improper closing argument of the State, discussed below. Had the jury heard the testimony of Ms. Young and Ms. Lane, the jury likely would not have found Mr. Barrows and the

investigating officer to be credible and would have found Mr. Jones not guilty of all crimes.

2. Mr. Jones' trial counsel elicited improper opinion testimony from the investigating officer that included a clear inference that, in the officer's opinion, Mr. Jones was guilty, and then failed to ask the Court to strike the testimony.

Robert Carpenter was a patrol sergeant with the Pierce County Sheriff's Department at the time of Mr. Jones' trial. 10/12/10 RP 104-105.

Mr. Carpenter was the officer who was dispatched to Ms. Young's apartment in response to her 911 call. *Id.* at 106. Mr. Jones' counsel elicited the following testimony from Mr. Carpenter on cross-examination:

Q. Sergeant, you weren't present when the altercation took place. Is that right?

A. No, I was not.

Q. You came afterwards?

A. Yes.

Q. So you don't know how the fight got started?

A. I know from -- based on the evidence and the scene and the story that I was told.

Q. So that's the only way that you knew how it got started?

A. The evidence at the scene was consistent with the stories that I received from the victim.

Q. Do you know who started the fight?

A. I would imagine the person who came storming through the door.

Q. But you don't know that for a fact. Is that true?

A. I think that's an aggressive act in itself. I know that must have been the first event that took place because if the door wasn't forced open, the fight couldn't have occurred.

Q. I understand that. But in terms of -- you still don't know for certain who started the fight?

A. Well, no, I do. The person who forced that door open probably started the fight. I think if I was in my residence and somebody forced their way in, well, they would probably have a stiffer penalty.

10/12/10 RP 116-117.

Because Mr. Carpenter did not see the altercation and had no first-hand knowledge of the sequence of events that took place in the apartment, Mr. Carpenter was not qualified to offer testimony about who started the fight. *See* ER 602 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the

witness has personal knowledge of the matter”). Further, Mr. Carpenter’s speculative opinion as to who started the fight was improper opinion testimony as to Mr. Jones’ guilt and invaded the province of the jury to determine the facts of the case.

Any testimony by Mr. Carpenter as to who started the fight or whether or not the door was forced open was rank speculation. Despite this, Ms. Olson never objected to Mr. Carpenter’s testimony or asked the trial court to strike any of Mr. Carpenter’s testimony, which included improper opinion testimony, speculation and conjecture, vouching for the credibility of Mr. Barrows, and invasion of the fact-finding function of the jury. This testimony was highly prejudicial: Washington courts have acknowledged that opinion testimony from a law enforcement officer is especially likely to influence the jury. *See, e.g., State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d. 323 (1985), *overruled on other grounds*, 70 Wn. App. 573, 854 P.2d 658 (1985) (opinion of sheriff or police officer “may influence the factfinder and thereby deny the defendant a fair and impartial trial”).

“No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement **or inference.**” *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987 (emphasis added) (citing *State v. Garrison*, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967); *State v. Haga*, 8

Wn.App. 481, 492, 507 P.2d 159, *review denied*, 82 Wn.2d 1006 (1973).

The testimony of Mr. Carpenter clearly “conveyed to the jury the impression that [Mr. Carpenter] thought [Mr. Jones] was guilty, and it was calculated to, and undoubtedly did, influence the jury in reaching its verdict.” *Haga*, 8 Wn. App. at 492, 507 P.2d 159.

“Impermissible opinion testimony regarding the defendant's guilt ... violates the defendant's constitutional right to a jury trial, which includes the independent determination of the facts by the jury.” *State v. Kirkham*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); *Black*, 109 Wn.2d at 348, 745 P.2d 12.)

Particularly in this case, where the credibility of Mr. Barrows and Mr. Jones was the dispositive issue, eliciting testimony from a law enforcement officer that clearly signaled to the jury that the officer believed Mr. Jones was guilty without asking the court to strike and admonish the jury to disregard it constituted ineffective assistance of counsel. The first prong of showing ineffective assistance of counsel is satisfied.

Mr. Carpenter’s testimony also conveyed to the jury the idea that Mr. Barrows had done nothing wrong in punching Mr. Jones, informing the jury that he would have done even more -- administered a “stiffer

penalty” to -- if anyone forced their way into his own residence. This testimony was inflammatory and appealed to the jury’s emotions. Nevertheless, Mr. Jones’ trial counsel did not ask the court to strike it.

Finally, Mr. Carpenter’s testimony regarding who started the fight between Mr. Jones and Mr. Barrows was based solely on his speculation and conjecture. Even though evidence relating to the existence of any fact cannot rest on guess, speculation, or conjecture (*State v. Prestegard*, 108 Wn.App. 14, 23, 28 P.3d 817 (2001)), Ms. Olson did not ask the trial court to strike Mr. Carpenter’s testimony.

Trial counsel’s failure to ask the court to strike the improper testimony of Mr. Carpenter and to admonish the jury to disregard it fell below an objective level of reasonableness. To elicit such testimony and fail to ask the court to strike and instruct the jury to disregard is far beyond merely a “lame cross-examination.” *Matter of Pirtle*, 136 Wn.2d 467, 489, 965 P.2d 593 (1998).

There is simply no legitimate strategic or tactical reason for defense counsel to elicit improper opinion testimony that is prejudicial to her client and then fail to ask the court to strike it and admonish the jury that it must not be considered. There is a reasonable probability that, had Mr. Carpenter’s improper testimony been stricken and the jury admonished to disregard it, the outcome of the trial would have been

different. The second prong of ineffective assistance of counsel is also satisfied.

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3. Mr. Jones' counsel failed to object when the prosecutor misstated facts and vouched for Mr. Barrow's credibility.

It is misconduct for a prosecutor to state a personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008) (citing *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995)).

The prosecutor clearly and repeatedly expressed her personal opinion about Mr. Barrows' credibility:

- Suggesting that Mr. Jones had to “come up with” an explanation for the marks on Mr. Barrow's neck, “[a]s opposed to Mr. Barrows, who candidly told his story. He didn't embellish it. He didn't exaggerate . . . . Mr. Barrows, he's not here to embellish or exaggerate. He's here to tell you what happened in that apartment on April 1, 2010.” 10/13/10 RP 161.

- “Again, I've already talked to you about Mr. Barrows' credibility, that he's not here to embellish or exaggerate what happened, he's just there to tell you what the defendant did to him on that day. He was candid in his description and he's got no motive to lie here. He's not going to gain by coming here and talking about this. He doesn't have any

benefit to it. He just came in here and he told you what happened.” *Id.* at 164-165.

- “Of the two, Mr. Barrows is the one that has credibility. Mr. Jones has none.” *Id.* at 181.

- “Obviously Mr. Barrows told you that wasn’t the case. The door came flying open. Monique Young took off for the bathroom and Mr. Jones came in and started beating the crap out of him. That is the most logical explanation. That is the most reasonable explanation and for the simple reason, it’s the truth.” *Id.* at 183-184.

These comments make it clear and unmistakable that the prosecutor was expressing her personal opinion rather than making inferences from the evidence. In this case, where credibility was the dispositive issue, these improper comments were highly prejudicial. Despite this, Mr. Jones’ counsel stated no objections to any of the prosecutor’s statements vouching for Mr. Barrow’s credibility. Failure to do so constituted ineffective assistance of counsel.

In this case, “ . . . counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *State v. Gordon*, \_\_\_ Wn.2d \_\_\_, 260 P.3d 884, 888-889 (2011) (quoting *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011) (quoting *State v.*

*Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987))). The Court should reverse and remand for a new trial.

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**B. PROSECUTORIAL MISCONDUCT DEPRIVED MR. JONES OF A FAIR TRIAL**

A defendant claiming prosecutorial misconduct must establish both an improper comment and the resulting prejudicial effect. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Comments “calculated to appeal to the jury’s passion and prejudice and encourage it to render a verdict on facts not in evidence are improper.” *State v. Stith*, 71 Wn.App. 14, 18, 856 P.2d 415 (1993) (quoting *State v. Stover*, 67 Wn.App. 228, 230–31, 834 P.2d 671 (1992)). Courts consider the allegedly improper comment in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. *McKenzie*, 157 Wn.2d at 52, 134 P.3d 221. Prejudice occurs if there is “a substantial likelihood the instances of misconduct affected the jury’s verdict.” *Pirtle*, 127 Wn.2d at 672, 904 P.2d 245.

Where, as here, defense counsel does not object to a prosecutor’s misconduct, request a curative instruction, or move for a mistrial, the

defendant must show that the misconduct was so flagrant and ill intentioned that no instruction could erase the prejudice engendered by it. *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988).

1. The prosecutor repeatedly made comments revealing her personal opinion about Mr. Barrows' credibility.

“Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness.” *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). As discussed above in section A.3, the prosecutor made numerous statements to the jury indicating her personal belief that Mr. Barrows was credible and told “the truth” to the jury.

2. The prosecutor improperly encouraged the jury to render a verdict on facts not in evidence.

Beginning during the argument on motions in limine and throughout the trial, the prosecutor repeatedly asserted that Mr. Jones had “kicked down the door” to gain entry to Ms. Young’s apartment. *See, e.g.*, 10/11/10 RP 8 (“the defendant, who has just kicked down the door, entered without permission”; “[a]fter kicking down the door,” the defendant fled); *Id.* at 15 (Ms. Young describes how Mr. Jones “kicks in her door” in the 911 recording); *Id.* at 26 (“that man right there, the

defendant, Joseph Jones, kicked in the door of his ex-girlfriend's apartment"); *Id.* at 27 ("he kicked in the door"); *Id.* at 28 ("You're going to see photographs of the door where it was kicked in."); *Id.* at 53 (asking Mr. Barrows how much time had elapsed between the time Mr. Jones knocked on the door "and the time the door was kicked in"); *Id.* at 155 ("He kicked down the door for no reason."); *Id.* at 156 ("Again, when you kick in a door, you're not there to have a talk.").

During rebuttal in closing argument, the prosecutor finally admitted, "There's no evidence that he did kick" the door down. 10/13/10 RP 157.

Even after this concession, the prosecutor continued to reinforce the image of an angry Mr. Jones "kicking in" the door, recalling for the jury Mr. Carpenter's improper testimony that "none of this would have happened if he hadn't kicked in that door." 10/13/10 RP 163. Again, just a few minutes later, the prosecutor told the jury, "Mr. Barrows probably stood there and when the door is kicked open, didn't even know what to do." 10/13/10 RP 164. These repeated references to Mr. Jones kicking down the apartment door were calculated to appeal to the jury's passion and prejudice, and the prosecutor knew that there was no evidence to support the assertion.

In fact, photographs of the door to Ms. Young's apartment taken

by Mr. Carpenter after the fight show the door still on its hinges: it was the trim around the door (10/12/10 RP 135-136), referred to by Mr. Carpenter and the prosecutor as the “door frame,” that came down. *Id.* at 110, 137.

The prosecutor also told the jury that Mr. Jones “had no key” to Ms. Young’s apartment. 10/13/10 RP 158. Contrary to the prosecutor’s assertion, however, there was no evidence presented that Mr. Jones “had no key.” In fact, Mr. Jones testified:

Q. Did you have a key to her apartment?

A. Yes.

10/12/10 RP 123.

Mr. Jones’ testimony was unrebutted.

3. The prosecutor misstated the law regarding the elements of burglary.

A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *State v. Davenport*, 100 Wn.2d 757, 764, 675 P.2d 1213 (1984). Here, the prosecutor mischaracterized the law when she told the jury that the “physical evidence” and the testimony of Mr. Barrows and Mr. Carpenter “dispute[d]” that Mr. Jones had a “right to be in there.” 10/13/10 RP 156. The misstatement of law was emphasized by the prosecutor’s presentation of two Power Point slides showing the damaged apartment door beneath

the words “Entered/Remained Unlawfully.” CP 132.

First, neither Mr. Carpenter nor Mr. Barrows had any personal knowledge whether Mr. Jones had a right to enter the apartment, nor did either Mr. Carpenter or Mr. Barrows testify that Mr. Jones had no such right.

Second, the fact that Mr. Jones’ entry into the apartment was forcible did not establish that his entry was unlawful. Unlawful entry is defined in RCW 9A.52.010(3): “A person ‘enters or remains unlawfully’ in or upon premises **when he is not then licensed, invited, or otherwise privileged to so enter** or remain.” (Emphasis added.) The fact that Mr. Jones damaged the door when he entered the apartment did not constitute evidence that he entered “unlawfully.”

In *State v. Steinbach*, 35 Wn. App. 473, 474-475, 667 P.2d 641 (1983), a minor who had been placed in alternative residential placement by juvenile court order “forcibly entered her mother’s residence . . . through a boarded-up window” and removed personal property from the house was found guilty of second degree burglary. However, the Supreme Court reversed the minor’s conviction because she was “privileged” to enter her mother’s home. *State v. Steinbach*, 101 Wn.2d 460, 461-462, 679 P.2d 369 (1984). (“Terri asserts that her entry into her mother’s home was privileged and therefore could not be unlawful. We agree.”). The fact

that the minor's entry into her mother's home had been "forcible" did not render the privileged entry "unlawful." There was no evidence presented that Mr. Jones had no license, invitation, or privilege to enter the apartment. Like the daughter in *Steinbach*, Mr. Jones' entry into the apartment he paid for and stayed at occasionally was privileged.

4. The prosecutor's argument contradicted the law stated in the jury instructions.

A prosecutor's argument to the jury must be confined to the law stated in the trial court's instructions. *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). The prosecutor's argument that Mr. Jones' entry into the apartment was "unlawful" because it was forcible goes far beyond the definition of "unlawful" entry as set out in the trial court's instructions. *See* CP 61 ("A person enters or remains unlawfully in or upon premises when he is not then licensed, invited, or otherwise privileged to so enter or remain.").

5. The prosecutor's repeated prejudicial misconduct denied Mr. Jones a fair trial.

When a prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict, the defendant is denied a fair trial. *State v. Gotcher*, 52 Wn.App. 350, 355, 759 P.2d 1216 (1988). The cumulative effect of repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series

of instructions can erase their combined prejudicial effect. *State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

In this case, jurors were confronted with a credibility contest between Mr. Jones and Mr. Barrows. The prosecutor's improper statements vouching for the credibility of Mr. Barrows, repeated misstatements of fact, and misstatement of the law regarding burglary created a substantial likelihood that the improper statements affected the jury. The Court should reverse Mr. Jones' conviction and remand for a new trial.

**C. THE ADMISSION OF THE 911 TAPE WAS A VIOLATION OF MR. JONES' SIXTH AMENDMENT RIGHT TO CONFRONTATION OF WITNESSES AGAINST HIM.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI.

The confrontation clause “applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’” *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation omitted). It “bars ‘admission of testimonial statements of a witness who did not appear at trial unless’ the witness ‘was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (quoting *Crawford*, 541 U.S. at 53–54, 124 S.Ct. 1354). Non-testimonial hearsay, on the other hand, is admissible under the Sixth Amendment subject only to the rules of evidence.

*Davis*, 547 U.S. at 821, 126 S.Ct. 2266.

*State v. Pugh*, 167 Wn.2d 826, 831, 225 P.3d 892 (2009).

1. The statements by Ms. Young on the 911 recording are testimonial.

The Washington Supreme Court summarized the law regarding “testimonial” and “nontestimonial” statements as applied to 911 telephone calls:

As the Court explained in *Davis*, statements made in the course of a police interrogation are nontestimonial if they were made under circumstances objectively indicating that the primary purpose of interrogating the speaker was “to enable police assistance to meet an ongoing emergency.” *Id.* at 822, 126 S.Ct. 2266. But they are testimonial if circumstances “objectively indicate that there [wa]s no such ongoing emergency” and “the primary purpose of the interrogation [wa]s to establish or prove past events potentially relevant to later criminal prosecution.” *Id.*

*Pugh*, 167 Wn.2d at 831-832, 225 P.3d 892

In *State v. Ohlson*, 162 Wn.2d 1, 11-12 and fn2, 168 P.3d 1273 (2007), the Supreme Court noted that the *Davis* court “assumed, without deciding, that 911 operators are law enforcement officers.” and whether a 911 call includes testimonial statements “requires courts to make an objective appraisal of the interrogation” by the 911 operator.

The *Davis* decision consolidated two cases: “*Davis v. Washington* (statements to law enforcement officers during a 911 call ...) and *Hammon v. Indiana* (statements to law enforcement officers at a crime scene).”

*Ohlson*, 162 Wn.2d at 11, 168 P.3d 1273 (citing *Davis*, 126 S.Ct. at 2273 and 2274 n.2). The *Davis* court applied four factors to reach opposite decisions in the consolidated cases. The factors utilized to make “an objective appraisal of” police interrogation are: “(1) the timing relative to the events discussed, (2) the threat of harm posed by the situation, (3) the need for information to resolve a present emergency, and (4) the formality of the interrogation.” *Pugh*, 167 Wn.2d at 832, 225 P.3d 892 (citing *Davis*, 547 U.S. at 821, 126 S. Ct 2266). In *Davis*, the U.S. Supreme Court applied the four factors to the two cases as follows:

<b><u>Factor</u></b>	<b><u>Davis</u></b>	<b><u>Hammon</u></b>
(1) Timing relative to the events discussed	(1) caller was speaking about events as they were actually happening	(1) caller made the statements some time after the events described were over
(2) Threat of harm	(2) speaker was facing an ongoing emergency; seeking help against physical threat	(2) no emergency in progress; caller stated no immediate threat to her person
(3) Need for information to resolve a present emergency	(3) statements obtained were necessary to resolve the present emergency	(3) interrogation was part of an investigation into possible criminal past conduct
(4) Formality of interrogation	(4) “frantic answers” given in an unsafe environment	(4) statements in response to questions recounted how past events began and progressed

See *Ohlson*, 162 Wn.2d at 11-13, 168 P.3d 1273.

The *Davis* court found that the caller’s statements in *Davis* were non-testimonial but that the caller’s statements in *Hammon* were

testimonial. *See Ohlson*, 162 Wn.2d at 11-13, 168 P.3d 1273.

This case is like *Hammon*, not *Davis*. The 911 tape reveals that Ms. Young was speaking to the dispatcher **after** Mr. Jones had entered the apartment, **after** the fight with Mr. Barrows was over, and as Mr. Jones was **leaving the scene**. Throughout the phone call Ms. Young describes the events in the past tense- clearly indicating that the events were not ongoing but had finished before she called 911. Further, Ms. Young indicates that after the incident but before calling 911 she had called and spoken with her mother, who was on the way to Ms. Young's residence. There was no ongoing emergency. Ms. Young described no threat of harm to herself, and was not seeking help against any immediate threat.

The dispatcher asked Ms. Young for Mr. Jones' physical description, what clothes he was wearing, whether he had any weapons, for a description of Mr. Jones' vehicle and license plate number, which way Mr. Jones left the scene, and what Mr. Jones' address was. Plaintiff's Ex. 1. The dispatcher twice asked Ms. Jones if Mr. Barrows was hurt or in need of medical assistance and Ms. Young stated twice that Mr. Barrows was "fine" and needed no paramedics or medical help. *Id.* At the end of the tape, the dispatcher summarizes the information he had obtained from Ms. Jones, i.e., how past events began and progressed, and Ms. Young calmly thanks the dispatcher and hangs up. *Id.* It is clear from

the 911 recording that Ms. Young's statements were testimonial and not describing an ongoing emergency and Ms. Young was not asking help against a physical threat. The description of testimonial statements in *State v. Koslowski* is applicable to Ms. Young's statements on the 911 recording in this case:

They were made in the course of police interrogation under circumstances objectively indicating that there was no ongoing emergency and the primary purpose of the interrogation was to establish past events potentially relevant to later criminal prosecution. The State has not established the statements were nontestimonial because it has not established that the circumstances objectively indicate the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency.

*State v. Koslowski*, 166 Wn.2d 409, 430, 209 P.3d 479 (2009).

2. The admission of Ms. Young's testimonial statements in violation of 911 Mr. Jones' confrontation rights under the 6<sup>th</sup> Amendment and Article 1 § 7 did not constitute harmless error.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him....” U.S. Const. amend. VI. The State is permitted to introduce the testimonial statements of an absent witness only if the witness is truly unavailable and the defendant has had a prior opportunity for cross examination. *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

While a trial court's decision to admit evidence is reviewed for abuse of discretion, appellate courts review a claimed violation of the confrontation clause de novo. *State v. Chambers*, 134 Wn.App. 853, 858, 142 P.3d 668 (2006) (citing *State v. Larry*, 108 Wn.App. 894, 901, 34 P.3d 241 (2001)).

Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error test. *Lilly v. Virginia*, 527 U.S. 116, 139-40, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); *Mason*, 160 Wn.2d at 927, 162 P.3d 396. If the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt, the error is harmless. *Id.*; *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

*Koslowski*, 166 Wn.2d at 431, 209 P.3d 479.

Mr. Jones was charged with first degree burglary and second degree assault. The only “untainted” evidence regarding whether Mr. Jones unlawfully entered Ms. Young’s apartment was provided by Mr. Jones himself, who testified that he had a key to the apartment and came and went without giving prior notice to Ms. Young. 10/12/10 RP 122-123.

Even if the jury believed that Mr. Jones had “kicked in” the door to enter the apartment, that fact did not establish that Mr. Jones’ entry was unlawful. *See* Section B.2 above. The uncontroverted testimony at trial was that he had a key and stayed in the apartment. The “untainted

evidence” was not “so overwhelming that it necessarily leads to a finding of the defendant's guilt” on the charge of burglary.

The “untainted evidence” about the fight and Mr. Jones’ claim of self-defense was contradictory. Mr. Barrows testified that Mr. Jones started the fight: Mr. Jones testified that Mr. Barrows started the fight and that Mr. Jones fought back in self-defense.

The testimony of Mr. Carpenter regarding who started the fight should be given no weight, since it was based on speculation and conjecture rather than his own personal knowledge. *See* 10/12/10 RP 116-118.

Thus, the “untainted evidence” regarding Mr. Jones’ claim of self-defense was not “so overwhelming that it necessarily leads to a finding of the defendant's guilt” on the charge of assault. *Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479.

Because Ms. Young’s statements on the 911 recording were testimonial, and because Mr. Jones did not have the opportunity to interview Ms. Young before trial or to cross-examine Ms. Young at trial, Mr. Jones’ right to confront witnesses against him was violated. *Koslowski*, 166 Wn.2d at 430-431, 209 P.3d 479 (“Because Ms. Alvarez was unavailable to testify and Mr. Koslowski had no prior opportunity for cross-examination, admitting the officers' testimony about her statements

at trial violated his right to confrontation.”).

The “untainted evidence” was contested and the primary issue for the jury was credibility. The 911 recording included Ms. Young’s statements that Mr. Jones “broke in” to the apartment, that he “kicked in” the door, and that he fought with Mr. Barrows, but did not injure him. Ms. Young’s statements from the 911 recording were used to corroborate Mr. Barrows’ testimony. It cannot be said that the erroneous admission of the 911 recording was “harmless error” because the untainted evidence was not so overwhelming as to necessitate a finding that Mr. Jones was guilty of first degree burglary and second degree assault.

Mr. Jones’ confrontation rights were violated. The remedy for a violation of a defendant’s confrontation rights is vacation of the convictions. *Koslowski*, 166 Wn.2d at 432-433, 209 P.3d 479.

**D. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. JONES OF FIRST DEGREE BURGLARY.**

There is sufficient evidence to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). The elements of burglary in the first degree as charged in this case required the State to prove that “with intent to commit a crime

against a person or property therein,” Mr. Jones “enter[ed] or remain[ed] unlawfully in a building and . . . assaulted” Mr. Barrows. RCW 9A.52.020.

To prove that Mr. Jones’ entry into Ms. Young’s apartment was “unlawful,” the State relied upon evidence that Mr. Jones’ entry was **forcible**. During the prosecutor’s closing argument, she summarized the State’s evidence of unlawful entry:

You’ve seen the **photographs** and you’ve seen the photographs any number of times. You saw them with Donald Barrows, you saw them with Sergeant Carpenter and some of the photos with Dr. Duralde. The defendant cannot dispute that he shoved or kicked his way into that apartment. He has to come up with an explanation to explain away the **damage** because he knows he can’t really explain away that damage, so he comes up with some half cocked story of, well, I was putting my key in and I felt the door close so at this point I didn’t feel it was necessary to lease so I decided I was going to get in there, and I was going to push my way in there. I didn’t kick my way in there, I pushed my way in. To be perfectly honest, it doesn’t matter whether he kicked or he pushed. There’s no evidence that he did kick. Nobody else was on that side of the door except for Mr. Jones. **But the evidence does unequivocally demonstrate that he forced his way into that apartment.**

Again, the evidence of entering or remaining unlawfully. **Somebody who has permission to get into that apartment doesn’t do that. Somebody who has a key to get into that apartment doesn’t do that. Mr. Jones had neither a key nor permission on April 1, 2010 to get into that apartment.**

10/13/10 RP 157-158 (emphasis added).

The State presented no evidence whatsoever to establish that “Mr. Jones had neither a key nor permission on April 1, 2010 to get into that apartment.” As previously discussed, Mr. Jones testified that he did, in fact, have a key and stayed in the apartment at will. Neither Mr. Barrows nor Mr. Carpenter had any personal knowledge whether Mr. Jones had a key or was licensed or privileged to enter the apartment. Although the 911 recording includes statements from Ms. Young that Mr. Jones “kicked in” the door, she did not suggest that Mr. Jones had no license or privilege to enter nor did she say that Mr. Jones had no key to the apartment.

That an entry into a building is forcible does not mean that it was unlawful if there was a license or privilege to enter. *See State v. Steinbach*, 101 Wn.2d 460, 461-462, 679 P.2d 369 (1984) (forcible entry into her mother’s home and removal of her mother’s personal property did not constitute burglary because a minor was privileged to enter her mother’s home).

No rational trier of fact could have found the essential elements of first degree burglary proved beyond a reasonable doubt because the State presented no evidence that Mr. Jones’ entry was unlawful. The State merely presented evidence that Mr. Jones’ entry was forcible. The only evidence regarding whether Mr. Jones’ entry was unlawful was his own testimony that he had a key to the apartment, which he was using to enter

the apartment at the time he pushed his way in, and that he stayed in the apartment at will.

Retrial following reversal for insufficient evidence is “unequivocally prohibited” and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). This Court should reverse Mr. Jones’ conviction for burglary in the first degree and remand for vacation of the conviction with prejudice because the State did not present sufficient evidence to support the conviction.

**E. CUMULATIVE ERRORS DEPRIVED MR. MR. JONES OF A FAIR TRIAL.**

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994). Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants reversal. *State v. Hodges*, 118 Wn.App. 668, 673, 77 P.3d 375 (2003), *review denied*, 151 Wn.2d 1031, 94 P.3d 960 (2004). Rather, the combined errors effectively denied the defendant a fair trial. *Hodges*, 118 Wn.App. at 673–74, 77 P.3d 375. Where the defendant cannot show prejudicial error occurred, cumulative error cannot

be said to have deprived the defendant of a fair trial. *State v. Stevens*, 58 Wn.App. 478, 498, 794 P.2d 38, *review denied*, 115 Wn.2d 1025, 802 P.2d 128 (1990).

Appellant has described multiple prejudicial errors that occurred at his trial in Sections A, B, C, and D above. In the event this Court determines that none of those errors alone warrants reversal of Mr. Jones' convictions, this Court should rule that the combined errors effectively denied Mr. Jones of a fair trial.

**F. THE TRIAL COURT EXCEEDED ITS SENTENCING AUTHORITY BECAUSE IT IMPOSED A VARIABLE PERIOD OF COMMUNITY CUSTODY.**

A court may impose only a sentence that is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). A court commits reversible error when it exceeds its sentencing authority under the SRA. *State v. Hale*, 94 Wn.App. 46, 53, 971 P.2d 88 (1999). In this case, the trial court exceeded its sentencing authority under the SRA.

The trial court imposed the maximum standard range prison term of 75 months on the burglary charge. CP 111; CP 113. In addition, the court imposed another 18 months community custody "or for the period of earned release awarded pursuant to RCW 9.945A.728(1) and (2).

whichever is longer[.]” CP 114.

Under RCW 9.94A.701, which took effect on July 26, 2009,

a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing. RCW 9.94A.701(1)-(3); *cf.* former RCW 9.94A.715(1).

This Court should vacate the sentence and remand for sentencing in compliance with RCW 9.94A.701.

**G. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING MR. JONES POST TRIAL MOTIONS BECAUSE ITS DECISION WAS BASED ON UNTENABLE GROUNDS AND MADE FOR UNTENABLE REASONS.**

On December 17, 2010, Mr. Jones’ sentencing hearing was held. Bryan G. Hershman, who had substituted in for Ms. Olson, presented what the court characterized as “boiler plate” post-trial motions for arrest of judgment, new trial, and relief from judgment. 12/17/10 RP 193; CP 121-128. However, the court acknowledged that Mr. Hershman had been involved in a lengthy trial and was still investigating this case. 6/17/11 RP 193. Mr. Hershman indicated that, in addition to the Declaration of Monique Young, filed with the motions on December 17, 2010 (CP 129-130), there were several more declarations he wanted to obtain, and wanted to be able to argue post-trial motions to the court. 6/17/11 RP 193.

The Court responded:

We tried this case in October. I believe it was October 13<sup>th</sup> when we got a verdict. I know that he's looking at time within the Department of Corrections as a standard range sentence, and I want to go to sentencing today. We have postponed this over and over and over, again. I'm going to deny your motion for a new trial, all that other stuff. Let's sentence him. If you want to then set a motion and do an order transporting him back, we can do that at a time that's convenient for everybody involved.

...

Let's get him sentenced, get him to DOC. You can bring him back at some point.

*Id.*

On December 17, 2010, the court entered a Scheduling Order, setting hearing on Mr. Jones' post-trial motions for March 4, 2011. CP 175. On May 2, 2011, another Scheduling Order was entered, setting the hearing for May 27, 2011. CP 176. The motions were finally argued on June 17, 2011.

At argument on the post-trial motions, Mr. Hershman repeated for the court the information that was included in Monique Young's Declaration, which had been filed on December 17, 2010, as well as the information included in Marcia Lane's Declaration the Declaration of Joanna Juarez, none of which had come in at trial. Noting that "[n]o one can look at this case and say that anything but credibility was at issue," Mr. Hershman argued that the court should "enter a finding today that

there is no way substantial justice has been accomplished in this case.”

6/17/11 RP 5-6.

In response, the prosecutor asserted that the defense had “decided to roll the dice and have Ms. Young not appear for trial.” 6/17/11 RP 7.

This assertion is directly contrary to Ms. Olson’s statement on the first day of trial: “Mr. Jones wants Ms. Young to come testify. It’s not that he’s hiding her, and there’s no evidence that he is.” 10/11/10 RP 33.

The prosecutor then argued that the court was required under *State v. Gassman*, 160 Wn. App. 600, 248 P.3d 155 (2011) to evaluate “the probative force of newly presented evidence which would warrant a new trial” by looking at “the timing of this submission,” and that “the likely credibility of the affiant bears on the probable reliability of that evidence.” 6/17/11 RP 8.

Mr. Hershman concluded his argument: “I’m asking the Court to allow a trier of fact to consider all of the evidence . . . . I’m asking that the Court determine that substantial justice was not done and send this matter back to trial and give me a chance in front of a jury where they get to hear all of the evidence.” 6/17/11 RP 10.

The court denied the motion for new trial because:

- “it was clear to me that the defendant did not want [Ms. Young] to appear for trial” (6/17/11 RP 11); and

• “it’s many, many months later, and to have friends and family come forward is difficult, in terms of credibility, for me to believe much.” *Id.*

An appellate court reviews a CrR 7.8 ruling for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 641-642, 790 P.2d 610 (1990). “A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds.” *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007) (citing *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Rundquist*, 79 Wn.App. 786, 793, 905 P.2d 922 (1995). A decision is “manifestly unreasonable” if the court, despite applying the correct legal standard to the supported facts, adopts a view “that no reasonable person would take,” *State v. Lewis*, 115 Wn.2d 294, 298–99, 797 P.2d 1141 (1990), and arrives at a decision “outside the range of acceptable choices.” *Rundquist*, 79 Wn.App. at 793, 905 P.2d 922.

*Rorich*, 149 Wn.2d at 641-42, 71 P.4d 638.

1. There is no evidence that Mr. Jones did not want Monique Young to testify at trial.

The trial court’s comment that “it was clear to me that the defendant did not want [Ms. Young] to appear for trial” (6/17/11 RP 11) is not supported by anything in the record. Because the trial court’s denial

of Mr. Jones' motion for relief from judgment was based on facts not in evidence, it was based on untenable grounds or made for an untenable reason.

2. *Gassman* is inapplicable to Mr. Jones' motion for relief from judgment.

Taking its cue from the prosecutor's argument based on *State v. Gassman*, the court denied Mr. Jones' motion because, "it's many, many months later, and to have friends and family come forward is difficult, in terms of credibility, for me to believe much." 6/17/11 RP 11.

In *Gassman*, the defendant sought a new trial **based on CrR 7.8(2), newly discovered evidence.** *Gassman*, 160 Wn., App. at 608, 248 P.3d 155. The *Gassman* Court noted,

"[I]n evaluating probative force of newly presented evidence 'the court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence.'"

*Gassman*, 160 Wn. App. at 609, 248 P.3d 155 (quoting *State v. Riofta*, 166 Wn.2d 358, 372, 209 P.3d 467 (2009) (quoting *Schlup v. Delo*, 513 U.S. 298, 332, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995))).

First, the Declaration of Monique Young was presented to the trial court on the day Mr. Jones was sentenced -- not "months and months later."

Second, Mr. Jones did not seek relief from judgment based on newly discovered evidence. In fact, he argued for relief from judgment because material evidence **that was available to defense counsel at the time of trial** was not presented to the jury. The trial court's paraphrasing of language from *Gassman* indicates that it relied upon that case to deny Mr. Jones' motion. Because *Gassman* is a case involving denial of a new trial based on newly discovered evidence, the court's decision was based upon untenable grounds to the extent it was based on *Gassman*.

Third, neither Marcia Lane nor Joanna Juarez had any control over when their Declarations were submitted to the court, nor was the length of time that had lapsed from trial or sentencing the kind of "timing" that the *Gassman* court was concerned about. Rather, the *Gassman* court was concerned that the new evidence was created by the recanting witness **"after he made a plea agreement**, but still received a 14-year sentence compared to Mr. Dunham's 18-month sentence. This evidence makes him appear more vindictive toward Mr. Dunham than credible." *Gassman*, 160 Wn. App. 610, 248 P.3d 155 (emphasis added). Ms. Lane and Ms. Juarez were neither recanting witnesses nor defendants who had made plea agreements.

Mr. Jones' motion for relief from judgment was filed on the day of his sentencing. That it was not argued for six months appears to have been

a function of the scheduling difficulties of the court and counsel, although that is not clear from the record. Regardless of why argument was not heard for “many, many months,” it had nothing to do with the credibility of Ms. Young, Ms. Lane, or Ms. Juarez.

This Court should rule that the trial court’s denial of Mr. Jones’ motion for relief from judgment was based upon untenable grounds or made for an untenable reason, and therefore was an abuse of discretion. The Court should reverse the Order Denying Defendant’s Motion for Relief from Judgment and remand for a new trial because substantial justice was not done since Mr. Jones was convicted in the absence of material witnesses who were available but did not testify at trial, and whose testimony would have corroborated that of Mr. Jones.

## **VI. CONCLUSION**

For the reasons stated above, this court should vacate Mr. Jones’ burglary conviction and remand for dismissal with prejudice of that charge and remand for a new trial on the charge of assault in the second degree and correction of sentence.

Alternatively, this Court should vacate Mr. Jones’ burglary and assault convictions and remand for new trial and correction of sentence.

DATED this 15th day of December, 2011.

Respectfully submitted,

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Sheri Arnold, WSBA No. 18760  
Attorney for Appellant

**CERTIFICATE OF SERVICE**

The undersigned certifies that on December 15, 2011, she delivered via e-mail [pcpatcecf@pierce.wa.us](mailto:pcpatcecf@pierce.wa.us) Pierce County Prosecutor's Office, Tacoma, Washington 98402, and by United States Mail to appellant, Joseph C. Jones, DOC # 793474, Washington State Penitentiary, 1313 North 13<sup>th</sup> Avenuc, Walla Walla, Washington 99362, copies of Appellant's Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on December 15, 2011.

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Norma Kinter

# ARNOLD LAW OFFICE

**December 15, 2011 - 1:30 PM**

## Transmittal Letter

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