Supreme Court No. 101098-2
Court of Appeals No. 82428-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JONNIE L. LAY,

Petitioner.

PETITION FOR REVIEW

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A. INTRODUCTION

The government waited 11 years after the alleged offense to charge Jonnie Lay with rape. Yet soon after the incident, the alleged victim reported it to the police and underwent a sexual assault exam. The police did not submit the swabs for DNA testing until 2016, when they were forced to do so by a change in the law. But for the results of the DNA test, which the police could have obtained right away, the government's evidence when it proceeded to trial was essentially the same as the evidence it had soon after the crime occurred. Under these circumstances, the government's decision to wait 11 years to file the charge violated both the statute of limitations and due process. The Court of Appeals held otherwise. This Court should grant review and reverse.

In addition, allowing Mr. Lay, who is Black, to be tried and convicted by a King County jury containing no Black members, violated his federal and state constitutional right to be tried by a fair and impartial jury.

B. IDENTITY OF PETITIONER/DECISION BELOW

Jonnie L. Lay requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Lay, No. 82428-7-I, filed on June 21, 2022. A copy of the Court of Appeals' opinion is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. The purpose of the statute of limitations is to encourage timely police investigations. Here, soon after the alleged offense, the police had enough information to identify Mr. Lay as a suspect. Yet they delayed in investigating the crime, only submitting the DNA sample collected in the rape kit more than nine years later. The police's dilatory conduct, resulting in a charge more than 10 years after the date of the alleged offense, violated the statute of limitations.

2. Negligent conduct by the police in investigating a crime, which causes an excessive delay in charging the accused, can violate due process. Here, due to the police's negligence in

investigating the crime, the State did not charge Mr. Lay until more than 11 years after the alleged offense. Mr. Lay was prejudiced due to the loss of potentially exculpatory evidence. The excessive pre-accusatorial delay violated due process.

3. Allowing Mr. Lay to be tried by a jury containing no Black members violated his state and federal constitutional right to an impartial jury drawn from a fair cross section of the community.

4. The prosecutor committed misconduct by releasing Mr. Lay's criminal history and characterizing his crimes as "brutal" and calling him an "animal" in front of the jury.

5. Mr. Lay received ineffective assistance of counsel.

D. STATEMENT OF THE CASE

In March 2007, 45-year-old Teresa Rogerson was homeless and living at Angeline's, a shelter in Belltown, Seattle. RP 2664-68. On March 15, 2007, she reported to the police that at around 2 p.m. the previous day, a white Cadillac containing two men drove up onto the sidewalk at the corner of

Second and Pike in downtown Seattle where she had been walking, and the passenger grabbed her and threw her into the backseat. RP 68, 2473-74. She said that while the driver drove the car, the passenger climbed into the backseat and raped her. RP 68, 2474. She said the driver then drove to a wooded area where the passenger removed her from the car and raped her again. RP 2474. She said the passenger put her back in the car and they drove around until dawn the next morning, when the two men let her go. RP 2475.

Ms. Rogerson told the police that at some point during the incident, she saw the passenger's photo "ID of some sort" with the name "John Lay" on it. RP 67, 81.

Ms. Rogerson underwent a sexual assault exam and made statements to a sexual assault nurse examiner and a hospital social worker about the incident. RP 2470, 2584-85, 2847, 2856, 2859, 2844. Several swabs were collected for DNA testing. RP 2578, 2606-08.

The police ran the name "John Lay" in the Seattle Police Department database. RP 71-75. Although they found no exact match for "John Lay," they found an arrest report for "Johnny L. Lay." RP 75, 83-84; Pretrial Ex. 3. The report indicated Mr. Lay was a registered sex offender and his DNA was in the "CODIS" database. RP 90-95; Pretrial Ex. 3. In addition, registered sex offenders are periodically photographed and thus the officers also had access to a photograph of Mr. Lay that they could have shown to Ms. Rogerson. RP 84, 160.

Police Detective Roger Ishimitsu telephoned Ms. Rogerson and arranged for her to come in for a formal interview. RP 62-65. When she did not appear at the arranged time, Detective Ishimitsu called and left a voicemail message asking her to contact him to reschedule. RP 65. About a week later, when he had not heard from her, he sent her a letter at Angeline's but she did not respond. RP 63-66. On April 16, when Detective Ishimitsu still had not heard from Ms. Rogerson, he inactivated the case. RP 66. He did not send the

DNA swabs to the lab for testing but kept the rape kit in storage. RP 77-78.

Nothing happened in the case until June 2016 when the police finally sent the rape kit to the lab for testing. RP 109-10. They received the results in March 2018. RP 112. DNA found on the swabs matched Mr. Lay's. RP 2651-52.

On March 8, 2018, the case was reassigned to Seattle Police Detective Shawn Martinell. RP 107, 112. He conducted "a couple of internet searches and police database searches" and was able to find Ms. Rogerson's current address and phone number within "a couple [of] hours." RP 147, 206. He called her and she came in for an interview. RP 108. He completed his investigation and submitted it to the prosecutor's office by March 23, 2018. RP 113-14.

On May 21, 2018, the prosecution charged Mr. Lay with one count of first degree rape. CP 1-3. At that time, the statute of limitations was 10 years. Former RCW 9A.04.080(1)(b)(iii)(A) (2017). The defense moved to dismiss,

arguing the excessive delay in filing the charge violated both the statute of limitations and due process. RP 233-57, 276-83. The court denied the motion. CP 61; RP 284-88.

A first trial ended in a mistrial due to a hung jury. CP 60; RP 1248. The State amended the charge to second degree rape. CP 76; RP 1334.

During jury selection Mr. Lay, who is Black, noticed the venire contained almost no Black members. RP 1314, 1320-21. Defense counsel moved to strike the venire and draw a new one in an effort to obtain a jury that more accurately reflected the racial make-up of King County. RP 1628-30, 1636. Counsel observed they had received 147 responses to the jury summons and only two of those individuals identified as Black. RP 1628. After hardship excusals, only one Black juror remained. RP 1628. Counsel pointed out this was a systemic problem in King County and occurred in the first trial as well. RP 1632. The State objected and the court denied the motion. RP 1630-31, 1636, 1834-35.

None of the jurors finally chosen to decide the case was Black. RP 2208.

At trial, Mr. Lay admitted having sexual intercourse with Ms. Rogerson but explained it was consensual. He testified that on that afternoon, he was hanging out at the fountain by the King County Courthouse when Ms. Rogerson approached him and offered him sex in exchange for crack cocaine. RP 2905-07. After they had sex, Ms. Rogerson asked him for more crack and when he refused, she became irate and started threatening him and calling him racial epithets. RP 2924. He did not kidnap her or rape her and believed the sex was consensual. RP 2929.

The jury found Mr. Lay guilty of second degree rape as charged. CP 83. The Court of Appeals affirmed.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. Charging Mr. Lay more than 10 years after the alleged offense violated the statute of limitations.

Allowing the government to pursue a charge more than 10 years after the alleged crime, where the police had all of the

information they needed to identify Mr. Lay as a suspect soon after the incident, contravened the purpose of the statute of limitations, which is to encourage prompt police investigations and prevent stale prosecutions. The delay prevented Mr. Lay from conducting a full investigation and presenting evidence in support of his defense of consent. This Court should grant review and reverse.

Statutes of limitations are "the primary guarantee against . . . overly stale criminal charges," United States v. Ewell, 383 U.S. 116, 122, 86 S. Ct. 773, 15 L. Ed. 2d 627 (1966), that are based on "acts in the far-distant past," Toussie v. United States, 397 U.S. 112, 114-15, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970). Statutes of limitation "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." United States v. Marion, 404 U.S. 307, 322, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971).

The purpose of a statute of limitations is to encourage prompt investigation of a crime, prevent stale prosecution, and serve as a means by which a crime does not hang over a person's head for an undue amount of time. People v. Mudd, 154 Ill. App.3d 808, 812, 507 N.E.2d 869 (1987). A statute of limitations "represents a policy decision limiting the power of a sovereign to make an offender answer for a crime, even though he committed it, unless he is prosecuted with due diligence." Id.

At the time the government filed the charge, the statute of limitations provided the crime of second degree rape could not be prosecuted more than ten years after its commission "if the rape [wa]s reported to a law enforcement agency within one year of its commission." Former RCW 9A.04.080(1)(b)(iii)(A). The statute contained two exceptions for any case involving a sex offense:

> In any prosecution for a sex offense as defined in RCW 9.94A.030, the periods of limitation prescribed in subsection (1) of this section run from the date of commission or one year from the date on which the identity of the suspect is conclusively established by

> deoxyribonucleic acid testing or by photograph as defined in RCW 9.68A.011, whichever is later.

Former RCW 9A.04.080(3) (2017).

Here, the government filed the charge more than 10 years after the alleged offense. Ms. Rogerson said the rape occurred between March 14 and 15, 2007. RP 2473. She immediately reported it to law enforcement. RP 2464-65. Yet the State did not file the charge until May 21, 2018. CP 1-3. Therefore, the State violated the 10-year statute of limitations unless either of the exceptions applied.

In light of the principal purpose of the statute of limitations, which is to insure against prejudice and injustice to the accused caused by prosecutorial delay, the exception to the limitation period provided by former RCW 9A.03.080(3) (2017) must be construed narrowly and in a light most favorable to Mr. Lay. See State v. Lindsay, 862 N.E.2d 314, 317 (Ind. Ct. App.); State v. Twiggs, 233 N.J. 513, 534, 187 A.3d 123 (2018) ("As an exception to the general rules

governing statutes of limitations, the DNA-tolling provision is interpreted narrowly.").

Soon after the alleged offense, Ms. Rogerson underwent a sexual assault exam and swabs containing DNA evidence were collected. RP 2578, 2606-08. At that time, Mr. Lay's DNA was in the CODIS database. RP 90-95, 113; Pretrial Ex. 3. Had the police sent the swabs for testing right away, they could have "conclusively established" his identity as a suspect long before the 10-year statute of limitations expired. In this situation, the Legislature could not have intended to excuse the police for deciding to delay testing the DNA and thereby avoid the 10-year limitations period.

In Washington as in other states, the development of DNA technology has complicated the underlying policy justifications for a statute of limitations. "Whereas fresh evidence was once critical when a sexual assault case rested on the memories of eyewitnesses or other circumstantial evidence, the same is no longer true when DNA evidence is available."

Amy Dunn, Note, Criminal Law-Statutes of Limitation on Sexual Assault Crimes: Has the Availability of DNA Evidence Rendered Them Obsolete? 23 U. Ark. Little Rock L. Rev. 839, 860 (Spring 2001). Both the accuracy and longevity of DNA evidence are far superior to that of any other type of evidence, rendering concerns about "stale evidence" almost baseless. Id.

But this rationale for extending the statute of limitations in cases involving DNA evidence does not apply if the accused maintains that he and the alleged victim engaged in consensual sex. Id. at 861. Allowing the government to delay investigating and prosecuting such a case "would subject [the accused] to the very prejudices that statutes of limitation were designed to avoid." Id. Forcing an accused to rely upon stale evidence to substantiate a defense of consent places innocent suspects at unfair risk of false conviction. Id.

Moreover, extending the statute of limitations in cases involving DNA evidence provides a disincentive for police to exercise diligence in their investigations. Id. at 866-67.

"Statutory exceptions for sexual assault crimes should minimize such delays by providing that DNA evidence undergo prompt analysis and that officials commence sexual assault prosecutions based on DNA evidence within a limited period of time after that evidence has positively linked a suspect to the crime." Id. at 866-67.

Here, Mr. Lay presented a defense of consent. RP 2905-07, 2920-22. Yet he was hampered in his ability to present that defense because he had to rely upon stale and missing evidence. In this situation, the Legislature could not have intended to excuse the police from conducting a prompt investigation. This Court should interpret the exception provided in former RCW 9A.04.080(3) (2017) narrowly and hold it does not excuse the untimely prosecution of Mr. Lay because the government failed to act with diligence in submitting the DNA samples for testing.

The police did not submit the swabs for testing promptly because they believed Ms. Rogerson would not cooperate with the investigation. RP 77. But that belief was inaccurate. Had

Detective Ishimitsu exercised a little bit more diligence, he could have made contact with Ms. Rogerson and engaged her in the investigation. She was living at Angeline's and easy to find. RP 147, 206, 2665, 2669. She was willing to cooperate and believed the police had abandoned her because she was poor and homeless. RP 2713-14.

In affirming the conviction, the Court of Appeals relied upon State v. McConnell, 178 Wn. App. 592, 315 P.3d 586 (2013). Slip Op. at 6. In McConnell, the Court of Appeals held the identity of a suspect is not "conclusively established" through DNA testing for purposes of RCW 9A.04.080(3) until the police match the DNA profile of an unknown suspect to the DNA profile of a known suspect. McConnell, 178 Wn. App. at 605. But that holding contravenes a principal purpose of the statute of limitations, which is to encourage prompt investigations. It allows the government to avoid the statute of limitations by delaying the testing of a DNA sample indefinitely.

Moreover, McConnell is distinguishable because in that case the police were not dilatory. Like Ms. Rogerson, the alleged victim in McConnell underwent a sexual assault examination shortly after an alleged rape. Id. at 596. But the police sent the swabs for testing promptly—within a few months. Id. at 597. They ceased investigating only because the DNA profile they obtained did not match anyone in the database. Id. Tolling the statute of limitations until McConnell's DNA profile was present in the database and the police were able to match it to the DNA profile obtained from the rape kit did not contravene the policies underlying the statute of limitations. By contrast, in this case, the police did not act with reasonable diligence because they did not submit the swabs for testing until several years had passed.

In addition, the statute of limitations may be tolled until after "the identity of the suspect is conclusively established . . . by photograph as defined in RCW 9.68A.011." Former RCW 9A.04.080(3) (2017).

Here, the police had access to a photograph of Mr. Lay they could have shown to Ms. Rogerson soon after the alleged offense. Ms. Rogerson told the police she saw the alleged rapist's photo ID with the name "John Lay" on it. RP 67, 81. The police ran that name in their database and came up with an arrest report for Mr. Lay. RP 75, 83-84; Pretrial Ex. 3. The report indicated Mr. Lay was a registered sex offender and thus they had access to his photograph. RP 84, 160. They could have shown the photograph to Ms. Rogerson and provided her an opportunity to identify him.

Again, it is not an excuse that the police did not promptly show Ms. Rogerson a photograph of Mr. Lay because they had lost contact with her. Detective Ishimitsu did not exercise diligence in trying to locate Ms. Rogerson and engage her in the investigation. She was ready and willing to cooperate. Under these circumstances, the exception for photographic identifications in former RCW 9A.04.080(3) (2017) should not apply.

This Court should grant review and hold that the police must exercise diligence in submitting DNA swabs for testing in order for the exception provided in RCW 9A.04.080(3) to apply. Here, the police did not exercise diligence. The tardy prosecution violated the statute of limitations.

2. The government's excessive delay in charging Mr. Lay violated due process.

The government's decision to wait more than 10 years to charge Mr. Lay violated due process. The government's evidence when it proceeded to trial was essentially the same as the evidence it had soon after the crime occurred. The only difference was that, due to a change in the law, the police were compelled to submit the sexual assault kit for DNA testing in 2016. But they could have submitted the swabs for testing back in 2007 and received the same results. The 10-year delay prejudiced Mr. Lay's ability to investigate and present evidence to support his defense of consent. The government's negligent, unreasonable decision to close the investigation and delay the

prosecution contravenes our fundamental notions of justice and fair play and violates due process.

Due process may be violated by a pre-accusatorial delay even if the charges are ultimately filed within the statute of limitations. State v. Oppelt, 172 Wn.2d 285, 287-89, 257 P.3d 653 (2011); United States v. Lovasco, 431 U.S. 783, 789, 97 S. Ct. 2044, 52 L. Ed. 2d 752 (1977); U.S. Const. amend. XIV.

To determine whether a pre-accusatorial delay violated due process, the Court considers: (1) the prejudice to the defendant caused by the delay; (2) the government's reasons for the delay; and (3) whether the government's reasons outweigh the prejudice to the defendant. Oppelt, 172 Wn.2d at 295.

The alleged crime occurred in March 2007 but the State did not file the charge until May 2018. CP 1-3. This 11-year delay prejudiced Mr. Lay's ability to present his defense of consent.

The trial court acknowledged the delay between the alleged offense and the charge was substantial and assumed the delay caused actual prejudice to the defense. RP 286.

"Actual prejudice exists when missing evidence or unavailable testimony, identified by the defendant and relevant to the defense, would minimize or eliminate the impact of the state's evidence and bolster the defense." State v. Jenkins, 106 N.E.3d 216, 221, 2018-Ohio-483 (Ohio Ct. App.), review denied, 153 Ohio St. 3d 1442, 102 N.E.3d 499 (2018) (internal quotations marks and citation omitted). For example, the deaths of witnesses, the fading of memories, and the loss evidence, when balanced against the other admissible evidence, may establish actual prejudice. Id.

Also, the Court considers whether the lengthy delay gave the prosecution a tactical advantage over the defendant. State v. Adkins, 115 N.E.3d 887, 909, 2018-Ohio-2588 (Ohio Ct. App.), review denied, 153 Ohio St.3d 1505 (2018).

In People v. Gulley, 83 Ill. App. 3d 1066, 1070, 404 N.E.2d 1077 (1980), the Illinois court held a 51-month pre-indictment delay caused actual prejudice because, in part, the passage of time made it impossible for the defendant to establish his alibi defense. Neither the defendant nor his witnesses could recall two uneventful days four years in the past in order to negate the evidence presented by the State. Id. "Presuming the defendant's innocence, it would take some unusual activity on the two relevant days to call attention to them to cause them to be recalled by the defendant or any of his alibi witnesses." Id. at 1070.

Here, like in Gulley, the passage of time made it impossible for Mr. Lay to perfect his defense of consent. Mr. Lay testified that on the day in question, he did not abduct Ms. Rogerson into a car at the corner of Pike and Second in downtown Seattle, as she claimed. Instead, he was hanging out at the fountain by the King County Courthouse when she

approached him and offered him sex in exchange for crack cocaine. RP 2905-08, 2916-22.

The 11-year passage of time made it impossible for Mr. Lay to investigate and present evidence relevant to this defense. For example, at the time of the alleged offense, there were surveillance cameras in the vicinity of Second and Pike. RP 80, 99, 252, 280. But any surveillance videos from the cameras were destroyed or lost long ago. RP 80, 99, 252, 280. Had Mr. Lay been able to obtain such videos, he could have shown that no abduction occurred in that area on that day.

Similarly, due to the passage of time, Mr. Lay was unable to obtain any possible 911 calls or canvass for any possible witnesses. Ms. Rogerson claimed she was forcibly abducted into a car at the corner of Second and Pike, a busy intersection in downtown Seattle, in the middle of the afternoon. RP 2584, 2675. If the incident happened as Ms. Rogerson described it, it is likely someone witnessed the abduction and possibly called 911. But 911 calls are written over after about three months. RP

2807. Had the government pursued the case in a timely manner, he could have determined whether anyone called 911 that day. He could have potentially established that no one called 911 or witnessed the alleged abduction. This would have supported his defense that he was in another part of downtown Seattle and did not abduct Ms. Rogerson into a car.

Conversely, had the State charged Mr. Lay sooner, he could have found witnesses who could support his version of events—that he was hanging out by the fountain by the King County Courthouse. He could have found witnesses who might have seen him walking with Ms. Rogerson in that area that day.

The government cannot establish that its reasons for delaying the prosecution outweigh the prejudice to Mr. Lay. In order to establish a due process violation, it is not necessary that the government's reasons for delaying the prosecution were a deliberate attempt to gain a tactical advantage over the accused. Oppelt, 172 Wn.2d at 296. Even mere negligence may be sufficient. Id.

Routine administrative or investigative delays generally do not violate due process. State v. Alvin, 109 Wn.2d 602, 606, 746 P.2d 807 (1987). But an investigative delay may be unjustifiable "when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased." Adkins, 115 N.E.3d at 907-08.

In People v. Edwards, the New York court held a two-year delay in charging the defendant with arson was unreasonable and a violation of due process where "there existed ample evidence to indict and prosecute defendant within days of the fire." People v. Edwards, 717 N.Y.S.2d 749, 749, 278 A.D.2d 659 (N.Y. App. Div. 2000). The court reasoned, "[a]bsent a showing of good cause for such a protracted delay, defendant is entitled to dismissal even without a showing of prejudice." Id. at 750.

Here, the government's delay in prosecuting Mr. Lay was negligent and unjustifiable. The government had ample evidence to charge and prosecute Mr. Lay soon after the alleged crime occurred. Mr. Rogerson reported the incident to the police right away and underwent a full sexual assault exam. RP 2464-75, 2578-85, 2606-08. Mr. Lay's DNA was in the CODIS database at the time. RP 90-95, 119; Pretrial Ex. 3. Had the police submitted the swabs in a timely manner, they could have matched the DNA profile to Mr. Lay right away.

Further, Ms. Rogerson told the police she had seen an ID of the suspect with the name "John Lay" on it. RP 67, 81. The police searched their database and found an arrest record for Mr. Lay. RP 90-95; Pretrial Ex. 3. Had the police been reasonably diligent, they could have accessed a photograph of Mr. Lay and shown it to Ms. Rogerson. RP 84, 160.

Detective Ishimitsu's reasons for inactivating the investigation were not reasonable and reflect a lack of diligence. Ms. Rogerson was available and wanted to cooperate.

RP 2713-14. After all, she had submitted to a full sexual assault exam, an unpleasant and often re-traumatizing experience. RP 2713-14, 2866. And she was easy to find. The police knew she was staying at Angeline's; they could have sent an officer there in person to find her. RP 2668-69.

The government's negligent failure to pursue the investigation in a timely manner was unjustifiable. When they finally filed the charge, they had essentially the same evidence that was available to them when they ceased investigating the case 11 years earlier. See Adkins, 115 N.E.3d at 907-08. The only difference is that they now had the results of a DNA test of the swabs from the rape kit. But they could have received those same results much sooner, and matched the DNA profile they obtained to Mr. Lay's profile, had they acted with reasonable diligence.

The government's unreasonable 11-year delay in charging Mr. Lay violated due process. This Court should grant review and reverse.

3. Requiring Mr. Lay to be tried and convicted by a jury that did not reflect a fair cross section of the community violated the state and federal constitutions.

Mr. Lay is a Black man accused of rape by a white woman. RP 1628-29. The circumstances of the case implicate issues of race and racial bias. RP 1628-29. Once it became apparent there were no Black members in the jury venire, Mr. Lay moved the court to strike the panel and draw a new one that more accurately reflected the racial makeup of King County. RP 1628-30, 1636, 2090, 2096. He argued the lack of diversity in the jury panel violated his constitutional right to an impartial jury. RP 1314, 1320-21, 2096. Defense counsel pointed out this was a systemic problem in King County. RP 1632. Yet the court denied the motion and allowed Mr. Lay to be tried and convicted by a jury containing no Black members. RP 1630-31, 1636, 1834-35, 2092-94, 2406, 2208. This violated the state and federal constitutions.

Article I, section 22 guarantees the right to trial "by an impartial jury of the county in which the offense is charged to

have been committed." Const. art. I, § 22. Article I, section 21 dictates this right "shall remain inviolate." Const. art. I, § 21. The Sixth Amendment guarantees people accused of crimes the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amends. VI, XIV. These constitutional provisions create the right to an impartial jury with jurors drawn from a fair cross section of the community. Taylor v. Louisiana, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); In re Pers. Restraint of Yates, 177 Wn.2d 1, 19, 296 P.3d 872 (2013); City of Bothell v. Barnhart, 172 Wn.2d 223, 228, 233, 257 P.3d 648 (2011).

Allowing Mr. Lay to be tried and convicted by a jury containing no Black members violated his state and federal constitutional right to be tried by a jury drawn from a fair cross-section of the community.

4. The prosecutor committed misconduct.

An accused in a criminal trial has a fundamental right to a fair trial. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); U.S. Const. amend. XIV; Const. art. I, § 3. Prosecutorial misconduct may deprive a defendant of that right. Glasmann, 175 Wn.2d at 703-04.

Here, the prosecutor committed misconduct by releasing Mr. Lay's criminal history and characterizing his crimes as "brutal" and calling him an "animal" in front of the jury.

5. Mr. Lay received ineffective assistance of counsel.

The federal and state constitutions guarantee a criminal defendant the right to counsel. U.S. Const. amend. VI; Const. art. 1, § 22. A defendant receives ineffective assistance of counsel if (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's poor performance prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35,

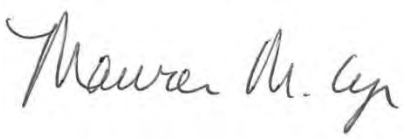
899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Mr. Lay received ineffective assistance of counsel because his trial attorney failed to meet with him for strategic discussions, give him full discovery, or question Ms. Roberson about her drug use.

F. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 14th day of July, 2022. I certify this brief complies with RAP 18.17 and contains 4,997 words, excluding those portions of the document exempted from the word count by the rule.



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Washington Appellate Project – 91052

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JONNIE L. LAY, Appellant.	No. 82428-7-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, C.J. — In 2018, a jury convicted Jonnie Lay of second degree rape for an offense he committed in 2007. On appeal, he argues that his conviction violated the statute of limitations in effect at the time he was charged, that the delay in his prosecution violated his due process rights, and that a nearly all white jury venire violated his right to an impartial jury under the state and federal constitutions. We reject these arguments and affirm Lay's conviction.

FACTS

On March 14, 2007, T.R. left the Belltown homeless shelter, Angeline's, and went for a walk down Second Avenue. Near the intersection with Pike Street, a car pulled up onto the sidewalk, blocking her path. Johnnie Lay jumped out of the car, grabbed T.R., and threw her into the back seat. Lay got into the passenger

seat and the driver, who was never identified, drove away. Over the course of the next several hours, Lay repeatedly raped T.R. in the car and at an unidentified wooded area, at times while threatening T.R. with a screwdriver. At one point, Lay dropped an identification badge and T.R. saw the name "John Lay."

Eventually, Lay and the driver threw T.R. out of the car in Belltown near the Sculpture Garden and she returned to Angeline's where she reported the rape and called the police. Seattle Police Officer Kurt Alstrin responded to the call and took T.R.'s statement. Officer Alstrin then took T.R. to Harborview Medical Center where she spoke with a sexual assault nurse examiner and a hospital social worker about the incident. She underwent a full sexual assault examination, which included the collection of several swabs for deoxyribonucleic acid (DNA) testing. A nurse observed a laceration near T.R.'s vagina as well as bruising on her thigh.

The Seattle Police Department (SPD) assigned the case to Detective Roger Ishimitsu. Detective Ishimitsu reviewed the police report and the Harborview medical records and telephoned T.R. at the number she had provided. They arranged for a formal interview on March 28, but T.R. did not show up. Detective Ishimitsu followed up with a voicemail and a letter, but T.R. never responded. By that point, T.R. had left Angeline's and was living at the YWCA.

Detective Ishimitsu searched SPD's database for "John Lay," the name T.R. reported to have seen on the dropped identification badge, and found several different individuals with similar names. He was unable to make a positive identification of the suspect. Because Detective Ishimitsu did not have a responsive victim and was unable to proceed with the case, he followed

department policy in effect at the time and did not send the sexual assault kit for testing and inactivated the case.

In 2015, the Washington Legislature passed a law, now codified as RCW 5.70.040, requiring the testing of all sexual assault kits held in law enforcement custody. SPD sent T.R.'s sexual assault kit to the state crime lab for testing in June 2016. The police received the results in March 2018. DNA found on the swabs in the sexual assault kit matched Lay, whose DNA was already in the FBI's Combined DNA Index System from prior convictions.

On March 8, 2018, SPD reassigned the case to Detective Shawn Martinell. Martinell located T.R., now living in a Belltown apartment, and arranged to interview her. He completed his investigation and submitted it to the prosecutor's office for possible charges by March 23, 2018. Lay, living in Illinois at the time, traveled to Seattle voluntarily for his arraignment. Police then obtained a DNA sample from him, which confirmed the DNA match. The State charged Lay with first degree rape on May 21, 2018.

At that time, the statute of limitations for first and second degree rape was 10 years "from the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing or by photograph . . . , whichever is later." Former RCW 9A.04.080(3) (2006).[1] Because the State filed the charge more than 10 years after the date of the alleged offense, Lay moved to dismiss the charge. The trial court denied the motion,

[1] The current statute of limitations for first and second degree rape is 20 years. RCW 9A.04.080(1)(b).

finding that SPD did not identify Lay by DNA or photograph until March 2018, two months before the State filed charges.

Lay's first trial ended in a mistrial with a hung jury. The State then amended the charge to second degree rape. At the second trial, Lay testified in his own defense. He admitted having sex with T.R., but testified that T.R. had approached him and offered to have sex with him in exchange for crack cocaine. He testified that the two wandered around downtown Seattle before finding a secluded location to have consensual sex and smoke crack together. Lay denied that any violence occurred and claimed the encounter ended when he left the area on a bus.

A jury convicted Lay of second degree rape. The court imposed a sentence within the standard range. Lay appeals.

ANALYSIS

Statute of Limitations

Lay first argues the trial court erred in denying his motion to dismiss the charge for violation of the statute of limitations. We disagree.

When the facts are not in dispute, alleged violations of the statute of limitations are questions of law we review de novo. State v. Peltier, 181 Wn.2d 290, 294, 332 P.3d 457 (2014). There are no disputed facts regarding the statute of limitations in this case. The State filed charges against Lay over 11 years after he committed the crime. At the time, the statute of limitations for second degree rape was 10 years. But the trigger date for the commencement of this 10-year period was not the date of the crime. In 2006, the legislature amended the statute of limitations for any sex offenses under RCW 9.94A.030 to start the clock "from

the date of commission or one year from the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing or by photograph as defined in RCW 9.68A.011, whichever is later." Former RCW 9A.04.080(3) (LAWS OF 2006 ch. 132, § 1). Then, as now, a "sex offense" under RCW 9.94A.030 included both first and second degree rape. Former RCW 9.94A.030(41); RCW 9A.44.045 (first degree rape); RCW 9A.44.050 (second degree rape).

The parties dispute the meaning of the phrase "the date on which the identity of the suspect is conclusively established by deoxyribonucleic acid testing or by photograph." Lay argues that the statute of limitations ran when T.R. reported the rape to police because police "could have 'conclusively established' his identity" with the results of the sexual assault kit and the information T.R. gave police regarding the name she saw on his identification badge. We reject this interpretation as contrary to the plain language of former RCW 9A.04.080(3) (2006).

The interpretation of a statute is a question of law that we review de novo. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). Our goal in interpreting a statute is to carry out the legislature's intent. Id. at 263. We must avoid an interpretation that would produce an unlikely, absurd, or strained result. State v. Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). We first examine the plain language of the statute. Gonzalez, 168 Wn.2d at 263. If the meaning of a statute is plain on its face, we give effect to the plain meaning as an expression of legislative intent. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

This court has previously held that "the identity of a suspect is not 'conclusively established' until DNA testing matches the DNA profile of an unknown suspect to the DNA profile of a known suspect." State v. McConnell, 178 Wn. App. 592, 315 P.3d 586 (2013), review denied, 180 Wn.2d 1015 (2014). Here, the DNA testing did not match Lay to the DNA profile from the sexual assault kit until March 2018. The statute of limitations began to run at that point.

Lay asks us to overrule McConnell, arguing the holding in that case "contravenes a principal purpose of the statute of limitations, which is to encourage prompt investigations. It allows the government to avoid the statute of limitations by delaying the testing of a DNA sample indefinitely." But even if we agreed with this reasoning, the public policy implications of the statute of limitations for rape is a question for the legislature, not this court. The plain language of the statute is unambiguous; the limitations period runs when DNA evidence is conclusively matched to a suspect, not when that evidence "could have been" matched.

We reach the same conclusion regarding the exception for photographic identification. Lay argues that the police had access to his photograph because he was a registered sex offender and the police "could have shown the photograph to [T.R.]" after she provided the name "John Lay." But, there is no dispute that T.R. did not positively identify Lay from a photograph, as required for the statute of limitations to begin to run. We therefore conclude the statute of limitations did not commence until Lay's DNA was matched to the sexual assault kit in March of 2018. The trial court did not err in denying Lay's motion to dismiss the charge against him on statute of limitations grounds.

Due Process

Lay next argues that, even if the State filed charges within the statute of limitations, the delay in bringing charges violated his due process rights. We again disagree.

Whether preaccusatorial delay violates due process is a question of law we review de novo. State v. Oppelt, 172 Wn.2d 285, 290, 257 P.3d 653 (2011). Preaccusatorial delay violates due process if prosecution of the case "violat[es] fundamental conceptions of justice." Id. at 295.

This court employs a three-part test in order to determine whether preaccusatorial delay violates due process. First, the defendant must show actual prejudice. Id. A defendant is not required to show bad faith, but "[w]here the State's reason for delay is mere negligence, establishing a due process violation requires greater prejudice to the defendant than cases of intentional bad faith delay." Id. at 296. "If the defendant establishes prejudice, the burden shifts to the State to show the reasons for the delay." McConnell, 178 Wn. App. at 606 (citing Oppelt, 172 Wn.2d at 295). The court then balances the State's justification against the prejudice to the defendant and determines "whether fundamental conceptions of justice would be violated by allowing prosecution." Oppelt, 172 Wn.2d at 295.

The Ninth Circuit has characterized the defendant's burden in a claim of prosecutorial delay as "heavy" and rarely met. United States v. Huntley, 976 F.2d 1287, 1290 (9th Cir. 1992). "Prejudice, whenever it is alleged, must be specially demonstrated and cannot be based upon speculation." State v. Haga, 8 Wn. App.

481, 489, 507 P.2d 159 (1973) (citing United States v. Marion, 404 U.S. 307, 92 S. Ct. 455, 30 L. Ed. 2d 468 (1971)). The mere assertion that a missing witness might have been useful does not establish actual prejudice. United States v. Mays, 549 F.2d 670, 677 (9th Cir.1977). Nor does the assertion that "witnesses' memories may have faded with the passage of time." Prantil v. California, 843 F.2d 314, 318 (9th Cir.1988).

Lay argues that the delay in his prosecution was the result of mere negligence, not bad faith. Therefore, Lay must make a heightened showing of prejudice to obtain relief under a negligent delay theory. Oppelt, 172 Wn.2d at 292-93.

We find the analysis in McConnell instructive. There, the defendant argued he suffered actual prejudice from a 12-year delay in filing charges because, by that point, his mother was no longer alive to testify and the State had destroyed much of the physical evidence. 178 Wn. App. at 606. The court concluded that McConnell failed to demonstrate actual prejudice because he did not identify what his mother would have said if called to testify or explain how the physical evidence would have aided his defense. Id. at 607.

In this case, Lay similarly argues that he suffered actual prejudice because the passage of time prohibited him from developing his defense of consent. He claimed that T.R. approached him and offered sex in exchange for crack cocaine. He testified that because he did not have any drugs or any money with which to purchase them, he and T.R. walked around downtown Seattle in search of a dealer who would give Lay drugs for which he could pay later. While walking around, Lay

claimed he found an envelope on the ground containing $500, and shortly afterwards found a dealer from whom he purchased $200 worth of crack. He testified that the two then found a spot out of public view near the sports stadiums where they smoked the crack and had consensual sex.

Lay argues that T.R. lied about having been raped and the State's delay in bringing a rape charge made it impossible for him to recover possible security camera footage of the downtown area where she alleged she was abducted. He contends that had he been immediately charged, he could have found this security footage to prove no abduction by car occurred in the location she claimed. Lay submitted a declaration from an investigator with the public defender's office who stated that in 2007 there were surveillance cameras on the southwest and northwest corners of the intersection of Second Avenue and Pike Street. He testified that when he visited the businesses at that location in January 2019, there were cameras at the intersection but the businesses that had been present in 2007 were no longer there. From this testimony, Lay contends that surveillance camera footage to prove T.R. lied about the abduction was lost.

This argument, however, is speculative and insufficient to carry a claim of unconstitutional preaccusatorial delay. Lay has no evidence that any exculpatory security camera footage ever existed. Even if there are security cameras at the intersection, there is no way to know that the cameras were directed toward the location T.R. identified as the place of her abduction.

Even less convincing is Lay's argument that, had the State charged him sooner, he could have found witnesses in the area of the alleged abduction to rebut

T.R.'s account of the rape. Despite testifying that he and T.R. interacted with a number of other individuals on the day in question, Lay has not identified any witness who could have corroborated his story. His mere assertion that such evidence might have existed is insufficient. Based on this record, Lay has failed to meet his burden of establishing actual prejudice.

Right to an Impartial Jury

Lay finally argues that we should reverse his conviction because the underrepresentation of African Americans in his jury venire violated his right to an impartial jury under both the state and federal constitutions. We reject this argument as well.

During jury selection before his second trial, Lay orally moved for a new venire because only two potential jurors in the venire of 147 identified themselves as Black or African American. Lay, who is Black, argued that the jury pool underrepresented the Black population of King County in violation of his constitutional right to an impartial jury. But when he moved to strike the jury panel below, defense counsel admitted "I don't know the county's approach to sending out . . . Jury Summons" and "I don't have evidence—to say that the . . . jury summonsing process is explicitly bias." He nevertheless argued that the result of the process in Lay's case was a disparity between the racial make-up of King County and the venire assigned to Lay's trial. He presented no statistical data to support this allegation.

The court denied the motion because Lay could not identify a deficiency in the county's jury summons process. The trial court opined that Lay was "asking

[the court] to redo the same thing we've already done . . . [a]nd hoping for a different result." The court stated the juror selection process was "race neutral," but indicated that if Lay found evidence indicating otherwise, the court was willing to hear it. Lay never brought such evidence before the trial court. At the conclusion of voir dire, the parties selected a panel of 14 jurors, including two alternates. None of the jurors was Black.

A defendant has a right under the Sixth and Fourteenth Amendments and article I, § 22 of the Washington constitution to be tried by a jury that is representative of the community. Taylor v. Louisiana, 419 U.S. 522, 527, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975); State v. Hilliard, 89 Wn.2d 430, 440, 573 P.2d 22 (1977). A defendant is not, however, entitled to exact cross representation in the jury pool and the jury selected for the defendant's trial need not be of any particular composition. Hilliard, 89 Wn.2d at 442. A jury selection process is adequate as long as it "may be fairly said that the jury lists or panels are representative of the community." Taylor, 419 U.S. at 538.

To establish a prima facie case of a violation of his right to a fair cross section of the community, Lay must establish "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is due to systemic exclusion of the group from the jury selection process." State v. Cienfuegos, 144 Wn.2d 222, 231-32, 25 P.3d 1058 (2001) (quoting Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d

579 (1979)). If a defendant establishes all three elements, he has shown a prima facie case of a Sixth Amendment violation and the State must justify the infringement "by showing attainment of a fair cross section to be incompatible with a significant state interest." Duren, 439 U.S. at 364.

In this case, the trial court found that Lay failed to demonstrate the second and third elements of the Duren test and denied Lay's motion to strike the venire. We review a trial court's ruling on challenges to the venire process for abuse of discretion. State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991). A challenge to the jury panel will be sustained only if there is a demonstrated material departure from the procedures provided by law. State v. Roberts, 142 Wn.2d 471, 519, 14 P.3d 713 (2012).

The trial court did not abuse its discretion in denying Lay's motion to strike the venire. Lay did not challenge the method by which King County Superior Court generates its master list of prospective jurors. Nor did he argue that the court departed from the statutory procedures for creating this random list. And there is no evidence it did so.

Chapter 2.36 RCW guides the assembly of Washington jury panels. Superior courts derive master jury source lists from all registered voters and all "licensed drivers and identicard holders" residing in each county. RCW 2.36.054(1). Potential jurors are selected at random. RCW 2.36.065. The court then sends those potential jurors summonses through the mail. RCW 2.36.095. In Hilliard, our Supreme Court held that the statutory method of selecting jurors at random from voter registration lists is the best source of compiling a fair cross-

section of the community. 89 Wn.2d at 440. Since Hilliard, the Washington legislature has revised the methods for compiling jury lists in an effort to make the pool of eligible jurors more inclusive and representative. State v. Lanciloti, 165 Wn.2d 661, 668-69, 201 P.3d 323 (2009). We have no basis to conclude that the method by which King County Superior Court generates its list of prospective jurors violates either the state or federal constitution.

Moreover, Lay provided no evidence to the trial court that King County's jury selection procedure leads to an unfair or unreasonable underrepresentation of Black voters in relation to the numbers of eligible members of that group in the community or that the court systematically excludes Black voters from the jury pool. Lay relied solely on the fact that, in his case, only two of the 147 potential jurors identified as Black or African American. But a mere allegation of underrepresentation in a jury venire does not establish a violation of a defendant's right to an impartial jury. In re Pers. Restraint of Yates, 177 Wn.2d 1, 20, 296 P.3d 872 (2013). For all these reasons, the trial court did not abuse its discretion in denying Lay's motion to strike the venire.

Lay raises two new arguments on appeal. First, Lay contends that by splitting King County into two different jury assignment areas, the court has created jury venires with disparate percentages of Black jurors in relationship to their numbers in the community. He maintains that King County Superior Court's adoption of two jury assignment areas, one for residents who live north of Interstate 90 and a second for residents who live south of Interstate 90, perpetuates historic racial disparities, the result of which is an unfair representation of the Black

population in Seattle jury pools.[2] Lay points to census data indicating that the Black population in Seattle, Kent and Renton is 9.2 percent, 12.4 percent, and 12.7 percent, respectively. He also relies on the academic research of Peter Collins and Brooke Miller Gialopsos who recently published the results of juror surveys which they undertook to determine whether there are gender, racial or ethnic, or sexual orientation disparities within jury pools in Washington state courts. See Collins & Gialopsos, "Answering the Call: An Analysis of Jury Pool Representation in Washington State," 22 Criminology, Criminal Justice Law & Society 1 (2021). Based on the survey responses from jurors, Collins and Gialopsos found that there is, in general, an underrepresentation of Black jurors at both the Seattle and Kent courthouses. Id. at 10.

But neither the demographic data Lay submits nor the survey results discussed in "Answering the Call" attribute this underrepresentation to the King County Superior Court jury assignment area boundaries or any other exclusionary aspect of the jury selection process. In fact, Lay has made no attempt to demonstrate disproportionality under any of the recognized statistical methods that courts have employed. See United States v. Hernandez-Estrada, 749 F.3d 1154,

[2] Our Supreme Court upheld the split between judicial divisions in King County as constitutional under both article I, section 22 of the State Constitution and the Sixth Amendment. State v. Lanciloti, 165 Wn.2d 661, 671-72, 201 P.3d 323 (2009). In that case, a Black defendant challenged the constitutionality of RCW 2.36.055 which permitted superior courts with more than one courthouse to divide its jury source list in a way to make it easier for jurors to travel to the courthouse nearest to their residence. Id. at 671. With the amendment to RCW 2.36.055, King County Superior Court passed amendments to Local CrR 5.1 and Local General Rule 18, dividing its jury source list into Seattle and Kent jury assignment areas. The boundary of the two jury assignment areas is Interstate 90. LCrR 5.1(2)(A), (B). The purpose of moving away from a county-wide unitary jury pool system was to reduce racial disparities in jury service. Lanciloti, 165 Wn.2d at 664, n.1. The Supreme Court held that RCW 2.36.055 did not violate the Sixth Amendment or article I, § 22's right to an impartial jury. Id. at 671-72.

1160 (9th Cir.), cert. denied, 574 U.S. 1029 (2014) (discussing strengths and weaknesses of various analytical methods for evaluating fair cross-section cases). A showing of underrepresentation alone does not establish systematic exclusion of a group in the jury selection process. Duren, 439 U.S. at 366. Instead, a defendant must show that any underrepresentation is inherent in the jury selection process. Id. The resulting underrepresentation must be "due to the system by which juries were selected." Id. at 367. Lay produced no evidence to establish a nexus between the jury assignment area system and the underrepresentation of people who identify as Black or African American in jury venires.[3]

Second, Lay asks this court to jettison the nexus requirement of the Duren test and hold that article I, §§ 21 and 22—in combination—confer broader protections of the right to a jury drawn from a fair cross section of the community than the Sixth Amendment. He argues that "this Court should find under the Washington Constitution, unlike the Sixth Amendment, evidence of underrepresentation of a distinctive group in the jury pool sufficiently establishes a fair cross section claim." In State v. Munzanreder, 199 Wn. App. 162, 174, 398 P.3d 1160, review denied, 189 Wn.2d 1027 (2017), Division Three of this court

[3] This court has repeatedly rejected challenges to the jury venire process on appeal where the defendant failed to make an evidentiary showing at trial that a distinctive minority group had been systematically excluded from the jury pool. See State v. Severns, no. 81668-3-I, slip op. at *4-5 (Wash. Ct. App. Dec. 6, 2021)[3] (a single instance of an unrepresentative jury pool is "anecdotal" and "does not prove that jury venires in King County are disproportionately lacking in African Americans relative to the population of African Americans in the county itself"); State v. Clark, 167 Wn. App. 667, 674-76, 274 P.3d 1058 (2012) ("A systematic failure, in the absence of evidence that normal selection procedures were not followed, would require evidence that a cognizable group routinely was excluded from jury service."); State v. Singleton, 9 Wn. App. 399, 406-07, 512 P.2d 1119 (1973) (trial court properly rejected defendant's challenge to the jury panel where no evidentiary showing was made in support of his argument that the jury selection process excludes large portions of poor and minority segments of King County).

rejected this argument. A panel of this division recently certified this question to our Supreme Court. See State v. Paul Rivers, no. 81216-5, Order of Certification (May 11, 2022). A commissioner of that court accepted certification and transferred the case to the Supreme Court for a determination on the merits. See State v. Paul Rivers, no. 100922-4, Ruling Accepting Certification (May 12, 2022).

Despite the pendency of this constitutional issue in the Supreme Court, we conclude we need not reach it here because even if we were to adopt the test Lay advances, he failed to present sufficient evidence to establish a prima facie case under that lesser standard. Based on the record before us, we cannot find for the first time on appeal that an underrepresentation of people who identify as Black or African American in jury venires at the Seattle courthouse is a per se violation of the state constitution's right to an impartial jury.[4]

Because the data Lay presents is so scant and the analysis so superficial, we conclude that he has not established a prima facie case of a constitutional violation under either the Sixth Amendment or article I, §§ 21 and 22.

Statement of Additional Grounds

Finally, Lay raises several additional arguments in his statement of additional grounds. We reject each of these arguments.

Lay argues that the State committed prosecutorial misconduct. To establish prosecutorial misconduct, the defendant must establish both improper conduct by

[4] We further note that Lay had the ability to ask the trial court to transfer venue to the Kent assignment area if he believed he would receive a more representative jury venire in that courthouse. King County Superior Court Local Criminal Rule (KCLCrR) 5.1(d)(3)(E) states that "The Court on its own motion or on the motion of a party may assign or transfer cases to another case assignment area in the county whenever required for the just and efficient administration of justice in King County." Lay never moved to change venue.

the prosecutor and prejudicial effect. State v. Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict. State v. Evans, 96 Wn.2d 1, 5, 633 P.2d 83 (1981). Lay first contends the prosecutor committed misconduct by releasing his criminal history to the press. However, there is no evidence in the record to substantiate this claim. Lay's allegation that his criminal record can be found online is wholly insufficient and does not establish prosecutorial misconduct.

Lay also argues that the prosecutor committed misconduct by characterizing his crime as "brutal" and alleges that the prosecutor called him an "animal" in front of the jury. The latter never happened. It was T.R. who described Lay as an animal. And although the prosecutor did describe the crime as "brutal," our Supreme Court has held that a prosecutor's repeated characterization of a crime as "brutal" does not constitute prosecutorial misconduct. State v. Pirtle, 127 Wn.2d 628, 673-74, 904 P.2d 245 (1995). Lay argues that the prosecutor's use of the term had racist connotations, citing the fact that African American men have a long history of being characterized as "brutes" and "savages." But the prosecutor never called Lay a "brute." She stated that Lay "brutally raped" T.R., an accurate factual description of the crime as it was described by the victim. Lay has also failed to make any showing that the prosecutor's use of the term had any effect on the jury's verdict.

Next, Lay argues that Seattle police did not read him his Miranda[5] warning upon his arrest. Miranda warnings protect a defendant's constitutional right not to

[5] Miranada v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966).

make incriminating confessions or admissions to police while in the coercive environment of police custody. State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S. Ct. 1592, 94 L. Ed. 2d 781 (1987). Without a Miranda warning, a suspect's statements during custodial interrogation are presumed involuntary. State v. Sargent, 111 Wn.2d 641, 647-48, 762, P.2d 1127 (1988). In this case, the State did not offer any of Lay's custodial statements as evidence. Even if the State did fail to give a Miranda warning, this failure did not affect Lay's conviction.

Finally, Lay argues he received ineffective assistance of counsel for his trial counsel's failure to meet with Lay for strategic discussions, failure to give Lay full discovery, and failure to question T.R. on her drug use.

To demonstrate ineffective assistance of counsel,

> [f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Lay cannot meet this standard. Even if we conclude that defense counsel made the errors Lay claims and that these errors rose to the level of deficient performance, he has not made any showing of prejudice. Lay does not explain how the outcome of trial would have changed if he had had strategic meetings with counsel and full access to discovery material. Moreover, T.R. freely admitted to using crack cocaine on the day she was raped. Lay does not explain how further

questioning on that subject would have helped his case.

Affirmed.

Andrus, C.J.

WE CONCUR:

Coburn, J.

Mann, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 82428-7-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Paralegal Date: July 15, 2022
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