

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

NO. 41131-8-II

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

STATE OF WASHINGTON, Respondent

v.

JONATHAN MARK LUCAS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.09-1-01509-1

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

I. THE TRIAL COURT DID NOT ERR, EITHER UNDER THE RULES OF EVIDENCE OR CASE LAW, IN ALLOWING THE STATE TO CROSS-EXAMINE DR. LARSEN ABOUT HIS KNOWLEDGE OF MR. LUCAS' PRIOR CONVICTION FOR ROBBERY, AND MR. LUCAS' RIGHT TO PRESENT A DEFENSE WAS NOT IMPAIRED.

II. MR. LUCAS WAS NOT DENIED A SPEEDY TRIAL WHERE HIS ATTORNEY WAIVED SPEEDY TRIAL SO THAT HE WOULD HAVE TIME TO PREPARE A MENTAL HEALTH DEFENSE.

III. MR. LUCAS' PERSONAL RESTRAINT PETITION SHOULD BE DISMISSED.

B. STATEMENT OF THE CASE

The State agrees largely with the statement of the case submitted by Mr. Lucas, but offers the following additional facts. Prior to trial, defense counsel stated that he believed his client would be best served by a defense of diminished capacity. RP 3, 4, 7, 9, 11, 13. Mr. Lucas never expressly disavowed this defense, but evidently did not want to waive speedy trial. *Id.* To the extent Mr. Lucas ever objected to his attorney's plan, it was only to the part of the plan that would require him to have a trial set outside the original time for trial period, not to the reliance on diminished capacity itself. *Id.*

Dr. Larsen, the expert hired by Mr. Lucas to evaluate him for diminished capacity, testified that Mr. Lucas gave him his version of the

incident which gave rise to the convictions in this case. RP 332.

Specifically, Mr. Lucas told him that after waking up that morning he consumed a large amount of alcohol. Id. He then went to a party where he consumed more alcohol. Id. He told Dr. Larsen that he drank four 24-ounce beers (ale, to be specific) and four glasses of gin. RP 349-50. At some point after that he lost memory of what happened. Id. He remembered vomiting, and remembered waking up in the jail. Id. He remembered “little else.” Id. Mr. Lucas also told Dr. Larsen that he had been off of his psychotropic medication for ten days at that point. RP 332-33. Dr. Larsen relied on Mr. Lucas’ assertions in forming his opinion. RP 333, 350. Dr. Larsen testified that he did not attempt to verify Mr. Lucas’ assertions and accepted his assertions “at face value.” RP 350. Dr. Lucas, relying on Mr. Lucas’ assertions about his alcohol consumption, testified at length about the effects of alcohol on the brain and on one’s ability to form the mental states requisite to commit these crimes. RP 328-30, 332-33.

C. ARGUMENT

I. THE TRIAL COURT DID NOT ERR, EITHER UNDER THE RULES OF EVIDENCE OR CASE LAW, IN ALLOWING THE STATE TO CROSS-EXAMINE DR. LARSEN ABOUT HIS KNOWLEDGE OF MR. LUCAS’ PRIOR CONVICTION FOR ROBBERY, AND MR. LUCAS’ RIGHT TO PRESENT A DEFENSE WAS NOT IMPAIRED.

Appellant complains that the trial court erred in allowing the State to cross examine Dr. Larsen about whether he was aware that Mr. Lucas had a prior conviction for robbery, a crime of dishonesty. ER 806 provides:

When a hearsay statement, or a statement defined in Rule 801 (d) (2) (iii), (iv) or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence, which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Professor Teglund states: "Despite the seemingly complex language of Rule 806, the general principle is simple: When a hearsay statement is admitted into evidence, the out-of-court declarant is treated as witness." Courtroom Handbook on Evidence, 2009-2010 Edition, Karl Teglund, at page. 465. Notably, there is no exception in ER 806 for declarations related through experts as opposed to lay witnesses. The declaration in question must be an assertion and it must be offered for the truth of the matter asserted. *State v. Fish*, 99 Wn.App. 86, 992 P.2d 505 (1999). Professor Teglund notes that the hearsay rule is sometimes phrased in terms of relevance. In other words, if the statement's relevance is

contingent upon its truth, it is offered for the truth of the matter asserted. On the other hand, “if the statement is relevant simply *because it was made*, and without regard to whether the statement is true or false, the statement is not hearsay. See *State v. Stubsjoen*, 48 Wn.App. 139, 738 P.2d 306 (1987).” See Courtroom Handbook on Evidence, 2009-2010 Edition, Karl Teglund, at page. 465.

Appellant suggests that the statements he made to Dr. Lucas were not hearsay because they were not offered for the truth of the matter asserted. This is incorrect. Dr. Larsen testified that he relied heavily upon the defendant’s assertions both about his past and about the assault itself, to form his opinions. Dr. Larsen was required to assume the truth of these assertions because if he didn’t, there would be no point in relying upon them to form his conclusions. Their relevance depended upon their truth. Through Dr. Larsen’s testimony, the defendant was able to present his version of events. For example, Dr. Larsen testified that he defendant had consumed a large amount of alcohol on the day of the assault and that he blacked out. Contrary to defendant’s claim, this is precisely the type of out-of-court statement that ER 806 permits impeachment of. If not, a defendant could place his version of the events before the jury without any adversarial testing. Although it is certainly true that a defendant need not testify in order to establish diminished capacity, and equally true that the

trial court cannot require the defendant to testify as a pre-condition to testimony by his expert about his version of events¹, these two rules do not nevertheless shield the declarant from impeachment where the expert is required to assume the truth of the declarations in order to form his opinion. Appellant has cited no case which stands for the proposition that ER 703 confers special status upon expert witnesses, shielding them from the impeachment principle of ER 806. He has cited no case which holds that ER 806 applies only to lay witnesses, not experts.

Defendant claims that the defendant's assertions to Dr. Lucas were not hearsay because they were self-serving and thus "inadmissible to prove the truth of the matter asserted." See Brief of Appellant at p. 13. That the statements were self-serving does not automatically render them inadmissible. Statements made for the purposes of medical diagnosis or treatment, for example, could be self-serving (and otherwise truthful) on the part of the declarant but admissible nonetheless. Not every exception to the hearsay rule requires that the statement in question be against the interest of the declarant. Appellant cites to *State v. Fullen*, 7 Wn.App. 369, 381, 499 P.2d 893 (1972), but *Fullen* does not support Appellant's claim that the trial court committed error here. In *Fullen*, the Court held that where the trial court refused to permit the psychiatrist from testifying

¹ See *State v. Eaton*, 30 Wn.App. 288, 633 P.2d 921 (1981).

about the statements the defendant made to him which supported his opinion, such refusal was error. *Fullen* at 381-82. However, the Court held the error was harmless. *Id.* *Fullen* does not stand for the proposition that a doctor, who bases his opinion not only on a defendant's assertions but on the truth of those assertions, could not then be cross-examined on whether he knew that the defendant had been convicted of a crime of dishonesty when he formed his opinion. Such testimony is critical in aiding the jury in their decision of whether to rely upon the expert's opinion.

Lucas argues that because the expert relied upon the defendant's assertions the assertions were necessarily offered for a non-hearsay purpose. This argument is meritless. An oft-cited reason for admitting a declarant's statements at trial is that they are not offered for the truth of the matter asserted but rather for the effect they had on the listener. For example, in an assault case the defendant might offer testimony that the victim leveled a slur upon him. The defendant would not be offering the statement to prove the truth of the slur, but rather to show why he was provoked into assaulting the alleged victim. The truth of such a declaration is immaterial. Here, the truth of the defendant's assertions was material because Dr. Larsen's opinion *depended upon their truth*. In deciding whether to rely upon Dr. Larsen's testimony, the jury was entitled to know whether Dr. Larsen knew that the person he evaluated, and upon whose

declarations he relied, had been convicted of a crime of dishonesty. If Dr. Larsen knew that the defendant had been convicted of a crime of dishonesty and assumed the truth of his statements anyway, the jury was entitled to consider that in deciding whether Dr. Larsen's conclusions were reasonable.

Lucas appears to argue that because the statements were admissible under ER 703² they could not have been hearsay because if they were hearsay, they would have been *inadmissible* under ER 801. The apparent tension between these rules is resolved by ER 806: A declarant's otherwise inadmissible hearsay declarations may be admitted under ER 703, but they are nevertheless subject to adversarial testing and impeachment under ER 806. Appellant's heavy reliance on *State v. Eaton*, 30 Wn.App. 288, 633 P.3d 921 (1981) is misplaced. In *Eaton*, the trial court was understandably concerned about the specter of the defendant's psychological expert parroting the defendant's version of the incident to the jury, thereby allowing the defendant to effectively testify before the jury while shielding him from cross-examination. *Eaton* at 291. The trial court in *Eaton* erred, however, in requiring the defendant to testify as a

² ER 703 provides: The facts or data in the particular case upon which an expert bases his opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

pre-condition to the admission of his expert's testimony. *Eaton* at 924.

The Court held that the appropriate method for testing the reliability of the psychiatrist's opinion was through cross-examination of the psychiatrist.

Id. In fact, that is precisely what occurred in this case. Dr. Larsen was able to relay his opinion about the defendant's capacity, which was based heavily on statements made to him by the defendant. The State was permitted to impeach Dr. Larsen's opinion, through cross-examination, by eliciting testimony that Dr. Larsen knew Mr. Lucas had been convicted of robbery. The jury was entitled to consider this evidence in making its determination about whether Dr. Larsen's medical opinion was reliable.

Mr. Lucas wanted to have it both ways: He wanted the jury to be able to hear his version of events, and the doctor's opinion which was based on the truth of that version, but did not want the jury to hear any evidence which might call into question the truth of his claims, which would in turn call into question the reasonableness of the doctor's opinion. ER 806 is designed to prevent this. It was not necessary for Dr. Larsen to relate Mr. Lucas' version of the incident to the jury. Indeed, *State v. Fullen* (supra), in holding that the trial erred in prohibiting the defendant's expert from testifying about his opinions which were based, in part, on the defendant's assertions to him, noted that it was not necessary for the expert to parrot the defendant's version of events. As such, the Court held,

it was clearly error for the trial court to bar the expert's testimony about the defendant's medical history as told to him by the defendant. *Fullen* at 382. However, as noted above, *Fullen* does not stand for the proposition that if the expert *had* testified about the defendant's version of events, the defendant would have been shielded from the operation of ER 806. Mr. Lucas chose to ask Dr. Larsen questions that opened the door to the impeachment of his declarations which were offered to Dr. Larsen (and, by extension, to the jury) for their truth. That the State could have objected to Dr. Larsen relaying Mr. Lucas' self-serving version of the event to the jury but chose not to does not shield him from the operation of ER 806. Mr. Lucas opened the door to impeachment of his assertions, which were offered for their truth. The trial court did not err.

Mr. Lucas was likewise not denied his constitutional right to present a defense. Much of Mr. Lucas' brief on this point involves a philosophical critique of the policy of allowing defendants to be impeached with crimes of dishonesty. Mr. Lucas complains that defendants who have been convicted of crimes of dishonesty are faced with the untenable choice of testifying and being impeached with damaging evidence or not testifying at all. This critique would be better directed to the Supreme Court, or the legislature, in a proper forum. Even better, a citizen's initiative could be crafted to address this perceived ill. In

this case, the proper function of this Court is determine whether ER 806 was used permissibly, not whether the rule allowing impeachment by prior conviction should be abolished. In this case, assuming the trial court properly applied ER 806, Mr. Lucas' constitutional right to present a defense was not violated. Mr. Lucas, it should be noted, is not claiming that either ER 609 or ER 806 is unconstitutional. Rather, he essentially claims that he should given refuge from ER 806 because the hearsay he offered was offered through an expert witness rather than a lay witness. As argued above, there simply is no such exception in either ER 806 or ER 703 for hearsay offered through an expert. The trial court did not err.

If the trial court did err, such error was harmless under either the constitutional or non-constitutional error standard. The State submits that the misapplication of an evidence rule resulting in the improper admission of evidence is subject to the harmless error test for non-constitutional error. An error in admitting evidence that does not result in prejudice to the defendant is not grounds for reversal. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P. 2d 1120 (1997). Where the error arises from a violation of an evidentiary rule, that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). This Court need not find that it is

harmless “beyond a reasonable doubt.” *Bourgeois* at 403; *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The improper admission of evidence is harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. *Thieu Lenh Ngiam v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994).

Here, the admission of the robbery conviction was of small moment in the overall trial. The State asked Dr. Larsen whether he was aware of Mr. Lucas’ prior robbery conviction and he said he was. Curiously, the State did not ask Dr. Larsen whether he was aware of the prior conviction at the time he formed his opinion. Dr. Larsen, it is worth noting, was in the courtroom during the offer or proof in which the prior conviction was discussed. The wording of the State’s question went only to Dr. Larsen’s current knowledge of the prior conviction, not whether he knew of it at the time of his evaluation. The State was seemingly caught off guard by Dr. Larsen’s answer, and seemed to anticipate that he would say “no.” Indeed, had the answer been “no” that would have been fodder for argument, by the State, that Dr. Larsen’s opinion was unreliable. Having received the opposite answer, the State dropped the matter and never brought it up again, even during closing argument. This case came down to a disagreement between experts and the State’s sought-after

smoking gun (the robbery conviction) played out more like a defective smoke bomb on the Fourth of July. It was a dud, to put it bluntly. Any error in admitting the defendant's prior conviction was both harmless beyond a reasonable doubt and of minor significance to the overall trial.

II. MR. LUCAS WAS NOT DENIED A SPEEDY TRIAL WHERE HIS ATTORNEY WAIVED SPEEDY TRIAL SO THAT HE WOULD HAVE TIME TO PREPARE A MENTAL HEALTH DEFENSE.

Mr. Lucas argues that his right to a speedy trial was violated because his attorney sought additional time to prepare his defense. Mr. Lucas frames this error under the rubric of speedy trial rather than as a denial of counsel. Mr. Lucas acknowledges that an attorney can seek additional time, outside of the time for trial period under CrR 3.3, to prepare for trial even where his client objects. See Brief of Appellant at 26-27, citing *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) and *State v. Williams*, 104 Wn.App. 516, 523, 17 P.3d 648 (2001). Because the law is so clearly adverse to Mr. Lucas on this point, he argues the issue as a denial of counsel because his attorney chose to pursue a defense with which he supposedly disagreed, while framing it as a speedy trial violation.

First, Mr. Lucas did not expressly disagree with the defense of diminished capacity. He merely wanted to “rely on his speedy trial rights.”

RP 3, 4, 9, 11, 13. This was not a case where an insanity defense was forced on a defendant over not only his objection but the objection of his attorney (see e.g. *State v. McSorely*, 128 Wn.App. 598, 116 P.3d 431 (2005)); or where a defendant repeatedly, from his own mouth, asserted that he did not want a mental health defense despite his attorney's opinion that such a defense was the only viable one (see e.g. *State v. Cross*, 156 Wn.2d 580, 132 P.3d 80 (2006). In this case, Mr. Lucas never expressly disavowed his attorney's plan to seek diminished capacity. Mr. Sowder, the attorney for Mr. Lucas, repeatedly expressed that diminished capacity was the only viable defense in this case. He said "it seems undisputed that the event occurred." RP 7.

Our Supreme Court stated in *State v. Cross*, supra, that the "details" of the defense strategy are for counsel to decide, not the client. *Cross* at 606. "Generally, the client decides the goals of litigation and whether to exercise some specific constitutional rights, and the attorney determines the means." *Cross* at 606. Decisions that rest with the client include whether to enter a plea of guilty, whether to waive a jury trial and whether to testify. *Cross* at 607. Included in that list, presumably, is the decision whether to appeal in non-capital cases. Here, as in *Cross*, the decision of whether to seek a mental health defense was a matter of trial strategy to be determined by counsel, particularly where it is "undisputed

that the event occurred.” RP at 7; see *Cross* at 607. Moreover, a conflict between counsel and the client on trial strategy is “not the type of conflict...that raises Sixth Amendment concerns.” *Cross* at 609.

Again, Mr. Lucas is not alleging deprivation of his Sixth Amendment right to conflict-free counsel. He raises this claim under the rubric of speedy trial, arguing that his attorney’s *reason* for needing more time to prepare for trial was not adequate. This claim is without merit. Mr. Lucas cites *State v. Saunders*, 153 Wn.App. 209, 220 P.3d 1238 (2009) in support of his claim. *Saunders* is distinguishable. In *Saunders*, numerous continuances were granted over the express objection of the defendant himself and the record demonstrated no good explanation for the delays. *Saunders* at 218. The record in that case demonstrated that lawyers for both the State and defense had been dilatory in preparing for trial. *Id.* Here, counsel for Mr. Lucas was the opposite of dilatory. Lucas has a Sixth Amendment right to effective counsel. His trial counsel made an exhaustive record of the fact that he could not render effective representation without pursuing a mental health defense. This was a matter of trial strategy to be determined by trial counsel. Counsel’s reason for seeking more time, therefore, was justified and proper. Mr. Lucas’ CrR 3.3 right to a speedy trial was not violated.

**III. MR. LUCAS' PERSONAL RESTRAINT PETITION
SHOULD BE DISMISSED.**

Mr. Lucas argues in his personal restraint petition that his conviction should be reversed and dismissed with prejudice because his appeal was delayed for a period of five months due to a clerical error in the Clark County Clerk's Office.

A personal restraint petitioner must prove either a constitutional error that caused actual prejudice or a nonconstitutional error that caused a complete miscarriage of justice. *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which he bases his claim of unlawful restraint and describe the evidence available to support the allegations; conclusory allegations alone are insufficient. RAP 16.7(a)(2)(i); *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988); *In re Pers. Restraint of Stockwell*, ___ Wn.App. ___, No 37238-0-II (February 17, 2011).

In evaluating personal restraint petitions, the Court can: (1) dismiss the petition if the petitioner fails to make a prima facie showing of constitutional or nonconstitutional error; (2) remand for a full hearing if the petitioner makes a prima facie showing but the merits of the contentions cannot be determined solely from the record; or (3) grant the personal restraint petition without further hearing if the petitioner has

proven actual prejudice or a miscarriage of justice. *Cook*, 114 Wn.2d at 810-11; *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983); *In re Pers. Restraint of Stockwell*, ___ Wn.App. ___, No 37238-0-II (February 17, 2011).

Here, Mr. Lucas fails to demonstrate any legal error which would compel relief. He baldly asserts that his Fourteenth Amendment right to due process was violated and that his right to appeal has been denied, neither of which is true or supported by any citation to authority. He has not alleged any prejudice he has suffered by the unfortunate delay in the prosecution of his appeal. He recites the facts of what happened without saying how he was harmed. Not every legal error carries a remedy. The delay in this case, while no doubt irritating to him, did not cause a complete miscarriage of justice, nor has Mr. Lucas suffered actual prejudice. His personal restraint petition should be dismissed.

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D. CONCLUSION

Mr. Lucas' convictions should be affirmed, and his personal restraint petition should be dismissed.

DATED this 2nd day of June, 2011.

Respectfully submitted:

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