

FILED
Court of Appeals
Division II
State of Washington
3/13/2019 9:53 AM

NO. 52022-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD ALAN LUCAS, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Phil Sorenson, Judge and Gerald Johnson, Judge

No. 17-1-00537-3

Brief of Respondent

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

 1. Did double jeopardy bar defendant's retrial where defendant requested the judge recuse himself from the trial, invited any error by failing to properly support his motion, and where the Code of Judicial Conduct eventually required recusal? (Appellant's Assignment of Error 1, 2, 3, 4, 5). 1

 2. Does the record support an ineffective assistance of counsel argument where the argument relies on confidential conversations between defendant and his attorney? 1

 3. Did the trial court properly exclude defendant's statement? (Appellant's Assignment of Error 6). 1

 4. Did defendant's prior convictions wash out where he had misdemeanor convictions that tolled the wash out period? (Appellant's Assignment of Error 7). 1

B. STATEMENT OF THE CASE..... 1

 1. PROCEDURE..... 1

 2. FACTS 6

C. ARGUMENT..... 9

 1. DOUBLE JEOPARDY DID NOT BAR DEFENDANT'S TRIAL WHERE DEFENDANT REQUESTED THE JUDGE TO RECUSE, ANY ERROR WAS INVITED, AND WHERE THE CODE OF JUDICIAL CONDUCT REQUIRED RECUSAL. 9

 2. ANY INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS UNSUPPORTED BY THE RECORD..... 14

3.	THE TRIAL COURT PROPERLY EXCLUDED DEFENDANT’S HEARSAY STATEMENT ON A MATTER IMMATERIAL TO HIS DEFENSE.	15
4.	DEFENDANT’S PRIOR CONVICTIONS DO NOT WASH OUT; THUS, HIS OFFENDER SCORE WAS PROPERLY CALCULATED BELOW.	17
D.	CONCLUSION.....	21

Table of Authorities

State Cases

<i>City of Seattle v. Patu</i> , 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).....	10
<i>State v. Corrado</i> , 81 Wn. App. 640, 645, 915 P.2d 1121 (1996)	9
<i>State v. Crowder</i> , 103 Wn. App. 20, 26, 11 P.3d 828 (2000).....	16
<i>State v. Dominguez</i> , 81 Wn. App. 325, 328, 914 P.2d 141 (1996).....	11
<i>State v. Eldridge</i> , 17 Wn. App. 270, 276, 562 P.3d 276 (1977).....	13
<i>State v. Ervin</i> , 169 Wn.2d 815, 821, 239 P.3d 354 (2010)	19
<i>State v. Gonzalez-Gonzalez</i> , 193 Wn. App. 683, 370 P.3d 989 (2016) ...	15
<i>State v. Graham</i> , 91 Wn. App. 663, 667, 960 P.2d 457 (1998)	9, 13, 14
<i>State v. Jones</i> , 26 Wn. App. 1, 5, 612 P.2d 404 (1980)	14
<i>State v. Moeurn</i> , 170 Wn.2d 169, 172, 240 P.3d 1158 (2010)	17
<i>State v. Robinson</i> , 146 Wn. App. 471, 478, 91 P.3d 906 (2008)	10
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	9
<i>State v. Thomas</i> , 150 Wn.2d 821, 871, 83 P.3d 970 (2004)	15

Federal and Other Jurisdictions

<i>United States v. Kelly</i> , 888 F.2d 732, 746 (11 th Cir. 1989)	13
--	----

Constitutional Provisions

Article 1, section 9 of the Washington State Constitution.....	9
Fifth Amendment to the United States Constitution.....	9

Statutes

RCW 46.20.342(1)(a) 19

RCW 9.94A.525..... 17, 18, 20

RCW 9.94A.525(c) 18

RCW 9A.56.063..... 1

RCW 9A.56.068..... 1

RCW 9A.56.140..... 1

Rules

ER 801(c) 15

ER 802 15

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did double jeopardy bar defendant's retrial where defendant requested the judge recuse himself from the trial, invited any error by failing to properly support his motion, and where the Code of Judicial Conduct eventually required recusal? (Appellant's Assignment of Error 1, 2, 3, 4, 5).
2. Does the record support an ineffective assistance of counsel argument where the argument relies on confidential conversations between defendant and his attorney?
3. Did the trial court properly exclude defendant's statement? (Appellant's Assignment of Error 6).
4. Did defendant's prior convictions wash out where he had misdemeanor convictions that tolled the wash out period? (Appellant's Assignment of Error 7).

B. STATEMENT OF THE CASE.

1. PROCEDURE

On February 3, 2017, the State charged Richard Lucas Jr., "defendant," with one count of unlawful possession of a stolen vehicle in violation of RCW 9A.56.068 and RCW 9A.56.140, and one count of making or possessing motor vehicle theft tools in violation of RCW 9A.56.063. CP 98-99.¹

¹ Clerk's Papers numbered above No. 97 reflect the State's estimate of how its supplemental designations will be numbered.

On March 2, 2017, defendant failed to appear at an omnibus hearing in this matter. CP 85. A bench warrant was issued for his arrest. CP 85. The order was quashed on March 21, 2017. CP 87. The State filed an Amended Information adding one count of felony bail jumping. CP 1-2.

The parties continued to prepare for trial. Defendant was accepted into drug court by Judge Phil Sorensen on November 20, 2017. CP 8. Defendant entered a *Newton/Alford* plea at that time. CP 9-18. On December 4, 2017, defendant moved to withdraw his guilty plea and opt out of drug court. CP 21.² Judge Sorensen granted defendant's motion. CP 21. Defendant was placed back on the trial track. By this point in defendant's case, he had been through three attorneys and was on his fourth. CP 90, 100, 101.

Defendant finally proceeded to trial on January 16, 2018, in front of the Honorable Judge Sorensen. 01/16/18 RP 1. Defense counsel had filed a notice of disqualification for Judge Sorensen. CP 22. Judge Sorensen told defense counsel that he believed he had made discretionary rulings on the case prior to counsel's motion. 1/16/18 RP 4-5. Defense counsel explained that he did not think those discretionary rulings applied in defendant's

² The order granting defendant's request states "Now, therefore, for the reasons put forth orally in open court ... the guilty pleas entered in this matter on 11/20/17 are hereby withdrawn ..." CP 21. No verbatim report of proceedings were included for that hearing, so the reasons justifying the withdrawal are unknown to the State.

“unique situation.” 01/16/18 RP 6. Further, defendant believed that Judge Sorensen made comments at the drug court hearing that suggested the court could not be fair and impartial. 01/16/18 RP 6. Defendant presented no evidence in the form of declarations or transcripts to support his motion.

The State opposed defendant’s motion. 01/16/18 RP 7. The State believed the court had made prior discretionary rulings on the case making recusal inappropriate. 01/16/18 RP 7. The State made no comment on defendant’s allegations about the courts impartiality because the prosecutor was not present when the statements were alleged to be made. 01/16/18 RP 7. The court denied the motion. 01/16/18 RP 7.

Defense counsel then moved to withdraw from the case. 01/16/18 RP 8. The State opposed counsel’s motion, citing the fact that defendant had been through several attorneys already, and the case was approaching a year old. 01/16/18 RP 8-9. The State argued,

[Defendant] has repeatedly had conflict with each of the attorneys that he’s had in the past. They have been allowed to withdraw, and he has entered pleas, withdrawn pleas, entered drug court, withdrawn, scheduled subsequent pleas, decided not to plead. He’s playing the system, quite frankly. It’s time for this case to proceed to trial.

01/16/18 RP 10. The court denied defense counsel’s motion. 01/16/18 RP 10. The court proceeded with pretrial motions and jury selection. 01/16/18 RP 12.

At the next appearance, the court opened the proceeding by stating, On Monday, [defendant] had concerns about what I had said during the withdrawal of his plea from drug court. I've arranged to have that transcript prepared. We can listen to it. Actually, it's the audio recording. It's not a transcript. We can listen to it if you'd like to.

01/18/18 RP 34. Defense counsel agreed that the audio recording should be played. 01/18/18 RP 34. The State did not object. 01/18/18 RP 36. The recording was marked as Exhibit 18. 01/18/18 RP 37.

After the recording was played for the parties, the Court stated, "[defense counsel], I will tell you right now that if [defendant] wants me to, I am going to recuse myself." 01/18/18 RP 37. Defense counsel said, "That is what I am going to ask." 01/18/18 RP 38. The court then declared a mistrial based on defendant's request. 01/18/18 RP 38.

The parties next appeared in front of the Honorable Judge Gerald Johnson. 01/29/18 RP 1. The morning trial was set to start, defendant again asked the court to continue trial. 01/29/18 RP 3. Defendant claimed his mother had a heart attack but had no documentation proving so, so the court denied the motion to continue. 01/29/18 RP 3-4. The parties proceeded to pretrial matters and jury selection. Defendant tried to fire his attorney before jury selection began. 01/29/18 RP 12. The court did not let defendant proceed pro se. 01/29/18 RP 13-15.

The State presented testimony from four witnesses. 01/30/18 RP 26, 109, 113, 118. Defendant testified in his own defense. 01/30/18 RP 162. Defendant made another motion to fire his attorney after defendant's direct examination. 02/01/18 RP 187-88. The court again denied defendant's motion. 02/01/18 RP 188. The court took a brief recess. 02/01/18 RP 205. When the parties returned on the record, defendant was not present. 02/01/18 RP 206. After efforts attempting to locate defendant, the court issued a bench warrant. 02/01/18 RP 223. Because the State could not cross examine defendant, the court allowed the State to introduce rebuttal testimony from a transcript of the hearing quashing defendant's prior bench warrant. 02/01/18 RP 227-8. That transcript provided a different explanation for why defendant failed to show at the prior hearing, which contradicted defendant's statements on direct examination. 02/01/18 RP 181, 241-2.

The next day, the jury returned guilty verdicts on all three charges. 02/02/18 RP 39. Defendant was not present. 02/02/18 RP 38. Sentencing did not occur until June due to defendant's failure to come to court. CP 102; 06/15/18 RP 45. At sentencing, he was represented by yet a different appointed attorney. 06/15/18 RP 45. Defendant did not stipulate to his criminal history. 06/15/18 RP 46. The State provided certified copies of defendant's felony and most recent gross misdemeanor convictions.

06/15/18 RP 46-7. The State argued that the gross misdemeanor tolled the remainder of the convictions, and defendant's offender score should be nine. 06/15/18 RP 46-47. Defense counsel agreed that the washout provision did not apply. 06/15/18 RP 48. The court imposed 57 months on count one, 61 months on count two, and 364 days on count three. 06/15/18 RP 61. Defendant filed a timely notice of appeal. CP 73.

2. FACTS

On February 2, 2017, Pierce County Sheriff Deputy Charles Roberts was patrolling near 10th Ave E and 104th Street in Pierce County, Washington. 01/30/18 RP 26, 32, 35. He saw defendant driving a 90's beige Nissan Sentra heading West. 01/30/18 RP 32-33. He did not see anyone else in the car. 01/30/18 RP 34. He turned after defendant passed him, pulling behind defendant. 01/30/18 RP 35. Roberts ran the license plate. 01/30/18 RP 35. As he followed defendant waiting for a return on the car's status, defendant turned into a driveway. 01/30/18 RP 38. Roberts was still waiting for the system to load the results, so he drove by the parked car slowly, and looked over his shoulder as he passed. 01/30/18 RP 40. He saw a male get out of the driver's seat. 01/30/18 RP 40.

As he passed, the system returned the license plates as stolen. 01/30/18 RP 40. Roberts did a U-turn to return to the car that was only a half-block behind him. 01/30/18 RP 40-1. Defendant was at the back of the

passenger side of the Nissan. 01/30/18 RP 41. Roberts recognized him as the driver. 01/30/18 RP 42. Defendant stopped but appeared to be “looking for the best place to go.” 01/30/18 RP 42.

Roberts told defendant, “get back in your car.” 01/30/18 RP 42. Defendant got back into the beige Nissan. 01/30/18 RP 44. Roberts had dispatch verify the plates were stolen. 01/30/18 RP 44. Upon verification, Roberts drew his gun and ordered defendant to put his hands up. 01/30/18 RP 45. In his right hand, defendant had a big ring of keys, which Roberts ordered him to drop. 01/30/18 RP 45. After defendant was arrested, a second records check verified the car itself was also stolen. 01/30/18 RP 46-7.

The car was impounded for a search warrant. 01/30/18 RP 47. Before the car was towed, Roberts observed several key rings on the passenger seat. 01/30/18 RP 49. A search of the vehicle revealed shaved keys of various car brands and generic keys. CP 23-24, Exh. 10, 11, 12, 13; 01/30/18 RP 50, 54-6, 61, 62, 64. Roberts explained that shaved keys are shaved so that the ridge detail are no longer prominent, making it easy to slip into an ignition and start the car without the proper key. 01/30/18 RP 28. Shaved keys are often associated with stolen cars. 01/30/18 RP 29. The registered owner had not given anyone permission to possess the car. 01/30/18 RP 112.

During this case, the State amended the charges to include a charge of bail jumping for defendant's failure to appear at an omnibus hearing. CP 1-2, 85. Defendant was scheduled to appear at 8:45AM the morning of that hearing. 01/30/18 RP 139. The scheduling order that listed the time defendant was instructed to appear contained a warning in bold letters that "Failure to appear will result in a warrant being issued for your arrest." 01/30/18 RP 139-40. The deputy prosecutor who was assigned to the relevant courtroom on the day defendant failed to appear testified. 01/30/18 RP 118-9. That prosecutor called roll at 8:42AM, 10:55AM, and the gallery was completely empty at 11:10AM. 01/30/18 RP 137-8.

At the hearing quashing the warrant, defendant had the defense attorney tell the court,

Mr. Lucas tells me that he believed that the omnibus hearing date, or omnibus date, was set for March 15th, as supported – that belief is supported in the record by the date that Mr. Lucas set the bench warrant quash, which is March 15th. ... Mr. Lucas did appear on the pretrial date which was the date preceding the omnibus. It sounds like he made an honest mistake.

02/01/18 RP 241-2. However, during direct examination, defendant said he was present at the omnibus hearing, but left after speaking to his attorney. 01/30/18 RP 179-80. Defendant was not cross-examined on this point due to his court disappearance.

Defendant remained absent when the jury returned its verdicts. 02/02/18 RP 38. Defendant was found guilty of all charges. 02/02/18 RP 39. On June 15, 2018, defendant was sentenced to 57 months on count one, 61 months on count two, and 364 days on count three. 06/15/18 RP 61. Defendant filed a timely notice of appeal. CP 73.

C. ARGUMENT.

1. DOUBLE JEOPARDY DID NOT BAR DEFENDANT'S TRIAL WHERE DEFENDANT REQUESTED THE JUDGE TO RECUSE, ANY ERROR WAS INVITED, AND WHERE THE CODE OF JUDICIAL CONDUCT REQUIRED RECUSAL.

The Fifth Amendment to the United States Constitution and article 1, section 9 of the Washington State Constitution provide an accused the protection from being tried twice for the same offense. The Double Jeopardy Clause bars trial if three elements are met: (a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy for the same offense. *State v. Graham*, 91 Wn. App. 663, 667, 960 P.2d 457 (1998) (citing *State v. Corrado*, 81 Wn. App. 640, 645, 915 P.2d 1121 (1996)).

The Washington Supreme Court has held that jeopardy attaches after the jury is impaneled and sworn. *State v. Strine*, 176 Wn.2d 742, 293 P.3d 1177 (2013). Once jeopardy attaches the court must determine whether a retrial is barred. *State v. Robinson*, 146 Wn. App. 471, 478, 91 P.3d 906

(2008). The standard varies greatly depending on whether a defendant requests the mistrial, or if the mistrial is declared over a defendant's objection. *Id.* at 478. When the defendant requests a mistrial, double jeopardy does not bar retrial. *Id.* at 478-9. Additionally, the invited error doctrine bars a party from raising an alleged error, even when that error is of constitutional magnitude. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).

a. Defendant invited any error by requesting a mistrial with an unsupported motion.

Here, defendant requested the judge recuse himself before the jury was impaneled. The judge told defense counsel he thought he had already made discretionary rulings in the case. 01/16/18 RP 4, 5. Defense counsel disagreed with the court. 01/16/18 RP 5-6. Counsel went on to state, "Beyond that and on behalf of [defendant], he indicates that things he heard at the drug court hearing would suggest that he believes that you could not be fair and impartial." 01/16/18 RP 6. The court did not understand what defendant meant. *Id.* Counsel stated, "What it means is that he believes he heard things that you said – and I'm not sure exactly what – but he suggests that based on things that he heard, he believes that you couldn't be impartial and fair." *Id.* No other evidence was presented to the trial court on this issue, and defense did not provide any transcripts to the court. The State objected to the judge recusing himself, stating "I don't think there's a factual basis

to support a motion for you to recuse yourself. I'd ask the Court to proceed.”

01/16/18 RP 7. The court denied the motion. *Id.*

At the point the judge denied defendant's motion, there was absolutely no support for defendant's motion or the allegations he made. A party claiming bias or prejudice must support their claim. *See State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996). Had the defendant properly supported his motion at the time he made it, the judge would have recused himself prior to the jury being selected and sworn. Because defendant's motion was improperly supported, any error in the judge's denial of the motion was invited. The judge's decision was proper, and this Court should affirm defendant's convictions.

- b. The judge supplemented the record on his own initiative and on defendant's behalf, which afforded defendant an alternative that he was not previously entitled to.

As argued above, the judge properly denied defendant's motion when it was before the court. Then, the judge then went beyond what is required of him and sought out a recording of the questioned proceeding on his own volition. He had the parties listen to it the following court day. The recording provided evidence to support defendant's motion that defendant did not care to provide earlier.

The judge turned to the parties for comment. Defense counsel asked to confer with defendant. 01/18/18 RP 37. When they returned, the judge

told defense counsel, “I will tell you right now that if [defendant] wants me to, I’m going to recuse myself.” 01/18/18 RP 37. Counsel replied, “That’s what I’m going to ask.” 01/18/18 RP 38. The judge immediately declared a mistrial.

Jeopardy was not terminated by the mistrial. While the judge preliminarily denied defendant’s motion, he revisited the request with the proper resources at the earliest opportunity. The judge went out of his way to ensure that defendant’s fair trial rights were protected, and defendant renewed his motion for the judge to recuse himself.

Accordingly, the mistrial was not declared over defendant’s objection, but rather, at defendant’s request. While his motion was preliminarily denied, it was only denied because defendant failed to support his assertions. The mistrial was the fruit of defendant’s motion because without the motion, the judge would not have sought out the recording and he would not have known that he needed to recuse himself. Double jeopardy was not violated in this case. Rather, the judge exceeded his duties in ensuring defendant’s rights were protected. The mistrial was properly declared at defendant’s request, and this Court should affirm defendant’s convictions.

- c. If this court finds that the mistrial was declared over defendant's objection, the mistrial was proper because manifest necessity existed.

Alternatively, if this Court decides that the mistrial was declared over defendant's objection, manifest necessity for a mistrial still existed, and the retrial was not barred. A trial judge has the discretion to declare a mistrial without terminating jeopardy where "there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." *State v. Eldridge*, 17 Wn. App. 270, 276, 562 P.3d 276 (1977). The trial judge is "vested with broad discretionary power to determine whether a trial should be aborted prior to verdict." *Id.* at 276-7. A mistrial necessitated by recusal in accordance with standards of judicial conduct does constitute a manifest necessity. *State v. Graham*, 91 Wn. App. 663, 667-8, 960 P.2d 457 (1998) (citing *United States v. Kelly*, 888 F.2d 732, 746 (11th Cir. 1989)).

Here, there was manifest necessity for the judge to recuse himself. The challenged language suggested the judge wished defendant would be charged with the full extent of the law. Such statement arguably offends the judge's appearance of fairness. Accordingly, the Code of Judicial Conduct required the judge to recuse himself under § 2.11. The recusal protected defendant's right to a fair and impartial trial. Because manifest necessity existed for a mistrial, double jeopardy was not violated.

Bad faith negates manifest necessity. *State v. Graham*, 91 Wn. App. 663, 670, 960 P.2d 457 (1998). However, absent evidence of bad faith, a trial court's finding of manifest necessity is afforded the highest degree of respect. *State v. Jones*, 26 Wn. App. 1, 5, 612 P.2d 404 (1980). The judge in this case did not act in bad faith when he declared the mistrial. The judge initially denied defendant's unsupported motion because he had no basis to grant it. The judge decided to seek out the recording of the hearing on his own and at the first available recess to determine if defendant's allegation had merit. Investigating the claim defendant made, to ensure defendant received a fair trial, was not bad faith.

Because the recusal was governed by the Code of Judicial Conduct and the judge did not act in bad faith in declaring a mistrial in accordance with the Code, manifest necessity existed for a mistrial. Accordingly, double jeopardy did not bar the retrial, and this Court should affirm defendant's convictions.

2. ANY INEFFECTIVE ASSISTANCE OF
COUNSEL CLAIM IS UNSUPPORTED BY THE
RECORD.

Defendant makes a cursory ineffective assistance of counsel argument because defense counsel renewed defendant's above-referenced motion. Brief of Appellant, 17-18. Defendant claims, "Either counsel made the motion against [defendant's] wishes or counsel failed to properly advise

[defendant] of the consequences of his choice.” Brief of Appellant, 17. This argument is wholly unsupported by the facts in this record. If defendant wishes to make this argument, it is properly done as a collateral attack and not in this direct appeal.

3. THE TRIAL COURT PROPERLY EXCLUDED
DEFENDANT’S HEARSAY STATEMENT ON A
MATTER IMMATERIAL TO HIS DEFENSE.

“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evidence Rule (ER) 801(c). Hearsay is not admissible unless it fits an exception. ER 802. Hearsay rulings are reviewed de novo, and an erroneous evidentiary ruling does not result in reversal unless a defendant was prejudiced. *See State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004); and *State v. Gonzalez-Gonzalez*, 193 Wn. App. 683, 689, 370 P.3d 989 (2016). Here, the trial court prevented defendant from telling the jury that his lawyer at the omnibus hearing told him he was free to leave. 01/30/18 RP 181. The testimony was as follows:

Q. Okay Why did you – what made you think you could leave, or did you think you could leave?

A. I thought I could leave because my lawyer said – he told me to come back on the 15th and –

[Hearsay objection sustained]

Q. Okay. But you talked to your lawyer?

A. Yeah.

[...]

Q. So you talked to your lawyer, and then you what?

A. I left. He said it was okay to go.

[Objection, jury instructed to disregard]

01/30/18 RP 180-182. Whether a statement is hearsay depends on the purpose for which the statement is offered. *State v. Crowder*, 103 Wn. App. 20, 26, 11 P.3d 828 (2000). Defense counsel did not clarify to the court whether the statement was hearsay or for the effect on the defendant's state of mind, as defendant now argues. Because defendant did not clarify the purpose of the statement, the court properly ruled on the objection.

Regardless of whether the trial court properly excluded the statement the attorney made to defendant, defendant's ability to present his defense was not prejudiced. He was still free to introduce evidence that he spoke to his lawyer and that conversation caused him to think he was free to leave. Such testimony would have gone toward negating the "knowledge" element to the bail jumping charge just as effectively as introducing the lawyer's statement. If this Court determines the trial court erred in its evidentiary ruling, the error was harmless to defendant's defense.

Defendant argues that the statement from the lawyer somehow would have raised a reasonable doubt to his guilt on the bail jumping charge. Brief of Appellant, 22. He goes on to reason, "[Defendant] was also unable

to explain to the jury how the transcript of the warrant quash hearing was entirely consistent with his version of events.” *Id.* Defendant is wrong. First, as argued *supra*, defendant was able to introduce that evidence because the impression the conversation left on defendant was admissible, but he chose not to present that testimony in a way that avoided the lawyer’s hearsay statements. Second, the State was forced to read the transcript of the quash hearing, which directly contradicted defendant’s direct testimony, because defendant fled from the courthouse in the middle of trial and the State could not cross examine him. Defendant forfeited his own opportunity to explain the purported consistency between his direct testimony and the quash hearing. Any error in that regard does not stem from the trial court’s evidentiary ruling. Accordingly, this Court should affirm defendant’s convictions.

4. DEFENDANT’S PRIOR CONVICTIONS DO NOT WASH OUT; THUS, HIS OFFENDER SCORE WAS PROPERLY CALCULATED BELOW.

A conviction that exists prior to the sentencing date on the current offense that has not “washed out” shall be included in the offender score. RCW 9.94A.525. Offender score calculations are reviewed de novo. *State v. Moeurn*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010). At sentencing, the trial court found defendant had an offender score of nine. CP 68-72. The record supports that finding, and defendant did not challenge his offender

score below. 06/15/18 RP 48. Now, defendant argues that he went from March 24, 2011, until January 25, 2017, without a conviction of any kind, so his prior convictions should have “washed out” under RCW 9.94A.525. Brief of Appellant, 16.

RCW 9.94A.525(c) states:

Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, *since the last date of release from confinement* (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing *any crime* that subsequently results in a conviction.

(Emphasis added.) Defendant’s calculation of the time period is incorrect because he fails to account for time that defendant was in custody, which restarted the five-year washout period. Considering the time defendant spent in custody and therefore not in the community within the meaning of the statute, defendant has not remained crime-free for a period of five years since he was initially convicted of Assault in 1999. *See* CP 54-67.

Defendant was last convicted of a felony in 2006.³ However, defendant’s driving with license suspended (DWLS) convictions prevented his prior convictions from washing out. 06/15/18 RP 48-9. A conviction for

³ At sentencing, defense counsel mentioned defendant was sentenced in 2007, 06/15/18 RP 47, but according to defendant’s Judgment and Sentence, he was sentenced in 2006. CP 54-67.

any crime, including a misdemeanor, interrupts the washout period and resets the five-year clock. *State v. Ervin*, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Defendant was charged with two counts of DWLS 1 under Tacoma Municipal cause numbers B00226150 and B00235544, the cases were both tracked in the B00235544 docket. *See* CP 52-53, Exh. 9 p. 10, 17.⁴ Defendant was convicted of driving with a suspended license under Tacoma Municipal cause no. B00235544 on March 24, 2011. CP 52-53, Exh. 9 p. 14. Defendant failed to report to jail. *Id*, p. 19. He quashed that warrant on June 14, 2011. *Id*, p. 20. At that time, he was booked into jail on both DWLS 1 convictions. *Id*, p. 20. Each conviction carries mandatory jail time of ninety days. *See* RCW 46.20.342(1)(a). Defendant was sentenced to 365 days in jail with 185 suspended. *See* CP 52-53, Exh. 9 p. 20. Defendant completed a workforce program in connection with the case in October of 2011. *Id*, p. 23. That release date pushed the five-year washout period until October of 2016. Then, defendant committed the crime of DWLS 1 again on June 27, 2015. CP 52-53, Exh. 10. That charge was eventually amended down to DWLS 3 and he was convicted on January 25, 2017. CP 52-53, Exh. 10. Defendant did not serve jail time on that conviction. *See* CP 52-53, Exh. 10.

⁴ However, the docket provides minimal information on the DWLS 1 charge under cause no. B00226150.

See the table below for clarity:

<i>Charge</i>	<i>Type of Crime</i>	<i>Commit Date</i>	<i>Sentencing Date</i>
Assault 3	Felony	03/20/2006	11/17/2006
DWLS 1	Misdemeanor	03/11/2010	03/24/2011
DWLS 3	Misdemeanor	06/27/2015	01/25/2017

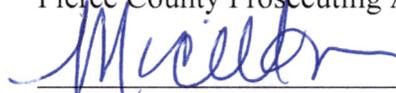
Accordingly, these charges toll the washout period. Because defendant did not serve jail time for his DWLS 1 convictions until 2011, the five-year period was pushed back until he was released from confinement on those charges in October 2011. He then committed a new crime within the five-year period, preventing any prior conviction from washing out under RCW 9.94A.525. As defense counsel correctly stated below, “[H]e has not gone five years in the community without committing or being charged with another crime. He has been close. He’s missed it by a few months.” 06/15/18 RP 48. Because defendant has not been free in the community for a five-year period without committing new crimes, his offender score was correctly calculated below under RCW 9.94A.525. This Court should affirm defendant’s offender score and sentence.

D. CONCLUSION.

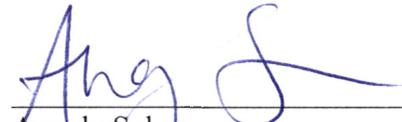
For the above stated reasons, the State requests this Court affirm defendant's convictions, offender score, and sentence.

DATED: March 13, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724



Angela Salyer
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. 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 the date below.

3.14.19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 13, 2019 - 9:53 AM

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