

NO. 343324

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DERRICK LYNN BARRETT

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY
The Honorable Henry A. Rawson

APPELLANT'S OPENING BRIEF

TANESHA LA'TRELLE CANZATER
Attorney for Appellant
Post Office Box 29737
Bellingham, Washington 98228-1737
(360) 362-2435

TABLE OF CONTENTS

I. <u>ASSIGNMENTS OF ERROR</u>	1
II. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
III. <u>STATEMENT OF THE CASE</u>	1
IV. <u>ARGUMENT</u>	1
1. THE TRIAL COURT’S DECISION TO EXCLUDE DEFENSE WITNESSES WAS EXTRAORDINARY WHEN A LESSER REMEDY WOULD HAVE BEEN EFFECTIVE.....	8
a. <u>Defense counsel promptly disclosed witnesses</u>	8
b. <u>The trial court’s decision to exclude witnesses as a discovery violation was manifestly unreasonable</u>	10
c. <u>The trial court’s decision to forgo an alternative remedy, and to instead, exclude witnesses impaired Mr. Barrett’s right to a fair trial</u>	11
2. MR. BARRETT’S CURRENT UNLAWFUL IMPRISONMENT CONVICTION DID NOT TRIGGER ENHANCEMENT UNDER RCW 9.94A.525(21).....	13
V. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

United States Constitution

<u>U.S. Const. amend VI</u>	12
<u>U.S. Const. amend XIV</u>	12

Washington State Constitution

<u>Wash. Const. art. 1 § 3</u>	12
<u>Wash. Const. art. 1 § 22</u>	12

United States Supreme Court Decisions

<u>Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)</u>	12
<u>Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)</u>	12
<u>Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)</u>	12

Washington State Supreme Court Decisions

<u>In re Pers. Restraint of Johnson, 131 Wash.2d 558, 568, 933 P.2d 1019 (1997)</u>	14
<u>Arborwood Idaho, LLC v. City of Kennewick, 151 Wash.2d 359, 367, 89 P.3d 217 (2004)</u>	13
<u>State v. Blackwell, 120 Wash.2d 822, 826, 845 P.2d 1017, 1020, (1993)</u>	8
<u>State v. Burri, 87 Wash.2d 175, 181, 550 P.2d 507 (1976)</u>	12
<u>State v. Costich, 152 Wash.2d 463, 470, 98 P.3d 795 (2004)</u>	13

<u>State v. Franklin, 172 Wash.2d 831, 835, 263 P.3d 585 (2011)</u>	13
<u>State v. Hutchinson, 135 Wash.2d 863, 881, 959 P.2d 1061 (1998)</u> ...	10, 11
<u>State v. Maupin, 128 Wash.2d 918, 924, 913 P.2d 808, 811 (1996)</u>	12
<u>State v. Wilson, 170 Wash.2d 682, 691, 244 P.3d 950, 954 (2010)</u>	14
<u>State Department of Ecology v. Campbell & Gwinn, L.L.C.,</u> <u>146 Wash.2d 1, 9-10, 43 P.3d 4 (2002)</u>	13

Washington State Court of Appeals Decisions

<u>In re Parentage of R.F.R., 122 Wash. App. 324, 331,</u> <u>93 P.3d 951 (2004)</u>	12
<u>State v. Barry, 184 Wash. App. 790, 797, 339 P.3d 200, 204 (2014)</u>	8
<u>State v. Cayetano-Jaimes, 190 Wash. App. 286, 295,</u> <u>359 P.3d 919, 924 (2015)</u>	8, 12
<u>State v. Dunivin, 65 Wash. App. 728, 731, 829 P.2d 799 (1992)</u>	8
<u>State v. Faulk, 17 Wash. App. 905, 908, 567 P.2d 235 (1977)</u>	9
<u>State v. Harris, 14 Wash. App. 414, 420, 542 P.2d 122 (1975)</u>	9
<u>State v. Hernandez, 185 Wash. App. 680, 684, 342 P.3d 820 (2015),</u> <u>review denied, 185 Wash.2d 1002 (2016)</u>	13, 14
<u>State v. Hodgins, 190 Wash. App. 437, 443,</u> <u>360 P.3d 850, 853 (2015)</u>	13, 14
<u>State v. Johnson, 180 Wash, App. 92, 99-100,</u> <u>320 P.3d 197, 201 (2014)</u>	14
<u>State v. Krenik, 156 Wash. App. 314, 320, 231 P.3d 252, 255 (2010)</u>	10
<u>State v. Linden, 89 Wash. App. 184, 197,</u> <u>947 P.2d 1284, 1290 (1997)</u>	8, 10
<u>State v. Oughton, 26 Wash. App. 74, 79, 612 P.2d 812, 815 (1980)</u>	9

<u>State v. Rice, 180 Wash. App. 308, 313, 320 P.3d 723 (2014)</u>	13
<u>State v. Williams, 191 Wash. App. 1048 (2015) review denied,</u> <u>185 Wash.2d 1036, 377 P.3d 736 (2016)</u>	10

Revised Code of Washington

<u>RCW 9.94A.030</u>	14
<u>RCW 9.94A.525(21)</u>	1, 6, 7, 13
<u>RCW 9.94A.525(21)(a)</u>	15
<u>RCW 9.94A.589</u>	7
<u>RCW 9.94A.589(1)(a)</u>	15

Superior Court Criminal Rules

<u>CrR 4.5</u>	8
<u>CrR 4.7(h)(2)</u>	8, 9
<u>CrR 4.7(h)(7)(i)</u>	10

I. ASSIGNMENTS OF ERROR

1. The trial court erred when it found defense counsel failed to timely disclose witnesses.

2. The trial court abused its discretion when it excluded defense witnesses as a discovery violation sanction.

3. The trial court's decision to exclude defense witnesses affected the defendant's constitutional right to a fair trial.

4. The trial court misinterpreted statutory law to enhance the offender score.

5. The trial court imposed a sentence based on an incorrect offender score.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was the trial court's decision to exclude defense witnesses extraordinary when counsel met his obligation to promptly disclose them to the state, and when there was a less severe remedy that could have satisfied the state's concerns? (Assignments of Error 1, 2, & 3)

2. Did the trial court err when it used a current unlawful imprisonment, domestic violence conviction as a prior conviction to trigger enhancement under RCW 9.94A.525(21)? (Assignments of Error 3 & 4)

III. STATEMENT OF THE CASE

Substantive facts

Derrick Lynn Barrett (Mr. Barrett) and K.K.M. had known each other for about 10 years, before they decided to date. 1/14/16 RP 407. Within days of starting their new relationship, K.K.M. moved in with Mr. Barrett and his roommate, Taylor Pillow

(Taylor). 1/14/16 RP 409. Taylor was like Mr. Barrett's younger brother. His grandmother babysat Mr. Barrett, when he was a child. 1/14/16 RP 410; 1/12/16 RP 319.

Mr. Barrett and K.K.M. dated for a few months before they decided to go their separate ways. K.K.M. moved out of Mr. Barrett's house and in with Taylor's mother, Wendy Pillow. 1/14/16 RP 411-413. But, they remained friends. 1/14/16 RP 412-414.

About a week after K.K.M. moved out, Mr. Barrett went to the bar where K.K.M. worked as a bar tender. His friend David Barton was there. K.K.M. was there bartending. She served Mr. Barrett a few drinks. And, although she was working, K.K.M. enjoyed a few drinks as well. "Nothing was out of the ordinary." 1/14/16 RP 416-418.

At some point, David Barton left the bar, but Mr. Barrett stayed until K.K.M. closed the bar for the night. 1/14/16 RP 420. K.K.M. offered to drive Mr. Barrett home and he accepted. On the way to Mr. Barrett's house, Mr. Barrett asked K.K.M. if she wanted to have sex. She said yes and pulled in to a Mennonite church parking lot. They undressed and tried to have sex; but they were interrupted by a passing car. 1/14/16 RP 424-426.

They got dressed and K.K.M. drove Mr. Barrett home. 1/14/16 RP 426. When they reached the bottom of Mr. Barrett's driveway, K.K.M. ordered him to get out. Mr. Barrett responded to K.K.M. with a few disrespectful remarks, which sparked a heated argument. 1/14/16 RP 427. They screamed and yelled at each other. K.K.M. even became violent. She punched, slapped, and pulled Mr. Barrett's hair. 1/14/16 RP 428. The two got out the car and started towards Mr. Barrett's house, arguing the whole way.

Before they could make it to the front door, a neighbor drove in to Mr. Barrett's driveway. 1/14/16 RP 430. K.K.M. walked up to the neighbor's truck and got in. Mr. Barrett pulled K.K.M. out of the truck, and the neighbor drove off. 1/14/16 RP 432. The situation seemed to calm down, after that. Until, they reached Mr. Barrett's front door. That's when K.K.M. started up again. Mr. Barrett chest bumped her and tried to open the door, but it was locked. He pounded on the door for Taylor, who asleep inside, to open it. 1/14/16 RP 433.

While he waited for Taylor to the open the door, K.K.M. became more belligerent. She pointed her finger at Mr. Barrett and he swatted her hand away. Then she tried to push Mr. Barrett. He had just reached for the door handle, when he stepped back to avoid K.K.M's push. The door swung open and both Mr. Barrett and K.K.M. fell in front of Taylor. 1/14/16 RP 433.

Taylor heard them arguing and admonished them to behave, before neighbors called police. Frustrated with Taylor for getting involved, Mr. Barrett swung at him. K.K.M. said something to Mr. Barrett that irritated him and he chased K.K.M. back outside. 1/14/16 RP 435.

K.K.M. tripped on loose gravel and fell. Mr. Barrett tripped too. They wrestled and tussled on the ground. K.K.M. managed to get up and threw rocks at Mr. Barrett, while he was still on the ground. Mr. Barrett grabbed ahold of her pants to knock her off her feet, so he could get up. 1/14/16 RP 436. When K.K.M. went down, Mr. Barrett placed his hands on K.K.M's shoulder. She yelled, "Take your hands off my privates!" 1/14/16 RP 437.

Mr. Barrett and K.K.M. collected themselves and went inside. As soon as they got to the bedroom, they started to argue again. K.K.M. ran out of the bedroom and out the front door. Mr. Barrett chased her outside and was confronted by police officers. 1/14/16 RP 441-442. K.K.M. ran to police. She claimed Mr. Barrett used his fingers to penetrate her vagina, and forced her to perform oral sex on him, and to have sexual intercourse with him. After a brief standoff, police arrested Mr. Barrett. 1/12/16 RP 147-149.

Procedural facts

The state charged Mr. Barrett with three counts second-degree rape, domestic violence; one count unlawful imprisonment, domestic violence; and, one count fourth-degree assault, domestic violence for swinging at Taylor. CP 259-262. Mr. Barrett pleaded not guilty and hired counsel to represent him at trial. 9/15/14 RP 9-10.

Initially, both defense counsel and the state moved the court for a series of continuances, for various reasons. Then, defense counsel moved the court for series of continuances, because he was involved in other trials. 11/3/14 RP 17-21. Although counsel had substitute counsel stand in for him at status conferences, the trial court grew weary of his absences and refused to grant another continuance on his behalf. 9/8/15 RP 52. So, after some 15 months, trial began. CP 266, 227, 228, 229, 230, 235, 51, 226, 236, & 239.

On the day of trial, defense counsel moved to add two witnesses. Defense counsel explained to the court he found out about these witnesses, just the week before. And although he made several attempts to contact them when he found out about them, he

could not. 1/12/16 RP 90. But, he notified the state with as much information about the witnesses as he had at that time. 1/12/16 RP 91.

One witness, Wendy Pillow, Taylor's mother, and K.K.M.'s roommate, would testify she saw K.K.M. hit herself on the day she was scheduled to meet with a detective to discuss what happened the night Mr. Barrett was arrested. When Wendy Pillow asked why she hit herself, K.K.M. told her it was to make her claim against Mr. Barrett more convincing. The other witness, David Barton, would essentially corroborate Wendy Pillow's testimony. 1/12/16 RP 87-88.

The state objected to these witnesses because defense counsel failed to comply with discovery rules. 1/12/16 RP 87. The state told the court defense counsel was supposed to render a written summary of these witnesses' testimonies and their contact information some days before. But, it did not receive anything or hear anything else about the witnesses, until that morning. 1/12/16 RP 87-89.

The state also reminded the court the case had been continued countless times, primarily because defense counsel was unavailable. CP 266, 227, 228, 229, 230, 235, 51, 226, 236, & 239. It had several individuals there that day, from other areas, ready for trial and it did not want to inconvenience them with another continuance. 1/12/16 RP 90-92. "This case is extremely old and I am in the position where I can't--essentially I can't put the victim through another continuance. I know this is straining on her. It's been extremely difficult to coordinate all of the witnesses that I have." 1/12/16 RP 92-93.

Defense counsel asked the court to consider an alternative. Instead of another continuance, defense counsel asked the court allow the witnesses, which would be

rebuttal witnesses anyway, to testify later in trial, and to grant the state leave to interview them over the telephone either that day after trial, or the next day. 1/12/16 RP 91-92.

The court disregarded the alternative. It found counsel's attempt to add these witnesses, while at the last minute, was not a willful violation and was not made in bad faith. But given the length of time the case was readying for trial, the court did not feel that there was any less effective sanction it could impose to avoid the surprise and prejudice for the state, so it excluded the witnesses." 1/12/16 RP 99-101.

"...disclosure as of basically today..., I feel that that constitutes a surprise to the prosecution. It also affects the--their ability, basically the State's ability to talk with the alleged victim in this matter, prepare, and/or confirm other things. Again, the--I'm not finding that the violation is willful. I'm not finding that it's made in bad faith. I--I just don't know the circumstances--how this disclosure came about other than you had someone, some informant or somebody--I didn't hear the word investigator actually found these people, or something like that. So, I'm not finding it, at this point it's willful or in bad faith. It's just--it's incomplete."

1/12/16 RP 98-99.

Trial proceeded. Mr. Barrett testified in his own defense and denied K.K.M.'s allegations. Without Wendy Pillow's and David Barton's testimonies, he did not have any other evidence for the jury to consider that was favorable to him. The jury found him guilty of three counts second-degree rape, domestic violence; one count unlawful imprisonment, domestic violence; and, one count fourth-degree assault, domestic violence. 1/14/16 RP 565; CP 56. At sentencing, the state presented Mr. Barrett's criminal history, which consisted of a fourth-degree assault conviction. 3/16/16 RP 585. It argued his offender score was seven, for the rape conviction, because the current unlawful imprisonment conviction counted as two points under RCW 9.94Aa.525(21).

Defense counsel objected to the state's arithmetic. He argued Mr. Barrett's offender score for the rape conviction was six.

So, we have one point for the prior assault. We have one point for the Derrick Pillow assault. There are two rape convictions that are not merged and so only one of those counts. In the score, you don't count one rape conviction against itself. So, we have--and then we have the unlawful imprisonment for a total of--one point count for the prior assault, one count for the Taylor Pillow [emphasis added] assault, three points for the unmerged rape and one point for the unlawful imprisonment for a total of six.

3/16/16 RP 597.

The state countered it was standard procedure to treat current offenses as prior convictions for sentencing purposes under RCW 9.94A.589. Therefore, the unlawful imprisonment conviction would stand as a prior conviction and count as two points under RCW 9.94Aa.525(21). 3/16/16 RP 600-601. Defense counsel disagreed and reinstated the objection. "We're disputing that the unlawful imprisonment should count in the score. I believe that's what 9.94A.589 addresses. We disagree as to its doubling affect and 9.94A.589 does not address that." 3/16/16 RP 600-601.

The court agreed with the state and treated Mr. Barrett's current unlawful imprisonment conviction as a prior offense. "So, in light of that, it appears appropriate that the court impose a number two there." The court has determined then that the scoring for the rape offense will be seven and for the unlawful imprisonment, four." 3/16/16 RP 601.

Based on that score, the court sentenced Mr. Barrett to serve one hundred and seventy months, concurrently, at the Department of Corrections, for the three second-degree rape convictions. The court also sentenced him to serve fourteen months on the unlawful imprisonment conviction and three hundred and sixty-four days for the fourth-

degree assault conviction. 3/16/16 RP 629; CP 56. Mr. Barrett appealed his convictions.
CP 1.

IV. ARGUMENT

1. THE TRIAL COURT'S DECISION TO EXCLUDE DEFENSE WITNESSES EXTRAORDINARY WHEN A LESSER REMEDY WOULD HAVE BEEN EFFECTIVE.

Standard of review

A trial court has wide discretion to sanction discovery violations. See State v. Dunivin, 65 Wash. App. 728, 731, 829 P.2d 799 (1992); State v. Linden, 89 Wash. App. 184, 197, 947 P.2d 1284, 1290 (1997). This court will review discovery violation sanctions for an abuse of discretion. State v. Barry, 184 Wash. App. 790, 797, 339 P.3d 200, 204 (2014). A court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons. State v. Cayetano-Jaimes, 190 Wash. App. 286, 295, 359 P.3d 919, 924 (2015).

Analysis

a. Defense counsel promptly disclosed witnesses. Superior Court Criminal Rule (CrR) 4.7 is a reciprocal discovery rule that separately lists the state's and the defendant's obligations when engaging in discovery. State v. Blackwell, 120 Wash.2d 822, 826, 845 P.2d 1017, 1020 (1993). CrR 4.7(b)(1) requires a criminal defendant to disclose the names and addresses of any defense witnesses no later than the omnibus hearing, and CrR 4.7(b)(2)(xiv) authorizes the trial court to require the defendant to state the general nature of the defense. See also CrR 4.5. The defendant's obligation to disclose is ongoing throughout proceedings, so any new material or information must be promptly disclosed. See CrR 4.7(h)(2); State v. Linden, 89 Wash. App. 184, 197, 947

P.2d 1284, 1290 (1997). Division Two of this court has declared “promptly” in CrR 4.7(h)(2) means at the moment of discovery or confirmation, even when that occurs during trial. State v. Falk, 17 Wash. App. 905, 908, 567 P.2d 235 (1977); State v. Harris, 14 Wash. App. 414, 420, 542 P.2d 122 (1975); State v. Oughton, 26 Wash. App. 74, 79, 612 P.2d 812, 815 (1980).

Here, the state moved to exclude defense witnesses on the grounds counsel failed to timely disclose them. However, about a week before trial, a source told defense counsel Wendy Pillow, Taylor’s mother and K.K.M.’s roommate, and David Barton had information that was favorable to Mr. Barrett. According to the source, Wendy Pillow saw K.K.M. hit herself on the thigh the day she was scheduled to meet with a detective. When asked why she hit herself, K.K.M. said it was to make her claim against Mr. Barrett more convincing. David Barton could corroborate what Wendy Pillow had to say. 1/12/16 RP 87-88. Before counsel could even locate the witnesses, he told the state about them and about what they would testify to. 1/12/16 RP 89.

The state told the court defense counsel was supposed to render a written summary of these witnesses’ testimonies and their contact information some days before. But, it had not received anything or heard anything else about the witnesses, until the morning of trial. 1/12/16 RP 87-89.

Defense counsel met his discovery obligation, given CrR 4.7(h)(2) allows for on-going disclosure. As soon as the source told him about these witnesses he notified the state. Although counsel did not render a written summary of their testimonies and their contact information to the state before trial, he did render enough information about what they would testify to so as to not surprise to the state.

b. The trial court's decision to exclude defense witnesses as a discovery violation sanction was manifestly unreasonable. “[I]f at any time, during the proceedings, it is brought to the court’s attention a party has failed to comply with an applicable discovery rule, the court may impose sanctions.” CrR 4.7(h)(7)(i); State v. Linden, 89 Wash. App. 184, 190, 947 P.2d 1284, 1286–87 (1997). Possible sanctions include discovery of undisclosed information, a continuance, dismissal, or other action the court deems necessary. CrR 4.7(h)(7); State v. Krenik, 156 Wash. App. 314, 320, 231 P.3d 252, 255 (2010). The court could also exclude witness testimony. CrR 4.7(h)(7)(i); State v. Williams, 191 Wash. App. 1048 (2015), review denied, 185 Wash.2d 1036, 377 P.3d 736 (2016). This, however, is “an extraordinary remedy” that “should be applied narrowly.” State v. Hutchinson, 135 Wash.2d 863, 881, 959 P.2d 1061 (1998) (relying on the “deems just” language in CrR 4.7(h)(7)(i); State v. Williams, 191 Wash. App. 1048 (2015), review denied, 185 Wash.2d 1036, 377 P.3d 736 (2016).

Before a trial court excludes evidence as a discovery violation sanction, it should consider: “(1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness’s testimony; and, (4) whether the violation was willful or in bad faith.” Id. at 883; State v. Williams, 191 Wash. App. 1048 (2015), review denied, 185 Wash.2d 1036, 377 P.3d 736 (2016). .

Here, the court denied defense counsel’s motion to add Wendy Pillow and David Barton as witnesses. 1/12/16 RP 98-101. It found, in part,

...disclosure as of basically today... I feel that that constitutes a surprise to the prosecution. It also affects the--their ability, basically the State’s ability to talk with the alleged victim in this matter, prepare, and/or confirm other things. Again, the--I’m not finding that the violation is

willful. I'm not finding that it's made in bad faith. I--I just don't know the circumstances--how this disclosure came about other than you had someone, some informant or somebody--I didn't hear the word investigator actually found these people, or something like that. So, I'm not finding it, at this point it's willful or in bad faith. It's just--it's incomplete.

1/12/16 RP 98-99. The court concluded, "...The court does not feel that there is any less effective sanction I can impose to avoid the surprise and prejudice for the state." 1/12/16 RP 101.

But there was a less effective remedy. A party's failure to identify witnesses in a timely manner could be "appropriately remedied by continuing trial to give the non-violating party time to interview a new witness or prepare to address new evidence." Hutchinson, 135 Wash.2d 863, 881, 959 P.2d 1061 (1998). The court did not want to entertain another continuance because the case had been readying for trial for well over a year. The state had individuals there that day, from other areas, ready for trial and neither it nor the state wanted to inconvenience them. CP 266, 227, 228, 229, 230, 235, 51, 226, 236, & 239; 1/12/16 RP 90-93.

Defense counsel recognized this and asked the court to consider an alternative that would not have postponed trial any further. He reminded the court these witnesses would be rebuttal witnesses and would likely testify later in trial. So, he asked the court to allow the witnesses to testify, and to grant the state leave to interview them over the telephone, either later that day or the next day. 1/12/16 RP 91-92. This would have satisfied the state's concerns and would have protected Mr. Barrett's right to present evidence in his own defense.

c. The trial court's decision to forgo an alternative remedy, and to instead, exclude defense witnesses impaired Mr. Barrett's right to a fair trial. The Sixth

and Fourteenth Amendments to United States Constitution guarantee persons accused of a crime the right to a fair trial. U.S. Const. amends. VI, XIV. Our state constitution provides a similar safeguard. Const. art. I, §§ 3, 22. Additionally, the right to due process ““provides heightened protection against government interference with certain fundamental rights.”” In re Parentage of R.F.R., 122 Wash. App. 324, 331, 93 P.3d 951 (2004) (quoting Troxel v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)).

The accused’s right to due process “is, in essence, the right to a fair opportunity to defend against the state’s accusations.” State v. Cayetano-Jaimes, 190 Wash. App. 286, 304, 359 P.3d 919, 928 (2015) citing, Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). And the right “to call witnesses in one’s own behalf [has] long been recognized as essential to due process.” Id. citing, Chambers, 410 U.S. at 294, 93 S.Ct. 1038. “Just as an accused has the right to confront the prosecution’s witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process.” Id. citing Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). “The guaranty of compulsory process is ‘a fundamental right and one “which the courts should safeguard with meticulous care.””” State v. Burri, 87 Wash.2d 175, 181, 550 P.2d 507 (1976); State v. Maupin, 128 Wash.2d 918, 924, 913 P.2d 808, 811 (1996).

Here, Mr. Barrett testified in his own defense. Throughout trial, and even at sentencing, he insisted he did not rape K.K.M; their sexual encounters were consensual. 1/14/16 RP 424; 3/16/16 RP 624. Given Mr. Barrett testified he did not rape K.K.M., Wendy Pillow’s and David Barton’s testimonies were critical. If the jury believed

K.K.M. hit herself to make her rape claim against Mr. Barrett more convincing, the jury, could have found her to be dishonest and the outcome of the case could have different.

Without their testimonies, the jury, which only heard Mr. Barrett's uncorroborated version of events, found him guilty.

2. MR. BARRETT'S CURRENT UNLAWFUL IMPRISONMENT
CONVICTION DID NOT TRIGGER ENHANCEMENT UNDER RCW
9.94A.525(21).

Standard of review

This court reviews offender score calculations de novo. State v. Hernandez, 185 Wash. App. 680, 684, 342 P.3d 820 (2015), *review denied*, 185 Wash.2d 1002 (2016). Statutory interpretation also is a question of law this court reviews de novo. State v. Rice, 180 Wash. App. 308, 313, 320 P.3d 723 (2014) (*citing State v. Franklin*, 172 Wash.2d 831, 835, 263 P.3d 585 (2011)).

This court's fundamental objective when it interprets statutes must be to ascertain and carry out the legislature's intent. Arborwood Idaho, LLC v. City of Kennewick, 151 Wash.2d 359, 367, 89 P.3d 217 (2004). If the statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. State Department of Ecology v. Campbell & Gwinn, L.L.C., 146 Wash.2d 1, 9–10, 43 P.3d 4 (2002). The plain meaning of a statute is gleaned from “ ’all that the Legislature has said in the ... related statutes which disclose legislative intent about the provision in question.’ ” State v. Costich, 152 Wash.2d 463, 470, 98 P.3d 795 (2004) (*alteration in original*) (*quoting State Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d at 11, 43 P.3d 4). Only if a statute remains ambiguous after a plain meaning analysis may this court resort to additional canons of statutory construction or legislative history. Id. at 12; State v. Hodgins, 190 Wash. App. 437, 443, 360 P.3d 850, 853 (2015).

Analysis

A sentencing court acts without authority under the Sentencing Reform Act of 1981, when it imposes a sentence based upon a miscalculated offender score. In re Pers. Restraint of Johnson, 131 Wash.2d 558, 568, 933 P.2d 1019 (1997); State v. Johnson, 180 Wash. App. 92, 99–100, 320 P.3d 197, 201 (2014). “[A] sentence that is based upon an incorrect offender score is a fundamental defect that inherently results in a miscarriage of justice.” In re Pers. Restraint of Johnson, 131 Wash.2d at 568; State v. Wilson, 170 Wash.2d 682, 688–89, 244 P.3d 950, 953 (2010). “[T]he remedy for a miscalculated offender score is resentencing using the correct offender score.” State v. Wilson, 170 Wash.2d 682, 691, 244 P.3d 950, 954 (2010).

“Offender scores are calculated in three steps: (1) identify all prior convictions; (2) eliminate those that wash out; (3) ‘count’ the prior convictions that remain in order to arrive at the offender score.” State v. Hernandez, 185 Wash. App. 680, 684, 342 P.3d 820 (2015), *review denied*, 185 Wash.2d 1002 (2016) (*quoting State v. Moeurn*, 170 Wash.2d 169, 175, 240 P.3d 1158 (2010)) (*internal quotation marks omitted*). Under RCW 9.94A.525(21), the offender score used in sentencing is increased due to certain prior convictions when “the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead[ed] and proven.” State v. Hodgins, 190 Wash. App. 437, 442–43, 360 P.3d 850, 853 (2015).

Paragraph (a) of that provision specifically states: “If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead[ed] and proven, *count priors* (emphasis added) as in subsections (7) through (20) of this section; however, count points as follows:

Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead [pleaded] and proven after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, a violation of a protection order that is a felony offense, a felony domestic violence harassment offense, a felony domestic violence stalking offense, a domestic violence Burglary 1 offense, a domestic violence Kidnapping 1 offense, a domestic violence Kidnapping 2 offense, a domestic violence unlawful imprisonment offense, a domestic violence Robbery 1 offense, a domestic violence Robbery 2 offense, a domestic violence Assault 1 offense, a domestic violence Assault 2 offense, a domestic violence Assault 3 offense, a domestic violence Arson 1 offense, or a domestic violence Arson 2 offense...

RCW 9.94A.525(21)(a).

Here, the trial court interpreted RCW 9.94A.525(21)(a) to include Mr. Barrett's current conviction for unlawful imprisonment and counted the conviction as two points, in his offender score. It accepted the state's argument that under RCW 9.94A.589 other current offenses are treated as prior convictions for scoring purposes. 3/16/16 RP 601.

Granted, under RCW 9.94A.589(1)(a), whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the offender score. However, as defense counsel argued only prior convictions trigger RCW 9.94A.525(21)(a) and RCW 9.94A.589(1)(a) does not address that. 3/16/16 RP 600-601. Therefore, the court should have calculated Mr. Barrett's offender score as follows:

Prior fourth degree assault conviction	1 point
Current fourth-degree assault conviction against Derrick Pillow	1 point
Three unmerged second-degree rape convictions	3 points

Unlawful imprisonment conviction

1 point

6 points

That would have given him an offender score of six, not seven for the rape convictions.

V. CONCLUSION

Mr. Barrett asks this court to vacate his conviction and to remand for a new trial, should it find the trial court abused its discretion when it excluded Wendy Pillow and David Barton. Should this court find the trial court miscalculated his offender score for the rape convictions, Mr. Barrett asks this court to remand his case so he can be sentenced again using the correct offender score.

Respectfully submitted this 16th day of May, 2017.

s/Tanesha L. Canzater

Tanesha La'Trelle Canzater, WSBA# 34341

Attorney for Derrick Lynn Barrett

Post Office Box 29737

Bellingham, WA 98228-1737

(360) 362- 2435 (mobile office)

(703) 329-4082 (fax)

Canz2@aol.com

DECLARATION OF SERVICE

May 16, 2017

Court of Appeals Case No. 34324

Case Name: *State of Washington v. Derrick Lynn Barrett*

I declare under penalty and perjury of Washington State laws that on Tuesday, May 16, 2017, I filed an appellant's opening brief with Division Three Court of Appeals and served copies of the same to:

BRANDEN PLATTER

Okanogan County Prosecuting Attorney
bplatter@co.okanogan.wa.us

*Mr. Platter accepts service by email.

SHAUNA FIELD

Okanogan County Prosecuting Attorney
sfield@co.okanogan.wa.us

DERRICK L. BARRETT #388196

Airway Heights Correctional Center
PO Box 2049
Airway Heights, WA 99001-1899

s/Tanesha L. Canzater

Tanesha L. Canzater, WSBA # 34341
Attorney for Derrick Lynn Barrett
Post Office Box 29737
Bellingham, Washington 98228
(360) 362-2435 (mobile)
(703) 329-4082 (facsimile)
Canz2@aol.com

LAW OFFICES OF TANESHA L. CANZATER

May 16, 2017 - 2:22 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 34332-4
Appellate Court Case Title: State of Washington v. Derrick L. Barrett
Superior Court Case Number: 14-1-00312-7

The following documents have been uploaded:

- 343324_Briefs_20170516142057D3120650_1145.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Opening Brief Barrett with cover A.pdf

A copy of the uploaded files will be sent to:

- ksloan@co.okanogan.wa.us
- jahays@3equitycourt.com
- tcanzater63@gmail.com
- sfield@co.okanogan.wa.us
- Canz2@aol.com
- bplatter@co.okanogan.wa.us
- sfield@co.okanogan.wa.us

Comments:

Sender Name: Tanesha Canzater - Email: canz2@aol.com
Address:
PO BOX 29737
BELLINGHAM, WA, 98228-1737
Phone: 877-710-1333

Note: The Filing Id is 20170516142057D3120650