

No. 67615-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JONNIE LAY, Jr.,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Beth Andrus

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REPLY BRIEF

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
2012 MAY 29 PM 4:42

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**TABLE OF CONTENTS**

A. REPLY ARGUMENT ..... 1

    1. THE DEFENDANT’S RIGHT TO A SPEEDY TRIAL WAS VIOLATED. .... 1

    2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO ENSURE THAT IMPEACHMENT EVIDENCE WAS NOT EMPLOYED BY THE PROSECUTOR AS SUBSTANTIVE EVIDENCE OF GUILT. .... 3

    3. THE TRIAL COURT MISCALCULATED MR. LAY’S OFFENDER SCORE. .... 5

B. CONCLUSION. .... 6

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000) . . . . . 5

State v. Chichester, 141 Wn. App.446, 170 P.3d 583 (2007) . . . . . 2

State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982) . . . . . 4

State v. Johnson, 49 Wn. App. 239, 742 P.2d 178 (1987), review denied, 110 Wn.2d 1006 (1988). . . . . 4

State v. Kelley, 64 Wn. App. 755, 828 P.2d 1106 (1992). . . . . 2

State v. Lavaris, 41 Wn. App. 856, 707 P.2d 134 (1985). . . . . 4

State v. Mehaffey, 125 Wn. App. 595, 105 P.3d 447 (2005). . . . . 5

State v. Price, 126 Wn. App. 617, 109 P.3d 27 (2005) . . . . . 4

State v. Wilson, 170 Wn.2d 682, 244 P.3d 950 (2010) . . . . . 5

**STATUTES AND COURT RULES**

CrR 3.3 . . . . . 2

ER 105 . . . . . 4

## **A. REPLY ARGUMENT**

### **1. THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED**

The Respondent contends that Mr. Lay's counsel did not raise the issue of prosecutorial mismanagement of resources in overburdening the assigned prosecutor with so many cases that speedy resolution of cases was impossible. Brief of Respondent (BOR), at p. 10, p. 20. To the contrary, this issue was raised multiple times, and Mr. Lay contends it squarely places before this Court the question whether the trial court engaged in an adequate inquiry.

At a hearing held February 22, 2011, defense counsel asked the court that the case commence "today," or in the alternative that it proceed to trial with a newly assigned prosecutor. 2/22/11RP at 6-7. Counsel noted that the date for trial had now been continued multiple times since the first re-setting of the trial start date on January 11, based on the prosecutor's unavailability as a result of his responsibilities for prosecuting other cases which the court had ordered go forward first, and that the speedy trial expiration date had been re-set in each instance. CP 7, CP 15-16; 2/22/11RP at 5-6. The trial court stated that it would not require the case to proceed that day and would not order the Prosecuting Attorney's Office to assign different counsel. 2/22/11RP at

7-8. On March 2, 2011, following the filing of briefing by the parties, a hearing was held in which Mr. Lay yet again asked that a different prosecutor be assigned to handle Mr. Lay's trial, and argued that the trial court was required to support its rulings of prosecutorial unavailability under CrR 3.3 with some explanation of what reasons of mismanagement of the prosecuting attorney's office was resulting in no prosecutor whatsoever being available to handle Mr. Lay's trial, which was a non-complex matter. 3/2/11RP at 3-6. Later, Mr. Lay also argued that the Superior Court's orders in which Judge Ronald Kessler had directed that certain cases "go out" before Mr. Lay's, and the resulting claim by the prosecutor of unavailability in conjunction with acknowledgments that he was personally prepared to prosecute the case, required an inquiry, in each instance, into whether the "prosecutor's office [was] responsibly managing its cases." 4/15/11RP at 3-4.

Indeed, the Court of Appeals has noted that, although the trial court has discretion to grant a continuance when the prosecutor is unavailable due to involvement in another trial, it also has a duty to make sure the State is responsibly managing its caseload. State v. Chichester, 141 Wn. App. 446, 170 P.3d 583 (2007); State v. Kelley, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992). Mr. Lay contends that duty

was not met here. Contrary to the Respondent's arguments, these cases do stand for the proposition that, in appropriate cases, such inquiry must be engaged in by the court. Appellant's Opening Brief, at pp. 10-13.

**2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO ENSURE THAT IMPEACHMENT EVIDENCE WAS NOT EMPLOYED BY THE PROSECUTOR AS SUBSTANTIVE EVIDENCE OF GUILT.**

Irrespective of whether foundational requirements under ER 613 were met by the prosecutor, defense counsel was plainly aware of the distinction between substantive evidence of Mr. Lay's guilt and matters raised by the prosecutor solely to impeach Ms. Bailey's trial testimony.

Mr. Jonnie Lay contends that his counsel was ineffective in failing to prevent the jury's use of the impeachment evidence as substantive. Mr. Lay's counsel failed to object when the prosecutor introduced extrinsic evidence of impeachment material, despite the complainant having affirmatively acknowledged making the prior statements. The prosecutor was permitted to place extrinsic evidence of Ms. Bailey's prior statements before the jury, unhindered by objection. More importantly, counsel unfortunately failed to request a limiting or cautionary instruction. When impeachment evidence is permitted, an instruction cautioning the jury to limit its consideration to that intended

purpose is both proper and necessary. See ER 105; State v. Price, 126 Wn. App. 617, 648-49, 109 P.3d 27 (2005). Mr. Lay's jury would be presumed to follow such an instruction, State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982), which would have precluded its use of Bailey's prior statements as substantive evidence of the claimed assaultive violation of the no-contact order that was in effect. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

Importantly, the Respondent contends that the failure to request a limiter must be presumed to be tactical, designed to preclude "reemphasis" of the evidence later in the trial. BOR, at p. 33. But Respondent essentially ignores that the fact that the ideal such instruction would have been given as a cautionary instruction, given by the court contemporaneously with the State's introduction of the impeachment material. See State v. Lavaris, 41 Wn. App. 856, 860-61, 707 P.2d 134 (1985). Such instruction would have prevented the jury from using the impeachment material as substantive evidence supporting the crime charged, without any danger of later re-emphasis of material that the jury might have forgotten about. Here, the absence of objection or a request for a limiting instruction regarding evidence

admitted to impeach cannot be characterized as a tactical choice. Cf. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

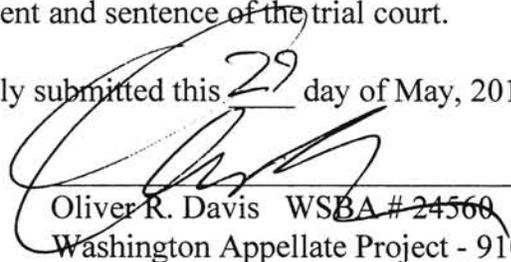
**3. THE TRIAL COURT MISCALCULATED MR. LAY'S OFFENDER SCORE.**

Mr. Lay argued that the court below was bound by the judgment of the Grays Harbor County sentencing court in 1995 which had calculated his offender score as a "2," because this was entered necessarily reflecting that the 1995 convictions for possession of stolen property had been counted as one offense, as the same criminal conduct. 8/17/11RP at 3, 7-9. If this is correct, it is a prior court's determination, that the two offenses encompass the same criminal conduct, and it is binding on the current sentencing court. State v. Mehaffey, 125 Wn. App. 595, 105 P.3d 447 (2005). The ultimate offender scoring represents that clearest expression of the prior court's calculation. Mr. Lay contends that the present sentencing court was bound by the Grays Harbor County Superior Court's determination in 2001 when it necessarily found that his four 1995 convictions for possession of stolen property were the same criminal conduct, and thus his current offender score was miscalculated, requiring that he be resentenced. State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010).

**B. CONCLUSION.**

Based on the foregoing and on his Appellant's Opening Brief, the appellant Jonnie Lay, Jr., respectfully requests that this Court reverse the judgment and sentence of the trial court.

Respectfully submitted this 29 day of May, 2012.



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 67615-6-I
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	)	
JONNIE LAY, JR.,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 29<sup>th</sup> DAY OF MAY, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SAMANTHA KANNER, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	( )	HAND DELIVERY
APPELLATE UNIT	( )	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF MAY, 2012.

X \_\_\_\_\_ 

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