

No. 67615-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JONNIE LAY, Jr.,

Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2012 FEB 29 PM 4:56

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

The Honorable Beth Andrus

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

D. ARGUMENT 4

 1. THE DEFENDANT’S RIGHT TO A SPEEDY TRIAL UNDER THE COURT RULES WAS VIOLATED ABSENT A FACTUAL FINDING BY THE COURT THAT NO OTHER PROSECUTOR WAS AVAILABLE TO TRY THE CASE. 4

 a. The speedy trial rule requires prompt disposition of a defendant’s case. 4

 b. The trial court continued the trial start date beyond the expiration date set under CrR 3.3 for reasons of prosecutor unavailability. 6

 c. Unavailability for trial requires a finding by the trial court explaining the unavailability of a prosecutor. 10

 2. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO ENSURE THAT IMPEACHMENT EVIDENCE WAS NOT EMPLOYED BY THE PROSECUTOR AS SUBSTANTIVE EVIDENCE OF GUILT. 14

 a. Matters introduced to impeach a trial witness are not probative of the substantive facts. 14

b. <u>Counsel understood the evidence of Bailey's videotaped statements made in the patrol car, and her formal police statement, were admissible solely to impeach her credibility.</u>	15
c. <u>Counsel was ineffective in failing to prevent the jury's use of the impeachment evidence as substantive.</u>	19
(i). Extrinsic evidence.	20
(ii) Limiting Instruction.	22
d. <u>No possible tactical justification.</u>	23
e. <u>Reversal is required.</u>	25
3. THE TRIAL COURT MISCALCULATED MR. LAY'S OFFENDER SCORE.	27
a. <u>The trial court rejected Mr. Lay's argument that it was required to score his four 1995 convictions as one offense.</u>	27
b. <u>The trial court was bound by the most recent sentencing determination of same criminal conduct.</u>	29
E. CONCLUSION.	32

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Alexander, 52 Wn. App. 897, 765 P.2d 321 (1988) 20

State v. Babich, 68 Wn. App. 438, 842 P.2d 1053 (1993). 16,20

State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000) 23,24

State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007). 29

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008) 15,16

State v. Chichester, 141 Wn. App.446, 170 P.3d 583 (2007) 11,12,13,14

State v. Clinkenbeard, 130 Wn. App. 552, 123 P.3d 872
(2005) 14,15,25

State v. Cornwall, 21 Wn. App. 309, 584 P.2d 988 (1978). 4

State v. Dickenson, 48 Wn. App. 457, 740 P.2d 312 (1987) 21

State v. Donald, 68 Wn. App. 543, 844 P.2d 447 (1993). 23,24

State v. Flinn, 154 Wn.2d 193, 110 P.3d 748 (2005). 5

State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999). 32

State v. Greenwood, 120 Wn.2d 585, 845 P.2d 971 (1993). 4

State v. Grisby, 97 Wn.2d 493, 647 P.2d 6 (1982) 22

State v. Hancock, 109 Wn.2d 760, 748 P.2d 611 (1988). 15

State v. Heredia-Juarez, 119 Wn. App. 150, 79 P.3d 987 (2003) 5

<u>State v. Jack</u> , 87 Wn.2d 467, 553 P.2d 1347 (1976).	6
<u>State v. Johnson</u> , 40 Wn. App. 371, 699 P.2d 221 (1985).	14,22
<u>State v. Johnson</u> , 49 Wn. App. 239, 742 P.2d 178 (1987), review denied, 110 Wn.2d 1006 (1988).	30
<u>State v. Kelley</u> , 64 Wn. App. 755, 828 P.2d 1106 (1992).	11,12
<u>State v. Kenyon</u> , 167 Wn.2d 130, 216 P.3d 1024 (2009).	10
<u>State v. Kokot</u> , 42 Wn. App. 733, 713 P.2d 1121 (1986).	14
<u>State v. Lara</u> , 66 Wn. App. 927, 834 P.2d 70 (1992).	31
<u>State v. Lavaris</u> , 41 Wn. App. 856, 707 P.2d 134 (1985).	22
<u>State v. Mehaffey</u> , 125 Wn. App. 595, 105 P.3d 447 (2005).	30,31
<u>State v. Myers</u> , 133 Wn.2d 26, 941 P.2d 1102 (1997)	23
<u>State v. Nieto</u> , 119 Wn. App. 157, 79 P.3d 473 (2003)	25
<u>State v. Newbern</u> , 95 Wn. App. 277, 975 P.2d 1041 (1999)	14,21,23
<u>State v. Powell</u> , 150 Wn. App. 139, 206 P.3d 703 (2009)	24
<u>State v. Price</u> , 126 Wn. App. 617, 109 P.3d 27 (2005)	22
<u>State v. Raschka</u> , 124 Wn. App. 103, 100 P.3d 339 (2004).	5,12
<u>State v. Ross</u> , 98 Wn. App. 1, 981 P.2d 888 (1999).	4
<u>State v. Saunders</u> , 153 Wn. App. 209, 220 P.3d 1238 (2009).	10,11
<u>State v. Torres</u> , 111 Wn. App. 323, 44 P.3d 903 (2002).	6

<u>State v. Williams</u> , 79 Wn. App. 21, 902 P.2d 1258 (1995).	16
<u>State v. Wilson</u> , 170 Wn.2d 682, 244 P.3d 950 (2010)	32
<u>State v. Wright</u> , 76 Wn. App. 811, 888 P.2d 1214 (1995), review denied, 127 Wn.2d 1010, 902 P.2d 163 (1995)	30

UNITED STATES SUPREME COURT CASES

<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	26
---	----

STATUTES AND COURT RULES

RCW 9.94A.525	27,29,30
RCW 9.94A.589(1)(a)	29,30
CrR 3.3	passim
ER 105	22,23
ER 607	15
ER 613	15,20

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. 6	20
Wash. Const. art 1, sec. 22.	20

TREATISES

5 Karl B. Tegland, <u>Washington Practice: Evidence</u> (2d ed. 1992) . .	22
5A Karl B. Tegland, <u>Washington Practice: Evidence</u> (3d ed.1989) .	16

PATTERN JURY IINSTRUCTIONS

11 Washington Pattern Jury Instructions: Criminal (3d ed. 2008) . . . 23

A. ASSIGNMENTS OF ERROR

1. The trial court erred in continuing the trial start date and the defendant's speedy trial expiration date under CrR 3.3.
2. Defense counsel was ineffective in failing to prevent the jury from utilizing evidence, introduced to impeach the recanting complainant, as substantive proof.
3. The trial court erred in calculating Mr. Lay's offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in continuing the trial start date and in extending the defendant's speedy trial expiration date "in the administration of justice," in the absence of a detailed showing regarding the prosecuting attorney's claim of unavailability?
2. Was counsel ineffective in failing to object to extrinsic evidence of the recanting complainant's prior statements, where she admitted to making the statement, and in failing to request a limiting instruction restricting the jury from considering the evidence as substantive, where the omission allowed the prosecutor to refer to the evidence as substantive proof in closing argument?
3. Did the trial court err in calculating Mr. Lay's offender score when it failed to treat his 1995 multiple convictions for possession of

stolen property as one offense, where previous sentencing courts had scored the convictions as a single crime?

C. STATEMENT OF THE CASE

Jonnie Lay was charged with Felony Violation of a No-Contact Order (Assault), Felony Harassment, and Second Degree Assault with a Deadly Weapon, charges which were instituted based on a call that his ex-girlfriend Kirsten Bailey placed to 911 on August 21, 2010. CP 1-2, 49-50; 5/10/11RP at 39-42; Supp. CP ____, Sub # 114D (Trial exhibit list, trial exhibit 1 (911 call); trial exhibit 4 (transcript of call)). .

Although Ms. Bailey alleged that she had been assaulted in her home after Mr. Lay arrived there in violation of the no-contact order, she placed the 911 call from a Kidd Valley hamburger restaurant. CP 4.

Ms. Bailey later recanted her allegations in a letter sent to the trial prosecutor on February 17, 2011, revealing that she had actually been hit by the defendant's new girlfriend when she ran into the couple at the Kidd Valley restaurant. 5/10/11RP at 10; Trial exhibit 10.

Prior to trial, the court, over objections by Mr. Lay, continued his trial start date and entered several orders re-setting his CrR 3.3 expiration date, based on the unavailability of the prosecutor as a result

of his responsibilities trying other cases assigned to the domestic violence unit. In each instance the court denied Mr. Lay's alternative request that his case be assigned to a different prosecutor. 2/22/11RP at 3-5.

In her trial testimony, Ms. Bailey continued to recant her claim, telling the jury that she had entered the Kidd Valley restaurant to eat, and was surprised by the presence there of her ex-boyfriend Mr. Lay, who was with a blond woman she did not know. 5/10/11RP at 34-38. The woman made gestures at her, and as Ms. Bailey quickly departed, the woman followed her into the parking lot and struck her in the face. 5/10/11RP at 36-38. Ms. Bailey testified that she made her false allegations against Mr. Lay out of anger, because he was with another woman, he had failed to prevent the woman from striking her, and he was uncaring about the incident afterward. 5/10/11RP at 123-26.

Mr. Lay stipulated to the existence of the no-contact order and his knowledge of it. 5/12/11RP at 37. After the State rested its case-in-chief, the court granted Mr. Lay's motion to dismiss counts 2 and 3, the charges of felony harassment and second degree assault with a knife, because the only evidence supporting those charges was contained in

statements by Ms. Bailey that were introduced by the prosecutor solely as impeachment of her trial testimony. 5/16/11RP at 37-38.

The jury convicted Mr. Lay on count 1, the remaining charge of felony violation of the no-contact order by assault. CP 73. Mr. Lay was sentenced to a standard range term of 50 months incarceration based on a disputed offender score of 6. 8/17/11RP at 10-12; CP 74-81.

Mr. Lay timely appealed. CP 88.

D. ARGUMENT

1. THE DEFENDANT'S RIGHT TO A SPEEDY TRIAL UNDER THE COURT RULES WAS VIOLATED ABSENT A FACTUAL FINDING BY THE COURT THAT NO OTHER PROSECUTOR WAS AVAILABLE TO TRY THE CASE.

a. The speedy trial rule requires prompt disposition of a defendant's case. The right to a speedy trial under Washington's Criminal Rules is fundamental. State v. Ross, 98 Wn. App. 1, 981 P.2d 888 (1999). In promulgating the speedy trial rules found in CrR 3.3, the Supreme Court exercised its rule-making power in aid of the constitutional imperative that there be prompt disposition of criminal cases. State v. Cornwall, 21 Wn. App. 309, 584 P.2d 988 (1978). The policy underlying CrR 3.3 is "that it is in the best interest of all concerned that criminal matters be tried while they are fresh." State v.

Greenwood, 120 Wn.2d 585, 595, 845 P.2d 971 (1993).

In 2003, CrR 3.3 was amended, to accommodate the trial court's need for more flexibility to deal with the complexities of trial scheduling. State v. Flinn, 154 Wn.2d 193, 199, n. 1, 110 P.3d 748 (2005). While the amendments favor a more relaxed approach to the speedy trial rule, the continued existence of the rule is testament to the fact that trial courts must still take affirmative steps to ensure criminal cases do not languish on stand-by status for months. Certainly, the 2003 amendments have not changed the fact that the trial court bears the ultimate responsibility of insuring an accused be tried in a timely fashion. State v. Raschka, 124 Wn. App. 103, 111, 100 P.3d 339 (2004).

The trial court must still find that a continuance "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense" in order to grant a party's motion for a continuance. CrR 3.3(f)(2). And trial courts are still required to consider all relevant factors before granting a continuance. Flinn, 154 Wn.2d at 199 (citing State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003)). Importantly, trial courts also still have an affirmative duty to furnish a complete record of reasons for failure to comply with the time limits of the rules. CrR 3.3(f)(2). More than bare

conclusions are required. State v. Jack, 87 Wn.2d 467, 469, 553 P.2d 1347 (1976). And the facts upon which the court acts must still be articulated so that appellate review can lead to precedential guidelines as to what factors justify delay. State v. Torres, 111 Wn. App. 323, 331, 44 P.3d 903 (2002).

b. The trial court continued the trial start date beyond the expiration date set under CrR 3.3 for reasons of prosecutor unavailability. Mr. Lay was arraigned on November 16, 2010, and was in custody, resulting in a speedy trial expiration date of January 15, 2011. On December 2, 2011, trial was set to start January 10, 2011. Supp. CP ___, Sub # 6 (minutes of arraignment, November 16, 2010), Supp. CP ___, Sub # 17 (minutes of December 2, 2010); see CP 6-8 (Defendant’s Objection to Past and Future Continuances of Speedy Trial), CP 15 (Declaration of Deputy Prosecuting Attorney); CrR 3.3(b)(1)(i).¹

On January 11, 2011, the trial court granted the State’s motion for a continuance of the trial start date based on the prosecutor’s unavailability as a result of vacation and being “backed up” in other

¹ Under CrR 3.3(b)(1)(i), where a defendant is “detained in Jail,” trial must start within 60 days of the date of arraignment.

cases assigned to the domestic violence unit. 1/11/11RP at 3-4. The court set a new expiration date of March 9, 2011, and set trial for February 7, 2011. Supp. CP ___, Sub # 25A; CP 47C. Mr. Lay objected to the orders setting new dates for the start of trial and speedy trial expiration under CrR 3.3. 1/11/11RP at 3-5. The trial court noted that the defense objections would be deemed preserved, and rulings on the defense objections were reserved for later argument. 1/11/11RP at 4-5.

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; these requests were again denied without prejudice, in anticipation of a hearing on the speedy trial issues previously set for March 2, 2011. 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 first of these administrative continuances was entered on February 7, 2011, and Mr. Lay objected on

February 17, 2011, within 10 days thereafter.² CP 28. 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. The court denied the defense motion to dismiss for violation of the speedy trial rules, without prejudice. 3/2/11RP at 11; CP 17. The court stated that it was not required to engage in an analysis, comparable to instances of court congestion, regarding why the prosecuting attorney's office was unable

² Mr. Lay's counsel filed "Defendant's Objection to Past and Future Continuances of Speedy Trial" on February 17, 2011, asking that a different prosecutor be assigned to try the case, and arguing that the continued holds on the trial start date and re-setting of the expiration date, including any future rulings based on unavailability, required a specific finding that no attorney in the Prosecuting Attorney's Office was available to prosecute the case; the State filed a response and declaration on March 2. CP 6-9, CP 10-14, CP 15-16.

to assign an lawyer to try Mr. Lay's case. 3/2/11RP at 10-11.

Regarding Mr. Lay's request for an order that the case be assigned to another lawyer, the court stated:

I'm going to deny that motion because I think that that really does involve the Court in making determinations that are more appropriate for the prosecutor's office to make itself.

3/2/11RP at 11.

On April 15, 2011, Mr. Lay's counsel argued that the holds placed on Mr. Lay's trial start date and the extensions of the speedy trial expiration date had again been unsupported by findings by the court as to why no attorney from the prosecuting attorney's office was available to try the defendant's case, for which the defense had previously asked.

4/15/11RP at 3-6.

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."³

³ The deputy prosecuting attorney's additional declaration submitted April 145, 2011, relates in detail the bases for his unavailability to try Mr. Lay's case as a result of

4/15/11RP at 3-4.

The court expressed understanding of the defense complaint that there were likely other attorneys in the Office of the Prosecuting Attorney who were licensed and capable of prosecuting a case of the simplicity of Mr. Lay's. 4/15/11RP at 18-19. However, ruling on Mr. Lay's objections to the continuances of trial and multiple re-settings of the trial expiration dates, the court denied the motion to dismiss, stating that it was not going to "get[] involved in internal prosecution way [sic] the prosecutor spends its time and money," or conclude that there was mismanagement in that office. 4/15/11RP at 18-19, 31-32.

c. Unavailability for trial requires a finding by the trial court explaining the unavailability of a prosecutor. Mr. Lay contends that the trial court's continuances of his trial date violated his right to a speedy trial, as guaranteed by CrR 3.3. On appeal, this Court reviews an alleged violation of the speedy trial rule de novo. State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009).

CrR 3.3(b)(1)(i) requires trial within 60 days when the defendant is in custody. State v. Saunders, 153 Wn. App. 209, 216–17, 220 P.3d

Judge Kessler's directives that certain cases be sent out before the defendant's. CP 30-35.

1238 (2009). Under CrR 3.3(h), the trial court must dismiss charges when the applicable speedy trial period has expired without a trial, but CrR 3.3(e) excludes the time allowed for valid continuances from the speedy trial period. Saunders, 153 Wn. App. at 217. When a period of time is excluded under CrR 3.3(e), the speedy trial period extends to at least 30 days after the end of the excluded period. CrR 3.3(b)(5).

A court can grant a continuance on motion of the court or party where the administration of justice requires and the defendant will not be prejudiced. CrR 3.3(f), (2). The trial court can consider scheduling conflicts in granting continuances. Flinn, 154 Wn.2d at 200.

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). That duty was not met here.

Given the unusually high number of continuances granted due to the prosecutor's unavailability, Mr. Lay's continuing objection, and the trial court's own recognition of the delay, the trial court had a responsibility to make sure the State was responsibly managing and

maximizing its resources before continuing Mr. Lay's case day after day. See Chichester, 141 Wn. App. at 447; Raschka, 124 Wn. App. at 111; Kelley, 64 Wn. App. at 763. For example, the court carried out this responsibility in Kelley to determine that the State was responsibly managing its resources, and accordingly granted its request for a continuance. There, the originally assigned prosecutor went on a previously scheduled vacation. Kelley's case was reassigned to another prosecutor, but that prosecutor was unavailable to try Kelley's case because he was involved in another trial. Kelley objected to the consequent trial delay, moved for a hearing, and sought to dismiss. Kelley, at 757-58.

At the hearing, the Assistant Chief Criminal Deputy Prosecutor testified she was responsible for case assignments in her office. She confirmed that the prosecutors were all backlogged with multiple cases and that she had reassigned the case to the next most available attorney. Kelley, 64 Wn. App. at 758. Based on this sworn testimony, the trial court determined the State had responsibly managed its caseload and this Court upheld the decision. Kelley, at 764.

Similarly, in Chichester, the trial court determined that the State had not responsibly managed its resources and accordingly denied its

request for a continuance. There, the prosecutor's office sought a continuance on the day of trial because the only available prosecutor was already assigned out to a different trial. The trial court inquired as to what attempts were made to reassign the case. The prosecutor said she spoke with others in her office but was not able to find an attorney to cover Chichester's case. The trial court dismissed the case, essentially finding that the prosecutor's office had failed to responsibly manage its resources. The Court of Appeals upheld that decision. Chichester, 170 P.3d 585-87.

In contrast to the trial courts in Chichester and Kelley, the trial court here did little toward ascertaining whether the prosecutor's office was responsibly managing its resources. Unlike in Kelley, the trial court never heard from the person actually overseeing case assignments in that office. Nor did the trial court engage in the kind of demanding inquiry that the Chichester court did to uncover whether there was a legitimate backlog or just some office policy standing in the way of reassignment.

Without a more developed factual record, the trial court simply could not know whether the prosecutor's office was responsibly managing its caseload when it issued the dozens of continuance orders based on prosecutor unavailability. As a result, this Court likewise does

not have an adequate record to support the trial court's conclusion that the prosecutor's office was responsibly managing the caseload. This constitutes an abuse of discretion. See Chichester, supra; State v. Kokot, 42 Wn. App. 733, 737, 713 P.2d 1121 (1986).

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

a. **Matters introduced to impeach a trial witness are not probative of the substantive facts.** Impeachment evidence pertains solely to a witness's credibility and is not probative of the substantive facts encompassed by the evidence. State v. Clinkenbeard, 130 Wn. App. 552, 569, 123 P.3d 872 (2005); State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). The proper consideration of impeachment material by the fact-finder is premised on the witness having made differing statements at different times, as opposed to any determination of credibility or weight of the impeaching material. See State v. Newbern, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999) (impeaching statements show the witness' trial testimony may not be believable, simply because the witness told different stories at different times).

However, this characteristic of impeachment material is not self-actualizing. Impeachment material introduced by the prosecution in a victim-recantation case not only sounds the same to a jury as substantive inculpatory evidence, but it can legally be considered as such by the jury and on appeal, absent affirmative action by defense counsel. It is critical that the State successfully be prohibited from using impeachment evidence as a guise for submitting to the jury substantive evidence that would be otherwise inadmissible as such. Clinkenbeard, at 569-70; State v. Hancock, 109 Wn.2d 760, 763, 748 P.2d 611 (1988).

b. Counsel understood that the evidence of Ms. Bailey's videotaped statements made in the patrol car, and her formal police statement, were admissible solely to impeach her credibility.

Defense counsel initially sought to delineate the distinction between substantive evidence of Mr. Lay's guilt and matters raised by the prosecutor solely to impeach Ms. Bailey's trial testimony.

The State was entitled to impeach the recanting complainant with prior inconsistent statements. ER 607; ER 613; State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). A party may use such statements to demonstrate the witness's lack of credibility, under the

principle that a person who has said one thing on one occasion and has stated differently on another, is likely untruthful. State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995).

The correct procedure to impeach a witness with a prior statement is to first ask the witness whether she made it. State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053 (1993). But if she admits the prior statement, extrinsic evidence of the statement is not allowed, because such evidence ““would waste time and would be of little additional value.”“ Babich, 68 Wn. App. at 443 (quoting 5A Karl B. Teglund, Washington Practice: Evidence § 258(2), at 315 (3d ed.1989)).

In most instances, prior inconsistent statements may not be used as evidence that the facts contained in the prior statements are substantive proof of the elements required for conviction. Burke, 163 Wn.2d at 219.

Accordingly, prior to trial, defense counsel procured a series of evidentiary rulings, some of which were conditional and established that certain matters deemed inadmissible as substantive evidence could be raised by the State, as impeachment material, if Ms. Bailey held to her apparent intention to recant when testifying.

First, the trial court *admitted* a recording of Ms. Bailey's 911 call in which she claimed that Mr. Lay had struck her, by agreement of the parties that the call constituted an excited utterance under ER 803(a)(2). 4/25/11RP at 36-37 (pre-trial ruling); Supp. CP ____, Sub # 114C (Pre-trial exhibit list, exhibit 8 (911 call recording)), see 5/9/11RP at 41 (admission during jury trial); Supp. CP ____, Sub # 114D (Trial exhibit list, exhibit 1 (911 call recording)).⁴

The court *excluded* the audio portion of a patrol car videotape of Ms. Bailey, which had been filmed while she was in the back of the responding police officer's vehicle. The court ruled that the statement made by Bailey at that time did not warrant admission under ER 803(a)(2) because Ms. Bailey's degree of excitement or upset was inadequate and too far divorced from the alleged incident. 4/25/11RP at 38-43, 4/27/11RP at 7-8. In the audio, Ms. Bailey is heard stating that Mr. Lay had punched her in the face, threatened to kill her, and wielded or swung a knife at her. 4/27/11RP at 4-8; see pre-trial exhibit 2 (in-car video).⁵

⁴ Trial exhibit 4, which was marked but not admitted, is a written transcript of Ms. Bailey's 911 call. Supp. CP ____, Sub # 114D (Trial exhibit 4).

⁵ Trial exhibit 9, which was also identified but not admitted, is a transcript of the audio portion of the patrol car video. Supp. CP ____, Sub # 114D (Trial exhibit 9).

see trial exhibit 2 (in-car video), trial exhibit 9 (transcript of video).

During examination of Ms. Bailey, the prosecutor also proffered Ms. Bailey's written police statement that she made to the Everett police officer who first responded to the complainant's 911 call.

5/10/11RP at 48; trial exhibit 5. Although Ms. Bailey stated at first that she did not believe she had made a police statement to the responding police officer, she specifically acknowledged making the statement in question when she was shown trial exhibit 5. 5/10/11RP at 45-46.

However, the prosecutor continued to read portions of trial exhibit 5, including sections of the statement in which Ms. Bailey told the officer:

- that Mr. Lay "balled up his fist and punched me in the face," and
- that "[i]t stunned me and I was seeing stars."

5/10/11RP at 49. The prosecutor also read portions of exhibit 5 in which Ms. Bailey told the officer that Mr. Lay had grabbed a knife from the kitchen, and had threatened to kill her. 5/10/11RP at 50.⁶

⁶ The prosecutor briefly contended, over Mr. Lay's objection, that the statement constituted a recorded recollection, admissible under the ER 803(a)(5) exception to the hearsay prohibition.⁶ 5/10/11RP at 48. This argument was later withdrawn. 5/10/11RP at 76..

Ms. Bailey was also questioned about statements she made while in the back of the responding officer's patrol car.⁷ 5/10/11RP at 50. When asked if she told the officer in the patrol car, contrary to her trial testimony, that she had been struck by Mr. Lay, Ms. Bailey stated that she could not remember what she had said "verbatim" or "specifically," but acknowledged expressly that she stated at that time that her injuries were from being punched by the defendant. 5/10/11RP at 50-51.

However, the prosecutor proceeded to read from the transcript of the patrol car videotape in which Ms. Bailey stated that the swelling on her face was "as a result of getting punched by Jonnie" and that Mr. Lay punched her because she said that she did not love him anymore. 5/10/11RP at 50-51. The prosecutor also played portions of the videotape in which Ms. Bailey stated that the defendant "grabbed a knife and started swinging it around," and told her "that he was going to kill [me], cut [me] into little pieces." 5/10-/11RP at 52.

c. Counsel was ineffective in failing to prevent the jury's use of the impeachment evidence as substantive. The defendant is

⁷ The videotape, played without audio, had been ruled admissible on ground that it portrayed Ms. Bailey's physical demeanor. 4/27/11RP at 7, 5/10/11RP at 44.

constitutionally entitled to the effective assistance of trial counsel. U.S. Const. amend. 6, Wash. Const. art 1, sec. 22. However, counsel's actions or non-actions in this case allowed the State to procure a guilty verdict in reliance on matters that should have been considered solely as impeachment.

(i). Extrinsic evidence. First, 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 rule is that extrinsic evidence of the statement is admissible only if a witness denies the prior statement. Babich, 68 Wn. App. at 443; State v. Alexander, 52 Wn. App. 897, 902, 765 P.2d 321 (1988).⁸

Here, however, the prosecutor was permitted to place extrinsic

⁸ ER 613 is a partial codification of the procedural requirements for impeachment by prior inconsistent statement. It provides:

(a) Examining Witness Concerning Prior Statement. In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2)

evidence of Ms. Bailey's prior statements before the jury, unhindered by objection. During her trial testimony, in each statement on which she was cross-examined, Ms. Bailey admitted making the prior allegations. She initially stated in answer to some questions by the prosecutor that she was unsure or could not recall whether or not she made the statements, but then freely noted that she had made each prior statement.

The denial required to trigger the examiner's entitlement to introduce extrinsic evidence need not be direct. For example, "even if a witness cannot remember making [the] prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling."

Newbern, 95 Wn. App. at 293, 975 P.2d 1041.

Here, however, Ms. Bailey specifically acknowledged making the statements about which she was asked, and explained that she made the false statements naming the defendant as her assailant because she was angry at Mr. Lay for being with another woman, and for not protecting her or helping her afterward. No grounds were elicited that provided a basis for reading the extrinsic evidence into the record.

State v. Dickenson, 48 Wn. App. 457, 467, 740 P.2d 312 (1987)

(quoting 5 Karl B. Tegland, Washington Practice: Evidence § 256 (2d ed. 1992)). There was no basis for introducing extrinsic evidence, but it went unchallenged here.

(ii) Limiting Instruction. Second, 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).

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). The jury could additionally have been instructed on the law in the form of a concluding general limiting instruction regarding proper use of any impeachment

evidence. ER 105; see 11 Washington Pattern Jury Instructions: Criminal 5.30, at 180 (3d ed. 2008) (pattern instruction regarding limit or caution on use of evidence for a single purpose)

Either or both forms of instruction would have prevented the jury from using the impeachment material as substantive evidence supporting the crime charged. But where no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider prior statements as it sees fit, including as substantive evidence. See State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997); Newbern, 95 Wn. App. at 295–96.

d. No possible tactical justification. In many circumstances, the absence of objection or a request for a limiting instruction regarding evidence admitted to impeach has been characterized as a tactical choice. See State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447 (1993). Such cases generally involve damaging evidence such as ER 404(b) prior acts, and the defendant is presumed to have decided that a limiting instruction would merely re-emphasize the damaging evidence. See Barragan, 102 Wn. App. at 762 (failure to limit prior act evidence

in assault trial to impeachment use was presumed to be tactical to avoid reemphasizing damaging evidence).

However, tactical decisions must always be reasonable and legitimate. State v. Powell, 150 Wn. App. 139, 153-54, 206 P.3d 703 (2009) (tactical decision which is not legitimate cannot excuse apparently deficient performance under rule that ineffective assistance doctrine cannot be used to remedy negative outcome of legitimate trial strategy). Thus in Powell, counsel's failure to request an instruction authorizing the jury to acquit the defendant of rape based on his belief the victim was not incapacitated was deficient performance, since no "objectively reasonable tactical basis existed" for failing to do so. The defense was warranted in law, counsel had argued the defense factually, and it was entirely consistent with the defense theory of the case. State v. Powell, 150 Wn. App. at 152-55.

In contrast, in defense of a prosecution for assault where the State bears the burden of presenting evidence sufficient to prove the crime charged, but the complainant has recanted, there is no legitimate strategic reason not to preclude evidence to the contrary from being admitted substantively. The jury's assessment of the case could not be detrimentally affected from the defense perspective by a proper request

for an instruction making clear that Ms. Bailey's statements in the patrol car, and her written police statement, could only be considered as impeachment evidence. This is particularly the case where the defendant has offered a viable defense of general denial of commission of the crime, which is supported by a cogent explanation by the complainant of the reasons for making the original false claim.

Counsel's non-action resulted in the jury being presented with substantive evidence which would be otherwise unavailable to be considered for questions of the jury's finding of proof beyond a reasonable doubt. See State v. Nieto, 119 Wn. App. 157, 79 P.3d 473 (2003) (where victim's statement was not admissible as substantive evidence, insufficient evidence remained to convict the defendant).

e. Reversal is required. During trial, absent a proper objection, the prosecutor was entirely unfettered in "exploit[ing] the jury's difficulty in making the subtle distinction between impeachment and substantive evidence." Clinkenbeard, at 570. As a result, the prosecutor was able to characterize the impeachment evidence in closing argument as substantive.

During argument, the prosecutor properly played the 911 tape, but then discussed the other statements made by Ms. Bailey as showing

the truth of what actually happened. Regarding the patrol car video, the prosecutor stated: “You saw her all on the in-car video. Her face is swollen. She tells officers, ‘My boyfriend hit me, my boyfriend hit me.’” 5/16/11RP at 64. And regarding Ms. Bailey’s police statement, the prosecutor told the jury to rely on that as proof, stating, “What’s credible is what she told the officers that day.”⁹ 5/16/11RP at 71. In rebuttal, the prosecutor again asked the jury to rely on “what [Ms. Bailey] said that day, what she consistently said to everyone she interacts with that day.” 5/16/11RP at 83. These references were never stated to be matters that should be used simply to assess the credibility of Ms. Bailey’s trial testimony. There was no objection, but by this point none could have been lodged, given counsel’s prior inaction.

An unreasonable standard of performance by defense counsel that undermines a reviewing court’s confidence in the outcome warrants reversal. See generally, Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (claim of ineffective assistance requires showing of deficient performance and resulting

⁹ The prosecutor’s reference in this passage to using “prior events” to judge Ms. Bailey’s credibility concerned ER 404(b) evidence of prior alleged assaults by the defendant. See 5/16/11RP at 62.

prejudice, i.e., that but for counsel's deficient representation, the verdict would, within reasonable probabilities, have been different).

Here, defaults by counsel concerning the opposing party's proffer of prior statements during trial allowed them to be advantageously utilized by the prosecutor to render non-substantive evidence into proof of guilt. This evidence included the prosecutor reading Ms. Bailey's prior statements into the record, including such dramatic statements such as her claim that Mr. Lay "balled up his fist and punched me in the face" and caused her "to see stars." 5/10/11RP at 49. And as a result of the lack of an objection or request for a limiting instruction, counsel in closing argument counsel was unable to object to the State's characterization of the impeachment material as substantive proof. Reversal is required.

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

a. The trial court rejected Mr. Lay's argument that it was required to score his four 1995 convictions as one offense. Mr. Lay argues that the trial court miscalculated his offender score by failing to count his prior 1995 convictions for possession of stolen property as the "same criminal conduct," as required by 9.94A.525(5)(a)(i), where a prior sentencing court in 2001 had treated the defendant's prior offenses

as the same criminal conduct.

Mr. Lay had been sentenced in 1995 on a plea of guilty to four counts of second degree possession of stolen property, committed on the same date of April 13, 1990. Supp. CP ____, Sub # 130A (Sentencing exhibit list, exhibit 1 (judgment and sentence in Thurston County No. 95-1-492-3)); CP 80.

Subsequently, Mr. Lay was sentenced in 2001 in Grays Harbor County on a guilty plea to one count of assault in the third degree with sexual motivation. Sentencing exhibit 2. His offender score was calculated as “2” based on prior offenses listed as a 1995 Thurston County conviction for “PSP 2^o” and the 1996 Illinois drug possession conviction.¹⁰ Sentencing exhibit 2, at p. 2.

Mr. Lay’s remaining criminal history consists of 2002 and 2006 convictions for failure to register, each of which was listed as an unranked felony without an offender score calculation. CP 80; Sentencing exhibits 4 (judgment and sentence in Grays Harbor County No. 01-1-534-1) and 5 (King County 05-1-08678-1 SEA)).

¹⁰ Mr. Lay was sentenced in 1996 Illinois for a conviction for unlawful possession of a controlled substance. The judgment does not reflect any prior criminal history. Sentencing exhibit 3 (judgment and sentence in Lake County, Illinois No. 96 CF 1737).

At sentencing in the present case, Mr. Lay argued that the court was bound by the judgment of the Grays Harbor County sentencing court in 1995 which had calculated his offender score as a “2,” 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. The trial court concluded that it was not bound by the prior offender scoring and counted the 1995 convictions as two points, based on Mr. Lay’s alternative contention three of the four counts of conviction were the same criminal conduct. 8/17/11RP at 10-12; CP 74-81.

b. The trial court was bound by the most recent sentencing determination of same criminal conduct. This Court reviews a sentencing court's calculation of an offender score de novo. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007).

Generally, the trial court calculates an offender score by first determining his prior convictions. RCW 9.94A.525; RCW 9.94A.589(1)(a); Bergstrom, 162 Wn.2d at 92. If the trial court finds that some of the prior offenses encompass the same criminal conduct, then those offenses count as only one crime. RCW 9.94A.525(5)(a)(i). In determining whether prior offenses encompass the same criminal

conduct, the current sentencing court is bound by a prior court's finding that two or more offenses are the same conduct: "Prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that yields the highest offender score." RCW 9.94A.525(5)(a)(i).

Thus, under the statute, a sentencing court is to count an offender's prior convictions separately in computing his or her offender score, unless (1) a court earlier found that the prior offenses constituted the same criminal conduct under RCW 9.94A.589(1)(a); or (2) the current sentencing court determines that other prior adult offenses for which the defendant received concurrent sentences, or other prior juvenile offenses for which sentences were served consecutively, should be counted as one offense. RCW 9.94A.525(5)(a)(i); State v. Wright, 76 Wn. App. 811, 888 P.2d 1214 (1995), review denied, 127 Wn.2d 1010, 902 P.2d 163 (1995); State v. Johnson, 49 Wn. App. 239, 242, 742 P.2d 178 (1987), review denied, 110 Wn.2d 1006 (1988).

Thus a prior court's determination, at any time in the past, that two offenses encompass the same criminal conduct, is binding on the current sentencing court. State v. Mehaffey, 125 Wn. App. 595, 105 P.3d 447 (2005). In Mehaffey, defendant was convicted for possession

of methamphetamine. Id. at 597. Courts had sentenced him twice before, once in 1998 and again in 1999, each time for multiple convictions. Id. at 598. At the current sentencing, Mehaffey asserted the 1999 sentencing court had counted two of his earlier offenses as the same conduct, but the current court refused to determine whether the prior court had found them to be the same conduct. Id. The Court of Appeals reversed and remanded for resentencing, explaining, "[t]he applicable offender score provisions instruct the current sentencing court that prior offenses that were previously found under former RCW 9.94A.400(1)(a) (1999) [now RCW 9.94A.589(1)(a)] to encompass the same criminal conduct 'shall' be counted as one offense. That is, the previous court's same criminal conduct determination is final." Id. at 600.

Only if no prior court has found multiple offenses to be the same conduct may the current sentencing court engage in its own independent same criminal conduct analysis. Id.; State v. Lara, 66 Wn. App. 927, 931, 834 P.2d 70 (1992). That is, the statute does not restrict the current sentencing court to a previous court's determination that multiple offenses were not the same criminal conduct. Lara, 66 Wn. App. at 931. But if any previous court found multiple offenses to be the

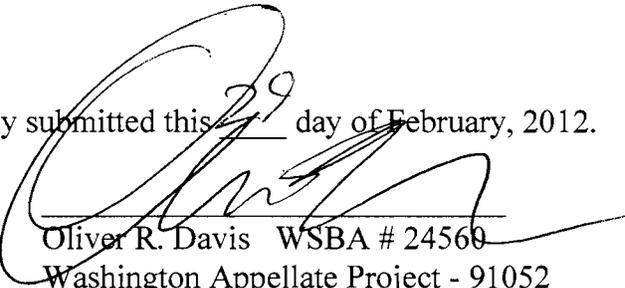
same conduct, the current court is bound by that determination. RCW 9.94A.525(5)(a)(i); Mehaffey, 125 Wn. App. at 600.

Here, 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, his current offender score was miscalculated, requiring that he be resentenced. State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010) (citing State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999)).

E. CONCLUSION.

Based on the foregoing, 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 February, 2012.



Oliver R. Davis WSBA # 24560
Washington Appellate Project - 91052
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF FEBRUARY, 2012, I CAUSED THE ORIGINAL **OPENING 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:

FILED
APPELLATE DIVISION
COURT OF WASHINGTON
2012 FEB 29 PM 4:56

- | | | |
|--------------------------------------|-----|---------------|
| [X] KING COUNTY PROSECUTING ATTORNEY | (X) | U.S. MAIL |
| APPELLATE UNIT | () | HAND DELIVERY |
| KING COUNTY COURTHOUSE | () | _____ |
| 516 THIRD AVENUE, W-554 | | |
| SEATTLE, WA 98104 | | |
|
 | | |
| [X] JONNIE LAY, JR. | (X) | U.S. MAIL |
| 742195 | () | HAND DELIVERY |
| STAFFORD CREEK CORRECTIONS CENTER | () | _____ |
| 191 CONSTANTINE WAY | | |
| ABERDEEN, WA 98520 | | |

SIGNED IN SEATTLE, WASHINGTON THIS 29TH DAY OF FEBRUARY, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710