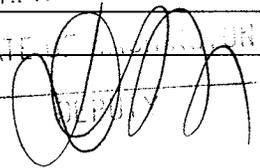


NO. 38099-4

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY 

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

GARNETT L. WILLIAMS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas P. Larkin

No. 08-1-02208-2

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**Brief of Respondent**

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**Table of Contents**

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

    1. Was defendant afforded sufficient opportunity to impeach the State's witnesses on cross-examination?..... 1

    2. Was defendant's offender erroneous when it included crimes for which defendant was not convicted? ..... 1

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

    1. Procedure..... 1

    2. Facts ..... 3

C. ARGUMENT..... 6

    1. DEFENDANT HAD SUFFICIENT OPPORTUNITY TO IMPEACH THE VICTIM'S CREDIBILITY ON CROSS EXAMINATION ..... 6

    2. THE STATE AGREES THAT DEFENDANT'S OFFENDER SCORE WAS CALCULATED INCORRECTLY AND THAT THE APPROPRIATE REMEDY IS REMAND FOR SENTENCING ONLY ..... 14

D. CONCLUSION. .... 17

## Table of Authorities

### State Cases

<i>State v. Bergstrom</i> , 162 Wn.2d 87, 92, 169 P.3d 816 (2007) .....	15
<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990) .....	13
<i>State v. Darden</i> , 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) .....	6, 8
<i>State v. Dixon</i> , 159 Wn.2d 65 at 76, 147 P.3d 991 (2006) .....	10
<i>State v. Kilgore</i> , 141 Wn. App. 817, 824, 172 P.3d 373 (2007) .....	14
<i>State v. Roche</i> , 75 Wn. App. 500, 513, 878 P.2d 497 (1994) .....	14
<i>State v. Williams</i> , 104 Wn. App. 516, 17 P.3d 648 (2001) .....	15

### Constitutional Provisions

Article I, Section 22 .....	6
Sixth Amendment .....	6

### Statutes

RCW 9.94A.030(45)(v) .....	16
RCW 9.94A.030(54)(a)(i) .....	16
RCW 9.94A.525(9) .....	16

### Rules and Regulations

ER 403 .....	9, 10, 12
ER 603(b) .....	10

ER 611(b) .....12  
ER 613 .....9  
ER 613(b) .....10

**Other Authorities**

5D Karl B. Tegland, Washington Practice: Courtroom Handbook on  
Washington Evidence ch. 5, at 334 (2008-09) .....11

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

1. Was defendant afforded sufficient opportunity to impeach the State's witnesses on cross-examination?
2. Was defendant's offender erroneous when it included crimes for which defendant was not convicted?

B. STATEMENT OF THE CASE.

1. Procedure

On May 8, 2008, the State charged GARNETT LYNN WILLIAMS, hereinafter "defendant," with one count of first degree assault (Count I), and one count of first degree unlawful possession of a firearm (Count II). CP 1-2. The State also alleged that the defendant was armed with a firearm during the assault. CP 1-2.

On June 25, the State and defense counsel were expecting to continue the trial date. RP (6/25/08) 2. Defense counsel had informed defendant that he was unprepared to go to trial as he had recently been assigned to the case. RP (6/25/08) 2-3. Defendant, however, informed counsel and the court that he did not wish to waive his right to a speedy trial and directed counsel to not ask for a continuance. RP (6/25/08) 2-3, RP 6-7. Defendant also indicated his desire to waive his right to a jury trial. RP (6/25/08) 2-3. The court declined to accept defendant's waiver,

but left the ultimate decision up to the trial judge, in order to give defendant “additional opportunity to maybe talk to [defense counsel] about it.” RP (6/25/08) 4.

On July 2, 2008, the parties appeared before the Honorable Thomas P. Larkin for trial. RP 4. Defense counsel informed the court that he was prepared, but again advised defendant to request a continuance for further preparation. RP 6-7. While defendant agreed with counsel’s recitation of events, he opposed a continuance and wanted to proceed with a bench trial. RP 7-11. The court accepted defendant’s waiver of a jury trial. RP 11. Both parties requested that the presentation of evidence begin on July 7. RP 13.

John Hall, the victim in the case, originally testified on July 7. RP 31. The following day, Detective Benson disclosed on the stand that he had taped an interview with Mr. Hall. RP 211-12. Detective Benson provided defense a copy of the transcribed interview. RP 215-17. As the transcript of the interview contained statements that were seemingly inconsistent with his testimony, the court directed the State to recall him. RP 219.

On July 9, Mr. Hall again took the stand. RP 238. The court treated Mr. Hall’s testimony as a continuation of defendant’s original cross examination. RP 237. Defense counsel reminded Mr. Hall of his testimony from July 7, and confronted him with his statements during the interview. RP 238-52. Mr. Hall did not deny making the statements to

Detective Benson, and tried to explain that he did not find the answers to be inconsistent. RP 238-52. Defendant admitted the transcript as evidence with no objection from the State. RP 250-51.

The court found defendant guilty as charged. RP 366. The court determined that defendant had an offender score of twelve for the assault, and seven for the unlawful possession of a firearm. CP 19-20. The court imposed the middle of a standard range sentence of 240 months, plus a 60-month firearm enhancement, for a total of 300 months. CP 21-34; RP 366, 383.

Defendant filed a timely notice of appeal. CP 35.

## 2. Facts

On May 7, 2008, Mr. Hall was at the Woodmark Apartments in Tacoma, Washington. RP 31. Mr. Hall is a drug dealer and the Woodmark Apartments are known for heavy drug use. RP 42, 46, 65. Mr. Hall knew many of the people at the Woodmark, including defendant, but he did not want to know any of them by name. RP 32, 44-45, 49, 250. He knew most of the people who lived at the apartments by their street names and he knew defendant as, "Pops." RP 31, 242.

At approximately 3:30 that afternoon, Mr. Hall heard that his name had come up in an argument between defendant and another person. RP 34. Mr. Hall confronted defendant who was outside his father's apartment. RP 33-35. After telling defendant to "keep [him] out of it," Mr. Hall turned away and was shot in the back. RP 35-36. Mr. Hall fell

to the ground and was shot again in the back. RP 36. When he rolled over, he saw defendant standing over him with a gun. RP 37. Defendant raised the gun again and Mr. Hall put his hand over his face. RP 38. Defendant then shot Mr. Hall in the hand. RP 38.

Demetra Bolar, another acquaintance of both defendant and Mr. Hall was nearby when she heard the shots. RP 78-79. She turned to see defendant standing over Mr. Hall with a gun in his hand. RP 80. Ms. Bolar also knew defendant as, "Pops." RP 66.

Pierce County Sheriff's Deputy Jerry Johnson was working as private security in the apartment complex that day. RP 137. Deputy Johnson was patrolling when he drove by several people standing in front of a single apartment. RP 139. He heard what sounded like gunshots just as he passed the unit in his patrol car. RP 139. He stopped the car, got out, and immediately called for back up. RP 139. When Deputy Johnson got out of his car, he saw two women running - one toward him and one away. RP 139. The woman running toward him, who was later identified as Rondala Mathis, was yelling that "Pops" had shot her boyfriend. RP 140-41. Deputy Johnson saw a man in a black hoody sweatshirt, later identified as defendant, walking toward the parking lot. RP 140, 168. When defendant saw the deputy, he ran into the apartment. RP 178. Deputy Johnson did not pursue defendant, but contacted Mr. Hall instead.

RP 141, 143. Deputy Johnson was concerned for his own safety as he knew a person could run through the apartment, exit into the back courtyard, and circle around him. RP 143-46, 148.

While he was waiting with Mr. Hall, Deputy Johnson interviewed Ms. Mathis and sent out an updated description of defendant to responding officers. RP 165-67. A few minutes later, defendant was apprehended a couple of blocks away. RP 150. Deputy Johnson took Ms. Mathis to defendant and she positively identified him as the person who shot Mr. Hall. RP 150, 152.

Officers obtained a search warrant for defendant's father's apartment. RP 180, 202. Inside, they found a black hoody sweatshirt on a chair in the living room and a .380 caliber Highpoint handgun together with a box of ammunition hidden inside the couch. RP 181-82. Bullet casings found at the scene matched bullet casings test fired from this gun. RP 317-19. Detectives also found a small, plastic ball at the scene that matched a small plastic ball found in the unfired ammunition. RP 292-93.

Dr. Lori Morgan treated Mr. Hall at the emergency room. RP 117. Dr. Morgan was able to remove one of the bullets from Mr. Hall's back from where it had lodged near his liver. RP 121. She was also able to remove bullet fragments from Mr. Hall's hand. RP 125-26. The third bullet, which perforated Mr. Hall's lung, remains in his chest. RP 121-22. Bullets recovered from Mr. Hall's person matched the class characteristics of bullets fired from the gun, but the technicians could not match

individual characteristics. RP 321. The class characteristics are unique, however, as Highpoint is the only weapon manufacturer that the technician knew of with those specific class characteristics. RP 323.

Defendant's sister, Mujaahidah Sayfullah, claimed that defendant had been with her all day. RP 333. She testified that she had dropped him off at his aunt's apartment, next to the Woodmark, between 4:15 and 4:25 p.m. RP 334-35. When she had spoken to the prosecutor earlier, she said she dropped him off at 5:30 p.m. RP 337. Defendant was arrested at 4:33 p.m. RP 256.

C. ARGUMENT.

1. DEFENDANT HAD SUFFICIENT OPPORTUNITY TO IMPEACH THE VICTIM'S CREDIBILITY ON CROSS EXAMINATION

The right to confront and cross-examine witnesses is guaranteed by the federal constitution under the Sixth Amendment and the state constitution under Article I, Section 22. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). A meaningful cross-examination allows a defendant to test the perception, memory and credibility of a witness. *Id.* A defendant has more latitude to explore credibility in a key witness. *Id.* at 619.

In the present case, defendant had ample opportunity to cross-examine Mr. Hall, including efforts to impeach his credibility. The court specifically directed the State to recall Mr. Hall to afford defendant the opportunity to explore Mr. Hall's prior inconsistent statements. RP 219. The court characterized Mr. Hall's recall as a continuation of the earlier cross examination. RP 238. The court not only heard Mr. Hall admit all the statements, but also had a copy of the transcript submitted as substantive evidence. RP 250-51.

Defendant claims that his right to cross-examine Mr. Hall was somehow limited by the court's rulings sustaining the State's improper objections. *See* Appellant's Brief at 11. Defendant claims that, because of the improper objections, he was unable to impeach Mr. Hall. Yet defendant does not assign error to the court's rulings, nor does he provide any basis, authority, or argument to show why the State's objections were improper beyond his bare assertion. Also, the record is quite clear that defendant was successful in raising doubts about Mr. Hall's credibility. Defendant is essentially requesting this court to review the trial court's credibility determination.

Defendant offers no evidence in the record to show how he was curtailed from his attempts to impeach Mr. Hall with his prior statements. Instead, he claims that the court sustained improper objections to his questions on cross-examination. None of the State's objections were improper.

- a. The trial court did not err when it sustained the State's proper objections.

The right to cross-examination is not absolute. *Darden*, 145 Wn.2d at 624. The scope of cross examination lies within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of that discretion. *Id.* “Abuse exists when the trial court’s exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.” *Id.* (internal citations omitted). Basic rules of evidence are used to determine whether a defendant has been denied his right to confrontation during cross-examination. *Darden*, 145 Wn.2d at 624.

Defendant’s first claim is that the State improperly objected to defendant’s questions relating to how Mr. Hall knew defendant. On recall, defendant asked Mr. Hall if he knew defendant’s name. RP 242-43. Mr. Hall stated he knew defendant as “Pops,” and does not know his actual name. RP 31, 242. Defendant pointed out that Mr. Hall did not give any name at all during his taped interview. RP 242. Mr. Hall again stated that the officer wanted to know defendant’s name, and he does not know it. RP 242-43. Defendant asked, “Now, when you were visiting the Woodmark prior to the shooting, or days or weeks prior to the shooting and you would run into my client, isn’t it true that you would refer to him as Pops?” RP 243. The State objected as asked an answered. RP 243.

A court may limit otherwise relevant evidence on the grounds of “undue delay, waste of time, or needless presentation of cumulative

evidence.” ER 403. As Mr. Hall had answered several times that he knew defendant as “Pops,” the court properly sustained the objection as the testimony was cumulative. RP 31, 242-43.

Next, defendant claims that the State’s objection to questions relating to whether Mr. Hall had seen defendant with a gun prior to the shooting was improper. Defendant asked Mr. Hall if he had seen defendant with the gun prior to shots being fired. RP 244. Mr. Hall had testified that he did not see defendant with a gun before the shots were fired. RP 38, 244. Defendant pointed out that in the taped interview, when asked if he had seen defendant with a gun, Mr. Hall responded, “yeah, I seen him fumbling in his pockets, that is why I tried to walk away.” RP 244. Apparently, Mr. Hall believed his statement to the officer was not inconsistent because he did not equate the “yeah” portion of the statement with ‘yes I saw him with a gun.’ *See* RP 244-45. Mr. Hall indicated that the “yeah,” portion of the statement was just how he talks. RP 245. Defendant then asked Mr. Hall to go through every other question in the eight-page transcript to see if there was a “yeah,” before any one, presumably to establish a pattern of speech. RP 245-46. The State objected citing relevance, and that Mr. Hall’s answer spoke for itself. RP 245.

ER 613 governs the admissibility of impeachment evidence. The rule provides that “[e]xtrinsic 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.” ER 613(b). If the witness responds to foundation questions by admitting making the prior inconsistent statement, then extrinsic evidence of the statement is inadmissible. *State v. Dixon*, 159 Wn.2d 65 at 76, 147 P.3d 991 (2006). “Where a witness admits to the statement at issue, a trial court may reasonably determine that permitting extrinsic evidence would be a ‘waste of time’ or a ‘needless presentation of cumulative evidence.’” *Id.* at 76 (quoting ER 403). As Mr. Hall admitted, he made both statements and explained how they were not inconsistent, going through the transcript to establish a pattern of speech through unrelated questions was not relevant. Mr. Hall’s explanation spoke for itself and it was up to the court to whether his explanation was credible<sup>1</sup>.

Defendant also claims the State’s objection to his questions regarding Mr. Hall’s knowledge of the people present at the time of the shooting was improper. Mr. Hall testified that he did not know anybody who was present, and he did not know whose apartment he was in prior to the shooting. RP 247. Mr. Hall then agreed that in his taped interview, he told officers that Rondala and Red were present. RP 248. Counsel then replied, “so when you testified the other day - - two days ago that you

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<sup>1</sup> While extrinsic evidence of a prior inconsistent statement is not admissible under ER 603(b), the transcribed copy of the interview was admitted into evidence without objection from the State. RP 250-51.

didn't know any names, you didn't know anybody that was there, that wasn't completely accurate, was it?" RP 248. The State objected as the form of the question was argumentative. RP 248.

Argumentative questions seek no facts, but instead seek agreement with the examiner's inferences, assumptions, or reasons. 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* ch. 5, at 334 (2008-09). Mr. Hall had already admitted making both statements and this question sought only Mr. Hall's agreement that they were different. The court properly sustained the objection as the form of the question was argumentative.

In addition, an objection to an argumentative question is merely an objection as to the form of the question, not the question itself. *See Id.* All that was required of counsel was for him to rephrase the question in such a way that did not demand agreement with his inference. Here, after the court sustained the State's objection, counsel continued inquiring as to Mr. Hall's knowledge of the people who were present after the shooting, and the answers he had given during his interview. RP 248-50. Counsel essentially rephrased his objectionable question with a series of questions that were not argumentative.

Finally, defendant argues that the State's objection on his recross-examination of Mr. Hall was improper. The State had only one question on redirect: "Have you since learned Red's real name based on this case?" RP 251. Mr. Hall responded that he did not know Red's name. RP 251.

Defendant then questioned Mr. Hall, again, on why he did not tell Detective Benson that it was “Pops” who shot him. RP 251-52. Mr. Hall repeated his earlier statements that he did not know the actual names of the people involved, and he did not give Detective Benson the street names, because that was not what Detective Benson had asked for. RP 251-52. Defendant then stated, “You weren’t specific in explaining and defining all of that when you answered “Red,” that is the name you knew?” RP 252. The State objected as the question had been asked and answered and that it was beyond the scope of redirect. RP 252.

Under ER 611(b), “[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.” As noted above, a court has no obligation to admit cumulative evidence. ER 403. Here, Mr. Hall had just answered a string of questions related to his knowledge of individual’s names and his response to Detective Benson’s questions. RP 242-43. The objection was proper as the same questions had been asked and answered. In addition, re-direct examination was limited to whether Mr. Hall knew “Red’s” name. Whatever explanation he may, or may not, have given Detective Benson was clearly outside the scope of redirect.

None of the State’s objections were improper; therefore the court did not err in sustaining those objections.

- b. The trial court properly exercised its discretion when it found Mr. Hall credible as related to the shooting.

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

As noted above, defendant did not assign error to the court's rulings, nor did he articulate any argument as to how the State's objections were improper. He also made no showing that he was in any way prejudiced as he was successful in exploring any inconsistencies in Mr. Hall's statements. Defendant's argument is actually challenging the court's finding that Mr. Hall was credible. The court carefully considered Mr. Hall's credibility in light of his testimony. In fact, when making its ruling, the court specifically stated:

So I take a look at all of the evidence that is presented. Was Mr. Hall a credible witness? He was a credible witness even though a lot of his testimony - - you could see he was trying to hide things, protect other people, not mention names, and those things. Was he credible in the key areas? I think he was.

RP 365-66.

The court later expounded on its credibility determination:

First of all, I found you guilty because I believed you were guilty beyond a reasonable doubt, and I have no doubt that you're guilty of the crime. That being said, we're going to move to sentencing.

I had concerns about this case and it troubles me, and some of the testimony of the witnesses that testified weren't credible. What they all did come in and say is the victim was a drug user, a drug seller. He admitted he was selling drugs in the place. There's no denying that. Other people testified to the same thing. He is a good guy? No, I don't think he's much of a good guy. People who sell drugs, they don't rate very high on my list, that is for sure.

RP 382-83.

The record clearly reflects that defendant was successful in raising questions as to Mr. Hall's credibility. However the court determined that Mr. Hall was credible where his testimony related to the shooting. As credibility determinations are for the trier of fact, the court's finding is not subject to review.

2. THE STATE AGREES THAT DEFENDANT'S OFFENDER SCORE WAS CALCULATED INCORRECTLY AND THAT THE APPROPRIATE REMEDY IS REMAND FOR SENTENCING ONLY.

A challenge to the offender score calculation may be raised for the first time on appeal. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994). A trial court's calculation of an offender score is reviewed under a de novo standard. *Id.* A reduced standard sentence range, not a reduced offender score, requires resentencing on remand. *State v. Kilgore*, 141 Wn. App. 817, 824, 172 P.3d 373 (2007).

Generally, the trial court calculates an offender score by adding together the current offenses and the prior convictions. *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). “The State bears the burden of proving the existence of prior convictions by a preponderance of the evidence.” *Id.* at 93. “The best evidence to establish a defendant’s prior conviction is the production of a certified copy of the prior judgment and sentence.” *Id.*

In 1998, defendant was convicted on three counts of robbery in the first degree. *See State v. Williams*, 104 Wn. App. 516, 17 P.3d 648 (2001) (published in part (2001 Wash. App. LEXIS 189)). This court vacated defendant’s convictions and remanded for a new trial. *Id.* On July 2, 2001, defendant entered a guilty plea to one count of first degree robbery and the other two counts were dismissed. CP (Exhibit 12).

In the present case, the judgment and sentence lists defendant’s criminal history as including *three* counts of first degree robbery, two counts of second degree robbery, and one count of unlawful possession of a controlled substance, giving defendant an offender score of twelve for Count I, and seven for Count II. CP 21-34. The State presented evidence through certified judgment and sentences for *one* count of first degree robbery (Exhibit 12), two counts of second degree robbery (Exhibit 11, 13), and one count of unlawful possession of a controlled substance (RP 377, 383). Removing the two counts of first degree robbery that were erroneously listed, would reduce defendant’s offender score.

Under RCW 9.94A.525(9), when the current conviction is a “serious violent offense,” prior violent offense convictions are counted as two points and nonviolent offenses are counted as one. First degree assault is a “serious violent offense.” RCW 9.94A.030(45)(v). First and second degree robbery is a violent offense. RCW 9.94A.030(54)(a)(i), (xi). Provided defendant has no other criminal history, his offender score should be eight for Count I (two points for each robbery, one point for unlawful possession of a controlled substance, and one point for his current offense of unlawful possession of a firearm), and five for Count II (one point for each prior and other current conviction).

Defendant was sentenced under a “nine or more” range of 240-318 months for Count I. CP 21-34. An offender score of eight gives defendant a standard range of 209-277 months. As the reduction of defendant’s offender score would change his standard sentence range for both counts<sup>2</sup>, the error was not harmless.

Assuming defendant has not acquired any new convictions, this court should remand for sentencing within the standard range for an offender score of eight on Count I, and five on Count II.

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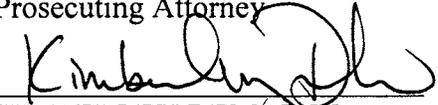
<sup>2</sup> Defendant’s offender score of five on Count II gives him a standard range of 41-54 months, which would run concurrent with Count I.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions but remand for resentencing within the appropriate standard range.

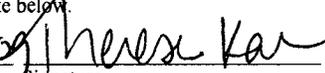
DATED: April 28, 2009.

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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.

4.28.09   
Date Signature

CO. JAMES R. P. 1:45  
STATE OF WASHINGTON  
BY   
APR 29 2009