

No. 39549-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DEMARCO V. McGOWN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
PIERCE COUNTY

The Honorable James R. Orlando, Judge

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting inadmissible hearsay evidence.

2. The trial court erred in refusing to give Demarco

McGown's proposed limiting instruction, which provided:

Evidence has been introduced in this case during the testimony of Detective Ringer consisting of a taped statement of Brennan Morford, prior out of court statements of Brennan Morford, and prior out of court statements of Monteece Brewer. This evidence was introduced for the limited purpose of impeachment. You must not consider this evidence for any other purpose.

CP 87.

3. The limiting instruction given by the court was inadequate.

That instruction provided:

Evidence has been admitted in this case for a limited purpose. This evidence consists of a tape recorded interview of Brennan Morford conducted by Det. John Ringer and may be considered by you only for the purpose of impeachment. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 88-89.

4. The offender scores were incorrect because they were calculated by counting convictions for first-degree assault with a deadly weapon and drive-by shooting separately even though they were the "same criminal conduct" under RCW 9.94A.589(1)(a).

5. McGown was deprived of his Article I, § 22 and Sixth Amendment rights to effective assistance of counsel at sentencing.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. At trial, over defense objection, the prosecution was allowed to play the tape-recorded interrogation of a state's witness, Morford. The prosecutor was also allowed to ask a police officer to recite what Morford had said during the taped and untaped portion of that out-of-court statement, as well as what another witness, Brewer, had said in his untaped statement.

a. To be admissible as a "prior inconsistent statement," a statement must be both inconsistent and made under oath, subject to penalty of perjury at a trial, hearing, other "proceeding" or deposition. To be admissible as a "consistent" statement, there must be a claim of "recent fabrication" of the version of events given in that statement.

Did the trial court err in admitting the statements as "prior inconsistent statements" where the bulk of the statements were consistent, not inconsistent? Were the statements further inadmissible as "consistent" statements where there was no claim of "recent fabrication?"

Further, were the statements inadmissible as "prior inconsistent statements" even to the extent they were inconsistent because the statements were not made under oath, subject to penalty of perjury at a trial, hearing, "other proceeding" or deposition?

b. Hearsay is only admissible under the "coconspirator" exception if they are made by a person who is part of a conspiracy and made in the course of and in furtherance of the conspiracy.

Did the trial court err in admitting the statements to the extent it

did so under the “coconspirator” exception when the statements were made to police during an interrogation and thus not made in the course of and furtherance of a conspiracy. Further, were the statements inadmissible because there was no evidence that either of the declarants were part of a conspiracy?

c. Is reversal required for the improper admission of the out-of-court statements of Brewer and Morford where there is more than a reasonable probability that the admission of those statements affected the verdict?

2. Under ER 105, when evidence is admitted for a limited purpose, the trial court is required to give a limiting instruction if the person against whom the evidence requests it. Such an instruction must caution the jury of the limited purpose for the evidence and remind them not to consider it for other purposes.

Although the trial court admitted evidence of Morford’s taped and untaped statements and Brewer’s untaped statement for limited purposes, the trial court refused to give a limiting instruction McGown proposed which would have addressed all three out-of-court statements, instead giving an instruction which referred only to the taped statement. Did the trial court err in failing to give an adequate limiting instruction and does this error compel reversal where the state’s case against McGown was based upon credibility and circumstantial evidence and an extremely weak identification from the witness?

3. McGown was charged with first-degree assault with a deadly weapon and drive-by shooting for the very same act of pulling a

gun out and shooting the victim from a car. Was counsel ineffective in failing to argue that those convictions were the “same criminal conduct” for sentencing when the acts amounting to each of the crimes were exactly the same, the crimes were committed in the same time and place, with the same criminal intent and victim? Further, was counsel’s ineffectiveness prejudicial to his client where McGown was given a higher sentence than was warranted as a result of counsel’s failures?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Demarco McGown was charged by information with first-degree assault and a firearm enhancement, drive-by shooting and first-degree unlawful possession of a firearm. CP 1-2; RCW 9.41.010(12); RCW 9.41.040; RCW 9.94A.310; RCW 9.94A.370; RCW 9.94A.510; RCW 9.94A.530; RCW 9A.36.011(1)(a); RCW 9A.36.045(1).

After jury trial before the Honorable Judge James R. Orlando on June 2, 2009, McGown was found guilty as charged. CP 90-94; RP 670-71.¹ On July 10, 2009, Judge Orlando ordered McGown to serve standard-range sentences for each offense based upon offender scores of 7 for counts I and II (the assault and drive-by shooting) and 5 for count III (the unlawful possession, plus the 60-month firearm enhancement, for a total sentence of 296 months. CP 115-128; RP 680. McGown appealed

¹The verbatim report of proceedings in this case consists of 6 volumes of transcript, which will be referred to as follows:
the 5 chronologically paginated volumes containing the trial and sentencing on May 20-21, 27, June 2, 3 and July 10, 2009, as “RP;”
the supplemental transcript of the voir dire proceedings as “2RP.”

and this pleading follows. See CP 133.

2. Relevant facts

On September 4, 2008, at about 8 in the evening, Billy-Ray Griffin was shot in the stomach and chest area three times. RP 364, 527-28. The shooting occurred outside El Hutchos restaurant and, at first, it was not expected that Griffin would survive. RP 462. He did, however, so police interviewed him on September 29, 2008, about what he said occurred. RP 474. According to Griffin, he had just walked out of the restaurant when a voice he recognized called his name from a car and then said something like, “smoke that guy.” RP 364, 485, 556. At that moment, a man Griffin had never seen who was sitting in the front passenger seat of the car pulled out a gun and shot him. RP 364.

Griffin was sure there were four or more people in the car but could not really see anyone in the back seat. RP 368-44. The only people he saw were the driver, whom he identified as Derrick Johnson, and the front-seat passenger, whom Griffin did not know. RP 368, 488-95.

A few minutes before the shooting, a police officer had driven by and seen two cars parked, occupied, next to El Hutchos. RP 38. The officer had written down the license plate numbers and noted that one car was a silver “PT Cruiser” while the other was a darker “Intrepid” which had what appeared to be two black males in their “20s” in the front seats. RP 42. The officer and his partner drove off and parked about five blocks away, doing other things. RP 42. About five or ten minutes later, they heard a broadcast of a report of a possible shooting at El Hutchos, so they returned to the restaurant. RP 42. The two cars the officer had previously

seen were no longer there but there was a group of people and the injured Griffin. RP 44. Medical assistance was called and other officers, including Detective John Ringer of the Tacoma Police Department (TPD), responded. RP 462.

When Ringer arrived at the scene, he was given the license plate numbers and vehicle descriptions from the patrol officer who had seen the vehicles parked by the restaurant earlier. RP 466. The officers had already determined that one vehicle was registered to Susie McGown and had set up surveillance at her home. RP 467, 469. About 30-45 minutes after Ringer started working at the scene, officers notified Ringer they had detained several people who had come out of Mrs. McGown's home. RP 467. Ringer then went to interview those people. RP 467.

One of those people was Mrs. McGown. RP 336, 471. An officer initially put Mrs. McGown in handcuffs although she was not in handcuffs when Ringer ultimately interviewed her about where her car was and who might have been in it that night. RP 336, 471, 574. Ringer also told Mrs. McGown to call both once her car returned and if she had any information to give him. RP 472. When she promised to do so, he had her and her friend "released." RP 472.

Based upon his interview with Mrs. McGown, Ringer thought the people in her car that night were probably Derrick Johnson, Demarco McGown, Monteece Brewer and Brennan Morford. RP 473. McGown was Mrs. McGown's son. RP 472-73. Mrs. McGown said that those were the people in the car an hour and a half before the incident, when they picked her up from work and dropped her off at home. RP 557, 575, 586.

Mrs. McGown said that a man she did not know who was later identified as Johnson was driving and he was introduced as Brewer's "cousin or uncle." RP 586.

Griffin confirmed that the driver of the car and the man that had called his name and said to "smoke" him was Derrick Johnson. RP 556. Griffin recognized the man's voice, saw him directly and knew him from a relationship Griffin had with Johnson's relative. RP 554-57. Griffin's girlfriend told police that Johnson was involved based on what Griffin told her and also threats she implied that Johnson had made. RP 555.

In contrast, Griffin was uncertain whether anyone depicted in a photograph montage which included a picture of Demarco McGown was involved in the shooting. RP 493. Although Griffin picked out the picture of McGown as someone who resembled the shooter closely in certain ways such as shape of the head and hair, Griffin said the picture looked older than the person who was involved. RP 493, 494, 581. Indeed, the officer who showed Griffin the montages said Griffin was only 40 percent sure of his limited identification of McGown looking like, but older than, the shooter. RP 495. The officer nevertheless did not make any further efforts at identification, such as trying to find other pictures of similar-looking individuals to try to get a better identification than "40 percent." RP 594. The officer said "the problem was this happened at night, it was dark, it was very quick in duration," Griffin did not get very close to the car and the interior of the car was dark. RP 594.

At trial, during direct examination, when asked whether he would be able to recognize the shooter if he saw him again, Griffin said he

believed he would. RP 368. He was asked to describe the shooter and did so, then gestured to McGown and said the shooter was “darker” than McGown. RP 369. Griffin was asked, “[d]o you see the person that shot you in the courtroom today,” and he said, “[n]o.” RP 369. When asked again, he said, “[n]ot - - I mean, I don’t know.” RP 369. Griffin also thought that, when he identified someone as looking like the shooter, he had said he was 90 percent certain, although the officer had remembered and written down only 40 percent. RP 383, 594. Griffin recalled looking at one specific person in the montage but that he “wasn’t sure” of his identification. RP 383.

When shown the montage with McGown in it at trial, Griffin picked out someone other than McGown as looking most like the shooter and identified that picture as the person he thought he had selected when shown the montage by police. RP 384, 401; see 494.

Griffin could not identify anyone else as having been in the car when shown montages which included pictures of Morford and Brewer, the other two people alleged to have been in the car. RP 493. Griffin explained that he never really saw who was in the back seat. RP 493.

Ringer interviewed Morford and Brewer about the incident. Morford, who was a teenager at the time, was interviewed for an hour and a half in the officers’ vehicle in front of his mother’s house, with about a half to a third of the interview ending up on audiotape. RP 497-501. Morford initially denied knowledge of the shooting but, after Ringer confronted him with details about what the officers thought had happened, spoke about it with them. RP 514. Ringer claimed that he had not given

Morford information about the incident beyond what was needed to “overcome his initial denials of knowledge.” RP 503. Ringer also said generally that Morford had identified McGown as the shooter in his statement to Ringer “multiple times” and had picked out a picture identifying McGown in a photographic montage procedure. RP 514.

At trial, however, Morford said that, in fact, he had lied both to Ringer and in the taped statement. RP 219-28. McGown was not in the car at all and was definitely not the shooter. RP 219-28, 236. Instead, it was Johnson, the driver, who had unexpectedly shot Griffin, saying to himself something like, “smoke that nigga,” before shooting. RP 243-45, 255-60. Morford and Brewer were sitting in the back seat and both were drinking and smoking pot at the time, so Morford’s recollection of specifics was hampered. RP 232-66.

Morford said he had lied to police and put the blame on McGown because Johnson had threatened him and told him to do so. RP 220-21, 246, 252. Johnson had told Morford he would kill him if Johnson was found or “caught of the crime.” RP 252. Morford was worried not only about himself but also about his brothers and sisters because Johnson knew where Morford lived. RP 282.

The prosecutor questioned why, if Johnson had threatened him, Morford would have said Johnson was there at all, as Morford had said in his statement. RP 269-87. The prosecutor also asked why Morford had waited months to change his story, suggesting that Morford had only done so after the charges against him had been dismissed so there could be no reprisals. RP 269. Morford, however, had written a letter to the defense

attorney several months before trial saying that he had lied to police, that McGown was not there and that McGown was not the shooter. RP 283. The letter also told counsel that Johnson had told Morford to blame McGown. RP 284.

At the time Morford wrote that letter, the charges against Morford were still pending. RP 283.

When he first spoke to Ringer, Brewer did not say anything about a shooting. RP 553. Instead, he said he was in the car with Morford, McGown and Johnson that night and they went to the movies. RP 553. After he was arrested, however, Brewer was interrogated further. RP 407. Brewer maintained that he was so drunk that night that he did not know what had happened. RP 518-21.

Ringer admitted that Brewer had “clearly stumbled before he ultimately gave a couple names” of who else was in the car. RP 518-21. Ringer also said that he and the other officer “made it clear we knew” that Brewer was in the car as well as the others. RP 549. Brewer’s response was that he was so “fucking drunk” that night that he did not know anyone had been shot until the following day. RP 549.

Ringer admitted that, in the interview with Brewer, there was mental “game playing.” RP 548. Ringer also said that Brewer answered many questions by saying “[y]ou already know” or “don’t ask questions you know the answer to” or similar things. RP 548. Ringer said that, nevertheless, several times Brewer had admitted to being in the back seat of the car during the shooting. RP 548-50.

At trial, Brewer said he did not remember anything about going

past El Hutchos or who was in the car that night. RP 407-12. He also disputed Ringer's claim that he had said that he was present for the shooting. RP 407-12. Brewer did not remember picking up Mrs. McGown from work that night, did not remember who was in the car, and did not remember if he talked to Mrs. McGown or learned from her that the police were looking for him after the incident. RP 407, 408, 417. Brewer did not remember anything like Mrs. McGown saying anything about police looking for him or what she may have said. RP 415. He also did not remember what he told Ringer about the incident. RP 418.

Brewer explained that he did drugs a lot, does not remember "a lot of stuff that happened" and "live[d] in the fast lane." RP 414.

Brewer said that, because of his lack of memory, what little he knew about what had happened was from reading police reports and "stuff" when he was charged. RP 415. He also said that "Detective Ringer has a real bad habit of putting stuff in, things that wasn't said" into written statements. RP 419. Brewer had questioned his lawyer about what could be done about that during the time Brewer was facing charges. RP 421. Indeed, Brewer said, Ringer had not even had a notepad and pen when they did the interview, so Brewer did not know how Ringer could have been accurately recording it. RP 421. Brewer also felt like Ringer was "kind of like pressuring" him and threatening him at the same time during the interview, kind of saying what he wanted Brewer to say. RP 424.

On September 5, the day after the incident, Mrs. McGown called Ringer and turned her car into the police, who put it in a "forensics bay"

to be photographed and processed for evidence. RP 476. Springer said the car appeared to have been “cleaned up” well and had a fine layer of dust on it but clear “wipe marks” on both doors. RP 477.

There was only one fingerprint of value located in the case. RP 175. The fingerprint, which was on the interior front-seat rear-view mirror of Mrs. McGown’s car, was Brewer’s, not McGown’s. RP 183, 211. A surveillance video was not able to show the license plate number of the car that was involved in the incident. RP 141. A witness initially said she thought she had seen “flashes” with the shots coming from the back seat of the car, not the front. RP 444-51. In her statement to police, she had only said that they came from the passenger side but not whether it was front or rear. RP 452-54. At trial, she said she thought the shots came from the back seat but said it also could have been from the front. RP 454.

Sometime after the incident, McGown was arrested after a traffic stop in which he was driving his mother’s car and Brewer was sitting in the front seat. RP 429. Brewer had to be chased and caught by police. RP 429. He explained that he ran when McGown was pulled over because he was scared of police in general and he had a parole violation warrant out for his arrest. RP 429.

D. ARGUMENT

1. THE PRIOR OUT-OF-COURT STATEMENTS OF MORFORD AND BREWER WERE INADMISSIBLE HEARSAY AND THE TRIAL COURT ERRED IN ADMITTING THAT EVIDENCE AND DENYING MCGOWN’S REQUEST FOR AN ADEQUATE LIMITING INSTRUCTION

At trial, over repeated defense objection, the court allowed the prosecutor to introduce evidence of the out-of-court statements of Morford and Brewer, initially codefendants of McGown whose cases were dismissed just prior to or at the start of McGown's trial.

The trial court abused its discretion in admitting those statements, because they were hearsay and were not admissible under any of the relevant rules of evidence. Further, the trial court erred in refusing to give McGown's proposed limiting instruction, because the instruction proposed by the state and given by the court was inadequate. Because there is a reasonable probability that the admission of the improper evidence affected the verdict, reversal and remand for new proceedings is required.

a. Relevant facts

At the beginning of trial, there was a discussion about Morford and Brewer having suddenly become witnesses instead of codefendants. RP 18-20. Counsel told the court that Morford had written a letter recanting his claims, and a copy of that letter had been sent to the prosecution. RP 18-20. The parties also told the court that Brewer was not cooperating with either side in the case. RP 19-20.

A little later, when counsel interviewed Morford and Brewer, Morford apparently refused to talk with the prosecutor present. RP 24-25. As a result, the prosecutor told the court he would be asking to have Morford declared a hostile witness. RP 31. The prosecutor also told the court it appeared Morford was going to testify to something different than what he had said in his statement. RP 31.

Once Morford testified that McGown was not in the car at the time of the shooting, was not the shooter and was not involved, the prosecutor then went through a vigorous, lengthy examination of Morford, detailing at length what Morford had said in his interrogation by Ringer. RP 222-74. The prosecutor went through the statement Morford gave to Ringer at length, asking Morford if he had told the officer specific things and asking him to comment on whether the things he told the officer were true. RP 250-71.

At one point, counsel objected that the bulk of the statements the prosecutor was admitting were prior *consistent* statements, not prior *inconsistent* statements. RP 255. Counsel also repeatedly objected that the state was basically just “testifying,” reading into the record the evidence it wanted to get in without regard for the rules of evidence. RP 255, 260. The court overruled the objections. RP 255, 260. Ultimately, the prosecutor declared to Morford, “the only difference in the entire statement you gave to the Detective Ringer is your friend Mr. McGown’s not the shooter, that was a lie.” RP 261.

After the jury was excused, the prosecutor then said he was going to offer Morford’s taped statement to Ringer in its “entirety.” RP 264. While admitting that what he had done with the statement in examining Morford “wasn’t impeachment” because Morford admitted to having said most of it, the prosecutor thought it was “relevant” for the jury to hear the tone used in the tape interview and the answers, as well as the detail that was provided. RP 254. A little later, the prosecutor again raised the issue, this time arguing that Morford’s statement should be admitted both as

“substantive evidence regarding identification” and as “impeachment,” although most of what was on the tape was “cumulative.” RP 437-38.

Counsel objected, arguing that the prosecutor had already established in his lengthy examination about all the differences between Morford’s statement and the testimony. RP 438. The tape was therefore unnecessary and cumulative. RP 438-39. Counsel was also concerned that it would be very difficult to get the jury to understand that the statement, if played, was not coming in as substantive evidence, rather than impeachment. RP 439.

The court said it was having trouble thinking of a potential limiting instruction that would not be seen as a comment on the evidence. RP 441. It nevertheless decided to let the prosecution play the tape but left the limiting instruction issue for later. RP 441. The court also commented that Morford said in cross-examination that “basically Detective Ringer was telling him what to say for the most part, giving him the suggested manner to form his statement.” RP 442. The court thought there was a “benefit to actually hearing the voice” on the tape and hear the responses. RP 442.

Later, when Ringer was testifying and the prosecutor moved to play the tape, counsel again objected, this time arguing that the tape was “a prior statement of a witness that’s not given under oath” and was not “subject to penalty of perjury” or made after being sworn in. RP 505-507. The prosecutor responded that he was trying to admit the tape under ER 801(d)(1)(i), as a prior statement of “identification of a person made after perceiving the person,” but counsel disputed that claim, saying the proper

rule was clearly ER 801(d)(1)(iii), regarding “a prior inconsistent statement.” RP 507.

At that point, the court opined that the statement might also be admissible because it was “a statement of a co-conspirator” i.e., Morford, who had “placed himself in the vehicle” at the time of the crime. RP 507-508. The court said there were many ways the evidence could come in without running afoul of the hearsay rule. RP 508-509.

Prior to playing the tape, the court told the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the taped statement of Brennan Morford and may be considered by you only for the purpose of judging or assessing his credibility. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP 509-510.

After the tape was played, the prosecutor asked the officer if Morford was able to identify McGown and whether that identification was “as the shooter.” RP 513. The officer said yes and also said Morford had no “hesitation” or “[q]ualification of any sort.” RP 514. The officer said “we had already had it identified [in the interview] who the shooter was.” RP 514.

In the direct examination of Brewer, the prosecutor went into detail about what Brewer had told Ringer during his interrogation. RP 410-432. When Brewer said that Ringer had put things into the statement which were not correct, the prosecutor told Brewer to put a mark by “every single sentence that is misrepresented by Detective Ringer” in the statement. RP 426. Brewer, who was in handcuffs, said they made it hard

for him to comply. RP 426. Brewer also said he had marked a few things in a “quick roll-through” of the statement and, when the prosecutor asked for an example, Brewer started talking about “bounty hunter blood” and everyone in the car being “Crips,” things Brewer said he had not said. RP 427. Counsel objected and the court told the prosecutor to ask another question. RP 427.

Later over defense objection, the prosecutor was allowed to elicit from Ringer that Brewer had said he knew “through Susie McGown” that police were looking for him or the car. RP 518. Counsel objected on hearsay grounds, noting that Brewer’s statement to Ringer was “unsworn.” RP 518. The prosecutor said it was “impeachment” and the court overruled the objection. RP 518. The officer was also allowed to testify, over defense objection, that Brewer had spoken to Mrs. McGown “around midnight of the date in question, the 4th, when they talked on the phone.” RP 518.

A few minutes later, when the prosecutor started questioning the officer further about the details of Brewer’s statement, counsel objected that the details were a “prior consistent statement, not an inconsistent statement.” RP 520. Counsel was overruled yet again and also was overruled when he objected after the prosecutor asked Ringer where Brewer had said he was and who he was with on the evening of the incident. RP 520.

When asked if Brewer had ever said that he was in the car during the shooting, Ringer started answering but counsel objected and the court told the jury “this is impeachment purposes and offered for that. The jury

will need to recall the testimony that was presented by Mr. Brewer.” RP 548-49. The officer was then allowed to testify that Brewer had said he was there but too drunk to know what had happened. RP 548-49.

Before closing argument, counsel raised the issue of the limiting instructions and expressed his concern about “how far” the hearsay exception for identification would be allowed to go. RP 602-603. The prosecutor argued that the exception applied to statements of Morford not only identifying McGown as the person in the car that night but also “identifying” him as the shooter. RP 602-604. The prosecutor also objected to the court giving any further limiting instructions on anything but the tape, saying that the cautions given at the time of the admission of the evidence were sufficient. RP 603-604. The court told counsel he might want to propose a different limiting instruction than the one the state had presented because there was other evidence admitted during Ringer’s testimony. RP 604.

The following day, McGown proposed an instruction regarding the proper use by the prosecution of the out-of-court statements RP 606. That instruction provided:

Evidence has been introduced in this case during the testimony of Detective Ringer consisting of a taped statement of Brennan Morford, prior out of court statements of Brennan Morford, and prior out of court statements of Monteece Brewer. This evidence was introduced for the limited purpose of impeachment. You must not consider this evidence for any other purpose.

CP 87. In contrast, the prosecutor’s proposed instruction provided only:

Evidence has been admitted in this case for a limited purpose. This evidence consists of a tape recorded interview of Brennan Morford conducted by Det. John Ringer and may be considered by you only for the purpose of impeachment. You may not consider it

for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP 88-89.

Counsel argued that the state's proposed instruction was inadequate because it did not cover anything but Morford's taped interview, leaving out the other out-of-court statements of Morford and Brewer which the state had been allowed to use. RP 607. The prosecutor argued that it would be too "confusing" to "piecemeal" specific evidence of different parts of each statement as relevant to identification, or only impeachment, or as substantive evidence. RP 608.

Indeed, the prosecutor said that he would be "well within the bounds of arguing only substantive evidence and make it real clear there was impeachment value to some of these statements." RP 608.

The court said it was "inclined" to give the state's proposed instruction. RP 608. Regarding Brewer, the court said, because Brewer was referred to his statement "many times during his testimony" the court could not "find a clear line between what is testimony that he was giving from the stand versus what he was potentially being impeached upon by a prior inconsistent statement." RP 608. The court decided to give the state's instruction as Instruction 24. CP 83.

In closing argument, the prosecutor repeatedly relied on what Ringer had said about Morford's statement to him and also what the jury had heard on the tape, arguing that this evidence proved McGown's guilt. RP 620-24.

For his part, counsel tried to outline the proper limits of the use of

the tape-recorded statement and other out-of court statements of Morford and Brewer. RP 630-34. He told the jury it was important to understand that they were not allowed to use Morford's statement as substantive evidence except for the identification. RP 631. He expressed a little concern that four jurors had taken "copious notes" when the taped statement was played, so he reminded jurors the evidence was only impeachment. RP 631.

In rebuttal closing argument, the prosecutor declared Morford to be "credible on everything but one issue, and that is who the shooter is." RP 661. The prosecutor also said the jurors should "be very clear" that "[a]ny statement" Morford made to Ringer "that the defendant is the shooter can be considered as evidence that the defendant is the shooter." RP 661.

b. The statements were inadmissible hearsay

The trial court erred in allowing the prosecution to play the taped statement of Morford and in allowing the officer to testify at length about what was said in the out-of-court statements of both Morford and Brewer, because the statements were inadmissible hearsay.

At the outset, it is questionable whether it was proper for the state to call Morford as a witness at all. While a party may impeach its own witness, it may not call a witness to testify for the primary purpose of getting into evidence out-of-court statements as "impeachment" which would otherwise be inadmissible. See State v. Hancock, 109 Wn.2d 760, 748 P.2d 611 (1988). Put another way, the prosecutor may not use the guise of "impeachment" "for the primary purpose of placing before the jury substantive evidence which is otherwise inadmissible." State v.

Lavaris, 106 Wn.2d 340, 344, 721 P.2d 515 (1986) (emphasis and citations omitted). The reason for this rule is that it would be an “abuse”

in a criminal case, for the prosecution to call a witness that it knew would not give it useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence

-or, if it didn't miss it, would ignore it. The purpose would not be to impeach the witness but to put in hearsay as substantive evidence against the defendant[.]

United States v. Webster, 734 F.2d 1191, 1192 (7th Cir. 1984), quoted in Lavaris, 106 Wn.2d at 344.

Here, it was clear before he testified that Morford was going to say that McGown was not the shooter. See RP 19-20. At the least, the prosecutor knew that Morford was saying so in the letter he had written. RP 19-20. Further, the prosecutor knew before he put Morford on the stand that Morford was going to testify consistent with that letter. RP 31. While Morford may have had some general information to admit, the prosecution's calling him to the stand under these circumstances, knowing that he was not going to adhere to his statement, smacks of calling him solely to get that statement into evidence so the jury could use it against McGown.

In any event, the evidence was not admissible under any of the theories advanced below. In admitting the statements, the court appears to have relied on several theories. One was that the statements were statements of “identification” which were admissible as such. RP 507. Another theory was that the statements were admissible as “prior inconsistent statements.” RP 505-507. And at least as to Morford, a

theory used by the court was that the statements were admissible as statements of a “coconspirator.” RP 507-508.

None of those theories supported playing the tape of Morford and allowing the degree of examination of Ringer about the statements of Morford and Brewer which occurred here. First, while some of the statements were admissible as “statements of identification” under ER 801(d)(1)(c), that rule did not support the wholesale admission of all of the evidence. Instead, “identification” evidence is limited to a statement of identification made after perceiving a person. See State v. Grover, 55 Wn. App. 923, 931, 780 P.2d 901 (1989), review denied, 114 Wn.2d 1008 (1990). The purpose of the rule, based on the identical federal rule, is to mitigate the “unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions.” See Comment to FRE 801(d)(1)(c), reprinted in 28 U.S. C. App. at 717.

As a result, where a witness makes an out-of-court identification of a person, that identification is admissible at trial provided that witness testifies. See, e.g., U.S. v. Owens, 484 U.S. 554, 562-63, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988). But the rule does not allow admission of *all* out of court statements regarding an offense - only those statements which identify the person who was perceived. See State v. Stratton, 139 Wn. App. 511, 517, 161 P.3d 448 (2007), review denied, 163 Wn.2d 1054 (2008). Thus, any statements by Morford or Brewer identifying who McGown was were clearly admissible. The problem here, however, is that the statements of “identification” were also statements claiming that

McGown was the person who had committed the shooting. It was not simply that it was McGown and not some other person that was in the car - it was that McGown was the shooter.

Indeed, because Morford already knew who McGown was, the statements were *not* statements of “identification” in the true sense - they were statements of accusation. Because the purpose of the rule is to admit evidence of out-of-court identifications, where, as here, the person making the “identification” knows the defendant, the use of that person’s out-of-court claim that the defendant had committed the crime is far from the purpose of the rule i.e., allowing the jury to hear that an out-of-court identification had occurred and its results. It is questionable whether Morford’s statements that McGown was the shooter were actually statement of “identification” as contemplated by the rule. But see, Grover, 55 Wn. App. at 931-32.

In any event, the “identification” exception for hearsay does not provide support for Ringer’s lengthy testimony about all of the other parts of Morford’s statement, all of Brewer’s statement and the playing of the tape, because that evidence went much farther than reciting the alleged “identification” and went into the substance of both statements.

The statements were also not admissible as “prior inconsistent statements.” Under ER 801(d)(1)(i), a statement is admissible as a “prior inconsistent statement” if 1) the declarant testifies at trial and is subject to cross-examination during the statement and 2) the statement is inconsistent with the declarant’s testimony “and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a

deposition.” State v. Sua, 115 Wn. App. 29, 45, 60 P.3d 1234 (2003).

Here, many of the statements allowed in by the court were not “inconsistent” - they were *consistent*. Indeed, the prosecutor admitted that, with Morford, every part of the statement which the prosecutor read into the record or otherwise discussed was consistent with Morford’s statement, with the sole exception of whether McGown or Johnson was the shooter. RP 261. Similarly, the statements the prosecutor elicited from Ringer about Morford’s statement and about Brewer’s statement were mostly consistent, such as what happened just before the incident, who was there, what car they were driving, who was driving, etc. See RP 410-27, 520.

A “consistent” statement is not admissible, however, except to rebut a claim of “recent fabrication.” See ER 801(d)(1)(ii); Thomas v. French, 99 Wn.2d 95, 103, 659 P.2d 1097 (1983). Prior statements which are consistent with the declarant’s testimony “are not admissible simply to reinforce or bolster the testimony.” See State v. Osborn, 59 Wn. App. 1, 4, 795 P.2d 1174, review denied, 115 Wn.2d 1032 (1990). To admit statements under the “consistent” statement exception, the prosecution is required to prove that the statements were made before the motive to fabricate arose, and that there is a claim that statement was fabricated. Id. In addition, the statements must have been made under circumstances which indicate that the declarant was unlikely to have known the legal consequences of the statement. See State v. Makela, 66 Wn. App. 164, 169, 831 P.2d 1109, review denied, 120 Wn.2d 1014 (1992).

Here, the state never argued that the statements of Morford or Brewer were admissible as “consistent,” or that they would rebut a claim of

“recent fabrication.” And there was no claim of any such fabrication of those “consistent” statements. Instead, the prosecution used the prior consistent statements to bolster its claim that Morford and Brewer were telling the truth about everything but whether McGown was the shooter, when they testified at trial. The statements were thus admitted for the specific, improper purpose of bolstering or reinforcing the “facts” the prosecution wanted the jury to believe, in violation of the limits of the prior “consistent” statement rule.

In addition, to the extent they were inconsistent with Brewer and Morford’s testimony, the statements the two men gave during their interrogations were not admissible as “prior inconsistent statements,” for several reasons. First, a prior statement to a police officer - even one on tape - does *not* meet those requirements, even if it is signed as “true and correct to the best of [the declarant’s] . . . knowledge” and made without duress. Sua, 115 Wn. App. at 45. Instead, unless the statement is signed before a notary public under oath under penalty of perjury, a statement to an officer cannot be admitted as a “prior inconsistent statement.” Sua, 115 Wn. App. at 44-46; compare State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982) (notary public used); State v. Nelson, 74 Wn. App. 380, 874 P.2d 170, review denied, 125 Wn.2d 1002 (1994) (same).

In this case, Morford and Brewer’s statements to police were not made under oath and under penalty of perjury. Indeed, Ringer himself admitted that he was not a notary public and did not put Morford under oath. RP 585. As a result, the statements made by Morford and Brewer, whether on tape or not, were inadmissible as “prior inconsistent

statements.”

Sua, supra, is instructive. In Sua, the defendant was accused of sexually molesting his girlfriend’s 16-year old daughter, based upon the daughter’s statement that he had kissed and groped her and had his hands down her pants. 115 Wn. App. at 31. Both the girlfriend and the daughter gave police written statements to that effect and the daughter further detailed the alleged molestation. Id. The statements were not signed under oath or penalty of perjury but were signed with the notation: “[t]he above is a true and correct statement to the best of my knowledge. No threats or promises have been made to me nor any duress used against me.” 115 Wn. App. at 33. At trial, both the daughter and the girlfriend testified that Sua had not committed the crimes. 115 Wn. App. at 34. The daughter testified that her accusations and statements to police were a “cry for attention” and not true, and the girlfriend testified that she had made her claims based upon what the daughter had said and when she had confronted the daughter, the girl had admitted making up the claims. 115 Wn. App. at 34-35. The prosecutor moved to admit the written statements of the daughter and girlfriend for “impeachment,” and limiting instructions were given for those statements and the 9-1-1 tape, which was similarly admitted as “impeachment.” 115 Wn. App. at 36.

Counsel then moved to dismiss, arguing there was no evidence of actual molestation because the impeachment evidence could not be used as substantive evidence. 115 Wn. App. at 38. The prosecutor argued that the statements were substantive and admissible under the “prior inconsistent statement” exception. The trial court agreed but strangely did not allow

further instruction or argument that the evidence could be used as substantive evidence. 115 Wn. App. at 38. Indeed, the jury was instructed not to consider the witnesses' oral statements and 9-1-1 tapes "for truth of the matters asserted in those statements" but only for the witness' credibility, although there was no mention about the written statements also admitted. Id. In closing argument, the prosecutor argued that the written statements could be considered as substantive evidence and, later, when the jury sent out a note asking whether it was true or false that they could use the exhibits only for credibility, and the court responded, "false." 115 Wn. App. at 40.

On review, this Court looked at the history of the "prior inconsistent statement" exception to the hearsay rule and concluded that it did not permit introduction of statements to police which do not meet the requirement of being "given under oath subject to the penalty of perjury." 115 Wn. App. at 48. The Court first noted that there had been significant debate and discussion in drafting the corresponding and identical federal rule, after which a compromise was made: to allow use of such statements "made while the declarant was subject to cross-examination at a tr[ia]l or hearing or in a deposition, to be admissible for their truth." 115 Wn. App. at 44, quoting, *Federal Rules of Evidence: House Comm. on the Judiciary*, H.R. REP. NO. 93-650, at 13 (1973), reprinted in, 1975 U.S.C. C.A.N. 7075, 7086. This compromise was more lenient than a House proposal to limit admission of prior inconsistent statements and allow them in only if they had been subject to cross-examination at the time they were made. Sua, 115 Wn. App. at 45, quoting, *Federal Rules of Evidence: Senate*

Comm. on the Judiciary, S. REP. NO. 93-1277, at 15 (1974), reprinted in, 1974 U.S.C. C.A.N. 7051, 7062.

Based upon this history, the Court held, statements to police which do not satisfy the requirements of being given under oath and subject to penalty of perjury were not admissible under the “prior inconsistent statements” rule. Sua, 115 Wn. App. at 44-46. In addition, this Court found, to simply state that such statements were admissible because they carried some “guaranties of truthfulness” would require the Court to ignore not only the explicit language of the rule but also the carefully crafted compromise which was reached in enacting it. Id.

In reaching its conclusion, this Court also rejected the prosecution’s efforts to rely on Smith, supra, and Nelson, supra, finding that those cases were inapposite. Sua, 115 Wn. App. at 49. In those cases, this Court pointed out, the declarant had taken an oath either subject to penalty of perjury in front of a notary public or by complying with the requirements for a sworn declaration under RCW 9A.72.085. Sua, 115 Wn. App. at 49. As a result, those statements met the requirements of the rule. Id. Finally, the Court dismissed the prosecution’s arguments as effectively asking to transform the rule “into a catchall provision that would require only a showing of particularized guarantees of trustworthiness” to admit all out-of-court statements by a witness, something which Washington has expressly rejected. 115 Wn. App. at 49. The Court concluded that the statements, admitted as substantive evidence, were not harmless error, so the conviction had to be vacated. 115 Wn. App. at 49.

Under Sua, the statements of Morford and Brewer to Ringer -

whether on tape or otherwise - were inadmissible as “prior inconsistent statements.”

Notably, the proper procedure for impeachment with a prior, inconsistent statement is *not* to establish that the prior statement was made and then play that statement for the jury or introduce that statement in evidence, as the prosecutor did here. Instead, under ER 613,

proper impeachment by prior inconsistent statement utilizes a procedure in which the cross examiner first asks the witness whether he made the prior statement. If the witness 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”. 5A K. Tegland, § 258(2), at 315.

State v. Babich, 68 Wn. App. 438, 443, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993). It is only if the witness *denies* the prior statement that extrinsic evidence of the statement is admissible “unless it concerns a collateral matter.” Id. Morford admitted that he had told police that McGown was there and was the shooter - he simply said that, when he made that statement, he was lying. The extrinsic evidence of his statement was not admissible.

Nor were the statements admissible under the trial court’s off-the-cuff theory that they were made by a “coconspirator.” Statements are not admissible under the hearsay exemption for statements of a conspirator unless those statements are 1) made by a person who is part of a conspiracy and 2) made in the course of and in furtherance of the conspiracy. ER 801(d)(2)(v); see State v. St. Pierre, 111 Wn.2d 105, 118-19, 759 P.2d 383 (1988).

Neither of those requirements were met here. For the purposes of

the rule, while a “conspiracy” does not require a formal agreement, there must at least be a “concert of action, all of the parties working together understandingly with a single design for the accomplishment of a common purpose.” State v. Barnes, 85 Wn. App. 638, 664, 932 P.2d 669, review denied, 133 Wn.2d 1021 (1997), quoting, State v. Casarez-Gastelum, 48 Wn. App. 112, 116, 738 P.2d 303 (1987). There was no evidence here that Morford - or for that matter Brewer - knew anything about what was going to happen or did anything to work towards the “purpose” of shooting Griffin. They could not be “coconspirators” of McGown in his alleged role as the shooter.

Further, the statements in question were not made “in the course of and in furtherance of the conspiracy.” Statements made during interrogation by police are not made either in the course of or in furtherance of a conspiracy. See, e.g., State v. Sanchez-Guillen, 135 Wn. App. 636, 644, 145 P.3d 406 (2006); State v. Atkinson, 75 Wn. App. 515, 520-21, 878 P.2d 505 (1994).

As a result, neither Morford’s nor Brewer’s statements were admissible as “coconspirator” statements.

The trial court’s errors in allowing the prosecution to use the evidence were compounded when it gave the limiting instruction proposed by the state and refused to give the instruction proposed by McGown. ER 105 provides:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Giving a limiting instruction is mandatory if requested by the party against whom the evidence is admitted. See State v. Gallagher, 112 Wn. App. 601, 611, 51 P.3d 100 (2002), review denied, 148 Wn.2d 1023 (2003). While the court is not required to use an instruction simply because it is the one that was requested by the defense, the instruction that is given must still be adequate to satisfy the requirements of ER 105. See id.

Here, the instruction the court gave did not meet that standard. That instruction only limited the jury's use of the "tape recorded interview of Brennan Morford," but did not refer to the other out-of-court statements of Morford or the out-of-court statements of Brewer. In contrast, McGown's instruction would have limited the jury's consideration of *all* of the hearsay of Brewer and Morford which the state introduced.

Reversal is required. Improper admission of evidence will compel reversal where there is a reasonable probability that its admission affected the outcome of the case. See State v. Justesen, 121 Wn. App. 83, 86 P.3d 1259, review denied, 152 Wn.2d 1033 (2004). Further, where "much of the [state's] evidence involves credibility determinations" or is circumstantial, it cannot be said that improperly admitted evidence did not have any effect on the jury's decision. 121 Wn. App. at 94-95.

Here, there can be no question that there is more than a reasonable probability that the improperly admitted evidence affected the outcome of the case. The evidence against McGown was far from overwhelming. Griffin's identification of McGown as the shooter was extremely weak. Griffin was uncertain and said the person in the picture - McGown - looked *older* than the shooter, something not physically possible as the picture was

taken *before* the incident. RP 493-95, 581. The shooter was also darker than McGown, according to Griffin. RP 369. Griffin identified someone else's picture as depicting the person who he thought was the shooter at trial, and, in fact, could not identify anyone in the courtroom - including McGown - as having been involved. RP 369, 384, 401, 494. Indeed, the prosecutor specifically recognized the weaknesses of Griffin's identification himself. See RP 620-621.

Aside from that identification, the only other evidence against McGown was the circumstantial evidence that he was seen in the car 1 ½ hours earlier by his mother and that it was his mother's car. Other than that, and the improperly admitted statements of Morford and Brewer, there was nothing to support the convictions.

Given the lack of strong evidence supporting the conviction, there is more than a reasonable probability that the improperly admitted statements affected the outcome. The statements tied McGown to the crime. And the statements would have affected the jury's determination of credibility, a crucial issue in the case.

Because the improperly admitted statements were integral to the finding of guilt and it is highly unlikely that the jury would have convicted had the evidence not been admitted, reversal is required.

2. THE FIRST-DEGREE ASSAULT AND DRIVE-BY SHOOTING OFFENSES WERE THE "SAME CRIMINAL CONDUCT" FOR SENTENCING AND COUNSEL WAS INEFFECTIVE

To properly sentence a defendant, the court is required to calculate his offender score, which is based upon his prior and current convictions

and the level of seriousness of the current offense. See State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). Under RCW 9.94A.589(1)(a), where there are multiple offenses which encompass the “same criminal conduct,” they are counted as a single offense in the offender score. See State v. Lessley, 118 Wn.2d 773, 779, 827 P.2d 996 (1991).

Even if reversal and remand for a new trial was not required in this case, reversal and remand for resentencing would be required, because the trial court erred in failing to count the assault and drive-by shooting offenses as “same criminal conduct” and counsel’s failure to raise the issue deprived McGown of his Sixth Amendment and Article 1, § 22 rights to effective assistance of counsel.

a. Relevant facts

The “Stipulation on Prior Record and Offender Score” listed the scoring for the current convictions as follows: for the first-degree assault, 2 points towards the offender score of the drive-by shooting and 1 point towards the score for the unlawful firearm possession; for the drive-by shooting, 2 points towards the assault and 1 point towards the unlawful possession, and for the unlawful possession, 1 point towards the other current offenses. CP 113-14. McGown did not sign the Stipulation. CP 114.

The Judgement and Sentence reflected the same criminal history and calculation, listing the offender scores and resulting standard ranges as follows: 7 for the assault, with a standard range of 178-236 months plus 60 months for the firearm enhancement, for a total range of 238-296 months; 7 for the drive-by shooting, for a standard range of 67-89 months, and 5 for

the unlawful possession, with a range of 41-54 months. CP 117-18.

At sentencing, counsel did not dispute those offender scores and ranges. RP 675-77. McGown was sentenced to the highest sentence within the standard range for each offense based upon those calculations plus a 60 month term for the enhancement, with the sentences ordered to be served concurrently. CP 115-28.

- b. The first-degree assault and drive-by shooting were the “same criminal conduct” and counsel was prejudicially ineffective in failing to raise the issue below

The wrong offender scores and resulting standard ranges were used below, because the offender scores counted the assault and drive-by shooting separately, even though they were the same criminal conduct under RCW 9.94A.589(1)(a). In general, this Court reviews the sentencing court’s offender score calculation *de novo*. See State v. Tili, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Such review quickly reveals that the assault and drive-by shooting offenses were the same criminal conduct and should have been counted as one for the purposes of the offender score in this case. Offenses are “same criminal conduct” under RCW 9.94A.589(1)(a) “if they require the same criminal intent, are committed at the same time and place, and involve the same victim.” State v. Anderson, 72 Wn. App. 453, 464, 864 P.2d 1001, review denied, 124 Wn.2d 1013 (1994).

Here, there can be no question that the assault and drive-by shooting meet all of those standards. The crimes obviously took place at the same time and place - they were for the exact same conduct, the

shooting of Griffin. See CP 1-2; RP 616. It was the “intentional shooting of another person,” Griffin, from the car that was the basis for the assault. CP 1-2; RP 616. It was the “reckless discharge” of the weapon from the car, which was the shooting of Griffin, which was the basis for the drive-by shooting. CP 1-2; see RP 619. That single action of pulling out the gun, pointing it at Griffin from inside the car and firing it was the basis for both charges. Because the conduct was the same, by definition the crimes occurred at the same time and place.

The crimes also had the same “criminal intent.” Crimes meet that standard if, when viewed objectively, the defendant’s intent did not change from one to the next. See Anderson, 72 Wn. App. at 464. In some cases, the courts have used a “furtherance” test, to ask whether one crime furthered the other. Thus, in Anderson, a defendant was convicted of both assault and escape when he assaulted a police officer in order to break free from custody. Id. Because the assault was committed to further the escape, the defendant’s criminal intent was the same from one offense to the other. Id.

But proof of “furtherance” is not required where, as here, the acts are the same. See State v. Haddock, 141 Wn.2d 103, 3 P.3d 733 (2000). Here, the assault was not committed to *further* the drive-by shooting - it *was* the drive-by shooting. See CP 1-2. In addition, the jury was specifically instructed that it could find that McGown had committed the drive-by shooting when he intentionally shot Griffin, because Instruction 15 told the jury that “recklessness” required for drive-by shooting was established “if a person acts intentionally or knowingly.” CP 74-76. The

intent for each offense, occurring at the exact same time and place and committed with the very same act, was the same.

Finally, both crimes involved the same victim under the facts of this case. In general, the prosecution is not required to specify a named victim in order to secure a conviction for drive-by shooting. See, Bowman v. State, 162 Wn.2d 325, 332, 172 P.3d 681 (2007). This is because drive-by shooting involves only a “reckless discharge” of a gun from a vehicle which creates a substantial risk of harm to another person. See RCW 9A.36.045. At the same time, however, if the prosecution can choose to charge and prove the presence of more than one person in the vicinity when the shots were fired, it may secure a separate count of drive-by shooting for each one of those people. See e.g., State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993).

Thus, while it is not required for the state to prove a particular victim in order to prove drive-by shooting, it is not precluded from doing so. When it charged McGown here, it specifically chose to allege that he “did unlawfully, feloniously, and recklessly discharge a firearm, thereby creating a substantial risk of death or serious physical injury to B. Griffin, a human being[.]” CP 1-2 (emphasis added). Although the “to convict” and general instruction on the drive-by shooting only required the jury to find that the discharge of the firearm “created a substantial risk of death or serious physical injury to another person” and did not specify that person, the only person alleged to have been shot at or even to have been outside at the time of the shooting was Griffin. CP 77-78. And there was no evidence of any stray shots or shots other than those which were fired

directly at Griffin or of any other shootings upon which the drive-by shooting offense could be based. Thus, Griffin was the victim of the drive-by shooting, as well as the assault.

In response, the prosecution may attempt to rely on the theory that it indicated in closing argument that the population in general was the victim of the drive-by shooting, so that “election” should control whether the crimes involved the same victim. Any such reliance would be misplaced. State v. Kier, 164 Wn.2d 798, 194 P.3d 212 (2008), which deals with the related issue of “merger” at sentencing, is instructive. In that case, the defendant pointed a gun at the driver of a car who was standing next to the car with someone he thought was buying it. The “buyer” then grabbed the driver, who was able to break free and run away. 164 Wn.2d at 802. The defendant then approached the driver’s car and pointed the gun at the person still inside, ordering him out. That passenger got out and the suspects drove away in the car. 164 Wn.2d at 803.

On appeal, the prosecution argued that the resulting robbery and assault charges did not “merge” for the purposes of sentencing, because they involved different victims. 164 Wn.2d at 808. The information charged both driver and passenger as the victims of the robbery but just passenger as the victim of the assault, and the “to convict” did not specify the named person from whom property was taken but the assault “to-convict” specified the passenger as the sole victim. Id. Evidence at trial was admitted referring to the car as belonging to both the passenger and the driver, the driver and passenger were both referred to as “victims,” the passenger said “we got carjacked” when asked to describe what happened

and the passenger testified about having a gun put in his face and being ordered out of the car. 164 Wn.2d at 810-11. In closing argument, the prosecutor said the robbery occurred when the handgun was put in the chest of the driver and the assault was when the pistol was pointed at the passenger. 164 Wn.2d at 811.

On appeal, the prosecution argued that the Court should find that the crimes involved different victims, because the prosecutor's argument was sufficient to "elect" that two separate victims were involved. 164 Wn.2d at 812-13. The Court rejected this idea, stating that, based on the evidence and instructions, it was not possible to say that the jury had not relied on the same victim for both crimes. 164 Wn.2d at 812. While the identity of the victim was not essential to the robbery conviction, because the jury had heard evidence describing both the driver and the passenger as the victims of the robbery and the instruction did not specify the victim, the verdict was ambiguous. 164 Wn.2d at 812-13. Applying a rule of lenity similar to the one applicable in statutory interpretation, the Supreme Court held that, where there is an ambiguity in a verdict, the rule of lenity requires interpreting the verdict in the light most favorable to the defendant. 164 Wn.2d at 812-14. In response to the prosecution's claim that its closing argument "elected" the victims, the Court said, [w]e cannot consider the closing statement in isolation." 164 Wn.2d at 813. Given the evidence identifying both driver and passenger as victims of the robbery, and the passenger's testimony that the gun was pointed at him during the stealing of the car, and because the instruction was not clear, the Court said, this was "not a situation in which a clear election was made." 164

Wn.2d 813. In addition, the Court said, the jury was correctly instructed to based its verdict on the instructions the court gave and evidence presented, not on arguments of counsel. Id.

Here, just as in Kier, the instructions were ambiguous, because they did not name a specific victim for the drive-by shooting but referred to a “person,” singular, rather than the public in general, which could be seen by jurors as supporting a requirement to find that Griffin was the victim. See RP 619. Further, the evidence in the case painted Griffin as the victim of both offenses - obviously, because he was the person who was shot in the drive-by shooting. Griffin was the only “victim” referred to and the only person shot, or shot at.

Under these circumstances, there can be no question that the jury could have found Griffin to be the victim of the drive-by shooting as well as the assault. Put another way, as in Kier, there is nothing indicating that the jury could *not* have made that determination. This ambiguity in the verdict has to be resolved in favor of McGown, so that Griffin - not the public at large - is the victim of the drive-by shooting, as well as the assault.

As a result, the two crimes should have been counted as the same criminal conduct for sentencing. Rather than a seven, the offender score for those offenses would have been a 5, and the score for the firearm possession a 4. See RCW 9.94A.510 (2008). The resulting standard ranges are, for the assault, 138-184 months, for the drive-by shooting, 41-54 months, and for the firearm possession, 36-48 months. Id. The 236 months plus the 60-month enhancement that McGown was ordered to serve

is thus improper and must be reversed.

In response, the prosecution may argue that the issue is “waived” because McGown’s counsel did not raise it below. Any such argument should be rejected and the issue should be addressed, because McGown’s counsel was ineffective in failing to argue the assault and drive-by shooting were “same criminal conduct” at sentencing. Both the Sixth Amendment and Article 1, § 22 protect the right to effective assistance of counsel at all critical stages of criminal proceedings, such as sentencing. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, § 22. Even considering a strong presumption of effectiveness, counsel will be deemed ineffective when his performance falls below an objective standard of reasonableness and that performance prejudiced the defendant. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990).

Counsel may be deemed ineffective if he fails to prepare adequately to represent his client or fails to make adequate investigations into the matters of defense which may be raised on his client’s behalf. State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). Failure to raise an argument about “same criminal conduct” when one is warranted is just such a failure. See State v. Saunders, 120 Wn. App. 800, 86 P.3d 232 (2004). Reversal and remand is required for such failures if there is a reasonable probability that, but for counsel’s defective

performance, the outcome would have been different. See Bowerman, 115 Wn.2d at 808.

Here, because the drive-by shooting and assault were the very same act against the same person, committed at the same time and place, it is unfathomable that counsel would not advance an argument that they were the same criminal conduct. It is not as if the offenses occurred on different days or in different places. It cannot be “reasonable” to completely fail to raise the only defense to the offender score your client has, especially under the unique facts of this case where the victim was so clearly targeted and no one else was around.

Further, counsel’s failure obviously prejudiced his client. Had counsel raised the issue, the court would have erred if it had failed to recalculate the offender score accordingly.

The sentences imposed by the court were based upon an offender score which improperly counted the first-degree assault and the drive-by shooting offenses separately even though they were the same criminal conduct. Counsel was ineffective in failing to raise the issue and this Court should so hold. New counsel should be appointed on remand as a result, regardless whether that remand is for resentencing or a new trial.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial or, at a minimum, for resentencing based upon the correct, lower offender score.

DATED this 28th day of July, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Demarco McGown, DOC 332585, WSP, 1313 N. 13th Ave.,
Walla Walla, WA. 99362.

DATED this 28th day of June, 2010.


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