

**NO. 40945-3-II**

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

STATE OF WASHINGTON, RESPONDENT

v.

RAYMOND GARLAND, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Judge Thomas Felnagle

No. 04-1-05384-8

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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. Whether the trial court properly allowed the State to impeach the defendant with trial counsel's opening statements from the two prior trials as prior inconsistent statements where they factually contradicted the defendant's testimony at trial?..... 1

    2. Whether the trial court properly exercised its discretion when it declined to consider the defendant's motion to dismiss until after the trial was completed, and in doing so did not violate the appearance of fairness doctrine?..... 1

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

    1. Procedure ..... 1

    2. Facts..... 4

C. ARGUMENT. . . . . 10

    1. THE COURT PROPERLY ALLOWED THE STATE TO IMPEACH THE DEFENDANT WITH DEFENSE COUNSEL'S OPENING STATEMENTS FROM THE PRIOR TRIALS. . . . . 10

    2. THE COURT DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE WHEN IT REFUSED TO HEAR HIS MOTION TO DISMISS UNTIL AFTER TRIAL WAS CONCLUDED..... 22

D. CONCLUSION..... 27

## Table of Authorities

### State Cases

<i>In re Swenson</i> , 158 Wn. App. 812, 818, 244 P.3d 959 (2010) ....	22, 23, 24
<i>Jones v. Halvorson-Berg</i> , 69 Wn. App. 117, 127, 847 P.2d 945 (1993).....	23
<i>State v. Acosta</i> , 34 Wn. App. 387, 391-392, 661 P.2d 602 (1983).....	11, 13, 17
<i>State v. Burke</i> , 163 Wn.2d 204, 219, 181 P.3d 1 (2008).....	11
<i>State v. Carlson</i> , 66 Wn. App. 909, 917, 833 P.2d 463 (1992).....	24
<i>State v. Classen</i> , 143 Wn. App. 45, 59, 176 P.3d 582 (2008).....	10
<i>State v. Costich</i> , 152 Wn.2d 463, 477, 98 P.3d 795 (2004) .....	16
<i>State v. Dault</i> , 19 Wn. App. 709, 578 P.2d 43 (1978).....	11, 12, 13, 17
<i>State v. Dominguez</i> , 81 Wn. App. 325, 328, 914 P.2d 141 (1996) .....	23
<i>State v. Dow</i> , 162 Wn. App 324, 333-34, 253 P.3d 476 (2011).....	11
<i>State v. Garland</i> , No. 83438-5.....	26
<i>State v. Johnson</i> , 53 Wn.2d 666, 670, 353 P.2d 809 (1959).....	10, 11
<i>State v. Lopez</i> , 74 Wn. App. 456, 874 P.2d 179 (1994) .....	10
<i>State v. Newbern</i> , 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999).....	11
<i>State v. Post</i> , 118 Wn.2d 596, 618-19, 826 P.2d 172, 837 P.2d 599 (1992).....	23
<i>State v. Rivers</i> , 129 Wn.2d 697, 707-09, 921 P.2d 495 (1996)....	11, 12, 17
<i>State v. Williams</i> , 79 Wn. App. 21, 28, 902 P.2d 1258 (1995).....	11, 12, 13, 19, 20, 22

**Federal and Other Jurisdictions**

*Kansas v. Ventris*, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009)..... 10  
*United States v. Dong Jin Chen*, 497 F.3d 718 (7<sup>th</sup> Cir. 2007) ..... 13  
*United States v. Harris*, 914 F.2d 927 (7<sup>th</sup> Cir. 1990)..... 12  
*United States v. Purchess*, 107 F.3d 1261, 1268 (7<sup>th</sup> Cir. 1997)..... 13  
*United States v. Sanders*, 979 F.2d 87 7<sup>th</sup> Cir. 1992)..... 12  
*United States v. Valencia*, 826 F.2d 169, 172 (2<sup>nd</sup> Cir. 1987)..... 12

**Constitutional Provisions**

Fourteenth Amendment, United States Constitution ..... 22  
Sixth Amendment, United States Constitution ..... 22  
Article I, § 22, Washington State Constitution ..... 22

**Statutes**

RCW 9A.16.070(1)..... 20  
RCW 9A.32.030(1)(a) ..... 2  
RCW 9A.32.030(1)(b) ..... 1

**Rules and Regulations**

CrR 4.5..... 17  
CrR 4.7..... 2  
ER 603(b)..... 10  
ER 613 ..... 18  
ER 613(b)..... 16, 18, 19  
ER 801(d)(2)(i) ..... 16, 17

ER 801(d)(2)(ii) .....	17
ER 801(d)(2)(iii) .....	17
ER 803(d)(2) .....	11
RPC 3.3(a)(1) .....	21
RPC 3.3(a)(2) .....	21
RPC 3.3(a)(4) .....	21

**Other Authorities**

McCormick on Evidence § 257 at 150-51 (4 <sup>th</sup> ed. 1992).....	20
Tegland, Karl, WASHINGTON PRACTICE: EVIDENCE: LAW AND PRACTICE, VOL. 5A § 613.3, p. 583, n. 9.....	12

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

1. Whether the trial court properly allowed the State to impeach the defendant with trial counsel's opening statements from the two prior trials as prior inconsistent statements where they factually contradicted the defendant's testimony at trial?
2. Whether the trial court properly exercised its discretion when it declined to consider the defendant's motion to dismiss until after the trial was completed, and in doing so did not violate the appearance of fairness doctrine?

B. STATEMENT OF THE CASE.

1. Procedure

On November 18, 2004, based on an incident that occurred on November 12, 2004 the State charged the defendant, Raymond Garland with: Count I, murder in the first degree; Count II, assault in the first degree; Count III, unlawful possession of a firearm in the first degree; and Count IV, assault in the second degree. CP 1-5. Counts I, II and IV included firearm sentence enhancements. CP 1-5. Count I was alleged to have occurred on the basis of the defendant's engaging in extreme indifference to human life under RCW 9A.32.030(1)(b).

On August 12, 2005 the State filed an amended information that modified the allegation under count I to allege premeditation under RCW

9A.32.030(1)(a) or in the alternative extreme indifference under RCW 9A.32.030(1)(a). CP 14-19. It also amended Count II to murder in the second degree; Count III to assault in the second degree; Count IV to unlawful possession of a firearm in the first degree; Count V to assault in the second degree. CP 14-19. Counts I, II, III, and V included firearm sentence enhancements. CP 14-19.

On January 16, 2007 the State filed a Second Amended Information. CP 54-56. It dismissed Count V by way of omission. *See* CP 56. It also added the middle name of the victim in Counts I and II.

On January 16, 2007 the defendant waived jury trial only as to Count IV, unlawful possession of a firearm in the first degree. CP 57.

A jury was empaneled on January 24, 2007. CP 1476; CP 1460. In the midst of trial on February 16, 2007 the court declared a mistrial after a number of jurors had to be removed and there were insufficient remaining jurors to proceed with trial where the defense was unwilling to stipulate to eleven jurors. CP 1475.

The court empanelled a new jury on August 9, 2007. CP 1484. On September 24, the judge recused herself on the defense motion due to the appearance that the court had concerns about her safety with regard to the defendant and/or his family. CP 1507-08; CP 508-518.

On January 26, 2009, prior to the third trial, the State brought a motion for sanctions for violations of CrR 4.7 (discovery) where the defense had failed to provide a current witness list, or failed to state the

general nature of the defense. CP 673-676. In its response, defense counsel advised that the defense would be the same [as at the two prior trials]. CP 739-50.

On July 29, 2009, the defense indicated that it wanted the court to consider a previously filed motion for dismissal, alleging mishandling of the case by the State, etc. *See* 1 RP (07-29 & 30-09) p. 4, ln. 8-9; p. 15ff. The court denied the defense request, deferring a hearing on the motion to dismiss until after the trial. 1 RP (07-29 & 30-09) p. 31, ln. 17-24.

On August 6, 2009 a jury was empanelled by the Honorable Judge Thomas Felnagle. CP 1509.

Once trial commenced, the defense reserved opening until after the close of the State's case and before it put on its own case. *See* 18 RP 09-16-09, p. 2422, ln. 5-8.

In its opening the defense told the jury that the defendant never had a gun, that the victim pulled a gun on Garland who then struggled with the victim, and the gun went off during that struggle. CP 1166, ln. 17-20. This claim was contrary to the claims made by the defense in their opening in the two prior trials. *See* CP 1087-1184. The court allowed the State to conduct a limited impeachment of Garland with opening statements from the first two trials. *See* 27 RP 10-08-09, p. 3740, ln. 1 to p. 3741, ln. 23.

The defense renewed the motion for dismissal at the close of State's case on September 16, 2009. 18 RP (09-16-09) p. 2417, ln. 13.

On October 26, 2009 the jury was unable to reach a verdict on murder in the first degree as to count I, but did find the defendant guilty of the lesser included offense of manslaughter in the second degree. CP 1343-46. The jury also found the defendant guilty of MURDER IN THE SECOND DEGREE IN COunt II and the lesser included charge of assault in the second degree in count III. As to counts I to III, the jury also found that the defendant was armed with a firearm when he committed those crimes. CP 1351-53. With regard to the bench trial on Count IV, the court found the defendant guilty of unlawful possession of a firearm in the first degree. CP 1388-90.

On July 9, 2010 the court sentenced the defendant to a total of 346 months. CP 1399-1412.

The notice of appeal was timely filed on July 12, 2010.<sup>1</sup> CP 1413.

## 2. Facts

On November 12, 2004 Karltin Marcy, his cousin Earl Kenyon Brock and Kenyon's girlfriend Shelley were at a party at the house of Lisa Loggins for most of the evening. 5 RP (08-13-09) p. 765, ln. 15 to p. 771,

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<sup>1</sup> The body of the Notice of Appeal appears to contain a scrivener's error in that it lists the defendant as "Castro Garcia." However, in the caption the cause number and the name of the defendant correctly list this case. It appears that the form was copied over from one used in another case as an incorrect Judge's name is also crossed out with the correct name handwritten in.

ln. 22; 17 RP (09-15-09) p. 2288, ln. 11 to p. 2290, ln. 24. Although Mr. Brock's real first name was Earl, he went by Kenyon. 5 RP (08-13-09) p. 765, ln. 15; 771, ln. 1-7. They left the party and drove to a bar by the name of Bleacher's. 17 RP (09-15-09) p. 2290, ln. 25 to p. 2292, ln. 7. A number of other people were with them as well. 17 RP (09-15-09) p. 2292, ln. 14-24.

Kenyon and Shelley drove in their own car. 17 RP (09-15-09) p. 2292, ln. 23. They pulled into the parking lot, but Karltn was right behind them. 5 RP (08-13-09) p. 774, ln. 8-12. Kenyon got into an argument with a white male who was in the parking lot. 5 RP (08-13-09) p. 782, ln. 18-24; 17 RP (09-15-09) p. 2294, ln. 20-21. The argument went on for about five minutes. 5 RP (08-13-09) p. 783, ln. 1-2.

Karltin pulled into the lot and parked and was talking to Lisa for a minute when he saw Kenyon arguing with someone. 17 RP (09-15-09) p. 2293, ln. 1-3. There were six people with Karltn and two other white males in the parking lot. 17 RP (09-15-09) p. 2293, ln. 16-19. Karltn got out of the car and walked around to the front and tried to find out what was going on. 17 RP (09-15-09) p. 2294, ln. 9-10.

Timothy Valentine, who was with Kenyon and Karltn, but in a different car saw Kenyon talking to someone who introduced himself by saying something to the effect of, "What's up man, my name's Ray." 9 RP (08-20-09) p. 1211, ln. 5-13. The person was a white male, wearing baggy clothes, slender, 150 to 160 in weight, a little bit less than six foot,

and with a tattoo on his neck. 9 RP (08-20-09) p. 1211, ln.14 to p. 1212, ln. 17; p. 1215, ln. 7-17. The one who identified himself as Ray [Garland] started to get aggressive, making fun of Kenyon for the way he was driving because Kenyon had nudged a telephone pole in the lot when he pulled in. 9 RP (08-20-09) p. 1216, ln. 13-21. Kenyon ignored that and didn't seem to care. 9 RP (08-20-09) p. 1216, ln. 24-25.

Garland then pulled up the shirt on his arm showed his tattoos and said, "three, six Crip." 9 RP (08-20-09) p. 1218, ln. 3-10. "Crip" is a reference to a gang member. 9 RP (08-20-09) p. 1218, ln. 12-15. Kenyon said, "fuck gangs, fuck you." 9 RP (08-20-09) p. 1219, ln. 1-2. Kenyon's attitude changed when after that Garland called Kenyon a nigger. 9 RP (08-20-09) p. 1217, ln. 1-5.

They [Garland and Kenyon] started to act like they were going to fight, so Karlitin grabbed Kenyon and put his arm around Kenyon's neck and told him to come on and pulled Kenyon to come along. 17 RP (09-15-09) p. 2294, ln. 12-13; p. 2295, ln. 4-6. Karlitin heard Kenyon say he'd beat him up, or other similar words, but didn't really know what the argument was over. 17 RP (09-15-09) p. 2295, ln. 15-20. Kenyon had started to take his coat off, presumably in preparation to engage in a fight. 7 RP (08-18-09) p. 942, ln. 12 to p. 943, ln. 1.

Karlitin heard the person arguing with Kenyon say, "Nigga, this is 26<sup>th</sup> Street Crip. Fuck you." 17 RP (09-15-09) p. 2306, ln. 1-2. Garland pulled out a gun and shot him [Kenyon]. 9 RP (08-20-09) p. 1223, ln.

1922; 17 RP (09-15-09) p. 2295, ln. 6-7; 7 RP (08-18-09) p. 943, ln. 6-12. No warning was given before the shots were fired. 17 RP (09-15-09) p. 2295, ln. 8-15. Shelley Dominic and Timothy Valentine identified the defendant as the one of the two white males, the one that had the neck tattoo that Kenyon had been arguing with, who shot Kenyon and Karltin. 5 RP (08-13-09) p. 781, ln. 23 to p. 782, ln. 2; p. 802;<sup>2</sup> 9 RP (08-20-09) p. 1255, ln. 9-25.

When the shots were fired, Karltin fell to the ground and everybody else just kind of ran off and was gone. 17 RP (09-15-09) p. 2295, ln. 23-25. Karltin got up off the ground, realizing he had been shot, and went into the bar. 17 RP (09-15-09) p. 2295, ln. 25 to p. 2296, ln. 3; p. 2297, ln. 7-10. When Karltin entered the bar, Kenyon fell over onto a table and Karltin fell down right inside the door and said that he was shot. 17 RP (09-15-09) p. 2295, ln. 25 to p. 2296, ln. 3.

Kartlin thought he had been shot in the stomach, because of pains he had there, however, it turned he had been shot in the left testicle. 17 RP (09-15-09) p. 2298, ln. 12-18; p. 2299, ln. 16-19; 2307, ln. 1-6.

On November 12, 2004 Thomas Wheeler was about a block and a half away from his home at Bleacher's Sports Bar in Spanaway after midnight when he was sitting at the first bar stool by the front door. 2 RP

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<sup>2</sup> The line numbers are missing from this portion of the transcript as they stopped midway through page 788.

(08-10-09) p. 260, ln. 18 to p. 261, ln. 2; p. 262, ln. 12-13. Mr. Wheeler worked for the U.S. Air Force Reserves and civil service and had lived in the Spanaway area for probably 20 years. 2 RP (08-10-09) p. 260, ln. 10-17.

Sitting on the bar stool, Mr. Wheeler heard a commotion behind him and turned around and heard yelling and screaming and tables were flying and people were heading out the back door. 2 RP (08-10-09) p. 262, ln. 12-18. He realized that two men had been shot. 2 RP (08-10-09) p. 262, ln. 18-19. One was holding his throat, heading toward Mr. Wheeler, and he collapsed. 2 RP (08-10-09) p. 19-21. Mr. Wheeler didn't realize a second man had been shot until he saw blood squirting out of what appeared to be his leg. 2 RP (08-10-09) p. 263, ln. 5-6. People were screaming and everyone was heading toward the back of the bar. 2 RP (08-10-09) p. 263, ln. 7-9.

Mr. Wheeler knew most of the people who worked at the bar. 2 RP (08-10-09) p. 14-15. When he realized the other man was shot, the first thing Mr. Wheeler did was get up and ran around the end of the bar because the bartender was six or eight months pregnant, so he grabbed her, went into the kitchen dove in there to protect her and dialed 911. 2 RP (08-10-09) p. 263, ln.11-16. Mr. Wheeler then grabbed towels, leaned back over the counter and was trying to help the person who was shot in the throat. 2 RP (08-10-09) p. 263, ln. 16-18. After that, Deputies showed

up, although Mr. Wheeler couldn't say if it was two minutes, five minutes or ten minutes until they arrived. 2 RP (08-10-09) p. 263, ln. 18-21.

Mr. Wheeler hadn't heard anything [gun shots] before the people came in because the music was too loud. 2 RP (08-10-09) p. 263, ln. 23-25.

On November 12, 2004, Pierce County Sheriff's Deputy Kristine Estes responded to a report of a shooting at Bleacher's Sports Bar in Spanaway. 2 RP (08-10-09) p. 144, ln. 24 to p. 145, ln. 2. As she arrived she saw people leaving the bar and in the parking lot. 2 RP (08-10-09) p. 148, ln. 12-13. When she walked into the bar she saw two black males on the floor, and one of them had a lot of blood near the groin area. 2 RP (08-10-09) p. 148, ln. 13-15.

The murder victim, Kenyon Brock had evidence of two gunshot wounds, one to the chest and one to the right thigh. 3 RP (08-11-09) p. 317, ln. 22 to p. 318, ln. 1.

The Medical Examiner, Dr. Howard, concluded that the cause of Mr. Brock's death was a gunshot wound that went through the sternum or breast bones, continued through the center of the chest, causing damage to the main artery, the aorta, and then continued towards his back and to the right side causing damage to his right lung. 3 RP (08-11-09) p. 335, ln. 7-17. These injuries would have resulted in substantial blood loss, the collapse of a lung and the inability to get air in and out of the lungs

because of the bleeding. 3 RP (08-11-09) p. 339, ln. 10 to p. 340, ln. 5. These injuries would result in a rapid death and were not medically repairable even if a surgeon had been on scene when they happened, or if Mr. Brock had made it to the emergency room. 3 RP (08-11-09) p. 340, ln. 19-23.

Dr. Howard, concluded that the manner of death was homicide, meaning the injury occurred at someone else's hand other than Mr. Brock. 3 RP (08-11-09) p. 357, ln. 12-17. This is because there was no evidence of close range fire, including visible residue, in either gunshot wound. 3 RP (08-11-09) p. 352, ln. 9-24.

C. ARGUMENT.

1. THE COURT PROPERLY ALLOWED THE STATE TO IMPEACH THE DEFENDANT WITH DEFENSE COUNSEL'S OPENING STATEMENTS FROM THE PRIOR TRIALS.

a. The Prior Opening Statements Of Defense Counsel Were Admissible.

A witness may be impeached as to their credibility by a prior inconsistent statement. *State v. Classen*, 143 Wn. App. 45, 59, 176 P.3d 582 (2008) (citing ER 603(b)). That rule also applies to criminal defendants who testify. *See State v. Lopez*, 74 Wn. App. 456, 874 P.2d 179 (1994); *State v. Johnson*, 53 Wn.2d 666, 670, 353 P.2d 809 (1959). *See also Kansas v. Ventris*, 129 S. Ct. 1841, 173 L. Ed. 2d 801 (2009).

Prior inconsistent statements generally do not constitute substantive evidence, and a limiting instruction is normally required if requested by the defense. See *State v. Dow*, 162 Wn. App. 324, 333-34, 253 P.3d 476 (2011) (citing *State v. Newbern*, 95 Wn. App. 277, 295-96, 975 P.2d 1041 (1999)). See also *Johnson*, 40 Wn. App. at 377; *State v. Burke*, 163 Wn.2d 204, 219, 181 P.3d 1 (2008). However, a prior inconsistent statement may be admissible as substantive evidence if it is an admission by a party opponent under ER 803(d)(2). See *State v. Williams*, 79 Wn. App. 21, 28, 902 P.2d 1258 (1995). In that instance, a limiting instruction would not be applicable.

Multiple Washington cases establish that a statement by an attorney may be attributable to a criminal defendant where the defendant was present when the attorney's statement was made and did not attempt to correct or dispute that statement. See *State v. Acosta*, 34 Wn. App. 387, 391-392, 661 P.2d 602 (1983); *State v. Dault*, 19 Wn. App. 709, 578 P.2d 43 (1978); *State v. Rivers*, 129 Wn.2d 697, 707-09, 921 P.2d 495 (1996). Indeed, these three cases together constitute the controlling case law on point on the issue of impeachment by opening statements as prior inconsistent statements.

In *State v. Acosta* and *State v. Dault*, the courts held that statements by defense counsel at an omnibus hearing were attributable to the defendant and could be used as a prior inconsistent statement if the defendant testified. *State v. Acosta*, 34 Wn. App. 387, 391-392, 661 P.2d

602 (1983); *State v. Dault*, 19 Wn. App. 709, 578 P.2d 43 (1978). In *State v. Rivers*, the Washington Supreme Court relied upon *Dault* and held that a defendant could also be impeached with his attorney's opening statement. *State v. Rivers*, 129 Wn.2d 697, 707-09, 921 P.2d 495 (1996).

Similar admissions of attorney statements have been made under federal law as well. See, e.g., *United States v. Valencia*, 826 F.2d 169, 172 (2<sup>nd</sup> Cir. 1987); *United States v. Harris*, 914 F.2d 927 (7<sup>th</sup> Cir. 1990); *United States v. Sanders*, 979 F.2d 87 (7<sup>th</sup> Cir. 1992).

It should be noted that contrary to the established case law, Tegland claims that the statements of an attorney cannot be attributed to the defendant. See Tegland, Karl, WASHINGTON PRACTICE: EVIDENCE: LAW AND PRACTICE, VOL. 5A § 613.3, p. 583; § 613.8, p. 590. However, in making that claim he ignores all the case law to the contrary (cited above), and instead relies on a single case that fails to support his claim. See Tegland, Karl, WASHINGTON PRACTICE: EVIDENCE: LAW AND PRACTICE, VOL. 5A § 613.3, p. 583, n. 9 (citing *State v. Williams*, 79 Wn. App. 21, 902 P.2d 1258 (1995)).

First, it should be noted that in *Williams* there was no evidence that the defendant was even aware of the defense asserted by counsel at the omnibus hearing where the statement was not discussed with the defendant before the hearing, was not discussed aloud at the hearing, and the omnibus form which contained the statement was not signed by the defendant. *Williams*, 79 Wn. App. at 22-23. Under those facts there was

no basis to attribute the statement to the defendant because the defendant never had an opportunity to disavow the statement. In this regard, *Williams* is consistent with federal law as well. See *United States v. Dong Jin Chen*, 497 F.3d 718 (7<sup>th</sup> Cir. 2007) (citing *United States v. Purchess*, 107 F.3d 1261, 1268 (7<sup>th</sup> Cir. 1997)).

In its opinion in *Williams* the court stated, “[w]e hold only that when an attorney is permitted to state alternative or inconsistent defenses on behalf of [a] client, the statement does not qualify as the admission of a party opponent.” *Williams*, 79 Wn. App. at 30-31.

Moreover, the court itself in *Williams* expressly stated that, “[n]othing in the opinion means that the statement of a defense attorney can or cannot be used against his or her client under circumstances in which the attorney has not asserted alternative and inconsistent defenses.” *Williams*, 79 Wn. App. at 30. The court went on to specifically state that it had no quarrel with the opinions in *Dault* or *Acosta*.

Thus, not only is the claim of Tegland unsupported by the authority he relies upon. It is actually contradicted by a body of appellate case law including an opinion of the Washington Supreme Court.

Here, the opening statements were reported but not transcribed for this appeal. 18 RP 09-16-09, p. 2422, ln. 5-8. However, the State had a copy of the opening statements transcribed and attached to the Memorandum in Support of State’s Motion to Admit Limited Evidence of Defense Counsel’s Prior Opening Statements so that defense counsel’s

opening statements from all three trials can be found at CP 1077-1179. More specifically, for the opening on January 24, 2007 *see* CP 1088-1113; for the opening on August 21, 2007 *see* CP 115-1144; for the opening from this trial on September 16, 2009 *see* CP 1163-1179.

In the January 24, 2007 opening Ms. Corey made the following statements to the jury.

Unfortunately, he [Garland] had a gun. He had a gun. He should not have had a gun, but merely having a gun does not make Ray guilty of Murder. It does not make him guilty of assault in the first degree.

CP 1090, ln. 21-24.

And he [Mr. Brock, the victim] started to take off his coat. And that, of course is a manifestation of his intent to engage in a physical fight. As he did that, he pulled out a revolver, a revolver. And he pulled out the revolver and he pointed it at Ray [Garland].

CP 1097, ln. 18-23.

He [Garland] was confident that the gun that was pointed at him by Earl Brock [the victim] would discharge and would kill him. So he took out the gun that he had, and he shot him.

CP 1099, ln. 3-5.

In the August 21, 2007 opening, Ms. Corey made the following statements to the jury.

Now, it's true that Ray [Garland] had a gun with him at that time. He didn't have a 9 millimeter, but he had a gun. Maybe he shouldn't have had the gun, but he had a gun and

he needed to use the gun. He needed to use the gun to act in self-defense.

CP 1117, ln. 14-18.

Mr. Brock, a large man, took off his coat. His friends were there. They appeared to be – to Mr. Garland, they reasonably appeared to be egging him on, making him want to fight, and then he went for that weapon. He went for a gun. And to Mr. Garland it reasonably appeared that he could not outrun that bullet and that he was going to be shot, so he acted in self-defense.

CP 1124, ln. 2-9.

When he saw Mr. Brock reach in and pull out a revolver, you can imagine what he thought. You can imagine a young man out on his birthday facing the barrel of a gun. He defended himself the only way he could.

CP 1125, ln. 22 to p. 1126, ln. 1.

The court allowed the State to conduct a limited impeachment of Garland with opening statements from the first two trials. *See* 27 RP (10-08-09) p. 3740, ln. 1 to p. 3741, ln. 23. Cross examination included the following exchange:

BY MR. PENNER:

Q. ... You were in court on January 24<sup>th</sup> of 2007 and again on August 21<sup>st</sup> 2007 when Ms. Corey [defense counsel] made certain statements about the case, correct?

A. Yes

Q. All right. And both of those times Ms. Corey stated that you had your own gun that night, correct?

A. Yes.

Q. And both times Ms. Corey stated that Mr. Brock produced a revolver and pointed it at you, isn't that correct?

- A. Yes.
- Q. And both times Ms. Corey stated that you then took out your own gun and shot Mr. Brock; isn't that correct?
- A. Yes, that's correct, she stated that.

27 RP 10-08-09, p. 3798, ln. 16 to p. 3799, ln. 3

The opening statements from the defendant's prior trials were attributable to Garland. As such, the court properly admitted the statements to impeach the defendant's testimony pursuant to ER 613(b).

Not only did the court properly admit the statements for purposes of impeachment, the statements were also separately admissible as a statement against penal interest by a party opponent under ER 801(d)(2)(i). Because the evidence was independently admissible as substantive evidence under this rule, the court can also affirm the admission of the impeachment evidence on this basis. This is so because the court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

The court should also have admitted the statements as substantive evidence. However, even where, out of an abundance of caution the court did not, the admission for purposes of impeachment should be affirmed because the court could have admitted the statements as substantive evidence.

The statements could be attributed to the defendant where they were made by the defendant's attorney in opening statements and the defendant was present and heard them. Being attributable to the defendant, the statements were admissible as a prior statements that were inconsistent with his testimony at trial, and could therefore be used to impeach him. As an admission by a party opponent, the statements were also separately admissible as substantive evidence under ER 801(d)(2)(i), (ii), (iii) so that the admission of the statements can also be affirmed on this alternative basis.

b. The Defense Claim That The Defendant May Only Be Impeached With Opening Statements From This Trial Is Without Merit.

The defense argues that the defendant should not have been impeached with opening statements from prior trials. Br. App. 23ff. That argument is based on the claim that *Rivers*, *Dault* and *Acosta* all involved cases where the statements by defense counsel occurred in the same trial. Br. App. 23. However, that claim is incorrect where the statements at issue in both *Dault* and *Acosta* occurred at the omnibus hearing, which occurs pre-trial, and thus, were not made in the course of trial. *Acosta*, 34 Wn. App. at 391; CrR 4.5.<sup>3</sup>

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<sup>3</sup> Section 4 of the rule is titled "Procedures Prior to Trial."

Moreover, the defense argument for a distinction between statements made in the current trial as opposed to prior trials is wholly lacking in merit. First, by its express language ER 613 merely refers to prior statements and does not refer to statements made in trial or opening.

It provides in pertinent part:

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

ER 613(b). The rule makes no distinction as to specifically when the statements occur. It merely requires that they were made prior to the witness' testimony at trial. Nor does the rule require that the statements occur during trial, or even an official proceeding. Indeed, most such statements do not occur in an official proceeding, but rather before official proceedings begin, or at least outside of official proceedings.

In light of the plain language of the rule and its routine application, the defense argument is deeply flawed. There is no legal basis for distinguishing between statements in the opening from the current trial as opposed to statements in the opening from prior trials. Nor does the case

law support such a distinction, since none of those cases involved opening statements from prior trials being used to impeach the defendant.

ER 613(b) focuses on prior inconsistent statements. Neither it, nor the caselaw interpreting it support a distinction between opening statements in the current trial be admissible while those from a prior trial are not. Accordingly, the defense argument on this claim should be rejected.

c. The Claim That Defense Counsel Was Asserting Contradictory Defenses Is Without Merit.

In order to claim that *State v. Williams* controls this case, the defense attempts to argue that counsel was asserting contradictory defenses. Br. App. 25ff. However, that claim is not supported by the facts, nor is the defense theory of the law supported by *Williams*.

In *Williams* the court stated that, “while an attorney’s statement may sometimes qualify as an admission of the client when offered against the client, it does not qualify when the attorney is pleading alternatively or inconsistently on the client’s behalf.” *Williams*, 79 Wn. App. at 29. The court went on to quote:

It can readily be appreciated that pleadings of this nature are directed primarily to giving notice and lack the essential character of an admission. To allow them to operate as admissions would frustrate their underlying purpose. Hence, the decisions with seeming unanimity deny them status as judicial admissions, and generally disallow them as evidentiary admissions.

*Williams*, 79 Wn. App. at 29 (quoting McCormick on Evidence § 257 at 150-51 (4<sup>th</sup> ed. 1992)).

Although not stated expressly, the court in *Williams* considered a statement written on an omnibus order that asserted two different defenses that were legally inconsistent and alternatives to each other, “[g]eneral denial, [e]ntrapment.” See *Williams*, 79 Wn. App. at 29.

In asserting general denial, Williams’ attorney was claiming that the defendant had not committed the act charged. *Williams*, 79 Wn. App. at 29. In asserting entrapment, defense counsel was claiming the defendant had committed the act charged, but only because he had been lured into doing so. *Williams*, 79 Wn. App. at 79 (citing RCW 9A.16.070(1)). Those two defenses are legally incompatible because they respectively assert that the defendant didn’t commit the crime and that he did commit the crime (but it was excused because he was induced to do so).

The statements in *Williams* came from the order for the omnibus hearing, upon which they were written by defense counsel. As indicated in section I.a above, there was no reason to believe that Williams was aware of defense counsel’s statements, so they could not be attributed to him in any case.

In this case, on the contrary, the statements with which the state impeached the defendant came from the opening statements in the defendant's prior trials. Unlike the statement in an omnibus order, the function of those opening statements was not directed primarily at giving opposing counsel notice such that the statements lacked the essential character of an admission. Indeed, opening statements are directed primarily at the jury, not opposing counsel.

Moreover, here, even on the omnibus order, the defense asserted was not legally inconsistent. Nor were the opening statements from the first trial. Rather, they were legally consistent, reasserting the defense of general denial [and self defense]. *See also* 27 RP (10—09) p. 3713, ln. 12-14. The difference was that defense counsel's prior opening statements and Garland's testimony were factually incompatible with the opening statement and Garland's testimony in the third trial.

Factual incompatibility is precisely when it is proper to use the prior statement for purposes of impeachment. This is particularly so where defense counsel is prohibited from knowingly putting on false testimony before the court. *See* RPC 3.3(a)(1), (2), (4). Defense counsel claimed she is entitled to make tactical decisions and change her theory of the case from one trial to the next and that the changes here came from counsel not the defendant. 27 RP (10-08 -09) P. 3714, ln. 17-25.

However, that does not entitle her to make false representations to the court, or to put on false testimony. Indeed, the court was deeply concerned with the integrity of the justice system as a result of defense counsel's conduct. 27 RP (10-08 -09) p. 3725, ln. 13 to p. 3726, ln. 1.

The statements used to impeach Garland were opening statements. Unlike statements at an omnibus hearing, they were not used to give notice to opposing counsel of incompatible defenses. Accordingly, they do not fall under *Williams*, which related to incompatible statements made in an omnibus order. Additionally, the defenses asserted in the openings of the first two trials were not legally incompatible with the defense asserted in the third trial. All were general denial/self-defense. Rather, what was asserted was factual incompatibility. That is not what was exempted in *Williams*. Accordingly, the defense claim on this issue is without merit and should be denied.

2. THE COURT DID NOT VIOLATE THE APPEARANCE OF FAIRNESS DOCTRINE WHEN IT REFUSED TO HEAR HIS MOTION TO DISMISS UNTIL AFTER TRIAL WAS CONCLUDED.

“Criminal defendants have a due process right to a fair trial by an impartial judge.” *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing United States Constitution, amends. VI, XIV; Washington Const., art. I, § 22. “Impartial means the absence of actual or apparent

bias.” *Swenson*, 158 Wn. App. at 818. The appearance of fairness doctrine is “directed at the evil of a biased or potentially interested judge...” *In re Swenson*, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing *State v. Post*, 118 Wn.2d 596, 618-19, 826 P.2d 172, 837 P.2d 599 (1992)).

The doctrine requires judges to disqualify themselves from a proceeding if they are biased against a party or their impartiality may reasonably be questioned. *In re Swenson*, 158 Wn. App. 812, 244 P.3d 959 (2010) (citing *State v. Dominguez*, 81 Wn. App. 325, 328, 914 P.2d 141 (1996)). Judges are presumed to act without bias. *Swenson*, 158 Wn. App. at 818 (citing *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993)).

Reviewing courts apply an objective test to whether a judge should disqualify because their impartiality might reasonably be questioned. The reviewing court must determine “whether a reasonably prudent and disinterested observer would conclude [that] [the defendant] obtained a fair, impartial and neutral [hearing].” *Swenson*, 158 Wn. App. at 818 (quoting *State v. Dominguez*, 81 Wn.App. 25, 28, 914 P.2d 141 (1996)). For such a claim to succeed, there must be evidence of actual or potential bias. *Swenson*, 158 Wn. App. at 818 (citing *Post*, 118 Wn.2d at 619).

“Further, a defendant who has reason to believe a judge should be disqualified must act promptly to request recusal and ‘cannot wait until [the defendant] has received an adverse ruling and then move for

disqualification.’’ *Swenson*, 158 Wn. App. at 818 (quoting *State v. Carlson*, 66 Wn. App. 909, 917, 833 P.2d 463 (1992)).

Here, there was no evidence of bias when the trial court decided to defer the defendant’s motion to dismiss until after the trial. Nor did the defendant ask the judge to recuse himself prior to his issuing his ruling.

On the day that the parties first appeared before Judge Felnagle for trial, he advised them that the major thing that all the parties needed to accomplish was to get the case to trial because Garland had been in custody for four years and he and the State deserved resolution of the case. RP 07-29, 30-09 p. 7, ln. 25 to p. 8, ln. 6. He said the primary emphasis was going to be on getting the case resolved, meaning getting it to the jury. RP 07-29, 30-09 p. 8, ln. 6-10.

The court noted that there were a number of issues that they might have to defer or set aside for another day. The estimates of the length of the trial ranged from a month to six months. RP 07-29, 30-09 p. 8, ln. 12-14. The court then indicated that it would be disappointed if the trial lasted eight weeks, that it expected six was about the maximum, and that four would be more realistic. RP 07-29, 30-09 p. 8, ln. 19-18. However, the court noted that it was not putting any time lines on the parties and the court’s belief based upon its experience that if the court and parties stayed focused, the case should be able to be tried in a reasonable amount of time. RP 07-29, 30-09 p. 8, ln. 19-23. The court said six months didn’t seem reasonable, but that it was open to the needs of the parties and

acknowledged that the court was not familiar with the tortured history of the case. RP 07-29, 30-09 p. 8, ln. 23 to p. 9, ln. 1.

As defense counsel herself noted, at the July 29, 2009 hearing, the defendant was going to reach his fifth year in custody on November 17 of that year (2009). RP 07-29, 30-09 p. 17, ln. 4-6.

In considering the defense request to hear the motion for dismissal prior to the trial, the court specifically noted that holding the hearing as defense wished with witness testimony would potentially involve scheduling an out-of-county judge to come in to handle the matter (because Judge Buckner was listed as a witness), the witnesses involved (including the deputy prosecutor) would need to be advised and may need attorneys, and as such, hearing the motion prior to trial would result in a massive delay to the defendant. RP 07-29, 30-09 p. 21, ln. 9-17. Meanwhile, the defendant would remain in custody without resolution of the case at trial. RP 07-29, 30-09 p. 21, ln. 17-21.

When explaining the considerations as to whether or not the court would hear the dismissal motion pre or post trial, the court noted:

...I have an obligation, I believe, to the integrity of the system from my perspective. And when I see a nearly 1,200-day-old case that has tried to be tried a couple of times, that has such a long and tortured history, I know that the longer it goes, the more of these problems are going to crop up; the more tenuous is the ability of both sides to present the evidence as it needs to be presented; the worse the witnesses' memories become; the more problems that develop. Quite frankly, we are never going to get a fair trial for Mr. Garland if this goes on and on. So I am caught

on the horns of an obvious dilemma. Its damned if you do, damned if you don't

We are now here ready for trial. The parties have said they can try this case. If I go the other direction and we end up having a hearing, there is no way it's going to happen quickly. The case is going to be set over and over and over, and the State has the same right as the defendant to have the trial proceed in an expeditious fashion.

1 RP 07-29 & 30-09 p. 30, ln. 22 to p. 31, ln. 16.

Clearly the court's point in proceeding to trial with the case was not to violate the defendant's right to a fair trial, but rather to ensure it by ensuring that the case did not become so old that it could not be effectively tried due to the fading of witness memory, etc. The court was also clearly concerned about the length of time the defendant had already been in custody while the trial was pending. These were legitimate concerns that respected the interests of both the defendant and the State in having a fair trial.

Moreover, the reasonableness of the trial court's action was essentially recognized by the Supreme Court when the court denied the defendant's motion for discretionary review and even the petition for an emergency stay of proceedings pending a ruling on the motion for discretionary review. *See State v. Garland*, No. 83438-5;<sup>4</sup> 18 RP (09-16-09), p. 2418, ln. 6-25.

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<sup>4</sup> Particularly note the court's entries for 08-14-2009 (Ruling on Motions) and 09-02-2009 (Ruling Denying Review).

Accordingly, the trial court did not abuse its discretion when it decided to defer the motion for a dismissal until after the completion of the trial. This claim should be denied.

D. CONCLUSION.

The court properly permitted the State to impeach the defendant with the defense opening statements from the two prior trials where those statements were legally attributable to the defendant and were prior inconsistent statements.

The court did not abuse its discretion, nor did it violate the appearance of fairness doctrine where it declined to consider the defense motion to dismiss until after the conclusion of trial where the case was nearly five years old, the defendant had been incarcerated that entire time, and hearing the motion might have involved considerable delay thereby removing the opportunity to have the case tried in an expeditious manner. This is particularly so where defense counsel did not ask the court to recuse himself for bias prior to his ruling on the motion, nor where the

Supreme Court declined to grant the defense petition for discretionary direct review of the trial court's ruling.

Because the appeal is without merit, it should be denied.

DATED: OCTOBER 31, 2011

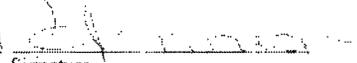
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Certificate of Service:

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.

  
Date

  
Signature

# PIERCE COUNTY PROSECUTOR

## October 31, 2011 - 11:55 AM

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