

No. 41131-8-II

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

STATE OF WASHINGTON,  
Respondent,  
v.  
JONATHAN MARK LUCAS,  
Appellant.

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STATE OF WASHINGTON  
BY  MOORE  
COURT OF APPEALS  
DIVISION II

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

APPELLANT'S OPENING BRIEF

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## A. SUMMARY OF ARGUMENT

At trial on charges of assault, a psychiatrist testified Jonathan Lucas's mental capacity was impaired due to mental illness and acute intoxication. The doctor recounted several statements Mr. Lucas made to him during his evaluation and testified he based his opinion in part on those statements. The trial court then permitted the deputy prosecutor to introduce, under ER 806, evidence of Mr. Lucas's prior conviction for first degree robbery in order to attack the credibility of his out-of-court statements. But because Mr. Lucas's statements to the psychiatrist were admitted only to explain the basis for the doctor's opinion and not as substantive evidence, ER 806 did not apply. This Court has unambiguously held the proper way to test the reliability of a defendant's out-of-court statements to a psychiatrist expert is by cross-examining the expert, not the defendant. Thus, admission of the highly prejudicial prior conviction evidence violated the Rules of Evidence and conflicts with this Court's case law.

In addition, a defendant asserting a diminished capacity defense must present expert testimony. Accordingly, allowing the State to present evidence of the defendant's prior convictions in

order to attack the credibility of his out-of-court statements to the expert unfairly burdens his constitutional right to present a defense.

Finally, the trial court granted a continuance beyond the speedy trial period over Mr. Lucas's objection, to allow defense counsel time to prepare for a defense that Mr. Lucas did not wish to pursue at the expense of his speedy trial rights. Because it is ultimately the accused's decision whether to pursue a diminished capacity defense, and not defense counsel's, the trial court's order granting the continuance violated Mr. Lucas's speedy trial rights.

#### B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting highly prejudicial evidence of Mr. Lucas's prior conviction.

2. Admission of the prior conviction evidence unfairly burdened Mr. Lucas's constitutional right to call witnesses and present a defense.

3. The trial court violated Mr. Lucas's speedy trial rights.

#### C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When an out-of-court statement has been admitted into evidence, ER 806 permits the opposing party to attack the credibility of the declarant only if the out-of-court statement is admitted as substantive evidence. In State v. Eaton, 30 Wn. App.

288, 633 P.2d 921 (1981), this Court held the proper way to test the credibility of a defendant's out-of-court statements to a psychiatric expert is to cross-examine the expert, not the defendant. Does the trial court's decision to permit the State to impeach Mr. Lucas with evidence of his prior conviction for robbery conflict with the Rules of Evidence and Eaton, where Mr. Lucas's out-of-court statements were admitted not as substantive evidence but only to explain the basis for the expert's opinion?

2. A criminal defendant has a state and federal constitutional right to call witnesses in his behalf and to present a defense. A defendant presenting a diminished capacity defense must rely on expert testimony. Did the trial court's decision permitting the State to present evidence of Mr. Lucas's prior conviction in order to attack the credibility of his out-of-court statements to the expert psychiatrist witness unfairly burden his constitutional right to present a defense?

3. A trial court may grant a continuance beyond the speedy trial period, over defendant's objection, to allow defense counsel time to prepare for trial if necessary to ensure effective representation and a fair trial. Ultimately, the decision to pursue a defense of diminished capacity falls to the defendant and not to

defense counsel. Did the trial court abuse its discretion in granting a continuance over Mr. Lucas's objection to allow counsel time to prepare for a defense of diminished capacity, where Mr. Lucas did not wish to pursue that defense at the expense of his speedy trial rights?

D. STATEMENT OF THE CASE

1. Criminal charges. On September 9, 2009, Mr. Lucas was charged with one count of second degree assault, RCW 9A.36.021(1)(a), and one count of fourth degree assault, RCW 9A.36.041. CP 3. He was arraigned on September 18, 2009. Sub #5.<sup>1</sup> He remained in custody pending trial. 10/27/09RP 7.

2. Motion for continuance. On October 27, 2009, a hearing was held on defense counsel's motion to continue the trial date past the 60-day speedy trial period. Counsel told the court that, given the nature of the crime, Mr. Lucas's intoxication at the time of the crime, and his history of mental illness, counsel had decided to pursue a defense of diminished capacity and voluntary intoxication. 10/27/09RP 1-3. Counsel needed additional time to consult with an expert and conduct further research into Mr. Lucas's mental health history. Id. But Mr. Lucas did not agree with the request for

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<sup>1</sup> A supplemental designation of clerk's papers has been filed for this document.

continuance and would not sign a waiver of his speedy trial rights. 10/27/09RP 1. Counsel explained Mr. Lucas did not want to pursue the diminished capacity defense and instead "want[ed] to rely on his speedy trial rights." 10/27/09RP 3. Counsel also noted Mr. Lucas "has always appeared competent to me." 10/27/09RP 3-4.

The trial court did not take note of Mr. Lucas's desire to forego a diminished capacity defense and proceed directly to trial. Instead, the court granted counsel's request for a continuance, finding counsel needed additional time to prepare for a diminished capacity defense. 10/27/09RP 9. The court set a new commencement date of November 28, 2009. 10/27/09RP 7. A "Waiver of Speedy Trial" was filed, but Mr. Lucas refused to sign it. Sub #16.<sup>2</sup>

3. Trial testimony. A jury trial finally took place in March 2010. At trial, Terry Taylor testified that on September 4, 2009, he was walking to the bank near the Red Lobster in Vancouver at around 6:00 p.m. 3/08/10RP 216-17. As he waited at a traffic light before crossing the street, a man approached him and stood next to him. 3/08/10RP 219-20. The man was yelling but not saying anything understandable. 3/08/10RP 220. His behavior seemed

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<sup>2</sup> A supplemental designation of clerk's papers has been filed for this document.

erratic and when the light changed, Mr. Taylor crossed the street and tried to get away from him. 3/08/10RP 221. But the man followed behind. 3/08/10RP 221. When Mr. Taylor told the man to get away, the man cursed, yelled something, and hit him in the face. 3/08/10RP 222. Mr. Taylor jogged away, turned a corner, and called police on his cell phone. 3/08/10RP 223.

Jeffrey Caton testified he is a Boulder County, Colorado, deputy sheriff and was off duty visiting Vancouver that day. 3/08/10RP 238. He and his wife were pulling into the parking lot of the Red Lobster when a bystander approached them and said a man had just assaulted another man. 3/08/10RP 238. Deputy Caton walked over to Mr. Taylor, identified himself, and asked if he needed any help. 3/08/10RP 238. The deputy was wearing an off-duty firearm and a badge but was not in uniform. 3/08/10RP 238. As Mr. Taylor told him what happened, the erratic man came around the corner and approached them. 3/08/10RP 242. Deputy Caton told the man to go away, but the man would not comply. 3/08/10RP 243-44. Instead, the man approached, reached over the deputy's arms, and hit him in the nose. 3/08/10RP 244. A later x-ray showed Deputy Caton's nose was fractured. 3/09/10RP 318.

Police arrived and arrested the man, who was identified as Jonathan Lucas. 3/08/10RP 283. After Mr. Lucas was handcuffed and placed in the back of a patrol car, an officer asked him what happened. 3/08/10RP 286. Mr. Lucas replied he had slapped Mr. Taylor because he had "disrespected him." 3/08/10RP 287. When the officer asked whether he had punched Deputy Caton, Mr. Lucas replied, "I don't know what you are talking about and take me to jail." 3/08/10RP 287.

The officer testified Mr. Lucas smelled strongly of intoxicants and his speech was slurred. 3/08/10RP 289. On the way to jail, he vomited in the car and it too smelled of alcohol. 3/08/10RP 289.

4. Diminished capacity defense and admission of prior conviction evidence. After the State rested its case, the defense called Dr. Jerry Larsen, a psychiatrist, as an expert witness. 3/09/10RP 322. Dr. Larsen testified he personally examined Mr. Lucas and reviewed the police reports and Mr. Lucas's background records. 3/09/10RP 324-26. The information consistently showed Mr. Lucas suffered from schizophrenia, paranoid type, with chronic symptoms including hallucinations, delusions, bizarre behaviors, and an inability to care for himself over many years. 3/09/10RP

326, 333. He had stopped taking his psychotropic medicine ten days before the incident. 3/09/10RP 332-33.

Mr. Lucas also had a history of alcohol and cocaine abuse. 3/09/10RP 330-33. He reported he was extremely intoxicated at the time of the incident and blacked out at some point during the day. 3/09/10RP 332. He also remembered vomiting and waking up in jail, but little else about the incident. 3/09/10RP 332.

Dr. Larsen opined that Mr. Lucas's ability to form an intent at the time of the incident was impaired by his mental illness and acute intoxication. 3/09/10RP 337. In addition, Mr. Lucas may have been unable to calculate the possible risks of his behavior, a necessary element of second degree assault as charged in count I. 3/09/10RP 336-37; CP 3; RCW 9A.36.021(1)(a).

Dr. Larsen testified he based his opinion in part on Mr. Lucas's statements made to him during his examination. 3/09/10RP 331. Dr. Larsen recounted Mr. Lucas's statements about the incident itself, as well as about his upbringing, mental health history and treatment, and alcohol and cocaine use. 3/09/10RP 329-33.

At the end of defense counsel's direct examination of Dr. Larsen, the deputy prosecutor moved, outside the presence of the

jury, to introduce evidence of Mr. Lucas's 2001 conviction for first degree robbery. 3/09/10RP 338-40. The prosecutor argued that, because Dr. Larsen testified to a number of Mr. Lucas's hearsay statements, the State was entitled under ER 806 to attack Mr. Lucas's credibility as if he had testified. Id. Defense counsel objected, arguing this was a "back door way to get into the defendant's prior criminal history that they can't do otherwise unless he testifies." 3/09/10RP 340; see also 3/09/10RP 347 (objecting again). The judge acknowledged Mr. Lucas's out-of-court statements were introduced only for the purpose of explaining how the expert formed his opinion, and not for the truth of the matters asserted. 3/09/10RP 341. Nonetheless, the judge agreed the State could attack Mr. Lucas's credibility by questioning Dr. Larsen about the robbery conviction during cross-examination. 3/09/10RP 342. Thus, the prosecutor subsequently asked Dr. Larsen, "Now, Doctor, you are aware that he has been convicted in 2001 of the crime of robbery in the first degree?" 3/09/10RP 351. The doctor responded that he was aware of the prior conviction. 3/09/10RP 351.

In rebuttal, the State presented the testimony of Greg Kramer, a psychologist at Western State Hospital who had also

evaluated Mr. Lucas. 3/09/10RP 388-90. Mr. Kramer agreed Mr. Lucas had chronic paranoid schizophrenia and was highly intoxicated at the time of the incident. 3/09/10RP 397-99. But Mr. Kramer believed the evidence was insufficient to show Mr. Lucas lacked the capacity to form an intent or to calculate the risks of his behavior. 3/09/10RP 403, 416.

5. Jury verdict. The jury found Mr. Lucas guilty of second and fourth degree assault as charged. CP 46-48.

#### E. ARGUMENT

1. THE TRIAL COURT'S DECISION TO ADMIT MR. LUCAS'S PRIOR CONVICTION FOR ROBBERY CONFLICTS WITH THE RULES OF EVIDENCE AND THIS COURT'S CASE LAW, AND UNFAIRLY BURDENED MR. LUCAS'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE

The trial court allowed the State to present evidence of Mr. Lucas's prior conviction for first degree robbery pursuant to ER 806, which permits a party to attack the credibility of a hearsay declarant as if the declarant had testified as a witness. 3/09/10RP 338-42. But the rule applies only if the out-of-court statement is admitted as substantive evidence and not for some other purpose. Here, Mr. Lucas's out-of-court statements were admitted not as substantive evidence but to explain the basis for the expert's opinion. As this Court held in State v. Eaton, 30 Wn. App. 288, 633 P.2d 921

(1981), the proper way to test the credibility of a defendant's out-of-court statements to a psychiatric expert is to cross-examine the expert, not the defendant. Thus, the trial court abused its discretion in permitting the State to introduce evidence of Mr. Lucas's prior conviction for robbery to attack his credibility.

In addition, a criminal defendant has a constitutional right to present a defense and call witnesses. A defendant presenting a diminished capacity defense must rely on expert testimony. Because Mr. Lucas was in effect forced to choose between presenting a diminished capacity defense and shielding the jury from evidence of his prior conviction, the trial court's decision unfairly burdened his constitutional right to present a defense.

a. The trial court abused its discretion in permitting the State to introduce evidence of Mr. Lucas's prior conviction. Mr. Lucas's prior conviction was admitted under ER 806. 3/09/10RP 338-42. ER 806 permits a party to attack the credibility of a hearsay declarant as if the declarant had testified at trial:

When a hearsay statement, or a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay

statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. . . .

The rule rests on the principle that "[t]he declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility is subject to impeachment and support just as if he had testified." Judicial Council Comment ER 806, quoted in 5C Karl B. Tegland, Washington Practice: Evidence Law and Practice § 806.1, at 240 n.1 (5th ed. 2007).

But ER 806, by its express terms, applies only "[w]hen a *hearsay* statement . . . has been admitted in evidence."<sup>3</sup> ER 806 (emphasis added). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Thus, "ER 806 authorizes impeachment of a declarant only when the declarant's statement has been offered to prove the truth of the

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<sup>3</sup> ER 806 also applies when "a statement defined in rule 801(d)(2)(iii), (iv), or (v), has been admitted in evidence." A statement defined in rule 801(d)(2)(iii), (iv), or (v), is a statement

offered against a party and is . . . (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Mr. Lucas's statements were not offered against him and do not fall under ER 801(d)(2).

matter asserted. If the statement is offered for some other non-hearsay purpose, ER 806 does not apply." State v. Fish, 99 Wn. 86, 95, 992 P.2d 505 (1999); see also United States v. Price, 792 F.2d 994 (11th Cir. 1986) (defendant not entitled to impeach informant under FRE 806, because informant's statements not offered to prove truth of matters asserted, but merely to place defendant's own statements in context); 5C Teglund, Washington Practice, supra, § 806.2, at 242.

Here, the trial court acknowledged that Mr. Lucas's out-of-court statements to Dr. Larsen were not offered to prove the truth of the matters asserted, but only to explain how the expert formed his opinion. 3/09/10RP 341. That is consistent with the Rules of Evidence. Mr. Lucas's out-of-court statements to Dr. Larsen were "self-serving" and thus were inadmissible to prove the truth of the matters asserted. State v. Fullen, 7 Wn. App. 369, 381, 499 P.2d 893 (1972). But they were admissible to explain the basis of Dr. Larsen's opinion. Id. at 383-84.

In Washington, ER 703 expressly allows experts to base their opinion testimony on facts or data that are not admissible in evidence "[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject."

ER 705 provides that an "expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise."

Together, these rules permit a trial court to allow an expert to relate otherwise inadmissible out-of-court statements to the jury in order to explain the reasons for his or her opinion. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice, §705.5, at 293-94 (5th ed. 2007).

Thus, although otherwise inadmissible out-of-court statements are admissible to show the basis of an expert's opinion, "[t]he admission of these facts . . . is not proof of them." Group Health Co-op. of Puget Sound, Inc. v. State Through Dept. of Revenue, 106 Wn.2d 391, 399, 722 P.2d 787 (1986).

"[I]f an expert states the ground upon which his opinion is based, his explanation is not proof of the facts which he says he took into consideration. His explanation merely discloses the basis of his opinion in substantially the same manner as if he had answered a hypothetical question. It is an illustration of the kind of evidence which can serve multiple purposes and is admitted for a single, limited purpose only."

Id. (quoting State v. Wineberg, 74 Wn.2d 372, 382, 444 P.2d 787 (1968) (internal citations omitted)); see also In re Detention of Marshall, 156 Wn.2d 150, 162-63, 125 P.3d 111 (2005) (expert

could relate otherwise inadmissible material only for purpose of explaining basis for her expert opinion).

Where otherwise inadmissible out-of-court statements are admitted for only the limited purpose of explaining the basis of an expert's opinion, a party is entitled to an appropriate instruction informing the jury of that purpose. State v. Lui, 153 Wn. App. 304, 321-22, 221 P.3d 928 (2009), rev. granted, 168 Wn.2d 1018, 228 P.3d 17 (2010). But the absence of a limiting instruction does not change the character of the evidence as non-hearsay. Id. In Lui, although no limiting instruction was requested or given, this Court held the out-of-court statements recounted by the experts were admitted only "to explain the bases for their opinions." Id. at 322. Thus, although no limiting instruction was provided to the jury in this case, Mr. Lucas's statements were admitted for a non-hearsay purpose and must be characterized as non-hearsay.

In sum, because Mr. Lucas's out-of-court statements recounted by Dr. Larsen were not hearsay, ER 806 did not apply.

Instead of allowing the State to present evidence of Mr. Lucas's prior robbery conviction to attack the credibility of his out-of-court statements, the court should have limited the State to cross-examination of the expert. In Eaton, the defendant presented

a diminished capacity defense, and the trial court required him to testify and subject himself to cross-examination—thereby permitting the jury to learn of his prior robbery conviction—so that the State could test the truth of his out-of-court statements to the psychiatrist expert. Eaton, 30 Wn. App. at 292-93. This Court reversed, holding "the proper way to test the reliability of the [expert's] opinion was through cross examination of the psychiatrist, not by requiring the defendant to testify." Id. at 292. This Court noted that, as discussed above, ER 703 permits an expert to base his opinion upon data not admissible in evidence so long as the data is of a kind reasonably relied upon by experts in the field. Id. at 293-94. Although the probative value of expert medical testimony may be lessened when it is based on subjective symptoms and narrative statements given by a defendant charged with a crime, the assumption underlying ER 703 is that opposing counsel will forcefully bring that point to the jury's attention during cross-examination of the expert. Id. at 294. Further,

Jurors are quite aware that a criminal defendant may be motivated to fabricate a defense and are unlikely to be influenced unduly by an expert opinion that is shown to rest on questionable sources of information. Moreover, experienced forensic psychiatrists are equally aware of the danger of fabrication and are trained to detect untruthful answers to their questions.

Id. at 295 (citations omitted).

Here, as in Eaton, the State had other means of attacking the credibility of Mr. Lucas's statements to Dr. Larsen. The Rules of Evidence did not permit the State to present Mr. Lucas's prior conviction for that purpose. Admission of the evidence was error.

b. Admission of the prior robbery conviction unfairly burdened Mr. Lucas's constitutional right to present a defense.

Few rights are as fundamental as that of an accused to present witnesses in his own defense. Both the Sixth Amendment<sup>4</sup> and article 1, section 22 of the Washington Constitution<sup>5</sup> guarantee a criminal defendant the right to compel the testimony of witnesses. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); Const. art. 1, § 22; U.S. Const. amend. 6. In addition, the right to call witnesses in one's own behalf has long been recognized as essential to due process. Chambers v. Mississippi, 410 U.S. 284, 294, 90 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. 14; Const. art. 1, § 3.

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<sup>4</sup> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor."

<sup>5</sup> Article 1, section 22 guarantees that "[i]n all criminal prosecutions the accused shall have the right . . . to have compulsory process to compel the attendance of witnesses in his own behalf."

As the United States Supreme Court explained, "[t]he right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). The right is fundamental to due process, as it encompasses "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." Id. This fundamental right is "guarded jealously." State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

In Washington, a defendant who wishes to present a defense of diminished capacity must present expert testimony: "To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired the defendant's ability to form the culpable mental state to commit the crime charged." State v. Atsbeha, 142 Wn.2d 904, 921, 16 P.3d 626 (2001). Admissibility of the testimony is subject to the usual Rules of Evidence, including those on relevance, expert witnesses, and unfair prejudice. State v. Acosta, 123 Wn. App. 424, 431, 98 P.3d 503 (2004).

As discussed above, ER 703 and 705 permit experts to rely on inadmissible evidence in forming their opinions and to recount

that evidence to the jury, as long as the evidence is of a type reasonably relied upon by experts in the field in forming their opinions. The evidence is admitted not as substantive evidence but to explain the basis for the expert's opinion. When a psychiatrist expert testifies in support of a diminished capacity defense, he may recount the out-of-court statements the defendant made to him during his mental health evaluation, if he relied upon those statements in forming his opinion. Eaton, 30 Wn. App. at 293-94.

In this case, the trial court permitted the State to present evidence of Mr. Lucas's prior robbery conviction in order to attack the credibility of his out-of-court statements made to the psychiatrist expert. The psychiatrist testified he relied heavily upon Mr. Lucas's statements in forming his opinion about his mental state.

3/09/10RP 349. Because Mr. Lucas was required to present the testimony of the expert in order to present his defense of diminished capacity, the trial court's decision in effect forced him to choose between what may have been his only viable defense and shielding the jury from knowledge of his prior conviction for first degree robbery. This was an unfair burden on Mr. Lucas's constitutional right to present a defense and a violation of due process.

In Eaton, when defendant proposed to call a psychiatrist expert in support of his diminished capacity defense, the trial court required him to testify and subject himself to cross-examination so that the State could test the truth of his out-of-court statements made to the expert. Eaton, 30 Wn. App. at 290-91. The trial court had earlier ruled that if defendant testified his previous robbery conviction would be admissible for the purpose of impeaching his credibility. Id. at 291. Thus, "defendant was faced with an unenviable choice: he could testify but thereby inform the jury of his previous conviction, or he could exercise his privilege against self-incrimination but thereby forfeit his only viable defense." Id. (footnotes omitted). This Court recognized the severity of the dilemma, noting that according to one famous study, defendants without a criminal record were acquitted 42 percent of the time, whereas defendants who the jury knew or suspected had a criminal record were acquitted only 25 percent of the time. Id. at 291 n.4 (citing H. Kalven & H. Zeisel, The American Jury 161 (1966)). Further, "[t]here is a significant danger that jurors will consider prior convictions admitted for impeachment purposes as substantive evidence of guilt, regardless of instructions to the contrary." Eaton, 30 Wn. App. at 291 n.4 (citations omitted).

Eaton did not address whether the trial court's ruling violated Mr. Eaton's Fifth Amendment right not to testify, as the issue had not been briefed. Id. at 296-97. Instead, the Court characterized the error as one "conditionally excluding evidence" in violation of the Rules of Evidence. Id. at 296. But the Court did note as an aside that the trial court's "ruling placed a significant burden on defendant's constitutional privilege against self-incrimination." Id. Indeed, "[t]he threat of admitting inherently prejudicial prior convictions places the accused in a catch-22 where he must either forego testifying in his defense or testify and risk portrayal as a criminal. Forcing the accused to such a Hobson's choice is not favored." State v. Hardy, 133 Wn.2d 701, 711, 946 P.2d 1175 (1997) (footnotes omitted).

Here, Mr. Lucas was not required to testify in order to present his diminished capacity defense, but the State was permitted to attack his credibility as if he had testified. The State was permitted to present evidence of Mr. Lucas's prior conviction for robbery pursuant to ER 806, just as it would have been able to do pursuant to ER 609(a)(2)<sup>6</sup> had Mr. Lucas testified. Thus, the

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<sup>6</sup> ER 609(a)(2) provides, "For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if . . . the crime . . . involved dishonesty or false statement."

harm caused to Mr. Lucas was similar to the harm caused to the defendant in Eaton. Mr. Lucas was faced with the "Hobson's choice" of presenting his diminished capacity defense and portraying himself as a criminal, or foregoing what may have been his only viable defense.

A trial court can violate a defendant's constitutional right "by making its asserting costly." Griffin v. California, 380 U.S. 609, 613, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (Fifth Amendment right to silence violated when prosecutor commented on exercise of right). Here, the trial court's decision imposed a significant cost on Mr. Lucas's exercise of his constitutional right to present a diminished capacity defense. The result was a constitutional violation.

c. The error was not harmless. Violation of the constitutional right to present a defense is harmless only if the State proves it is harmless beyond a reasonable doubt. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010); Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Error is harmless if the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." Jones, 168 Wn.2d at 724 (citing State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2001)).

If the error is characterized as a non-constitutional error, this Court must determine whether, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Calegar, 133 Wn.2d 718, 727, 947 P.2d 235 (1997) (citations omitted).

Here, the error in admitting Mr. Lucas's prior conviction for first degree robbery was not harmless under either standard.

Washington courts consistently recognize that prior conviction evidence has a great capacity to arouse prejudice among jurors. "Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes." Hardy, 133 Wn.2d at 706; see also State v. Jones, 101 Wn.2d 113, 120, 677 P.2d 131 (1984), overruled on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) (prior conviction evidence is inherently prejudicial because it tends to shift the jury's focus "from the merits of the charge to the defendant's general propensity for criminality").

Courts find compelling statistical studies showing that "even with limiting instructions, a jury is more likely to convict a defendant

with a criminal record." Jones, 101 Wn.2d at 120; see also Hardy, 133 Wn.2d at 710 (citing statistical studies showing that probability of conviction increases dramatically when jury learns a defendant has previously been convicted of a crime); Eaton, 30 Wn. App. at 291 n.4.

Where trial courts have erroneously admitted defendants' prior criminal convictions for impeachment purposes, cases finding the errors harmless "have turned on the fact that the defendant had other prior convictions that were properly admissible." Calegar, 133 Wn.2d at 728 (citing State v. Rivers, 129 Wn.2d 697, 706, 921 P.2d 495 (1996) (ER 609(a)(1) error harmless where two other felonies, robbery and attempted robbery, were per se admissible under ER 609(a)(2)); State v. Roche, 75 Wn. App. 500, 509, 878 P.2d 497 (1994) (ER 609(a)(1) error harmless where defendant had six convictions automatically admissible under ER 609(a)(2) and there was uncontroverted evidence of guilt); State v. Millante, 80 Wn. App. 237, 246-47, 908 P.2d 374 (1995) (ER 609(a)(1) error harmless where prior conviction for attempted robbery properly admitted under ER 609(a)(2)); State v. Wilson, 83 Wn. App. 546, 554, 922 P.2d 188 (1996) (ER 609(a)(1) error harmless where defendant's prior theft conviction admissible under ER 609(a)(2),

evidence was overwhelming, and defendant's testimony was implausible)).

Here, the jury heard no other evidence of Mr. Lucas's criminal history. Under the authorities cited, therefore, the prejudice caused when the jury heard Mr. Lucas was previously convicted of first degree robbery was not harmless.

As in Eaton, "[a] negative assessment of [Mr. Lucas's] credibility would have influenced the weight the jury gave to the opinion of [Dr. Larsen], defendant's key witness." Eaton, 30 Wn. App. at 297. Under these circumstances, this Court must conclude that the additional evidence placed before the jury as a result of the trial court's error probably had an effect on the verdict. Id. Thus, the conviction must be reversed.

2. THE TRIAL COURT VIOLATED MR. LUCAS'S  
RIGHT TO A SPEEDY TRIAL

a. The trial court granted a continuance, over Mr. Lucas's objection, beyond the speedy trial period. The speedy trial rule requires a defendant detained in jail be brought to trial within 60 days after the date of arraignment. CrR 3.3(b)(1)(i), (c)(1). Mr. Lucas was detained in jail and arraigned on September 18, 2009. 10/27/09RP 7; Sub #5.

On October 27, 2009, defense counsel moved to continue the trial date past the 60-day speedy trial period so that he could prepare for a diminished capacity defense. 10/27/09RP 1-3. But Mr. Lucas objected and refused to sign a speedy trial waiver. 10/27/09RP 1, 3; Sub #16. Mr. Lucas did not wish to pursue the diminished capacity defense and instead "want[ed] to rely on his speedy trial rights." 10/27/09RP 3.

The right to a speedy trial under the speedy trial rule is a fundamental right. State v. Ross, 98 Wn. App. 1, 4, 981 P.2d 88 (1999). The trial court's decision to grant a continuance beyond the speedy trial period over Mr. Lucas's objection, in order to provide defense counsel additional time to pursue a mental health defense that Mr. Lucas did not wish to pursue at the expense of a speedy trial, was a violation of that fundamental right.

b. A trial court may not grant a continuance beyond the speedy trial period over the defendant's objection, where the reason for the continuance is to allow defense counsel time to prepare for a mental health defense that the defendant does not wish to pursue at the expense of a speedy trial. A trial court may grant a continuance over defendant's objection to allow defense counsel more time to prepare for trial in order to ensure effective

representation and a fair trial. State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984); State v. Williams, 104 Wn. App. 516, 523, 17 P.3d 648 (2001). In Campbell, the Supreme Court held the trial court's decision to grant a continuance over defendant's objection in order to allow defense counsel additional time to prepare for trial was justified due to "the complexity and length of this case." Campbell, 103 Wn.2d at 14-15.

But a court may not grant a continuance over defendant's objection in order to allow counsel additional time to pursue a goal of litigation that the defendant does not agree with. State v. Saunders, 153 Wn. App. 209, 220-21, 220 P.3d 1238 (2009). In Saunders, defense counsel moved for a continuance over defendant's objection in order to pursue further negotiations with the State that the defendant expressly did not agree with. Id. at 212-13. The Court noted that, under RPC 1.2(a), "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Id. at 220 (quoting RPC 1.2(a)). Because "the client controls the goals of litigation," where the client's goal is to go to trial and the client has rejected further negotiation, a strategy to delay trial for further

negotiation is a breach of the attorney's ethical duties. Saunders, 153 Wn. App. at 220. Thus, "[t]rial courts should tread carefully and provide adequate explanation before granting a continuance where defense counsel moves for a continuance for further negotiation and the defendant objects to a continuance that will delay trial." Id. at 221. That the State agrees to such a continuance does not relieve the trial court of its burden. Id. In Saunders, because the defendant consistently resisted extending the time for trial while he was incarcerated awaiting trial and the multiple continuances granted were without adequate basis, the appellate court reversed the conviction and ordered the charge be dismissed. Id.

As noted in Saunders, certain decisions regarding the defense of a criminal case fall to the defendant rather than defense counsel. The American Bar Association Standards for Criminal Justice provide:

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include:

- (i) what pleas to enter;
- (ii) whether to accept a plea agreement;
- (iii) whether to waive jury trial;
- (iv) whether to testify in his or her own behalf;

and

- (v) whether to appeal.

American Bar Association, Standards for Criminal Justice: The Defense Function § 4-5.2(a), available at [http://www.abanet.org/crimjust/standards/dfunc\\_blk.html#5.2](http://www.abanet.org/crimjust/standards/dfunc_blk.html#5.2).

Washington courts look to the ABA standards as guidelines of what should be done in a criminal case. State v. A.N.J., 168 Wn.2d 91, 112-13, 225 P.3d 956 (2010).

In addition, "a defendant has a *constitutional* right to at least broadly control his own defense." State v. Jones, 99 Wn.2d 735, 740, 664 P.2d 1216 (1983) (citing Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)). "Faretta embodies 'the conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount.'" Jones, 99 Wn.2d at 740 (citations omitted). Thus, for instance, a defendant has the right to decide personally whether or not to enter a plea of not guilty by reason of insanity. Id. at 743. Defendant also has the right to decide whether or not to instruct the jury on an affirmative defense. State v. McSorley, 128 Wn. App. 598, 603, 116 P.3d 431 (2005).

The right to control one's own defense extends to the right to decide personally whether to mount a mental health defense. In State v. Lafferty, 749 P.2d 1239, 1248 (Utah 1988), at trial, defense counsel proffered expert testimony concerning Lafferty's mental

state at the time of the killings, in an attempt to establish a mental state for manslaughter rather than for first degree murder, but Lafferty strongly objected to that approach. Id. at 1248-49. The Utah court explained that the right to the assistance of counsel, as set forth in Faretta and other cases, implies a right in the defendant to conduct his or her own defense with the *assistance* of counsel. Id. at 1249. Thus, "[t]he accused must be allowed to control the organization and content of his [or her] own defense." Id. (quoting McKaskle v. Wiggins, 465 U.S. 168, 174, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984)).

Application of these principles in this case means that Mr. Lucas, rather than defense counsel, had ultimate authority to decide whether to pursue a defense of diminished capacity. The record shows Mr. Lucas did not wish to pursue that defense at the cost of his speedy trial rights. Thus, the trial court abused its discretion in granting a continuance over Mr. Lucas's express objection, where the reason for the continuance was to give counsel additional time to pursue a defense that Mr. Lucas did not agree with.

c. The conviction must be reversed and the charges dismissed. Failure to comply strictly with the speedy trial rule requires dismissal, regardless of whether the defendant can show prejudice. State v. Vernon G., 90 Wn. App. 16, 20-21, 950 P.2d 971 (1998). That is the remedy here.

F. CONCLUSION

The trial court abused its discretion in granting a continuance over Mr. Lucas's express objection, requiring reversal of the convictions and dismissal of the charges. Alternatively, because the trial court abused its discretion and unfairly burdened Mr. Lucas's constitutional right to present a defense by admitting highly prejudicial evidence of his prior conviction for first degree robbery, the convictions must be reversed and remanded for a new trial.

Respectfully submitted this 20th day of January 2011.



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 41131-8-II
v.	)	
	)	
JONATHAN LUCAS,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20<sup>TH</sup> DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> JONATHAN LUCAS 977864 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20<sup>TH</sup> DAY OF JANUARY, 2011.

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