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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JONNIE LAY, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH ANDRUS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Washington's time for trial rule permits a case to be dismissed only when a defendant is not brought to trial within the time allowed by the rule. Where the court finds that a continuance is necessary in the administration of justice and a defendant will not be prejudiced, the rule provides that the time for trial does not expire until thirty days after the date to which the trial is continued. When the court delayed Lay's trial, the court adjusted the expiration date only where it found continuances were necessary in the administration of justice. Did the court properly exercise its discretion in granting multiple continuances, pursuant to CrR 3.3(f)(2), based on the deputing prosecuting attorney's (DPA) trial schedule?

2. Legitimate trial tactics and strategy cannot form the basis of an ineffective assistance of counsel claim. At trial, the recanting victim was impeached with a written statement and oral statements she made to police that were captured on in-car video. The DPA then properly argued this evidence as it related to her credibility. Where the defense theory was that the victim's recantation testimony was credible, and that her earlier accounts were false and motivated by anger, does counsel's failure to

request a limiting instruction for impeachment evidence reflect a legitimate trial strategy? If not, has Lay failed to show prejudice from the lack of a limiting instruction?

3. A trial court must exercise discretion when determining whether prior offenses constitute the same criminal conduct for scoring purposes where the original sentencing court did not make such a determination. At sentencing, the trial court found that two of Lay's four prior convictions for Possessing Stolen Property in the Second Degree from one county were not the same criminal conduct, despite the fact that a third county had scored only one count. Did the trial court properly exercise its discretion when it scored two of the convictions separately?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Lay was charged by Amended Information with Domestic Violence Felony Violation of a Court Order, Felony Harassment, and Assault in the Second Degree. CP 60-61. The State alleged that, while a valid Domestic Violence No Contact Order was in effect, Lay punched Kirsten Bailey in the face, threatened to kill her,

and came at her brandishing a knife that constituted a deadly weapon. Id.

At the close of the State's case in chief, the trial court dismissed the Felony Harassment and Assault in the Second Degree charges, as the only evidence before the jury as to those acts was not admissible as substantive evidence. 5/16/2011 RP 37-38. On May 16, 2011, the jury found the defendant guilty of Domestic Violence Felony Violation of a Court Order. CP 73. On August 17, 2011, the trial court calculated Lay's offender score to be six and accordingly sentenced Lay to 50 months in the Department of Corrections. CP 75, 77.

2. SUBSTANTIVE FACTS

On August 21, 2010 in Seattle, Washington, defendant Johnnie Lay, Jr. punched his girlfriend of approximately three years, Kirsten Bailey, in the face causing injuries. 5/10/2011 RP 31; Trial Ex. 1- 4. At the time of this incident, a Domestic Violence No Contact Order was in effect prohibiting Lay from coming into contact with Bailey. Trial Ex. 14 (Stipulation). After being struck, Bailey called 911 from a restaurant parking lot and,

while anxious and crying, she told operators what had happened.

Trial Ex. 1, 4.

When police responded, Bailey gave a full written statement of the events and was also interviewed by police on in-car video.

Trial Ex. 2, 5. In her written and video statements, Bailey told

police that after being punched in the face she told Lay to leave.

Instead, he came toward her brandishing a knife, threatening to kill her and cut her up into little pieces if he saw her with another man.

Trial Ex. 2, 5, 9. Bailey was fearful that Lay would kill her, and fled as soon as Lay looked away. Id.

The in-car video captured visible injuries to Bailey's face, and she was seen by medics at the scene. Trial Ex. 2. Bailey also reported to medics at the scene and to medical professionals at Northwest Hospital that her boyfriend had hit her. 5/12/2011 RP 88-90; 5/16/2011 RP 30. At a follow-up interview with a Seattle Police Detective, Bailey expressed that she was very fearful of cooperating because she was afraid of retaliation by Lay.

5/12/2011 RP 49-51.

Sometime after this incident, but before the defendant was arrested, Lay spoke to Bailey on the phone while he was in California. 5/10/2011 RP 53, 58. When Lay was eventually

arrested and arraigned for this incident, in November of 2010, Bailey addressed the arraignment court and claimed that she was not afraid of Lay and that she did not want a no-contact order imposed. 5/10/2011 RP 98-101.

In the following months, Lay called Bailey from the King County Jail numerous times. 5/10/2011 RP 101-14; Trial Ex. 8. In the jail calls, Lay manipulated Bailey by alternating between telling her what to do and expressing his love for her and that he wanted to marry her. Id. In a number of calls, Lay attempted to convince Bailey to alter her story about what had happened on August 21, 2010 by referring to her not helping "Judd" or "Judge." Id. For example, in one call Lay told her, "You know I'm really good at analogies? You know this friend of ours, Judd? Tell him that everything was a lie." 5/10/2011 RP 105; Trial Ex. 8. After these calls, in February of 2011, Bailey sent a letter to the parties recanting her original statements and claiming that some other woman had hit her. 5/10/2011 RP 113-14.

Lay and Bailey had begun their romantic relationship approximately three years prior to this incident, and there is a history of domestic violence between the two. On January 9, 2009, Lay and Bailey got into a fight where Lay punched Bailey in the

face on the bridge of her nose. 5/10/2011 RP 63-64. Lay then fled the apartment by stealing Bailey's car keys and car. Id. Bailey waited approximately a week before reporting this incident to police. Id.

On another occasion that same year, on June 7, 2009, when Bailey had left their apartment for a period of time, Lay slapped Bailey and strangled her such that she had difficulty breathing. 5/10/2011 RP 60-63. Lay then opened all the windows and told Bailey that he didn't care if anyone heard. Id. When Bailey attempted to leave, Lay grabbed her by her hair and pulled her to the ground. Id. Lay only stopped assaulting her when Bailey began screaming. Id. Bailey immediately reported this incident to police. Id.

C. ARGUMENT

- 1. LAY'S TRIAL BEGAN WITHIN THE ALLOWABLE TIME FOR TRIAL PERIOD AS THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CONTINUING HIS TRIAL DATE MULTIPLE TIMES.**

Lay asserts that the trial court abused its discretion by continuing his trial multiple times. Notably, Lay does not ask for any remedy regarding these alleged violations and fails to specify

which of the various continuances violated his rights; rather, he argues that the record below is simply insufficient to support the trial court's granting of continuances. This argument should be rejected. Under the time to trial rule, trial courts are allowed to grant continuances when they deem it necessary to do so in the administration of justice. Here, the trial court properly exercised its discretion in granting a number of continuances in the administration of justice primarily because the DPA was occupied in other trials.

a. Relevant Facts.

Lay was held in custody pending his trial. Thus, CrR 3.3 required his trial be held within 60 days of the original commencement date. On the original trial date, January 10, 2011, the assigned DPA was in trial on another case and the court continued Lay's case to January 11, 2011, pursuant to CrR 3.3(f)(2), and extended time for trial expiration to February 10, 2011. CP 114. On January 11, 2011, the DPA was still in trial on the other case and requested a continuance to accommodate a vacation he had previously scheduled for January 18 through Friday, February 4, 2011. 1/11/2011 RP 3-5; CP 30-31 (Second

Declaration of DPA). At that time, the court continued Lay's trial date to Monday, February 7, 2011 under CrR 3.3(f)(2), and extended time for trial expiration to March 9, 2011. CP 113.

From February 7 through February 14, 2011, the DPA was in another trial with a defendant whose case had an older arraignment date than Lay's. CP 31. On those dates, the court entered orders continuing the defendant's trial date under CrR 3.3(f)(2) and extended expiration to March 16, 2011. CP 113.

On February 15, 2011, defendant Amaya-Martinez, whose case was also assigned to this DPA, brought a motion before Chief Criminal Judge Ronald Kessler. 2/22/2011 RP 4-5; CP 31.

Amaya-Martinez was arraigned four months before Lay (a typo in the declaration lists the arraignment year as 2011 but should read 2010 as the declaration was signed April 14, 2011). CP 31. At that time, Amaya-Martinez had been waiting several months for his trial to begin and his attorney, Leona Thomas, was in trial on another case. 2/22/2011 RP 4-5. Judge Kessler ordered that the DPA would not be assigned to trial with any other defendant before Amaya-Martinez, so that the DPA would be available to begin trial with Thomas as soon as she became available (Thomas represented that she expected to become available within a couple

of days or immediately after the President's Day Holiday on February 21). 2/22/2011 RP 4-5; CP 31-32.

From February 14 to February 23, 2011, the court continued Lay's trial date based on Judge Kessler's ruling. CP 119-22. In those orders, rather than extending expiration, the court maintained Lay's time for trial expiration date of March 16, 2011, as it did not make a finding that the continuance was required in the administration of justice. Id.

On February 17, 2011, Lay properly filed notice of his objections to the continuances and extension of time for trial expiration. CP 6-9. Lay demanded that the court dismiss the charges for a violation of CrR 3.3 or, in the alternative, that the court order the King County Prosecuting Attorney's Office (KCPAO) to reassign the case to another DPA. Id. Lay's briefing indicated an objection to "any and all previous and future continuances of speedy trial that are based upon the prosecutor's unavailability." CP 6. The State filed responsive briefing with an attached declaration from the DPA explaining his case assignments, the court's prioritizing of the cases (as determined by arraignment dates), and the facts described above. CP 10-16.

From February 23 through March 7, 2011, the DPA was in trial on the Amaya-Martinez case. CP 31. During that time, the court entered orders continuing the defendant's trial date, pursuant to CrR 3.3(f)(2), and extended expiration to April 7, 2011. CP 32, 123-27.

On March 2, 2011, a hearing was held before Assistant Chief Criminal Judge Theresa Doyle to address Lay's time for trial motions. Neither in his briefing nor at oral argument did Lay's counsel ever accuse the State of mismanagement of resources, or ask that the court inquire into the various case assignments of other DPAs before making its decision on the merits of Lay's motion or in granting further continuances. 3/2/2011 RP 3-11. At the hearing, Judge Doyle inquired with counsel regarding Lay's specific objections, as the State had answered ready for trial in January and continued to answer ready for trial. 3/2/2011 RP 7-8. Upon questioning, Lay's counsel agreed that the real objection was the court's prioritizing of the DPA's other cases ahead of Lay's. Id.

Judge Doyle denied Lay's motion to dismiss for a violation of CrR 3.3 and held that there was no violation of the time for trial rule as the court had the inherent ability to control its calendar and prioritize cases. 3/2/2011 RP 11. In making her ruling, Judge

Doyle specifically cited to State v. Chichester, 141 Wn. App. 446, 170 P.3d 583 (2007). Additionally, Judge Doyle denied Lay's alternative motion to force reassignment to another DPA, and noting that DPA case assignment was an internal decision more appropriately made by the KCPAO. Id.

Beginning on March 8 through March 21, 2011, the DPA was in trial on four other cases (one of which resolved in less than a day) with older arraignment dates than Lay's. CP 32-34, 128-33. During that time, the court entered orders continuing the defendant's trial date, pursuant to CrR 3.3(f)(2), and extended expiration to April 20, 2011. Id.

On March 21, 2011, the court continued Lay's case and trial expiration date because defense counsel was on medical leave and the DPA was on leave due to an unexpected family matter. CP 33, 134. On March 22, 2011, defense counsel was again on medical leave and the court continued Lay's trial, pursuant to CrR 3.3(f)(2), and extended expiration to April 22, 2011. CP 135. Based on the court's prioritizing of in-custody cases by arraignment date and the availability of the DPA, Lay's case would have begun trial on March 22, 2011, if not for defense counsel having been out on medical leave. CP 33-34.

However, because counsel was out on medical leave, on the afternoon of March 22, 2011, the DPA began trial on another case that had a later arraignment date than Lay's. CP 33-34. From March 23 to March 28, 2011, the court continued Lay's trial, pursuant to CrR 3.3(f)(2), and extended expiration to April 27, 2011. CP 32-33, 136-37.

Beginning on March 28 through April 18, 2011, the DPA was in trial on several other cases with older arraignment dates than Lay's. CP 32-35, 138-50. From April 4 through April 13, 2011, the defense attorney was in trial on other cases. CP 142-48. From March 28 through April 18, 2011, the court continued Lay's trial date, pursuant to CrR 3.3(f)(2), and extended expiration to May 20, 2011. CP 32-35, 138-50.

On April 20 and 21, 2011, Lay's trial date was continued, pursuant to CrR 3.3(f)(2), because the DPA was out on medical leave. CP 151-52. As the trial date was continued to Monday, April 25, 2011, the court extended expiration to May 25, 2011. CP 152. Lay's trial began with pretrial motions on April 25, 2011, when the case was assigned to Judge Andrus' court. CP 153.

b. The Trial Court Appropriately Exercised Its Discretion.

While this court generally reviews an alleged violation of the time for trial rule *de novo* (State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009)), Lay's actual contention here is that his time for trial right was violated by the court's granting numerous continuances when the DPA was in trial on other cases. Accordingly, the standard of review here is abuse of discretion rather than a *de novo* review. A reviewing court will not disturb a trial court's grant or denial of a motion for a CrR 3.3 continuance absent a showing of a manifest abuse of discretion. State v. Cannon, 130 Wn.2d 313, 326, 922 P.2d 1293 (1996). A trial court abuses its discretion only where its decision was "manifestly unreasonable, or was based on untenable grounds or reasons." State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005).

Washington's time for trial rule (CrR 3.3) was amended extensively to its current form in 2003. Karl B. Tegland, 4A Washington Practice: Rules Practice 53 (2007 Pocket Part, 6th ed. 2002). One of the stated goals of the task force that reviewed and proposed changes to the rule was to "provide courts with greater flexibility for getting cases heard, including flexibility with regard to

court congestion." Id. at 54. To accomplish this goal, the task force proposed the addition of a limited cure period, as well as the addition of a 30-day buffer period to ensure that "following the end of an excluded period of time there will always be at least 30 days within which to bring the case to trial." Id. Both provisions were included in the amended rule. See CrR 3.3(b)(5) and (g).

In its current form, as amended in 2003, the time for trial rule mandates that a defendant who is detained in jail shall be brought to trial "within the longer of (i) 60 days after the commencement date specified in this rule, or (ii) the time specified in subsection (b)(5)." CrR 3.3(b)(1). Subsection (b)(5) specifies that "if any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period." CrR 3.3(b)(5). Continuances, defined as "delay granted by the court pursuant to section (f)," are excluded periods. CrR 3.3(e)(3).

Under section (f), a continuance may be granted "on motion of the court or a party" when "such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). When a

court grants a continuance, it "must state on the record or in writing the reasons for the continuance." Id.

The rule now also dictates that "no case shall be dismissed for time-to-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution." CrR 3.3(h). This section gives effect to the task force's intent "that the courts apply the proposed rule 'as is' instead of adding new requirements not already there." Tegland, 4A Washington Practice: Rules Practice at 55.

Washington courts have consistently held that a prosecutor's reasonably scheduled vacation is good cause to continue trial. State v. Torres, 111 Wn. App. 323, 331, 44 P.3d 903 (2002), review denied, 148 Wn.2d 1005 (2003); State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003). Division One has explicitly recognized that "deputy prosecutors, particularly those in our heavily populated counties, are required to try cases back to back, day after day, and month after month, and year after year." State v. Kelley, 64 Wn. App. 755, 764-65, 828 P.2d 1106 (1992).

The court in Kelley noted that such vacations should be honored by the court: "To construe CrR 3.3 otherwise would be to deprive deputy prosecutors of the dignity they deserve, and would

result eventually in less effective justice as well as in unfairness in the administration of justice." Id. at 767. Likewise, when a prosecutor is unavailable because of involvement in another trial, a court does not abuse its discretion by continuing the case.

Chichester, 141 Wn. App. at 454. Similarly, a court is permitted to continue a trial when one of the attorneys is sick. State v. Jones, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003).

Lay asserts that none of the many continuances in this case was validly granted, that each continuance constituted an abuse of the court's discretion, and that his right to a speedy trial was thus violated. But to reach this conclusion, Lay ignores the plain language of CrR 3.3 as well as precedent that establishes that a court does not abuse its discretion by continuing cases when proper grounds exist. The court delayed the start of Lay's trial multiple times, beginning January 10, 2011, pursuant to CrR 3.3(f)(2), due to the unavailability of the DPA and/or defense counsel. In doing so, the court carefully and correctly applied CrR 3.3.

Lay cites no authority and presents minimal argument in support of his contention that the trial court abused its discretion in granting the first two continuances in this case: a one-day

continuance due to the DPA being in trial, and a several-week continuance due to the DPA's pre-scheduled vacation. As stated above, a prosecutor's responsibly scheduled vacation is a valid basis for granting a continuance. Here, the court found that the DPA reasonably had scheduled his vacation and thus a continuance was warranted in the administration of justice, pursuant to CrR 3.3(f)(2). On appeal, Lay fails to state any grounds under which these continuances, and thus the time for trial expiration extension to March 9, 2011, constituted an abuse of discretion by the trial court. CP 113-14.

Additionally, the trial court here did not abuse its discretion in granting numerous continuances in the administration of justice due to the DPA and/or defense counsel being unavailable due to their participation in other trials. Division One has acknowledged that in urban areas, as is the case here, attorneys are often in back to back trials for months at a time. Kelley, 64 Wn. App. at 764-65. Division Two has also held that a trial court does not abuse its discretion when it continues a trial under CrR 3.3 when the assigned DPA is unavailable due to his or her participation in other trials. State v. Williams, 104 Wn. App. 516, 17 P.3d 648 (2001). In Williams, the court found that several continuances that resulted in

a month-long delay were warranted in the administration of justice (although the trial court had incorrectly categorized them as "unforeseen circumstances"), due to the DPA being involved in another trial and the need for defense counsel to prepare. Id. at 522-24.

The trial court here also granted several continuances due to defense counsel or the DPA being out on medical leave. Short continuances for attorneys being ill do not constitute an abuse of discretion. State v. Jones, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003). Again, Lay cites no authority to the contrary.

A few other short delays initiated by the court also fall within the first broad category of unavailability on the part of either the DPA or defense counsel. Specifically, the court entered four orders that resulted in moving Lay's trial date from February 11 to February 22 because the DPA was expected to start another trial. CP 31-32, 119-22. However, in contrast to the instances where the DPA was actually in another trial, the court properly recognized in these instances that "the administration of justice" did not require the delays, and accordingly did not adjust Lay's expiration date. Id. Thus, expiration remained March 16, 2011, as it had been set by the court on February 10, 2011. The expiration date was changed

only when the court assigned the DPA out to trial on in-custody defendant Amaya-Martinez, and the court found a continuance was therefore required for the administration of justice on Lay's case. CP 31-32, 118-22.

In sum, the record of the various continuances and other adjustments of Lay's trial date establish that the trial court carefully and correctly applied the plain language of CrR 3.3. As a result, Lay's trial date was never moved beyond the applicable expiration dates, which were appropriately reset pursuant to CrR 3.3(b)(5) each time the court found proper grounds to continue the trial in the administration of justice. Because CrR 3.3(h) allows for dismissal only for an express violation of the time for trial rule, and because no such violation occurred here, Lay's convictions should be affirmed.

Nevertheless, despite the fact that the court properly applied CrR 3.3, and despite the fact that dismissal under the rule is appropriate only where expressly required by the rule, Lay asserts that more was required to justify the continuances. In essence, he invites this Court to read into the amended time for trial rule requirements that are not expressly set forth in the rule. His arguments should be rejected.

With respect to the continuances initiated by the court because the DPA was in trial on other cases, Lay cites Kelley, supra, and Chichester, supra, for the proposition that the trial court had a duty to inquire about the KCPAO's allocation of resources and/or to force the KCPAO to reassign a different prosecutor. Lay contends, for the first time on appeal, that because the court did not involve itself in the internal process of the KCPAO's case assignments, the court abused its discretion in continuing Lay's trial. His reliance on these cases is misplaced.

Kelley, for instance, addressed the propriety of a five-day extension beyond the defendant's original expiration date and the court's subsequent denial of the defendant's motion to dismiss for violation of former CrR 3.3. Kelley's case had been reassigned to another DPA, who was not available to begin trial on the extended date, in order to accommodate the originally assigned DPA's vacation. Kelley, 64 Wn. App. at 757. This Court held that the evidence presented by the State at a post-conviction hearing on the defendant's dismissal motion, including an affidavit from the originally assigned DPA and testimony from the DPA in charge of felony trial assignments, was sufficient to justify the extension beyond the expiration date. Id. at 767.

Kelley did not hold, however, that the trial court had a duty to seek such evidence. Rather, the court in Kelley held that the trial court appropriately exercised its discretion in delaying the trial date until the DPA finished another trial. Id. Further, Division One has since clarified that Kelley did not create a per se requirement of reassignment when a prosecutor becomes unavailable. State v. Heredia-Juarez, 119 Wn. App. 150, 79 P.3d 987 (2003). Rather, the court reaffirmed that the trial court should consider relevant information in exercising its discretion to grant or deny a continuance. Id. at 155.

Division One has also held that a trial court does not abuse its discretion in granting continuances (under the former version of CrR 3.3) in one case in order to allow another case to go to trial. State v. Angulo, 69 Wn. App. 337, 848 P.2d 1276 (1993). In Angulo, Division One held that the trial court's decision to prioritize another case over Angulo's was not an abuse of discretion because the court's decision relied on the age of the cases as determined by their arraignment dates, and thus to how long they had been incarcerated. Id. at 343. Here, it is evident that the Chief Criminal Judge and Assistant Chief Criminal Judge were aware of the DPA's trial assignments, and determined that they should be prioritized

based on their age (as determined by date of arraignment) when the DPA returned from vacation. 1/11/2011 RP 3-5; 2/22/2011 RP 3-8; 3/2/2011 RP 3-11.

Lay's reliance on Chichester is also misplaced. There, this Court upheld the trial court's exercise of discretion to deny the State a continuance and to dismiss the prosecution when the State failed to assign a prosecutor to try the case by the trial date set at a readiness hearing, despite being warned that a continuance would likely not be granted for lack of an available prosecutor.

Chichester, 141 Wn. App. 446. But nothing in Chichester required the trial court here to refuse to continue Lay's trial date or to create a more extensive record. Indeed, Chichester did not implicate CrR 3.3 at all except to the extent that the trial court denied the State's request for a continuance within the time for trial period. Rather, this Court simply held that "control of a trial calendar ultimately rests with the court, not the litigants. The court's decisions were reasonable. We find no abuse of discretion." Id. at 459.

Chichester thus provides no authority for Lay's proposition that the trial court here abused its discretion.

Essentially, Lay is asking this court to require that trial courts conduct evidentiary hearings to determine whether or not a

prosecutor's office is responsibly allocating its resources every time a case is continued due to a DPA being occupied in another trial. To require such an inquiry would be an undue burden on the trial courts and is not supported by the plain language of CrR 3.3 or existing case law. Because the trial court here appropriately applied the time for trial rule and did not manifestly abuse its discretion in granting continuances warranted in the administration of justice, this Court should affirm Lay's convictions.

2. LAY'S COUNSEL PROVIDED EFFECTIVE REPRESENTATION.

Lay argues that counsel was ineffective for not objecting to the improper introduction of extrinsic evidence and failing to propose an appropriate limiting instruction, thus allowing the DPA to improperly argue the evidence as substantive rather than mere impeachment. Counsel was not ineffective here. Impeachment evidence was properly introduced, tactical reasons justified not requesting a limiting instruction, and the DPA appropriately referenced the evidence in closing argument and rebuttal. Even if counsel was ineffective, there was no prejudice to the defendant.

A challenge to effective assistance of counsel is reviewed *de novo*. State v. Rainey, 107 Wn. App. 129, 135, 28 P.3d 10 (2001). The federal and state constitutions guarantee effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. art. I, § 22. An appellant claiming ineffective assistance of counsel must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). This Court has favored a strong presumption of counsel's effectiveness. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court must evaluate counsel's representation against the entire record. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Legitimate trial tactics fall outside the bounds of an ineffective assistance of counsel claim. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The effectiveness of counsel cannot be measured by the result obtained. State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979).

Thus, in order for this Court to overturn Lay's convictions on the grounds of ineffective assistance of counsel, he must show that there were no legitimate strategic or tactical reasons behind defense counsel's decision, counsel was objectively deficient, and prejudice resulted from counsel's action or inaction. Rainey, 107 Wn. App. at 135; State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Prejudice occurs when, but for counsel's deficient performance, there is a reasonable probability that the outcome would have differed. State v. Powell, 150 Wn. App. 139, 153, 206 P.3d 703 (2009). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Powell, 150 Wn. App. at 153 (quoting In re Pers. Restraint of Hubert, 138 Wn. App. 924, 930, 158 P.3d 1282 (2007)) (internal quotation marks omitted).

a. Relevant Facts.

On direct examination, Bailey testified that she was assaulted by an unknown woman. 5/10/2011 RP 34-39. Bailey's testimony was a clearly different version of events than that which was contained in both her written statement and in her statements

made on in-car video. After the 911 call was admitted and played for the jury, Bailey acknowledged that she had given a different account to police on the day of the incident. On cross examination, Bailey explained that she had lied to police about who assaulted her because she was angry with Lay for being with another woman. 5/12/2011 RP 13, 31-32.

During direct examination, when questioned about having given a written statement to police, Bailey initially said that she did not believe that she had done so. 5/10/2011 RP 45. Upon being provided a copy of the written statement on the stand, Bailey identified her signature and indicated that she had a vague memory of making the statement to police. Id. at 46. However, she acknowledged that "it's what I told the officer at the time." Id. When the DPA asked what Bailey had told the officer at the time, she merely answered, "Pretty much what's in here," rather than giving a substantive response. Id.

When the DPA continued to question Bailey about her earlier statements, Bailey's answer to several questions was that she did not remember what she had told police and that the statement did not refresh her recollection. 5/10/2011 RP 47-48. After this claim

of lack of specific memory, the DPA altered his approach and the dialogue continued:

Q: Now isn't it true that you told the officer that day that, quote, I told him, referring to Jonnie, that I didn't love him anymore?

A: I don't recall specifically saying that.

Q: Is that what your statement says?

A: That's what it says on the paper.

Q: Does your statement also go on to say you told Jonnie, it's over and I wanted him to leave as he was sitting on the couch?

A: That's what it says.

5/10/2011 RP 50.

The exchange continued in this fashion for several more questions. 5/10/RP 2011 50-51. Upon questioning by the DPA about verbal statements that Bailey had made to police officers, Bailey admitted that she was sure that she also spoke to the officers about the incident. Id. at 50. When asked if she remembered telling the officers that her injuries were a result of being punched by Lay, Bailey answered that she did not remember exactly what she had told police. Id.

Next, when the DPA asked more broadly if Bailey had claimed that her injuries were from Lay that day, she answered yes.

Id. at 50-51. When asked whether or not she gave more detail to the officers about what had happened, Bailey claimed that she did not remember. Id. at 51. The DPA then asked if Bailey remembered telling police that she should not have let Lay into her apartment or told him that she didn't love him anymore, and that Lay punched her. Id. Bailey responded that she didn't remember saying that. Id. The examination continued with the DPA playing two small audio portions of the in-car video. Id. at 51-52.

Each time Bailey was asked specifically about a statement, she claimed that she did not remember but admitted it was her voice once the audio was played. Id. After a court recess and later in her testimony, another portion of the audio was played for Bailey after she had claimed she did not remember making statements regarding Lay's consumption of alcohol, why she was upset with Lay on that day, and how Lay claimed he could flee to Chicago and never be caught. Id. at 95-97.

In closing argument, the DPA argued that Bailey's statements made to 911 and to medical personnel on the night of the incident were the true account of what had happened that night. 5/16/2011 RP 59. The DPA further argued that the history of domestic violence, and post-event manipulation through calls made

from the King County Jail gave context for Bailey's recantation at trial. Id. at 64-71. In the DPA's closing, the only comment that referenced impeachment evidence was Bailey's statement that "my boyfriend hit me." Id. at 64. That exact same statement was also contained in the 911 tape and the statements to medical personnel that were admitted as substantive evidence. The DPA did not make any other reference to Bailey's written statement or the statements made on in-car video. Id. at 58-71.

Conversely, in closing, defense counsel argued that the version of events Bailey gave on the night of the incident was a false account and that her trial testimony was truthful. Id. at 71-80. Defense counsel made no reference in closing argument to either Bailey's written statement or any of the statements made on in-car video. Id.

In rebuttal, the DPA responded by continuing to argue that Bailey was not a credible witness and that she was acting to protect the defendant. Id. at 83. The DPA noted that Bailey has said many different things over a period of time and told the jury:

You had the prior events which you can use to judge her credibility, you have what she said that day, what she said consistently to everyone she interacts with that day, you have the defendant calling her from jail, telling her what to say, trying to influence her testimony.

Id. at 82. Again, the DPA never specifically referred to Bailey's written statement or any of the statements made on in-car video.

Id. at 81-84.

b. The Victim Was Properly Impeached With Prior Inconsistent Statements Under ER 613.

Commentators have outlined the general procedure for impeachment with an inconsistent statement under ER 613. Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 613.10, at 490 (4th ed.). If a witness admits authorship of an inconsistent writing but the contents have not been brought out, the material parts of the writing may be read to the jury but not offered as an exhibit. Id. at 490.

Division Two has explained, however, that since the adoption of ER 613, it is sufficient for the examiner to give the declarant an opportunity to explain or deny the statement, either on

cross-examination or after the introduction of extrinsic evidence.¹ State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998) (citing John William Strong et al., McCormick on Evidence § 37, at 121-22 (4th ed.1992)). The court held that "the traditional foundation questions on cross-examination are now an optional tactic rather than a mandatory requirement." Johnson, supra (quoting Karl B. Tegland, 5A Washington Practice: Evidence Law and Practice § 258, at 317 (3d ed.1989)).

Lay's first claim of ineffective assistance relates to the failure to object when the DPA confronted Bailey with prior statements made in writing and on video. It is apparent from the record that the DPA properly impeached Bailey, under ER 613, with prior inconsistent statements she had made to police. 5/10/2011 RP 45-52, 95-97. Although the DPA could have skipped over the foundational questions, he adhered to the formality of the pre-rule method by directing Bailey to the context and content of the statements and giving her an opportunity to testify to the contents

¹ Pre-rule case law required the examiner to first direct the declarant's attention to the exact content of the allegedly contradictory statement, as well as to the time and place where the declarant made the statement, and to the persons present, before introducing extrinsic evidence. State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998) (citing May v. Wright, 62 Wn.2d 69, 72, 381 P.2d 601 (1963), and Webb v. Seattle, 22 Wn.2d 596, 610, 157 P.2d 312 (1945)).

of the prior statements. Only when it became clear that Bailey was not going to testify to the contents of the statements, by either denying the statements or claiming lack of memory, did the DPA confront her with the actual substance of the statements.

The record shows that, at the time of the testimony, a sidebar was requested by the DPA after the defense noted that it was objecting to the admission of Exhibit 5 as a recorded recollection (the request to admit under this rule was later withdrawn). 5/10/2011 RP 48-49, 69-70. According to the court's summary of that sidebar, although Lay was objecting to the admission of the written statement itself, counsel informed the court that he believed that it was appropriate for the DPA to read from Exhibit 5 because it was proper impeachment of the witness. 5/10/2011 RP 69. Thus, the defense attorney was aware of the rule and correctly agreed that the DPA was appropriately impeaching the witness with her prior statement. Because the testimony was properly put before the jury under ER 613, counsel's performance on this issue was objectively effective.

c. The Failure To Request A Limiting Instruction Is Presumptively A Tactical Decision.

ER 105 states that "[w]hen evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." Impeachment evidence goes to the credibility of the witness and is not proof of the substantive facts therein. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985).

When the trial court admits such evidence, an instruction cautioning the jury to limit its consideration to the intended purpose is both proper and necessary. Johnson, 40 Wn. App. at 377. But where a party fails to request a limiting instruction, our courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to prevent reemphasis of the damaging evidence. State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009); State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27, review denied, 155 Wn.2d 1018 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

Division Three has held that such a decision is presumed tactical where defense counsel failed to request a limiting

instruction regarding the defendant's prior criminal history where it was offered only for impeachment purposes. State v. Dow, 162 Wn. App. 324, 335, 253 P.3d 476 (2011). A reviewing court need not find defense counsel's strategy to be a successful one as the objective standard is not result-based. State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689.

During pretrial motions, the trial court reviewed the in-car video and addressed the admissibility of Bailey's statements. The court concluded that the audio of Bailey's statements was not admissible as an excited utterance, but that it could be offered for impeachment if Bailey testified inconsistently. 4/27/2011 RP 7-8. If that situation were to arise, the court noted that it would be inclined to give an appropriate limiting instruction. Id. at 8. Further, it is apparent that, at defense counsel's request, the court gave a limiting instruction regarding the evidence of prior incidents of domestic violence that were admitted under ER 404(b). 5/10/2011 RP 131-32; 5/12/2011 RP 8. Thus, counsel was aware of the

appropriate use of a limiting instruction, and knew that the court would give such an instruction regarding the statements if requested.

Additionally, the court, by agreement of the parties, admitted a recording of Bailey's call to 911 as an excited utterance.

4/25/2011 RP 36-37. In that call, Bailey had told the operator that the defendant had struck her. Trial Ex. 1. At trial, Bailey's explanation for her statements to 911 was the same explanation she gave regarding the written statement and the in-car video: that she lied to police on the date of the incident because she was angry that the defendant was with another woman.

In closing, defense counsel repeatedly focused on the version of events Bailey testified to at trial. 5/16/2011 RP 71-80. He argued that, while Lay might be guilty of being a cheater and should have prevented this other woman from assaulting Bailey, Lay was not guilty of the charged crime. Id. at 73. Counsel reasoned that Bailey did not come forward with the truth earlier than February of 2011 because she had no attorney to advise her and was fearful of admitting that she had lied to police. Id. at 75-76. In a clear attempt to minimize the impact of damaging impeachment evidence, counsel made no mention of the

statements at issue in his closing and did not request a limiting instruction that might further highlight the evidence. Id. at 71-80.

Knowing that the jury had to decide which version was true, Bailey's account to 911 or her testimony at trial, it was a legitimate defense strategy to not request a limiting instruction for the impeachment evidence where counsel argued that her recantation was the more credible account. Id. Even a risky and unsuccessful strategy is presumptively tactical unless the defense can establish that there was *no conceivable* legitimate tactic explaining counsel's performance. State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

In his brief, Lay argues that this decision could not be tactical where the defendant "offered a viable defense of general denial...which is supported by a cogent explanation by the complainant of the reasons for making the original false claim." App. Br. at 25. Contrary to his claim, this was exactly the situation where the choice to not request a limiting instruction was a reasonable tactical decision. The logical reason for this defense strategy, which came out primarily through cross examination of Bailey and in closing argument, was that, regardless of how many times, how many ways, and to how many people Bailey claimed

that Lay assaulted her, she gave that false account to everyone that day to punish the defendant for cheating on her. Because the failure to request a limiting instruction was presumptively tactical, Lay has not established that counsel was ineffective.

d. Lay Cannot Show Prejudice.

Alternatively, if this Court finds that counsel provided deficient performance, then Lay cannot show that he was prejudiced. To prevail, Lay must show that, "but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78. Lay does not even attempt to meet this burden and claims merely that counsel's performance undermines confidence in the outcome. App. Br. at 26.

Lay cannot show that but for the lack of a limiting instruction, he would have been acquitted. Any possible prejudicial effect that resulted from the introduction of impeachment evidence was eclipsed by the overwhelming weight of evidence against Lay. See Hendrickson, 129 Wn.2d at 80 (denying ineffective assistance claim, despite counsel's deficient performance, because "evidence in the record powerfully supports Hendrickson's guilt").

Whether or not a limiting instruction was given, the jury was in a position to consider Bailey's trial testimony and statements to 911 in the context of when the statements were made and whether the impeaching statements lent credence to or cast doubt on the prior substantive statements. Both the DPA and the defense attorney appropriately argued which version the jury should find more credible based on the surrounding circumstances and the context of the relationship.

In addition to the 911 call and the testimony of medical personnel, the State introduced, as substantive evidence, a number of jail calls made by Lay to Bailey. In those calls Lay was obviously tampering with Bailey. 5/10/2011 RP 98-113. For example, in one call Lay tells Bailey "I told you the story of what happened that day." Id. at 106; Trial Ex. 8. Logically, there would be no need for Lay to tell Bailey what happened that day, as she was present and the victim of the incident. Rather, the only reason Lay needed to "tell her what happened" was to induce her to lie to prevent him from being convicted.

Likewise, when referencing the court system by using "Judd" or "Judge," Lay tells Bailey, "the smartest thing for you to do is to not even talk to him." Id. at 107; Trial Ex. 8. Again, if Bailey's

recantation were truthful, there would be no reason for Lay to have tried to convince her to not appear for trial or speak with the authorities.

Where there was no reasonable explanation for Lay's statements made from jail and his significant efforts to tamper with Bailey, there can be no question that the jury viewed this evidence as consciousness of guilt. Likely, after hearing these statements directly from Lay, the jury considered this evidence almost as strongly as they would consider a recorded confession.

In light of the extremely incriminating nature of the jail phone calls and the corresponding timing of Bailey's change of story, the jury clearly found Bailey's at-trial recantation not credible. A limiting instruction clarifying that the prior inconsistent statements were offered only for impeachment purposes would not have changed the outcome of this case given the overwhelming evidence of Lay's guilt.

Lay also references the portion of the State's closing argument discussing Bailey's statements to law enforcement as an example of how a limiting instruction would have prevented improper use of the impeachment testimony as substantive evidence. However, Lay mischaracterizes the DPA's statements in

closing argument for this assertion. In arguing that the more credible account from Bailey was what she told 911 operators, the DPA noted that Bailey was consistent in her account to everyone in the hours following the events.

This argument is an exact demonstration of the intent of ER 613. The DPA told the jury in rebuttal that the jury should rely on "what she said that day, what she *consistently* said to everyone she interacts with that day...." 5/16/2011 RP at 83 (emphasis added). Rather than making any statements regarding substantive evidence, the DPA was arguing that early statements that were consistently made were more credible than the later inconsistent statements made as a result of witness tampering by Lay.

As counsel was obviously effective regarding the appropriate presentation of evidence put on by the State, where tactical reasons justify not giving a limiting instruction, and where the DPA appropriately referenced the evidence in closing argument and rebuttal, this Court should reject Lay's claim of ineffective assistance of counsel. Even if counsel was ineffective as to any one of these issues, Lay has failed to show prejudice.

3. THE TRIAL COURT WAS NOT PRECLUDED FROM MAKING ITS OWN DETERMINATION REGARDING SAME CRIMINAL CONDUCT WHERE THE PREVIOUS SENTENCING COURT COUNTED ALL FOUR PRIOR CONVICTIONS.

Lay asserts that, because Grays Harbor County Superior Court Judgment and Sentence documents in 1999 and 2002 (Sentencing Ex. 2 and 4) listed only one conviction for Possessing Stolen Property in the Second Degree (PSP 2) from a 1995 case where the defendant was convicted in Thurston County of four counts of PSP 2 (Sentencing Ex. 1), the trial court erred when it counted two of the Thurston County convictions in the defendant's offender score. Neither the Sentencing Reform Act nor the case law support Lay's claim that the trial court in this case was bound to follow the scoring of the Grays Harbor court and find the four prior 1995 convictions constituted the "same criminal conduct."

This Court reviews the trial court's calculation of an offender score *de novo*. State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). Where multiple prior convictions exist, in order to calculate one's offender score, the present court must count all convictions separately, except that "prior offenses which were found, under RCW 9.94A.589(1)(a), to encompass the same criminal conduct, shall be counted as one offense, the offense that

yields the highest offender score." RCW 9.94A.525 (5)(a)(i). RCW 9.94A.589(1)(a) specifically applies to current offenses, meaning offenses that are being sentenced together at the same time. Thus 9.94A.525(5)(a)(i) is clear that a present sentencing court is bound only by a prior "same criminal conduct" finding that was made by the original sentencing court.

To read this statute otherwise would be in direct contradiction to the Sentencing Reform Act's prohibition of collateral estoppel-type arguments. RCW 9.94A.525(22) states in part:

The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense....Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

This means that, even if a prior court incorrectly failed to include a prior conviction in its calculation of an offender score, a later court or a court on resentencing is not barred from counting such a conviction.

Here, it is apparent when looking at the Judgment and Sentence from Thurston County that the four prior convictions for PSP 2 were not found by the original sentencing court to

encompass the "same criminal conduct." On the first page of the document there is an unchecked box and blank space for such a finding ("Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.400) [blank space following]"). Further, on the second page there are no prior criminal convictions listed in the space marked, yet Lay's offender score is listed as a three, meaning the court counted all of the current offenses against one another.

Also of note, although the two Grays Harbor Judgment and Sentences that Lay relies upon list only one prior conviction for PSP 2 from 1995, neither document contains any reference to a finding of "same criminal conduct." Sentencing Ex. 2 and 4. Thus, even if this court were to agree with Lay's assertion that the trial court is bound by *any* prior court's finding of "same criminal conduct," no such finding exists here. Rather, the record from those cases merely shows that the court mistakenly failed to include three convictions for PSP 2.

Lay cites State v. Mehaffey to support his contention that *any* court's previous determination of an offender score calculation is final and binding on a later court. 125 Wn. App. 575, 105 P.3d 447 (2005). Lay misinterprets that case. Mehaffey held that a

finding of "same criminal conduct" that was expressly made by a court when sentencing multiple current offenses will govern whether or not they will be considered as "same criminal conduct" at a subsequent sentencing. Mehaffey, 125 Wn. App. at 600. Thus, even if a "same criminal conduct" analysis today would yield a finding that the offenses do not encompass the "same criminal conduct," the original court's is what governs. Id.

Even if Lay is correct that *any* prior finding of "same criminal conduct" precludes the court from revisiting the issue, Mehaffey still does not support his proposition that the trial court in this case should have counted the four prior convictions as one. Division Three rejected Mehaffey's argument that, because the original sentencing judge had counted two prior offenses as one offense, the current trial court was bound by that determination. Id. at 601. Rather the court held that because there was no explicit finding of "same criminal conduct" in the documents, the current trial court needed to exercise its own discretion and make its own determination whether the prior crimes were the "same criminal conduct." Id.

Here, the trial court, at the request of the DPA, exercised its discretion in finding that three of the counts from Thurston County

constituted the "same criminal conduct" because they involved the same victim, while one count did not constitute the "same criminal conduct" because it involved a different victim. CP 85-86; 8/17/2011 RP 11-12. Thus, when the trial court counted these offenses as two points after making a determination of same criminal conduct, it appropriately exercised the very discretion Mehaffey requires.

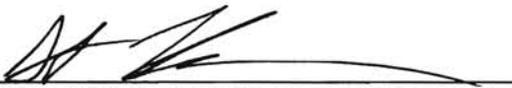
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Lay's conviction and sentence.

DATED this 15 day of May, 2012.

Respectfully submitted,

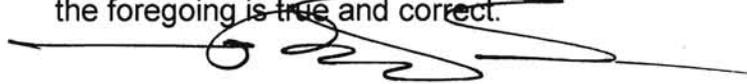
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Oliver R. Davis, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JONNIE LAY, JR., Cause No. 67615-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/15/12

Date