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

STATE OF WASHINGTON,	)	No. 65319-9-I
	)	
Respondent,	)	
	)	
v.	)	
	)	
GARY GENE WESTOM,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: July 25, 2011
	)	

Ellington, J. — Gary Westom appeals his conviction for first degree arson. He contends the court erred by allowing the State to improperly impeach a witness using hearsay evidence. We affirm.

BACKGROUND

On September 18, 2009, Mandi Wagner and Josh Lamoreaux hosted a party on the covered porch of their mobile home on Fourth Street and Alder in Sultan. Around 8:00 p.m., a fight involving between 9 and 20 people broke out in front of a house a few doors down at 410 Alder.

Two hours later, a man wearing a hood approached the Wagner/Lamoreaux home carrying a can of gasoline with a lighted piece of fabric in the spout. He threw the can toward the home and ran off. The can hit the roof and fell onto the porch, igniting the porch carpet and two guests' clothing. Lamoreaux extinguished the fire.

Nobody could identify the man who threw the can, but Lamoreaux and at least one of his guests saw the man leave in a white van.

Darbi Stine was in the neighborhood most of that day and witnessed the arson. She was acquainted with Gary Westom and identified him as the person she saw get out of a white van, put on a hood, throw the gas can at the Wagner/Lamoreaux home, and run back into the van. She reported she had seen Westom with companions earlier that evening, first in a store down the block and then in a fight with some people from 410 Alder. She said that after the fight Westom yelled, "You all niggers are going to burn."[1]

Police arrested Westom a few days later. He denied having thrown the gas can. He told police he had been in a fight in the Fourth Street and Alder area on September 18, 2009, when some people jumped him and his friends, and that after the fight, he went to his friend Darrold Johnson's house where he stayed with his girlfriend, Lynette Johnson, until midnight. Darrold told police Westom had not stayed with him on September 18 but that he had stayed with him three or four nights after that date. Lynette confirmed she was with Westom on September 18, 2009 and that he had been in a fight that day. She told police that, after the fight, a person driving a white van took her and Westom to a gas station, where Westom filled a can with gas, that the driver then took them back to Alder, and Westom got out of the van. Lynette got out after him and walked up Fourth Street.

Westom was charged with one count of first degree arson. Lynette had

[1] Report of Proceedings (RP) (Mar. 16, 2010) at 131-32.

essentially recanted, claiming she did not remember anything and would assert her Fifth Amendment right to remain silent. The defense sought to prevent the State from calling her as a witness. The court denied the motion, reasoning:

> I've seen witnesses that have said that they're going to take the Fifth Amendment and they don't take the Fifth Amendment. I've seen witnesses who have said that they are going to testify, and they take the Fifth. So you really don't know until they raise their little right hand and I raise my right hand and I swear them in and they take the stand.[2]

The court set out the circumstances under which the State could attempt to refresh Lynette's memory, including use of two videotapes of Lynette in the area with Westom that evening. Additionally, the State was permitted to bring up the anniversary of her son's death, which was the same date as the arson, to attempt to refresh her recollection of events that day. But the State was not permitted to produce evidence of her prior statements to police as a means of refreshing her memory.

Just before the State called Lynette to the stand, her attorney stated that she intended to testify "to the best of her ability."[3] The court confirmed its guidelines, noting that the State could use her statements to police to impeach her should her testimony be inconsistent with those statements.

Lynette first testified she had no memory of the events of September 18, 2009. The State showed her video footage from the surveillance camera at a store near Fourth Street and Alder around 7:40 p.m. She admitted she was the person in the video and that she was with Westom, but she denied the video refreshed her recollection. The State showed her video from a surveillance camera at the Sultan

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[2] RP (Mar. 15, 2010) at 17.

[3] RP (Mar. 17, 2010) at 292.

visitor information center near Fourth Street and Alder at around 9:50 p.m. In that video, a white van turns onto Fourth Street and stops. Then, a woman runs from the van down Fourth Street. Johnson confirmed the woman was wearing the same clothing she had been wearing in the store video, but denied that it was her.

The State then asked her where she had been at that time, and she responded that she had been at Darrold's house:

> Q Do you remember where you were on September 18th at about 9:50?
>
> A: I thought that we were at Amy and Darrold's house.
>
> Q: And just so I'm clear, what you're telling us today, that your memory, as you sit there on the witness stand, is that about 9:50 on September 18th, you were at Amy and Darrold's house; is that what you said?
>
> A: I don't really remember where we were, or where I was.
>
> Q: Isn't that what you just told us, that you were at Amy's and Darrold's house?
>
> A: I don't remember.
>
> Q: Is that what you just told us?
>
> A: That's where I thought we were, at some friends' house, yes.[4]

Outside the presence of the jury, the prosecutor sought to impeach her using her statements to police. The court granted the motion, noting that after Johnson gave her contradictory testimony, "she apparently realized that she had been boxed in, and she tried to resort to her mantra that, I don't remember. It comes too late."[5]

The State then elicited the following testimony:

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[4] RP (Mar. 17, 2010) at 303–04.

[5] Id. at 308.

> Q: Ms. Johnson, do you remember telling Detective Vanderweyst on the evening of September 18 of 2009 that you, your boyfriend, the defendant, arrived at approximately Fourth and Alder in a white van?
>
> A: No.
>
> Q: Do you remember telling Detective Vanderweyst that after your boyfriend, the defendant, left that white van, that you got out of the van and walked down Fourth Street down to Main Street in Sultan?
>
> A: No. I don't recall saying that.[6]

Detective Vanderweyst subsequently testified that during the course of his interview with Lynette Johnson on September 26, 2009, she told him that she and Westom arrived in a white van at the area of Fourth Street and Alder, and that when Westom left the van, she also got out and walked down Fourth Street.

The jury convicted Westom as charged.

DISCUSSION

Westom contends that the State impermissibly called Johnson for the primary purpose of impeaching her with inadmissible hearsay and that she did not provide substantive evidence to make impeachment appropriate. We review a trial court's evidentiary rulings for an abuse of discretion.[7] A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds.[8]

Evidence Rule (ER) 607 allows the credibility of any witness to be challenged by any party, including the party calling the witness. Hearsay evidence is generally

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[6] Id. at 310-11.

[7] State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

[8] State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

inadmissible under ER 802.[9] A prior out-of-court statement is not hearsay and may be used to impeach if it casts doubt on the witness's credibility without regard to the truth of the matter asserted.[10]

But a party may not call a witness for the primary purpose of "'eliciting testimony in order to impeach the witness with testimony that would be otherwise inadmissible.'"[11] A party may impeach a witness only if her credibility is "a fact of consequence" to the action, meaning that the witness has provided testimony at trial that is injurious to a party to the matter.[12] If a witness does not testify at trial about the fact at issue, whether from lack of memory or another reason, there is no testimony to impeach.[13] Conversely, even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, there is a compelling need for the jury to know that this witness may be unreliable.[14]

Lynette affirmatively testified she thought she and Westom were at Darrold's

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[9] Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c).

[10] State v. Allen S., 98 Wn. App. 452, 467, 989 P.2d 1222 (1999) (citing ER 801(c)).

[11] Id. at 465 (quoting State v. Lavaris, 106 Wn.2d 340, 345, 721 P.2d 515 (1986)); see also State v. Hancock, 109 Wn.2d 760, 762–67, 748 P.2d 611 (1988).

[12] Allen S., 98 Wn. App. at 459–63.

[13] Id. at 463 (quoting State v. Newbern, 95 Wn. App. 277, 293, 975 P.2d 1041 (1999) (citing 5A Karl B. Tegland, Wash. Practice: Evidence § 256, at 310 (3d ed. 1989))).

[14] Id. ("'If the witness claims a total lack of memory and gives no substantive testimony on the factual issue at hand, a prior statement by the witness is inadmissible regardless of whether the lapse of memory is genuine because . . . there simply is no testimony to impeach.'" (alteration in original) (quoting 5A Tegland, supra § 256 at 310)).

house at the time of the fire. If true, that evidence would provide an alibi for Westom. The State had proper grounds to impeach her testimony using her prior inconsistent statements. Westom does not point to anything in the record that indicates the State called Johnson for the primary purpose of impeaching her. Rather, the State and the court proceeded cautiously and properly. The court did not abuse its discretion in permitting the impeachment.

Affirmed.

WE CONCUR: