

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 67615-6-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	UNPUBLISHED OPINION
JONNIE LEE LAY, JR.,)	
AKA JOHNNIE LAY,)	
AKA JOHNNY LAY,)	
)	
Appellant.)	FILED: December 3, 2012
)	

Leach, C.J. — Jonnie Lay Jr. appeals his conviction for domestic violence felony violation of a court order. He argues that the trial court’s decision to continue his trial date due to prosecutor unavailability violated his right to a speedy trial under CrR 3.3. He also challenges the court’s offender score calculation and alleges prosecutorial misconduct and ineffective assistance of counsel. Finding no merit in Lay’s arguments, we affirm.

FACTS

The State alleged that on August 21, 2010, Jonnie Lay Jr. punched Kirsten Bailey, his ex-girlfriend, in the face, threatened to kill her, and came toward her while brandishing a knife. When the police arrived, Bailey provided a written statement of the incident. The police also conducted a video interview with her in their cruiser. Bailey reported a similar story to medics at the scene

and at the hospital.

The State charged Lay by amended information with domestic violence felony violation of a court order, felony harassment, and assault in the second degree. The court arraigned him on November 16, 2010. Following the arraignment, Lay called Bailey from jail numerous times. During the calls, he advised her to change her story, telling her that he loved her and that he wanted to marry her. He also sent her a letter from jail. Later, Bailey wrote a letter to the prosecutor in which she recanted her original allegations that Lay assaulted her in her home and that she called 911 from a nearby restaurant. In the letter, she claimed that Lay's new girl friend hit her after Bailey encountered the couple at the restaurant.

Lay's original trial date was January 10, 2011. After a series of continuances and orders resetting his speedy trial expiration date under CrR 3.3, the trial began with pretrial motions on April 25, 2011. A number of the continuances were due to the deputy prosecuting attorney's scheduled vacation, medical leave, and scheduling conflicts with other trials.

At trial, Bailey testified consistent with her recantation letter. The prosecutor impeached her, using the prior inconsistent statements she made to police. At the close of the State's case in chief, the trial court dismissed the felony harassment and assault in the second degree charges because the only

evidence supporting those charges was Ms. Bailey's original statement, admitted for impeachment purposes only.

A jury convicted Lay of domestic violence felony violation of a court order. The trial court sentenced him to 50 months in prison based on a disputed offender score of six. Lay appeals.

STANDARD OF REVIEW

We review de novo an alleged violation of a defendant's right to a speedy trial.¹ We review for abuse of discretion a trial court's decision to grant a motion for a continuance in a criminal case.² We will not disturb the trial court's decision absent a clear showing that it is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.³

We also review de novo both a claim of ineffective assistance of counsel⁴ and a sentencing court's offender score calculation.⁵

ANALYSIS

The trial court set Lay's original trial date for January 10, 2011, and

¹ State v. Kenyon, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009) (citing State v. Carlyle, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996)).

² Kenyon, 167 Wn.2d at 135 (quoting State v. Flinn, 154 Wn.2d 193, 199, 110 P.3d 748 (2005)).

³ Kenyon, 167 Wn.2d at 135 (quoting Flinn, 154 Wn.2d at 199).

⁴ In re Pers. Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

⁵ State v. Moeurn, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010) (citing State v. Bergstrom, 162 Wn.2d 87, 92, 169 P.3d 816 (2007)).

established the speedy trial expiration date as February 10, 2011. Ultimately, pretrial motions began on April 25, 2011, with an expiration date of May 25, 2011. Lay claims that the trial court abused its discretion when it continued his trial date, denied his request that the case start with a different, newly assigned, prosecutor, and extended the speedy trial expiration date. He contends that the State did not sufficiently prove the assigned prosecutor's unavailability and that the court had a duty to make sure that the State responsibly managed its case-load assignments to individual deputy prosecutors. Essentially, he claims that case law requires that the trial court affirmatively determine the prosecutor's office responsibly managed its resources to maximize the availability of a deputy to try his case and make a record supporting that finding before it continued the case. Lay contends that the delay violated his speedy trial rights under CrR 3.3 but makes no claim of actual prejudice to the presentation of his defense. He does not assert that the court granted any continuance outside the rule's time limitations or that the delay violated his constitutional rights.

CrR 3.3(b)(1)(i) requires trial of a defendant detained in jail within 60 days after the commencement date. This was Lay's circumstance. However, a court order granting a party's motion for a continuance under CrR 3.3(f)(2) extends the allowable time for trial.⁶ The court may grant a party's motion to continue the

⁶ CrR 3.3(b)(5); CrR 3.3(e)(3).

trial to a specified date “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.”⁷ When the court grants a continuance, it “must state on the record or in writing the reasons for the continuance.”⁸

The prosecutor’s unavailability due to scheduling conflicts with other trials may constitute unforeseen or unavoidable circumstances warranting a continuance.⁹ Additionally, a prosecutor’s responsibly scheduled vacation provides a valid basis for granting a continuance.¹⁰ A court also acts within its discretion when it grants a continuance due to counsel’s illness.¹¹

When the trial court denied Lay’s motion to dismiss his case for violation of CrR 3.3, it observed that asking the court to assign a different deputy prosecutor “really does involve the Court in making determinations that are more appropriate for the prosecutor’s office to make itself.” In response to Lay’s assertion that the court should not have prioritized other cases over his own, the court stated, “I would go back to the State versus Chichester case and the comment the Court of Appeals made in that case about the trial court’s inherent ability to control its calendar, and that would include deciding what cases go out

⁷ CrR 3.3(f)(2).

⁸ CrR 3.3(f)(2).

⁹ State v. Williams, 104 Wn. App. 516, 522, 17 P.3d 648 (2001).

¹⁰ State v. Kelley, 64 Wn. App. 755, 767, 828 P.2d 1106 (1992).

¹¹ State v. Jones, 117 Wn. App. 721, 729, 72 P.3d 1110 (2003).

and when they go out.”¹²

Lay cites State v. Chichester¹³ and State v. Kelley¹⁴ in arguing that the trial court “has a duty to make sure the State is responsibly managing its caseload [sic].” In Chichester, we affirmed dismissal of a criminal case where the trial court concluded that the State did not follow the court’s instructions to solve a scheduling problem in a way that did not require another continuance because of its “purposeful disagreement with the court’s calendar policy, not a minor act of negligence by a third party.”¹⁵ Lay’s case did not present the trial court with remotely analogous circumstances.

In Kelley, the trial court conducted an evidentiary hearing before denying the defendant’s motion to dismiss for an alleged violation of his CrR 3.3 speedy trial rights. Lay contends that Kelley requires a similar hearing here. We disagree. We did not consider this issue in Kelley. Instead, after reviewing the extensive trial court record, we affirmed the trial court’s decision and recognized that it “will not be an unusual circumstance, particularly in our more heavily populated counties,” for the next most available prosecutor to already be at trial.¹⁶ In State v. Heredia-Juarez,¹⁷ we held that Kelley did not create a per se

¹² See State v. Chichester, 141 Wn. App. 446, 459, 170 P.3d 583 (2007) (“Control of a trial calendar ultimately rests with the court, not the litigants.”).

¹³ 141 Wn. App. 446, 170 P.3d 583 (2007).

¹⁴ 64 Wn. App. 755, 828 P.2d 1106 (1992).

¹⁵ Chichester, 141 Wn. App. at 456.

¹⁶ Kelley, 64 Wn. App. at 767.

requirement to reassign a case when a prosecutor becomes unavailable; instead, the court must consider “all relevant factors” when exercising its discretion to grant or deny a continuance.

The record amply demonstrates that the trial court appropriately considered the relevant factors and supports its determination that the prosecutor’s office acted in good faith in managing its case load. The court properly noted the reason for granting each continuance. Despite Lay’s contention that the court should have prioritized his “easy” case over other trials, the trial court has a responsibility to assure a speedy trial for all criminal defendants.¹⁸ Because the trial court does not consider one case in isolation from others in deciding whether to grant a continuance, “[t]he court can therefore properly consider the factors affecting all defendants whose cases are scheduled to go out for trial.”¹⁹ CrR 3.3 does not require the court to conduct full evidentiary hearings on each motion or to make detailed findings of fact supporting its reason for granting the continuance. With these considerations in mind, we hold that the trial court did not abuse its discretion in granting the continuances and did not deprive Lay of his right to a speedy trial under CrR 3.3.

Lay also challenges his offender score. The trial court generally

¹⁷ 119 Wn. App. 150, 155, 79 P.3d 987 (2003).

¹⁸ State v. Angulo, 69 Wn. App. 337, 343, 848 P.2d 1276 (1993).

¹⁹ Angulo, 69 Wn. App. at 343.

calculates an offender score by adding together the current offenses and prior convictions.²⁰ If the court determines that some of the prior offenses encompass the same criminal conduct, those offenses count as only one crime.²¹ Multiple crimes encompass the same criminal conduct if they involve the same criminal intent and were committed against the same victim at the same time and place.²²

In 1995, Lay was convicted in Thurston County of four counts of possession of stolen property. In the judgment and sentence, the court did not indicate that the offenses encompassed the same criminal conduct. In 2001, the Grays Harbor County Superior Court sentenced Lay on one count of assault in the third degree with sexual motivation. The judgment and sentence lists only one Thurston County conviction in the criminal history section and does not explain why the others are not listed. This prior conviction was scored as one offense. The judgment and sentence does not include any affirmative finding that one or more of the 1995 offenses constituted the same criminal conduct.

Here, the State recommended scoring the 1995 conviction as two points because three of the four counts included the same intent, conduct, and victim, and occurred on the same date. The fourth count involved a different victim and thus was not the same offense. Over Lay's objection, the trial court followed the

²⁰ RCW 9.94A.589(1)(a); Bergstrom, 162 Wn.2d at 92.

²¹ RCW 9.94A.525(5)(a)(i); Bergstrom, 162 Wn.2d at 92-93.

²² State v. Young, 97 Wn. App. 235, 240, 984 P.2d 1050 (1999).

State's recommendation.

Lay claims that RCW 9.94A.525(5)(a)(i) and State v. Mehaffey²³ required the trial court to score the 1995 convictions the same as the Grays Harbor County Superior Court did because its decision estops later sentencing courts from scoring those crimes differently. Lay does not dispute that some or all of the four counts from 1995 were not actually the same criminal conduct; rather, he limits his claim to the binding effect of the Grays Harbor County Superior Court judgment and sentence.

Neither RCW 9.94A.525(5)(a)(i) nor Mehaffey supports Lay's position. RCW 9.94A.525(5)(a)(i) addresses how a sentencing court scores multiple prior convictions and provides,

In the case of multiple prior convictions, for the purpose of computing the offender score, count all convictions separately, except:

(i) 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. The current sentencing court shall determine with respect to other prior adult offenses for which sentences were served concurrently or prior juvenile offenses for which sentences were served consecutively, whether those offenses shall be counted as one offense or as separate offenses using the "same criminal conduct" analysis found in RCW 9.94A.589(1)(a), and if the court finds that they shall be counted as one offense, then the offense that yields the highest offender score shall be used. The

²³ 125 Wn. App. 595, 600, 105 P.3d 447 (2005) (concluding that under the Sentencing Reform Act of 1981, chapter 9.94A RCW, "the previous court's same criminal conduct determination is final").

current sentencing court may presume that such other prior offenses were not the same criminal conduct from sentences imposed on separate dates, or in separate counties or jurisdictions, or in separate complaints, indictments, or informations.

Lay relies upon the sentence, "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." But his argument ignores the circumstances when a trial court makes this determination under RCW 9.94A.589(1)(a). This latter statute applies only to a trial court finding for current offenses for which a defendant is being sentenced.²⁴ This means that a court considering whether multiple prior convictions constitute the same criminal conduct is bound by a decision of the trial court that convicted the defendant of the prior offenses. This may reflect the legislature's determination that the court convicting a defendant of a crime has the most complete information about the facts and circumstances of that crime. However, because decisions made later by other courts in the context of deciding whether prior convictions constitute the same criminal conduct are not made under RCW

²⁴ RCW 9.94A.589(1)(a) provides in its relevant language, Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

9.94A.589(1)(a), the first sentence of RCW 9.94A.525(5)(a)(i) does not apply here. That sentence would only apply if the trial court in Thurston County had found that the offenses on which it sentenced Lay constituted the same criminal conduct.

In Mehaffey, the defendant argued that the current sentencing court should have presumed that the previous sentencing court found his prior offenses to be the same criminal conduct from the fact that the prior court had counted them as one offense.²⁵ Division Three declined to address this argument because of the meager record before it and decided the case on an alternate basis.²⁶ Thus, it provides no authority for Lay's claim that the fact that the Grays Harbor County Superior Court counted his Thurston County offenses as one offense establishes that it found those offenses to constitute the same criminal conduct. As in Mehaffey, we are unwilling to engage in this suggested presumption, particularly when the Grays Harbor County judgment and sentence lists only one of the Thurston County convictions, without explanation for the omission of the others, and the sentence was the result of a plea bargain, whose terms were unknown to the trial court.

At sentencing, the trial court concluded that the 2001 offender score

²⁵ Mehaffey, 125 Wn. App. at 601.

²⁶ Mehaffey, 125 Wn. App. at 601.

calculation was improper. A sentencing court acts without authority under the Sentencing Reform Act of 1981 when it imposes a sentence based upon a miscalculated offender score.²⁷ We conclude that the trial court did not err when it declined to follow the Grays Harbor County Superior Court. The 1995 sentence supports applying the State's recommendation to score the crimes as two points, rather than one.

For the first time on appeal, Lay also alleges prosecutorial misconduct. He claims that the prosecutor acted improperly when he (1) inappropriately referred to impeachment evidence, (2) stated that Lay was currently in jail, and (3) attempted to "sway" Bailey's recanted testimony with Lay's letter and telephone calls from jail.

To succeed on a claim of prosecutorial misconduct made for the first time on appeal, the appellant must show that the prosecutor's behavior was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury."²⁸ To prove prosecutorial misconduct, an appellant must show both improper conduct and resulting prejudice.²⁹ Conduct is not flagrant and ill-intentioned where a curative instruction could have cured any error.³⁰ However, "the cumulative effect of

²⁷ In re Pers. Restraint of Johnson, 131 Wn.2d 558, 568, 933 P.2d 1019 (1997).

²⁸ State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

²⁹ State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009).

repetitive prejudicial prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect.”³¹ Prejudice exists where there is a substantial likelihood that the misconduct affected the verdict.³² We review a prosecutor’s comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.³³

Counsel may use a witness’s prior inconsistent statement to impeach his or her credibility.³⁴ However, such statements cannot be used to argue that the facts contained in the prior statement are substantively true.³⁵ Under ER 613, an examiner lays proper foundation to introduce evidence of a prior inconsistent statement where the examiner provides the declarant an opportunity to explain or deny the statement, either on cross-examination or after introducing extrinsic evidence.³⁶ If a witness responds to foundation questions by acknowledging making the prior inconsistent statement, extrinsic evidence of the statement is not admissible.³⁷

³⁰ State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011), petition for review filed, No. 86790-9 (Wash. Dec. 8, 2011).

³¹ Walker, 164 Wn. App. at 737.

³² State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006).

³³ State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

³⁴ State v. Garland, 169 Wn. App. 869, 885, 282 P.3d 1137 (2012).

³⁵ Garland, 169 Wn. App. at 885.

³⁶ State v. Johnson, 90 Wn. App. 54, 70, 950 P.2d 981 (1998).

³⁷ State v. Dixon, 159 Wn.2d 65, 76, 147 P.3d 991 (2006).

The trial court permitted the State to use Bailey's oral and written statements to police officers to impeach her credibility, but not as substantive evidence. On cross-examination, Bailey either denied making those statements to the police or claimed not to remember making them. Once it was clear that Bailey was not going to testify to the contents of the prior statements, the prosecutor confronted her with the written statement she made to police shortly after the incident as well as the audio from the video interview in the police car.

During closing, the prosecutor talked about the statements that Bailey made to officers after the incident. In discussing this impeachment evidence, he said that the prior statements reflected her credibility. He referred to them in terms of "it's a time where there's no reason to change the situation, change the story," and "what's credible."

When we examine the prosecutor's comments in the context of his entire closing, the prosecutor did not personally vouch for the witness's credibility, which would have been improper.³⁸ Instead, he invited the jury to infer that statements made closer in time to the incident were more credible than Bailey's recantation, which followed her conversations with Lay while he was in jail. A prosecutor has reasonable latitude to draw inferences from the evidence, including inferences about witness credibility.³⁹ Here, the prosecutor's remarks

³⁸ State v. Gregory, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

³⁹ Gregory, 158 Wn.2d at 810.

to the jury about credibility were drawn from the evidence. Because the prosecutor properly noted that the evidence concerned credibility, the references were not improper.

Despite Lay's claim that the prosecutor improperly stated during his closing argument that Lay was currently in jail, the record does not support that assertion. In his closing argument, the prosecutor stated that Lay was in jail at the time of his arraignment and when he called Bailey and told her to change her story. The prosecutor did not tell the jury that Lay was in jail during trial.

The prosecutor's use of Lay's letter and phone calls from jail was not improper. The court admitted Lay's statements in the phone calls as statements of a party opponent. It admitted Bailey's statements in the phone calls to impeach her credibility and gave a contemporaneous limiting instruction regarding that evidence. Lay did not object when the prosecutor discussed the letter. The prosecutor properly used the statements in the phone calls and the letter to impeach Bailey's credibility. Therefore, Lay's prosecutorial misconduct claim fails.

Finally, Lay contends that he received ineffective assistance of counsel because counsel (1) failed to object when the prosecutor introduced extrinsic evidence to impeach Bailey's credibility, (2) failed to request a limiting or cautionary instruction to prevent the jury from considering impeachment

evidence as substantive evidence, and (3) failed to object to the prosecutor's use of impeachment evidence as substantive evidence. We reject these arguments.

To prevail, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness based on a consideration of all the circumstances and (2) that the deficient performance prejudiced the trial.⁴⁰ The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct.⁴¹ To show prejudice, the defendant must prove that but for the deficient performance, there is a reasonable probability that the outcome would have been different.⁴²

The State introduced extrinsic evidence of Bailey's prior inconsistent statements in the written statement and the police video in order to impeach her. Lay claims that Bailey admitted making the prior statements, so defense counsel was ineffective because he failed to object to the introduction of extrinsic evidence. He asserts that Bailey "initially stated in answer to some questions by the prosecutor that she was unsure or could not recall whether or not she made the statements, but then freely noted that she had made each prior statement."

⁴⁰ State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).
⁴¹ State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).
⁴² In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

Thus, he claims that the State should not have introduced extrinsic evidence of the statements. However, Lay also acknowledges that a witness need not directly deny making the statement to permit extrinsic evidence. He notes that under State v. Newbern,⁴³ denial includes the witness's inability to remember making the prior inconsistent statement.

Under ER 613, discussed above, if the witness admits making the prior inconsistent statement, extrinsic evidence is inadmissible.⁴⁴ Despite Lay's argument to the contrary, Bailey was an evasive witness who refused to testify to the statements or claimed that she could not recall making them. Because the State properly used the extrinsic evidence to impeach Bailey, counsel's performance was not deficient when he did not object to the State's use of that evidence.

Lay also argues that counsel was ineffective when he failed to request a limiting or cautionary instruction that the jury could consider Bailey's written and oral statements to police only to assess her credibility. The court gave a contemporaneous limiting instruction concerning other evidence but did not do so for those statements. However, the final jury instructions included a general limiting instruction:

Evidence has been introduced in this case on the subject of

⁴³ 95 Wn. App. 277, 293, 975 P.2d 1041 (1999).

⁴⁴ Dixon, 159 Wn.2d at 76.

the defendant's past acts, statements, or threats for the limited issue of evaluating the credibility of the testimony of Kirsten Bailey. You may not consider it for any other purpose. Any discussion of the evidence during your deliberation must be consistent with this limitation.

The evidence of the defendant's past acts, statements or threats is not on its own sufficient to prove the defendant guilty of any crime charged in the Information. Bear in mind as you consider this evidence that at all times the State has the burden of proving that the defendant committed each of the elements of the offense charged in the Information. The defendant is not on trial for any act, conduct, or offense not charged in the Information.

"Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice."⁴⁵ Even if Lay was entitled to an instruction and counsel was deficient in failing to request one, Lay has not shown prejudice. Although it is preferable for the trial court to give a limiting instruction contemporaneously with the evidence, the court acts within its discretion when it gives a limiting instruction at the close of all the evidence.⁴⁶ Here, the court's instruction at the close of all evidence referred to all past statements, which includes the evidence at issue. Because the court presumes that the jury follows its instructions⁴⁷ and Lay has not shown otherwise, he fails to demonstrate that a contemporaneous limiting instruction would have changed

⁴⁵ State v. Thompson, 169 Wn. App. 436, 495, ___ P.3d ___ (2012), petition for review filed, No. 87909-5 (Wash. Sept. 26, 2012).

⁴⁶ State v. Ramirez, 62 Wn. App. 301, 304, 814 P.2d 227 (1991).

⁴⁷ Carnation Co. v. Hill, 115 Wn.2d 184, 187, 796 P.2d 416 (1990).

the result of the trial.

Finally, Lay argues that defense counsel was ineffective when he failed to object to the prosecutor's references to the impeachment evidence during the State's closing. As discussed above, the prosecutor referred to the impeachment evidence in closing in order to question Bailey's credibility. Because the prosecutor's comments were not improper, defense counsel's failure to object was not unreasonable.

CONCLUSION

The trial court acted within its discretion when it continued Lay's trial date, and Lay fails to show any resulting prejudice from the delay. It correctly calculated Lay's offender score and properly rejected the earlier incorrect calculation. The prosecutor's use of and references to impeachment evidence were not improper, and Lay does not show resulting prejudice. Finally, Lay fails

NO. 67615-6-I / 20

to show that counsel's performance was either deficient or prejudicial. For these reasons, we affirm.

Leach, C. J.

WE CONCUR:

Jan, J.

Appelwick, J.