IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DEMARCO VENTURA MCGOWN, Appellant.	No. 39549-5-II UNPUBLISHED OPINION

Van Deren, J. — Demarco Ventura McGown appeals his convictions and his sentence for first degree assault with a firearm sentence enhancement (count I), drive by shooting (count II), and first degree unlawful possession of a firearm (count III). He argues that the trial court improperly admitted witnesses' out-of-court statements, refused to give his proposed limiting instruction, and that his convictions for first degree assault and drive by shooting were the same criminal conduct for offender score calculation purposes. We affirm.

FACTS

On the evening of September 4, 2008, 32 year old Billy-Ray Griffin Jr. was at El Hutchos, a neighborhood restaurant and bar located at 62nd and East McKinley Avenue in Tacoma, Washington. He had a drink and was leaving for the night. As Griffin walked across the parking lot to his van, a car pulled up. Griffin described the car as a dark colored "Dodge Neon or

something like that." Report of Proceedings (RP) at 375. The driver, who Griffin identified as Derrick Johnson, called out, "Is that BP?," a name Griffin sometimes used. RP at 367. Johnson then told the person sitting in the front passenger seat of the car to shoot Griffin. Griffin said that he saw the man in the front passenger seat point a semiautomatic, .45 caliber handgun out the window and fire four shots, three of which hit Griffin.

Griffin had never seen the person sitting in the front passenger seat before, but he described the shooter as a young, "fair skinned," black man with long braided hair, a "pretty distinctive nose that was kind of long and skinny," and "bug eyes." RP at 371, 368, 490. Griffin testified that the man was sitting down, so he could not tell how tall he was. When asked if he saw the person who shot him in the courtroom, Griffin initially said, "No," but then stated, "I mean, I don't know." RP at 369. He explained, "I don't know the person that shot me, never have seen him before." RP at 369. Griffin said that it was dark at the time, that he had been shot shortly after first seeing this man, that he "was on the verge of dying" and he was "rushed to the emergency room" soon thereafter.[1] RP at 369.

Sioeli Laupati was driving past El Hutchos when he saw a man talking to people in a black car in the parking lot. Laupati heard gunshots, saw the car "take off," and saw the man who had been talking to the people in the car clutching his stomach. RP at 568. The shots came from the passenger side of the car. Laupati got out of his vehicle to help the man, confirmed that the man

[1] Griffin was shot two times in the chest and once in the stomach and he was taken to a hospital where he underwent surgery. He was bending over talking to someone in the car when the shots entered his chest and stomach, travelled diagonally from top to bottom through his torso, and exited his back and sides, damaging numerous internal organs along the way. The surgeon who treated Griffin described Griffin's injuries as "obviously life-threatening." RP at 535. Griffin's injuries required an initial one month hospital stay and thereafter he was repeatedly in and out of the hospital with various complications.

had been shot, and stayed with the man until the police arrived.

Kathryn Little was at the El Hutchos bar talking to a friend on the evening of the shooting. The woman to who Little was speaking heard gunshots and ran outside. When Little went out to check on her, she saw a man who had been shot stumbling towards her. Little and others got the man a chair and tried to keep him awake because he kept losing consciousness. The man pulled up his shirt to reveal his wounds and Little observed "a couple bullet holes." RP at 350.

On September 4, 2008, Tacoma Police Officer Patrick Patterson was on patrol with his partner, Tacoma Police Officer Frisbie,[2] in the area of El Hutchos. Patterson explained that this area has more problems than other parts of the city, so the officers took particular notice of a silver Chrysler PT Cruiser and a black Dodge Intrepid parked next to El Hutchos. The officers observed that the vehicles were occupied, and noted the license plate numbers before leaving the area. About five minutes later, the officers were notified about the El Hutchos shooting.

When the officers returned to the bar, neither the PT Cruiser nor the Dodge Intrepid were there, and there was a small crowd of people outside. The people pointed to a man who had apparently been shot with his shirt up and blood on his chest. The man, later identified as Griffin, was seated in a chair and was fading in and out of consciousness. He was transported by ambulance to the hospital.

Patterson communicated the information regarding the vehicles he and Frisbie had seen earlier to other units while Frisbie tried to gather information from the people in the crowd, who seemed afraid and uncooperative. Shortly after Patterson broadcast the vehicle information, other officers found and stopped the PT Cruiser.

[2] The record does not contain Frisbie's first name.

Patterson reviewed the bar's surveillance video with the restaurant staff. The video showed Griffin leaning over, apparently speaking with the occupants of the Dodge Intrepid, and then falling over. Patterson stored a copy of the surveillance video on a portable data storage device and gave it to a police forensic technician.

Dorothy Steadman was driving the silver PT Cruiser which was parked at El Hutchos. She testified that she was waiting to pick up her friend who was in the bar when she heard the squealing of tires and saw a dark car behind hers. Steadman said she heard three or four gunshots from that car, saw the flashes in her rearview mirror, and she observed the car drive away after the shots were fired. She saw the shots come from the passenger side of the vehicle. Steadman also left El Hutchos, but she was soon stopped by police officers.

Tacoma Police Detective John Ringer investigated the shooting. Through the license plate information noted by the patrol officers, the police traced the suspect vehicle to Susie McGown, its registered owner. Ringer interviewed Susie McGown, who is McGown's mother, and he asked her the location of the Dodge Intrepid. She did not know where her car was when Ringer interviewed her, but she identified those who had borrowed it as Derrick Johnson, Demarco McGown, Monteece Brewer, and Brennan Morford.

Ringer was not able to speak with Griffin until almost a month after the shooting due to the severity of Griffin's wounds. When Ringer finally spoke with Griffin in a hospital intensive care unit, Griffin said that he recognized only one person in the car, Derrick Johnson,[3] the driver. Griffin was able to describe only the driver and front seat passenger because he had not seen the

[3] Griffin knew Johnson only by his street name, "Top Dog," but later identified Johnson as the driver after viewing a photo montage. RP at 481.

two individuals in the back seat well enough to identify them.

Ringer asked Griffin to view photo montages that included Johnson, McGown, Brewer, and Morford, with one photo montage for each of them. Griffin identified Johnson as the driver from the first montage and McGown from the second montage as the front seat passenger and shooter.[4] Griffin was not able to identify either of the two back seat occupants from the photo montages that included Morford and Brewer.

Ringer contacted Morford on September 29, 2008. Morford was cooperative and agreed to be interviewed after Ringer advised him of his *Miranda* rights.[5] After an initial interview, Morford provided a recorded statement. Morford repeatedly identified McGown as the shooter in the initial interview, after reviewing a photo montage, and later in his recorded statement. Ringer later testified that Morford never referred to Johnson as the shooter.

On September 27, 2008, Lakewood Police Officer Nicholas McClelland stopped McGown for speeding in the same Dodge Intrepid. McGown had no driver's license and McClelland took him into custody. Brewer was in the car with McGown; however, he fled and other police officers chased and apprehended him.

Following Brewer's arrest, Ringer interviewed him at the Pierce County jail about the El Hutchos shooting. Ringer testified that Brewer stated that McGown was with Brewer and two other friends in the Dodge Intrepid on the night Griffin was shot.

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[4] Detective Ringer testified that Griffin said he was "40 percent" sure that the person he picked from the second photo montage (McGown) was the shooter. RP at 495. Ringer said Griffin explained that the person in the photograph closely resembled the shooter but Griffin remembered him as perhaps looking a little younger. At trial, Griffin testified that he told Ringer he was "90 percent" sure about his identification of the shooter from the photo montage. RP at 383.

[5] *Miranda v. Arizona*, 384 U.S. 436, 444–45, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The State charged McGown with first degree assault with a firearm sentence enhancement (count I), drive by shooting (count II), and first degree unlawful possession of a firearm (count III).[6] Before jury selection, McGown successfully moved to exclude gang evidence.

Numerous witnesses testified to events as above described. The State also called Morford, who testified that he witnessed the shooting at El Hutchos. Morford said that he was seated in the back seat of the Dodge Intrepid when the shooting occurred. He testified that the car probably belonged to McGown's mother, that Johnson was driving, and that he and Brewer were in the backseat. Morford also testified that the weapon used to shoot Griffin was a semiautomatic handgun.

Morford then testified that Johnson, not McGown, shot Griffin. He said that both he and Brewer were in the back seat "drinking some liquor [and] smoking weed" during the incident, and neither he nor Brewer shot Griffin. RP at 242. Morford denied that McGown was in the car and that there were any other occupants in the car. He said that no one was in the front passenger seat.

Morford testified that Johnson said something to the effect of, "Just shoot that nigger," or, "Just pop that nigger," and that Johnson said that to himself. RP at 255. Morford later acknowledged that this did not "make a whole lot of sense," and that he had given a previous statement to police and a recorded statement identifying McGown as the shooter. RP at 292. He said that in all other aspects his prior statement was true, but that he had lied about the shooter's identity because he was afraid of Johnson and Johnson told him to put the blame on McGown.

Brewer also testified that he, Johnson, Morford, and McGown "may have been" together

[6] The State charged Morford and Brewer as codefendants but dismissed their cases prior to McGown's trial. Johnson was never apprehended.

in the car on the evening of September 4, 2008. RP at 409. He acknowledged that Johnson was driving. Brewer denied remembering anything else about that evening. He did say that he remembered a telephone conversation that he had with Ringer on September 9, 2008. Brewer acknowledged that he had made prior statements to Ringer, but he claimed that he could not remember the night in question and said that "Detective Ringer has a real bad habit of putting stuff in, things that wasn't said." RP at 419.

Ringer testified regarding the content of Morford's and Brewer's prior statements. The trial court admitted Morford's tape recorded statement, but admonished the jury to consider it only for purposes of assessing Morford's credibility. Defense counsel acknowledged that Ringer's references to out-of-court statements regarding identification were "clearly allowable," but he objected to Ringer's references to other prior statements as hearsay. RP at 485. In response to defense counsel's hearsay objections, the State repeatedly explained, where appropriate, that the testimony was being offered for impeachment purposes, and the trial court repeatedly admonished the jury, where appropriate, to consider Ringer's testimony for impeachment purposes only.

The State proposed a limiting jury instruction, based on WPIC 5.30[7] and consistent with the trial court's earlier oral admonition, that the use of Morford's recorded interview was for purposes of credibility only; the defense proposed a limiting instruction that directed the jury to consider all out-of-court statements made by Brewer and Morford as nonsubstantive evidence. The trial court gave the State's proposed instruction.

The jury returned guilty verdicts on all counts as charged. The jury also returned a special

[7] 11 Washington Pattern Jury Instructions: Criminal 5.30, at 180 (3d ed. 2008) (WPIC).

verdict finding McGown was armed with a firearm when he committed the first degree assault (count I).

The trial court sentenced McGown to 236 months plus a 60 month firearm sentence enhancement (296 months confinement) on count I, 89 months on count II, and 54 months on count III; all standard range sentences to be served concurrently. The court also imposed 24 to 48 months in community custody on count I and 18 to 36 months in community custody on count II. McGown appeals.

ANALYSIS

I. Admission of Evidence

McGown argues that the trial court erred in allowing the prosecution to play Morford's tape recorded statement at trial and in allowing Ringer to testify about what Morford and Brewer said in their out-of-court statements because the statements were inadmissible hearsay.[8] We disagree.

A. Standard of Review

"Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and we review them only for manifest abuse of discretion. An erroneous ruling with respect to such questions requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of trial." *State v. Aguirre*, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010) (citation omitted). And, while the trial court's interpretation of the rules of evidence is a question of law that we review de novo, we,

[8] McGown repeatedly claims trial court error related to its admission of evidence. The proper standard of review is abuse of discretion. *See State v. Aguirre*, 168 Wn.2d 350, 361-62, 229 P.3d 669 (2010). Thus, our holdings use the abuse of discretion language.

nevertheless, review the court's application of the rules to particular facts for abuse of discretion. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 642, 145 P.3d 406 (2006).

B. Identification Evidence—ER 801(d)(1)(iii)

McGown admits that the portions of the statements by Morford and Brewer addressing identity were properly admitted. "[A]ny statements by Morford or Brewer identifying who McGown was were clearly admissible." Br. of Appellant at 22. But McGown argues that, while Morford's and Brewer's prior out-of-court statements were admissible to identify McGown, their identification of McGown as "the shooter" went too far.[9] Br. of Appellant. at 22-23.

ER 801(d)(1)(iii) provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is one of identification of a person made after perceiving the person. "'A pretrial identification of the accused is admissible as substantive evidence of identity despite the witness's inability to make an in-court identification.'" *State v. Grover*, 55 Wn. App. 923, 930, 780 P.2d 901 (1989) (quoting *State v. Hendrix*, 50 Wn. App. 510, 514, 749 P.2d 210 (1988)). "Uncertainty or inconsistency in identification testimony 'goes only to its weight, not its admissibility.'" *Grover*, 55 Wn. App. at 930 (quoting *State v. Vaughn*, 101 Wn.2d 604, 610, 682 P.2d 878 (1984)).

In *Grover*, a detective testified that he had interviewed a witness at the scene of a robbery and that the witness identified the codefendants "as the robbers." *Grover*, 55 Wn. App. at 931. The trial court admitted the detective's testimony under ER 801(d)(1)(iii). The court held that "extrajudicial statements of identification are not hearsay even though the declarant fails to identify the defendant at trial." *Grover*, 55 Wn. App. at 931. Such evidence "does not present

[9] Brewer's prior statement placed McGown in the car on the night of the incident.

the dangers of hearsay as long as the witnesses are 'present in court and subject to . . . cross-examination.'" *Grover*, 55 Wn. App. at 932 (alteration in the original) (quoting *State v. Simmons*, 63 Wn.2d 17, 22, 385 P.2d 389 (1963)).

Moreover, ER 801(d)(1)(iii) "does not require that the statements be elicited from the declarant but may be admitted through testimony of another person who heard or saw the identification." *Grover*, 55 Wn. App. at 932. Accordingly, *Grover* held that admission of the officer's testimony recounting the eye witness's identification of the defendants violated neither the constitutional right of confrontation nor ER 801(d)(1)(iii). *Grover*, 55 Wn. App. at 934. *See also United States v. Owens*, 484 U.S. 554, 564, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) (neither the Confrontation Clause[10] nor Federal Rule of Evidence 802 (prohibiting admission of hearsay) is violated by admission of an identification statement of a witness who is unable, because of a memory loss, to testify concerning the basis for the identification).

As in *Grover*, Ringer's testimony about Morford's and Brewer's out-of-court statements identifying McGown as the shooter were properly admissible under ER 801(d)(1)(iii). For the same reason, the trial court did not abuse its discretion in admitting Morford's and Brewer's prior statements under ER 801(d)(1)(iii) to the extent that they addressed the shooter's identification. *Grover*, 55 Wn. App. at 930.

C. Impeachment Evidence—ER 607

McGown also argues that the identification exception to the hearsay rule cannot operate so broadly as to sanitize the admissibility of other portions (i.e., those statements not specifically addressing identity) of Morford's and Brewer's out-of-court statements and Morford's recorded

[10] U.S. Const. amend. VI.

statement. But the other portions of Morford's and Brewer's out-of-court statements were properly admitted for impeachment purposes. And the trial court admonished the jury before it heard Morford's recorded statement that the statement was to be considered only for the purpose of assessing Morford's credibility.[11]

"The admissibility of evidence offered to impeach the credibility of a witness is governed by ER 607, which provides that '[t]he credibility of a witness may be attacked by any party, including the party calling [the witness].'"[12] *State v. Lavaris*, 106 Wn.2d 340, 344, 721 P.2d 515 (1986) (first alteration in original). "In general, a witness's prior statement is admissible for impeachment purposes if it is inconsistent with the witness's trial testimony." *State v. Newbern*, 95 Wn. App. 277, 292, 975 P.2d 1041 (1999). The reason for using prior inconsistent testimony to impeach is to allow an adverse party to show that the witness tells different stories at different times and, from this, the jury may disbelieve the witness's trial testimony. *Newbern*, 95 Wn. App. at 293. The *Newbern* court explained:

> If a witness does not testify at trial about the incident . . . there is no testimony to impeach. But conversely, even if a witness cannot remember making a prior inconsistent statement, if the witness testifies at trial to an inconsistent story, the need for the jury to know that this witness may be unreliable remains compelling.

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[11] The trial court gave the following oral limiting instruction to the jury before playing the tape recording:

> Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of the taped statement of Brennan Morford and may be considered by you only for the purpose of judging or assessing his credibility. You may not consider it for any other purpose.
>
> Any discussion of the evidence during your deliberations must be consistent with this limitation.

RP at 509-10.

[12] ER 607 was amended September 1, 1992, after *Lavoris* was published. We have updated the language in the quotation to be consistent with the current court rule.

95 Wn. App. at 293 (citations omitted).

In *Newbern*, the witness gave a statement, as well as a subsequent tape recorded statement, to an investigating detective that described how her boyfriend pointed a gun at her and then shot her in the chest when she refused to get off the telephone. 95 Wn. App. at 280-81. At trial, the witness testified that the shooting was an accident and that she had been untruthful in her prior statement in order "to 'get back' at" her boyfriend. *Newbern*, 95 Wn. App. at 282. Over Newbern's hearsay objection, the trial court permitted the detective to testify about his initial interview with the victim during which she described how her boyfriend shot her. The trial court also admitted the recorded interview over the defendant's hearsay objection. We held that, because the victim/witness testified at trial inconsistently with her prior statement, the trial court did not err[13] in allowing the State to use her prior statements to impeach her trial testimony. *Newbern*, 95 Wn. App. at 293-94. We hold that the trial court here did not abuse its discretion in admitting Morford's and Brewer's prior statements to Ringer for impeachment purposes after Morford testified at trial that his prior statement was untrue and after Brewer testified at trial that he could not remember the shooting.

D. Prior Inconsistent Statements—ER 801(d)(1)(i)

McGown further argues that Morford's and Brewer's statements to Ringer were not admissible as prior inconsistent statements because they were not made under oath as required by ER 801(d)(1)(i) and, in any event, the statements are mostly *consistent* with Morford's and Brewer's trial testimony, differing primarily in the identity of the shooter. McGown's reliance on ER 801(d)(1)(i) and our application of that rule in *State v. Sua*, 115 Wn. App. 29, 60 P.3d 1234

[13] The proper standard of review is abuse of discretion. *Aguirre*, 168 Wn.2d at 361-62.

(2003) is misplaced.

ER 801(d)(1)(i) states that a prior statement of a testifying witness subject to cross-examination is not hearsay if the statement is "inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition." In *Sua*, we declined the State's invitation to hold that ER 801(d)(1)(i) permitted the admission of two trial witnesses' out-of-court written statements "to prove the truth of the matters asserted therein." 115 Wn. App. at 47. *Sua* addressed the requirements of ER 801(d)(1)(i) when admitting *substantive evidence* and acknowledged that an out-of-court statement may be used to *impeach the credibility* of the person who made it. 115 Wn. App. at 43 & n.32; *see also State v. Williams*, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995) (to the extent that a witness's own prior inconsistent statement is offered to cast doubt on his or her credibility, it is not offered to prove the truth of the matter asserted, it is not hearsay, and it may be admissible for impeachment purposes).

Again, *Newbern* provides the appropriate analysis. Newbern claimed that the trial court erred[14] when it admitted statements that the victim/witness made during an interview because many of those statements were consistent with her subsequent trial testimony and she admitted at trial that the inconsistent statements were untrue. *Newbern*, 95 Wn. App. at 294. We explained that "[t]o be admissible for impeachment purposes, a witness's in-court testimony need not directly contradict the witness's prior statement." *Newbern*, 95 Wn. App. at 294. Inconsistency is determined, "'not by individual words or phrases alone, but the *whole impression or effect* of what has been said or done.'" *Newbern*, 95 Wn. App. at 294 (quoting *Sterling v. Radford*, 126

[14] It apparently bears repeating that the standard of review is abuse of discretion.

Wash. 372, 375, 218 P. 205 (1923)). "'It is enough if the proferred testimony, taken as a whole, either by what it says or by what it omits to say affords some indication that the fact was different from the testimony of the witness whom it sought to contradict.'" *Newbern*, 95 Wn. App. at 294 (internal quotation marks omitted) (quoting *United States v. Gravely*, 840 F.2d 1156, 1163 (4th Cir.1988)). The focus is on aiding the fact finder in evaluating the credibility of the witness's testimony. "[T]he jury is better able to determine the value and weight to give a witness's trial testimony if it knows that the witness expressed contrary views while the event was still fresh in the witness's memory and before the passage of time created opportunities for outside influence to distort the statement." *Newbern*, 95 Wn. App. at 295.

In *Newbern*, the victim/witness's trial testimony was directly contrary to the critical portions of the statements that she made to the investigating detective three months earlier, shortly after the shooting. 95 Wn. App. at 295. The inconsistencies in her accounts of what transpired were important, not because one version of the events was more believable than the other, but because they raised serious questions about the witness's credibility and perceptions. *Newbern*, 95 Wn. App. at 295. Under such circumstances, we held that the trial court did not abuse its discretion in admitting the victim/witness's prior inconsistent and consistent statements for impeachment purposes. *Newbern*, 95 Wn. App. at 295. The same is true here.

We hold, consistent with *Newbern*, that given the inconsistencies between Morford's and Brewer's trial testimony and their prior statements to Ringer, the trial court did not abuse its discretion in admitting evidence of the prior statements for impeachment purposes. And further, consistent with *Grover*, those portions of Morford's and Brewer's out-of-court statements that addressed identification of the shooter were admissible as substantive evidence. Thus, McGown's

challenges to the trial court's admissibility determinations fail.

II. Limiting Instruction

McGown contends that the trial court erred in not giving his proposed limiting instruction relating to Morford's and Brewer's prior statements. We disagree.

> A trial court has discretion to decide how instructions are worded. Moreover, the instructions must be read as a whole and a requested instruction need not be given if the subject matter is adequately covered elsewhere in the instructions. Finally, instructions are sufficient if they permit counsel to satisfactorily argue his theory of the case to the jury.

State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988) (citations omitted); *see also State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003) (parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case).

"We review a challenged jury instruction de novo." *State v. Ridgley*, 141 Wn. App. 771, 779, 174 P.3d 105 (2007). When reviewing an instruction, we consider it in the context in which it was presented. *See State v. Hutchinson,* 135 Wn.2d 863, 885, 959 P.2d 1061 (1998) (jury is presumed to read instructions as a whole, *in light of all other instructions*). The trial court does not err in refusing to give a proposed instruction that is incorrect in any material particular. *State v. Robinson*, 92 Wn.2d 357, 361, 597 P.2d 892 (1979).

The trial court's written limiting instruction at the conclusion of evidence stated:

> Evidence has been admitted in this case for a limited purpose. This evidence consists of a tape recorded interview of Brennan Morford conducted by Det[ective] John Ringer and may be considered by you only for the purpose of impeachment. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

CP at 82. McGown's proposed instruction read:

> Evidence has been introduced in this case during the testimony of Detective Ringer consisting of a taped statement of Brennan Morford, prior out of court statements

> of Brennen Morford, and prior out of court statements of Monteece Brewer. This evidence was introduced for the limited purpose of impeachment. You must not consider this evidence for any other purpose.

CP at 87.

McGown's proposed instruction limited the jury's use of *all* out-of-court statements by Morford and Brewer to impeachment only. As discussed above, the portions of those statements addressing the identity of the shooter were admissible as substantive evidence.[15] *Grover*, 55 Wn. App. at 930. Because McGown's proposed instruction was materially incorrect, the trial court did not err in declining to give it. *Robinson*, 92 Wn.2d at 361. We thus affirm the trial court's decision declining to give McGown's proposed limiting instruction.[16]

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[15] As noted, Morford's prior statement identified McGown as the shooter. Brewer's prior statement also identified McGown as one of the occupants of the car, and other evidence showed shots were fired from that car. In making hearsay objections during Ringer's testimony, defense counsel noted at one point that he was not objecting to Ringer's reference to out-of-court statements of a testifying witness for "identification purposes," which defense counsel acknowledged was "clearly allowable." RP at 485.

[16] The trial court's limiting written instruction was not improper in light of the circumstances of the case and the record. While the written instruction limited the jury's use of Morford's recorded statement to impeachment purposes, it did not contradict, negate, or alter the trial court's repeated admonitions to the jury throughout Ringer's testimony to consider the detective's references to prior statements of Morford and Brewer that did not address identification for impeachment purposes only. While it is within a trial court's discretion to choose to wait and give a limiting instruction at the close of all of the evidence, "it is usually preferable to give a limiting instruction contemporaneously with the evidence at issue." *State v. Ramirez*, 62 Wn. App. 301, 304, 814 P.2d 227 (1991). Such contemporaneous limiting instruction may be given orally and need not be reduced to writing. *Moore v. Mayfair Tavern, Inc*., 75 Wn.2d 401, 409, 451 P.2d 669 (1969). Here, the trial court repeatedly gave appropriate limiting instructions throughout Ringer's testimony. We presume that the jury followed the trial court's instructions, including the court's oral admonitions to the jury during the trial. *See State v. Warren*, 165 Wn.2d 17, 25-26, 28, 195 P.3d 940 (2008).

McGown also argues that the improper admission of Morford's and Brewer's prior statements requires reversal of his convictions. He relies on *State v. Justesen*, 121 Wn. App. 83, 96, 86 P.3d 1259 (2004) for the proposition that a nonconstitutional evidentiary error requires reversal if the error, within reasonable probability, materially affected the outcome of the trial. He argues that the State's case was weak because Griffin was unable to identify McGown at trial as

III. Same Criminal Conduct

McGown also argues that, even if reversal of his conviction is not warranted, remand for resentencing is required because his convictions for first degree assault and drive by shooting under the facts of this case encompass the same criminal conduct and thereby require recalculation of his offender score and resentencing. He additionally argues that his trial counsel was ineffective for failing to raise the same criminal conduct issue at his sentencing.[17]

Under RCW 9.94A.589(1)(a), "same criminal conduct" is defined as "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim."[18] If any one of these three elements of same criminal conduct is missing, a trial court must count multiple offenses separately when calculating a defendant's offender score. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). We will not disturb a trial court's decision as to whether two or more crimes are the same criminal conduct unless the trial court

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the shooter and, thus, the State's case relied heavily on the identification of McGown as the shooter in Morford and Brewer's out-of-court statements.

But, as discussed above, the admission and consideration of Morford's and Brewer's out-of-court statements for impeachment purposes and as substantive evidence regarding the identification of the shooter were proper. Moreover, other eyewitness testimony established that the shots hitting Griffin were fired from the passenger side of the car in question. The only disputed question at trial was the identity of the shooter inside the car and Morford's and Brewer's prior statements identifying McGown as the shooter were corroborated by Morford's separate selection of McGown as the shooter when viewing a photo montage prepared by Ringer. The photo montage and selection result were submitted as a trial exhibit. Accordingly, McGown's assertion that reversal is required fails.

[17] If McGown is raising the ineffective assistance argument to forestall a possible determination that he waived or failed to preserve the same criminal conduct issue by not raising it below, it was unnecessary. He couches his argument as a challenge to his offender score, and such challenge may be raised for the first time on appeal. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994)).

[18] "Intent in this context means the defendant's objective criminal purpose in committing the crime." *State v. Walker*, 143 Wn. App. 880, 891, 181 P.3d 31 (2008).

abused its discretion or misapplied the law. *State v. Burns*, 114 Wn.2d 314, 317, 788 P.2d 531 (1990).

Here, the charged offenses do not involve the same victim. As reflected in the to convict instruction (No. 13) for the first degree assault charge, the jury was asked in relevant part whether the State had proved beyond a reasonable doubt that "on or about the 4th day of September, 2008, the defendant or an accomplice assaulted *B. Griffin*." CP at 71 (emphasis added). The to convict instruction for the drive by shooting charge (No. 18) asked the jury whether the State had proved that on or about the 4th day of September, 2008, the defendant or an accomplice recklessly discharged a firearm from a motor vehicle and that "the discharge created a substantial risk of death or serious physical injury to *another person*." CP at 76 (emphasis added).

McGown argues that the evidence shows that "there was no evidence of any stray shots," that Griffin was "the only person shot, or shot at," and that Griffin was the only person "outside at the time of the shooting." Br. of Appellant at 36, 39. Accordingly, McGown argues, Griffin was the victim for both the assault charge and the drive by shooting charge. But the eyewitness trial testimony described the shooting as taking place in the parking lot of a "neighborhood bar." RP at 346. A bar patron, Kathryn Little, testified that at the time of the incident, there were two or three other people in the parking lot. Eyewitness Dorothy Steadman testified that she was parked next to the bar in her PT Cruiser waiting to pick up a friend who was at the bar when she observed the shooting. Two other friends were waiting with her in her car. She also observed a white car in the bar's parking lot with two people standing outside of it, who she originally thought were the targets of the shots fired from the dark car. Moreover, four shots were fired, but only three hit Griffin. In light of the stray shot, any of the people in the parking lot or in the

immediate area were at substantial risk of death or serious physical injury. Accordingly, we hold that the assault and drive by shooting charges involved different victims and did not encompass the same criminal conduct.

Moreover, because McGown's offenses were not the same criminal conduct, his defense counsel had no basis to argue that his convictions for first degree assault and drive by shooting were the same criminal conduct for purposes of calculating his offender score. Thus, McGown fails to show that his defense counsel was ineffective. *Walker*, 143 Wn. App. at 892-93.

We affirm McGown's convictions and sentence.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Penoyar, C.J.

Johanson, J.