

New Jersey Appellate Division Rules That Defendant's Prior Conviction Is Admissible To Impeach His Credibility After He Introduces His 911 Call At Trial

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In a March 20, 2019 decision by the New Jersey Appellate Division, *State v. Outland*, A-1307-16T3, the court held that once a defendant introduces into evidence a 9-1-1 recording of his call to police, the State is permitted, on rebuttal, to introduce defendant's sanitized criminal history for impeachment purposes. The court concluded that the admission of the prior criminal history was proper, accompanied by the limiting instruction, even though the defendant did not testify.

The Defendant, Thomas Outland, was charged with numerous crimes related to the robbery of a check cashing business. He subsequently took the case to trial and was convicted. During the State's case at trial, the following pertinent facts were presented. The Defendant worked next door to the business, and would frequent the business and often bring coffee to the female employee who worked in the rear where the safety deposit box was located. On the day of the robbery, exterior video footage from the business captured the defendant joining two hooded figures while holding a white object, similar in appearance to a paper cup. The footage shows the group move together towards the check cashing business and disappear inside. Moments later, the two hooded figures run out. Shortly thereafter, police cars arrive.

The female employee testified at trial that on the morning of the robbery, the Defendant called in to her and she unlocked the security door to get her coffee. When she did, a man forced the security door open and punched her. Both that man and a second man had their faces covered with hoods. The female was punched again and pushed down onto the floor. Approximately \$35,000 was stolen. When the female raised her head, she saw the defendant near the door. She asked the defendant to call the police, and he told her to calm down because the men were dangerous. Thereafter, a customer entered the store, and the female again asked defendant to call 9-1-1, which he did.

After the State rested their case, the Defendant offered his 9-1-1 call into evidence and played it for the jury. The trial court ruled that the recording was admissible as an exception to the hearsay rule, both as a present sense impression and excited utterance, as defendant was discussing an event occurring before him, and was doing so in a way that he sounded “excited and unreflective.”

The trial court also ruled that if Defendant played the recording to the jury, the State would be permitted in its rebuttal case to play redacted portions of Defendant’s two recorded statements to police, and proffer his prior convictions.

After the Defendant played the 9-1-1 recording, the State moved into evidence his sanitized criminal history of four prior indictable offenses and service of state prison time, and the two redacted statements. In the statements, Defendant denied culpability, but discussed in detail how easy it would be to plan a robbery at the check cashing store because the employees were so “lax” about security, and their patterns of behavior so well established. He added, “if it was me and I knew that she opened the door like that, I could plan. I know how to plan around shit[.]”

Defendant was convicted of robbery and conspiracy to commit robbery and sentenced to a sixteen-year extended term as a persistent offender subject to the No Early Release Act. Defendant appealed his conviction to the Appellate Division, arguing that the trial court should not have permitted the admission of the defendant’s prior convictions. The Appellate Division affirmed the conviction.

The Appellate Division noted that although hearsay is generally inadmissible, there are various exceptions to the hearsay rule. Two such exceptions are present sense impression and excited utterance. Here, the Appellate Division agreed with the trial court that the recording was offered by the defendant to allow the jury to hear his tone and manner, which would arguably be evidence of his innocence. In addition, the Appellate Division agreed that playing the recording for the jury to hear was, in effect, equivalent to making an assertion of innocence from the witness box.

The Appellate Division then addressed the use of the defendant’s prior convictions during the State’s rebuttal case. The Appellate Division agreed with the decision of the trial court that Rule 806 of the New Jersey Rules of Evidence permitted the admission of evidence impeaching the credibility of the

hearsay declarant where that party introduces hearsay.

N.J.R.E. 806 provides in part that “the credibility of [a hearsay] declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness.” The Appellate Division also cited to the comments following Rule 806, which state in part that a statement introduced under an exception to the hearsay rule can be impeached by evidence that the declarant had been convicted of a crime.

The Appellate Division also cited to other federal and state courts use of similar evidence rules, including Federal Rule of Evidence 806, to permit admission of prior convictions to impeach the credibility of a hearsay declarant, regardless of whether he or she testified.

In sum, the Appellate Division agreed that when evaluating the credibility of hearsay, a jury should be entitled to hear the same impeaching evidence as if the declarant had testified. The Appellate Division ruled that the trial court did not err by allowing the State to proffer defendant’s prior convictions in order to impeach his credibility.