32841-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MARCO A. GALLEGOS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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1. Trial counsel's failure to request a jury instruction on accomplice credibility was ineffective assistance.

2. The evidence was insufficient to support a finding of premeditation.

3. More than sixteen months of unnecessary delay violated Mr. Gallegos's constitutional right to a speedy trial.

B. ISSUES

1. The only evidence of the defendant's complicity in two murders was provided by three codefendants. Did trial counsel provide ineffective assistance by failing to request a cautionary jury instruction on the reliability of accomplice testimony?

2. No evidence showed the murder was planned. The victim assaulted one of the participants and "within a split second" shots were fired. The victim died almost immediately. Does this evidence support a finding of premeditation?

3. The State did not obtain the evidence necessary to support the defendant's conviction, namely the testimony of the codefendants, until 14 months after his arrest. During this

time the State resisted severance alleging the codefendants' statements could be redacted for use at trial, thereby obtaining continuances over the defendant's consistent objections and requests for a speedy trial. Did the unjustified delays violate the defendant's Sixth Amendment right to a speedy trial?

C. STATEMENT OF THE CASE

A couple of people saw a car off the road near Roza Dam and noticed a dead body in the back seat. (RP 378) Officers from the Kittitas County Sheriff's office went to the scene. (RP 382-90) The car was taken to the Sheriff's office where the deceased, later identified as Ryan Pederson, was removed from the back seat, taken to the hospital for x-rays and then to the funeral home to await the arrival of the pathologist. (RP 404, 432-35) There was a lot of blood on the back seat. (RP 433)

After Mr. Pederson was removed from the car, Detective Andrea Blume noticed a wire hanging out of the trunk. (RP 437) Detective Blume was aware that the car was registered to Mike Eby and the person in the back seat did not match Mr. Eby's description. (RP 438) The decision was made to pop the trunk. (RP 438) There was another body in the back of the trunk, wrapped in plastic bags and bound with duct tape.

(RP 439) This body was identified as Mr. Eby and transported to the hospital and funeral home as well. (RP 443-44)

Mr. Eby's daughter Ashleigh had already reported her father missing, so a few days after the bodies were discovered she came to the police station to give information about his disappearance. (RP 641) She told Detective Blume that she and her father had recently associated with a person named Loks, later identified as Jose Pineda. (RP 641) According to Ms. Eby, on the night of his death her father had been planning on meeting Mr. Pineda. (RP 643)

After talking with Ms. Eby, Detective Blume obtained cell phone records for Mr. Pineda, Mr. Eby, Mr. Pederson, and Ms. Eby. (RP 797) With information from these records, Detective Blume determined that Mr. Eby had had numerous calls to and from Mr. Pineda, the last call from Mr. Eby's phone was made in the vicinity of Fruitvale and Hathaway, and around that time calls from Mr. Pineda's phone put him in the same vicinity. (RP 799-800) During her interview, Ms. Eby had mentioned that she and her father had recently visited the home of Troy Whalen, which was located near Fruitvale and Hathaway. (RP 803-804)

Around this time, Yakima police were investigating a report that Mr. Eby and Duane Martin had been assaulted in Mr. Whalen's garage, and property including two guns had been taken from them. (RP 808-09)

The assault and robbery had taken place a few months earlier, and Mr. Martin had been assaulted by Mr. Pineda. (RP 809) Based on this information, police had obtained a search warrant. (RP 809) Although Detective Blume was not involved in the search, she learned that blood stains and a bullet had been found in the garage. (RP 810) Electrical wire similar to the wire that had been around Mr. Eby's wrapped body was also found. (RP 810-11)

Based on this information, Detective Blume obtained a warrant to search Mr. Whalen's garage for evidence relating to Mr. Eby's death. (RP 931) After finding numerous items that appeared to support the inference Mr. Eby had been killed in Mr. Whalen's garage, police detained Mr. Whalen. (RP 946-47) Mr. Whaley identified Mr. Pineda and described two other individuals he identified as EB and Dabs as having been present when Mr. Eby was killed and when Mr. Pederson was kidnapped and killed. (RP 947-48) In a subsequent interview, Mr. Pineda identified these individuals as Heriberto Villa and Marco Gallegos. (RP 949)

On February 6, 2013 the State charged Marco Gallegos with unlawful possession of a firearm and two counts of aggravated murder, all committed on December 20, 2012. (CP 1-2) The information named Mr. Pineda, Mr. Whalen and Mr. Villa as codefendants. (CP 1-2) Trial was set for April 1, 2013. (CP 3)

On March 21 the trial date was continued to June 24 because "the State needs time to obtain results and further investigation related to case (WSP crime lab ect.) Defense needs time to review discovery and prepare for trial." (CP 4) Mr. Gallegos refused to waive his right to speedy trial but his lawyer did not object. (CP 4)

On June 13, 2013, the trial court scheduled a hearing for June 24, 2013 to hear Mr. Gallegos's pro se motion for new counsel and motion for severance. (CP 6) The court granted the State's motion for a continuance of the trial date to November 25, 2013 "to track with the other codefendants & judicial economy." (CP 6) Mr. Gallegos objected to the continuance. (CP 6)

On October 4, "Troy Whalen expressed interest in cooperating and submitted to a screening interview. That was a one hour and 22 minute interview that was recorded." [1] (SRP 143)[2]

On November 14, trial was rescheduled for December 16. (CP 7) The scheduling order does not indicate whether Mr. Gallegos waived his right to speedy trial or his lawyer agreed to the continuance. (CP 7) No reason is given for the continuance. (CP 7)

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[1] The chronology of events involving codefendants' recorded statements and cooperation agreements was provided to the court at the July 3 argument on Mr. Gallegos's motion to dismiss for violation of his right to a speedy trial. (SRP 143-46)

[2] A three-volume report of various pretrial proceedings, paginated separately from the trial transcript, is referenced as SRP.

"On November 20th, 2013, Jose Pineda agreed to submit to a screening interview or a free talk with the prosecutor's office. That interview lasted one hour and 26 minutes. It was recorded." (SRP 144)

"On December 2nd, 2013, Heriberto Villa agreed to submit to a screening interview or a free tack [sic] with the prosecutor's office. The interview lasted one hour and 51 minutes. The interview was recorded." (SRP 146)

The issue of severance was discussed at the omnibus hearing on December 11, 2014. (RP 9-10; CP 7, 10) The deputy prosecutor explained that there were potential issues relating to hearsay statements of at least one co-defendant and discussed with the court the necessity of redacting a codefendant's written statement in order to avoid severance. (RP 10-11) The deputy prosecutor acknowledged that this needed to be done soon and stated it was at the top of his list. (RP 10-11) Counsel for Mr. Gallegos stated that he was opposing further continuances and the decision on severance would depend on the State's decisions. (RP 24) The court granted the State's motion for an order setting the trial date for April 14, 2014 to permit "additional trial preparation." (CP 10)

"On December 19, 2013, Heriberto Villa agreed to submit to an additional screening interview or free talk with the prosecutor's office.

That lasted -- the free talk lasted one hour and 23 minutes. That interview was recorded." (SRP 146)

At a hearing on January 21, 2014, Mr. Gallegos's lawyer reminded the court that the deputy prosecutor had been instructed to advise the parties as to the State's position on severance, explaining that he was reluctant to brief the issue in the event the State would be agreeing to sever and that, without that decision, it was impossible for him to schedule interviews with likely witnesses. (SRP 6) The court noted that identification of pretrial motions was necessarily delayed until the State determined its position on severance:

> The state was going to be ready to deliver their position on the severance issue, whether they were going to concede, whether they believed that all these gentlemen could, in fact, be tried together. So the state was going to be letting the court know as well as defense counsel their position on the severance issue.

(SRP 7) The court also noted that at the previous hearing the State had been ordered to file a witness list but had not yet done so. (SRP 12-13) Mr. Gallegos's attorney again argued to the court that the lack of a witness list was contributing to unavoidable delay in filing defense motions. (SRP 18) [3] The court entered an order continuing the status conference to

[3] The court asked counsel to email her any authority that would be helpful to the court, with service on other parties: "[A]nything that's going to be compelling authority that either side want me to look at, I ask that it be sent by way of e-mail, obviously with all

February 7 and requiring the State to have established its position on severance and to provide a witness list. (CP 11)

At the February 7 hearing the court asked about the severance issue and the deputy prosecutor told the court: "At this point, Judge, it's the state's position that they remain joined. That may or may not change. At this point that's the state's position. Obviously if counsel files motions the state will respond to the motions for severance." (CP 51) Asked whether he was aware of any possible issues relating to the admissibility of codefendants' statements, the deputy prosecutor responded:

> I'm very concerned about that. The question is whether I can redact them. I think under the court rule I receive a motion, a formal motion of severance, then I will go and redact. I don't know who's going to make it or not. That's going to depend greatly on who or what statements may need to be redacted to comply with Bruton.

(CP 52) The court noted that it had been apparent that all defense counsel were moving for severance, but the deputy prosecutor responded that without a formal motion for severance from each defendant, the State would not be willing to undertake a determination to redact the "very long

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other parties being notified of what's being sent. Again, I would like to be proactive in the research area." (1/31/14 RP 17)

interview." [4] (CP 52) The court then asked each defense counsel to expressly indicate an intent as to severance, commenting:

> "If everybody is moving for severance, then to just have the argument under the court rule and the case law as to whether joinder or severance is appropriate isn't going to get us there. We need to have the statements and the state's position regarding redactions to discuss for purposes of that hearing."

(CP 53) The deputy prosecutor objected, contending he could not respond to a motion for severance without any briefing or statement of the defense theory. (CP 71) The court explained:

> "Severance is not a surprise here, Mr. Clements. . . . The only reason I set this off as far as I did is it was clear to me, and I think it was clear to you that that was going to be their position. We can sit here and reference the court rule, and I'm fine with that. What I'm trying to do is eliminate the meaningless steps."

(CP 72) Eventually, the deputy prosecutor conceded: "Well, I think that we could redact potentially. I think some of these issues may resolve, but I can't make a record on that at this juncture. I think that's what I'm trying to hint at, but I'm not going to go much further than that." (CP 83)

At the March 7 hearing the State advised the parties that Messrs. Pineda and Whalen would be appearing as cooperating witnesses for the State. (CP 124) Counsel for Mr. Villa testified that they would be

[4] The deputy prosecutor is presumably referring to statements provided by Mr. Pineda and Mr. Villa, transcripts of which had apparently been provided to defense counsel on an unspecified date.

offering a defense of diminished capacity, and the parties discussed whether severance was still an issue in light of Mr. Gallegos's defense of general denial. (CP 132, 134)

At the March 28 hearing, counsel for Mr. Villa and Mr. Gallegos argued in favor of severance. (CP 155-62)[5] Noting that, because neither the court nor counsel had had any intimation that Mr. Pineda or Mr. Whalen was considering testifying, their recent agreement to do so raised entirely new issues with respect to severance. (CP 175-76) The court declined to grant the motion for severance. (CP 175)

On April 11 the State disclosed for the first time that it had obtained statements from the sole remaining codefendant, Mr. Villa, and requested a ruling from the court on whether those statements must be disclosed to Mr. Gallegos under the discovery rules. (CP 207) Mr. Villa's attorney argued such disclosure was precluded by an immunity agreement entered into between Mr. Villa and the State prohibiting use of the statements. (CP 209) Although the record discloses that Mr. Villa had made several statements subject to immunity agreements, neither the court nor Mr. Gallegos's counsel had been aware of such statements. (CP 212) The deputy prosecutor explained that with respect to Mr. Villa, as had

[5] Mr. Kirkham rested largely on his brief which, unfortunately, was never filed with the court.

been the case with Messrs. Pineda and Whalen, the State's position was that it was entitled to withhold disclosure of the fact or timing of any statements of codefendants while evaluating their implications for purposes of severance or plea negotiations and declined to agree to severance. (CP 217; see RP 66) Trial was rescheduled for May 5. (CP 44)

On April 30 the court entered an order granting its own motion for a continuance of the trial date to July 14 because "ongoing motions needed to be briefed and argued which will be relevant to trial and may be dispositive. Also evidentiary hearings that will affect evidence allowed at trial." (CP 46)

At the June 26 hearing the State agreed to sever the defendants' trials. (SRP 45) The court set Mr. Gallegos's trial for July 14. (RP 60)

On July 3 the court heard Mr. Gallagos's motion to dismiss for speedy trial violation. The State advised that an essential witness, the pathologist who performed the autopsies, had been in New Zealand since January, would be there until August 15, and could only be brought to Yakima for trial testimony at a cost to the County of about $20,000. (SRP 67-69) The State conceded no effort had been made to contact Dr. Wigren until after June 26. (SRP 112) Following an extended analysis of the

issues, the Court denied Mr. Gallegos's motion to dismiss for violation of his right to a speedy trial. (RP 188-206)

On July 10, the deputy prosecutor explained to the court that Yakima County had not been aware of Dr. Wigran's unavailability for the past six months because, although the evidence now shows Mr. Eby was killed in Yakima County, the bodies were found in Kittitas County and the autopsies were performed in Kittitas County, so the pathologist was employed by Kittitas County and Yakima County had not been made aware of his whereabouts. (RP 244-45) Counsel for Mr. Gallegos pointed out that the State had made no efforts to obtain Dr. Wigren's presence at trial, whether by way of a contract or a subpoena, until late June. (RP 267) At the conclusion of the hearing, Mr. Gallegos's trial remained set to begin on July 14.

On the morning of July 14, Mr. Villa entered a guilty plea and agreed to become a witness for the State. (CP 323) Mr. Gallegos was arraigned on an amended information, and at defense counsel's request the court entered an order setting July 18 for the pre-trial hearing. (CP 375-78; RP 352) On July 18, the deputy prosecutor informed the court that Dr. Wigren would not be able to appear for trial until August 9 at the earliest, and the State's primary investigator would be taking a previously scheduled vacation beginning on July 29. (RP 334) Given the 5-day

delay occasioned by the events of July 14, the time for trial was reasoned to expire on August 20. (RP 352-53) The court set trial to begin with pretrial motions on August 20 and jury selection to begin on August 25. (RP 352-53; CP 379)

The charges against Mr. Gallegos were tried to a jury commencing August 26, 2014. (RP 143-2001)

Jose Pineda told the jury he had known Mike Eby through their mutual friend Duane Martin since April 2012. (RP 1394) Mr. Pineda believed Mr. Martin had stolen some marijuana plants from him during the summer of 2012. (RP 1396) As a result, Mr. Pineda had gone to Troy Whalen's garage, where he assaulted Mr. Martin. (RP 1397) Mr. Eby was there and Mr. Pineda relieved both Mr. Eby and Mr. Martin of their guns. (RP 1397) According to Mr. Pineda, a week after that incident Mr. Eby had asked Mr. Pineda to return his pistol. (RP 1398) Mr. Pineda had told Mr. Eby that he could not return the pistol but that he would provide him with drugs in exchange. (RP 1413)

In the interim Mr. Pineda had been associating with Mr. Eby and had recently bought a car from him in exchange for drugs and some cash. (RP 1414) Some of the cash Mr. Pineda paid to Mr. Eby turned out to be counterfeit, so Mr. Pineda had agreed to reimburse Mr. Eby for the counterfeit money. (RP 1414-15)

On the afternoon of December 20 Mr. Pineda picked up Mr. Villa as he and his wife were on their way to Wal-Mart. (RP 1422) Mr. Villa told him that Mr. Eby had approached a rival gang member and asked to have Mr. Pineda robbed. (RP 1413) Mr. Pineda had already heard about this shortly after the incident involving Mr. Martin. (RP 1414) Since this was the second time Mr. Villa had mentioned it, Mr. Pineda decided to call Mr. Eby and meet up with him. (RP 1421-22) His plan was to have Mr. Eby meet them at Troy Whalen's house. (RP 1422)

Mr. Pineda and his wife and Mr. Villa returned home from shopping some time after dark. (RP 1029) When they returned to Mr. Pineda's home they found Mr. Gallegos parked in the driveway. (RP 1423) The three men then drove to Troy Whalen's house. (RP 1425)

According to Mr. Pineda, as they were driving to Mr. Whalen's he told Mr. Gallegos he was "gonna go talk to somebody about setting, possibly setting me up." (RP 1448) Mr. Pindea testified: "I just basically let him know I'm gonna talk to him about it, you know, and if he's, he comes out lying about it we're gonna jump him." (RP 1456) According to Mr. Pineda, Mr. Gallegos acquiesced in this plan. (RP 1449, 1456)

Mr. Pineda eventually reached Mr. Eby's daughter Ashleigh and told her he wanted to get hold of her father to give him the money he had promised. (RP 1420) After two phone calls to Mr. Eby, in which Mr.

Pineda promised to give him the money, Mr. Eby agreed to meet with him. (RP 1421, 1450)

After Mr. Eby arrived at Mr. Whelan's garage they talked and smoked some meth. (RP 1457) Mr. Pineda asked Mr. Villa to invite Mr. Pederson, who was sitting outside in Mr. Eby's car, to come inside. (RP 1457-58)

Eventually Mr. Pineda accused Mr. Eby of trying to set him up: "Is that true you're trying to rob me? Something like that." (RP 1462) Mr. Eby initially denied the charge, then acknowledged he might have said something like that, but it was before he had gotten to know Mr. Pineda. (RP 1463) Mr. Pineda asked Mr. Villa to confirm the threat, Mr. Villa telephoned Mr. Campos who confirmed that Mr. Eby was trying to have Mr. Pineda set up. (RP 1463, 1466) Mr. Pineda testified that, as soon as Mr. Campos confirmed the allegation, "Mike Eby kind of just took off on me and started punching me." (RP 1466) Mr. Pineda told the jury that as he was getting hit he heard a gunshot. (RP 1471) According to Mr. Pineda, then Mr. Eby stopped moving, Mr. Gallegos pulled him off and shot him again. (RP 1471-72)

After dragging Mr. Eby's body to the middle of the room, Mr. Pineda gave his gun to Mr. Villa and told him to take Mr. Pederson inside the house. (RP 1475, 1481) Mr. Pineda told the jury: "Mr. Gallegos

informed me to inform Mr. Villa to kill Mr. Pederson" and Mr. Pineda told Mr. Villa "[t]hat Mr. Gallegos told me to tell him that he's gonna have to kill him." (RP 1492, 1496) According to Mr. Pineda, he, Mr. Gallegos and Mr. Whalen wrapped Mr. Eby's body and put it in the trunk of the car. (RP 1499) Mr. Pineda drove the car with Mr. Villa in the front passenger seat and Mr. Gallegos and Mr. Pederson in the back seat. (RP 1500) Mr. Pineda asked Mr. Whelan to follow in Mr. Pineda's car. (RP 1502) The plan was to drive to Roza Dam, shoot Mr. Pederson, who was seat-belted in the back seat, pull the car into the water, leave it and go home in the car driven by Mr. Whelan. (RP 1501, 1504) In the event it was very dark and they thought they had parked right by the river. (RP 1509) After Mr. Villa shot Mr. Pederson, Mr. Pineda put Mr. Eby's car in drive and then they took off. (RP 1512-13) After stopping at Mr. Whelan's house to smoke, Mr. Pineda drove home with Mr. Villa and Mr. Gallegos. (RP 1517)

Mr. Whalen told the jury Mr. Pineda arrived at his home around seven o'clock in the evening on December 20, accompanied by Mr. Villa and Mr. Gallegos. (RP 1301) They went out to his garage. (RP 1303-04) Some time later he saw Mr. Eby, whom he had met a couple of times before, and Mr. Pederson, whom he had never seen before, walking towards his garage. (RP 1306) About half an hour later he heard gunshots

in the garage. (RP 1307) A minute or two later Mr. Pineda asked him for a sheet or tarp. (RP 1307-08) A few minutes later Mr. Whelan went to the garage where he found Mr. Pineda, Mr. Villa, Mr. Pederson, and Mr. Gallegos, along with Mr. Eby's body wrapped in a sheet. (RP 1309) Messrs. Pineda, Villa and Pederson all followed him into the back of the house. (RP 1313) Mr. Pineda handed Mr. Villa a pistol, told him to stay there, and went back out to the garage. (RP 1313-14) Eventually Mr. Pineda asked him to drive his car and follow them. (RP 1323) They drove to Rosa Dam, then back towards town, and pulled off the road towards the river. (RP 1328-32) Mr. Whalen heard gun shots. (RP 1333) Messrs. Pineda, Villa and Gallegos got in the car, stopped at a house outside Selah, then drove to Mr. Whalen's house where he got out and they left. (RP 1336, 1339)

Mr. Villa told the jury that although he knew about Mike Eby's effort to set Mr. Pineda up, he didn't know what it was about until Mr. Pineda confronted Mr. Eby in the garage. (RP 1644) He used Mr. Pineda's phone to call Mr. Campos, and when Mr. Campos confirmed that Mr. Eby had tried to set him up, Mr. Pineda said that was all he wanted to know and hung up. (RP 1644-50) Then, according to Mr. Villa, Mr. Pineda told Mr. Eby "that he was gonna get messed up after we were done smoking" and tucked in his shirt so his gun was showing. (RP 1650-51)

Mr. Eby told Mr. Pineda it wasn't going to go down like that, then swung on him and hit Mr. Pineda so hard they both fell to the ground. (RP 1651) Then, in a split second, four or five gunshots went off. (RP 1651) According to Mr. Villa, "Mike Eby's swinging on him and within a split second um like 4 or 5 gunshots go out and like um in the time it takes to get like, when the gunshots go off Gallegos had his gun out and I see the last gunshot the muzzle flash from the gun." (RP 1652) Mr. Villa assured the jury "I didn't know none of that was gonna go down it just happened so fast . . . ." (RP 1671) Then Mr. Pineda got up with his gun out, told Mr. Villa to take Mr. Pederson inside, and gave Mr. Villa his gun. (RP 1680-81) "So I was like kind of basically just doing what they said or what Pineda said." (RP 1683) He confirmed that Mr. Pineda told him to kill Mr. Pederson. (RP 1689)

D. ARGUMENT

1. TRIAL COUNSEL'S FAILURE TO REQUEST A JURY INSTRUCTION ON ACCOMPLICE CREDIBILITY WAS INEFFECTIVE ASSISTANCE.

The federal and state constitutions guarantee effective assistance of counsel. *See* U.S. Const. amend. VI; Washington Const. art. I, § 22. To prove ineffective assistance of counsel, appellant must show that his

counsel's deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420–21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Varga*, 151 Wn.2d 179, 198, 86 P.3d 139 (2004). Prejudice occurs when, but for deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

It is well settled law that when an accomplice gives uncorroborated testimony the trial court must give cautionary instructions. *State v. Everybodytalksabout*, 145 Wn.2d 456, 480, 39 P.3d 294 (2002). When the State relies solely on the uncorroborated testimony of an accomplice, the trial court must instruct the jury to carefully examine it in the light of other evidence. *State v. Harris*, 102 Wn.2d 148, 154–55, 685 P.2d 584 (1984) (*overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *State v. Brown*, 113 Wn.2d 520, 782 P.2d 1013 (1989), and *State v. McKinsey*, 116 Wn.2d 911, 810 P.2d 907 (1991)); *State v. Sherwood*, 71 Wn. App. 481, 485, 860 P.2d 407 (1993).

> The testimony of an accomplice, given on behalf of the plaintiff, should be subject to careful examination in light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

State v. Murphy, 98 Wn. App. 42, 47, 988 P.2d 1018 (1999), *citing* 11 Washington Practice, WPIC § 6.05, at 136 (2d ed.1994).

> A person is an accomplice of another person in the commission of a crime if:
> (a) With knowledge that it will promote or facilitate the commission of the crime, he
> (i) solicits, commands, encourages, or requests such other person to commit it; or
> (ii) aids or agrees to aid such other person in planning or committing it; or
> (b) His conduct is expressly declared by law to establish his complicity.

RCW 9A.08.020(3). Whether a witness is an accomplice depends on "whether he could be indicted for the same crime for which the defendant is being tried." *City of Seattle v. Edwards*, 50 Wn.2d 735, 738, 314 P.2d 436 (1957). Accomplice liability is based upon the participant's general knowledge of the crime committed. *State v. Sweet*, 138 Wn.2d 466, 479, 980 P.2d 1223 (1999).

Three rules govern the issue of whether failure to instruct the jury on accomplice testimony is reversible error:

> (1) [I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration.

State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988). These rules apply in the present case.

Messrs. Pineda, Villa and Whalen were all charged with, and pleaded guilty to, offenses based on the actions about which they testified, which involved their aiding in the commission of the crimes. Apart from these three witnesses, no evidence places Mr. Gallegos at the scene of the crime. The nearest thing to corroboration was Mr. Pineda's wife's testimony that Mr. Gallegos left her home with Mr. Pineda some hours before the time of the murder, and she awakened at an unknown time during the night and heard voices including Mr. Gallegos. No other testimony or physical evidence supports the allegation that Mr. Gallegos was a participant in the murder of Mr. Eby or Mr. Pederson. The evidence tends to show he was only briefly acquainted with Mr. Eby and had never met Mr. Pederson. The extent of the independent evidence that purportedly corroborates the codefenants' testimony is minimal to non-existent. In this case, failure to instruct the jury on accomplice testimony is reversible error.

Failure to request the mandatory instruction cannot have been a matter of trial tactics. The instruction would have ensured that the jury

treated the accomplice testimony with great caution, giving rise to a reasonable doubt as to Mr. Gallegos's guilt.

2. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A FINDING OF PREMEDITATION.

The jury found Mr. Gallegos guilty of the premeditated intentional murder of Mr. Eby. Even assuming the jury concluded the testimony of the accomplices was credible, the evidence was insufficient to support the essential element of premeditation.

The test for reviewing an appellant's challenge to the sufficiency of evidence in a criminal case is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *State v. Gentry*, 125 Wn.2d 570, 596–97, 888 P.2d 1105 (1995). All reasonable inferences from the evidence are drawn in favor of the State. *Id.* at 597, 888 P.2d 1105.

"[P]remeditation is 'the deliberate formation of and reflection upon the intent to take a human life' and involves the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short.' " *State v. Pirtle*, 127 Wn. 2d 628, 644, 904 P.2d 245 (1995). There must both be evidence the defendant had sufficient time in

which to premeditate and evidence to support the inference that he did so. *State v. Bingham*, 105 Wn.2d 820, 719 P.2d 109 (1986).

Premeditation may be shown by circumstantial evidence where the jury's inferences are reasonable and substantial evidence supports the jury's verdict. *State v. Finch*, 137 Wn.2d 792, 831, 975 P.2d 967 (1999). Where the sufficiency of the evidence has been challenged with respect to the element of premeditation, a wide range of factors may support an inference of premeditation. *Id.* Motive, procurement of a weapon, stealth, and method of killing are "particularly relevant" factors in establishing premeditation. *State v. Pirtle*, 127 Wn.2d 628, 644, 904 P.2d 245 (1995).

According to Mr. Villa, the event of Mr. Eby assaulting Mr. Pineda was unexpected, and the shooting occurred "in a split second." Mr. Pineda's intent had been to "jump" Mr. Eby (meaning "beat him up") if Mr. Campos affirmed that Mr. Eby had tried to set him up. (RP 1452, 1456) Mr. Pineda denied any intent to shoot or kill Mr. Eby. (RP 1452) And Mr. Pineda testified that, at most, Mr. Gallegos had merely acquiesced in Mr. Pineda's plan. (RP 1456) No evidence supports the inference Mr. Gallegos had any independent motive for shooting Mr. Eby. While Mr. Gallegos was apparently carrying a pistol, Mr. Pineda explained "Well I just assumed he was. We were always armed." (RP 1460) Mr. Gallegos's customary habit of carrying a weapon does not

support the inference of a premeditated intent to kill Mr. Eby on this occasion.

The evidence was insufficient to support a reasonable inference Mr. Gallegos acted with a premeditated intent to kill. The first degree murder charge should be reversed.

3. MORE THAN SIXTEEN MONTHS OF UNNECESSARY DELAY VIOLATED MR. GALLEGOS'S CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The United States and Washington Constitutions guarantee the right to a speedy trial. U.S. Const. amend. VI; Wash. Const. Art. I, § 22; *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989). The State and Federal rights are coextensive. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). When an appellant alleges violation of this right, the issue is reviewed *de novo*. *State v. Iniguez*, 167 Wn.2d at 280.

Whether a criminal defendant's constitutional right to a speedy trial has been violated begins with a determination whether the delay, under the circumstances of the case, is presumptively prejudicial. *Iniguez* at 283-84. The length of the delay, the complexity of the case, and the nature of the evidence are relevant factors in this determination. *Iniguez* at 292.

The delay in this case, 18 months from the filing of the information in February 2013, to the commencement of trial in August 2014, is considerable. No tangible evidence supported the charges against Mr. Gallegos. The only remotely relevant forensic evidence, the results of the pathologist's examination of the bodies, was apparently available to the State for the first ten months after Mr. Gallegos was arrested. Apart from the testimony of the codefendants, the testimony at trial merely disclosed the course of the investigation that led to the interviews with, and arrest of, the codefendants. The only plausible reason for delay was the State's insistence on joining Mr. Gallegos's trial with that of the codefendants.

Under these circumstances, the delay was presumptively prejudicial.

Once delay is found to be presumptively prejudicial, an analysis of whether the delay was unconstitutional involves an analysis based on four factors set out in *Barker v. Wingo*, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972): "This involves a more searching examination of the circumstances, including the length of and reasons for delay, whether the defendant asserted his speedy trial rights, and prejudice to the defendant." *State v. Iniguez*, 167 Wn.2d at 292.

a. The Extraordinary Delay Was Unreasonable.

The first constitutional analysis factor is the length of the delay: whether it "stretches beyond the bare minimum needed to trigger" the inquiry. *Iniguez* at 293, *quoting Doggett v. U.S.*, 505 U.S. 647, 651-52, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992). The court should consider the reasons for each delay and the respective parties' responsibility. *Iniguez* at 294. The passage of a lengthy period of time to trial requires the reviewing court to appraise the circumstances with extreme care. *Iniguez* at 294.

In June 2013, the State had no admissible evidence Mr. Gallegos was in Troy Whalen's garage on December 20, 2012. The State sought and obtained a five-month continuance for the purpose of further investigation. By the November trial date the State had obtained recorded statements from two codefendants, but unless the codefendants agreed to testify against Mr. Gallegos, those statements could not be used as evidence against him at trial. For the next four months the State refused to agree to sever the trials of the codefendants until the parties had resolved the issue of whether the statements could be redacted to comply with the requirements of the confrontation clause. By April, Mr. Villa, the third codefendant had provided a statement.

The United States Supreme Court has concluded that the admission of the incriminating statements of a non-testifying codefendant at their joint trial violates a defendant's Sixth Amendment right of confrontation, notwithstanding any limiting instruction. *Bruton v. United States*, 391 U.S. 123, 135–37, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). See also *State v. Cotten*, 75 Wn. App. 669, 690, 879 P.2d 971 (1994). "[T]he admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence" does not violate the Confrontation Clause. *Richardson v. Marsh*, 481 U.S. 200, 211, 107 S. Ct. 1702, 95 L. Ed. 2d 176 (1987). Redactions that merely leave a blank space, the word 'deleted,' or other similar obvious indications of alteration to remove the defendant's name, do violate Bruton. *Gray v. Maryland*, 523 U.S. 185, 192, 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998).

During the winter of 2013-2014, the State must have been aware that if his codefendants' statements were redacted to comply with the requirements of *Bruton* and its progeny, the evidence would be insufficient to bring Mr. Gallegos to trial. The State's only possibility of bringing Mr. Gallegos to trial rested on its success in persuading these witnesses to testify against Mr. Gallegos.

By the time of the December hearing, the State could not have reasonably believed that Mr. Gallegos could be tried jointly with his codefendants. The State never intended to try Mr. Gallegos in December, 2013. The clearest evidence of this fact is the State's failure to subpoena any witnesses, including Dr. Wigran, who thus became unavailable to testify at any trial before August 2014.

The State repeatedly led the court to believe redacted versions of the statements would be prepared promptly so that the court could consider the issue of whether severance was required, only to follow up with a series of arguments and explanations for why this had not been done, primarily arguing that until the defendants moved for severance no effort at redaction need be made. Yet the State's strategy of intentional delay is apparent from the deputy prosecutor's statement at the February 7 2014 hearing: "Well, I think that we could redact potentially. I think some of these issues may resolve, but I can't make a record on that at this juncture. I think that's what I'm trying to hint at, but I'm not going to go much further than that." (CP 83) Thus nearly three months passed with no redactions being provided before the State announced that Messrs. Pineda and Whalen had agreed to testify for the State, thereby obviating the need for any redactions. The delay was prolonged by the State's continued insistence on joint trials of Mr. Villa and Mr. Pineda after the

fact of Mr. Villa's statements had been disclosed and until he entered into an agreement to testify for the State.

The record is replete with Mr. Gallegos's objections to the delay. Mr. Gallegos never waived his right to speedy trial, and his lawyer objected to every continuance of the trial date and nearly every continuance of a motion or status hearing.

The right to a speedy trial "is as fundamental as any of the rights secured by the Sixth Amendment." *Barker v. Wingo*, 407 U.S. at 516 n. 2. Mr. Gallegos did not cause these delays. The majority of the delays were caused by the State's intransigence with respect to severance and the State's need for time in which to seek evidence against Mr. Gallegos. The delays were the result of numerous decisions that were within the court's discretion. But in requesting continuances, the State misled the court as to the reason the delay was needed, thus depriving the court of important information as to the justification for delay. (7/3 RP 195-96) In exercising that discretion the court gave unjustified weight to the State's purported need for delay and failed to give sufficient weight to Mr. Gallegos's constitutional right to a speedy trial.

b. The Defendant Never Waived His Right To A Speedy Trial.

Mr. Gallegos objected to every continuance of the trial date. (7/3 RP 194) His attorney repeatedly advised the court that Mr. Gallegos wished to proceed to trial as soon as possible. (7/3 RP 195) In denying his motion to dismiss for violation of his right to a speedy trial, the court suggested proceeding to trial would have constituted ineffective assistance, a comment that reflects the court's presumption that evidence existed to support Mr. Gallegos's conviction. (7/3 RP 195) The court also suggested that Mr. Gallegos's demand for a speedy trial from the outset undermined his right to a speedy trial because the request was unreasonable:

> Mr. Gallegos from the get-go objected to any continuances, which I think really weakens the position, quite frankly, in that regard a bit. Because for the defendant to have a realistic expectation on two counts of first degree aggravated murder that anybody would have a case ready to go within a 60-day timeframe, again, is not necessarily a realistic expectation.

(7/3 RP 194) This comment suggests that an individual who knows he is innocent, and who knows the State cannot produce evidence to support his conviction, is nevertheless not entitled to a speedy trial if the case appears to be complex. Such an analysis is contrary to the constitutional right to a presumption of innocence.

c. The Extraordinary Delay Was Prejudicial.

The United States Supreme Court addressed prejudice in *Barker*:

> Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired.

Barker, 407 U.S. at 532 (citations omitted).

From the time of Mr. Gallegos's arrest until his codefendants agreed to testify against him, the State had insufficient evidence to present a case against him. His defense was denial and this defense was sufficient to prevent a conviction. The sixteen-month delay was sufficient to permit the State to persuade Mr. Gallegos's codefendants to testify for the State and present sufficient evidence to overcome this defense in the eyes of the jury. The overwhelming prejudice to Mr. Gallegos's defense is self-evident.

Mr. Gallegos did not receive the speedy trial guaranteed by the constitution. His conviction should be dismissed with prejudice.

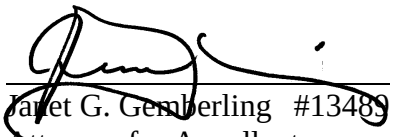
E. CONCLUSION

Mr. Gallegos was convicted solely on the basis of the testimony of accomplices. Yet his attorney failed to request a standard instruction advising the jury to act upon such testimony "with great caution." This error requires reversal of his convictions.

The accomplices' testimony was not available to the State until 14 months after Mr. Gallegos was arrested and the scheduled trial date had been reset twice over his objection. The delays resulted from the State's refusal to agree to severance and failure to advise the court regarding statements that had been obtained from the codefendants during this time. This unjustified delay in bringing Mr. Gallegos to trial in a timely manner requires dismissal of the charges against him.

Dated this 4th day of September, 2015.

JANET GEMBERLING, P.S.



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