

66707-6

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NO. 66707-6-I

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

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STATE OF WASHINGTON,

Respondent,

v.

DARIN J. GATSON,

Appellant.

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

SETH A. FINE  
Deputy Prosecuting Attorney  
Attorney for Respondent

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Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## I. ISSUES

(1) Can a defendant claim on appeal that the grant of a continuance violated CrR 3.3, when the continuance was granted on defense motion, and the defendant never moved for dismissal under that rule?

(2) If the issue can be raised, did the trial court abuse its discretion in continuing the case because defense counsel was scheduled for another trial at the same time?

(3) Does a 3½-month delay between arrest and trial violate the constitutional right to a speedy trial, where a significant part of the delay was on defense motion based on counsel's unavailability, and there is no showing that the delay impaired the defense?

(4) At a bench trial, the defendant did not object to scientific evidence offered by the State. Instead, he argued that the evidence was too subjective and should be disregarded by the court. On appeal, can the defendant argue that the evidence was inadmissible under the Frye standard?

(5) If the issue can be raised, is fingerprint identification generally accepted in the scientific community?

(6) At sentencing, the court found that two of the counts involved use of a motor vehicle. For the first time on appeal, the

defendant challenges this finding with respect to one of the counts. Even if that finding was set aside, an identical license revocation would result from the finding on the other count. Should the court consider the defendant's challenge?

(7) If the issue can be raised, did the defendant use a vehicle to commit the crime of possessing a stolen vehicle, when he used the vehicle to transport itself from the place where he acquired it?

## **II. STATEMENT OF THE CASE**

### **A. FACTS OF THE CRIME.**

At around 4:30 on the morning of August 29, 2010, George Ponylite was walking along Highway 99 in Edmonds, headed towards work. As he passed a car dealership, he noticed that a Jeep Wrangler had its engine running. A person inside the car waved to him. The person then drove the car onto the street and drove away. Mr. Ponylite contacted police. 12/13 RP 11-16.

Police spotted the car a few minutes later. They signaled it to stop. The car fled at speeds up to 85 miles per hour. Police attempted to stop the car by using a spike strip. The car ran over the spikes and lost part of a front tire, but it continued to flee. The pursuit continued into Everett. The Jeep ran a red light, nearly

colliding with two cars that were waiting for the light. At this point, police decided to terminate the pursuit. They watched the Jeep head onto an I-5 on-ramp. 12/13 RP 23-35.

Police continued to patrol the area. Near the next northbound I-5 exit, they found the Jeep. It had collided with a light post. 12/13 RP 90-91. The keys were still in the car. 12/13 RP 97. On the floorboard were documents relating to a purchase of the vehicle. A vehicle trip permit was also found there. 12/13 RP 133-40.

Police used an experienced tracking dog to track from the Jeep. The dog tracked for 1½ blocks and found the defendant, Darin Gatson, underneath a bush. 12/13 RP 111-12, 115-18. On searching the defendant, police found the keys to a different Jeep in his pocket. When asked about the key, the defendant accused the officer of planting it on him. 12/13 RP 76.

When questioned, the defendant denied taking any vehicle. He claimed that he had been sleeping under the bush. 12/13 RP 40-42. At the jail, however, the defendant spontaneously said “that it was by the grace of God that he didn’t crash the Jeep and that he was trying to get to his mother’s house in Everett when he was driving the Jeep.” 12/13 RP 43.

The keys that were found in the defendant's pocket fit a Jeep Cherokee at the same car dealer from which the Wrangler had been stolen. The Cherokee could not be started because it had a dead battery. Both the Wrangler key and the Cherokee key were normally stored on a key board located in the dealer's sales office. The purchase records were normally kept in a filing cabinet in the office. Although the office showed no signs of forced entry, there was a serious security flaw. The recent installation of an air conditioning unit had left a gap, which allowed someone to reach in and unlock a door. 12/13 RP 164-71.

Two latent fingerprints were found on the trip permit in the Wrangler. At trial, two experts testified that these fingerprints matched those of the defendant. 12/14 RP 5-7, 26. One of these experts described the identification process. Latent fingerprints can have three levels of detail. Level I is the general form of the print. Level II is ridge endings, bifurcations, or small dots. Level III is individual ridge characteristics and pores. 12/13 RP 181. Latent prints do not always show level III detail, but the prints in this case had "lots" of it. 12/13 RP 189; 12/14 REP 14.

Fingerprint identification is sometimes discussed in terms of Galton points, which refers to level II detail. At that level, these

fingerprints had well over 14 points of identification. In addition there were a large number of points of identification at level III. 12/14 RP 14-15. The defense neither objected to this testimony nor offered any contrary testimony.

## **B. SCHEDULING OF TRIAL.**

With regard to the defendant's time-for-trial issue, the relevant chronology is the following:

August 29, 2010	Defendant arrested. CP 178-79
September 17	Information filed. CP 180.
September 20	Defendant arraigned. Trial set for October 29. CP 197-98. Defendant remains in custody. CP 199-201.
October 29	Trial continued to November 5. CP 193-94.
November 4	Trial continued to November 11. CP 191-92.
November 12	Trial continued to December 10. CP 6189-90.
December 13	Bench trial commences. 12/13 RP 3-4.

## **III. ARGUMENT**

### **A. THE DEFENDANT WAS BROUGHT TO TRIAL WITHIN THE TIME REQUIRED BY CrR 3.3.**

The defendant claims that he did not receive a speedy trial. His brief intermingles arguments based on CrR 3.3 and on the constitutional right to a speedy trial. This is incorrect analysis. The

court rule and the constitutional right are governed by different standards and must be analyzed separately.

**1. Since The Defendant Never Sought Dismissal In The Trial Court, He Cannot Claim On Appeal That Dismissal Was Required Under CrR 3.3.**

Insofar as the defendant relies on CrR 3.3, the issue cannot be raised on appeal. In the trial court, he never sought dismissal based on any speedy trial or time-for-trial argument. This failure precludes review of any argument based on the court rule.

With the exception of jurisdictional and constitutional issues, appellate courts will review only issues which the record shows have been argued and decided at the trial court. CrR 3.3 does not create a constitutional right, nor is it jurisdictional. Although the right is to be strictly enforced, it is nonetheless a procedural rule.

State v. Barton, 28 Wn. App. 690, 693, 626 P.2d 509, review denied, 95 Wn.2d 1027 (1981) (citations omitted).

“The court’s obligation to dismiss a prosecution for violation of CrR 3.3 is triggered by a motion by the defendant.” Id. Absent such a motion, there is no trial error for an appellate court to review. Id. at 694. Here, the defendant never moved for dismissal, so he was not entitled to one. The timeliness of the trial under CrR 3.3 is therefore not subject to review.

**2. Under CrR 3.3(f)(2), The Defendant Cannot Challenge A Continuance That Was Granted Pursuant To A Motion Brought On His Behalf.**

If the issue can be considered, the court should hold that the trial was timely. Because the defendant was in custody pending trial, he was entitled to be tried within 60 days after arraignment. CrR 3.3(b)(1)(i), (c)(1). This computation, however, excludes “[d]elay granted by the court pursuant to section (f).” CrR 3.3(e)(3).

That section authorizes trial courts to grant continuances:

On motion of the court or a party, the court may continue the trial date 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. . . The court must state on the record or in writing the reasons for the continuance. *The bringing of such a motion by or on behalf of any party waives that party’s objection to the requested delay.*

CrR 3.3(f)(2) (emphasis added).

In the present case, the defendant was arraigned on September 20. CP 197-98. Trial commenced on December 13, 84 days later. 12/13 RP 3-4. The court granted three continuances, of 7, 6, and 29 days. CP 193-94, 191-92, 189-90. Of these three continuances, only the last needs to be considered. If that continuance was proper, the 29 excluded days reduced the countable time to 55 days, which is within the limit set by CrR

3.3(b)(1)(i). Conversely, if the 29-day continuance was not proper, neither the 13 days excluded by the other two continuances nor the resulting “buffer period” under CrR 3.3(b)(5) would be enough to render the trial timely.

Under CrR 3.3(f)(2), the bringing of a continuance motion “*on behalf of*” a party waives that party’s objection to the resulting continuance. The 29-day continuance was granted on motion brought on behalf of the defendant. 11/12 RP 4. Consequently, the defendant cannot object to the motion being granted.

The waiver provision of CrR 3.3(f)(2) was adopted as part of the 2003 amendments to the time-for-trial rules. Prior to that amendment, courts did sometimes consider defendants’ objections to continuances that were requested by their attorneys. See, e.g., State v. Campbell, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985). Under this procedure, defendants and their attorneys could “double team” the court by taking opposing positions. Regardless of which way the court ruled, its decision could be challenged on appeal. The 2003 amendment eliminated the ability of the defense to set up trial courts in this manner.

This amendment reflects the ordinary rules governing the attorney-client relationship. “[A] lawyer shall abide by a client’s decisions concerning the objectives of representation and ... shall consult with the client as to the means by which they are to be pursued.” RPC 1.2(a). “[W]hen a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas.” Faretta v. California, 422 U.S. 806, 820, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). “A person who chooses to be represented by counsel has no constitutional right to personally conduct his defense.” State v. Blanchley, 75 Wn.2d 926, 938, 454 P.2d 841 (1969), cert. denied, 396 U.S. 1045 (1970).

CrR 3.3(f)(2) embodies these principles. The timing of trial does not implicate the objectives of representation, but only the means of achieving those objectives. The choice of means is properly a matter for counsel to decide. The rule allocates to counsel the authority to make a binding decision to seek a continuance. Since the defendant chose to be represented by counsel, he has no constitutional right to object to that decision.

The defendant claims that the authority of counsel to seek a decision is “not limitless.” Brief of Appellant at 14. CrR 3.3(f)(2)

does not, however, set any limits. Courts no longer have the power to “interpret” CrR 3.3 in a way contrary to its plain language:

If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1 [governing time for arraignment], the pending charge shall not be dismissed unless the defendant’s constitutional right to a speedy trial was violated.

CrR 3.3(a)(4).

Under CrR 3.3(f)(2), a defendant may not object to delay resulting from a motion brought on his behalf. Under CrR 3.3(e)(3), delays granted pursuant to section (f) are excluded in computing the time for trial. There is no exception for cases in which the defendant personally objects to the delay. Since that circumstance is not addressed in the rule, a charge cannot be dismissed on that basis, absent a violation of the defendant’s constitutional right.

The defendant cites one case in which, under the current version of CrR 3.3, Division Two of this court considered a defendant’s objection to a continuance granted on his attorney’s motion. State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009). The court did not explain how its analysis could be reconciled with the plain language of CrR 3.3(f)(2). Nor was the court’s consideration of this objection necessary for the ultimate

result – there were two subsequent continuances granted on the State’s motion without adequate explanation. Saunders, 153 Wn. App. at 213-15 ¶¶ 5-9, 221 ¶ 22. To the extent that Division Two disregarded the plain language of the rule, its analysis should not be followed.

In any event, the basis for Division Two’s holding does not apply in the present case. In Saunders, the defense attorney had sought the continuance to allow “ongoing negotiations.” The defendant personally objected to further plea negotiations. Id. at 212 ¶¶ 3-4. Whether to seek a negotiated settlement is an issue involving the objectives of representation, not merely the means. In seeking a continuance to achieve an objective that his client rejected, defense counsel had acted outside of his proper rule under RPC 1.2(a). Saunders, 153 Wn. App. at 218 ¶ 16 n. 9.

In the present case, in contrast, there is no indication that counsel was seeking any objective different from the defendant’s. The defendant merely disagreed with his attorney as to the best means to achieve that objective. Under RPC 1.2, this was a matter within counsel’s control. Even under Division Two’s analysis, there is no reason to allow the defendant to challenge a continuance that

was granted on his attorney's motion. On the basis of that continuance, his trial was timely.

**3. If The Issue Can Be Raised, The Trial Court Properly Exercised Its Discretion In Granting A Continuance Based On The Unavailability Of Defense Counsel On The Scheduled Trial Date.**

Finally, even if the defendant can raise the challenge, the continuance was proper. The decision to grant a continuance rests within the sound discretion of the trial court. That decision will not be disturbed unless there is a clear showing that it is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State v. Kenyon, 167 Wn.2d 130, 135 ¶ 19, 216 P.3d 1024 (2009).

Here, the order granting the continuance set out the following reasons:

Defense atty has a conflict with the trial date and has motions that need to be filed prior to trial. 3.5 was continued at the state's req.

CP 189.

The record supports these reasons. On the same day that the case was scheduled for trial, defense counsel was also scheduled for a murder trial. 11/12 RP 2-3. The unavailability of counsel may be good cause for delaying a trial. State v. Carson, 128 Wn.2d 805, 815, 912 P.2d 1016 (1996) (conflicting trials for

both counsel was “unavoidable circumstance” justifying delay under former version of CrR 3.3(e)(8)); State v. Jones, 117 Wn. App. 721, 730, 72 P.3d 1110 (2003), review denied, 151 Wn.2d 1006 (2004) (conflicting trial for prosecutor was “unavoidable circumstance”). The defendant was unable to suggest any realistic alternative to a continuance. 11/12 RP 5-8. Even on appeal, he does not identify any alternative. Since counsel cannot try two cases at once, this conflict supports the trial court’s determination that the continuance was required in the administration of justice. The defendant has failed to demonstrate that the decision to grant a continuance was an abuse of discretion. Consequently, the delay resulting from that continuance was an excluded period, and trial was timely under CrR 3.3.

## **B. THE DEFENDANT RECEIVED A SPEEDY TRIAL UNDER CONSTITUTIONAL REQUIREMENTS.**

### **1. Since The Defendant Was Brought To Trial Within Four Months Of His Arrest, Further Analysis Of The Circumstances Is Not Constitutionally Required.**

The defendant also claims that his constitutional right to a speedy trial was violated. Even though this issue was not raised in the trial court, it can be raised on appeal to the extent that it constitutes “manifest error affecting a constitutional right.” RAP 2.5(a)(3). With regard to this right, analysis under the state

constitution is substantially the same as under the federal constitution. State v. Iniguez, 167 Wn.2d 273, 290 ¶ 36, 217 P.3d 768 (2009).

Constitutional analysis involves “an ad hoc balancing test that examines the conduct of both the State and the defendant.” Iniguez, 167 Wn.2d at 283 ¶ 16; see Barker v. Wingo, 407 U.S. 514, 530, 932 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Before the court engages in this balancing, however, there is a threshold inquiry: “a defendant must show that the length of the delay crossed a line from ordinary to presumptively prejudicial.” “The term ‘presumptively prejudicial’ does not indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker inquiry.” What constitutes a “presumptively prejudicial” delay depends on the specific circumstances of each case. Iniguez, 167 Wn.2d at 283 ¶ 17.

Under constitutional analysis, delay is measured from the date of charging or arrest, whichever occurred first. United States v. MacDonald, 456 U.S. 1, 6-7, 102 S. Ct. 1497, 71 L. Ed. 2d 696 (1982). (This is longer than the applicable period under CrR 3.3.)

Here, the relevant period of delay is from arrest (August 29) to the commencement of trial (December 13), a total of 106 days.

Such a short delay – approximately 3½ months – is not sufficient to establish “presumptive prejudice,” so as to require further analysis under constitutional standards. In Iniguez, the court found “presumptive prejudice” from a delay of more than eight months. The court reached this conclusion based on the following factors: the defendant was in custody pending trial, the charges were not complex, and the State’s case rested on eyewitness testimony from multiple people. This last factor was significant because of “the importance of avoiding delays that could result in witnesses becoming unavailable or their memories fading.” Iniguez, 167 Wn.2d at 292 ¶ 44. The eight-month delay was, however, “just beyond the bare minimum needed to trigger the Barker inquiry.” Id. at 293 ¶ 47. In other jurisdictions, courts have found that pre-trial delays of less than five months were not presumptively prejudicial. United States v. Sprout, 282 F.3d 1037, 1043 (8th Cir. 2002) (4-month delay); United States v. Nance, 666 F.2d 353, 360 (9th Cir.), cert. denied, 456 U.S. 918 (1982) (5-month delay).

In the present case, two of the same factors that existed in Iniguez are present, but not the third. As in Iniguez, the defendant was in custody pending trial, and the charges were not complex. Unlike Iniguez, however, the State's case primarily rested on circumstantial evidence rather than eyewitness testimony. As a result, there was little likelihood that a few months' delay would result in significant loss of memory or the unavailability of important witnesses. If an eight-month delay is barely sufficient to require further analysis, a delay of less than half that long is not sufficient. This is especially true when the circumstances of the case present less danger that the delay would hamper the defense. The defendant has not cited a single case in which such a short delay was considered presumptively prejudicial. Even if there is no special justification for delay, the constitution does not require a trial faster than this. Since the threshold has not been reached, no further analysis of the Barker factors is required.

**2. If Balancing Of The Barker Factors Is Necessary, It Demonstrates That There Was No Constitutional Violation.**

If this court concludes that the threshold has been reached, it should balance four factors in determining whether the constitutional right has been violated: length of delay, reasons for

delay, the defendant's assertion of his rights, and prejudice. Barker, 407 U.S. at 530; Iniguez, 167 Wn.2d at 293-95 ¶¶ 46-51.

**a. Length of delay**

In analyzing this factor, the court will consider “the extent to which the delay stretches beyond the bare minimum needed to trigger the inquiry. . . [T]he longer the pretrial delay, the closer a court should scrutinize the circumstances surrounding the delay.” Iniguez, 167 Wn.2d at 293 ¶ 46. As discussed above, it is doubtful whether a 3½-month delay even reaches the level necessary to trigger an inquiry. If it exceeds that level, it does so by a very small amount. Consequently, little justification is needed to render the delay constitutionally permissible.

**b. Reasons for delay**

Unlike the inquiry under the time-for-trial rule, analysis of this factor is not limited to a determination of whether delay is “justified” or “unjustified.”

[D]ifferent weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighted heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant. Finally, a valid reason,

such as a missing witness, should serve to justify appropriate delay.

Barker, 407 U.S. 531.

Here, as discussed above, a large portion of the delay was supported by a valid reason: the unavailability of defense counsel due to his involvement in another trial. There is no hint that there was any deliberate attempt to hamper the defense. To the contrary, much of the delay was requested by defense counsel acting on the defendant's behalf. If the court erred in yielding to counsel's request, that error is entitled to very little weight.

**c. Defendant's assertion of his rights.**

As the defendant's brief points out, the defendant personally objected to the delays. His attorney, however, requested the same delays. As already discusses, a defendant who is represented by counsel has no constitutional right to conduct his own defense. Blanchley, 75 Wn.2d at 938. Consequently, under constitutional analysis, the relevant fact is counsel's agreement, not the defendant's personal opposition. "[I]f delay is attributable to the defendant, then his waiver may be given effect." Barker, 407 U.S. at 529. Even if the defendant merely fails to object, that failure will "make it difficult for a defendant to prove that he was denied a speedy trial." Id. at 532.

#### **d. Prejudice**

Again, different types of prejudice will be accorded different weights. The most serious type of prejudice is impairment of the defense. Prejudice resulting from lengthy pre-trial incarceration will be given lesser weight but is still significant. Id. at 532-33. Although the defendant was incarcerated pre-trial, there is no showing that the delay resulted in any impairment to the defense. Consequently, the delay receives only moderate weight.

When all of these factors are considered together, they compel the conclusion that the defendant's constitutional rights were not violated. This is apparent from a comparison of this case with Iniguez. There, the court analyzed the factors as follows: (1) The total delay was eight months. (2) The delays were due to scheduling difficulties and the State's need to interview witnesses. Although "there is some question as to whether the State could have acted more diligently," this factor did not weigh against the state. (3) The defendant consistently demanded a speedy trial. (4) The defendant was incarcerated pending trial, but there was no showing that the defense was impaired. Iniguez, 167 Wn.2d at 293-95 ¶¶ 46-51.

In the present case, the defendant's showing is comparable or weaker than in Iniguez: (1) The delay was less than half as long. (2) As in Iniguez, much of the delay was caused by scheduling difficulties. (3) Although the defendant personally asserted his rights, the attorney acting on his behalf did not. (4) The showing of prejudice is the same as in Iniguez: pre-trial incarceration, but no impairment of the defense. If these factors are sufficient to render a delay of over eight months constitutionally permissible, they are equally sufficient to render a delay of 3½ months constitutionally permissible. There was no constitutional violation.

### **C. THE TRIAL COURT PROPERLY ADMITTED FINGERPRINT IDENTIFICATION EVIDENCE.**

#### **1. Absent Any Objection At Trial Based On The Frye Standard, The Issue Has Not Been Preserved For Appeal.**

The defendant claims that the fingerprint evidence should have been excluded because it did not meet the standards for admissibility of scientific evidence. See Frye v. United States, 293 F. 1012 (D.C. Cir. 1923). This argument has not been preserved for review. The requirements for objecting to evidence are set out in ER 103(a)(1):

Error may not be predicated upon a ruling which admits ... evidence, unless ... a timely objection or motion to strike is made, stating the specific ground of

objection, if the specific ground was not apparent from the context. . .

The defendant's brief claims that "[d]efense counsel moved to exclude latent fingerprint identification evidence." Brief of Appellant at 19. In support of this statement, he cites to the following portion of counsel's closing argument:

The fingerprints, your Honor, this seems to be the things that we always go back to. This is a subjective system. I would ask the Court to take into account the officer's testimony. He believes one in 300 times that this has actually happened when he has been given a known reference sample from an individual has [sic] and then compared them. I would submit to the court, I think a better practice to actually verify them would have been to put them into the AFIS system. They would have gotten 25 potential candidates, and then they could have narrowed things down from there. Taking a known sample, giving them to an officer to compare in an admittedly subjective system, I don't think gets us the results that we would actually like to see.

Had they put it into the AFIS system, had they determined that Mr. Gaston was a potential suspect, had they gone that route, which it sounds like they do virtually every other case, then I would readily admit, I don't think we would have an issue, but they took a known sample from a suspect, compared it in a subjective system where we really don't have any guidelines for determining a match and then for verification, one fingerprint was compared also to a known sample.

So, it is just such a small group, I would ask the Court to disregard the evidence.

Counsel went on to argue that “if the court does put weight into that evidence,” it was insufficient to establish the defendant’s guilt. 12/14 RP 48-49. This was not a motion to exclude evidence – it was an argument that the evidence was entitled to no weight.

If this argument is considered a “motion to exclude,” it is neither timely nor specific. To be timely, “[a]n objection must be made as soon as the basis of the objection becomes known.” State v. Leavitt, 49 Wn. App. 348, 357, 743 P.2d 270 (1987), aff’d, 111 Wn.2d 66, 758 P.2d 982 (1988). Here, the defense raised no objection at the time that the fingerprint experts testified. 12/13 RP 177-93; 12/14 RP 3-28. The purported “motion to exclude” did not come until closing argument. This was too late to preserve the issue.

The “motion to exclude” was also insufficiently specific. Defense counsel claimed that the fingerprint analysis was “subjective,” but he never mentioned the Frye standard. He never claimed that the method of analysis lacked acceptance in the scientific community. He never alluded to any studies or critiques of its validity. Such an “objection” is insufficient to preserve an argument based on Frye.

The situation in this case is analogous to that in State v. Wilbur-Bobb, 124 Wn. App. 627, 141 P.3d 665 (2006). There, an expert witness estimated the defendant's blood alcohol level by use of retrograde extrapolation. At trial, the defense objected that there was an inadequate foundation for this testimony. In arguing that objection, counsel mentioned that the State had not presented "any information or any indication that this is scientifically accepted." Id. at 633 ¶ 16. On appeal, this court held that this objection was not adequate to apprise the trial court of a Frye challenge. Consequently, that issue was not preserved for appeal.

Similarly in the present case, the defendant argued generally that the fingerprint evidence in this case was unreliable. He did not alert the court to any objection based on the Frye standard. That objection cannot be raised for the first time on appeal.

**2. The Frye Standard Only Applies To New Scientific Techniques, Not To One That Has Been Routinely Used For Over A Century.**

If the issue is considered, the defendant's arguments should be rejected. "Washington has adopted the Frye test for evaluating the admissibility of *new* scientific evidence." State v. Gregory, 158 Wn.2d 758, 829, 147 P.3d 1201 (2006) (emphasis added). "Testimony which does not involve new methods of proof or new

scientific principles from which conclusions are drawn need not be subjected to the Frye test.” Rather, the admissibility of such testimony is determined under ER 702. State v. Russell, 125 Wn.2d 24, 69, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

The defendant claims that “general acceptance may change over time and the Frye determination must take into account any recent changes in the perceived reliability of the instrument or theory in question.” Appellants brief at 2. As authority for this proposition, he cites State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022 (2000). The Kunze case, however, does not state any such proposition. That case applied Frye to the novel scientific technique of latent *earprint* identification.

Unlike earprint identification, fingerprint identification is not “new.” It has been routinely admitted for over a century. United States v. Crisp, 324 F.3d 261, 266 (4<sup>th</sup> Cir. 2003). The first reported American decision holding it admissible is People v. Jennings, 252 Ill. 534, 96 N.E. 1077 (1911); see United States v. Llera Plaza, 188 F.Supp. 2d 549, 572-74 (E.D. Pa. 2002) (discussing history of fingerprint identification). Since then, there

have been no reported decisions holding that such evidence is unreliable. Markham v. State, 189 Md. App. 140, 159, 984 A.2d 262, 274 (2009). Evidence that is not new does not need to be reviewed under the Frye standard. Russell, 125 Wn.2d at 69. Consequently, the Frye standard does not apply to fingerprint identification evidence.

**3. If The Frye Standard Is Applied, Fingerprint Identification Evidence Remains Generally Accepted In The Scientific Community.**

Even if the standard were applied, it would not lead to exclusion of the evidence. The defendant cites some articles that have criticized fingerprint identification procedures or suggested improvements. The mere existence of criticism, however, does not mandate exclusion of evidence. "Frye requires only general acceptance, not *full* acceptance, of novel scientific methods." Russell, 125 Wn.2d at 41 (court's emphasis). Nor is evidence rendered inadmissible by the possibility of improved procedures. Any procedure could be improved. "[W]hile further research into fingerprint analysis would be welcome, to postpone present in-court utilization of this bedrock forensic identifier pending such research would be to make the best the enemy of the good." United States

v. Crisp, 324 F.3d 261, 270 (4<sup>th</sup> Cir.), cert. denied, 540 U.S. 888 (2003).

Two recent Federal cases have conducted an extensive review of the scientific status of fingerprint identification. United States v. Mitchell, 365 F.2d 215 (3<sup>rd</sup> Cir.), cert. denied, 543 U.S. 974 (2004); United States v. Baines, 573 F.3d 979 (10<sup>th</sup> Cir. 2009). The hearing in Mitchell was particularly extensive. It covered five days, with numerous witnesses testifying on both side. In both Mitchell and Baines, the courts held that the evidence was sufficiently reliable to be admitted.

Since these are Federal cases, they applied the standard set out in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1983). Under that standard, general acceptance of a scientific technique is “an important factor,” but it is not conclusive. Id. at 594. In both cases, the courts concluded that fingerprint evidence is generally accepted. Mitchell, 365 F.3d at 241; Baines, 573 F.3d at 991. In a recent Maryland decision applying the Frye standard, the court likewise held that fingerprint identification continues to be generally accepted. Markham v. State, 189 Md. App. 140, 157-64, 984 A.2d 262, 272-

77 (2009). The defendant has not cited a single case holding to the contrary.

The defendant does cite several articles criticizing fingerprint identification techniques. Many of these criticisms do not withstand close scrutiny. For example, the defendant claims: “The foundational premise on which fingerprint identification rests – that no two individuals have the same fingerprint – has never been proven.” Brief of Appellant at 24. This statement is correct only if “proof” requires absolute certainty. It is impossible to compare the fingerprints of every person on Earth. But over the past century, millions of people have been fingerprinted. No one has ever found two different people with the same fingerprint. Mitchell, 365 F.3d at 236. This strongly indicates that, if duplicates ever exist at all, they are so rare that the possibility can be ignored.

The unlikelihood of a mistaken identification is illustrated by an experiment conducted by the FBI in Mitchell. They distributed the latent fingerprints from that case to law enforcement agencies in the United States, Canada, and the United Kingdom. They asked these agencies to determine whether the fingerprints matched anyone in their records. Collectively, those records contained the fingerprints of almost 70 million people. Of the

agencies that responded, two had the defendant's fingerprints in their databases. Both reported that the latent prints matched the defendant. The other agencies all reported that their records contained no match. Id. at 223-24. Out of the hundreds of millions of individual fingerprints in the agencies' databases, none were mistakenly matched to those of that defendant.

The defendant also points out that different experts disagree on what degree of resemblance is necessary to declare a "match." Brief of Appellant at 23. In deciding the significance of this fact, the court should distinguish between "false positives" (incorrect identifications) and "false negatives" (incorrect findings of dissimilarity).

While a system of identification with a high false negative rate may be unsatisfactory as a matter of law enforcement policy, in the courtroom the rate of false negatives is immaterial to the Daubert admissibility of latent fingerprint identification offered to prove positive identification because it is not probative of the reliability of the testimony *for the purpose for which it is offered* (i.e., for the ability to effect a positive identification).

Michell, 365 F.3d at 239 (court's emphasis).

Here, this court is being asked to assess the accuracy of a positive identification. If that identification is accurate, it would make no difference that some other expert might have refused to

make the same identification. In other words, the only significant issue is the likelihood of a false positive. The likelihood of a false negative is immaterial.

Under some circumstances, some fingerprint experts will refuse to make identifications on the basis of similarities that would convince other experts. Id. at 224. When identifications are made, however, the error rate is very low. Id. at 240. In Baines, there was testimony that the error rate was one in every 11 million cases. This is far lower than the threshold necessary to declare a technique reliable. Baines, 573 F.3d at 990-91.

In many different fields, experts often testify to conflicting conclusions. That occurrence does not render their testimony inadmissible. In the present case, there is not even any evidence of any disagreement concerning the conclusions reached by the experts. So far as the record shows, any qualified expert would have reached the same conclusion. The possibility that experts might disagree in other cases has no relevance to the admissibility of the undisputed evidence in this case.

In short, fingerprint identification is highly reliable. It has been routinely accepted as evidence for over a century. There are doubtless steps that could be taken to further improve the reliability

of the scientific techniques and to reduce the incidence of false negatives. Some recent studies have suggested such measures. Those suggestions do not, however, eliminate the general acceptance of fingerprint identification. If the Frye standard applies, the evidence meets that standard.

**D. THE TRIAL COURT CORRECTLY HELD THAT THE CRIME OF POSSESSING A STOLEN VEHICLE INVOLVED USE OF A MOTOR VEHICLE.**

**1. The Court Should Not Consider The Defendant's Challenge Since The Finding Does Not Affect The Length Of The Defendant's License Revocation, And The Issue Is Raised For The First Time On Appeal.**

Finally, the defendant challenges the trial court's determination that the defendant's crime of possession of a stolen vehicle was a felony in the commission of which a motor vehicle was used. In the trial court, the defendant raised no objection to the trial court's finding. 1/24 RP 11-19 (defense argument at sentencing). Under RAP 2.5(a), the court may refuse to review any claim of error that was not raised in the trial court. The defendant has provided no explanation of why this case should fall within any exception to that rule.

The issue is also moot. The defendant was convicted on three counts: attempting to elude a pursuing police vehicle (count 1), possessing a stolen motor vehicle (count 2), and second degree

burglary (count 3). The trial court determined that both counts 1 and 2 involved use of a motor vehicle. CP 4-5. The defendant has conceded that this finding was correct as to count 1. Brief of Appellant at 35.

The effect of these findings is specified in RCW 46.20.285:

The department [of licensing] shall revoke the license of any driver for the period of one calendar year ... upon receiving a record of the driver's conviction of any of the following offenses ...:

...

(4) Any felony in the commission of which a motor vehicle is used. . .

This statute calls for a single act of revocation by the Department. One year after that revocation, the defendant can apply for reinstatement of his license. RCW 46.20.311(2). It makes no difference whether the revocation was for one conviction or two. Regardless of the number of counts, the period of revocation is one year.

A court will ordinarily not review a case if the issues involved are purely academic. State v. Gentry, 125 Wn.2d 570, 616, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995). This includes sentence provisions that no longer have any impact on the defendant. For example, the court refused to consider a challenge

to an offender score after the defendant had completed serving his sentence. State v. Ross, 152 Wn.2d 220, 228, 95 P.3d 1225 (2004). If a finding does not materially affect the sentence, any error in it is harmless. State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139 (1992). Because the finding with regard to count 2 is purely academic and does not impact the defendant's sentence, the validity of that finding need not be reviewed.

**2. If The Issue Can Be Raised, A Vehicle Is Used To Commit The Crime Of Possessing Stolen Property When The Defendant Uses The Vehicle To Transport The Property From The Crime Scene.**

If the finding is reviewed, it should be upheld. A trial court's factual finding will be upheld if it is supported by substantial evidence. State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994). The meaning of RCW 46.20.285(4) was explained in State v. Batten, 140 Wn.2d 362, 365, 997 P.2d 350 (2000):

[I]n order for the statute to apply, the vehicle must contribute in some way to the accomplishment of the crime. There must be some relationship between the vehicle and the commission or accomplishment of the crime. Accordingly, where the conviction is a possessory felony, we hold that the possession must have some reasonable relation to the operation of a motor vehicle or that the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony.

In Batten, the vehicle was used to store and conceal a firearm and controlled substances. The court held that this was a sufficient nexus to support a finding that the vehicle was “used” in the commission of the unlawful possession of those items. Id. at 365-66.

A vehicle is not used to commit a crime when the relationship between the crime and the vehicle was merely incidental. For example, a person who had drugs in his pocket while driving a car did not “use” the car to commit the crime of possessing a controlled substance. State v. Wayne, 134 Wn. App. 873, 142 P.2d 1125 (2006). Division Three reached a similar result when the drugs were contained in the defendant’s purse and in clothing within a basket, both of which were in the defendant’s car. The court distinguished between these drugs and those that are “located upon or under fixtures of the vehicle itself.” If the vehicle itself is used to store and conceal the contraband, then the vehicle is “used” to commit the crime of possessing that contraband. On the other hand, if the drugs are within items that are inside the vehicle, the use of the vehicle does not contribute in a reasonable degree to the commission of the crime. State v. Hearn, 131 Wn. App. 601, 128 P.3d 139 (2006).

If the vehicle is merely the object of the crime rather than an instrumentality, that vehicle is not “used” in the commission of a crime. The court applied this principle to a defendant who committed malicious mischief by spray-painting a police vehicle. The court held that this act did not constitute “use” of that vehicle. State v. B.E.K., 141 Wn. App. 742, 172 P.3d 365 (2010).

A vehicle can, however, be both an object and in instrumentality. For example, members of an auto theft ring were held to have used the stolen cars to commit the crime of first degree theft:

[The defendant] and his cohorts used cars to drive around looking for other cars to steal. *They took possession of the stolen cars by driving them away from the scene.* A car was used by the lookout during the theft. After dismantling the engines, the unwanted parts were driven away for disposal. The [trial] court's finding that an automobile was used in the commission of the crimes is easily supported by this record.

State v. Dykstra, 127 Wn. App. 1, 12 ¶ 30, 110 P.3d 758 (2005), review denied, 156 Wn.2d 1004 (2006) (emphasis added).

Similarly, a defendant “used” a stolen car to commit the crime of possession of a stolen vehicle when, among other things, he drove the car to a State Patrol office in an attempt to relicense it. State v. Contreras, 162 Wn. App. 540, 547, 254 P.3d 214 (2011).

The defendant cites to California cases construing a similar statute, Cal. Vehicle Code § 13350. In particular, he seeks to rely on People v. Poindexter, 210 Cal. App. 3d 803, 808, 258 Cal. Rptr. 680 (1989). There, the defendant and his accomplice happened on a parked car. They took a part from the car, installed it on the accomplice's car, and drove away. The California Court of Appeal held that the car was not "used" to commit the felony of grand theft: "The crime was not carried out by means of the car, nor was the car used as an instrumentality of the crime." People v. Poindexter, 210 Cal. App. 3d 803, 808, 258 Cal. Rptr. 680 (1989).

Subsequent California cases have construed this holding narrowly. In a second case, the defendant and an accomplice engaged in a scheme to obtain merchandise from stores by use of stolen cashier's checks. They used a car and truck to travel to the stores and haul the merchandise away. The court held that these vehicles were "used" in the commission of the felony of conspiracy to commit grand theft:

Both the Isuzu car and the U-Haul truck were instrumental in carrying out the crimes charged. Their use was necessary in order to haul away the merchandise acquired in the fraudulent purchases. Defendant and her co-defendant would not have been able to move the heavy musical and television equipment away from the stores where they obtained

the merchandise without the use of such vehicles. Moreover, it appears that the use of these vehicles was a deliberate part of the two co-conspirators elaborate fraud scheme. We hold that the trial court did no err in ordering defendant to surrender her driver's license pursuant to section 13350.

People v. Paulsen, 217 Cal. App. 3d 1420, 1423, 267 Cal. Rptr. 122, 123-24 (1989).

Even when no "elaborate scheme" was involved, the court reached a similar result. In re Gasper D., 22 Cal. App. 4<sup>th</sup> 166, 27 Cal. Rptr. 152 (1994). There, the defendant broke into a parked car, stole a stereo, and drove away. A quarter of a mile away, he was stopped by police and arrested. The stolen stereo was found in the trunk of the defendant's car. The defendant was convicted of burglary of a motor vehicle (which is a felony in California). The court held that he had used a vehicle to commit this felony: "Aside from the use of the vehicle for transportation to and away from the chosen crime scene, there was use of the vehicle to conceal the fruits of the crime in the trunk." Id. at 170, 27 Cal. Rptr. 2d at 154.

In attempting to reconcile these cases, this court should recognize some fundamental facts. To commit a crime successfully, the criminal must escape from the crime scene. If the crime involves acquisition or possession of property, he must

transport the property as well. If that property is large or heavy, transporting it will normally require a vehicle. Under such circumstances, the vehicle is an essential component of the criminal's plan for committing the crime.

In the present case, the defendant took possession of a large and heavy item of stolen property – a motor vehicle. He needed a way to transport this property, but he had one – the vehicle could transport itself. As in Paulsen, the defendant “used” the vehicle to commit his crime when he used it to transport stolen property from the crime scene. As in Dykstra, the use of a vehicle to commit a crime includes “[taking] possession of the stolen cars by driving them away from the scene.” Dykstra, 127 Wn. App. at 12 ¶ 30. The trial court correctly found that the defendant used a motor vehicle to commit the crime of possessing stolen property.

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on December 28, 2011.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
SETH A. FINE, WSBA # 10937  
Deputy Prosecuting Attorney  
Attorney for Respondent