

NO. 39721-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ALBERT JAMAL YOUNGBLOOD,

Appellant.

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STATE OF WASHINGTON
BY [Signature]

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable John Nichols, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant Albert Youngblood's convictions for first degree kidnapping based on conduct incidental to a robbery must be dismissed for insufficient evidence as required by the Fourteenth Amendment and Article I, § 3 of the Washington Constitution.

2. Mr. Youngblood's second trial and his convictions for first degree kidnapping violated his constitutional right not to be twice put in jeopardy for the same offense.

3. The trial court erred by discharging the first jury without considering the length of the deliberations in light of the length of the trial and the complexity of the issues.

4. The trial court erred by discharging the first jury without finding that discharge was necessary to the proper administration of public justice.

5. The trial court erred by discharging the first jury without making a finding of manifest necessity.

6. The trial court erred by discharging the first jury without declaring a mistrial.

7. Mr. Youngblood did not receive effective assistance of counsel because his attorney did not object to evidence by a key witness who stated that he was afraid for his safety and the safety of his family.

8. The trial court erred in permitting a conviction for

attempting to elude a pursuing police vehicle where the evidence that Mr. Youngblood was an accomplice was insufficient.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A robbery necessarily involves restraining a person to take or retain property from another. A kidnapping may be incidental to the robbery and may not stand as a separate offense. In the present case, Mr. Youngblood's two kidnapping convictions are based on acts inherently part of the robbery. Should both kidnapping convictions be dismissed based on the lack of sufficient, separate evidence establishing those offenses? Assignment of Error 1.

2. Did Mr. Youngblood's second trial and his conviction for two counts of first degree kidnapping violate his constitutional right not to be twice put in jeopardy for the same offense when the jury deadlocked on the kidnapping charges where the judge asked the presiding juror about the possibility of a verdict but did not ask the other jurors if they agreed with the presiding juror's assessment, did not seek Mr. Youngblood's consent to discharge the jury, did not consider the length of deliberations in light of the length of the trial and the complexity of the issues, did not make any findings relating to whether or not the jury should be discharged, and did not declare a mistrial? Assignments of Error 2

through 6.

3. Did the trial court err by discharging the first jury without asking the jurors if they agreed with the presiding juror that they were deadlocked? Assignments of Error 2 through 6.

4. Did the trial court err by discharging the first jury without considering the length of their deliberations in light of the length of the trial and the complexity of the issues involved? Assignment of Error 3.

5. Did the trial court err by discharging the first jury without making a finding that discharge was necessary to the proper administration of public justice or due to manifest necessity? Assignments of Error 4 and 5.

6. Did the trial court err by discharging the first jury without declaring a mistrial? Assignment of Error 6.

7. Did the trial judge's decision to discharge the first jury violate Mr. Youngblood's constitutional right to a verdict from the jury that began deliberations in his case? Assignments of Error 2 through 6.

8. Mr. Youngblood's attorney did not object to inadmissible testimony in the second trial that a witness was afraid for the safety of his family. Was counsel's failure to object to this irrelevant and prejudicial evidence deficient performance that prejudiced the appellant? Assignment of Error 7.

9. Was there sufficient evidence that Mr. Youngblood was an accomplice to the driver of the car—Samuel Ferguson—when Mr.

Ferguson attempted to elude a pursuing police vehicle, and where there was no evidence that Mr. Youngblood encouraged or assisted Mr. Ferguson's failure to stop for the pursuing police vehicles? Assignment of Error 8.

C. STATEMENT OF THE CASE

1. Procedural history:

Albert Youngblood was charged by information filed in Clark County Superior Court on May 27, 2008, with one count of first degree robbery, contrary to RCW 9A.56.200; two counts of first degree kidnapping,¹ contrary to RCW 9A.40.020; and one count of attempting to elude a pursuing police vehicle, contrary to RCW 46.61.024(1). Appendix A. Clerk's Papers [CP] 1- 2. Each offense was alleged to have occurred while Mr. Youngblood or an accomplice was armed with a firearm. RCW 9.94A.533(3). CP 1-2. He was charged with co-defendants Samuel Ferguson and John Fitzpatrick.² CP 1.

Mr. Youngblood was arraigned on June 5, 2008, and waived speedy trial on July 10, 2008 with a new commencement date set for September 4, 2008. CP 5. The trial was continued to December 14, 2008 over Mr. Youngblood's objection on October 27, 2008. Mr. Youngblood moved for continuance on December 11, 2008; Mr. Ferguson and Mr. Fitzpatrick opposed the continuance in order to proceed to trial scheduled

¹The alleged victim in Count 2 was Roberta Damewood. The alleged victim in Count 3 was Javier Rivera. CP 1-2.

²Court of Appeals No. 39287-9-II.

for December 15, 2008 and moved to sever their case from Mr. Youngblood's case. The court granted Mr. Youngblood's request for continuance and he waived speedy trial on December 11, 2008 with a new commencement date of February 9, 2009. CP 29.

Trial to a jury began on February 9, 2009, the Honorable John F. Nichols presiding. On February 20, 2009, the jury found Mr. Youngblood, Mr. Fitzpatrick, and Mr. Ferguson guilty of robbery while armed with a firearm, and attempting to elude a police vehicle. 8RP at 1131-33; CP 72, 75, 76. The court had previously dismissed the firearm enhancement regarding the charge of attempting to elude a police vehicle at the conclusion of the State's case in chief. 6RP at 821.

On the afternoon of February 20, 2009, the jury sent a question indicating that it was unable to reach an agreement on a portion of the charges. The Jury Question stated:

If we are unable to come to an agreement on a portion of the charges, while agreeing on other portions, what do we do?

8RP at 1124; Supplemental CP at 202. Appendix B.

The jury was brought into the courtroom and the following exchange took place:

THE COURT: We're at a very serious stage of the proceedings as you can well imagine. And in response to your question, I have an additional instruction to give your question and ask you. And it's going to be directed to the attention of the foreperson and you're only supposed to answer pursuant to the question I ask and it's going to be a yes or no answer, okay?

Now I'll read the entirety to you. I've called you back into the

courtroom to find out whether you have a reasonable probability of reaching a verdict.

First, a word of caution. Because you are in the process of deliberating, it is essential that you give no indication about how the deliberations are going. You must not make any remark in that courtroom that may adversely affect the rights of either party or may in any way disclose your opinion of this case or the opinions of members of the jury.

I'm going to ask your presiding juror if there's a reasonable probability of the jury reaching a verdict within a reasonable time. The presiding juror must restrict her answer to yes or no when I ask this question and must not say anything else.

Okay. So the question is: Is there a reasonable probability of the jury reaching their verdict within a reasonable time, as to all the counts, as regarding all the Defendants?

JURY FOREPERSON: No.

THE COURT: Okay. And is there a reasonable probably of the jury reaching a verdict within a reasonable time as to any of the counts?

JURY FOREPERSON: Yes.

8RP at 1128-29.

Approximately sixteen minutes later, the court brought the jury out again.

THE COURT: Okay. You may be seated. The jurors are all present. And again, I ask the foreperson, do you have—reached a verdict on some counts?

JURY FOREPERSON: We have.

THE COURT: And have you signed those verdict forms related to those counts you have agreed upon?

JURY FOREPERSON: Yes.

THE COURT: And you have not been able to reach an agreement on the remaining counts?

JURY FOREPERSON: Correct.

THE COURT: Okay. If you will hand the verdict forms to the bailiff.

8RP at 1130-31.

The court then accepted the jury's guilty verdicts on Count 1, first degree robbery, and Count 4, attempting to elude a police vehicle. 8RP at 1131-34. After accepting this verdict, the judge excused the jury:

THE COURT: Okay. With that I do want to thank sincerely the dedication and the work done by the jurors in reaching this determination. I respect that. You are now discharged.

8RP at 1134. The verdict forms for Counts 2 and 3 were left blank. CP 73, 74.

The judge did not ask Mr. Youngblood, his counsel, or the prosecuting attorney if they agreed to discharge the jury. 8RP at 1134. The court did not make any findings relating to his decision to discharge the jury, and did not formally declare a mistrial. 8RP at 1134. The State refiled Counts 2 and 3 and Youngblood waived speedy trial on March 31, 2009. CP 91. Mr. Youngblood and Mr. Ferguson went to trial a second time, three months after the first jury was discharged.

The jury returned a verdict of guilty to the charges of first degree kidnapping as to both on May 22, 2009. CP 127, 128, 129, 130.

The matter came on for sentencing on August 7, 2009. The court

sentenced Mr. Youngblood within the standard range. 11RP at 1801-08; CP 160.

Timely notice of appeal by the defense was filed on August 28, 2009. CP 174. This appeal follows.

2. First trial testimony:

Two men wearing hats with eyeholes cut in them entered a Shari's Restaurant in Vancouver, Washington at approximately 5 a.m. on May 21, 2008. 2Report of Proceedings [RP] at 116, 119, 143.³ Once inside the restaurant, the men directed two restaurant employees—Javier Rivera and pie maker Roberta Damewood—to move from the kitchen area to another part of the restaurant where the mops are kept, and for both of them to lie on the floor. 2RP at 120, 121, 122, 123, 143, 148. In the mop room, Ms. Damewood hid her cell phone under some mops. 2RP at 123. Ms. Damewood testified that she did not see a gun. 2RP at 130, 132, 135, 139. After five to ten minutes, when it was quiet, she retrieved her phone and called 911. 2RP at 124, 126. Mr. Rivera also testified that he did not see

³The Verbatim Report of Proceedings consists of thirteen volumes:

1RP February 10, 2009, jury trial (morning);
2RP February 10, 2009, jury trial; (afternoon);
3RP February 11, 2009, jury trial (morning);
4RP February 11, 2009, jury trial (afternoon);
5RP February 12, 2009, jury trial;
6RP February 17, 2009, jury trial;
7RP February 18, 2009, jury trial;
8RP February 19, 20, 2009, jury trial, April 21, 2009, motion hearing;
9RP May 19, 2009, second jury trial;
10RP May 20, 2009, second jury trial;
11RP May 21, 2009, second jury trial, August 7, 2009, sentencing.
RP February 9, 2009 (voir dire, first trial); and
RP May 18, 2009 (voir dire, second trial)

a gun. 2RP at 145, 146. Mr. Rivera stated that the man was wearing gloves but he could see a little bit of his forearms and that his skin was “brownish, dark, black.” 2RP at 153.

One of the men directed Shari’s employee Regina Bridges to go to the cash register and open the till. 2RP at 168. She stated that he was wearing a hoody over a grayish stocking cap with eyeholes cut in it, and that he pointed a handgun at her. 2RP at 167, 168. She stated that she saw the other man and that he also was wearing a hoody with the hood portion over his head, had a cap pulled over his face with eyeholes in it, and that he was standing behind Mr. Rivera holding a gun. 2RP at 170. Ms. Bridges opened the till using a magnetic swipe card and after she did so, the man took money from the register and put it in his pocket. 2RP at 173, 174. After taking the money, both men went out the front door. 1RP at 65-66. Ms. Bridges stated that the man who had her open the till was wearing white knit cotton gardening gloves with blue piping. 2RP at 196.

Jason Godsil and his wife walked into the restaurant as the two men ran past them out the door. 1RP at 65-66. Mr. Godsil had seen a black Lincoln Town Car idling in the parking lot by the door as he entered the restaurant. 1RP at 65. He went out of the restaurant and saw the car drive slowly out of the parking lot and down 164th Street toward Highway 14. 1RP at 69. Ms. Bridges called 911 and said that she thought the men were African American. 2RP at 178, 179.

While traveling southbound on Interstate 205 at 4:58 a.m. on May

21, 2008, Neil Martin of the Vancouver Police Department saw a black Lincoln Town Car going northbound on the interstate. 1RP at 11. He radioed that he has seen a Town Car heading northbound, and police were positioned where I-205 merges with I-5. 4RP at 401. Deputy Thomas Yoder and several other police units followed the car, which was travelling at normal speed on northbound I-5 until they reached the Ridgefield exit, at which time Deputy Yoder activated his overhead lights. 4RP at 403, 404. The Town Car exited the freeway at the Ridgefield exit and went into the Tri Mountain Shopping Plaza and turned around. 4RP at 405, 407, 466. Det. Thomas Mitchum was standing with his gun drawn in the area between the parking lot and the roadway, and was able to see the driver, whom he identified as Mr. Ferguson. 4RP at 409,469, 473, 474. The car did not stop and went around the police car, which Det. Mitchum described as being parked in a "semi-roadblock." 4RP at 469, 472. After the car left the Tri Mountain parking lot, Deputy Yoder saw an object tossed from the car, which was later identified as a gun wrapped inside a gray hat with eyeholes cut in it. 4RP at 410, 441.

After leaving the parking lot, the car reentered the freeway headed northbound and increased its speed to 100 or 110 miles per hour with several units following it. 4RP at 413, 414, 417.

Continuing northbound into Cowlitz County, the car hit a spike strip deployed by officers. 4RP at 418. The car exited into Longview when several of its tires degraded and broke up. 4RP at 418, 420. The

car continued onto Highway 432 and went through three red lights. 4RP at 420. The car hit a traffic median at the intersection of Oregon Way and 15th Avenue and came to a stop. 4RP at 420. Deputy Yoder saw three African American males get out of the car and run down 15th Avenue. 4RP at 423. Mr. Fitzpatrick was taken into custody by Deputy Jeremy Koch, who stated that Mr. Fitzpatrick was breathing hard. 4RP at 515, 533. Mr. Youngblood was arrested by Officer Tim Deisher and was found with a black hat with eyeholes cut in it, and currency in his pocket. 4RP at 546. Police found a roll of coins under him after he was arrested. 4RP at 489, 493, 546. Mr. Youngblood was determined to be a possible contributor of DNA found on the black hat. 5RP at 670, 671. Police found Mr. Ferguson behind a couch on the porch of a house. 5RP at 575.

Inside the Town Car police found a pair of white gloves with blue piping and a roll of pennies. 5RP at 591, 597.

3. Second trial testimony:

Mr. Rivera testified that early in the morning of May 21, 2008, while he was in the kitchen of Shari's, he turned around and was grabbed by a person, and saw another person pointing a handgun at him. Both were wearing masks. 9RP at 1207, 1208, 1220. The man who had grabbed him took him to the back of the restaurant near the icemaker, where saw Roberta Damewood. The man then took both of them to the room where they keep the cleaning equipment. 9RP at 1209. He stated that the man was wearing a mask and that he could not see his face, but

that his skin was “dark.” 9RP at 1210, 1211, 1219. After approximately thirty seconds the man grabbed him and made him lie face down on the floor. 9RP at 1214, 1215. While on the floor he took his wallet and put it under some mops in the room. 9RP at 1233, 1234. The man with the gun stayed in the front of the restaurant. 9RP at 1212. After about two minutes it was quiet and Ms. Damewood got up from the floor, and both of them went toward the front cash register. 9RP at 1217, 1218.

Mr. Rivera said that he did not remember his testimony from the first trial when he said that he saw a person pointing something at him, but he did not know what it was. 9RP at 1245, 1246. Mr. Rivera said that he was untruthful during the first trial because he “was afraid.” 9RP at 1247.

He stated that he was afraid

[b]ecause you don't know if the person who you're testifying against has family members, have friends that can come after you and hurt you or hurt your family. I go to work at night, and my children go to school by themselves. One time they stay home at --- alone for a short period of time. And I do have to go to work to support them.

9RP at 1256.

He stated that no one had bothered him since he testified at the first trial. 9RP at 1259-60.

Regina Bridges testified that while making coffee at Shari's on May 21, 2008, she saw a man come into the restaurant wearing a silver-grayish stocking hat with eyeholes cut in it, and with a hoody pulled over

the hat. 9RP at 1274, 1275. She said that he had brown, tan, or dark brown skin. 9RP at 1276. He walked up to her and she saw he had a gun which he pointed at her. 9RP at 1275, 1276. He took her back into the kitchen, and she saw another man standing behind Mr. Rivera. 9RP at 1277, 1278. The two men spoke to each other and then the man took her from the kitchen area to the cash register. 9RP at 1280. She told him that he had to use her card to open the register, and he said to "do it." 9RP at 1280. She opened the register and then he took money from the till and put it in his pocket. 9RP at 1280. She said that he was wearing white gardening gloves with blue piping around the wrists. 9RP at 1280. He then said "let's roll" to the other man in the kitchen, who walked toward the pass-through and said "what?" The man said "let's roll" a second time and they both ran out the door. 9RP at 1282, 1283. Ms. Bridges then called 911. 9RP at 1284, 1286-1291. She stated that a hat and gloves entered as exhibits by the State were worn by the man in the restaurant. 9RP at 1292-94. A hat entered as an exhibit contained DNA that included Mr. Youngblood as a possible contributor. 11RP at 1612. Ms.

Damewood said while in the restaurant the morning of May 21, 2008, a man entered the restaurant wearing a mask told her to "go this way" and she went to the mop room with Mr. Rivera behind her. 9RP at 1321. He asked if they had anything on them and she said "no." 9RP at 1323. Ms. Damewood had a cell phone which she threw in a corner when the man stepped away. 9RP at 1323. The man returned and asked if they had a

cell phone and she said “no,” and then he left again. 9RP at 1323. He returned a third time and told her to get down on the floor and told Mr. Rivera to come with him. 9RP at 1324. She got down on the floor on her hands and knees. 9RP at 1324. The man told Mr. Rivera to get down on the floor which he did. 9RP at 1325-26. Ms. Damewood heard noises and then called 911 using her cell phone. 9RP at 1326, 1335-38. She did not see a gun held by either man. 9RP at 1344.

D. ARGUMENT

4. **THE TWO COUNTS OF KIDNAPPING WERE INCIDENTAL TO THE ROBBERY AND THEREFORE THE STATE PRESENTED INSUFFICIENT EVIDENCE OF KIDNAPPING, AND THE SEPARATE CONVICTIONS VIOLATE MR. YOUNGBLOOD’S RIGHT TO DUE PROCESS OF LAW.**

Mr. Youngblood’s first degree robbery conviction rested on the State’s contention that he or an accomplice displayed and threatened use of a firearm. CP 1. Likewise, the kidnapping convictions rested on his intent to facilitate the commission of first degree robbery. CP 1-2.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996).

Evidence is sufficient to support a conviction only if, viewing the

evidence in the light most favorable to the prosecution, a rational trier of fact could find each of the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

In the present case, the use of a firearm elevated both offenses: the robbery would not be a first degree robbery without it and the kidnapping would not be a first degree kidnapping without the intent to commit first degree robbery. CP 1-2. The robbery and kidnapping offenses require intentional restraint, and necessitate the same proof. Accordingly, kidnapping was incidental to the robbery and no separate conviction may be imposed and enforced for kidnapping under *State v. Korum* and *In re Pers. Restraint of Bybee, infra*.

In *Korum*, 120 Wn.App. 686, 703, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614 (2006), the Court dismissed kidnapping offenses on the grounds they were incidental to robbery. In *Bybee*, 142 Wn.App. 260, 266, 175 P.3d 589 (2007), the Court found that as a matter of law, there was "insufficient evidence to prove kidnappings independent of and with a different purpose than the robberies." *Bybee*, 142 Wn.App.

at 266; *Korum*, 120 Wn.App. at 707.

As charged in the case at bar, the essential elements of first degree kidnapping are intentional abduction “with intent to facilitate commission of any felony or flight thereafter.” CP 1-2; RCW 9A.40.020(1).

“Restrain” is defined in RCW 9A.40.010(1) as “to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty.” Restraint is committed "without consent" if it is “accomplished by . . . physical force, intimidation, or deception” RCW 9A.40.010(1).

“Abduct” is “to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force.” RCW 9A.40.010(2).

The substantial interference with a person’s liberty required to prove restraint must be a “real or material interference,” as contrasted with a slight inconvenience or petty annoyance. *State v. Robinson*, 20 Wn.App. 882, 884, 582 P.2d 580 (1978), aff’d on other grounds, 92 Wn.2d 307, 597 P.2d 892 (1979). By placing the word “substantial” in the statutory definition of restraint, the legislature demonstrated that the statute is intended to reach significant conduct restricting a person’s freedom of movement in “important” and “essential” ways. *Id.* at 885. Furthermore, this substantial interference with a person’s freedom of movement must

not be incidental to the commission of another crime. *Green*, 94 Wn.2d at 227; *Korum*, 120 Wn.App. at 707.

Kidnapping is a serious offense, contemplating serious conduct as its cause, and requires more than interference with a person. *Robinson*, 20 Wn.App. at 884-85. In cases where kidnapping is incidental to another offense, there may be insufficient evidence to prove a separate kidnapping offense. *In re Bybee*, 142 Wn.App. at 265-67. Here, the first degree kidnapping counts were incidental to the robbery and no separate conviction may be imposed and enforced.

The offense of first degree kidnapping involves more than merely moving or holding a person incidental to the commission of another crime. Offenses that involve moving or holding another person may include conduct that technically falls under the legal definition of kidnapping but does not meet the legal requirements for true kidnapping. *Green*, 94 Wn.2d at 227. Interference with a person's freedom of movement must have a significance that is independent of the other offense being committed. *Id.* Otherwise, the restraint does not amount to the commission of the separate crime of kidnapping. *Id.*

In *Green*, the defendant picked up his victim, stabbed her, and then carried her to another part of a building. *Id.* at 226. The *Green* Court ruled that, "the mere incidental restraint and movement of a victim which

might occur during the course of a [crime] are not standing alone, indicia of a true kidnapping. “ *Id.* at 227. Although Green “lifted and moved the victim to the apartment’s exterior holding area, it is clear these events were actually an integral part of and not independent of the underlying homicide.” *Id.* at 226-27. Moving a person’s body against that person’s will is considered an incidental restraint if it was done solely as a means of committing another crime. *Id.*

Mr. Youngblood submits that this case is controlled by *Korum*. In that case, the defendants committed several robberies, inside people’s homes, and restrained the victims. In two of the robberies, the victims were restrained with duct tape, again at gunpoint. *Korum*, 120 Wn.App. at 690-91. In another robbery, the defendants tied up seven people with wrist restraints and duct tape at gunpoint. *Id.* at 691.

The *Korum* Court found the restraint, abduction, and use of force “incidental” to the robberies. *Id.* at 707. The purpose of the restraint was to complete the robbery and prevent the victims’ interference with the thefts; the secretion of the victims was not extreme, remote, or far longer than it took to complete the robberies; and the restraint did not raise a separate and distinct injury.

Similarly, in Mr. Youngblood’s case, the purpose and extent of the movement of Ms. Damewood and Mr. Rivera was to accomplish the

robbery. Nether was restrained by handcuffs or ties, as shown by Ms. Damewood who used a hidden cell phone and called the police, and Mr. Rivera, who was able to extract his wallet and hide it under some mops. Both got up from the floor after a few minutes when it was quiet and went to the front of the restaurant.

As recognized in *Korum* and *Green*, kidnapping may come close to the line of being subsumed by another offense when that offense, like robbery, necessarily involves some detention against the victim's will. *Green*, at 306; *Korum*, 120 Wn.App. at 705. Mr. Youngblood's kidnapping convictions are incidental to the robbery conviction. Where kidnapping is incidental to robbery, the kidnapping must be dismissed. *Korum*, 120 Wn.App. at 707.

2. **MR. YOUNGBLOOD'S KIDNAPPING CONVICTIONS VIOLATED HIS CONSTITUTIONAL RIGHT NOT TO BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.**

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. A similar prohibition is set forth in Article I, Section 9 of the Washington Constitution. Wash. Const. Article I, § 9. Both constitutions protect an individual from being held to answer multiple times for the same offense:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Double jeopardy prevents retrial following an acquittal “even though ‘the acquittal was based upon an egregiously erroneous foundation.’” *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), citing *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). The constitutional prohibition against double jeopardy “also embraces the defendant’s ‘valued right to have his trial completed by a particular tribunal.’” *Arizona v. Washington*, 434 U.S. at 503, quoting *Wade v. Hunter*, 336 U.S. 684, at 689, 69 S. Ct. 834, 93 L.Ed. 974, (1949) A second prosecution may be grossly unfair, even if the first trial is not completed:

[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.

Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, 434 U.S. at 504-05, (footnotes omitted.)

Since discharging the jury inevitably implicates the double jeopardy clause, a trial court's discretion to declare a mistrial is not unbridled. *Arizona v. Washington*, 434 U.S. at 514; *State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003). Discharge of the jury without first obtaining the accused's consent is equivalent to an acquittal, unless such discharge is necessary to the proper administration of public justice. *Juarez*, at 889. A mistrial frees the accused from further prosecution, unless prompted by "manifest necessity." *Juarez*, at 889. To justify a mistrial, "extraordinary and striking circumstances" must clearly indicate that substantial justice cannot be obtained without discontinuing the trial. *Juarez*, at 889.

If the jury "through its foreman and of its own accord, acknowledges that it is hopelessly deadlocked, there would be a factual basis for discharge if the other jurors agree with the foreman." *State v. Jones*, 97 Wn.2d 159 at 164, 641 P.2d 708 (1982).

Under such circumstances, the court must consider the length of the jury deliberations in light of the length of the trial and the complexity of the issues. *State v. Kirk*, 64 Wn. App. 788 at 793, 828 P.2d 1128

(1992). A mechanical focus on any single factor is insufficient to justify a mistrial and discharge of the jury. *State ex rel. Charles v. Bellingham Mun. Court*, 26 Wn. App. 144 at 148-149, 612 P.2d 427 (1980). Where the trial court discharges a hung jury too quickly, the accused's right to a verdict from that jury is abridged. *Jones*, at 163.

In the present case, neither Mr. Youngblood nor his attorney gave consent for discharge of the first jury in this case. Accordingly, the discharge was equivalent to an acquittal unless supported by "extraordinary and striking circumstances" indicating that substantial justice could not be obtained without discontinuing the trial. *Juarez, supra*, at 889.

First, Judge Nichols did not ask the jurors if they agreed with the presiding juror's claim that the jury was unable to reach a verdict on all the counts. 8RP at 1129. Accordingly, he failed to follow the first requirement set forth in *Jones*—determining whether or not the other jurors agreed with the presiding juror, in order to ascertain whether or not discharge was truly warranted. *Jones*, at 164.

Second, there is no indication that Judge Nichols weighed the minimal "relevant considerations" prior to discharging the jury. *Jones, supra*, at 165.

Third, Judge Nichols did not make the findings required for

discharge of a jury short of verdict. He did not find that discharge of the jury was necessary to the proper administration of public justice, prompted by manifest necessity, or supported by extraordinary and striking circumstances that required discontinuation of the trial to obtain substantial justice. *Juarez* at 889.

Fourth, Judge Nichols did not formally declare a mistrial. His failure to do so deprived Mr. Youngblood of the opportunity to object or argue against his decision to discharge the jury.

For all these reasons, Judge Nichols' decision to discharge the jury violated Mr. Youngblood's constitutional right to receive a verdict from the jury he selected during his first trial. His second trial and conviction on the kidnapping charges violated his constitutional right to the protections of the double jeopardy clause. The convictions for kidnapping must be reversed and the case remanded for a new sentencing hearing. *Jones, supra*.

3. **MR. YOUNGBLOOD'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY DID NOT OBJECT TO TESTIMONY THAT MR. RIVERA WAS AFRAID FOR THE SAFETY OF HIS FAMILY**

- a. **Mr. Youngblood had the constitutional right to effective assistance of counsel.**

Mr. Youngblood's attorney failed to object when Mr. Rivera

testified at the second trial that he was afraid for the safety of his family. When asked by the prosecution why he testified that he did not see a gun at the first trial, but testified at the second trial that he had seen a gun, Mr. Rivera stated that he was afraid. 9RP at 1255. He stated that he was afraid:

[b]ecause you don't know if the person who you're testifying against has family members, have friends that can come after you and hurt you or hurt your family. I go to work at night, and my children go to school by themselves. On a time they stay home at --- alone for a short period of time. Andy I do have to go to work to support them.

9RP at 1256.

Competent defense counsel would have been aware of the evidence rules and law and voiced an objection to this inadmissible testimony and the prejudicial nature of the evidence presented. Moreover, counsel's deficient performance prejudiced Mr. Youngblood.

Persons accused of crimes have the constitutional right to counsel. U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. Counsel provides a critical role in ensuring a defendant receives due process of law and that the adversarial process is fair. *Strickland v. Washington*, 466 U.S. 558, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel necessarily includes the right to effective counsel. *Strickland*, 466 U.S. at 86; *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25

L.Ed.2d 763 (1970); *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302, *rev. denied*, 90 Wn.2d 1006 (1978).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under this test, the reviewing court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 698.

b. Defense counsel's performance was deficient because he did not object to Mr. Rivera's testimony.

When the accused encourages or threatens a witness not to testify against him, the defendant's actions are admissible because they reveal a consciousness of guilt. *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945); *State v. Moran*, 119 Wn.App. 197, 218-19, 81 P.3d 122 (2003)(defendant's letter to friend calling witness obscene names), *rev. denied*, 151 Wn.2d 1032 (2004); *State v. McGhee*, 57 Wn.App. 457, 788 P.2d 603 (threat against victim admissible to show both consciousness of

guilt and to tie defendant to victim), *rev. denied*, 115 Wn.2d 1013 (1990). However, mere speculation of threats is not admissible to show the defendant's guilty conscience. In order to be admissible, the actions or statements must be made by the defendant or someone acting at his request or with his knowledge. *Kosanke*, 23 Wn.2d at 215.

Here, the State elicited testimony from Mr. Rivera that he was afraid that the defendants or members of their families would hurt him or his family, and that is why he changed his testimony. Any effort to intimidate Mr. Rivera was not admissible to show Mr. Youngblood's guilt unless the efforts were linked to him. Absolutely no evidence was presented that any defendant had threatened Mr. Rivera. Counsel failed to object to this portion of Mr. Rivera's testimony. Counsel did not cite any cases or prepare a memorandum on this issue. Thus, it appears he was not aware of and certainly had not read the relevant cases on this issue.

Effective defense counsel is expected to understand the case law applicable to important issues at trial. *See Thomas*, 109 Wn.2d at 229 ("A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases). There can be no tactical reason not to move to exclude the testimony.

c. Mr. Rivera's fear for his and his family's safety was irrelevant and any relevancy

was outweighed by its prejudicial effect.

Only relevant evidence is admissible in Washington. ER 402; *State v. Kinchen*, 92 Wn.App 442, 452, 963 P.2d 928 (1998). Evidence is relevant if it tends to “make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*

Mr. Rivera’s fear for his family’s safety was not relevant to any fact that was of consequence in this case. *See Kinchen*, 92 Wn.App. at 452-53 (inflammatory photographs were not relevant to unlawful imprisonment charges, tended to show defendant bad father, and put him on trial for uncharged crimes).

Evidence of the accused’s character is generally not admissible to prove he acted in conformity with that character. ER 404(a). Similarly, evidence of the defendant’s other misconduct may not be used to demonstrate the defendant is a dangerous person or the type of person who would commit the charged offense. ER 404(b); *State v.*

Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). The testimony of Mr. Rivera's fear was improper character evidence, as it implied that Mr. Youngblood was a threatening and dangerous person.

d. Mr. Youngblood was prejudiced by his attorney's deficient performance.

Mr. Youngblood's defense was that he was not responsible for or involved in the incident. This was based in substantial part upon the lack of credibility of State's witness Mr. Rivera. Mr. Youngblood's defense was seriously damaged when the State produced testimony that Mr. Rivera was afraid for his family. Defense counsel's failure to object to this evidence was highly prejudicial to his client's case. Because defense counsel did not move to suppress the testimony, or ask for a mistrial once the testimony came in, the jury was free to speculate that Mr. Youngblood or a member of his family created fear in Mr. Rivera as substantive evidence against Mr. Youngblood.

Mr. Youngblood's convictions for kidnapping must be reversed.

Thomas, 109 Wn.2d at 232.

4. REVERSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF ACCOMPLICE LIABILITY FOR THE OFFENSE OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE

Under the due process clauses of the state and federal

constitutions, defendants are entitled to be free from conviction upon anything less than constitutionally sufficient evidence. *See State v. Sandstrom*, 442 U.S. 510, 99 S. Ct. 50, 61 L. Ed. 2d 39 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). If the prosecution fails to present such evidence on every essential element of the crime, reversal and dismissal is required. *See State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In this case, this Court should reverse and dismiss the conviction for attempting to elude a pursuing police vehicle because the prosecution failed to present constitutionally sufficient evidence to prove that Mr. Youngblood acted as accomplice. Even viewing the evidence in the light most favorable to the State, there is insufficient evidence that Mr. Youngblood committed the offense. It is uncontroverted that Deputy Mitchum identified Mr. Ferguson as the driver of the car. Moreover, there is no evidence in the record that Mr. Youngblood in any way assisted, encouraged, commanded or otherwise aided Mr. Ferguson when he failed to stop after the car reentered the freeway after leaving the Tri Mountain Shopping Plaza and the time the car was wrecked in Longview. Due to the absence of any evidence that Mr. Youngblood was an

accomplice to the offense, the conviction must be dismissed.

F. CONCLUSION

Based on the above, Albert Youngblood respectfully asks this Court to dismiss the conviction for attempting to elude a pursuing police vehicle, and to dismiss the kidnapping convictions as incidental to the robbery and contrary to the prohibition against double jeopardy, or in the alternative, grant him a new trial on the charges of kidnapping.

DATED: June 24, 2010.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over a horizontal line. The signature is fluid and cursive.

PETER B. TILLER-WSBA 20835
Of Attorneys for Albert Youngblood

EXHIBIT A

STATUTES

RCW 9A.40.010

Definitions.

The following definitions apply in this chapter:

(1) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

(2) "Abduct" means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force;

(3) "Relative" means an ancestor, descendant, or sibling, including a relative of the same degree through marriage or adoption, or a spouse.

RCW 9A.40.020

Kidnapping in the first degree.

(1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:

- (a) To hold him for ransom or reward, or as a shield or hostage; or
- (b) To facilitate commission of any felony or flight thereafter; or
- (c) To inflict bodily injury on him; or
- (d) To inflict extreme mental distress on him or a third person; or

(e) To interfere with the performance of any governmental function.

(2) Kidnapping in the first degree is a class A felony.

RCW 9A.56.200

Robbery in the first degree.

(1) A person is guilty of robbery in the first degree if:

(a) In the commission of a robbery or of immediate flight therefrom, he or she:

(i) Is armed with a deadly weapon; or

(ii) Displays what appears to be a firearm or other deadly weapon; or

(iii) Inflicts bodily injury; or

(b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.

(2) Robbery in the first degree is a class A felony.

RCW 9.94A.533

Adjustments to standard sentences.

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by

seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9A.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9A.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm

enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under *RCW 9.94A.728(4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW

9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under *RCW 9.94A.728(4);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a

persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or **9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under *RCW 9.94A.728(4);

(c) The sexual motivation enhancements in this subsection apply to all felony crimes;

(d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced;

(e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;

(f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

(9) An additional one-year enhancement shall be added to the standard sentence range for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089 committed on or after July 22, 2007, if the offender engaged, agreed, or offered to engage the victim in the sexual conduct in return for a fee. If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement. If the offender is being sentenced for an anticipatory offense for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089, and the offender attempted, solicited another, or conspired to engage, agree, or offer to engage the victim in the sexual conduct in return for a fee, an additional one-year enhancement shall be added to the standard sentence range determined under subsection (2) of this section. For purposes of this subsection, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

(10)(a) For a person age eighteen or older convicted of any criminal street gang-related felony offense for which the person compensated, threatened, or solicited a minor in order to involve the minor in the

commission of the felony offense, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by one hundred twenty-five percent. If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

(b) This subsection does not apply to any criminal street gang-related felony offense for which involving a minor in the commission of the felony offense is an element of the offense.

(c) The increased penalty specified in (a) of this subsection is unavailable in the event that the prosecution gives notice that it will seek an exceptional sentence based on an aggravating factor under RCW 9.94A.535.

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

(12) An additional twelve months shall be added to the standard sentence range for an offense that is also a violation of RCW 9.94A.831.

RCW 46.61.024

Attempting to elude police vehicle — Defense — License revocation.

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a

reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

(2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.

(3) The license or permit to drive or any nonresident driving privilege of a person convicted of a violation of this section shall be revoked by the department of licensing.

EXHIBIT B

DATE: 2/20/09

TIME: 12:00

Do not disclose any information or state how the jury has voted.

FILED

FEB 20 2009

Sherry W. Parks, Clerk, Clerk C

08-1-00819-3

JURY QUESTION

If we are unable to come to an agreement on a portion of the charges, while agreeing on other portions, what do we do?

Are we hung or do we have to continue deliberating until we agree?

You will be brought back into the courtroom for further instructions. In the meantime continue to deliberate while the parties are notified.

Feb. 20, 2009 @ 12:15 pm.


Judge


FOREMAN/PRESIDING JUROR

43 (R)

FILED
COURT OF APPEALS
10 JUN 25 PM 1:12
STATE OF WASHINGTON
BY _____
FEMITY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ALBERT JAMAL
YOUNGBLOOD,

Appellant.

COURT OF APPEALS NO.
39721-8-II

CLARK COUNTY CAUSE
NO. 08-1-00819-3

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Albert J. Youngblood, Appellant, and Michael Kinnie, Deputy Prosecutor, by first class mail, postage pre-paid on June 24, 2010, at the Centralia, Washington post office addressed as follows:

Mr. Michael C. Kinnie
Clark County Deputy Prosecutor
P.O. Box 5000
Vancouver, WA 98666

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

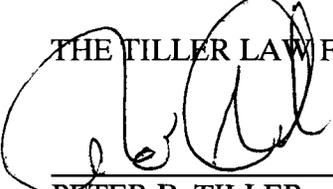
CERTIFICATE OF
MAILING

1

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