

NO. 42033-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FLOYD ARGUS GREENLEE, III,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated the defendant's right to speedy trial under CrR 3.3 when it granted a state's motion to continue the trial past the time for speedy trial in order to secure the presence of an unnecessary witness.

2. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it admitted irrelevant, unfairly prejudicial evidence and when, but for the admission of that evidence, the jury would have acquitted the defendant.

3. Trial counsel's failure to bring a motion to suppress all evidence the police obtained after illegally arresting the defendant denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. Does a trial court violate a defendant's right to speedy trial under CrR 3.3 if it grants a state's motion to continue the trial past the time for speedy trial in order to secure the presence of an unnecessary witness?

2. Does a trial court deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it admits irrelevant, unfairly prejudicial evidence under circumstances in which the jury would have acquitted the defendant but for the admission of that evidence?

3. Does a trial counsel's failure to bring a motion to suppress all evidence the police obtained after illegally arresting the defendant deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the trial court would have granted the motion to suppress and the jury would have acquitted the defendant had the evidence been suppressed?

STATEMENT OF THE CASE

Factual History

On November 22, 2010, a white male entered the Walmart in Longview, walked to the electronics department at the back of the store, and placed a 46" Samsung television worth \$698.00 in his shopping cart. RP 88-96.¹ This same person then walked to the exit at the front doors of the store where a Walmart employee checks receipts against merchandise customers are taking out of the store. *Id.* Seeing the defendant, this Walmart employee asked for the receipt for the television. RP 128-133. The defendant responded by picking the television up and running out of the entrance doors with it. *Id.* The Walmart employee followed the defendant out and saw him jump into the back seat of a light-colored, older, Lincoln that had pulled up to the front doors of the store as the defendant ran out. RP 128-133, 165-166.

On the next day, November 23, 2010, another white male of similar appearance to the one the day previous entered the same Walmart through another entrance, got a shopping cart, and pushed it over to the computer section of the store. At that point, he placed a touch screen computer priced at \$898.00 in the cart and pushed it towards the entrance. RP 100-112. As he got to the front of the store, this person pulled the computer box out of the

¹The record on appeal includes three volumes of continuously numbered verbatim reports, referred to herein as "RP [page #]."

cart and ran out the doors, passing the same Walmart employee from the day previous. *Id.* Once again, a light colored, older Lincoln pulled up to the front of the store, and the person stealing the computer jumped in the back seat of the car, which sped out of the parking lot. RP 133-136, 165-166. The Walmart employee believed the same person committed both thefts, and that the same vehicle was involved on both days. RP 135-136. Apparently, a customer in the parking lot was able to get the license number on the car. RP 111, 166. All of the thief's movements in and out of the Walmart were videotaped from multiple cameras on both days. RP 82-124.

After the second theft, Longview Police Officer Ripp came to the Walmart, interviewed store security and the Walmart employee who saw both events, and got the licence number for the suspect vehicle. RP 162-166. Later that day, another Longview Officer stopped the suspect vehicle and arrested the driver on an unrelated matter. RP 167-168. When he found out about this, Officer Ripp went to the jail and asked the driver if he had been at the Walmart that day or the previous day. *Id.* This person denied any involvement with the Walmart thefts, but he did make statements implicating the defendant. *Id.* He also told Officer Ripp that the defendant was staying at 1213 30th Avenue in Longview. *Id.*

A couple of days after the second theft, Officer Ripp and three other Officers went to 1213 30th Avenue in Longview and knocked on the door.

RP 173-176. A woman answered and the officers asked where the defendant was. *Id.* She told them that he was upstairs in a bedroom and that they could go up to see him. *Id.* Officer Ripp and another officer then walked up the stairs and down the hall to the open door of a bedroom. *Id.* Inside, the officers saw the defendant and another male. *Id.* Once the officers verified the defendant's identity, they entered the bedroom and arrested him. *Id.* The officers then took the defendant to the police station where he made incriminating statements to them. RP 177-183. The officers also noted that the defendant appeared to be wearing clothing similar to the suspect on the Walmart videos. *Id.* The officers seized these items as evidence. *Id.*

Officer Ripp later showed the Walmart security videos and still photographs made from the videos to Department of Corrections Probation Officer Megan Hlavac and Longview Police Captain Robert Huhta. RP 137-142, 144-153. Officer Hlavac had been the defendant's probation officer for a number of years and had over 50 contacts with him over that period. RP 137-142. Captain Huhta has been acquainted with the defendant for over 10 years and knows his family. RP 144-153. Both officers identified the person in both videos as the defendant Floyd Greenlee. RP 137-142, 144-153.

Procedural History

By information filed December 1, 2010, and later amended, the Cowlitz County Prosecutor charged the defendant Floyd Argus Greenlee with

one count of theft in the second degree and one count of theft in the third degree. CP 1-2. The defendant made bail shortly after his arrest and remained out of custody for the entirety of the case. RP 1, 4. On December 22, 2010, the defendant, appeared with his appointed attorney for arraignment and pled not guilty to the charges. RP 1-3. At that time, the court set a trial date of March 14, 2011, which was 82 days from arraignment. *Id.*

On March 10, 2011, the parties again appeared before the court. RP 4. At that time, the state moved to continue the trial date, arguing that one of its witnesses was unavailable on the date set. *Id.* In a written affirmation attached to the state's motion to continue, the state claimed the following as the facts underlying its need for a continuance of the March 14, 2011 trial date.

1. The defendant is charged with Theft in the Second Degree.
2. The Defendant was arraigned on December 22, 2010. His jury trial was scheduled for March 14, 2010.
3. The defendant is currently out of custody. The time for trial runs until March 21, 2010.
4. Matthew Shirley is listed as a witness in this case. Matthew Shirley is a security officer at Wal-Mart. Mr. Shirley provided security footage of the Defendant taking items and exiting the store without paying for them. He also identified the Defendant as the person on the security footage. Mr. Shirley is material to this case.
5. Mr. Shirley will be out of state on vacation from March 5th -

March 17th, 2010. For this reason, Mr. Shirley is unavailable for the current trial date.

6. I have contacted the Defendant's attorney and he does not object to the continuance, but he has not had a chance to speak with his client yet.

7. CrR 3.3(f)(2) permits the court to continue a jury trial if there is good cause for a continuance. The unavailability of a witness has been found to be grounds to delay a trial for a reasonable period of time. *See State v. Torres*, 111 Wash.App. 323, 329, 44 P.3d 903 (2002).

CP 7.

The defense objected to any continuance of the trial date, arguing that the state's claim that Mr. Shirley actually would identify the defendant as the perpetrator of the offense was incorrect. RP 4-5. Rather, the defense argued that Mr. Shirley would only function to set the foundation for the admission of the video tapes and that the state could call a different Walmart employee to establish this foundational requirement. *Id.* However, noting that the state's affidavit claims that Mr. Shirley would be called to identify the defendant as the perpetrator, the court granted the state's motion and reset the trial to March 28, 2011. *Id.* There is no statement or discussion on the record on why the court did not reset the trial for March 18th, 21st, or 22nd, which were all court days after the state's witness returned from his vacation but still within the time for speedy trial. RP 3-5; CP 6-7. In addition, a careful review of Mr. Shirley's testimony from trial reveals that he did not

identify the defendant as the perpetrator of the two crimes. RP 82-124.

Fourteen days later on March 24, 2011, the state moved the court for another continuance of the trial date, this time arguing that the prosecutor in charge of the defendant's case was in "another trial." RP 282-284. The court granted the motion over the defendant's objection, and reset the trial for April 4, 2011. *Id.* During this motion, the state did not explain why it had not informed the court of this fact two weeks previous when the court had granted the state's first motion to continue. *Id.*

On April 4, 2011, the court called this case for trial, with the state calling Matthew Shirley, Irmgard Potter (the Walmart employee who was working at the front doors on both days), Officer Hlavac, Captain Huhta, and Officer Ripp. RP 82-124, 128-136, 137-142, 145-153, 162-202. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History. In addition, during Officer Ripp's testimony, the state elicited the following facts over defense objection: (1) that a witness had given Officer Ripp the license number of the suspect vehicle, (2) that a person by the name of Kevin Atkinson had been arrested on an unrelated matter while driving the vehicle associated with the license number the witness had given him, (3) that Mr. Atkinson denied any involvement with the Walmart thefts, (4) that he got the defendant's name and address from Mr. Atkinson, and (5) that prior to speaking with Mr. Atkinson, Officer Ripp

had not heard of the defendant. RP 162-168.

In addition, during Officer Ripp's testimony, the state elicited the fact that based upon the information he received from Mr. Atkinson, Officer Hlavac and Captain Huhta went to the defendant's address, placed him under arrest, took him to the police station, read him his *Miranda* warnings, and then took him to jail. RP 177-183. Finally, at the end of Officer Ripp's testimony, the state offered the defendant's booking photo and defendant's booking sheet into evidence. RP 183. The defense objected on the basis of relevance. *Id.* However, the court admitted the two items into evidence as Exhibit No. 7. *Id.*

Following the close of the state's case, the defense closed without calling any witnesses. RP 203. The court then instructed the jury without objection from either party. RP 204-211. The parties then presented closing argument. RP 225-260. During rebuttal, the state made the following argument:

You know, I don't – it is not very surprising that Kevin Atkinson, a person who is arrested for doing whatever he is doing in the vehicle would give a false name. People who commit crimes give false names. Sure. Not surprising. We are not asking you to trust everything. Kevin – We don't know what Kevin Atkinson said to Officer Ripp. That – We didn't get into that. But we do know that he was driving the same car that was reported at the scene and we saw that silver, looked like a Lincoln or something like that, pull up and head out. We do know he was driving the same car that had been reported from the Walmart. And, we do know that when Officer Ripp went and spoke with Kevin Atkinson, before he did, he said he did

know the name Floyd Greenlee, and he got an address from him, and he – a few days – a day or two later went to that address, and the Defendant was there. So that does connect him to that car. And for all we know, really, we know there was definitely another person helping out in the car. For all we know, and it's not the issue here, Kevin Atkinson could have been the driver of the car that day.

RP 255-256.

Following argument, the jury retired for deliberation, later bringing back verdicts of guilty on both counts. CP 69-70; RP 267-269. One week later, the court sentenced the defendant to 6 months in jail on the felony, which was at the top end of the standard range. CP 72-84. The court then gave the defendant 90 days in jail on the misdemeanor, consecutive to the time on the felony. *Id.* The defendant thereafter filed timely notice of appeal. CP 85.

ARGUMENT

I. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO SPEEDY TRIAL UNDER CrR 3.3 WHEN IT GRANTED A STATE'S MOTION TO CONTINUE TO SECURE THE PRESENCE OF AN UNNECESSARY WITNESS.

Under CrR 3.3(b), the time for trial for a person not held in jail is “90 days after the commencement date specified in this rule,” or “the time specified under subsection (b)(5).” CrR 3.3(b)(1)(i)&(ii). The “[t]he initial commencement date” under CrR 3.3(c)(1) is “the date of arraignment as determined under CrR 4.1.” Under CrR 3.3(h), “[a] criminal charge not brought to trial within the time period provided by this rule shall be dismissed with prejudice.” CrR 3.3(h). The purpose of CrR 3.3 is to prevent undue and oppressive incarceration prior to trial. *State v. Kingen*, 39 Wn.App. 124, 692 P.2d 215 (1984).

Under CrR 3.3(f)(2), the trial court may grant a motion to continue a trial to a specific date outside of the time limits for speedy trial upon a showing of good cause if such continuance is “required in the administration of justice” and it will not prejudice the defendant. This section states:

(f) Continuances. Continuances or other delays may be granted as follows:

. . . .

(2) Motion by the Court or a Party. 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 motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

CrR 3.3(f)(2).

While the trial court bears the responsibility for assuring a defendant's right to speedy trial under this rule, the decision whether or not to grant a continuance beyond the time required under CrR 3.3 lies within the sound discretion of the trial court and will only be overruled upon an abuse of that discretion. *State v. Nguyen*, 131 Wn.App. 815, 129 P.3d 821 (2006). An abuse of discretion occurs "when the trial court's decision is arbitrary or rests on untenable grounds or untenable reasons." *State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001).

For example, in *State v. Nguyen, supra*, a defendant was convicted of a home invasion robbery following a trial outside the time for speedy trial. The court set the trial outside the speedy trial rule upon the state's motion that it needed more time to gather more information about some "related" home invasion robberies. In fact the state had no evidence linking the defendant or his offense to the other defendants and the other cases. Rather, the state believed that further investigation might potentially link the cases. Following conviction the defendant appealed, arguing that the trial court had abused its discretion when it granted the state's motion to continue.

In addressing the defendant's arguments the Court of Appeals first acknowledged that separate trials for multiple defendant's charged with the same offenses were not favored at the law. Thus, it would well be within the trial court's discretion to exceed one defendant's speedy trial rights in order to facilitate a joint trial. However, the court went on to note that where the various defendants were not charged jointly and where there was no evidence to link the various similar offenses, it would be an abuse of discretion to exceed one defendant's speedy trial rights to allow the police more time to search for "potential" connections among the cases. The court held:

The suspicion that a link will "potentially" be discovered between the case that is scheduled for trial, and other crimes not yet charged, is not like other reasons that our courts have recognized as justifying delay of trial as "required in the administration of justice." The continuance in this case was not required to allow the State to prepare its case. The State could have proceeded to trial on December 29 on the charge for which Nguyen had already been arraigned. If forensic testing later provided evidence that Nguyen was responsible for other crimes, the State could have filed the additional charges at that time. Alternatively, if trying all the home invasion robberies together was a higher priority, the State could have waited to charge Nguyen until the testing of evidence was completed. The State has not explained why it is just to detain a defendant longer than 60 days after arraignment solely on the suspicion that he might be linked to some other crime.

State v. Nguyen, 131 Wn.App. at 820-821.

In the case at bar, the defendant was out of custody during the entirety of the proceedings and the initial commencement date for speedy trial was his arraignment on December 22, 2010. This put his last date for trial under

the 90 day limit on March 22, 2011. At arraignment, the court set a trial date for March 14, 2011, which was 82 days after arraignment. On March 10, 2011, the prosecutor moved for a continuance of the trial date, presenting an affirmation under oath stating that (1) Mr. Shirley was an essential witness who would identify the defendant as the perpetrator of the two thefts, and (2) he was unavailable from March 5th to March 17th as he was on vacation. The defendant objected to any continuance outside of the time for speedy trial, arguing that Mr. Shirley was not an essential witness, that he would not identify the defendant, and that another Walmart employee could lay the foundation necessary to introduce the video tapes into evidence. The court granted the state's motion, specifically noting that the state had alleged in its affirmation that Mr. Shirley would identify the defendant. As the following explains, the trial court abused its discretion when it granted this motion for two reasons.

First, a careful review of Mr. Shirley's trial testimony reveals that at no point did he identify the defendant as the perpetrator of the offenses. This is not unusual, since his involvement in the case was to review the security video tapes and make copies of them for the police. He did not claim to be acquainted with the defendant and he did not claim that he had ever even been in the defendant's physical presence. Thus, at best, all he could do would be to look at the tapes and then give an opinion that "to him" the

defendant in the courtroom looked like the person on the video tapes. This type of opinion evidence is obviously incompetent. Thus, the state's affirmation in support of the motion to continue was erroneous, and the trial court's decision to grant the continuance on this basis constituted an abuse of discretion.

The trial court's decision granting the state's motion and continuing the case beyond the time for speedy trial was also an abuse of discretion for a second, more fundamental reason. This reason is that the court could have granted the motion and reset the trial within the time for speedy trial. As the state's affirmation set out, Mr. Shirley was only unavailable until March 17th. Since speedy trial did not run out until March 22nd, the court could have reset the trial for Friday, March 18th, Monday, March 21st, or Tuesday, March 22nd without violating the defendant's right to speedy trial under CrR 3.3. There is no discussion in the record at all as to why the court did not do this. Thus, the trial court violated the defendant's statutory right to speedy trial and this court should vacate the convictions and remand with instructions to dismiss with prejudice under CrR 3.3(h).

II. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ADMITTED IRRELEVANT, UNFAIRLY PREJUDICIAL EVIDENCE.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

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.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove the strength and length of the chain of inferences necessary

to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to

support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

In the case at bar, the court denied the defendant a fair trial when it allowed the state to elicit three types of evidence that were either completely irrelevant and prejudicial, or slightly relevant but much more unfairly

prejudicial than probative. This evidence was: (1) inadmissible hearsay that the driver of the vehicle associated with the thefts was associated with the defendant, (2) a police officer's evidence of guilt, and (3) an irrelevant, prejudicial booking sheet and photograph for the defendant. The following examines each class of evidence and how its admission denied the defendant a fair trial.

(1) The Trial Court Erred When it Allowed the State to Present Inadmissible, Prejudicial Hearsay over Defense Objection.

Under ER 802, hearsay "is not admissible except as provided by these rules, by other court rules, or by statute." Under ER 801(c) hearsay is defined as follows:

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

ER 801(c).

The phrase "other than one made by the declarant while testifying at the trial or hearing" includes an out-of-court statement made by an in-court witness. *State v. Sua*, 115 Wn.App. 29, 60 P.3d 1234 (2003). In the case at bar, the trial court repeatedly allowed the state, over defense objection, to elicit numerous statements "other than one made by the declarant while testifying at trial." This hearsay, elicited over repeated defense objection, included the following facts: (1) that someone said they say the suspect

vehicle, (2) that someone said they obtained the license number from the suspect vehicle, (3) that another police officer said that he had stopped that vehicle and arrested Mr. Atkinson, who was the driver, (4) that Mr. Atkinson denied any involvement in the Walmart thefts, (5) that Mr. Atkinson said that he was acquainted with the defendant, and (6) that Mr. Atkinson told Officer Ripp that the defendant was staying at 1213 30th Avenue in Longview. This evidence was critical to the state's case because it connected the defendant to the vehicle used as a getaway car for both thefts.

The state responded to the defendant's hearsay objections by twice declaring that it was not offering this evidence to prove the truth of the statements. Thus, the prosecutor argued that the statements were not hearsay. RP 167, 173. The problem with using this argument to justify the admission of these hearsay statements is twofold. First, the statements were only relevant to the extent that they were being offered to prove the truth of their content. In other words, why Officer Ripp did what he did, and went where he went, did not make any issue at trial either slightly more or less probable. Thus, his actions were not relevant.

Second, a review of closing argument reveals that the state was specifically offering this inadmissible hearsay as substantive evidence because the state specifically argued that the jury should find the defendant guilty based upon this evidence. The following is taken from the state's

rebuttal argument.

You know, I don't – it is not very surprising that Kevin Atkinson, a person who is arrested for doing whatever he is doing in the vehicle would give a false name. People who commit crimes give false names. Sure. Not surprising. We are not asking you to trust everything. Kevin – We don't know what Kevin Atkinson said to Officer Ripp. That – We didn't get into that. But we do know that he was driving the same car that was reported at the scene and we saw that silver, looked like a Lincoln or something like that, pull up and head out. We do know he was driving the same car that had been reported from the Walmart. And, we do know that when Officer Ripp went and spoke with Kevin Atkinson, before he did, he said he did know the name Floyd Greenlee, and he got an address from him, and he – a few days – a day or two later went to that address, and the Defendant was there. So that does connect him to that car. And for all we know, really, we know there was definitely another person helping out in the car. For all we know, and it's not the issue here, Kevin Atkinson could have been the driver of the car that day.

RP 255-256.

This argument stands in stark contrast to the state's prior claims that it was not seeking to elicit the hearsay evidence about the getaway vehicle to use substantively. Rather, this is specifically why the state elicited this critical evidence that connected the defendant to the getaway vehicle. Thus, the trial court erred when, over repeated defense objection, it allowed the state to elicit this evidence.

(2) The Trial Court Erred When it Allowed the State to Elicit Opinion Evidence of Guilt from a Police Officer.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the

right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). In order to sustain this fundamental constitutional guarantee to a fair trial both defense counsel and the prosecutor, as well as the witnesses, must refrain from any statements or conduct that express their personal belief as to the credibility of a witness or as to the guilt of the accused. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956). If there is a “substantial likelihood” that any such conduct, comment, or questioning has affected the jury’s verdict, then the defendant’s right to a fair trial has been impinged and the remedy is a new trial. *State v. Reed*, 102 Wn.140, 684 P.2d 699 (1984).

For example, in *State v. Denton*, 58 Wn.App. 251, 792 P.2d 537 (1990), the defendant was charged with two counts of bank robbery. At trial he admitted the crimes, but claimed he acted under threat of death from a person named Walker. When Mr. Walker was called to testify he admitted to previously beating the defendant, but he denied having threatened to have the defendant killed if he did not perform the robberies. Following this testimony, the defense proposed to cross-examine Walker concerning statements he made while in prison to a cell-mate named Livingston in which he admitted to Livingston that he had threatened to kill the defendant if he did not perform the robberies.

However, when Livingston was examined outside the presence of the

jury he refused to testify concerning his conversation with Walker as he didn't want to be labeled a "snitch." Although the court gave Livingston an 11 month sentence for contempt it refused to allow defense counsel to cross-examine Walker concerning his admissions to Livingston. Following verdicts of guilty the defendant appealed arguing that the trial court erred when it refused to allow the offered cross-examination of Walker.

In rejecting the defendant's claim, the Court of Appeals stated the following.

Asking these questions would have permitted defense counsel to, in effect, testify to facts that were not already in evidence. Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross examination when such information is not otherwise admitted as evidence. *See State v. Yoakum*, 37 Wash.2d 137, 222 P.2d 181 (1950).

State v. Denton, 58 Wn.App. at 257 (citing *State v. Yoakum*, 37 Wn.2d 137, 222 P.2d 181 (1950)).

Similarly in *State v. Yoakum, supra*, the defendant was charged with Second Degree Assault out of an incident in which the defendant knifed another person during a fight outside a bar. During the trial the defendant testified and claimed self defense. During cross examination the prosecutor repeatedly impeached the defendant with a transcript of a taped conversation the defendant made to the police. However, the prosecutor never did offer either the transcript into evidence or call the officer to testify concerning the

statement.

Following conviction the defendant appealed, arguing that he was denied a fair trial because of the prosecutor's repeated reference during cross-examination to evidence within the personal knowledge of the prosecutor that was never made part of the record. In setting out the law on this issue, the Washington Supreme Court relied upon and quoted extensively from the Arizona Supreme Court's decision in *Hash v. State*, 48 Ariz. 43, 59 P.2d 305 (1936).

In *Hash* the defendant appealed his conviction for statutory rape, arguing that the trial court had erred when it allowed the prosecutor to cross-examine a witness concerning inconsistent statements the witness had previously made to the prosecutor in his office in front of another deputy prosecuting attorney. The Arizona Supreme Court stated the following concerning the state's impeachment of the witness.

It can at once be seen that these questions must have been damaging to the defendant. Back of each was the personal guarantee of the county attorney that Edgar had stated to him all the things assumed in the question. In other words, it was as though the county attorney had himself sworn and testified to such facts. Not only was his personal and official standing back of these statements, but he called in to corroborate him Ed Frazier, deputy county attorney, a lawyer of high standing for integrity and ability. These questions were not put, as the court assumed as a basis for impeachment. Their certain effect was to discredit the witness J. A. Edgar. The county attorney, if he knows any facts, may, like any other witness, be sworn and submit himself to examination and cross-examination, but he may not obtrude upon the jury and into the case knowledge that he

may possess under the guise of cross-examination, as in this case.

* * *

To give sanction to the manner in which the prosecution conducted the cross-examination of defendant's witness J. A. Edgar would establish a precedent so dangerous to fair trials and the liberties of our citizens that we feel for that reason alone the case should be retried.

State v. Yoakum, 37 Wn.2d 142-143 (quoting *Hash v. Arizona*, 59 P.2d at 311).

In *Yoakum* the Washington Supreme Court went on the reverse the defendant's conviction, stating as follows.

A person being tried on a criminal charge can be convicted only by evidence, not by innuendo. The effect of the cross-examination as conducted by the deputy prosecutor was to place before the jury, as evidence, certain questions and answers purportedly given in the office of the chief of police, without the sworn testimony of any witness. This procedure, followed with such persistence and apparent show of authenticity was prejudicial to the rights of appellant.

State v. Yoakum, 37 Wn.2d at 144.

Similarly, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985).

In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'"

(Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state’s expert to testify in a rape case that the alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant’s guilt or innocence).

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the

bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Under this rule the fact that officers performed a “high risk” traffic stop, arrested the defendant, placed him in handcuffs, and took him to the police station or the jail is not evidence because it constitutes the arresting officer’s opinions that the defendant is guilty. For example, in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967), the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing that the attending officers’ failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent’s negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant’s vehicle falls into this category. Therefore, the witness’ opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he issued, would not be acceptable as opinion evidence.

Warren v. Hart, 71 Wn.2d at 514.

Although *Warren* was a civil case, the same principle applies in criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide. Thus, in the case at bar, the fact that Officer Ripp arrested and handcuffed the defendant and took him to the police station and then booked him into jail constituted improper opinion evidence of guilt. One is left in this case to ask the question: what was the relevance of the fact that the officers arrested the defendant and read him his *Miranda* rights and took him to the police station and then to the jail? What fact at issue at trial does the fact of the arrest, *Miranda*, and booking in jail make more or less likely? The answer is that the only relevance in this evidence lies in the inference that the officers believed the defendant guilty. Why did they arrest, *Mirandize*, and then book the defendant into jail? They took these actions because they believed he was guilty. This evidence had no other relevance. Thus, it was error for the state to elicit it.

(3) The Trial Court Erred When it Allowed the State to Introduce the Defendant's Booking Photograph into Evidence Because it Was Irrelevant and More Prejudicial than Probative.

Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence.” Under ER 402, “all relevant evidence is admissible” with certain limitations. By contrast, under this same rule “[e]vidence which is not relevant is not admissible.” Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the “existence of any fact” as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) .

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery, and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant’s arguments, the court first noted that lay witnesses may testify concerning the mental capacity of a defendant so long as the witness’ opinion is based on facts the witness personally observed. The court then noted that the trial court did not abuse its discretion when it

excluded the defendant's proposed witness because she did not meet these criteria as she had never observed the defendant when he was abusing drugs.

In the case at bar, the ultimate question before the jury was whether or not the state could prove beyond a reasonable doubt that the defendant was the person who committed the two thefts at Walmart. As the defendant's questions and arguments at trial show, the defense did not dispute the fact of the two thefts or the values of the items taken. Rather, the defense simply claimed that the defendant was not the person who committed the crimes. In an attempt to prove its case, the state had the defendant's "booking sheet" and a blowup of the "booking sheet" photo marked as a piece of evidence and then offered them into evidence. The defense objected that they were irrelevant. The state never responded to this argument as indeed the only possible relevance for this evidence, particularly the booking sheet, was to emphasize to the jury that Officer Ripp believed the defendant was guilty of the crime because he arrested the defendant and booked him into jail. The use of the booking sheet emphasized this improper point. Since this item did not make any fact at issue more or less likely, it was irrelevant and the trial court erred when it admitted it over defense objection.

In the case at bar, the errors in admitting the improper hearsay and the improper opinion evidence was far from harmless. In making this argument, the defense points out the following facts: (1) no physical evidence

connected the defendant to the offenses in this case, (2) the Walmart employee who actually twice saw the thief from the distance of only a few feet was unable to identify him, and (3) the two officers who did identify the defendant from the videotapes had their identification contaminated by the fact that Officer Ripp suggested to them that the defendant was the person in the video instead of showing them the videos and asking whether or not they knew who the person was. Thus, in the case at bar, the critical evidence on the issue of identity came from two sources: the hearsay evidence connecting the defendant to the getaway vehicle, and the admission of Officer Ripp's opinion that the defendant was guilty. Absent this improper evidence, it is more likely than not that the jury would have acquitted the defendant on both charges. As a result, the defendant is entitled to a new trial.

III. TRIAL COUNSEL'S FAILURE TO BRING A MOTION TO SUPPRESS ALL EVIDENCE THE POLICE OBTAINED AFTER ILLEGALLY ARRESTING THE DEFENDANT DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper

functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to bring a suppression motion arguing that all of the evidence the police officers obtained from the defendant, including his

clothing and statements, should be suppressed because the arresting officer violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when he entered the defendant's bedroom without a warrant and without an exception to the warrant requirement. The following presents this argument.

In *Payton v. New York*, 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980), the United States Supreme Court ruled that the Fourth Amendment prohibits the police from entering a person's home in order to make a routine, warrantless arrest. In this case, the court stated: "[T]he Fourth amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's house in order to make a routine felony arrest." In explaining this interpretation, the court notes that "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton v. New York*, 445 U.S. at 590. The Washington State Supreme Court subsequently refined this principle under Washington Constitution, Article 1, § 7, and held that the police may not call a person to the door and then make an arrest without a warrant. *State v. Holeman*, 103 Wn.2d 426, 693 P.2d 89 (1985).

In the case at bar, as in *Payton* and *Holeman*, the police entered the home where the defendant was living without his permission, walked up the

stairs, looked into his bedroom, and then entered and arrested him without a warrant. Thus, this arrest was illegal. Had defendant's trial counsel made a motion to suppress, the trial court would more likely than not have suppressed both the defendant's statements given immediately after his arrest, as well as the clothing the officers took from the defendant's person.

The state may respond to this argument by claiming that the officers were not acting illegally because they entered with the permission of another person who was apparently, or at least appeared, to be a tenant of the home. However, as the decision in *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005), illustrates, this argument fails because the police did not also obtain the defendant's permission to enter.

In *State v. Morse, supra*, the police went to an apartment complex and contacted the manager in an attempt to find a person with an outstanding warrant. The manager informed the police that the wanted person had stayed in a particular apartment in the past, but had not been around for about a week. The officers then went to that apartment and knocked on the door. A woman answered and told the police that the wanted person was not in the apartment and had not been there for about a week. Without asking this person's authority over the apartment, the police asked and obtained her permission to search for the wanted person. In fact, the woman and her husband had been staying in the apartment temporarily with the lessor while

their apartment was being painted. After entering, one of the officers walked down the hall to the master bedroom, saw the lessor lying on the bed, told him that he was there to look for the wanted person, and entered. As the officer entered, he saw scales and methamphetamine sitting on a desk. The officer then arrested the lessor.

The lessor of the apartment later moved to suppress the evidence the police had seized, arguing that (1) the officers' warrantless search into his apartment violated his right to privacy under Washington Constitution, Article 1, § 7, and (2) that the temporary residents to his apartment did not have authority to consent to a search of his bedroom. The state responded that (1) for the purposes of obtaining consent, the lessor was not present until the officer first found him and determined his relationship to the apartment, (2) that the temporary residents had the apparent authority to consent to a search of the whole apartment, and (3) that the lessor's failure to object when he saw the officer and heard what he intended to do constituted a consent to search. The trial court denied the motion and the defendant was convicted. He then appealed. However, the Court of Appeals affirmed the denial of the suppression motion, holding in an unpublished opinion that the temporary residents had the actual and apparent authority to consent to the search of the whole apartment, and that because the lessor did not explicitly object to the search, the police did not have to secure his consent before entering his

bedroom. Following this decision, the defendant sought and obtained review before the Washington Supreme Court.

In addressing the defendant's arguments, the Supreme Court first noted that the applicable test under the Fourth Amendment is whether or not the police acted reasonably in obtaining consent of a person who had the "apparent authority" to consent. If they did, then the search does not violate the defendant's rights under the United States Constitution, Fourth Amendment. The court then went on to note that the test under Washington Constitution, Article 1, § 7, is different, given the added protections found in the state constitutional provision. In so holding, the court rejected the state's argument that the defendant was not "present" in the apartment unless and until the police found him. The court held:

The State argues that Dangle had common authority to consent to a search of the premises and that when they came upon Morse, the police officers had no duty to obtain his consent. The State argues that it was Morse's affirmative duty to explicitly object to the search. It is essentially the State's position that Morse was not present in his own apartment until police found him. While such a suggestion may make sense from the perspective of the Fourth Amendment's "reasonableness" requirement, simply inquiring into whether a police officer's subjective beliefs are reasonable is not sufficient under article I, section 7.

We have been quite explicit that under our constitution, the burden is on the police to obtain consent from a person whose property they seek to search. In obtaining that consent, police are required to tell the person from whom they are seeking consent that they may refuse to consent, revoke consent, or limit the scope of consent. We have never held that a cohabitant with common

authority can give consent that is binding upon another cohabitant with equal or greater control over the premises when the nonconsenting cohabitant is actually present on the premises. We have never held that a person is not present in her home unless and until the police come upon her. We decline to do so now.

State v. Morse, 156 Wn.2d at 13 (citations omitted).

The court then went on to reverse the Court of Appeals decision, holding that (1) the temporary resident did not have the authority to consent to a search of the defendant's bedroom and (2) that the search was invalid because the police did not obtain the defendant's permission to search. The court's conclusions on these issues were as follows:

The Washington Constitution guarantees to its citizens that they will neither be disturbed in their private affairs, nor have their homes invaded, without authority of law. Warrantless searches are per se unreasonable. While consent is a recognized exception to the warrant requirement, all such exceptions are narrowly drawn. Common authority to consent to a search is based upon authority to control the premises. A cohabitant who has common authority to use and control the premises has authority to consent to a search that is within the scope of that authority. Authority to control is determined by the shared use of the premises, the reasonable expectations of privacy, and the degree to which a cohabitant has assumed the risk that others will consent to a search. The scope of the authority of a cohabitant to consent extends only to areas shared by the cohabitants. When a cohabitant who has equal or greater authority to control the premises is present, his consent must be obtained and the consent of another of equal or lesser authority is ineffective against the nonconsenting cohabitant. "Presence" is used according to its ordinary meaning. A person is not absent just because the police fail to inquire, are unaware, or are mistaken about the person's presence within the premises. If the police choose to conduct a search without a search warrant based upon the consent of someone they believe to be authorized to so consent, the burden of proof on issues of consent and the presence or absence of other cohabitants is on the police.

State v. Morse, 156 Wn.2d at 14-15 (citation and footnote omitted).

The decision in *Morse* has direct application to the facts in the case at bar. In this case, the police obtained permission from a person with apparent authority to enter the house and go up to the defendant's bedroom. However, they did not seek the defendant's permission to enter, even though they believed him to be present. Consequently, by entering without his permission and without a warrant, they violated the defendant's right to privacy under Washington Constitution, Article 1, § 7. As a result, had trial counsel brought a motion to suppress, the trial court more than likely would have granted the motion and suppressed the statements the police obtained from the defendant as the immediate and direct result of the illegal arrest, along with the clothing that the officers obtained from the defendant's person.

There is no tactical reason for a trial counsel to fail to bring a meritorious motion to suppress, particularly when that motion would result in the suppression of critical incriminating evidence. Thus, trial counsel's failure to bring a motion to suppress fell below the standard of a reasonably prudent attorney. In addition, as the preceding argument on the evidence shows, the state's case was far from compelling that the defendant was the perpetrator of these two crimes. Perhaps the most compelling evidence the state had was the clothing that the police took off the defendant's person and

that strongly resembled the clothing the thief was wearing on the two days in question. Had this evidence been suppressed, it is more likely than not that the jury would have returned verdicts of acquittal. As a result, the failure to bring the suppression motion also caused prejudice to the defendant and thereby violated his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

CONCLUSION

The trial court failed to bring the defendant to trial within the required time under CrR 3.3. As a result, this court should vacate the convictions and remand with instructions to dismiss both charges with prejudice. In the alternative, this court should vacate the convictions and remand for a new trial based upon the state's introduction of irrelevant, prejudicial evidence, and based upon trial counsel's failure to bring a motion to suppress.

DATED this 23rd day of November, 2011.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

CrR 3.3
Time for Trial

(a) General Provisions.

(1) Responsibility of Court. It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(2) Precedence Over Civil Cases. Criminal trials shall take precedence over civil trials.

(3) Definitions. For purposes of this rule:

(i) 'Pending charge' means the charge for which the allowable time for trial is being computed.

(ii) 'Related charge' means a charge based on the same conduct as the pending charge that is ultimately filed in the superior court.

(iii) 'Appearance' means the defendant's physical presence in the adult division of the superior court where the pending charge was filed. Such presence constitutes appearance only if (A) the prosecutor was notified of the presence and (B) the presence is contemporaneously noted on the record under the cause number of the pending charge.

(iv) 'Arraignment' means the date determined under CrR 4.1(b).

(v) 'Detained in jail' means held in the custody of a correctional facility pursuant to the pending charge. Such detention excludes any period in which a defendant is on electronic home monitoring, is being held in custody on an unrelated charge or hold, or is serving a sentence of confinement.

(4) Construction. The allowable time for trial shall be computed in accordance with this rule. 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, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial

of a pending charge shall apply equally to all related charges.

(6) Reporting of Dismissals and Untimely Trials. The court shall report to the Administrative Office of the Courts, on a form determined by that office, any case in which

(i) the court dismissed a charge on a determination pursuant to section (h) that the charge had not been brought to trial within the time limit required by this rule, or

(ii) the time limits would have been violated absent the cure period authorized by section (g).

(b) Time for Trial.

(1) Defendant Detained in Jail. A defendant who is detained in jail shall be brought to trial within the longer of

(i) 60 days after the commencement date specified in this rule, or

(ii) the time specified under subsection (b)(5).

(2) Defendant Not Detained in Jail. A defendant who is not detained in jail shall be brought to trial within the longer of

(i) 90 days after the commencement date specified in this rule, or

(ii) the time specified in subsection (b)(5).

(3) Release of Defendant. If a defendant is released from jail before the 60-day time limit has expired, the limit shall be extended to 90 days.

(4) Return to Custody Following Release. If a defendant not detained in jail at the time the trial date was set is subsequently returned to custody on the same or related charge, the 90-day limit shall continue to apply. If the defendant is detained in jail when trial is reset following a new commencement date, the 60-day limit shall apply.

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire

earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under CrR 4.1.

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the defendant's rights under this rule signed by the defendant. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the trial contemporaneously or subsequently set by the court.

(ii) Failure to Appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.

(iii) New Trial. The entry of an order granting a mistrial or new trial or allowing the defendant to withdraw a plea of guilty. The new commencement date shall be the date the order is entered.

(iv) Appellate Review or Stay. The acceptance of review or grant of a stay by an appellate court. The new commencement date shall be the date of the defendant's appearance that next follows the receipt by the clerk of the superior court of the mandate or written order terminating review or stay.

(v) Collateral Proceeding. The entry of an order granting a new trial pursuant to a personal restraint petition, a habeas corpus proceeding, or a motion to vacate judgment. The new commencement date shall be the date of the defendant's appearance that next follows either the expiration of the time to appeal such order or the receipt by the clerk of the superior court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of

venue. The new commencement date shall be the date of the order.

(vii) Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

(d) Trial Settings and Notice--Objections--Loss of Right to Object.

(1) Initial Setting of Trial Date. The court shall, within 15 days of the defendant's actual arraignment in superior court or at the omnibus hearing, set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. If a defendant is not represented by counsel, the notice shall be given to the defendant and may be mailed to the defendant's last known address. The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

(2) Resetting of Trial Date. When the court determines that the trial date should be reset for any reason, including but not limited to the applicability of a new commencement date pursuant to subsection (c)(2) or a period of exclusion pursuant to section (e), the court shall set a new date for trial which is within the time limits prescribed and notify each counsel or party of the date set.

(3) Objection to Trial Setting. A party who objects to the date set upon the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. Such motion shall be promptly noted for hearing by the moving party in accordance with local procedures. A party who fails, for any reason, to make such a motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

(4) Loss of Right to Object. If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

(e) Excluded Periods. The following periods shall be excluded in computing the time for trial:

(1) Competency Proceedings. All proceedings relating to the competency of a defendant to stand trial on the pending charge, beginning on the date when the competency examination is ordered and terminating when the court enters a written order finding the defendant to be competent.

(2) Proceedings on Unrelated Charges. Arraignment, pre-trial proceedings, trial, and sentencing on an unrelated charge.

(3) Continuances. Delay granted by the court pursuant to section (f).

(4) Period between Dismissal and Refiling. The time between the dismissal of a charge and the refiling of the same or related charge.

(5) Disposition of Related Charge. The period between the commencement of trial or the entry of a plea of guilty on one charge and the defendant's arraignment in superior court on a related charge.

(6) Defendant Subject to Foreign or Federal Custody or Conditions. The time during which a defendant is detained in jail or prison outside the state of Washington or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.

(7) Juvenile Proceedings. All proceedings in juvenile court.

(8) Unavoidable or Unforeseen Circumstances. Unavoidable or unforeseen circumstances affecting the time for trial beyond the control of the court or of the parties. This exclusion also applies to the cure period of section (g).

(9) Disqualification of Judge. A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. 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 motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

(g) Cure Period. The court may continue the case beyond the limits specified in section (b) on motion of the court or a party made within five days after the time for trial has expired. Such a continuance may be granted only once in the case upon a finding on the record or in writing that the defendant will not be substantially prejudiced in the presentation of his or her defense. The period of delay shall be for no more than 14 days for a defendant detained in jail, or 28 days for a defendant not detained in jail, from the date that the continuance is granted. The court may direct the parties to remain in attendance or be on-call for trial assignment during the cure period.

(h) Dismissal With Prejudice. A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim and at the court's discretion shall allow the victim to address the court regarding the impact of the crime. No case shall be dismissed for time-to-trial reasons except as expressly required by this rule

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Court of Appeals Case Number: 42033-3

Designation of Clerk's Papers

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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Hearing Date(s): _____

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Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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