

66707-6

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NO. 66707-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DARIN GATSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Darin Gatson's convictions must be reversed on two independent grounds. First, Mr. Gatson's speedy trial rights were violated when his trial was continued over his objections for more than six weeks while he remained in custody. Second, Mr. Gatson was convicted in a bench trial after the court refused to exclude latent fingerprint identification evidence. The court relied extensively on the evidence to find Mr. Gatson guilty. However, the evidence is unreliable under Frye v. United States, 293 F. 1013, 1014 (D.C. Cir.1923). Accordingly, Mr. Gatson's convictions must be reversed and remanded for a new trial.

In the alternative, if the convictions are not reversed, the special finding as to count two must be reversed and vacated because the Jeep Wrangler was only the object of the crime of possession of a stolen vehicle.

B. ASSIGNMENTS OF ERROR

1. The trial court erred by continuing Mr. Gatson's trial beyond the speedy trial date.

2. The trial court abused its discretion by granting a continuance of Mr. Gatson's trial on October 28, 2010.

3. The trial court abused its discretion by granting a continuance of Mr. Gatson's trial on October 29, 2010.

4. The trial court abused its discretion by granting a continuance of Mr. Gatson's trial on November 4, 2010.

5. The trial court abused its discretion by granting a continuance of Mr. Gatson's trial on November 12, 2010.

6. The trial court violated Mr. Gatson's constitutional right to a speedy trial.

7. The trial court erred by admitting, and relying extensively on, unreliable latent fingerprint evidence.

8. The trial court erred in finding Mr. Gatson used a motor vehicle in the commission of possession of a stolen vehicle.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused is guaranteed the right to a speedy trial by both the federal and state constitutions. A violation of this right is assessed by balancing the length of the delay, the defendant's conduct and assertion of his speedy trial right, the prejudice caused by the delay, and the reasons for the delay. The right to a speedy trial is also a fundamental right under Washington's speedy trial rule, Criminal Rule 3.3. Where a defendant repeatedly objects to further continuances and insists upon his right to a speedy trial, that

request must be taken seriously. Where the trial court granted several trial continuances over Mr. Gatson's vigorous objections and without copious scrutiny of the justifications for the delay and where the continuances resulted in Mr. Gatson spending at least six additional weeks in custody, were Mr. Gatson's constitutional and statutory speedy trial rights violated?

2. Scientific and technical evidence must be reliable to be admissible in a criminal trial. Under Frye v. United States, 293 F. 1013, 1014 (D.C. Cir.1923), such evidence is reliable if it is generally accepted in the relevant scientific community. The validity of latent fingerprint evidence—the practice of lifting an unknown fingerprint, or a fragment, off of an object and comparing it to a known sample—is substantially questioned among professionals in the field. Where the trial court admitted latent fingerprint evidence over defendant's attempts to exclude and relied on that evidence in finding Mr. Gatson guilty, must Mr. Gatson's convictions be reversed and remanded for a new trial?

3. RCW 46.20.285(4) authorizes the Department of Licensing (DOL) to revoke a person's driver's license for one year if the person "uses" a motor vehicle in the commission of a felony. The statute applies only if the offender uses a vehicle to facilitate

commission of the crime; it does not apply if the vehicle is only the *object* of the crime. Did the trial court err in finding Mr. Gatson “used” a motor vehicle to commit the crime of possession of a motor vehicle, where the car was merely the object of the crime?

D. STATEMENT OF THE CASE

Mr. Gatson was charged with attempting to elude a pursuing police vehicle (RCW 46.61.024), possession of a stolen vehicle (RCW 9A.56.068), and second degree burglary (RCW 9A.52.030). CP 156-57 (second amended information). The charges arose out of allegations that Mr. Gatson burglarized a car dealership, taking the keys to two sets of cars, removed a Jeep Wrangler from the dealership and eluded pursuing police vehicles as he drove the car over nine miles.

No witness testified that they saw Mr. Gatson on the dealership property or in the Jeep Wrangler. George Ponylite testified that he walked by the car dealership at about 4:30 a.m. on August 29, 2010. 12/13/10RP 11. He heard the sound of an engine running and saw an individual inside a Jeep. 12/13/10RP 12. He then saw the vehicle exit the dealership lot. 12/13/10RP 15. Because the windows were fogged over, he could not identify

who the driver was, but Mr. Ponylite only saw one person inside the Jeep. 12/13/10RP 15, 18.

Edmonds police officer Nathaniel Rossi pursued a Jeep Wrangler after receiving a report of a possible stolen vehicle. 12/13/10RP 22-25. Though Officer Rossi testified the lights and sirens on his marked police vehicle were illuminated, the Jeep did not stop. 12/13/10RP 25, 27. Officer Rossi testified he only saw one person in the car. 12/13/10RP 29. But he did not get a good look at the driver and, thus, could not identify him or her. 12/13/10RP 47.

Edmonds police officer Douglas Compton joined the pursuit after Officer Rossi. 12/13/10RP 61. He did not view Mr. Gatson that night and could not identify him at trial. 12/13/10RP 72.

The pursuit was called off after the Jeep Wrangler failed to yield despite encountering police-laid spike strips designed to damage the vehicle's tires. 12/13/10RP 34, 71. Everett Police Officer Kelly Carman intended to join the pursuit just as it was called off. 12/13/10RP 87, 89. She did not see who was driving the eluding vehicle. 12/13/10RP 100.

Officer Carman caught up with the Jeep Wrangler a few miles away a short time later. 12/13/10RP 91-92. The vehicle

looked like it had crashed and no one was inside. 12/13/10RP 90, 92. Another officer arrived with a police dog that eventually came in contact with Mr. Gatson under a bush over a block away from the crashed Jeep. 12/13/10RP 92-93, 117.

Mr. Gatson informed the police that he was homeless and sleeping under a bush when the police dog contacted him. 12/13/10RP 77. A key to a different car, a Jeep Cherokee, was found on Mr. Gatson. 12/13/10RP 48, 75-76, 96-97. He denied knowledge of the key and asserted it had been planted on him. 12/13/10RP 76.

A police detective subsequently located papers, such as car purchase paperwork, on the driver's side floor of the Jeep Wrangler. 12/13/10RP 132-33. The detective processed the papers and other locations on the vehicle for fingerprint evidence. 12/13/10RP 132, 141, 143. He also checked the key police found on Mr. Gatson, and it matched a Jeep Cherokee from the dealership. 12/13/10RP 152-53. The detective did not take any fingerprint evidence from the dealership office. 12/13/10RP 155.

Edmonds Police Officer Lawrence Paul Miller received images of fingerprints lifted off the documents in the Jeep Wrangler as well as a card with Mr. Gatson's ten inked fingerprints.

12/13/10RP 183, 186. Officer Miller testified that a latent fingerprint is a fingerprint that has been found on a piece of evidence and is not usually visible but needs to be developed through certain processes. 12/13/10RP 181. He compared the latent fingerprints from the documents with the ten-fingerprint card for Mr. Gatson using an ACE-V methodology. 12/13/10RP 182. ACE-V is an acronym for the method of comparing fingerprints using analysis, comparison, evaluation and verification. 12/13/10RP 182. Under the first three steps, Officer Miller simply analyzes the latent print, compares it against a known sample and then evaluates the degrees of similarity. 12/13/10RP 182. In the final step, verification, a second evaluator verifies the match. 12/13/10RP 182. Officer Miller ultimately concluded two fingerprints recovered from the documents in the Jeep matched the print for one of Mr. Gatson's fingers from the supplied card. 12/13/10RP 187; 12/14/10RP 5-6.

Mr. Gatson waived his right to a jury trial. 12/10/10RP 10-14. The court convicted him of all three counts after a bench trial. CP 4; CP 17-19. The court imposed a special finding requiring DOL to revoke Mr. Gatson's license for one year for counts one

(eluding a pursuing police vehicle) and two (possession of a stolen vehicle). CP 5.

E. ARGUMENT

1. THE CONVICTIONS MUST BE REVERSED AND THE CHARGES DISMISSED BECAUSE MR. GATSON WAS DENIED HIS RIGHT TO A SPEEDY TRIAL.

a. Mr. Gatson repeatedly objected to the continuance of his trial.

Trial was initially scheduled for October 29, 2010. CP ___ (Sub # 7 (Order Setting Trial Date)).¹ Mr. Gatson vigorously objected to a series of continuances that resulted in over a six-week delay.

On October 28, the court entered an order resetting hearings (CrR 3.5 and arraignment on amended information) to October 29, when a motion to continue would also be considered. 10/28/10RP 2; CP ___ (Sub # 11). At the hearing on October 29, the court continued trial to November 5, with pretrial hearings set for November 4, "in the administration of justice" and finding (without elaborating) that Mr. Gatson would not be prejudiced. CP ___ (Sub

¹ A supplemental designation of clerk's papers has been filed requesting the trial court transmit the additional documents indicated here by "Sub #" to the Court.

13). The basis for the continuance is merely “necessity for pretrial motions.” Id. Mr. Gatson did not sign the order. Id.

On November 4, the trial court granted an additional continuance, continuing the trial from November 5 to November 19, 2010. CP __ (Sub # 15). The prosecutor argued that good cause supported a continuance because plea negotiations had been ongoing until the prior week. 11/4/10RP 2. Mr. Gatson contested this assertion. CP __ (Sub # 18, p.5 (letter from Gatson)). The prosecutor also argued that a witness was unavailable for pretrial motions scheduled for that day and another witness was unavailable for trial the following week. 11/4/10RP 2. Mr. Gatson and defense counsel objected to the continuance. 11/12/10RP 2-3; CP __ (Sub # 18, p.5 (letter from Gatson)). Defense counsel responded that the defendant objects and “is getting very frustrated [and] . . . wants to get this resolved.” 11/4/10RP 3-4. Defense counsel further argued the State had set forth no basis for the necessity of the witnesses. 11/4/10RP 4. The defense was prepared to go to trial. 11/4/10RP 4. Nonetheless, the court found “good cause to continue” without elaboration and indicated the time remained within the speedy trial period. 11/4/10RP. Mr. Gatson

refused to sign the order and his objection was noted. 11/5/10RP 5; see CP __ (Sub #15).

Mr. Gatson wrote a letter to the court protesting the continuances. CP __ (Sub # 18, p.5 (letter from Gatson)). He informed the court that no plea negotiations were ongoing, the prosecution was “stagnating the case” and the continuances violated his speedy trial rights. Id.

Pursuant to the previous order, pretrial motions were set for November 12; however, on that date defense counsel found it necessary to move for a continuance over Mr. Gatson’s objection. CP __ (Sub # 17); 11/12/10RP 4 (defense counsel notes client’s objection to continuance). Defense counsel represented another client in an ongoing murder trial that would not be finished by the November 19 extended trial date in this case. 11/12/10RP 3.² Defense counsel also needed to complete and file a motion to bifurcate based on an amended information produced by the State that week. 11/12/10RP 3-4. The prosecutor indicated the proposed new trial dates would work for the State. 11/12/10RP 4-5. Mr. Gatson objected on the record and informed the court he was prepared to go to trial the following week, even without his

² Defense counsel had previously informed the court of the potential scheduling conflict. 11/4/10RP 4-5.

counsel. 11/12/10RP 5-7, 8. Despite defendant's objection, the continuance was granted and trial was set for December 9, 2010—over 6 weeks later than the original trial date. CP __ (Sub # 17); 11/12/10RP 6-7. Mr. Gatson did not sign the order. 11/12/10RP 10. The trial court informed Mr. Gatson his objections may be a basis for appeal. 11/12/10RP 6-7.

On November 13, Mr. Gatson again wrote to the court objecting to the repeated continuances of his trial date. CP __ (Sub #18, pp.2-3). He requested the court dismiss the case for violation of his rights. Id.

Mr. Gatson was in custody during the entire course of these continuances. E.g., 11/12/10RP 5-6 (not transported for hearings); CP __ (Sub # 18, p.7 (return address for "Snohomish County Corrections)).

- b. The court violated Mr. Gatson's constitutional right to a speedy trial and abused its discretion in granting several continuances over his objection.

An accused is guaranteed the right to a speedy trial by both the federal and state constitutions. Barker v. Wingo, 407 U.S. 514, 531-32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22. This right "is as fundamental as any of the rights secured by the Sixth Amendment." State v. Iniguez,

167 Wn.2d 273, 280-81, 217 P.3d 768 (2009) (quoting Barker, 407 U.S. at 515 n.2). This Court reviews an alleged constitutional violation de novo. Id. at 282.

Under both the federal and state constitutions, this Court must use the balancing test introduced in Barker to determine if the pretrial delay violated the defendant's speedy trial right. Iniguez, 167 Wn.2d at 283. This test analyzes the length of the delay, the defendant's conduct and assertion of his speedy trial right, the prejudice caused by the delay, and the reasons for the delay. Id. at 283-85; Barker, 407 U.S. at 529-30. No one factor is dispositive. "But, because we are dealing with a fundamental right of the accused, this process must be carried out with full recognition that the accused's interest in a speedy trial is specifically affirmed in the Constitution." Barker, 407 U.S. at 533.

The right to a speedy trial is also a fundamental right under Washington's speedy trial rule. State v. Ross, 98 Wn. App. 1, 4, 981 P.2d 88 (1999). CrR 3.3 requires that a defendant who is in custody be brought to trial within 60 days, or the trial court must dismiss the charge. Certain periods may be excluded in computing the time for trial, including valid continuances granted by the court pursuant to CrR 3.3(f). CrR 3.3(e)(3). "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.” CrR 3.3(b)(5). The court is required to state the reasons for the delay on the record. CrR 3.3(f)(2).

Although the rule is “not a constitutional mandate,” its purpose is to protect the constitutional right to a speedy trial. State v. Kenyon, 167 Wn.2d 130, 136, 216 P.3d 1024 (2009). Under CrR 3.3(a)(1), “it is the trial court which bears the *ultimate* responsibility to ensure a trial is held within the speedy trial period.” State v. Jenkins, 76 Wn. App. 378, 382-83, 884 P.2d 1356 (1994) (emphasis in original). This responsibility “underscore[s]... the importance” of the speedy trial rule. State v. Saunders, 153 Wn. App. 209, 220, 220 P.3d 1238 (2009). The State also bears responsibility for seeing that the defendant is timely tried and must uphold its duty in good faith and act with due diligence. Ross, 98 Wn. App. at 4.

The application of the speedy trial rule to the facts of a particular case is reviewed de novo. State v. Lackey, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009); see, e.g., Kenyon, 167 Wn.2d 130 (speedy trial violation found through de novo review of the court’s compliance with the rules regarding the continuance decision, not

the discretionary decision itself). Although the application of CrR 3.3 is reviewed de novo, a trial court's factual determination to grant a continuance is reviewed for abuse of discretion. Kenyon, 167 Wn.2d at 135.

Excluded periods under CrR 3.3(e) include delays "granted by the court pursuant to section (f)." CrR 3.3(e)(3). A continuance may be granted based on "written agreement of the parties, which must be signed by the defendant" or "on motion of the court or a party" where a continuance "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(1), (2).

Because the party who moves for continuance "waives that party's objection to the requested delay," a motion for continuance made by defense counsel is generally presumed to waive objection on behalf of the defendant. CrR 3.3(f)(2); State v. Vicuna, 119 Wn. App. 26, 33, 79 P.3d 1 (2003). But this rule is not limitless.

Where a defendant repeatedly objects to further continuances and insists upon his right to a speedy trial, that request must be respected. This Court has therefore dismissed a conviction for a CrR 3.3 violation despite defense counsel's agreement to continuances beyond the speedy trial period.

Saunders, 153 Wn. App. at 217. In Saunders, two continuances were requested by defense counsel for the purpose of investigation or preparation for trial, two were agreed motions purportedly for the purpose of negotiations, and two were requested by the State without adequate explanation—but Saunders personally objected to all six, refused to sign each and every continuance form, and moved to dismiss pro se. Id. at 212-15. Because he “consistently resisted extending time for trial,” the Court found he did not waive his objection. Id. at 220.

Like Saunders, Mr. Gatson objected to all extensions of his trial date. Mr. Gatson wrote directly to the court to inform it of his objections. CP __ (Sub # 18 (containing two letters)). When present, he objected on the record at hearings, including the November 12 hearing at which defense counsel requested the continuance. 11/4/10RP 3-4; 11/12/10RP 5-8; CP __ (Sub # 13 (Gatson refused to sign order)). He refused to sign orders continuing the case. E.g., CP __ (Sub # 13); CP __ (Sub #. 15); CP __ (Sub # 17).

Mr. Gatson’s continuous objections, moreover, weigh heavily in favor of finding a violation of his constitutional speedy trial rights. Barker, 407 U.S. at 529-30, 533; Iniguez, 167 Wn.2d at 295 (courts

should give “strong evidentiary weight” to defendant’s assertion of his right, including “the frequency and force of a defendant’s objections . . . as well as the reasons why the defendant demands . . . a speedy trial”). Though six weeks is not a particularly lengthy delay, the other two Barker factors also cut in favor of a speedy trial violation. The almost two-month delay was prejudicial to Mr. Gatson because he spent the entire time in custody. See Iniguez, 167 Wn.2d at 292 (eight-month delay presumptively prejudicial where defendant in custody). In Iniguez, the court also considered that the case, which involved four counts of robbery, was not complex or involving multiple actors. Id. The same applies here where Mr. Gatson was charged with three counts arising from the same incident and there were no co-defendants.

The cause for the delay included the State’s inability to schedule witnesses it deemed necessary and defense counsel’s conflicting trial calendar. Mr. Gatson, however, was never himself the basis for any continuance. The court, furthermore, did not copiously evaluate the bases for the delays. See Saunders, 153 Wn. App. at 221 (“Absent convincing and valid reasons for the continuances granted on January 8, February 20, or March 18, the trial court’s orders granting the three continuances were

“manifestly unreasonable, [and] exercised on untenable grounds [and] for untenable reasons.” (citations omitted)).

State v. Campbell, does not control the outcome here. 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984). In Campbell, the trial court did not abuse its discretion in granting a continuance requested by defense counsel to prepare for a capital trial, even over the defendant’s objection. Campbell involved three counts of aggravated first degree murder, aggravating factors, the death penalty, and large amounts of complex forensic physical evidence, but the trial was delayed for only six months and the defendant objected to only a single continuance. Id. at 5-15. Here, Mr. Gatson’s case was not complex and he objected vigorously and repeatedly to each continuance.

- c. Because Mr. Gatson’s speedy trial rights were violated, his convictions must be reversed and the charges dismissed.

When a violation of the constitutional right is proven, dismissal is the only available remedy. State v. Ellis, 76 Wn. App. 391, 395, 884 P.2d 1360 (1994). Similarly, CrR 3.3 is strictly applied, requiring dismissal for any violation. State v. Raschka, 124 Wn. App. 103, 112, 100 P.3d 339 (2004) (citing State v. Striker, 87 Wn.2d 870, 875-77, 557 P.2d 847 (1976)). Thus, even where no

prejudice has occurred as a result of a speedy trial violation, Washington courts have consistently sanctioned dismissal as a remedy for a violation of the speedy trial right. See, e.g., Kenyon, 167 Wn.2d at 139 (once basis for continuance held invalid, reversal automatically applied); State v. Houser, 91 Wn.2d 269, 274, 588 P.2d 219 (1978) (dismissal required whether defendant prejudiced or not); State v. Edwards, 94 Wn.2d 208, 215, 616 P.2d 620 (1980) (holding strict rule necessary to preserve integrity of judicial process and compliance with constitutional guarantee); Saunders, 153 Wn. App. at 220.

Here, like in Saunders, Mr. Gatson repeatedly objected to extending his time for trial while he was incarcerated. 153 Wn. App. at 221. As discussed above, the trial court abused its discretion by granting continuances over Mr. Gatson's objections and without valid and convincing grounds. See id. (court's continuances lacked valid, convincing grounds rendering them manifestly unreasonable). Absent valid bases for the continuances, the trial court lacked authority to bring Mr. Gatson to trial outside the 60-day speedy trial period. Thus, under the federal and state constitutions as well as CrR 3.3, Mr. Gatson's convictions must be

reversed and remanded for entry of an order dismissing the charges with prejudice.

2. THE TRIAL COURT ERRED BY NOT EXCLUDING UNRELIABLE LATENT FINGERPRINT EVIDENCE.

- a. Mr. Gatson challenged the reliance on proffered fingerprint comparisons to establish his presence in the Jeep Wrangler.

Defense counsel moved to exclude latent fingerprint identification evidence³ admitted through a State witness, Officer Miller. 12/14/10RP 48-49; see also 12/14/10RP 45, 47. During cross-examination of Officer Miller, defense counsel vigorously debased the reliability of the evidence. 12/14/10RP 7-11, 15-18, 19. The witness admitted that his fingerprint analysis was subjective “in that we use the information in the print we want to use.” 12/14/10RP 8. There are no set standards in the field or that he personally uses when conducting such analyses. 12/13/10RP 190; 12/14/10RP 7. The analysis “basically [involved] looking at a picture and comparing it to another.” 12/14/10RP 11.

³ As set forth above, a latent fingerprint is a fingerprint, or more often a fragment of a fingerprint, that has been found on a piece of evidence and is not usually visible but needs to be developed through certain processes. 12/13/10RP 181; Robert Epstein, Fingerprints Meet Daubert: The Myth of Fingerprint “Science” Is Revealed, 75 S. Cal. L. Rev. 605, 607-10 (March 2002). Here the latent fingerprints were compared with the ten-fingerprint card for Mr. Gatson using ACE-V methodology. 12/13/10RP 182. ACE-V is an acronym for the subjective method of comparing fingerprints using analysis, comparison, evaluation and verification. 12/13/10RP 182.

Officer Miller did not know the error percentage rate of his analytical method because one had not been established.

12/14/10RP 9. He further conceded that, in this case, contrary to his standard practice, he did not check the latent fingerprints against a database, rather he checked them only against a known sample from Mr. Gatson. 12/14/10RP 11, 16-17, 19. The witness recognized it is “not an exact process” and mistakes have been made in other cases. 12/14/10RP 17-18.

The court asked the State’s witness questions but did not exclude the evidence. 12/14/10RP 12 (upon court questioning, witness testified he did not personally lift fingerprints he subsequently analyzed). The court considered the fingerprint identification evidence to be “[o]ne of the key components of the evidence.” 12/14/10RP 58-60 (also setting forth “the Court does conclude that the fingerprint evidence which essentially places the defendant in the Jeep Wrangler is a key component and a persuasive piece of evidence”); CP 17 (Finding of Fact # 2 (“The defendant’s fingerprints were found in the Jeep Wrangler and are a persuasive and key component to placing the defendant in the vehicle.”)). In light of the absence of standards by which to reliably judge the comparability of fingerprints, and the substantial debate

regarding reliability, which is outlined below, the trial court erred by admitting and relying on the State's latent fingerprint evidence.

b. Admission of fingerprint evidence must satisfy reliability standards under *Frye v. United States*.

Washington courts apply the Frye standard in determining the reliability and admissibility of scientific evidence. E.g., *Anderson v. Akzo Nobel Coatings, Inc.*, No. 82264-6, Slip Op. at 7-8, __ Wn.2d __ (Sept. 8, 2011); *State v. Greene*, 139 Wn.2d 64, 70, 984 P.2d 1024 (1999); see *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir.1923). Frye directs courts to apply certain criteria in assessing the reliability and admissibility of expert testimony. Evidence based on a scientific theory or principle must have "achieved general acceptance in the relevant scientific community" before it is admissible at trial. *State v. Gentry*, 125 Wn.2d 570, 585, 888 P.2d 1105 (1995); accord *Frye*, 293 F. at 1014. "[T]he core concern . . . is only whether the evidence being offered is based on established scientific methodology." *State v. Cauthron*, 120 Wn.2d 879, 889, 846 P.2d 502 (1993).

Frye hearings are unnecessary when a scientific practice has been previously found to be generally accepted in the scientific community. *State v. Russell*, 125 Wn.2d 24, 69, 882 P.2d 747

(1994). However, general acceptance may change over time and the Frye admissibility determination must take into account any recent changes in the perceived reliability of the instrument or theory in question. State v. Kunze, 97 Wn. App. 832, 853, 988 P.2d 977, rev. denied, 140 Wn.2d 1022 (2000). General acceptability is not satisfied “if there is a significant dispute between qualified experts as to the validity of scientific evidence.” Id. (citing Cauthron, 120 Wn.2d at 887).

This court normally reviews a lower court's evidentiary rulings for an abuse of discretion. E.g., State v. George, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). However, admissibility of evidence under Frye is a mixed question of law and fact subject to de novo review. Anderson, Slip Op. at 5 (citing State v. Copeland, 130 Wn.2d 244, 255-56, 922 P.2d 1304 (1996)).

c. Professionals substantially debate the validity of latent fingerprint evidence, which was admitted here.

“[T]he accuracy of latent print identification has been subject to intense debate.” Simon Cole, Criminology: More than Zero: Accounting for Error in Latent Fingerprint Identification, 95 J. Crim. L. & Criminology 985, 986 (Spring 2005). For example, a 2002 article points out a complete lack of testing in the field: “the reality is

that the fingerprint community has never conducted any scientific testing to validate the premises upon which the field is based.” Epstein, supra n.2, at 622. The article describes the only published study testing the premise that “fingerprint examiners can make reliable identifications from the type of small distorted latent fingerprint fragments that are typically detected at crime scenes.” Id. This study, commissioned by Scotland Yard, was “an utter embarrassment to the fingerprint community.” Id. The results showed wide variation among experienced fingerprint examiners, who disagreed on (a) how many points of comparison were necessary to match prints and (b) whether identifications could even be properly effectuated in the sample pairs used (examiners were almost evenly split on this issue on at least one sample pair). Id. at 623. As the Scotland Yard-commissioned researchers concluded, “[t]he variation [in the responses] confirms the subjective nature of points of comparison.” Id.

Other scholars have also criticized the science underlying fingerprint identifications. One wrote, “The field of forensic fingerprint identification suffers from an appalling lack of basic foundational research.” Tara M. LaMorte, Comment: Sleeping Gatekeepers, United States v. Llera Plaza and the Unreliability of

Forensic Fingerprint Evidence Under Daubert, 14 Alb. L.J. Sci. & Tech. 171, 179, 183 (2003) (calling for courts to thoroughly reexamine field of fingerprint analysis based on widely known lack of scientific reliability and standards). Another noted,

The reliability of fingerprint identification has never been comprehensively tested. The foundational premise on which fingerprint identification rests - that no two individuals have the same fingerprint - has never been proven. Nor has the fingerprint-identification process's error rate been established or even estimated.

Katherine Schwinghammer, Note: Fingerprint Identification: How the "Gold Standard of Evidence Could be Worth Its Weight, 32 Am. J. Crim. L. 265, 266 (2005).

Furthermore, substantial research demonstrates that despite the long-standing practice of admitting fingerprint testimony in court, very little research demonstrates the relative frequency with which the defining ridge characteristics or other identifying marks in a fingerprint occur within any given population, or the adequacy of the standards underlying fingerprint identification. See, e.g., Jennifer F. Mnookin, et al., The Need for a Research Culture in the Forensic Sciences, 58 UCLA L. Rev. 725 (Feb. 2011) (criticizing and evaluating lack of scientific basis for latent fingerprint identification, among other pattern identification fields, and citing

extensively to a 2009 report by the National Academy of Science finding the same); Michael J. Saks, Merlin and Solomon: Lessons from the Law's Formative Encounters with Forensic Science Identification, 49 Hastings L. J. 1069, 1105-06 (1998) (finding basic premises of fingerprint science untested by conventional means); Margaret A. Berger, Procedural Paradigms for Applying the Daubert Test, 78 Minn. L. Rev. 1345, 1354 (1994) ("Considerable forensic evidence [including fingerprints] made its way into the courtroom without empirical validation of the underlying theory and/or its particular application."); Epstein, *supra* n.2, at 623 ("no testing has been conducted to determine the probability of two different people having a number of fingerprint ridge characteristics in common").⁴ Several scholars have noted that historical judicial acceptance of latent fingerprint identification resulted from entirely cursory judicial scrutiny of the methodology involved and therefore

⁴ In a highly publicized case, a federal district court judge barred fingerprint analysis testimony from a trial, but later changed his mind and admitted the testimony. See Simon Cole, Grandfathering Evidence: Jennings to Llera Plaza and Back Again, 41 Am. Crim. L. Rev. 1189, 1195 n.13 (Summer 2004) (discussing United States v. Llera Plaza, Nos. CR. 98-362-10, CR. 98-362-11, CR. 98-362-12, 2002 WL 27305, at * 19 (E.D. Pa. Jan. 7, 2002), vacated and withdrawn by 188 F. Supp. 549 (E.D. Pa 2002). However, the judge adhered to many of his factual findings, including the finding that fingerprint examiners do not represent a scientific community so that even if they agree among themselves that fingerprint analysis is a valid science, this agreement does not demonstrate the scientific community agrees with the science underlying fingerprint identification. 41 Am. Crim. L. Rev. at 1244, 1250.

should not form a basis for modern acceptance. Epstein, supra n.2 at 615-17 (collecting articles and discussing cases).

To counsel's knowledge, no Washington decision evaluates the reliability of ACE-V latent fingerprint identification in light of this substantial debate. In State v. Hayden, 90 Wn. App. 100, 950 P.2d 1024 (1998), this Court evaluated the reliability of an enhanced digital imaging process used to evaluate latent fingerprints. However, that case did not involve the ACE-V methodology at issue here. Moreover, in that case appellant submitted no articles or evidence to dispute the reliability evidence presented by the State's experts. 90 Wn. App. at 107. In light of the lack of evidence of dispute among qualified experts, this Court found no error in the admission of the digital imaging evidence. Id. at 108-09.

Because the holding in Hayden pertained to a different methodology and was based on different evidence than presented here, it is not controlling. Under Frye, the latent fingerprint identification evidence considered below was unreliable and should have been excluded.

d. Mr. Gatson's conviction must be reversed because the court relied on unreliable latent fingerprint evidence.

The error in admitting unreliable evidence requires reversal of Mr. Gatson's convictions. In State v. Sipin, this Court engaged in harmless error review subsequent to determining that simulation evidence using a particular computer program, which was admitted at defendant's trial, was inadmissible under Frye. 130 Wn. App. 403, 420, 123 P.3d 862 (2005). Thus, that defendant had to show that "the outcome of the trial might reasonably have been different if the trial court had excluded the challenged evidence." Sipin, 130 Wn. App. at 421. Because absent the unreliable computer simulation, both the State and the defendant produced persuasive identity evidence, the outcome of the trial might reasonably have been different if the computer simulation evidence had been excluded. Id.

In Kunze, on the other hand, Division Two of this Court did not engage in harmless error review. It found simply that the admission of evidence not generally accepted in the scientific community required reversal of defendant's conviction and remand for a new trial. 97 Wn. App. at 857.

Even under harmless error review, however, reversal is required in this case. The trial court relied heavily upon the fingerprint evidence in finding Mr. Gatson guilty of all three counts. 12/14/10RP 58-60; CP 7. In its ruling, the trial court called the evidence a “key component” of the convictions. 12/14/10RP 58-60. The court repeated this emphasis in its findings of fact. CP 7. Consequently, the admission of the unreliable evidence affected the outcome of the trial. It was not harmless. Mr. Gatson’s convictions must be reversed and remanded for a new trial because they were based on unreliable latent fingerprint evidence.

3. WHERE THE CAR WAS MERELY THE OBJECT OF THE CRIME, THE TRIAL COURT ERRED IN FINDING MR. GATSON ‘USED’ A MOTOR VEHICLE TO COMMIT POSSESSION OF A STOLEN VEHICLE.

If Mr. Gatson’s convictions are upheld, the court’s special finding that his possession of a motor vehicle was a felony in the commission of which a motor vehicle was used must be reversed. See CP 5 (Judgment and Sentence).

- a. RCW 46.20.285(4) requires DOL revoke a convicted felon's driver's license if a motor vehicle was used to facilitate commission of the crime, but not if the car was merely the object of the crime.

RCW 46.20.285(4) mandates that the Department of Licensing revoke a driver's license for one year where the driver has a final conviction for "[a]ny felony in the commission of which a motor vehicle is used."⁵ The application of this statute to a given

⁵ The statute provides in full:

The department shall revoke the license of any driver for the period of one calendar year unless otherwise provided in this section, upon receiving a record of the driver's conviction of any of the following offenses, when the conviction has become final:

(1) For vehicular homicide the period of revocation shall be two years. The revocation period shall be tolled during any period of total confinement for the offense;

(2) Vehicular assault. The revocation period shall be tolled during any period of total confinement for the offense;

(3) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle, for the period prescribed in RCW 46.61.5055;

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

(5) Failure to stop and give information or render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or personal injury of another or resulting in damage to a vehicle that is driven or attended by another;

(6) Perjury or the making of a false affidavit or statement under oath to the department under Title 46 RCW or under any other law relating to the ownership or operation of motor vehicles;

(7) Reckless driving upon a showing by the department's records that the conviction is the third such conviction for the driver within a period of two years.

RCW 46.20.285.

set of facts is a matter of law reviewed de novo. State v. B.E.K., 141 Wn. App. 742, 745, 172 P.3d 365 (2007).

RCW 46.20.285(4) does not define “use.” In State v. Batten, the Washington Supreme Court held there must be a sufficient nexus between the crime and the offender’s use of a motor vehicle to justify revocation of his license under the statute. 140 Wn.2d 362, 365-66, 997 P.2d 350 (2000). The court determined the term “used” in the statute means “employed in accomplishing something.” Id. at 365 (quoting State v. Batten, 95 Wn. App. 127, 131, 974 P.2d 879 (1999), aff’d, 140 Wn.2d 362, 997 P.2d 350 (2000) (quoting Webster’s Third New International Dictionary 2524 (3d ed. 1966)). Thus, “the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony.” Id. at 365 (quoting Batten, 95 Wn. App. at 131). In Batten, a sufficient nexus existed between Batten’s use of a car and the crimes of unlawful possession of a controlled substance and unlawful possession of a firearm, where Batten used the car as a place to store, conceal, and transport the contraband over a period of time. Id. at 365-66. Because Batten’s use of the car contributed to the accomplishment of the crime, and was not merely incidental to the crime, DOL was authorized to revoke Batten’s driver’s license. Id.

Courts do not apply RCW 46.20.285(4) where the vehicle was not “an instrumentality of the crime, such that the offender use[d] it in some fashion to carry out the crime.” B.E.K., 141 Wn. App. at 748. A car is merely incidental to a crime, and not “used” to commit the crime, if it is used simply as a means of transportation. See, e.g., State v. Wayne, 134 Wn. App. 873, 875-76, 142 P.3d 1125 (2006) (insufficient nexus existed between use of car and crime of possession of cocaine, where Wayne merely drove car while possessing cocaine on his person); State v. Hearn, 131 Wn. App. 601, 610-11, 128 P.3d 139 (2006) (insufficient nexus existed between use of car and crime of possession of methamphetamine, where drugs were merely found inside car); State v. Griffin, 126 Wn. App. 700, 708, 109 P.3d 870 (2005), rev. denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006) (sufficient nexus existed between use of car and crime of possession of cocaine, where Griffin obtained the cocaine in exchange for giving someone a ride in his car).

In accordance with the reasoning of Batten and the other cases cited above, courts also hold that, if a car is merely the *object* of the crime and not used independently as an instrument to facilitate commission of the crime, the statute does not apply. B.E.K., 141 Wn. App. 742; State v. Dykstra, 127 Wn. App. 1, 110

P.3d 758 (2005), rev. denied, 156 Wn.2d 1004, 128 P.3d 1239 (2006). In B.E.K., the juvenile offender was adjudicated guilty of second degree malicious mischief for spray painting a police patrol car. Id. at 744. In determining whether the car was “used” to commit the felony, the Court acknowledged the car was a necessary ingredient of the crime. Id. at 747. Second degree malicious mischief, as charged, required proof that the offender perpetrated the mischief on an emergency vehicle.⁶ Thus, there was a “clear relationship” between the vehicle and the crime. Id. “But a relationship in any form between the vehicle and the crime is not sufficient.” Id. Instead, “the vehicle must be an instrumentality of the crime, such that the offender uses it in some fashion to carry out the crime.” Id. at 747-48. Because “B.E.K. did not employ the patrol car in any manner to commit his act of mischief but simply made the patrol car the *object* of the crime,” there was not a sufficient nexus between the crime and B.E.K.’s use of the car to justify suspending his driver’s license under RCW 46.20.285(4). Id. at 748 (emphasis added).

⁶ Under RCW 9A.48.080(1)(b), a person is guilty of the felony of second degree malicious mischief if he knowingly and maliciously “[c]reates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle.”

In State v. Dykstra, by contrast, a car was “used” to commit the crime of car theft, but only because the car was *both* the object *and* an instrumentality of the crime. 127 Wn. App. at 12. Dykstra was charged and convicted of five counts of first degree theft for his role in an auto theft ring. Id. at 6. Thus, cars were the object of the crimes. Id. at 12. But they were also “used” to facilitate commission of the crimes, where: Dykstra and his cohorts used cars to drive around looking for other cars to steal; they took possession of the stolen cars by driving them away from the scene; they sat in cars while acting as lookouts; and, after dismantling the engines, they used cars to carry the unwanted parts away for disposal. Id.

California courts similarly hold that, in order for a car to be “used” to commit a crime, it must be more than merely the object of the crime or a means of transportation.⁷ See People v. Gimenez, 36 Cal. App. 4th 1233, 42 Cal. Rptr. 2d 681 (1995) (sufficient nexus existed between use of car and crime of vehicle burglary, where

⁷ California's statute, California Vehicle Code section 13350(2), requires the Department of Motor Vehicles to revoke the driver's license of an offender who is convicted of “[a]ny felony in the commission of which a motor vehicle is used.” Thus, the statute is almost identical to RCW 46.20.285(4). Batten, 140 Wn.2d at 366. As such, California cases interpreting the California statute are persuasive authority for Washington courts interpreting RCW 46.20.285(4). Id.; Batten, 95 Wn. App. at 130.

defendant used car to carry burglary tools and intended to use car to carry away stolen car radio); In re Gaspar D., 22 Cal. App. 4th 166, 27 Cal. Rptr. 2d 152 (1994) (sufficient nexus existed between use of car and crime of vehicle burglary, where juvenile offender used car to carry and conceal stolen car stereo and burglary tools); People v. Paulsen, 217 Cal. App. 3d 1420, 267 Cal. Rptr. 122 (1989) (sufficient nexus existed between use of car and crime of fraud, where defendant used truck to carry and conceal stolen merchandise); People v. Poindexter, 210 Cal. App. 3d 803, 258 Cal. Rptr. 680 (1989) (insufficient nexus existed between use of car and crime of theft, where defendant used car merely as a means of transporting himself to the scene, and as a means of transporting himself and stolen property away from the scene).

- b. The trial court erred in finding Mr. Gatson 'used' a car to commit possession of a stolen vehicle where the car was merely the object of the crime.

In this case, the Jeep Wrangler was merely the object of the possession of a stolen vehicle crime. The car was a necessary ingredient of the crime and there was a "clear relationship" between the vehicle and the crime. B.E.K., 141 Wn. App. at 747. "But a relationship in any form between the vehicle and the crime is not sufficient." Id. If the vehicle is merely the *object* of the crime, it is

not “used” to commit the crime for purposes of RCW 46.20.285(4). Id. at 748. With regard to the possession of a stolen vehicle count, the car was merely an object of the crime. Indeed, it was the crime. Under the above cited authorities, because the Jeep Wrangler was merely the object of the crime and was not otherwise “used” in commission of the crime, a car was not “used” to commit the crime for purposes of RCW 46.20.285(4).

On the other hand, the court properly found Mr. Gatson “used” a car in the attempting to elude a pursuing police vehicle charge. In that count, the car was not merely an object of the crime. Rather in that count, Mr. Gatson used the Jeep Wrangler for the purpose of eluding pursuing police vehicles. For count one, therefore, the court properly made a special finding under RCW 46.20.285(4). In count two, however, possession (or use) of the car was the crime itself.

In State v. Contreras, Division Three of this Court recently held that a car was “used” to commit the crime of possession of a stolen vehicle because the defendant tried to assert ownership of the car by relicensing it. State v. Contreras, ___ Wn. App. ___, 254 P.3d 214, 217 (2011). Moreover, in that case, the defendant possessed the car for over three years. Id. Contreras is thus

distinguishable from this case because Mr. Gatson did not assert ownership of the car or otherwise “use” it in the commission of the crime of possession of a stolen vehicle. In the alternative, Contreras was wrongly decided in contravention of the above cited authorities.⁸

In sum, the trial court erred in finding Mr. Gatson “used a motor vehicle in the commission of the offense” as to count two, possession of a stolen vehicle. CP 5. At the least, the statute is ambiguous when applied to these facts and, under the rule of lenity, this Court must construe the statute in favor of Mr. Gatson.⁹ B.E.K., 141 Wn. App. at 745.

- c. The finding that Mr. Gatson ‘used’ a motor vehicle in the commission of count two must be reversed and vacated.

When a trial court erroneously finds an offender “used” a motor vehicle in the commission of a felony, the court’s order that

⁸ Appellant Contreras filed a petition for review on this issue, which is currently pending in the Washington Supreme Court. Sup. Ct. No. 86362-8 (petition for review filed August 16, 2011).

⁹ If the statute's meaning is plain on its face, the Court follows that plain meaning without resorting to statutory construction. B.E.K., 141 Wn. App. at 745 (citing State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003)). A statute is ambiguous if it can reasonably be interpreted in more than one way. B.E.K., 141 Wn. App. at 745 (citing Vashon Island Comm. for Self-Gov't v. Wash. State Boundary Review Bd., 127 Wn.2d 759, 771, 903 P.2d 953 (1995)). Under the rule of lenity, if two possible statutory constructions are permissible, the Court construes the statute strictly against the State in favor of a criminal defendant. B.E.K., 141 Wn. App. at 745 (citing State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)).

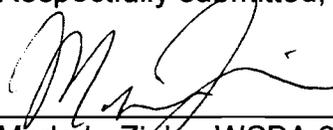
DOL be notified of the offender's conviction must be reversed and vacated. B.E.K., 141 Wn. App. at 748. Here, the trial court erroneously found Mr. Gatson "used" a motor vehicle to commit the crime of possession of a stolen vehicle. CP 5. Thus, that portion of the court's order must be reversed and vacated. See B.E.K., 141 Wn. App. at 748.

F. CONCLUSION

Mr. Gatson's convictions must be reversed because his speedy trial rights were violated and the convictions were based on unreliable latent fingerprint evidence. In the alternative, the special finding should be reversed and vacated as to count two because a vehicle was not used in commission of that crime.

DATED this 9th day of September, 2011.

Respectfully submitted,



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Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66707-6-I
)	
DARIN GATSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF SEPTEMBER, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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