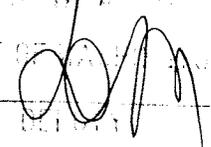


07 AUG -6 AM 9:00
STATE OF WASHINGTON
BY 

NO. 35492-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL CARL JOHNSON,

Appellant.

BRIEF OF APPELLANT

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P.M. 8-1-07

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I. ASSIGNMENT OF ERROR

1. THE TRIAL COURT ERRED IN BY NOT DISMISSING ALL CHARGES AGAINST DANIEL JOHNSON AS JOHNSON'S RIGHT TO COURT RULE SPEEDY TRIAL AND STATE AND FEDERAL SPEEDY TRIAL WAS VIOLATED.
2. THE TRIAL COURT ERRED BY ITS REFUSAL TO GRANT DANIEL JOHNSON'S MOTION TO SUPPRESS THE EVIDENCE SEIZED AS A RESULT OF A WARRANTLESS SEIZURE OF A CHEVROLET TAHOE IN WHICH HE WAS A PASSENGER. (CONCLUSIONS OF LAW 5, CP 213-14).
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II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. DID THE TRIAL COURT VIOLATE DANIEL JOHNSON'S RULE-BASED, FEDERAL, AND STATE RIGHT TO SPEEDY TRIAL BY CONTINUING HIS CASE FOR A COMBINED TOTAL OF 8 MONTHS THEREBY PROMPTING THE STATE TO FILE AN ADDITIONAL FIRST DEGREE ASSAULT CHARGE AGAINST HIM AND COMPELLING HIM TO BE TRIED WITH CO-

DEFENDANTS WITH WHOM HE HAD AN ANTAGONIST DEFENSE?

2. **DID THE TRIAL COURT VIOLATE DANIEL JOHNSON'S STATE AND FEDERAL RIGHT TO BE FREE FROM A WARRANTLESS SEIZURE WHEN THE TRIAL COURT UPHELD THE STOP OF A WHITE CHEVROLET TAHOE IN WHICH JOHNSON WAS A PASSENGER?**
3. **DID THE TRIAL COURT DENY DANIEL JOHNSON A FAIR TRIAL BY REFUSING TO SEVER HIS CASE FROM CO-DEFENDANTS ODELL AND BALASKI WHEN THE SEVERANCE WOULD HAVE PREVENTED THE JURY FROM DECIDING THE CASE AFTER HEARING ANTAGONISTIC DEFENSES?**
4. **WAS DANIEL JOHNSON DENIED DUE PROCESS WHEN THE TRIAL COURT FOUND HIM GUILTY OF THE FIRST DEGREE ASSAULT OF LAURA HARRINGTON WHEN THERE WAS INSUFFICIENT EVIDENCE THAT HE COMMITTED THAT CRIME?**
5. **WAS DANIEL JOHNSON DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL FAILED TO OBJECT TO ANOTHER DEFENDANT'S COUNSEL ELICITING FROM JOHNSON THAT HE HAD "DONE THIS" BEFORE?**

III. STATEMENT OF THE CASE

(a) Factual History

Late on the evening of August 6, 2005, Robert Harrington and his wife, Laura, were visiting at the Vancouver home of their friend, Gerald Newman. 18ARP¹ 703-06. Suddenly, three persons appeared in the living room each wearing gloves, masks, and

¹ For assistance in finding the matching volume for the page numbers cited, the volume number and if applicable, letter will be listed in front of the "RP".

camouflage clothing. 18ARP 713-14. All carried guns. Id. at 714. None were distinguishable from the other. 18ARP 714, 802. Newman lunged at the intruders and was shot in the hip. 18ARP 715, 801. The Harringtons ran out the back door and onto the deck. 18ARP 715. Both Harringtons fell. 18ARP 716. Mrs. Harrington looked up and saw one of the intruders standing over her and her husband with a gun. 18ARP 716-17. The Harringtons ran. 18ARP 717. Mr. Harrington pushed Mrs. Harrington in front of him as they fled across the backyard lawn. Id. Mrs. Harrington heard a gunshot, felt her husband fall back, and heard him say, "Oh my God", several times. Id. She kept running across the lawn as she heard more gunshots. Id. She crawled through a hedge and lay down in a neighbor's flowerbed. 18ARP 718. She heard footsteps in the Newman yard and felt the intruders were looking for her. 18ARP 718. She heard a male voice say they had to get out of there. 18ARP 718. Shortly thereafter, she heard the sounds of a car rapidly leaving. 18ARP 718.

Newman's neighbor, Charles Graham, let the hysterical Mrs. Harrington into his home after she pounded frantically at his front door. 18ARP 718, 18BRP 961. Graham had heard the gunshots. 18BRP 959. Another neighbor, Joseph Cottrell, also heard the

gunshots. 18BRP 916-17. So did Metro Watch worker Michael Koenekamp. 19ARP 986. All contacted 911. 18BRP 926, 961, 19ARP 992.

Additionally, Cottrell noticed an unfamiliar white Chevrolet Tahoe parked near Newman's house after hearing the shots. 19A 919. Shortly thereafter, he saw that the Tahoe was gone although he did not see or hear it leave. 19ARP 926-28, 940. He described the Tahoe to the 911 dispatcher. 19ARP 919-926. Koenekamp had also seen a white Tahoe in the area after he heard the gunshots. 19ARP 986. He first noticed it pulled alongside the roadway in a residential area not far from Newman's home. Id. He noted that the Tahoe had an Oregon license plate and was occupied by at least a driver. 19ARP 987. Shortly thereafter, Koenekamp saw what he believed to be the same Tahoe. 19ARP 989. He followed it and was able to get the Oregon license plate. 19ARP 991. He reported the specific plate information to the police via his dispatcher. 19ARP 991-92. When he had the Tahoe in his view, it was not being driven evasively or erratically. 19ARP 1006. Information about the shooting, including the Tahoe's description and license plate, were broadcast to law enforcement. 19ARP 1039-41.

Police responded to Newman's home. 19ARP 1084. They found a large amount of blood just inside the front door. 19ARP 1085. Newman was found laying in a bedroom. 19ARP 1085. In addition to being shot in the hip, Newman had also been beaten about the face with the butt of what appeared to be a gun. 18ARP 807, 19ARP 1096. Newman's memory of what happened in the house was limited. 18ARP 801. He did recall that there were three intruders who had no permission to be in his home, that he was shot, and beaten. 18ARP 801-03. He couldn't tell the police anything about the intruders identity. 18ARP 802.

The police located the body of Robert Harrington on Newman's backyard lawn. 19B 111129-30. A forensic pathologist testified that he had been shot 6 times and that any of the shots could have been fatal. 21ARP 1561. Mrs. Harrington had a few cuts, scrapes, and bruises, but was otherwise uninjured. 19ARP 1095.

Approximately an hour after the shots were originally reported, Clark County Deputy Todd Young saw the Tahoe. 19ARP 1040-42. He followed the Tahoe with the intent to stop it after additional officers arrived. 19ARP 1043. Suddenly, the Tahoe pulled over and stopped. 19ARP 1043. Four Tahoe doors opened

and four men got out. 19ARP 1043-44. One of the men, the front passenger, ran. 19ARP 1044. The other three men cooperated with Deputy Young's directions to lay down at Young's direction. The three men were identified as Daniel Johnson, Jason Balaski and Michael Odell. 22BRP 1968. The police used a dog to search for the fleeing front seat passenger but did not locate him. 18ARP 1046. Through later investigation, he was identified as Adrian Rekdahl.² 19BRP 1256. The stop occurred in front of Balaski's home. 23ARP 2073.

Of the three, Johnson was the only man with blood on his clothing. 22ARP 1796, 1802, 22BRP 1912-13. The clothing was seized for testing. 22BRP 1969. DNA analysis established that it was Newman's blood. 22ARP 1796, 1802, 22BRP 1912-13. There was also spots of Newman's blood in the Tahoe. 22BRP 1912-14.

Johnson, Balaski, and O'Dell were each processed for the presence of gunshot residue. 20BRP 14954. The State's gunshot residue expert testified that both Johnson and Balaski had a microscopic amount of residue on their hands. 21BRP 1706-08. No residue was found on Odell. 21BRP 1707.

² Rekdahl was arrested in October 2005. At the time of Johnson's trial, Rekdahl was incarcerated in Oregon pending extradition to Washington.

No guns associated with the shootings were presented as evidence at trial. 21BRP 1660. A Washington State Patrol forensic scientist had a hunch that the bullets came from two guns but he could not be more definite than just a hunch. 21BRP 1664.

Police located vehicles registered to Johnson and Balaski at a shop owned by Odell on Albina in Portland. 19BRP 1182-84. Rekdahl's pickup was located nearby at Odell's combined residence and glass business on Winchell. 19BRP 1186. The Albina and Winchell addresses are within a few blocks of each other. 19BRP 1185. The Tahoe's registered owner was Odell's mother-in-law who also lived at the Winchell address. 24ARP 2248.

Search warrants were served on the Tahoe, Rekdahl's pickup, and various residences and buildings including Odell's Portland properties on Albina and Winchell, the Vancouver-area home Balanski shared with his brother, and Johnson's home in Aloha, Oregon. 20ARP 1338-1345, 1354, 1355.

In the Tahoe, there were several hand held radios. 20ARP 1347-48. The radios were on the same frequency and able to communicate with each other. 23ARP 2073. Packaging for the radios was located at the Albino shop. 20BRP 1396. Also at the

Albina shop, the police found Johnson's wallet and Balaski's wallet both containing their respect identifications. 20BRP 1958. At Balaski's home, the police found what appeared to be a map to Odell's home. 19BRP 1189-91.

In Johnson's home, the police found a road atlas with the proximate location of Newman's home circled and a piece of paper with rough directions to Newman's address. 20ARP 1365-66. Johnson, Balaski, and Odell each gave handwriting exemplar's on the State's motion. None of the handwriting on the recovered items came back as belonging to Johnson, Balaski, or Odell. 20ARP 1315

The jury learned that Odell had sold a house to Rekdahl some years earlier, employed Rekdahl at his Portland-area business, and allowed Rekdahl to store items at both the Winchell and the Albina addresses. 24ARP 2238. Rekdahl was friends with Balaski and Johnson. 19BRP 1270. 26ARP 2580. Odell knew Johnson casually through Rekdahl. 24ARP 2258. Odell had met Newman a few times through his brother who had, at one point, been employed by Newman at his trucking business. 18ARP 795.

Certain statements attributed by police to Odell and Balaski were presented as evidence at trial. 23ARP 2067. Odell

acknowledged being at the Dancing Bare earlier in the evening. A Dancing Bare bartender had identified Johnson, Balaski, Odell, and Rekdahl as having been at the Dancing Bare earlier on the evening of the shooting. 19BRP 1256-57. Balaski told police that if he said anything, it would be very incriminating. 23ARP 2067.

Johnson was the only defendant to testify. He explained that he was contacted by Rekdahl to participate in a burglary where the anticipated take was \$1.2 million dollars. 26ARP 2582, 2650. Johnson did not know the name or location of the home to be burglarized. 26ARP 2586. He met with Rekdahl and Balaski at Rekdahl's cabin in Morton, Washington, to discuss the plan. 26ARP 2582. While he was on his way to the cabin, Odell called Johnson to make sure he was on his way to the cabin. 26ARP 2582.

On August 6, 2005, Rekdahl called Johnson and told him that tonight was the night and to meet at the Dancing Bare. 26ARP 2585. When Johnson arrived, Balaski, Rekdahl, and Odell were already there. 26ARP 2585. Johnson was surprised to see Odell and somewhat taken aback when he concluded that the \$1.2 million was going to be split four ways instead of three ways.

26ARP 2585. Johnson asked Odell why he would get involved in the burglary. Odell said it was for the money. 26ARP 2587.

The group left the Dancing Bare. 26ARP 2587. Johnson was directed to go to the store and buy hand-held radios. 26ARP 2587. Johnson did so, then drove to Odell's Albina shop. 26ARP 2588. Odell, Balaski, and Rekdahl were waiting there for him. Id. Johnson dressed in camouflage clothing. 26ARP 2589. Johnson armed himself with a loaded pistol. 26ARP 2589. Johnson offered to drive everyone to the burglary in his Dodge Durango but Odell wanted to drive the Tahoe instead. 26ARP 2590.

Odell drove himself and the three co-defendants to Newman's home. 26ARP 2592. Odell didn't ask anyone for directions. 26ARP 2592. Once they got to Newman's, Odell remained in the Tahoe. 26ARP 2592. Balaski and Rekdahl, who also wore either camouflage or green pants, grabbed rifles out of a black bag. 26ARP 2588, 2591. Johnson was unaware to that point that Balaski and Rekdahl planned to arm themselves. 26ARP 2591. They put on masks and walked toward Newman's backyard but changed course and went through Newman's unlocked front door. 26ARP 2592.

The only person Johnson saw in the home was Newman. 26ARP 2594-95. Newman lunged at the group. 26ARP 2593. Rekdahl shot his gun, Newman flinched but Johnson did not believe that Newman had been hit. 26ARP 2593. Johnson subdued Newman but hitting him in the head with his pistol. 26ARP 2594. Balaski and Rekdahl moved further into the house. 26ARP 2594. Johnson heard gunshots. Id. Rekdahl came back to where Johnson was holding Newman and began beating Newman with the butt of his rifle. 26ARP 2594. Rekdahl stopped beating Newman at Johnson's urging. 26ARP 2595. Rekdahl said that they had to go. Id. It was dawning on Johnson at that point that maybe there hadn't been any intent to steal money and that he had been duped. 26ARP 2595, 2597-99. His suspicion was confirmed when they all got back into the Tahoe with Odell as the wheel. 26ARP 2599. Odell asked Balaski if he had killed him. 26ARP 2597. Balaski said that he had. Id. In response, Odell pumped his fist in the air victoriously. Id.

Odell stopped at one point so Johnson, Balaski, and Rekdahl, could put the guns and some of their clothing in the black bag and ditch it in some bushes. 26ARP 2611.

(b) Procedural History

(i) Charges, Co-Defendants, Arraignment, and Speedy Trial

Daniel Johnson was arraigned on August 26, 2005, while represented by court-appointed counsel, Suzan Clark. 2RP 25-27. The original information listed four co-defendants: Jason Balaski, Daniel Johnson, Michael Odell, and Adrian Rekdahl. CP 9-11. Each co-defendant was charged identically with three crimes: felony murder in the first degree of Robert Harrington with a predicate offense of first degree burglary (count I); attempted first degree murder of Gerald Newman (count II); and burglary in the first degree while armed with a firearm or while committing an intentional assault (count III). CP 9-11. All charges also carried firearm enhancements. CP 9-11. The court set Johnson's trial date for October 3, 2005. 2RP 25-27. Johnson was not set for trial with his two co-defendants. Rather, Balaski and Odell waived speedy trial and were set to February 21, 2006. 2RP 27.

On September 9, 2005, defense counsel Clark requested a continuance over Johnson's objection.³ 3RP 54-57. Clark needed more time to prepare. 3RP 54. The court found good cause for the continuance in Clark's request. 3RP 57. Although the court was

³ Johnson remained in custody after his August 7, 2005, arrest.

inclined to set Johnson's trial date with Balaski and Odell, it set December 12, 2005, instead. 3RP 54-57.

On October 4, 2005, retained counsel Gerald Wear filed a substitution of counsel with the court.⁴ CP 21. On November 4, the State filed a second amended information again listing the names of all four co-defendants. CP 33-35. By the new information, the State added a charge of first degree attempted murder against Laura Harrington. CP 33-35. All charges carried firearm enhancements. CP 33-35. At a November 29 review, Wear said that he was ready for trial as scheduled on December 12. 7RP 81.

On December 6, Johnson entered a not guilty plea to the third amended information. 8ARP 95-96. This information listed only Johnson's name. CP 42-43. It charged him with first degree felony murder of Robert Harrington with a predicate offense of first degree burglary by being armed with a firearm or committing assault (count I); first degree assault on Gerald Newman (count II), and burglary in the first degree while armed with a firearm or committing assault (count III). CP 42-43. All counts included a firearm enhancement. CP 42-43. At this point, Wear asked for more time to prepare for trial. 8BRP 100. Johnson signed a

⁴ Wear would later be joined on the case by California attorney Mark Axup.

speedy trial waiver with a December 23, 2005, commencement date. CP 44. 8BRP 102-07. The court requested that Johnson agree to the December 23 date as it wanted to set Johnson's trial with Balaski's and Odell's February 21, 2006, trial. 8BRP 102-07.

On February 7, 2006, the State filed a fourth amended information against Johnson and a third amended information against Balaski, Odell, and Rekdahl. The new information – the information Johnson, Balaski, and Odell were tried on – charged first degree felony murder of Robert Harrington with a predicate offense of first degree burglary (count I), two counts of first degree assault (Newman and Mrs. Harrington, respectively counts II and III), and burglary in the first degree (count IV). CP 96-98. All charges included a firearm enhancement. CP 96-98.

At a hearing on February 9, Balaski and Odell again asked for a continuance of the trial date. 10RP 150. Both signed speedy trial waivers. 10RP 150. Johnson objected to the continuance. 10RP 159-65. Over Johnson's objection, the court set a new trial date of August 14, 2006, for all three defendants. 10RP 165. The court found good cause to continue Johnson's trial over his objection in order to try the three co-defendants in a joint trial. *Id.*

Johnson filed an objection to the fourth amended information on February 16, because it was be amended to add back an assault charge on Mrs. Harrington to conform to the charges against the other, now-joined, co-defendants. CP 105-07.

Trial commenced, with all three joined defendants on August 10, 2006.

(ii) Pre-Trial Motions

(a) *Search Warrant of Johnson's Aloha, Oregon, Home.*⁵

As part of his pre-trial motions, Johnson objected to the search of his Aloha, Oregon, home. CP 48-90. An Oregon judge had signed a search warrant authorizing the search. *Id.* The trial court heard and denied the motion on February 2, 2006. 9RP117. Johnson argued that the warrant failed to establish a required nexus between the incident at Newman's home and any anticipated evidence at Johnson's home. 9RP 117-19. The court disagreed and found that there was sufficient evidence of a conspiracy between Johnson, Balaski, Odell, and Rekdahl, to allow the police to search Johnson's home for any written proof of a conspiracy. 9RP 137. The court also found that it was reasonable for the police

⁵ I am not raising this as an issue. Because appellant might raise it in Statement of Additional Grounds for Review (SAG), I am including it in the factual statement.

to look for proof of Johnson owning a rifle. *Id.* The court entered written findings of fact and conclusions of law at CP 108-111.

(b) *Terry*⁶ *Stop of White Chevrolet Tahoe*

Johnson, Balaski, and Odell joined in a challenge to what was characterized as a *Terry* stop of the white Chevrolet Tahoe driven by Odell and occupied by Johnson and Balaski. 13BRP 348-375. They all argued similarly that there was no legal basis for the stop. *Id.* The court heard the motion, including testimony, on June 7, 2006. 13A & B RP. The court found a valid basis for a *Terry* stop thereby denying the motion to suppress. 13BRP 380. Written findings of fact and conclusions of law were entered. CP 211-14.

(iii) *Severance, Antagonistic Defenses*

Before trial, the three co-defendants moved to sever their respective cases from one another. Johnson moved to have his case severed from Balaski and Odell both on speedy trial grounds and because of anticipated antagonist defenses. 13BRP 404. The State objected to the severance. 13BRP 408. The court denied the motion finding that judicial economy favored joinder. 13BRP 414.

⁶ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed 2d 889 (1968)

The severance motion was repeatedly raised by Johnson as well as Balaski and Odell at various times throughout the trial. 11ARP 521, 558; 16RP 617, 671-72; 18ARP 767; 18BRP 880; 25RP 2532, 2568; 26ARP 2574-75.

That at least Balaski's and Odell's defenses were antagonist was apparent from opening argument. Balaski committed to a defense where he agreed that he had been with the co-defendants earlier at the Dancing Bare but had run out of money and returned home alone. 17RP 651-58. Balaski only later decided to join the group again when they called him. Id. He was actually getting into the Tahoe at the front of his house when the police pulled in behind it. Id. He had not gone to Newman's residence and had nothing to do with the events at Newman's residence. Id.

In his opening statement, Odell agreed that he too had been at the Dancing Bare but had only been with the others in the Tahoe because they decided to continue drinking together. 17RP 645-51. He did not know Balaski well. Id. Balaski gave him direction to what Odell believed was Balaski's home. Id. Odell was told to wait in the Tahoe and had nothing to do with the events at Newman's home other than to inadvertently be the driver of the Tahoe. Id. He denied all criminal culpability. Id.

Johnson's opening statement was more guarded and did not focus on Johnson's defense as much as it encouraged the jurors to keep an open mind and to pay attention to the facts and the law. 17RP 658670. However, once Johnson testified, it was very apparent that the defenses were antagonistic. 17RP 672.

Balaski and Odell, in closing, stayed with the same defense they each raised in opening statement. 26BRP 2770-2812; 26CRP 2815-74; 27ARP 2879-80. Johnson's closing statement focused on how he had agreed only to commit a burglary and should not be found guilty of the acts of the others when he had no idea those acts were going to occur. 26B 2770-2812.

(iii) Voir Dire⁷

Prospective jurors filled out a jury questionnaire.⁸ Depending on the answers to the questionnaire, the court allowed individual questioning outside the presence of the rest of the jury venire. Derrick Romano was one such person. RP 3-8. Romano indicated some awareness about the facts of the case and was

⁷ Although I am not raising a voir dire issue, it is anticipated that appellate Johnson may wish to do so in his Statement of Additional Grounds for Review (SAG). As such, a factual summary is provided.

⁸ The portion of the voir dire wherein Derrick Romano testifies is contained in its own short volume and was prepared by transcriptionists Reed Jackson, Watkins.

individually questioned by the State and all defense counsel. RP 3-14. It was learned Romano had talked briefly to Newman after the incident when he was at Newman's home to take pictures in preparation for Newman selling his home by owner. Id. Newman declined to answer questions about the injury to his leg. Id. Romano had been in Newman's home and seen what he believed were blood stains including a lot of torn up carpet in Newman's bedroom. Id. The State challenged Romano for cause. RP 15. Balaski and Odell objected to the for-cause challenge. RP 15-16. Johnson remained silent on the issue. RP 16. No one used their peremptory challenge against Romano. Romano was seated as juror #6.

Johnson did challenge Romano in a post-trial motion for a new trial expressing concern about Romano's knowledge of Newman's house and his bringing to the venire the potential to taint his fellow jurors with outside information. CP 335-39. 29RP 2927. The court denied the motion. 29RP 2932.

IV. ARGUMENT

(1) THE TRIAL COURT VIOLATED DANIEL JOHNSON'S RULE-BASED, FEDERAL, AND STATE RIGHTS TO A SPEEDY TRIAL.

A defendant who is detained in jail pending trial is entitled to trial within 60 days from arraignment. CrR3.3 (b)(1)(i). A defendant can waive his 60-day speedy trial right. CrR 3.3(f)(2). A waiver period is excluded from the speedy trial calculation. CrR 3.3 (e)(3), (f)(1). Daniel Johnson was arraigned on his original information on August 26, 2005, but not tried until August 10, 2006. During the year between arraignment and trial, Johnson waived speedy trial for only 62 days from December 23, 2005, to February 21, 2006. With the exception of that one waiver of speedy trial, Johnson objected to each continuance of his trial date. Because of the multiple continuances, Johnson faced an additional charge and was forced into trial with co-defendants from whom his case should have been severed. The trial court abused its discretion by repeatedly continuing Johnson's trial over his objections especially insofar as it was done to assure a joint trial, and because Johnson was prejudice by the continuances, his case should be dismissed as a violation of CrR 3.3, federal speedy trial, and state speedy trial.

(a) *The trial court violated Johnson's right to a rule-based speedy trial.*

The decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. *State v. Miles*, 77 Wn.2d 593, 597, 464 P.2d 723 (1970). Trial court's decisions to grant motions for continuances are reviewed under an abuse of discretion standard. *State v. Hurd*, 127 Wn.2d 592, 594, 902 P.2d 651 (1995). As such, the court will not disturb the trial court's decision unless the defendant makes "a clear showing . . . [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing *MacKay v. MacKay*, 55 Wn.2d 344, 347 P.2d 775 1062 (1959)). In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. *State v. Eller*, 84 Wn.2d 90, 95, 525 P.2d 242 (1974). As a general rule, the court should sever to protect a defendant's right to a speedy trial. *State v. Eaves*, 39 Wn. App. 16, 19-20, 691 P.2d 245 (1984).

The trial court abused its discretion in granting a continuance over Johnson's objection on February 9, 2006. Johnson had

waived his speedy trial only through February 21. When Johnson was set to be tried on his own, the State, by its third amended information against Johnson, charged him with three crimes all with firearm enhancements: first degree felony murder, first degree assault against Newman, and first degree burglary. But in its fourth amended information against Johnson, when Johnson was joined for trial with Balaski and Johnson, the State added the additional charge of first degree assault against Mrs. Harrington to conform Johnson's information to the charges pending against Balaski and Odell. As such, had the court not continued the trial over Johnson's objection, thereby allowing his case to be joined for trial with the co-defendants, Johnson would not have face the additional first degree assault charge.

(b) Johnson's federal right to a speedy trial was similarly violated.

To determine whether a defendant's federal constitutional speedy trial rights have been violated, the court must balance four factors: (1) the length of the delay, (2) the reason for the delay, (3) the defendant' assertion of the right, and (4) the prejudice to the defendant. *State v. Hudson*, 130 Wn.2d 48, 57 n.5., 921 P.2d 538 (1996) (citing *Barker v. Wingo*, 407 U.S, 514, 530, 92 S. Ct. 2182,

33 L. Ed. 2d 101 520 (1972); *Doggett v. United States*, 505 U.S. 647, 112 S. Ct. 2686, 2690, 120 L. Ed. 2d 520 (1992); *State v. Fladebo*, 113 Wn.2d 388, 393, 779 P.2d 707 (1989). In addition, the court should also consider any other relevant circumstances. *Fladebo*, 113 Wn.2d at 393.

Under the federal standard, Johnson's argument is the same as was noted under the rule-based section noted above. With the exception of a 62-day window, Johnson was not willing to waive his speedy trial right. It took almost a year from arraignment to trial. He had been in custody for over a year as of his trial date. Johnson should not have been tried with co-defendants with antagonistic defenses. And the joint trial came with an additional class A felony charge against Johnson.

(c) Finally, as above, Johnson's state speedy trial right was violated.

Our Supreme Court has previously developed a similar test for deprivations of the right to speedy trial under Const. Art 1, Sec 22 (Amend 10). *Fladebo*, 113 Wn.2d at 393-94 (citing *State v. Christensen*, 75 Wn.2d 678, 686, 453 P.2d 644 (1969); *State v. Bradfield*, 29 Wn. App. 679, 683, 630 P.2d 494, *review denied*, 96 Wn.2d 1018 (1981)). Under the state test, the court must consider

whether the delay itself was long enough to amount to a denial of the right to speedy trial; (2) whether the defense was prejudiced by the delay; (3) whether the delay was purposeful and designed by the State to oppress the defendant, and (4) whether the defendant was subject to long and undue imprisonment in jail while awaiting trial. *Fladebo*, 113 Wn.2d at 394 n.3 (citing *Christensen*, 75 Wn.2d at 686).

Johnson wanted to go to trial on his original trial date of October 26. That trial date was put off at the original defense counsel's request because the State delayed providing her with discovery such that she only had three-weeks to prepare for trial. Instead, Johnson had to wait almost a year while being dragged along – at the State's approval to be tried with co-defendant's - with whom he had an antagonistic defense. All in all, Johnson had to wait for just short of a year to have his case heard while all the while incarcerated in the Clark County Jail. Such was a violation of his state speedy trial rights.

(2) DANIEL JOHNSON WAS IMPROPERLY SEIZED. DEPUTY YOUNG HAD NO BASIS TO BELIEVE THAT THE WHITE TAHOE OR ITS OCCUPANTS HAD BEEN INVOLVED IN CRIMINAL ACTIVITY.

Under the Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution, the state bears the burden of proving that a warrantless stop or seizure falls into one of the few 'jealously and carefully drawn' exceptions to the warrant requirement. *State v. Williams*, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). Exceptions to the warrant requirement fall into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *State v. Ladson*, 138 Wn.2d 343, 349-50, 979 P.2d 833 (1999) (citing Robert F. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, U. Puget Sound L. Rev. 411, 528-80 (1988)). The burden is always on the State to prove one of these narrow exceptions. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). Here, the State argued and the trial court accepted that the warrantless seizure of Daniel Johnson was based

upon a valid *Terry* stop. Both the state and the trial court are wrong.

(a) Daniel Johnson was seized when Deputy Young shined his spotlight on Johnson and held him at gunpoint.

The first step in analyzing police-citizen interactions is to determine whether a seizure has occurred. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). It is elementary that all investigatory detentions constitute a seizure. *State v. Armenta*, 134 Wn2d. 1, 10, 948 Wn.2d 1280 (1997).

(b) The seizure of Daniel Johnson was not justified at its inception.

A warrantless investigatory stop must be reasonable under the Fourth Amendment and Article I, Section 7 of the Washington State Constitution. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). The state must prove an investigatory stop's reasonableness. *Id.* An investigatory stop is reasonable if the arresting officer can identify specific and articulable facts that, taken together with rational inferences from those facts, reasonably warrant the intrusion, *State v. Mendez*, 137 Wn.2d at 223. Articulable suspicion means a "substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (citing 3 Wayne R. LaFave,

Search and Seizure, section 9.2, at 65 (1978). The suspicion must be individualized. *Brown v. Texas*, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980). An investigatory detention is only permissible if it is justified at its inception. *Ladson*, 138 Wn.2d at 350.

The facts in *Brown v. Texas*, 443 U.S. 47, are similarly slim and did not support a *Terry* investigative stop. In *Brown*, police were patrolling in an area with a high incidence of drug crimes. While driving past an alley, both officers saw two men walking in opposite directions away from each other. The officers pulled into the alley and tried to contact Brown who refused to give information about himself to the officers in violation of a Texas statute making it a crime to refuse to give your name and address to law enforcement. Contrary to the *Terry* requirement of reasonable and articulable suspicion, neither officer could articulate any criminal activity they suspected Brown had engaged in or was about to be engaged in. The best the officers could come up with was that the situation looked suspicious so they wanted to identify Brown.

Similarly to our facts, the police just wanted to contact the vehicle in which Johnson was a passenger. The police had no reason to believe that this particular white Tahoe was related to any

sort of criminal activity. There has been a white Tahoe near Newman's house when shots were heard. Metro Watch employee Koenekamp saw a white Tahoe close to the area where he heard shots. Koenekamp later followed a white Tahoe that might have been the same vehicle that he had seen in the proximity where he heard the shots. But a white Tahoe is a ubiquitous vehicle. And this stop was an hour after the shooting occurred. The requirement for a *Terry* stop, as in *Brown*, were not met.

(3) DANIEL JOHNSON'S CASE SHOULD HAVE BEEN SEVERED FOR TRIAL FROM CO-DEFENDANTS BALASKI AND ODELL.

Daniel Johnson's case should have been severed for trial from his co-defendants. While it may not have been obvious before opening statement that antagonistic defenses would be presented, that the defenses were antagonistic became abundantly clear during opening statement and as the case progressed. As such, the court erred in not severing Johnson for trial as requested.

The decision to proceed with joint or separate trials is entrusted to the sound discretion of the trial court and will not be disturbed on appeal absent a manifest abuse of discretion. *State v. Grisby*, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). Separate trials are not favored in Washington and are granted only where a

defendant demonstrates that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Hoffman*, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). Severance is not mandatory, except to protect one defendant from incriminating out-of-court statements by another. CrR 4.4(c)(1); *Eaves*, 39 Wn. App. at 19-20. When speedy trial and consolidation considerations collide, the court must balance the competing interests. *State v. Dent*, 123 Wn.2d 467, 484-85, 869 P.2d 392 (1994). The court may only proceed with a joint trial if the defendant fails to establish lack of prejudice in presenting a defense. *State v. Melton*, 63 Wn. App. 63, 66-67, 817 P.2d 413 (1991). The defendant must point to specific prejudice before a decision to consolidate will be overturned. *State v. Kinsey*, 20 Wn. App. 299, 579 P.2d 1347 (1978).

Johnson's defense was that he had only agreed to commit a burglary with Balaski, Odell, and Rekdahl and was completely oblivious to what later became apparent: that at least Odell had gone to Newman's home to murder someone. Odell argued that Johnson's defense was untrue. Odell was the victim. He was duped into driving the others to commit a crime. Balaski told Odell to drive to what he believed was Balaski's home. In reality it wasn't

Balaski's home. It was a crime scene thanks to Balaski's, Rekdahl's, and Johnson's scheming. Balaski's defense was different yet. He hadn't been in the Tahoe at all. He had been with Odell, Rekdahl, and Johnson earlier at the Dancing Bare but he left without them. And rather than getting out of the Tahoe when Deputy Young arrived, he was actually getting into the Tahoe to go out with them again for another round of drinking. In order "to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *United States v. Davis*, 623 F.2d 188, 194-95 (1st Cir. 1980) (cited with approval in *Grisby*, 97 Wn.2d at 508. Here, the conflict between Johnson's defense and the defense of Odell and Balaski were so irreconcilable, that the jury could only have unjustifiably inferred that this conflict alone demonstrates guilty. As such, the trial court erred in not failing to sever Johnson's case from Balaski and Odell.

- (4) THE TRIAL COURT VIOLATED DANIEL JOHNSON'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE I, SECTION 7, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGMENT OF CONVICTION ON TWO COUNTS OF FIRST DEGREE ASSAULT BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL**

EVIDENCE JOHNSON'S CULPABILITY FOR EITHER CRIME.

The State failed to prove that Daniel Johnson committed first degree assault against Laura Harrington either as a principal or as an accomplice. As the State failed to prove the charges, the court denied Johnson due process when it entered a finding of guilt for that charge.

As part of the due process rights guaranteed under both the Washington Constitution, Article I, Section 3, and the United States Constitution, Sixth Amendment, the State must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L. Ed. 2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16, *review denied*, 81 Wn.2d 1004 (1972).

As a result, any convictions not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 557, 513 P.2d 549, *review denied*, 83 Wn.2d 1003, (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the State present substantial evidence "that the defendant was the one who perpetrated the crime." *State v. Johnson*, 12 Wn. App. 40, 43, 527 P.2d 1324 (1974), *review denied*, 85 Wn.2d 1001 (1975).

The test for determining the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L. Ed. 2d 560(1979); *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980).

To find Johnson guilty of first degree assault of Laura Harrington as instructed, the jury had to find that Johnson,

- (1) On August 6, 2005, acting as a principal or as an accomplice, he assaulted Laura Harrington;
- (2) That the assault was committed with a firearm or by force or means likely to produce great bodily harm or death;
- (3) That as a principal or as an accomplice he acted with the intent to inflict great bodily hard or death; and
- (4) That the acts occurred in the State of Washington.

CP 275.⁹

The evidence was insufficient to find Johnson guilty as the principal actor. Three armed persons entered Newman's home wearing camouflage clothing, gloves, and masks. Neither Newman nor Mrs. Harrington could distinguish one from the other or identify any of the persons. Someone assaulted Mrs. Harrington by holding a gun at her as she lay prone on the deck. Someone likely looked for Mrs. Harrington in the backyard after her husband was shot and killed. But none of this evidence pointed to Johnson.

The same holds true for the sufficiency of facts to convict Johnson as an accomplice. A person is an accomplice to a crime if, with knowledge that that it will promote or facilitate the commission of a crime, he solicits, commands, encourages, or requests another person to commit the crime or aids or agrees to

⁹ Instruction numbers 23

aid another person in committing the crime. RCW 9A.08.020(3)(a). "Mere presence at the scene of a crime, even if coupled with assent to it, is not sufficient to prove complicity. The State must prove that the defendant was ready to assist in the crime." *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). The evidence here showed that the only crime Johnson was ready to assist was in a burglary where money was have been taken. As such, it was error to find him guilty of first degree assault against Mrs. Harrington.

(5) TRIAL COUNSEL'S FAILURE TO OBJECT TO EVIDENCE OF DANIEL JOHNSON'S PRIOR IRRELEVANT CRIMINAL BEHAVIOR DENIED JOHNSON EFFECTIVE ASSISTANCE OF COUNSEL.

The Washington State and United States Constitutions guarantee a criminal defendant the right to effective assistance of counsel. Const. Art. I, Sec. 22; U.S. Const. Amend. VI. To prove that counsel was ineffective by constitutional standards, the defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have

been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McKinnon*, 110 Wn. App. 1, 5, 38 P.3d 1015 (2001).

Here, defense counsel was ineffective when he failed to object to evidence that Johnson had “done this before.” 26ARP 2623. A claim of ineffective assistance of counsel can be premised on a failure to object to otherwise inadmissible evidence. *State v. Dawkins*, 71 Wn. App. 902, 980, 863 P.2d 124 (1993). Generally, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. ER 404(b). Before such evidence can be admitted, the trial court must first determine whether the offered evidence is relevant, i.e., whether the evidence is offered to prove a fact of consequence to the action, and if so, whether the evidence tends to make such fact more or less probable. ER 401; *State v. Dennison*, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). If relevant, the trial court must then, on the record, balance the evidence’s probative value against its prejudicial effect. ER 403; *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). If such evidence is admitted the court must explain its purpose to the jury. *State v. Bacotgarcia*, 59 Wn. App. 815, 819, 801 P.2d 993 (1990).

But here the court got to do none of that because defense counsel didn't object to the following question by Odell's counsel and Johnson's answer:

Q: Mr. Senescu asked if you were surprised when Newman attacked you.

A: Yes, I was surprised, a man comes running at us –

Q: Okay, that's fair, you'd be surprised. But you said, "But it can happen" –

A: Yeah, it can happen.

Q: Because you've done this before, haven't ya?

A: Yeah, I have.

26ARP 2622-23.

In the context of this case, this question and consequent answer was very damaging especially as it pertained to the assault charge against Mrs. Harrington. As there was no evidence of Johnson's past criminal history so that the jury might assess what Johnson had "done before" the jury was left to speculate. That speculation is likely what convinced the jury that Johnson was guilty of the assault on Mrs. Harrington.

V. CONCLUSION

Because the trial court violated Daniel Johnson's right to a speedy trial, his case should be remanded for dismissal. The lack of

evidence on the first degree assault of Laura Harrington also requires remand for dismissal.

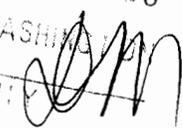
In the alternative, the evidence found in the white Tahoe should be suppressed necessitating remand for retrial. Also necessitating retrial is the lack of effective assistance of counsel, at least on the assault charge against Mrs. Harrington.

Finally, if a new trial is in order on remand for Johnson and either or both of his co-defendants, Johnson's case should be severed for retrial.

Respectfully submitted this 1st day of August, 2007



LISA E. TABBUT/WSBA #21344
Attorney for Appellant

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

STATE OF WASHINGTON,) Court of Appeals No. 35492-6-II
Respondent,)
vs.) AFFIDAVIT OF MAILING
DANIEL CARL JOHNSON,)
Appellant.)
_____)

LISA E. TABBUT, being sworn on oath, states that on the 1st day of August 2007,
affiant deposited in the mails of the United States of America, a properly stamped envelope
directed to:

Michael C. Kinnie
Clark County Prosecuting Attorney
P.O. Box 5000
Vancouver, WA 98666-5000

Daniel Carl Johnson/DOC#959648
Clallam Bay Corrections Center
1890 Eagle Crest Way
Clallam Bay, WA 98326-9723

AFFIDAVIT OF MAILING - 1 -

LISA E. TABBUT
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and that said envelope contained the following:

- (1) APPELLANT'S BRIEF
- (2) AFFIDAVIT OF MAILING

Dated this 1st day of August 2007,



LISA E. TABBUT, WSBA #21344
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 1st day of August 2007.



Stanley W. Munger
Notary Public in and for the
State of Washington
Residing at Longview, WA 98632
My commission expires 05/24/08

