

No. 39287-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN L. FITZPATRICK,

Appellant.

STATE OF WASHINGTON  
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DIVISION II

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

The Honorable John Nichols, Judge

APPELLANT'S OPENING BRIEF

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**A. ASSIGNMENTS OF ERROR**

- 1. THE TRIAL COURT ERRED IN ENTERING A GUILTY FINDING AGAINST MR. FITZPATRICK FOR ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE WHEN THE EVIDENCE THAT HE ACTED AS AN ACCOMPLICE TO THE ELUDING WAS INSUFFICIENT.**
- 2. THE TRIAL COURT ERRED IN FINDING MR. FITZPATRICK GUILTY OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE BECAUSE MR. FITZPATRICK WAS A VICTIM OF MR. FERGUSON'S ELUDING BEHAVIOR.**
- 3. THE TRIAL COURT DEPRIVED MR. FITZPATRICK HIS RIGHT TO A SPEEDY TRIAL UNDER CrR 3.3.**
- 4. THE TRIAL COURT ERRED IN REFUSING TO SEVER MR. FITZPATRICK'S CASE FROM CO-DEFENDANT MR. YOUNGBLOOD TO PRESERVE MR. FITZPATRICK'S SPEEDY TRIAL RIGHT.**
- 5. THE TRIAL COURT ABUSED ITS DISCRETION BY TRYING CO-DEFENDANT MR. YOUNGBLOOD WITH MR. FITZPATRICK OVER MR. FITZPATRICK'S OBJECTION.**

**B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- 1. WHETHER THERE WAS SUFFICIENT EVIDENCE THAT MR. FITZPATRICK WAS AN ACCOMPLICE TO DRIVER MR. FERGUSON'S ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE WHEN (I) THERE WAS NO EVIDENCE THAT MR.**

**FITZPATRICK ENCOURAGED EITHER MR. FERGUSON'S FAILURE TO STOP OR RECKLESS DRIVING AND (II) MR. FITZPATRICK WAS A VICTIM OF MR. FERGUSON'S ELUDING BEHAVIOR?**

- 2. DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT REFUSED TO SEVER MR. FITZPATRICK'S CASE FROM CO-DEFENDANT MR. YOUNGBLOOD'S CASE IN ORDER TO PRESERVE MR. FITZPATRICK'S RIGHT TO A SPEEDY TRIAL?**

**C. STATEMENT OF THE CASE**

**1. Procedural Overview**

John Fitzpatrick was tried to a Clark County jury on a four-count information charging: count 1, robbery in the first degree in violation of RCW 9A.08.020(3), RCW 9A.56.190, RCW 9A.56.200, RCW 9A.56.200(1)(a)(i); count 2 and 3, kidnapping in the first degree in violation of RCW 9A.08.020(3), RCW 9A.40.020, RCW 9A.40.020(1)(b); and count 4, attempting to elude a pursuing police vehicle in violation of 9A.08.020(3), RCW 46.61.024(1). CP 1-2; 3RP<sup>1</sup>, 4ARP, 4BRP 5ARP, 5BRP, 6RP, 7RP, 8RP, 9RP. Mr. Fitzpatrick was joined at trial with two

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<sup>1</sup> There are multiple volumes of verbatim. The number appearing prior to "RP" refers to the volume number where the listed page appears.

co-defendants, Albert Youngblood and Samuel Ferguson. 3RP<sup>2</sup>, 4ARP, 4BRP 5ARP, 5BRP, 6RP, 7RP, 8RP, 9RP. The prosecutor joined the three co-defendants in the Information. CP 1-2. Mr. Fitzpatrick wished to have his trial severed from Mr. Youngblood and made motions to the court asking for severance. CP 50-51; 2RP 207, 215; 7RP 1291. The motions were unsuccessful. 2RP 222; 7RP 1315. After many hours of deliberation, the jury found each of the three defendants guilty of first degree robbery and attempting to elude a pursuing police vehicle. CP 101, 102, 104-110; 8RP 1583; 9RP 1586-1627. The jury, however, in each case could not reach a verdict on either of the kidnapping charges and a mistrial was declared on those charges. 9RP 1623-1627. The jury also found that each of the co-defendants were armed with a firearm during the commission of the robbery. 9RP 1623-1627. The trial court had earlier stricken the allegations that the co-defendants was armed with a firearm during the attempting to elude a pursuing police vehicle. 7RP 1314.

Rather than being re-tried on the kidnapping charges, Mr. Fitzpatrick agreed to enter an Alford plea<sup>3</sup> to an amended information changing counts 2 and 3 of the original information to unlawful imprisonment.<sup>4</sup> CP 245-246, 247-259; 9RP 1702-1715. Count 2 was

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<sup>2</sup> There are multiple volumes of verbatim. The number appearing prior to "RP" refers to the volume number were the listed page appears.

<sup>3</sup> North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2f 162 (1970)

enhanced with a firearm enhancement. CP 245-246. Count 3 was enhanced with a deadly weapon enhancement. CP 245-246. At sentencing, the State agreed that Mr. Fitzpatrick's prior California criminal history washed out. 9RP 1720. That gave Mr. Fitzpatrick an offender score of three based only on the current offenses. He was sentenced to 141 months. CP 265-279; 9RP 1720-1735.

Mr. Fitzpatrick made a timely appeal. CP 261.

## **2. Speedy Trial Timeline**

May 21, 2008: Mr. Fitzpatrick was arrested on the underlying charges. 4ARP 482, 495.

May 27, 2008: The Clark County prosecutor filed a four-count information against Mr. Fitzpatrick and co-defendants Mr. Ferguson and Mr. Youngblood. CP 1-2.

June 5, 2008: Mr. Fitzpatrick was arraigned and assigned a trial date with co-defendants Mr. Ferguson and Mr. Youngblood. The trial was set for July 28, 2008. 1RP 1.

July 10, 2008: Mr. Fitzpatrick signed a speedy trial waiver with a commencement date of September 4, 2008. His trial date was reset with the co-defendants for November 3, 2008. CP 7. 1RP 8-13.

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<sup>4</sup> Mr. Fitzpatrick is not challenging his unlawful imprisonment convictions on appeal.

September 4, 2008: The commencement period on the speedy trial waiver starts a new 60-day speedy trial time clock. CP 7.

October 27, 2008: Mr. Fitzpatrick's defense counsel, James Sowder, requested a continuance of the trial date so he would have additional preparation time. 2RP 177-178, 181. Mr. Fitzpatrick objected to the continuance. 1RP 180. The trial court agreed to continue Mr. Fitzpatrick's trial date and maintained the joinder of the three co-defendants. The Court set a new trial date of December 15, 2008. 2RP 179.

December 11, 2008: Mr. Youngblood requested a continuance of the trial date. 2RP 199, 201.<sup>5</sup> Mr. Fitzpatrick objected to any continuation of the December 15 trial. 2RP 205, 229. In an effort to preserve his speedy trial rights, Mr. Fitzpatrick moved to sever his trial from co-defendant Mr. Youngblood. 2RP 206, 207, 215. The trial court refused to grant the severance and reset a trial date of February 9, 2009, in part to avoid a trial during the Christmas holidays. 2RP 217-222.

February 9, 2009: First day of trial for the three joined co-defendants. 3RP.

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<sup>5</sup> The record in this area of the transcript is a little unclear. The transcriptionist apparently confused the names of the defense attorneys representing Mr. Ferguson and Mr. Youngblood. In appellate counsel's review of the transcript, it appears that the names of the defendants is accurate but the names of defense counsel are not always accurate. In other words, the wrong defense attorney is identified as the speaker.

At the end of the State's case, Mr. Fitzpatrick moved again to sever his case from Mr. Youngblood's case. 7RP 1291. The court denied the severance motion. 7RP 1315.

### **3. Trial Testimony**

Just before 5:00 a.m. on May 21, 2008, two men wearing dark clothing and hats with cut out eye holes entered a Vancouver area Shari's Restaurant. 4ARP 482, 483; 4BRP 612-614. There were three employees and one customer inside the Shari's. 4BRP 660. The two men, had the cook, Javier Revera<sup>6</sup>, and the pie maker, Roberta Damewood, at gunpoint, lie on the floor. 4BRP 612-617, 637-643. One of the two men had the hostess, Regina Bridges, open the till. 4BRP 667. That man emptied much of the till by grabbing the bills and wadding them in his pocket and also grabbing rolled coins. 4BRP 668, 717-18, 722. Ms. Damewood heard at least one of the men speak and also saw brown skin between his hat and his shirt. 4BRP 672. Based on those observations, she felt that at least one of the men was African American. 4BRP 672. Ms. Damewood testified that both men had handguns. 4BRP 662, 664, 674.

After the money was removed from the till, the two men left the restaurant. 4BRP 669. As they were leaving, three customers were

coming into the restaurant. 4BRP 669. One of the customers, Jason Godsil, noticed an idling black Lincoln Towncar near the front door. 4ARP 558. Mr. Godsil saw the two men leaving the restaurant and noticed that one had a gun. 4ARP 560. After entering the restaurant and being told by Ms. Bridges that the restaurant had just been robbed, Mr. Godsil went back outside to get a license plate number on the Towncar. 4ARP 562. However, the Towncar was pulling out of the parking lot and was too far away for Mr. Godsil to see the license plate. 4ARP 562-563. The Towncar was traveling at a normal speed as it left the parking lot. 4ARP 562-563.

Both Ms. Damewood and Ms. Bridges called 911 and reported the robbery. 4BRP 618, 670. Mr. Godsil saw that the Towncar was headed generally in the direction of I-5. 4ARP 563.

The 911 operator alerted the police to the robbery. 4ARP 483. Vancouver Police Corporal Neil Martin started heading southbound towards the Shari's by driving down I-205. 4ARP 482, 484. On I-205, he noticed a black Lincoln Towncar going in the opposite direction and alerted other officers. 4ARP 488. Other officers waited at the merge of I-205 with I-5 in a northbound direction. In a few minutes, a black Lincoln

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<sup>6</sup> The last name appears in the Information as "Rivera" and in the trial record as "Revera." CP 2; 4ARP at 636.

Towncar passed the waiting officers. 5BRP 895. The officers followed the Towncar north on I-5. 5BRP 895.

As the Towncar headed north, there were at least four police cars directly behind it. 5BRP 897. The Towncar drove at a legal speed and committed no traffic infractions. 5BRP 898, 902. After following the Towncar for several miles, the officer in the police car closest to the Towncar used his overhead lights to signal the Towncar to stop. 5BRP 898. The Towncar pulled off I-5 at the Ridgefield exit. 5BRP 898-899. The Towncar ran a red light and then drove slowly through a strip mall parking lot. 5BRP 902, 961-962. The car was traveling slowly enough that one of the officers was able to see that Mr. Ferguson was driving the car. 5BRP 965-968. Because the Towncar did not stop in response to the police car's lights, an officer signaled the car to stop using his siren. 5BRP 900.

Rather than stopping in the strip mall parking area, the Towncar returned to I-5. 5BRP 903-905. Mr. Ferguson accelerated. 5BRP 903-905. As the Towncar merged back onto I-5, an officer noticed an object being thrown from the driver's side window of the Towncar. 5BRP 905-906. Another officer stopped and searched that area. 5BRP 933-934. He found a loaded handgun and a grayish colored knit cap with eyeholes cut into it. 5BRP 934-939.

Meanwhile, officers continued to follow the Towncar as it drove north on I-5 at speeds up to 110 miles per hour. 5BRP 907-912, 970-971. 1002-1003; 7RP 1242. The Towncar was being driven somewhat erratically, passing other vehicles in the right hand lanes. 5BRP 923. As the Towncar neared Longview, Cowlitz County Sheriff deputies deployed a spike strip causing the Towncar's tires to deflate. 5B 912; 7RP 1243. The Towncar did not stop. 7RP 1243. It took an off-ramp and headed into Longview at speeds up to 80 miles per hour. 7RP 1245. The Towncar continued into Longview and ran at least two red lights. 7RP 1245. Pieces of tire flew off the Towncar and hit the police cars following it. 5BRP 912-913. There had been a succession of police cars following the Towncar. A number of the police cars had official markings and were driven by uniformed police officers who were using lights and sirens to signal Mr. Ferguson to stop. 5BRP 899; 7RP 1244.

The Towncar stopped abruptly at an intersection in Longview when it high-centered on a traffic island. 7RP 1236. Officers watched as three African-American men got out of the car and ran. 5BRP 917, 976-977; 7RP 1247. Many officers from various police agencies arrived in the area and set up containment. 5BRP 976, 1005, 1038; 6RP 1060, 1076. Mr. Fitzpatrick was detained first. 5BRP 1009-1010. The officer who detained Mr. Fitzpatrick testified that Mr. Fitzpatrick was breathing

heavily, as if he had been running. 5BRP 1010. Mr. Fitzpatrick denied being in the Towncar or with the other men. 5BRP 1028.

The next person to be detained was Mr. Youngblood. 5BRP 1038, 1043. After a brief chase and struggle with officers, Mr. Youngblood ended up on the ground. 5BRP 1038. Discovered underneath Mr. Youngblood was a black knit cap with eyeholes cut into it as well as a roll of nickels. 5BRP 1040. Mr. Youngblood also had 80 bills in denominations of ones, fives, and a single ten wadded up in his pocket. 4ARP 501-502.

Mr. Ferguson was the last person taken into custody and he was found behind a sofa on the porch of a nearby house. 6RP 1067-1070, 1076-1080. All three men, Mr. Fitzpatrick, Mr. Ferguson and Mr. Youngblood, are African-American.

The police impounded the Towncar and later searched it under the authority of a search warrant. During the search, they found in the car's interior, two pair of white gloves as well as a roll of dimes. 6RP 1008, 1093. The hostess at the Shari's Restaurant, Ms. Bridges, noticed that one of the robbers wore white gloves with blue piping like the type of gardening gloves her mother used to wear. 4BRP 690. One pair of gloves from the Towncar were gardening-type gloves with blue piping. 6RP 1093.

Also as part of the investigation, a detective reviewed the dispatcher logs to determine the amount of time that passed between the first 911 from Shari's and the time the black Towncar was seen by police at the I-205/I-5 merge. 6RP 1101-1104. The time was just short of 15 minutes. The detective then drove between Shari's and the I-205/I-5 merge on a different day but at the same time in the morning using the most direct route. The drive took him slightly more than 15 minutes. 6RP 1101-1104.

A review of the till at Shari's revealed that approximately \$159.00 was missing. 4BRP 721. It had been a slow night at Shari's with few customers and little income. 4BRP 720.

Prior to trial, at the urging of the prosecutor, the Washington State Patrol Crime Lab performed DNA testing on the items taken into evidence: the two hats, the gun, the gloves. 6RP 1144-1167. There was insufficient DNA for testing on the gray hat, the gun, and the magazine. 6RP 1158. Mr. Youngblood's DNA was the only DNA on any item that suggested a match and that was on the interior of the black hat. 6RP 1160-1163. Mr. Fitzpatrick and Mr. Ferguson were excluded from the DNA profile on the interior of the black hat. 6RP 1164. Because of the limited DNA on the exterior of the black hat, Mr. Fitzpatrick and Mr. Ferguson could not be excluded from the mixed DNA profile found on the black hat.

6RP 1160-1164. Mr. Youngblood was a possible contributor to the DNA results on the black hat's exterior. 6RP 1164.

**D. ARGUMENT**

**1. THERE IS INSUFFICIENT EVIDENCE THAT MR. FITZPATRICK ACTED AS AN ACCOMPLICE TO THE CHARGE OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE.**

Mr. Fitzpatrick did not commit the crime of attempting to elude a pursuing police vehicle. The evidence against him was insufficient. As the evidence was insufficient, his conviction must be reversed and dismissed and his case remanded for resentencing with one less current offense in his offender score.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. Amend. 14; Wash. Const. Art. 1, § 3. "The reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in

issue.” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).<sup>7</sup>

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all the elements of the crime beyond a reasonable doubt. State v. Devries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn therefrom. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt; the reviewing court must be satisfied that substantial

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<sup>7</sup> The United States Supreme Court noted, “It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of guilt with utmost certainty.” In re Winship, 397 U.S. at 364.

evidence supports the State's case. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992) review denied, 119 Wn. 1003, 832 P.2d 487 (1992), abrogated on other grounds by State v. Trujillo, 75 Wn. App. 913, 883 P.2d 329 (1994).

As instructed in Mr. Fitzpatrick's case, a person is guilty of attempting to elude a pursuing police vehicle if the following six elements are proven:

- (1) That on or about the 21<sup>st</sup> day of May, 2008, a defendant drove a motor vehicle;
- (2) That a defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- (3) That the signaling police officer's vehicle was appropriately marked, showing it to be an official police vehicle;
- (4) That a defendant willfully failed or refused to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, a defendant drove in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

CP 95 (Instruction 21); See also RCW 46.61.024.

Moreover, the court instructed the jury on accomplice liability.

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such person in the commission of the crime:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(i) solicits, commands, encourages, or requests another person to commit the crime; or

(ii) aids or agrees to aid another person in planning or committing the crime.

The word “aid” means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether the person is present at the scene or not.

CP 82 (Instruction 9); See also RCW 9A.08.020.

Looking at the evidence in the case in the light most favorable to the State, it cannot be held that there is substantial evidence that Mr. Fitzpatrick is guilty of attempting to elude. First, Mr. Fitzpatrick was not the driver of the Towncar. Mr. Ferguson was the driver. The very nature of the crime suggests that only one person, the driver, can commit the crime. It is the driver that must be signaled to stop, not a passenger.

Second, even if a passenger could be legally liable as an accomplice, there is no substantial evidence in the record that Mr. Fitzpatrick did anything to solicit, command, encourage, or request that

Mr. Ferguson not stop after being signaled to do so by the police or to drive recklessly after he was directed by the police to stop.

Interpreting the evidence in the light most favorable to the State, Mr. Fitzpatrick participated in a robbery at the Shari's restaurant. After the robbery, he was a passenger in the Towncar. The Towncar left the restaurant driving at a normal speed. A string of marked and unmarked police cars fell in behind the Towncar at the I-205 merge with I-5 and followed the Towncar north toward Longview. The Towncar drove at the posted speed limit and made no evasive maneuvers. Near Ridgefield, the police officer in the car closest to the Towncar, signaled the Towncar to stop by activating his overhead lights. The Towncar took the Ridgefield exit, ran a red light, and drove so slow through a strip mall parking lot that one officer was able to get a good look at the driver, Mr. Ferguson. Suddenly, Mr. Ferguson drove back onto I-5. A hat and handgun were thrown from the driver's window. Mr. Ferguson drove at speeds upwards of 110 miles an hour passing slower vehicles.

Just south of Longview, Cowlitz County Sheriff deputies were able to flatten the Towncar's tires. Mr. Ferguson continued to drive into Longview at 80 miles per hour with chunks of the tires flying off and hitting the pursuing police cars. The Towncar crashed at an intersection and both Ferguson and his two passengers ran from the car and were taken

into custody by the police. In all of this, there was no evidence of what Mr. Fitzpatrick was doing in the car. Mr. Fitzpatrick might have been telling Mr. Ferguson to “go, go, go” and run from the police. But it is equally possible that Mr. Fitzpatrick was telling Mr. Ferguson (a) to slow down and stop, or (b) to slow down and abide by the traffic laws. Alternately, it is just as possible that Mr. Fitzpatrick was saying nothing at all and instead was screaming in terror as the Towncar rocketed down the freeway. In short, there is simply no evidence of what Mr. Fitzpatrick was doing in the car. That Mr. Fitzpatrick ran after the crash tells us nothing other than he was scared. “A person being tried on a criminal charge can be convicted only on evidence, not by innuendo.” State v. Yoakum, 37 Wn.2d 137, 144, 22 P.2d 181 (1950). In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 932 (1999).

Only a few Washington cases have addressed when evidence is sufficient for an alleged accomplice to be found guilty of a driver’s criminal act. In Parker, defendant Parker was convicted of vehicular homicide and vehicular assault after a car he was racing collided with an oncoming vehicle killing one person and seriously injuring another. State v. Parker, 60 Wn. App. 719, 806 P.2d 1241 (1991). On appeal, Parker

argued that the evidence was insufficient to show that he acted intentionally to encourage the other driver to commit vehicular homicide or vehicular assault. In its ruling, relying on In re Wilson, the court noted that presence alone, plus knowledge of ongoing activity, does not establish the intent requisite to a finding of accomplice liability. Parker, 60 Wn. App. at 724-25; In re Wilson, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979) (no complicity where defendant was present but did not participate in pulling rope across highway as cars approached). Rather, an accomplice must be associated “with the venture and participate in it as something he wishes to bring about and by his action makes it succeed.” Parker, 60 Wn. App. at 725 (quoting from State v. Jennings, 35 Wn. App. 216, 220, 666 P.2d 381, review denied, 100 Wn.2d 1024 (1983)). In short, there had to be substantial evidence that the accused did an affirmative act to encourage the other driver’s criminal behavior. In Parker, there was substantial evidence of an affirmative act because Parker knowingly played cat and mouse with the other driver on the freeway while both were traveling at excessive speed.

Unlike the facts of Parker, there is no evidence that Mr. Fitzpatrick engaged in an affirmative act that encouraged Mr. Ferguson to refuse to stop for the police and to thereafter drive recklessly. Unlike Parker, there is no evidence of what was happening between Mr. Ferguson and Mr.

Fitzpatrick when Mr. Ferguson decided not to stop for the police but to drive recklessly instead. It is every bit as possible that Mr. Fitzpatrick was telling Mr. Ferguson to stop or to keep calm and to keep driving at the speed limit as Mr. Ferguson had done since leaving Shari's.

The ruling in State v. Cordero, is also instructive. 36 Wn.2d 846, 221 P.2d 472 (1950). In Cordero, defendant Cordero was charged with negligent homicide. Cordero, who was intoxicated, let a female acquaintance, Nunes, drive the car he had in his possession. Nunes had also been drinking. After driving around for a few hours, Nunes lost control of the car. A female passenger was ejected from the car, and subsequently died. The court could find no evidence that Nunes was driving recklessly until moments before the accident or that Cordero knew Nunes was affected by the alcohol she drank earlier. The court found that there was insufficient evidence that Cordero "did aid or abet, permit, encourage, assist, advise, or counsel" Nunes to commit the charged unlawful acts. Cordero, 36 Wn.2d at 847, 852.

The facts of Mr. Fitzpatrick's case are like those of Cordero. Up until the moment that Mr. Ferguson refused to stop and thereafter drove recklessly, everything about Mr. Ferguson's driving suggested that he intended to observe the traffic laws and pull over when signaled to do so by the police. There is no evidence in the record to suggest that Mr.

Fitzpatrick did anything to “solicit, command, encourage, or request” that Mr. Ferguson drive other than lawfully.

On a final note, a victim of another’s crime cannot be an accomplice to that crime. RCW 9A.08.020(5); City of Auburn v. Hedlund, 165 Wn.2d 645, 201, P.3d 315 (2009). In Hedlund, a party started in an apartment and ended up in tragedy on a highway after seven partygoers crammed themselves into a small car. The driver lost control of the car and killed himself and all but one of his passengers. The surviving passenger, Hedlund, furnished alcohol at the party and used a video camera to film the antics in the car prior to the deadly crash. Hedlund was charged with being an accomplice to the DUI driver because she was show boating with the video camera and encouraging the drunk driver even though one of the passengers wanted the driver to stop. Hedlund was convicted of DUI and appealed. Our Supreme Court reversed Hedlund’s conviction holding that the victim of a crime cannot be an accomplice. Applying the logic of Hedlund to our facts, Mr. Fitzpatrick was, like Hedlund, the victim of another’s behavior and, as such, cannot be convicted of eluding as Mr. Ferguson’s accomplice.

**2. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT VIOLATED MR. FITZPATRICK'S RIGHT TO A SPEEDY TRIAL BY COMPELLED MR. FITZPATRICK TO BE TRIED WITH CO-DEFENDANT MR. YOUNGBLOOD.**

Absent compelling circumstances, a criminal defendant should be tried within the speedy trial time period set out by court rule. See CrR 3.3 attached at Section F, Appendix with Court Rules. Mr. Fitzpatrick objected to the trial court setting his trial beyond his CrR 3.3 speedy trial time limit. The trial court's reason for setting the trial beyond speedy trial was to keep Mr. Fitzpatrick joined for trial with co-defendant Mr. Youngblood. But, as directed in CrR 4.4, criminal trials should not be continued over a speedy trial objection simply to maintain a joint trial of joined co-defendants. See CrR 4.4 attached at Section F, Appendix with Court Rules. The trial court abused its discretion in continuing Mr. Fitzpatrick's trial beyond speedy trial. Mr. Fitzpatrick's convictions should be reversed.

The trial court's decision to continue a trial beyond a defendant's speedy trial is reviewed for abuse of discretion. State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004). A trial court abuses its discretion when its decision 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).

Mr. Fitzpatrick was arrested and in custody in the Clark County Jail after his May 21, 2008 arrest. Because he was in custody, he should have been tried within 60 days of his June 5, 2008, arraignment. CrR 3.3(b)(1). It was the responsibility of the trial court to ensure the Mr. Fitzpatrick was tried within speedy trial. CrR 3.3(a)(1). But Mr. Fitzpatrick's trial did not start until eight months later on February 9, 2009. Mr. Fitzpatrick's first trial date was July 28, 2008. The prosecutor joined the case for trial with co-defendants Mr. Youngblood and Mr. Ferguson. On July 10, Mr. Fitzpatrick's defense counsel, Mr. Sowder, moved for a continuance of the trial as he needed more time to prepare. An attorney can waive his client's speedy trial right when such a continuance is required in the administration of justice and does not prejudice the defendant. CrR 3.3(f)(2). Such time periods are excluded from the speedy trial calculation. CrR 3.3(e)(3). Mr. Fitzpatrick reluctantly signed a speedy trial waiver with a September 4, 2008, commencement date. CP 7.

The court set the trial to November 3, the last date allowed by Mr. Fitzpatrick's speedy trial waiver. On October 27, Mr. Sowder again asked for a continuance of the trial date citing the need for more time to prepare for trial. At this point, there were only a few days remaining on Mr. Fitzpatrick's 60-day speedy trial time clock because the new

commencement period, based upon the speedy trial waiver, started on September 4. Mr. Fitzpatrick objected to the continuance. Nevertheless, the trial court granted Mr. Sowder's request and set the trial to December 15. The time from the October 27 request by Mr. Sowder to the new December 15 trial date was excluded from the speedy trial calculation. CrR 3.3 (e)(3); CrR 3.3(f)(2). But because most of the 60 days has been used up between September 4 and October 27, only a few were left in the 60-day speedy trial time period if Mr. Fitzpatrick's case was continued again without adequate cause.

On December 11, Mr. Youngblood requested a continuance of the December 15 trial citing the need for additional time to prepare for trial as he had just been served with DNA test results that negatively impacted Mr. Youngblood but did not have the same negative consequences for Mr. Fitzpatrick. 2RP 206. Mr. Fitzpatrick again objected to any continuance of his trial date and asked that his trial date be preserved and his case severed from Mr. Youngblood. 2RP 205. Mr. Fitzpatrick argued and agreed with the argument of the co-defendants, that as the DNA test results did not implicate him, he would be prejudiced by Mr. Youngblood's DNA test results coming in at trial. 2RP 207-215. The court declined to grant the severance motion and reset the trial date to February 9, 2009. 2RP 207. In refusing to sever the case, the court cited

to the judicial economy of a single trial. But the court was wrong in doing so.

Under CrR 4.4(c)(2)(i), a co-defendant should be severed for trial to protect his individual speedy trial right. State v. Nguyen, 131 Wn. App. 815, 129 P.3d 821 (2006). While severance of co-defendants is not mandatory under the rule, it has been noted that if “administration of justice” can be invoked at any time to grant a continuance, then “there is little point in having the speedy trial rule at all”. State v. Adamski, 111 Wn.2d 574, 580, 761 P.2d 621 (1988). All three of the defendants agreed that severance from Mr. Youngblood was in the best interest of each defendant because only Mr. Youngblood’s DNA was a definitive match to any of the evidence. Because the DNA testing was either inconclusive as to Mr. Fitzpatrick or Mr. Ferguson, or otherwise numerically insignificant given the comparative United States population statistics for possible contributors, no DNA results should have been admitted in the trial of Mr. Fitzpatrick and Mr. Ferguson. As such, severance to protect Mr. Fitzpatrick’s speedy trial rights weighed in favor of Mr. Fitzpatrick and should have been granted. The trial court abused its discretion when concluding otherwise. Had the trial court acted as it should and granted the severance, the last day on speedy trial for Mr. Fitzpatrick was approximately December 25, 2008. Under CrR 3.3(b)(5), there was an

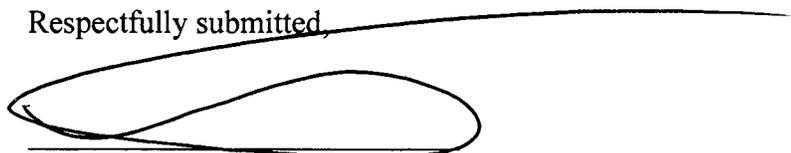
additional 30 day period beyond the previously scheduled trial date December 15 by which Mr. Fitzpatrick could be tried because the period between October 27 and December 15 was an excluded period under CrR 3.3(e)(3). Even with the added 30 days under the speedy trial rule, Mr. Kitzpatrick's right to an in-custody speedy trial ran out no later than January 25, 2009. When speedy trial rights are violated under CrR 3.3, the remedy is dismissal with prejudice. CrR 3.3(h). No showing of prejudice is required. State v. Kenyon, 167 Wn.2d 130, 135-39, 216 P.3d 1024 (2009). Mr. Fitzpatrick's robbery conviction and eluding conviction should be dismissed with prejudice.

**E. CONCLUSION**

Both the first degree robbery and the attempting to elude a pursuing police vehicle should be dismissed because of the speedy trial violation. Alternatively, Mr. Fitzpatrick's attempting to elude a pursuing police vehicle conviction should be dismissed because there was insufficient evidence that he acted as an accomplice to that charge.

DATE this 16th day of December 2009.

Respectfully submitted,



LISA E. TABBUT, WSBA 21344  
Attorney for Appellant

## **F. APPENDIX WITH COURT RULES**

### **RULE CrR 3.3 TIME FOR TRIAL**

#### **(a) General Provisions.**

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

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

#### **(3) Definitions.** For purposes of this rule:

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

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

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

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

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

(4) **Construction.** The allowable time for trial shall be computed in accordance with this rule. If a trial is timely under the language of this rule, but was delayed by circumstances not addressed in this rule or CrR 4.1, the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated.

(5) Related Charges. The computation of the allowable time for trial of a pending charge shall apply equally to all related charges.

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

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

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

(b) Time for Trial.

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

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

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

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

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

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

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

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

(5) Allowable Time After Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

(c) Commencement Date.

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

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

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

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

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

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

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

court of notice of action terminating the collateral proceeding, whichever comes later.

(vi) Change of Venue. The entry of an order granting a change of venue. The new commencement date shall be the date of the order.

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

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

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

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

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

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

(c)(2) or there is a subsequent excluded period pursuant to section (e) and subsection (b)(5).

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

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

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

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

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

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

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

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

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

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

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

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

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

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

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

**RULE 4.4**  
**SEVERANCE OF OFFENSES AND DEFENDANTS**

(a) Timeliness of Motion--Waiver.

(1) A defendant's motion for severance of offenses or defendants must be

made before trial, except that a motion for severance may be made before or at the close of all the evidence if the interests of justice require. Severance is waived if the motion is not made at the appropriate time.

(2) If a defendant's pretrial motion for severance was overruled he may renew the motion on the same ground before or at the close of all the evidence. Severance is waived by failure to renew the motion.

(b) Severance of Offenses. The court, on application of the prosecuting attorney, or on application of the defendant other than under section (a), shall grant a severance of offenses whenever before trial or during trial with consent of the defendant, the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense.

(c) Severance of Defendants.

(1) A defendant's motion for severance on the ground that an out-of-court statement of a codefendant referring to him is inadmissible against him shall be granted unless:

(i) the prosecuting attorney elects not to offer the statement in the case in chief; or

(ii) deletion of all references to the moving defendant will eliminate any prejudice to him from the admission of the statement.

(2) The court, on application of the prosecuting attorney, or on application of the defendant other than under subsection (i), should grant a severance of defendants whenever:

(i) if before trial, it is deemed necessary to protect a defendant's rights to a speedy trial, or it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant; or

(ii) if during trial upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant.



(3) When such information would assist the court in ruling on a motion for severance of defendants, the court may order the prosecuting attorney to disclose any statements made by the defendants which he intends to introduce in evidence at the trial.

(4) The assignment of a separate cause number to each defendant of those named on a single charging document is not considered a severance. Should a defendant desire that the case be severed, the defendant must move for severance.

(d) Failure To Prove Grounds for Joinder of Defendants. If, pursuant to section (a), a defendant moves to be severed at the conclusion of the prosecutions case or of all the evidence, and there is not sufficient evidence to support the grounds upon which the moving defendant was joined or previously denied severance, the court shall grant a severance if, in view of this lack of evidence, failure to sever prejudices the moving defendant.

(e) Authority of Court To Act on Own Motion. The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or the prosecution.

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CERTIFICATE OF MAILING

State of Washington, Respondent, v. John L. Fitzpatrick, Appellant  
Court of Appeals No. 39287-9-II

I certify that I mailed a copy of Appellant's Brief to:

John L. Fitzpatrick/DOC#331037  
Washington Corrections Center  
P.O. Box 900  
Shelton, WA 98584

and to:

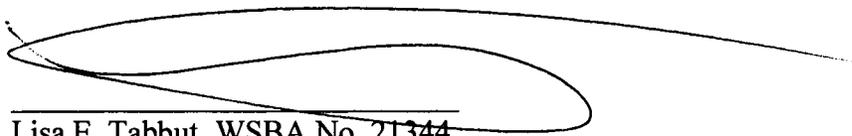
Michael C. Kinnie  
Clark County Prosecuting Attorney's Office  
P.O. Box 5000  
Vancouver, WA 98666-5000

And that I also mailed the original and one copy to the Court of Appeals, Division II.

All postage prepaid, as required, on December 16, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE  
OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT .

Signed at Longview, Washington, on December 16, 2009.

  
\_\_\_\_\_  
Lisa E. Tabbut, WSBA No. 21344  
Attorney for Appellant

CERTIFICATE OF MAILING