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COURT OF APPEALS
DIVISION II

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NO. 39287-9-II

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

STATE OF WASHINGTON
BY  _____
DEPUTY

STATE OF WASHINGTON, Respondent

v.

JOHN LANELL FITZPATRICK, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-00820-7

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of the facts as set forth by the defendant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that there is insufficient evidence to establish accomplice liability in the attempt to elude pursuing police vehicles. The defense claims that there was no evidence that the defendant encouraged the driver to stop or engage in any type of driving and further that he, in fact, was a victim of the crime.

As the facts clearly indicate, this was an armed robbery of a local restaurant. Two men, armed with firearms, entered the restaurant. Their identities were disguised by wearing dark clothing and hats with cut out eye holes. They grabbed a bunch of the money and fled the scene. One of the victims felt that at least one of the men was African-American. They testified that both men had handguns.

The two men left the restaurant and as they were leaving three customers were coming into the restaurant. One of the customers noticed a black Lincoln Towncar idling nearby. He saw the two men leaving the restaurant and noticed that one had a gun.

The towncar was then identified and spotted leaving the area of the restaurant on the freeway. At least four squad cars followed the vehicle as it took exit from the freeway and then ultimately went back onto the freeway. They saw the towncar run a red light and was traveling slowly. They noticed that there were three individuals in the vehicle. As the towncar merged back onto the freeway an officer noticed an object thrown from the car. It turned out to be a loaded handgun and one of the knit caps with eye holes cut into it. The officers continued to follow the towncar as it fled on I-5 at speeds up to 110 miles per hour. They indicated that it was being driven rather erratically and passing other vehicles to the right. As it neared Longview, Washington, the Cowlitz County Sheriff's Deputies deployed a spike strip. The vehicle did not stop but took an off-ramp headed into Longview, Washington at speeds of up to 80 miles per hour, where it ran at least two red lights. The officers noted that pieces of tire were flying from the towncar. The vehicle finally stopped, at which point the officers saw three African-American men get out of the car and run. The defendant was one of the people who ran from the car.

The State submits that this entire transaction was an attempt to flee an armed robbery by all three of the individuals involved (two of the men who went into the restaurant and the one man who was the driver). There is absolutely nothing in this evidence to indicate the defendant was not a

willing participant in this. Certainly, there is nothing to indicate that he was a “victim” of some type of criminal activity. Quite the contrary, it appears that all three of these individuals were acting in concert before, during, and after the events.

To establish accomplice liability, the State must present some “evidence that the defendant participated in the undertaking and sought, by his action, to make it succeed.” State v. Alford, 25 Wn. App. 661, 666, 611 P.2d 1268 (1980), *aff’d sub nom. State v. Claborn*, 95 Wn.2d 629, 628 P.2d 467 (1981). Specifically, the evidence must show that the defendant aided in the planning or in the commission of the crime and that he had knowledge of the crime. State v. Trout, 125 Wn. App. 403, 410, 105 P.3d 69, *review denied*, 155 Wn.2d 1005 (2005). Where criminal liability is predicated on the accomplice liability statute, the State is required to prove only the accomplice's general knowledge of his coparticipant's substantive crime. Specific knowledge of the elements of the coparticipant's crime need not be proved to convict one as an accomplice. State v. Rice, 102 Wn.2d 120, 125, 683 P.2d 199 (1984).

To be liable as an accomplice, a defendant must encourage, render assistance, or aid in planning or committing the crime. RCW 9A.08.020. But presence together with knowledge of the ongoing criminal activity are not sufficient to establish accomplice liability. State v. Parker, 60 Wash.

App. 719, 724-25, 806 P.2d 1241 (1991) (citing In re Welfare of Wilson, 91 Wash. 2d 487, 492, 588 P.2d 1161 (1979)). Rather, an accomplice must be associated "with the venture and participate in it as something he wishes to bring about and by his actions make it succeed." Parker, 60 Wash. App. at 724-25 (quoting State v. Jennings, 35 Wash. App. 216, 220, 666 P.2d 381 (1983)). But one who agrees to participate in a criminal act runs the risk that his accomplice will do an act that exceeds the scope of the original plan. State v. Davis, 101 Wash. 2d 654, 658, 682 P.2d 883 (1984). The State must prove that the defendant was ready to assist in the crime, he shared in the criminal intent of the principal, "demonstrating a **community of unlawful purpose at the time the act was committed**". State v. Castro, 32 Wn. App. 559, 564, 648 P.2d 485; 1982. cf, State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979).

The State submits that our case is a clear demonstration of a "community of unlawful purpose at the time the act is being committed". The three individuals are acting in a joint venture and are fully participating in this endeavor. Because of that, the State submits that there is absolutely no evidence to indicate that this man is anything other than an active participant and that the jury was properly instructed on accomplice liability. (CP 71 – Court's Instructions to the Jury).

The trial court, when addressing the question of accomplice liability, indicated as follows:

Accomplice liability, again, the evidence will show that we have three people acting in concert before the robbery takes place. I think one of the key issues, as the State pointed out, the car is idling in the parking lot and two people are in and at least one is behind the wheel, idling the car.

Two, with regard to the driving aspects of it, there's been enough circumstantial evidence that they're acting in concert at that point. They're driving slowly, anyone could be involved. And obviously thereafter, the high speed chase, getting out together, running together, I mean there's enough circumstantial evidence to indicate that they're acting in concert, they're presence was there and enough circumstantial evidence that somehow they were aiding with regard to that.

-(RP 1315, L5-20)

As the evidence clearly demonstrated, these defendants are not engaged not only in an ongoing criminal activity, but are actively attempting to work in concert to avoid detection and capture.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error is a claim that the defendant's right to speedy trial was violated by keeping him joined for trial purposes with the other two coconspirators. The specific claim is that the defendant objected to a continuance on December 11, 2008. This particular

continuance request was by one of the co-conspirators, Mr. Youngblood. (RP 199-201). Our defendant objected to the continuance and attempted to sever his trial from the codefendants. 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, which all of the parties involved indicated could be quite troublesome. (RP 217-222).

The decision to proceed with joint or separate trials is entrusted to the trial court's sound discretion; we will not disturb the decision absent manifest abuse of discretion. State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). Washington law disfavors separate trials. Grisby, 97 Wn.2d at 506. The trial court should sever defendants' trials at any point in the trial whenever, "upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." CrR 4.4(c)(2)(ii). Trial courts properly grant such severance motions only if 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). State v. Johnson, 147 Wn. App. 276, 284, 194 P.3d 1009 (2008).

As stated in State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6

(1982):

We agree with the statement of the Court of Appeals in State v. Herd, 14 Wn. App. 959, 963 n.2, 546 P.2d 1222 (1976) that "Separate trials have never been favored in this state. See State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970). Nothing in CrR 4.4(c) has changed this." Furthermore, we concur that "the granting or denial of a motion for separate trials of jointly charged defendants 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. Barry, 25 Wn. App. 751, 756, 611 P.2d 1262 (1980). It would be burdensome, as a matter of course, "to accommodate separate trials in all cases . . .

Separate trials should be required only in those instances in which an out-of-court statement by a codefendant expressly or by direct inference from the statement incriminates his fellow defendant." State v. Ferguson, 3 Wn. App. 898, 906, 479 P.2d 114 (1970).

It's clear from the record that the defendant had requested continuances at prior occasions to adequately prepare his defense. Also, at the time of the December 11, 2008 hearing, his attorney was also talking about the use of some additional experts, which may or may not have been ready to go. There is absolutely nothing in this record to support a conclusion that there was some type of internal conflict or potential problems of mutually exclusive defenses or one of the other types of activities that are normally cited in requesting severance from

coconspirators. The only thing the defendant is referring to, appears to be, a violation of speedy trial. The State submits that in our situation there were adequate reasons for doing so and that the trial court was well within its discretion to set the case over. As the trial court made clear to the parties:

And in view of the facts and circumstances as indicated by the Probable Cause statements and police reports, it – this is something that cries out to be tried together. And I don't think anyone really disagrees with that.

-(RP 220, L10-14)

A criminal charge not brought to trial within the time limits of CrR 3.3 must be dismissed with prejudice. CrR 3.3(h). The Appellate Court reviews the application of the speedy trial rule de novo. State v. Carlyle, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996). It reviews the trial court's decision to grant or deny a motion for a continuance for abuse of discretion. State v. Johnson, 132 Wn. App. 400, 412-14, 132 P.3d 737 (2006), *review denied*, 159 Wn.2d 1006 (2007). The Court will not disturb the trial court's decision unless the appellant demonstrates that the trial court's decision was manifestly unreasonable, or exercised on untenable ground or for untenable reasons. State v. Downing, 151 Wn.2d 265, 272-73, 87 P.3d 1169 (2004) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Recently, in State v. Iniguez, 167 Wn.2d 273, 217 P.3d 768 (2009)

the issue was framed nicely in the Court Synopsis as follows:

This case requires us to examine the contours of the constitutional right to a speedy trial. Following his arrest on four counts of first degree robbery, Ricardo Iniguez remained in custody pending a joint trial with his codefendant. The State moved for a total of four trial continuances, the last of which the State sought because it belatedly learned a key witness was out of town. In addition, Iniguez's codefendant and counsel sought various continuances. Iniguez objected to all continuance requests and also moved for a bail reduction, severance, and a dismissal of the charges against him. The trial court denied all of Iniguez's motions. Trial began more than eight months after Iniguez's arrest, and the jury convicted him on all counts. The Court of Appeals reversed Iniguez's conviction and dismissed the charges against him with prejudice. While rejecting Iniguez's claim that the continuances violated the allowed time for trial under CrR 3.3, the court held that the more than eight-month delay between arrest and trial was presumptively prejudicial and violated Iniguez's constitutional right to a speedy trial. We reverse the Court of Appeals and hold there was no constitutional speedy trial violation under either article I, section 22 of the Washington Constitution or the Sixth Amendment to the United States Constitution.

The State submits that there is no showing by the defense that there has been an abuse of discretion by the trial court in granting the continuance and resetting the trial date. As the court has made clear consistently throughout this record, his primary goal is to make sure that all three receive a fair trial. Because the evidence is that all of them were

acting in concert, any experts used by any of the three would obviously benefit all of the defendants together. This is not a situation of mutually exclusive defenses, nor does there appear to be any conflict among the defendants as it relates to this activity. With that in mind, the State submits that the court was well within its power to deny the continuance of the defendant's trial and further deny him severance from the other coconspirators.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 3 day of Feb, 2010.

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