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STATE OF WASHINGTON

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Court of Appeals No. 39810-9-II
Clark County No. 08-1-00818-5

STATE OF WASHINGTON,

Respondent,

vs.

SAMUEL E. FERGUSON

Appellant.

BRIEF OF APPELLANT

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01-47-C (11)

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

**I. THE ACCOMPLICE LIABILITY INSTRUCTION WAS
ERRONEOUS. 1**

**II. THE ACCOMPLICE LIABILITY STATUTE IS
UNCONSTITUTIONALLY OVERBROAD. 1**

**III. MR. FERGUSON’S RIGHT TO A SPEEDY TRIAL WAS
VIOLATED. 1**

**IV. MR. FERGUSON’S KIDNAPPING CONVICTION SHOULD
BE REVERSED AND DISMISSED DUE TO INSUFFICIENT
EVIDENCE. 1**

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

**I. THE COURT’S ACCOMPLICE LIABILITY INSTRUCTION
RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT
MR. FERGUSON COMMITTED AN OVERT ACT. 1**

**II. THE ACCOMPLICE LIABILITY STATUTE IS
OVERBROAD BECAUSE IT CRIMINALIZES
CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION
OF THE FIRST AND FOURTEENTH AMENDMENTS..... 1**

**III. THE TRIAL COURT ERRED WHEN IT FAILED TO
SEVER MR. FERGUSON’S TRIAL FROM MR. YOUNGBLOOD
IN ORDER TO PRESERVE HIS RIGHT TO A SPEEDY TRIAL. 1**

**IV. MR. FERGUSON’S KIDNAPPING CONVICTIONS, AS
WELL AS THE ACCOMPANYING FIREARM
ENHANCEMENTS, SHOULD BE DISMISSED DUE TO
INSUFFICIENCY OF THE EVIDENCE WHERE THE
KIDNAPPINGS WERE MERELY INCIDENTAL TO THE
ROBBERIES. 1**

C. STATEMENT OF THE CASE..... 1

1. Summary of facts	2
2. Speedy Trial Timeline.....	4
D. ARGUMENT.....	6
I. THE COURT’S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. FERGUSON COMMITTED AN OVERT ACT.....	6
II. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.....	8
III. THE TRIAL COURT ERRED WHEN IT FAILED TO SEVER MR. FERGUSON’S TRIAL FROM MR. YOUNGBLOOD IN ORDER TO PRESERVE HIS RIGHT TO A SPEEDY TRIAL.	12
IV. MR. FERGUSON’S KIDNAPPING CONVICTIONS, AS WELL AS THE ACCOMPANYING FIREARM ENHANCEMENTS, SHOULD BE DISMISSED DUE TO INSUFFICIENCY OF THE EVIDENCE WHERE THE KIDNAPPINGS WERE MERELY INCIDENTAL TO THE ROBBERIES.....	17
E. CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Adams v. Hinkle</i> , 51 Wn.2d 763, 322 P.2d 844 (1958).....	13
<i>Brandenburg v. Ohio</i> , 395 U.S. 444, 89 S.Ct. 1827 (1969).....	14, 15, 16
<i>Broadrick v. Oklahoma</i> , 413 U.S. 601, 93 S.Ct. 2908 (1973).....	14
<i>City of Bellevue v. Lorang</i> , 140 Wn.2d 19, 992 P.2d 496 (2000).....	13, 14
<i>Conchatta Inc. Miller</i> , 458 F.3d 258 (3d Cir. 2006).....	14
<i>In re Pers. Restraint of Bybee</i> , 142 Wn.App. 260, 175 P.3d 589 (2007) .	25
<i>In re Winship</i> , 397 U.S. 358, 25 L. Ed. 2d 368 (1970).....	23
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971).....	17
<i>State v. Adamski</i> , 111 Wn.2d 574, 761 P.2d 621 (1988).....	20
<i>State v. Downing</i> , 151 Wn.2d 265, 87 P.3d 1169 (2004).....	17
<i>State v. Elmore</i> , No. 34861-6-II (2010).....	23
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	23, 25, 26
<i>State v. Kenyon</i> , 167 Wn.2d 130, 216 P.3d 1024 (2009).....	21
<i>State v. Korum</i> , 120 Wn.App. 686, 86 P.3d 166 (2004); <i>reversed on other grounds</i> , 157 Wn.2d 614 (2006).....	22, 25, 26, 27
<i>State v. Molina</i> , 83 Wn.App. 144, 920 P.2d 1228 (1996).....	22
<i>State v. Nguyen</i> , 131 Wn. App. 815, 129 P.3d 821 (2006).....	19
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977).....	24
<i>State v. Robinson</i> , 20 Wn.App. 882, 582 P.2d 580 (1978), <i>affirmed on other grounds</i> , 92 Wn.2d 307, 597 P.2d 892 (1979).....	24, 25
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	23
<i>State v. Saunders</i> , 120 Wn.App. 800, 86 P.3d 232 (2004).....	23
<i>State v. Thereoff</i> , 25 Wn.App. 590, 608 P.2d 1254 (1980).....	24
<i>State v. Tvedt</i> , 153 Wn.2d 705, 107 P.3d 728 (2005).....	22
<i>United States v. Platte</i> , 401 F.3d 1176 (10 th Cir. 2005).....	13
<i>Virginia v. Hicks</i> , 539 U.S. 113, 123 S. Ct. 2191 (2003).....	13, 14
<i>State v. Everybodytalksabout</i> , 145 Wn.2d 456, 39 P.3d 294 (2002).....	10
<i>State v. Matthews</i> , 28 Wn. App. 198, 624 P.2d 720 (1981).....	10
<i>State v. Peasley</i> , 80 Wn. 99, 141 P. 316 (1914).....	10, 11, 12
<i>State v. Redden</i> , 71 Wn.2d 147, 426 P.2d 854 (1967).....	11
<i>State v. Renneberg</i> , 83 Wn.2d 735, 522 P.2d 835 (1974).....	11, 12

Statutes

RCW 9A.08.020.....	14, 16
RCW 9A.40.010.....	24
RCW 9A.40.020.....	24

Other Authorities

CrR (a)(1).....	18
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CrR (b)(5).....	20
CrR (e)(3).....	20
CrR (f)(2).....	18, 19
CrR 3.3(e)(3).....	18
CrR 3.3(h).....	21
CrR 4.4.....	17, 19
WPIC 10.51.....	15, 16

Rules

CrR 3.3.....	9, 16, 17, 18, 20
CrR 4.4.....	17

Constitutional Provisions

U.S. Const. Amend. 1.....	13
U.S. Const. Amend. XIV.....	13
Wash. Const. Article I, Section 5.....	13

A. ASSIGNMENTS OF ERROR

I. THE ACCOMPLICE LIABILITY INSTRUCTION WAS ERRONEOUS.

II. THE ACCOMPLICE LIABILITY STATUTE IS UNCONSTITUTIONALLY OVERBROAD.

III. MR. FERGUSON'S RIGHT TO A SPEEDY TRIAL WAS VIOLATED.

IV. MR. FERGUSON'S KIDNAPPING CONVICTION SHOULD BE REVERSED AND DISMISSED DUE TO INSUFFICIENT EVIDENCE.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. THE COURT'S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. FERGUSON COMMITTED AN OVERT ACT.

II. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

III. THE TRIAL COURT ERRED WHEN IT FAILED TO SEVER MR. FERGUSON'S TRIAL FROM MR. YOUNGBLOOD IN ORDER TO PRESERVE HIS RIGHT TO A SPEEDY TRIAL.

IV. MR. FERGUSON'S KIDNAPPING CONVICTIONS, AS WELL AS THE ACCOMPANYING FIREARM ENHANCEMENTS, SHOULD BE DISMISSED DUE TO INSUFFICIENCY OF THE EVIDENCE WHERE THE KIDNAPPINGS WERE MERELY INCIDENTAL TO THE ROBBERIES.

C. STATEMENT OF THE CASE

1. Summary of facts

In the early morning hours of May 21, 2008 two men entered the Shari's restaurant on 164th Street in Vancouver, Washington wearing ski masks which covered their faces. RP 3A, p. 189. At least one of the men had a gun. RP 3B, p. 369. Regina Bridges, Roberta Damewood and Javier Rivera were working at Shari's at the time, and a regular customer named Brad was enjoying breakfast. RP 3B, p. 317-389. Regina Bridges was working in the front of the restaurant when the men entered. RP 3B, p. 368-69. One of the men approached her with a gun. RP 3B, p. 369. The man directed her to the kitchen area where she saw another man holding a gun to Javier, the cook. RP 3B, p. 371. The other man took Javier and Roberta, the baker, back to a mop closet and the first man took Regina back to till area. RP 3B, p. 373. Regina used her "mag card" to open the till and the man reached in and took the cash and coins and stuffed it in his pocket. RP 3B, 374. The man then called to the other man and he came out from the kitchen and they left. RP 3B, p. 376.

Roberta the baker saw Javier and Regina approaching her, and she saw a man behind Regina. RP 3B, p. 319, RP 10, p.1588. The man directed her and Javier to a mop closet. RP 3B, p. 321, RP 10, p. 1590. Roberta did not see anyone holding a gun. RP 3B, p. 323, RP 10, p.1609. The man moved Javier from the mop closet to an area just outside the mop

closet. RP 3B, p. 324, RP 10, p.1591. Roberta couldn't recall how long they remained there, but guessed it was between five and ten minutes. RP 3B, p. 325. Roberta called 911 with a cell phone she had successfully hidden while back in the mop room. RP 10, p. 1593-96. Despite not having seen a gun, Roberta told the 911 operator she was afraid she would be shot.¹ RP 10, p. 1606, 1608, 1609.

Javier Rivera was the cook on shift when this incident took place. RP 10, 1476-77. Javier encountered a man standing behind him and another man standing in front of him. RP 10, p. 1477. In the first trial on this matter Javier denied seeing a gun. RP 3B, p. 351. In the second trial, however, Javier claimed that the man standing in front of him was pointing a gun at him. RP 10, p. 1477-78. Javier testified that the reason he perjured himself in the first trial was because he feared retaliation if he testified to seeing a gun. RP 10, p. 1525-27.

After retrieving the money from the till the two masked men left Shari's and got into a Lincoln Town car and traveled to Longview. RP 3A, p. 265, 269, 743. Mr. Ferguson was seen driving that car while it made a short detour in Ridgefield. RP 4B, p. 674-75. Mr. Ferguson was

¹ Although the portion of the 911 tape where this most likely was said is reported as inaudible (it is found in the top three lines of RP 10, p. 1606), all parties agreed that she did, in fact, express fear of being shot to the 911 dispatcher.

arrested in Longview shortly after the Lincoln Town car was involved in a collision, in an area near the crash. RP 5, p. 777.

Mr. Ferguson was charged with robbery in the first degree with a firearm enhancement, two counts of kidnapping in the first degree with a firearm enhancement, and one count of eluding a police vehicle. CP 1-3. Mr. Ferguson was found guilty of robbery in the first degree, with a firearm enhancement, and eluding a police vehicle after a first jury trial. CP 37, 40-41. Because the jury hung on the kidnapping charges, Mr. Ferguson was retried on those charges and convicted, with a firearm enhancement, after a second trial. CP 38-39, 76-79. He was given a standard range sentence of 329 months in prison. CP 83. This timely appeal followed. CP 94.

2. Speedy Trial Timeline

May 21, 2008: Mr. Ferguson was arrested on the underlying charges. RP 5, p. 777.

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

June 5, 2008: Mr. Ferguson was arraigned and assigned a trial date with co-defendants Mr. Fitzpatrick and Mr. Youngblood. The trial was set for July 28, 2008. Supp. CP 99.

July 10, 2008: Mr. Ferguson 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. Supp. CP 100-101.

September 4, 2008: The commencement period on the speedy trial waiver starts a new 60-day speedy trial time clock. See CrR 3.3 (b) (5) (c).

October 27, 2008: Mr. Ferguson's defense counsel, David Kurtz, requested a continuance of the trial date so he would have additional preparation time. Appendix A (Report of Proceedings from October 27th, 2008, p. 187).² Mr. Ferguson objected to the continuance. Appendix A at p. 180-92. The trial court agreed to continue Mr. Ferguson's trial date and maintained the joinder of the three co-defendants. The Court set a new trial date of December 15, 2008. Appendix A at p. 189.

December 11, 2008: Mr. Youngblood requested a continuance of the trial date. RP 2, p. 132. Mr. Ferguson objected to any continuation of the December 15 trial. RP 2, p. 133. In an effort to preserve his speedy trial rights, Mr. Ferguson moved to sever his trial from co-defendant Mr. Youngblood. RP 2, p. 136-37. The trial court refused to grant the

² In preparing my statement of arrangements, I failed to order transcription of the hearing from October 27th, 2008 because the clerk's minute sheet from that date made it sound as though there were no objections to the continuance and that all were in agreement. In hindsight, I should not have relied on the clerk's minute sheet and simply ordered every hearing.

severance and reset a trial date of February 9, 2009, in part to avoid a trial during the Christmas holidays. RP 2, p. 154-59.

February 9, 2009: Mr. Ferguson's first trial commenced, along with the joined co-defendants. RP volume 3A.

D. ARGUMENT

I. THE COURT'S ACCOMPLICE LIABILITY INSTRUCTION RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. FERGUSON COMMITTED AN OVERT ACT.

Accomplice liability requires an overt act. *See, e.g., State v. Matthews*, 28 Wn. App. 198, 203, 624 P.2d 720 (1981). It is not sufficient for a defendant to approve or assent to a crime; instead, she must say or do something that carries the crime forward. *State v. Peasley*, 80 Wn. 99, 100, 141 P. 316 (1914). In *Peasley*, the Supreme Court distinguished between silent assent and an overt act:

To assent to an act implies neither contribution nor an expressed concurrence. It is merely a mental attitude which, however culpable from a moral standpoint, does not constitute a crime, since the law cannot reach opinion or sentiment however harmonious it may be with a criminal act.
Peasley, at 100.

See also State v. Everybodytalksabout, 145 Wn.2d 456, 472, 39 P.3d 294 (2002) ("Physical presence and assent alone are insufficient" for conviction as an accomplice.)

Similarly, in *State v. Renneberg*, the Supreme Court approved the following language: “to aid and abet may consist of *words spoken, or acts done...*” *State v. Renneberg*, 83 Wn.2d 735, 739, 522 P.2d 835 (1974), *emphasis added*. The Court noted that an instruction is proper if it requires “*some form of overt act in the doing or saying of something that either directly or indirectly contributes to the criminal offense.*” *Renneberg*, at 739-740, *emphasis added, quoting State v. Redden*, 71 Wn.2d 147, 150, 426 P.2d 854 (1967).

Instruction No. 9 (first trial) and Instruction No. 8 (second trial) were fatally flawed because they allowed conviction without proof of an overt act. CP 15, 64. Under the instruction, the jury was permitted to convict if Mr. Ferguson was present and assented to his codefendants’ crimes, even if he committed no overt act.³ CP 15, 64. Because of this, the instruction violates the “overt act” requirement of *Peasley, supra* and *Renneberg, supra*.

The last two sentences of Instructions No. 9 (first trial) and 8 (second trial) do not correct this problem. The penultimate sentence (“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”) does not exclude other

³ It must be emphasized that the driver of the vehicle did not leave the scene of the crime in great haste. The reckless nature of the driving did not begin until the Town Car reached Ridgefield.

situations. CP 15, 64. Thus a person who is present and *unwilling* to assist, but who approves of the crime, may still be convicted if she or he knows his presence will promote or facilitate the crime.

Similarly, the final sentence fails to save the instruction as a whole. Although the final sentence (“more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice”) excludes presence coupled with mere knowledge, the instruction does not exclude presence coupled with silent assent or silent approval. CP 15, 64. Even with this final sentence, a person who is present and unwilling to assist, but who silently approves of the crime could be convicted.

Because the instructions allowed conviction as an accomplice in the absence of an overt act, the convictions must be reversed and the case remanded to the trial court for a new trial. *Peasley, supra; Renneberg, supra; cf. State v. Coleman*, No. 64923-0-I (Division I, 4-17-10).

II. THE ACCOMPLICE LIABILITY STATUTE IS OVERBROAD BECAUSE IT CRIMINALIZES CONSTITUTIONALLY PROTECTED SPEECH IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS.

The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people

peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. 1.

This provision is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Adams v. Hinkle*, 51 Wn.2d 763, 768, 322 P.2d 844 (1958).⁴ A statute is unconstitutionally overbroad if it criminalizes constitutionally protected speech or conduct. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 26, 992 P.2d 496 (2000).

Any person accused of violating such a statute may bring an overbreadth challenge; she or he need not have engaged in constitutionally protected activity or speech. *Lorang* at 26. The First Amendment overbreadth doctrine is thus an exception to the general rule regarding the standards for facial challenges. U.S. Const. Amend. I; *Virginia v. Hicks*, 539 U.S. 113, 118, 123 S. Ct. 2191 (2003). Instead of applying the general rule for facial challenges, “[t]he Supreme Court has ‘provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or “chill” constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions.’”

United States v. Platte, 401 F.3d 1176, 1188 (10th Cir. 2005), quoting *Virginia v. Hicks* at 119; see also *Conchatta Inc. Miller*, 458 F.3d 258,

⁴ Washington’s Constitution affords a similar protection: “Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.” Wash. Const. Article I, Section 5.

263 (3d Cir. 2006). Accordingly, an overbreadth challenge will prevail even if the statute could constitutionally be applied to the accused.

Lorang at 26.

A statute that reaches a “substantial” amount of protected conduct is unconstitutionally overbroad:

The showing that a law punishes a “substantial” amount of protected free speech, “judged in relation to the statute’s plainly legitimate sweep,” *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908 (1973), suffices to invalidate all enforcement of that law, “until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression. *Id.* at 613...

Virginia v. Hicks at 118-19.

The First Amendment protects speech that supports or encourages criminal activity unless the speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

Brandenburg v. Ohio, 395 U.S. 444, 447, 89 S.Ct. 1827 (1969).

The accomplice liability statute (RCW 9A.08.020) is unconstitutionally overbroad because it criminalizes a substantial amount of speech (and conduct) protected by the First Amendment. Under RCW 9A.08.020 a person may be convicted as an accomplice if she or he, acting “[w]ith knowledge that it will promote or facilitate the commission of the crime...aids or agrees to aid [another] person in planning or committing it.” The statute does not define “aid.” Nor has any Washington court

limited the definition of aid to bring it into compliance with the U.S. Supreme Court's admonition that a state may not criminalize advocacy unless it is directed at inciting (and likely to incite) "imminent lawless action." *Brandenburg* at 447-49.

Instead, Washington courts—and the trial court in this case—have adopted a broad definition of "aid," found in WPIC 10.51:

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.

See Supp. CP 15, 64. By defining "aid" to include anything more than mere presence and knowledge of criminal activity, the instruction criminalizes a vast amount of speech and conduct protected by the First Amendment, and runs afoul of the U.S. Supreme Court's decision in *Brandenburg*, *supra*.

For example, a college professor who praises ongoing acts of criminal trespass by antiwar protestors is guilty as an accomplice if he utters his praise knowing that it will provide support and encouragement for the protestors. A journalist sent to cover the protest, who knows that media presence encourages the illegal activity, would be guilty as an accomplice simply for reporting on the protest. Anyone who supports the

protest from a legal vantage point (for example, by carrying an antiwar sign on the sidewalk across the street) is guilty as an accomplice. An attorney who agrees to represent the protestors *pro bono* provides support and encouragement, and is thus guilty of trespass as an accomplice.

It is possible to construe the accomplice statute in such a way that it does not reach substantial amounts of constitutionally protected speech and conduct. Indeed, the U.S. Supreme Court has formulated appropriate language for such a construction. *Brandenburg*, supra. However, such a construction has yet to be imposed. The prevailing construction—as expressed in WPIC 10.51 and adopted by the trial court in instructions 8 and 9—is overbroad. Therefore, RCW 9A.08.020 is unconstitutional.

In this case, Mr. Ferguson was convicted as an accomplice to robbery and kidnapping, carried out by Fitzpatrick and Youngblood. Because the accomplice liability statute is unconstitutional, the robbery and kidnapping convictions must be reversed and dismissed with prejudice.

III. THE TRIAL COURT ERRED WHEN IT FAILED TO SEVER MR. FERGUSON'S TRIAL FROM MR. YOUNGBLOOD IN ORDER TO PRESERVE HIS RIGHT TO A SPEEDY TRIAL.

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. Ferguson 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. Ferguson and 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. The trial court abused its discretion in continuing Mr. Ferguson's trial beyond speedy trial. Mr. Ferguson's convictions, including the kidnapping convictions obtained at the second trial, 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. Ferguson 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. Ferguson was

tried within speedy trial. CrR 3.3(a)(1). But Mr. Ferguson's trial did not start until eight months later on February 9, 2009. Mr. Ferguson's first trial date was July 28, 2008. The prosecutor joined the case for trial with co-defendants Mr. Youngblood and Mr. Fitzpatrick. On July 10, Mr. Ferguson's defense counsel, Mr. Kurtz, 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. Ferguson signed a speedy trial waiver with a September 4, 2008, commencement date. Supp. CP 100.

The court set the trial to November 3, the last date allowed by Mr. Ferguson's speedy trial waiver. On October 27, Mr. Kurtz 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. Ferguson's 60-day speedy trial time clock because the new commencement period, based upon the speedy trial waiver, started on September 4. Mr. Ferguson objected to the continuance. Nevertheless, the trial court granted Mr. Kurtz's request and set the trial to December 15. The time from the October 27 request by Mr. Kurtz 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. Ferguson'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. Ferguson or Mr. Fitzpatrick. RP 2, p. 131-32. Mr. Ferguson again objected to any continuance of his trial date and asked that his trial date be preserved and his case severed from Mr. Youngblood. RP 2, p. 133, 136-37. Mr. Ferguson 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. The court declined to grant the severance motion and reset the trial date to February 9, 2009. 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. Ferguson’s speedy trial rights weighed in favor of Mr. Ferguson 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. Ferguson 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. Ferguson 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. Ferguson’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). Further, because Mr. Ferguson's right to a speedy trial had been violated by the time trial commenced on February 9th as to all charges, the court lacked jurisdiction to force Mr. Ferguson to face trial a second time on the kidnapping charges. Mr. Ferguson's convictions, arising out of both trials, should be dismissed with prejudice.

IV. MR. FERGUSON'S KIDNAPPING CONVICTIONS, AS WELL AS THE ACCOMPANYING FIREARM ENHANCEMENTS, SHOULD BE DISMISSED DUE TO INSUFFICIENCY OF THE EVIDENCE WHERE THE KIDNAPPINGS WERE MERELY INCIDENTAL TO THE ROBBERIES.

Counsel for Mr. Ferguson made a motion at the close of the State's case to dismiss the kidnapping charges because they were incidental to the robbery. RP 12, p. 1928-29 (counsel for Mr. Youngblood makes the motion), p. 1930 (counsel for Mr. Ferguson joins the motion). The State resisted the motion by arguing that because it alleged, in the Information, that the victim of the robbery was Regina Bridges, rather than Shari's, that crime had a different victim than the kidnappings. RP 12, p. 1931. The State opined that it could defeat any suggestion that the kidnapping was incidental to the robbery by simply naming different victims for the

various crimes. RP 12, p. 1931-32. The State admitted that the kidnapping was “absolutely incidental” to the robbery, but that so long as it wasn’t the “same victim,” *State v. Korum* (120 Wn.App. 686, 86 P.3d 166 (2004); *reversed on other grounds*, 157 Wn.2d 614 (2006)) did not apply.

At the outset, it must be noted that when a commercial establishment is robbed, only one robbery has occurred even where multiple employees, who have joint control over the establishment, are present. *State v. Molina*, 83 Wn.App. 144, 920 P.2d 1228 (1996); *State v. Tvedt*, 153 Wn.2d 705, 107 P.3d 728 (2005). It was disingenuous for the State to suggest, as it did here, that Regina Bridges was the victim of this robbery to the exclusion of the other employees present. The money taken did not belong to Ms. Bridges but to Shari’s. She was simply the employee who was closest to the cash register. Mr. Rivera and Ms. Damewood were victims of this robbery to the same degree that Ms. Bridges was. Similarly, Ms. Bridges was restrained to the same degree as Mr. Rivera and Ms. Damewood when she was grabbed in the shoulder area by a man who had brandished a gun and moved her to the kitchen area where Mr. Rivera and Ms. Damewood were located. The restraint of all three individuals was incidental the robbery because it is impossible to commit a first degree robbery of a commercial establishment without

restraining the employees with at least as much restraint as was used in this incident.

Under the incidental restraint doctrine, evidence of restraint that is merely incidental to the commission of another crime is insufficient to support a kidnapping conviction. *State v. Elmore*, No. 34861-6-II (2010); citing *State v. Saunders*, 120 Wn.App. 800, 817-18, 86 P.3d 232 (2004). “Although rooted in merger doctrine, courts reviewing kidnapping charges that are arguably merely incidental to another crime frequently borrow a sufficiency of the evidence analysis.” *Id.*; *Saunders* at 817. Whether a “kidnapping is incidental to the commission of other crimes is a fact-specific determination.” *Elmore*, *State v. Green*, 94 Wn.2d 216, 227, 616 P.2d 628 (1980).

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the

evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

As the jury was instructed in this case, the essential elements of first degree kidnapping are intentional abduction "with the intent to facilitate the commission of Robbery or flight thereafter." CP 66. RCW 9A.40.020 (1). "Abduct" is defined as, "to restrain a person by using or threatening to use deadly force." RCW 9A.40.010 (2). "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with that person's liberty. Restraint is "without consent" if it is accomplished by physical force, intimidation, or deception. RCW 9A.40.010 (1).

The substantial interference with a person's liberty required to prove restraint must be a "real or material interference," as contrasted with a slight inconvenience or petty annoyance. *State v. Robinson*, 20 Wn.App. 882, 884, 582 P.2d 580 (1978), *affirmed on other grounds*, 92 Wn.2d 307, 597 P.2d 892 (1979). By placing the word "substantial" in the statutory definition of restraint, the legislature demonstrated that the statute is

intended to reach significant conduct restricting a person's freedom of movement in "important" and "essential" ways. *Id.* at 885.

Further, this substantial interference with a person's freedom of movement must not be incidental to the commission of another crime. *Green* at 227; *Korum* at 707. Kidnapping is a serious offense and requires more than interference with a person. *Robinson* at 884-85.

Even when kidnapping and robbery convictions do not violate double jeopardy, there may be insufficient evidence to prove a separate kidnapping offense. *In re Pers. Restraint of Bybee*, 142 Wn.App. 260, 265-67, 175 P.3d 589 (2007). Offenses that involve moving or holding another person may include conduct that technically falls under the legal definition of kidnapping but does not meet the legal requirements for true kidnapping. *Green* at 227. Interference with a person's freedom of movement must have a significance that is independent of the other offense being committed. *Id.* Otherwise, the restraint does not amount to the commission of the separate crime of kidnapping. *Id.*

In *Green*, for example, the defendant picked up his victim, stabbed her, and carried her to another part of an apartment building. *Green* at 226. The court ruled that "the mere incidental restraint and movement of a victim which might occur during the course of a [crime] are not standing alone, indicia of a true kidnapping." *Green* at 227. Although *Green*

“lifted and moved the victim to the apartment’s exterior holding area, it is clear these events were actually an integral part of and not independent of the underlying homicide.” *Id.* at 226-27. Moving a person’s body against that person’s will is considered an incidental restraint if it was done solely as a mean of committing another crime. *Id.*

More analogous to Mr. Ferguson’s brief, in *Korum* the defendants committed several robberies inside people’s homes and restrained the victims. In two of the robberies, the victims were restrained with duct tape at gunpoint. *Korum* at 690-91. In another robbery, the defendants tied up seven people with wrist restraints and duct tape at gunpoint. *Korum* at 691.

The *Korum* Court found the restraint, abduction, and use of force “incidental” to the robberies. *Korum* at 707. The purpose of the restraint was to complete the robbery and prevent the victims’ interference with the thefts; the secretion of the victims was not extreme, remote, or for longer than it took to complete the robberies; and the restraint did not raise a separate and distinct injury. For example, the five minutes it took one victim to free himself from the duct tape restraints showed he was not restrained to a degree so significant as to establish a separate offense. *Korum* at 707.

Likewise, in Mr. Ferguson's case, the purpose and extent of the restraint was to accomplish the robbery. Although restrained, the victims were not so unduly restricted in movement, as shown by the fact that Ms. Damewood used a hidden cell phone to call 911.

As noted in *Korum* and *Green*, kidnapping may readily hew close to the line of being subsumed by another offense when that offense, like robbery, necessarily involves some detention against the victim's will. *Green* at 306; *Korum* at 705. While "a literal reading" of statutes might suggest every robbery could be a kidnapping, this overlap should not be interpreted as intentional. *Id.* Ferguson's kidnapping convictions are incidental to the robbery. Where kidnapping is incidental to the robbery, the kidnapping must be dismissed.

E. CONCLUSION

Mr. Ferguson's convictions for robbery and kidnapping should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 24th day of May, 2010.


ANNE M. CRUSER, WSBA #27944
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that on 05/24/10, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to (1) Mike Kinnie, P.O. Box 5000, Vancouver, WA 98666; (2) David Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402; and (3) Samuel Ferguson, DOC #335077, Washington State Penitentiary, 1313 N. 13th Ave., Walla Walla, WA 99362.

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10 MAY 27 PM 12:52

STATE OF WASHINGTON

BY _____

STENNY

APPENDIX A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,)	CAUSE NO. 08-1-00820-7
)	APPEALS NO. 38287-9-II
PLAINTIFF,)	
)	
v.)	
)	
JOHN F. FITZPATRICK,)	
)	
DEFENDANT.)	

CD PROCEEDINGS

VOLUME 2 (CONTINUING)

OCTOBER 27, 2008

HEARD BEFORE THE HONORABLE JOHN F. NICHOLS

FOR THE PLAINTIFF:
ANTHONY GOLIK

FOR THE DEFENDANT FITZPATRICK:
JEFF SOWDER

FOR THE DEFENDANT FERGUSON:
DAVID KURTZ

FOR THE DEFENDANT YOUNGBLOOD:
JAMES KIRKHAM

VOLUME 2 (CONTINUING)

OCTOBER 27, 2008, 8:47 A.M.

1
2
3 THE COURT: Okay. Everybody's here for something,
4 trial dates?

5 MR. GOLIK: I think we're on for review of trial,
6 Your Honor, it sounds like --

7 MR. SOWDER: (Inaudible).

8 MR. GOLIK: -- Defense Counsel on all three are in
9 agreement to -- amongst each other, it sounds like
10 continuing the trial date. We're just talking about
11 dates.

12 MR. SOWDER: And I have a motion to join to
13 Mr. Kurtz' motion to suppress. Give a copy, assuming
14 (inaudible) don't object to this motion. It's pretty
15 much similar to his, except I did add the new statute
16 does allow for subpoenas out of state, if that's what
17 they did. We're not really sure what they did. If they
18 do go by that, then they need to conform with the new
19 statute.

20 MR. GOLIK: Except --

21 MR. KIRKHAM: Your Honor, essentially, I have no
22 (inaudible) obviously, (inaudible) is fine. I think
23 we're here, realistically, to talk about when we can
24 actually go to trial on this. My preference, after
25 speaking with my client is to do it sooner rather than

1 later, given the number of many months that they've --
2 he's been in custody in the jail. But I understand that
3 after speaking with co-counsel -- other Defendants'
4 counsel in this case that there's issues with going in
5 December. I prefer December, but --

6 Essentially, what we have here is we're waiting for
7 DNA, which I guess they're supposed to start testing
8 tomorrow. And then I guess it's going to be about three
9 weeks before they're done and maybe another week after
10 that before we get the results, or something like that.
11 So that would put us at the end of November.

12 And in that time period, of course, we can
13 interview the necessary witnesses that we need to
14 interview. I don't need to interview a lot of the
15 witnesses for my client. I need to interview about
16 seven or eight, and I think we've got two set up
17 already. So I think the interviews can be done.

18 That's why I'm pushing for a December date. I
19 understand you have dates on the 15th and the 22nd of
20 December, after speaking with Robbie. But apparently,
21 that's not going to work out for at least one of the
22 Defense counsel.

23 MR. SOWDER: Okay, I guess I'm next. My client's
24 not entirely clear he wishes to waive speedy trial, but
25 I know I need to waive it to provide effective

1 assistance of counsel, so we had that discussion Friday.
2 I'm -- the sooner the better. If we have to do this in
3 December, that's fine. But I guess --

4 THE COURT: I guess there's --

5 MR. SOWDER: -- there's some problems elsewhere.

6 THE COURT: -- just one fly in the ointment then.

7 MR. KURTZ: Judge, I've got a trial going on on the
8 15th, but I can probably move that.

9 THE COURT: Okay.

10 MR. KURTZ: And frankly, Judge, I'll make this a
11 priority if we need to with regards to that date.

12 THE COURT: So, is that a date that we have,
13 December 15th?

14 MR. ^{KURTZ}~~KIRKHAM~~: I would prefer the 15th. I think
15 Mr. Golik's okay with that --

16 MR. GOLIK: That's fine.

17 MR. ^{KURTZ}~~KIRKHAM~~: -- as long as it doesn't go to the
18 22nd apparently. And I haven't -- actually,
19 Mr. Ferguson and I haven't really talked about him
20 waiving speedy trial again. We have talked about our
21 need to be ready, and he has waived in the past. I --
22 my opinion is, is that he probably would waive one more
23 time so we can be ready to go on the 15th. But again,
24 if, for some reason, Mr. Ferguson said, no, I don't want
25 to waive again, it's just -- then I would concur with

1 Mr. Sowder, that in order for me to be ready I would
2 need --

3 THE COURT: Well, you've requested the DNA.

4 MR. KIRKHAM: Plus we've got the motions to hear on
5 the 7th, my motion for the 3.5, slash, Sixth Amendment
6 and the 3.6.

7 THE COURT: So, I guess then that we either have a
8 voluntary waiver, or we go through a colloquy with
9 regard to that.

10 MR. GOLIK: Perhaps they could speak with their
11 clients for a minute about waivers.

12 MR. ~~KIRKHAM~~^{KURTZ}: I -- they're on the record, so I
13 could ask Mr. Ferguson right now. Mr. Ferguson --

14 (TWO COUNSEL NOT IN VIDEO RANGE)

15 MR. FERGUSON: I'm not (inaudible).

16 MR. ~~KIRKHAM~~^{KURTZ}: -- are you prepared to waive speedy
17 trial one more time? No?

18 MR. FERGUSON: No, I'm ready to go.

19 MR. ~~KIRKHAM~~^{KURTZ}: Okay.

20 MR. SOWDER: Mr. Fitzpatrick?

21 MR. FITZPATRICK: Definitely not.

22 MR. SOWDER: Okay.

23 THE COURT: There you go. Well, okay, we go to
24 trial.

25 Well, the issue is this: The attorneys can advise

1 you. And apparently, you've heard what they've said and
2 they have talked to you. They've indicated to me that
3 in order to be prepared for your trial, they will need
4 to await certain testing reports. Following that, we
5 then have a suppression hearing, and then we have dates
6 available in December. And apparently they will not be
7 able to get their reports done on the DNA until the end
8 of December. Sir?

9 DEFENDANT UNIDENTIFIED: We've been in here since
10 May. We were arrested in May. It was four months their
11 time. We had issues with the DNA is what held up the
12 process. We were willing to waive. I, personally,
13 would be willing to waive if you would drop down bail to
14 make that more reasonable, not so far as excessive. But
15 to waive again when I was coerced the first time to
16 waive time and wasn't explained about the waiver, I
17 wouldn't be willing to waive at no time when trial was
18 been set --

19 THE COURT: I --

20 DEFENDANT UNIDENTIFIED: -- (inaudible) been
21 prepared.

22 THE COURT: I understand your position. You want
23 to get this done and over with, the sooner the better.
24 That's what your position is.

25 DEFENDANT UNIDENTIFIED: November 3rd.

1 THE COURT: You have attorneys that are
2 representing you. Now is when the law is saying, in
3 order to have a fair trial -- by mean fair, have
4 adequate representation -- they need certain things to
5 take place. And that's what they've indicated that
6 they're requesting that.

7 MR. SOWDER: I would note that he does perhaps have
8 a point on the DNA. We were, early on, willing to do
9 the DNA. It's just the State wanted to not let our
10 expert watch it.

11 THE COURT: Uh-huh.

12 MR. SOWDER: And that sort of delayed things by
13 four weeks --

14 THE COURT: Well, we had --

15 MR. SOWDER: -- maybe more.

16 MR. GOLIK: Let me respond to that briefly, Your
17 Honor.

18 THE COURT: Sure.

19 MR. GOLIK: The DNA testing -- the DNA lab was
20 ready to do testing long ago, at the beginning of this
21 case. I advised the Defense on how they were going
22 to -- how the testing was going to be done. The lab was
23 ready to start right away, and the Defense requested an
24 order to halt any DNA testing until the Defense could
25 bring the motion that they brought before you.

1 So, the State didn't do the testing, pursuant to
2 the Defense request and the court order to halt all
3 testing. It was all, you know, on the Defense.

4 So then we waited until Your Honor heard the motion
5 for the DNA testing, and how the defense expert,
6 Mr. Riley, was going to -- when he was going to be at
7 the DNA lab and what part of the testing he would
8 observe. Your Honor heard that motion and Your Honor
9 ruled for the Defense. All three Defense attorneys are
10 using Mr. Riley, the same expert.

11 THE COURT: Uh-huh.

12 MR. GOLIK: And they won. So I advised the Crime
13 Lab immediately. The Crime Lab was here. They knew
14 that Defense won. So the Crime Lab was waiting to hear
15 from Dr. Riley so that he could come in.

16 Dr. Riley delayed for a significant period of time
17 before contacting the Crime Lab and setting up his
18 appointment to come in. I advised Defense Counsel,
19 Mr. Sowder, who has kind of been the point person on the
20 Defense side with Mr. Riley that, you know, the one, get
21 Mr. Riley in -- Dr. Riley in there. Dr. Riley, like I
22 say, I don't know why didn't respond.

23 Mr. Sowder had an order that was complying with
24 your ruling. Your Honor gave a written ruling. It was
25 clear to all parties that the Defense won and Dr. Riley

1 was going to be there the whole time, but apparently,
2 Mr. Sowder advised the defense expert not to actually
3 contact the lab for some reason until the -- he
4 circulated that order to everybody.

5 So anyway, the State was -- the State Crime Lab was
6 ready at the beginning to do the DNA testing. The State
7 Crime Lab had to stop because the Defense didn't want it
8 done in the way they were going to do it. And then
9 after that motion was heard, then the defense expert
10 continued to delay, and that's why we still don't have
11 the testing done.

12 Dr. Riley is finally scheduled to be at the Crime
13 Lab tomorrow to observe the beginning of testing. So
14 the State has been ready all along to do testing. The
15 State has had to continue to wait for the Defense to
16 dictate how it's going to be done and then dictate the
17 timing of it, as the State can't do any testing until
18 Dr. Riley's there.

19 So Dr. Riley is finally showing up tomorrow to
20 observe the beginning of the testing. Dr. -- the DNA
21 Crime Lab analyst, Stephanie Winter-Sermeno, advised me
22 that since the testing is going to start tomorrow, from
23 the time of the start of the testing tomorrow, it will
24 take about three weeks to complete all testing and have
25 a written report.

1 So, that's the reason for the delay in the DNA
2 testing effort.

3 MR. SOWDER: This requires some reply --

4 THE COURT: Okay.

5 MR. SOWDER: -- the way it was put, and it may not
6 make any difference in Your Honor's decision, but as I
7 recall, the DNA -- when we were told there was going to
8 be DNA testing, I filed a motion to not test to --
9 through consumption. The State then asked for Dr. Riley
10 to be appointed, and I thought that was done fairly
11 quickly.

12 The State replies that, no, we have these new
13 protocols that Dr. Riley or any other expert can't be
14 there. We objected to that, had the hearing. Your
15 Honor made the decision and the -- ultimately, I don't
16 think there was any de -- any request or delay to not
17 have Dr. Riley contact them till the order was signed.
18 I think Mr. Golik and I had a conversation about that we
19 didn't have to wait for that.

20 So at some point, I called him thereafter and I
21 said to contact them. And I don't know what schedule
22 is, so I don't know why that might have delayed it, but
23 sort of change this (sic) into the State's -- the State
24 blamed -- denying us a right to have an expert present
25 becoming the Defendant dragging their feet and delaying

1 the DNA is not the proper characterization of the facts.

2 THE COURT: Well, the State wasn't delaying.

3 MR. SOWDER: What?

4 THE COURT: The State wasn't delaying.

5 DEFENDANT UNIDENTIFIED: The State was delayed --
6 they changed --

7 THE COURT: Not --

8 DEFENDANT UNIDENTIFIED: -- they policies --

9 THE COURT: Not --

10 DEFENDANT UNIDENTIFIED: -- in (inaudible).

11 THE COURT: Hold on. I have to listen just to your
12 attorneys. The State wasn't delaying the DNA process.
13 From their point of view, they were ready, set to go.
14 But due to the fact that you requested, and rightly so,
15 in my opinion, to observe that, that kicked in all these
16 delays. Right?

17 DEFENDANT UNIDENTIFIED: (Inaudible).

18 THE COURT: No, sir.

19 MR. SOWDER: Well, I think the State -- we had a
20 right to have a person present.

21 THE COURT: They --

22 MR. SOWDER: They changed their protocols.

23 THE COURT: Understandable. If you had waived
24 that, they'd be ready.

25 MR. SOWDER: Yeah.

1 MR. GOLIK: But -- and even after they prevailed,
2 they -- we had to wait --

3 THE COURT: You had to wait --

4 MR. GOLIK: -- for Dr. Riley --

5 THE COURT: -- for Dr. Riley --

6 MR. GOLIK: -- to --

7 THE COURT: Right.

8 MR. GOLIK: -- be -- grace the lab with his --

9 THE COURT: Well, we had to --

10 MR. GOLIK: -- presence, which happens --

11 THE COURT: -- we had to wait --

12 MR. GOLIK: -- tomorrow.

13 THE COURT: -- for the hearing.

14 MR. UNIDENTIFIED: For the order to be signed.

15 MR. SOWDER: Well --

16 THE COURT: One, for the availability of people
17 before you can have the hearing. This kind of is a nice
18 background. And I understand that everyone agrees that
19 there were some delays in having the hearing, and then
20 at post-hearing, the order and post-order, making
21 arrangements. The question comes down to, are you
22 requesting a continuance at this time?

23 MR. SOWDER: Yes.

24 MR. ^{Kirkham}~~KIRKHAM~~: On the part of Mr. Ferguson, I am,
25 and Mr. Ferguson having already stated, he doesn't want

1 to waive any more speedy, wants to get it underway, and
2 I understand his frustration.

3 But I need -- in order for me to do an adequate
4 job, we need to know about the DNA, we need to have the
5 suppression hearings and 3.5, slash, 3.6 dealt with.
6 And, quite frankly, I've got six or seven people I need
7 to interview of the -- I think one of which we
8 interviewed -- one we were supposed to interview last
9 week and I guess he didn't show.

10 MR. SOWDER: Right.

11 ^{Kurtz}
MR. ~~KIRKHAM~~: So we -- I need to -- I, personally,
12 need to do about four or five more interviews before I
13 go to trial. Because some of them are critical. In
14 fact, I dare say, that they're -- probably the ones I'm
15 interviewing are material to my client.

16 MR. GOLIK: I agree.

17 ^{Kurtz}
MR. ~~KIRKHAM~~: So --

18 MR. GOLIK: Yeah, I agree with that.

19 ^{Kurtz}
MR. ~~KIRKHAM~~: -- I have to interview them.

20 THE COURT: So Counsel for Mr. Fitzpatrick and
21 Mr. Ferguson agree. And -- that they need a
22 continuance. Mr. Youngblood's Counsel --

23 ^{Kirkham}
MR. ~~KURTZ~~: Judge, when I took this case, I
24 informed Mr. Youngblood that I would need a little bit
25 more time. He had no problem with it then. I don't

1 know -- because I didn't get over here early enough
2 yesterday to speak with him -- what his position on it
3 is this morning, but I anticipate that he will be okay
4 with December 15.

5 THE COURT: Then your position is that you need
6 further time in order to be ready.

7 MR. ~~KURTZ~~^{KIRKHAM}: I do need time, Judge.

8 THE COURT: Okay. Well, based upon the
9 representation by Counsel that it's vital and imperative
10 to their proper preparation for the trial that they have
11 a continuance till December 15th, I will grant it on
12 that basis.

13 MR. SOWDER: December 15th.

14 MR. KIRKHAM: Yes.

15 MR. SOWDER: That's (inaudible) the 12th.

16 MR. KIRKHAM: Thank you, Your Honor. Appreciate
17 it.

18 MR. SOWDER: And readiness will be?

19 THE COURT: The 11th.

20 MR. SOWDER: December 11th. And we have the
21 suppression hearing scheduled for?

22 MR. KIRKHAM: November 7th.

23 MR. SOWDER: What time?

24 MR. KIRKHAM: I can't remember what time it is. I
25 think it's nine.

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THE COURT: 1:30.

MR. KIRKHAM: Oh, 1:30.

MR. SOWDER: So any additional motions should target that date, too, I suspect.

THE COURT: Yes.

THE CLERK: (Inaudible)?

THE COURT: Well, it's due to their request, it would be the same elapsed days. Correct? Is this the excluded period.

MR. SOWDER: I suspect that is the court rule.

MR. KIRKHAM: I think that's the court rule.

THE COURT: Okay. And so you probably want to know what those elapsed days are.

MR. SOWDER: And it's a --

THE CLERK: (Inaudible).

MR. SOWDER: And it's a continuance, not a resetting of commencement.

MR. KIRKHAM: Right.

THE COURT: 11/3, at that time said it was 60 days. So it will still be 60 days.

MR. GOLIK: Your Honor, with respect to Mr. Youngblood, Mr. Kirkham is indicating he thinks his client is probably agreeable. Could we get a little more clarification on that?

I don't know if Mr. Kirkham -- he had indicated his

1 client wanted to waive. He said he thinks he's okay
2 with it.

3 THE COURT: But he said that he still needs
4 additional time to prepare.

5 MR. GOLIK: He did, yeah, although his --

6 MR. ~~KURTZ~~^{Kirkham}: If I could have a minute, Judge.

7 THE COURT: Sure.

8 MR. GOLIK: I think his making of the record wasn't
9 quite as clear as the other two. So.

10 MR. ~~KIRKHAM~~^{Kurtz}: Your Honor, could I go ahead and sign
11 mine, because I need to get upstairs?

12 THE COURT: Sure.

13 MR. ~~KIRKHAM~~^{Kurtz}: Okay.

14 MR. SOWDER: I've got (inaudible). I'll be right
15 back.

16 MR. KIRKHAM: Actually, I think so does Mr. Sowder;
17 he's got a trial, too.

18 MR. SOWDER: Yeah.

19 THE COURT: So does Judge Nichols.

20 MR. KIRKHAM: That's right. It's a non-jury.

21 THE COURT: Just the same rights are involved.

22 MR. ~~KIRKHAM~~^{Kurtz}: Do you want to sign this?

23 MR. FERGUSON: (No audible response.)

24 MR. ~~KIRKHAM~~^{Kurtz}: Just for the record, I indicate that
25 Mr. Ferguson doesn't wish to sign the (inaudible) order.

1 Mr. Ferguson, you understand that you're not
2 required to sign the order, that your presence here is
3 indication that you know that you have -- that trial for
4 December 15th. So the whole purpose of the scheduling
5 order is to make sure you know -- to make sure you show
6 up.

7 MR. FERGUSON: (inaudible) didn't show up.

8 MR. ~~KIRKHAM~~^{KURTZ}: It's technical.

9 MR. FERGUSON: I'll be fine.

10 MR. SOWDER: So the same for Mr. Fitzpatrick, I'll
11 note that he's not waiving, I'm signing (inaudible).

12 MR. ~~KIRKHAM~~^{KURTZ}: Okay, I'll put that on mine, too.

13 DEFENDANT UNIDENTIFIED: Never need to sign none of
14 'em.

15 (INAUDIBLE CONVERSATIONS)

16 THE COURT: Okay. Mr. Kirkham?

17 MR. KIRKHAM: Judge, he pretty much wants to go
18 party line with this (inaudible).

19 THE COURT: Okay.

20 MR. KIRKHAM: I've informed him that (inaudible).

21 (COUNSEL IS OUTSIDE MICROPHONE RANGE)

22 THE COURT: Okay. And based upon the fact that the
23 request, additional time for preparation to be done, I
24 will also with Mr. Youngblood grant a continuance.

25 (INAUDIBLE CONVERSATIONS)

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THE COURT: Did Mr. Golik sign on that one?

THE CLERK: I think he did.

THE COURT: Okay. Thank you.

(SESSION ENDS AT 9:04 A.M.)

APPENDIX B

9A.56.200. Robbery in the first degree

- (1) A person is guilty of robbery in the first degree if:
 - (a) In the commission of a robbery or of immediate flight therefrom, he or she:
 - (i) Is armed with a deadly weapon; or
 - (ii) Displays what appears to be a firearm or other deadly weapon; or
 - (iii) Inflicts bodily injury; or
 - (b) He or she commits a robbery within and against a financial institution as defined in RCW 7.88.010 or 35.38.060.
- (2) Robbery in the first degree is a class A felony.

9A.40.020. Kidnapping in the first degree

- (1) A person is guilty of kidnapping in the first degree if he intentionally abducts another person with intent:
 - (a) To hold him for ransom or reward, or as a shield or hostage; or
 - (b) To facilitate commission of any felony or flight thereafter; or
 - (c) To inflict bodily injury on him; or
 - (d) To inflict extreme mental distress on him or a third person; or
 - (e) To interfere with the performance of any governmental function.
- (2) Kidnapping in the first degree is a class A felony.