

NO. 42033-3-II
Cowlitz Co. Cause NO. 10-1-01227-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

FLOYD A. GREENLEE, III,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
ERIC BENTSON/#38471
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
I. STATE’S RESPONSE TO ASSIGNMENT OF ERROR.....	1
II. ISSUES PERTAINING TO THE STATE’S RESPONSE TO THE ASSIGNMENT OF ERROR	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT.....	9
A. GREENLEE’S TRIAL OCCURRED WITHIN THE TIME ALLOWED BY CRR 3.3.....	9
1. BECAUSE GREENLEE DID NOT MOVE THE COURT TO SET THE TRIAL WITHIN THE TIME LIMITS REQUIRED UNDER CRR 3.3(D)(3), HE WAIVED HIS RIGHT TO OBJECT TO THE SETTING OF THE TRIAL DATES.	11
2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND GOOD CAUSE TO CONTINUE THE TRIAL DATE	15
B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF GREENLEE’S ARREST, BOOKING PHOTO, AND INFORMATION THAT LED OFFICER RIPP TO GREENLEE’S LOCATION.....	22
1. GREENLEE DID NOT OBJECT TO EVIDENCE OF HIS ARREST BEING ADMITTED AT TRIAL, THEREFORE HE HAS WAIVED THIS ISSUE ON APPEAL.	23

2.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING GREENLEE'S BOOKING PHOTO, BECAUSE HIS IDENTITY WAS AT ISSUE IN THE CASE...	26
3.	BECAUSE THE STATEMENTS MADE TO OFFICER RIPP WERE ADMITTED TO SHOW HOW HE CAME TO CONTACT GREENLEE, THEY WERE NOT HEARSAY.	28
4.	EVEN IF THE ADMISSION OF THESE STATEMENTS WAS IN ERROR, THE ERROR WAS HARMLESS.....	32
C.	GREENLEE DID NOT SUFFER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY CHOSE NOT FILE A MOTION TO SUPPRESS	35
V.	CONCLUSION	43

TABLE OF AUTHORITIES

	Page
CASES	
<i>City of Kennewick v. Vandergriff</i> , 109 Wn.2d 99, 743 P.2d 811 (1987) ..	13
<i>Herberg v. Swartz</i> , 89 Wn.2d 916, 578 P.2d 17 (1978).....	26
<i>State v. Alexander</i> , 64 Wn App. 147, 822 P.2d 1250 (1992).....	36
<i>State v. Barragan</i> , 102 Wn.App. 754, 9 P.3d 942 (2000).....	39
<i>State v. Blight</i> , 89 Wn.2d 38, 569 P.2d 1129 (1977)	18
<i>State v. Bobenhouse</i> , 143 Wn.App. 315, 177 P.3d 209 (2008).....	13
<i>State v. Bustamante-Davila</i> , 138 Wn.2d 964, 983 P.2d 590 (1999).....	44
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984).....	17
<i>State v. Carney</i> , 129 Wn.App. 742, 119 P.3d 922 (2005)	13
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984).....	36
<i>State v. Cunningham</i> , 93 Wn.2d 823, 613 P.2d 1139 (1980)	36
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	29
<i>State v. Day</i> , 51 Wn.App. 544, 754 P.2d 1021 (1988).....	17, 19
<i>State v. Downing</i> , 151 Wn.2d 265, 87 P.3d 1169 (2004)	17
<i>State v. Fagalde</i> , 85 Wn.2d 730, 539 P.2d 86 (1975).....	23, 26
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998)	42
<i>State v. Greenwood</i> , 120 Wn.2d 585, 845 P.2d 971 (1993)	12
<i>State v. Gregory</i> , 152 Wn.2d 759, 147 P.3d 1201 (2006)	29

<i>State v. Greiff</i> , 141 Wn.2d 910, 10 P.3d 390 (2000).....	36
<i>State v. Grilley</i> , 67 Wash.App. 795, 840 P.2d 903 (1992).....	19
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020 (1986).....	36
<i>State v. Halstien</i> , 122 Wn.2d 109, 857 P.2d 270 (1993).....	37
<i>State v. Henderson</i> , 26 Wn.App. 187, 611 P.2d 1365 (1980).....	18
<i>State v. Iverson</i> , 126, Wn.App. 329, 08 P.3d 799 (2005)	31
<i>State v. Jamison</i> , 25 Wn.App. 68, 604 P.2d 1017 (1979).....	25
<i>State v. Jury</i> , 19 Wn.App. 256, 576 P.2d 1302.....	39
<i>State v. Kelly</i> , 32 Wn.App. 112, 645 P.2d 1146 (1982).....	18
<i>State v. Khoumvichai</i> , 149 Wn.2d 557, 69 P.3d 862 (2003).....	41
<i>State v. Kirwin</i> , 165 Wn.2d 818, 203 P.3d 1044 (2009).....	26
<i>State v. Laureano</i> , 101 Wn.2d 745, 682 P.2d 889 (1984).....	24
<i>State v. Lynn</i> , 67 Wn.App. 339, 835 P.2d 251 (1992)	27
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	39
<i>State v. McNeal</i> , 145 Wn.App. 352, 37 P.3d 280 (2002).....	40
<i>State v. Mendoza</i> , 139 Wn.App. 693, 162 P.3d 459 (2007).....	30
<i>State v. Miles</i> , 77 Wn.2d 593, 464 P.2d 723 (1970).....	17
<i>State v. Myers</i> , 86 Wn.2d 419, 545 P.2d 538 (1976)	40
<i>State v. Nguyen</i> , 68 Wn.App. 906, 847 P.2d 936, <i>review denied</i> , 122 Wn.2d 1008 (1993)	18

<i>State v. Nichols</i> , 161 Wn.2d 1, 162 P.3d 1122 (2007).....	47
<i>State v. Price</i> , 126 Wn.App. 617, 109 P.3d 27 (2005).....	33
<i>State v. Reichenbach</i> , 153 Wn.2d, 126, 101 P.3d 80 (2004)	47
<i>State v. Rivers</i> , 129 Wn.2d 697, 921 P.2d 495 (1996).....	30
<i>State v. Robinson</i> , 171 Wn.2d 292, 253 P.3d 84 (2011).....	26
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994), <i>cert. denied</i> , 115 S.Ct. 2004, 131 L. Ed. 2d 1005.....	37
<i>State v. Sanford</i> , 128 Wn.App. 280, 115 P.3d 368 (2005).....	30
<i>State v. Sardinia</i> , 42 Wn.App. 533, 713 P.2d 122, <i>review denied</i> , 105 Wash.2d 1013 (1986).....	40, 41
<i>State v. Silvers</i> , 70 Wn.2d 430, 423 P.2d 539 (1967)	25
<i>State v. Stubsjoen</i> , 48 Wn.App. 139, 738 P.2d 306 (1987).....	24
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981)	35, 37
<i>State v. Thomas</i> , 1 Wn.2d 298, 95 P.2d 1036 (1939)	12, 39
<i>State v. Visitacion</i> , 55 Wn.App. 166, 776 P.2d 986, 990 (1989).....	40
<i>State v. Wheelchel</i> , 115 Wn.2d 708, 801 P.2d 948 (1990)	36
<i>State v. Williams</i> , 85 Wn.App. 271, 932 P.2d 665 (1997).....	31, 43
<i>State v. Yuen</i> , 23 Wn.App. 377, 597 P.2d 401 (1979)	19
<i>Strickland v. Washington</i> , 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	39, 41

Other Authorities

RAP 2.5(a)	21, 23, 24, 25
------------------	----------------

Rules

CrR 3.3 (b)(2)(i).....	10
CrR 3.3(a)(1).....	9
CrR 3.3(b)(1) & (f)(2).....	10
CrR 3.3(b)(2).....	9, 10, 12
CrR 3.3(b)(5).....	9
CrR 3.3(d)(3).....	i, 10, 11, 12, 13, 14, 21
CrR 3.3(e)	9
CrR 3.3(e)(3) & (8).....	10
CrR 3.3(f)(2)	1, 10, 11
CrR 3.3(f)(2) & (b)(2)(ii).....	1
ER 401	26
ER 801(c).....	29
JCrR 3.08(f)(1).....	13
JCrR 3.08(f)(2).....	13

I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

The trial court did not abuse its discretion by granting a short continuance when the State's witness was unavailable for the trial date, the trial court did not abuse its discretion when admitting evidence at trial, and Greenlee did not suffer ineffective assistance of counsel.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- A. When the State had a material witness who was unavailable for the trial date, could be made available in a reasonable time, and Greenlee would suffer no prejudice, did the trial abuse its discretion in granting a continuance pursuant to CrR 3.3(f)(2) & (b)(2)(ii)?**
- B. Did the trial court abuse its discretion by admitting evidence for the purpose of showing the jury how police came to contact Greenlee?**
- C. Did Greenlee suffer ineffective assistance of counsel, when his attorney did not bring a motion to suppress his arrest, even though this motion would have failed, there was a legitimate strategic reason for not filing it, and Greenlee did not suffer prejudice as a result?**

III. STATEMENT OF THE CASE

Shortly after 9:00 p.m. on November 21, 2010, Greenlee entered the Wal-Mart at 540 7th Avenue in Longview through the general merchandise entrance wearing dark shoes, dark pants, a dark jacket with gray stripes along the arms, and a white hat. RP at 89, 91, 101, 130, 140,

149, 166. Upon entry Greenlee obtained a shopping cart and pushed it into the store to the electronics section. RP at 90, 92. In electronics, Greenlee pushed the cart alongside televisions (“TVs”) that were for sale, then turned around and pushed the cart by the TVs in the opposite direction. RP at 94. While viewing the TVs, Greenlee spoke on a phone. RP at 95. Eventually, Greenlee took a 46” TV selling for \$698.00 and placed it in the cart. RP at 96. He then headed back toward the general merchandise entrance pushing the TV in the cart. RP at 96.

When Greenlee approached the exit, he encountered Wal-Mart greeter Irmgard Potter. RP at 128-29. Ms. Potter asked Greenlee if he had a receipt. RP at 130. Greenlee pretended to look for a receipt, then grabbed the TV and ran out the entrance door. RP at 130. After exiting the store, Ms. Potter observed Greenlee enter an older model, light-colored car that was waiting for him. RP at 132.

Just before 4:00 p.m. on November 22, 2010, Greenlee returned to the same Wal-Mart but entered through the grocery entrance wearing a dark beanie, dark pants, a dark jacket with a gray shirt hanging out from the bottom, and white shoes. RP at 101, 134, 112, 142. Again Greenlee selected a cart and pushed it into the store. RP at 101. This time, Greenlee went toward the computer section of the electronics department. RP at 102. Greenlee pushed the cart alongside an aisle containing

computers and computer accessories. RP at 103. Again Greenlee spoke on a phone. RP at 104. Greenlee picked up an HP Touch computer selling for \$898.00 and placed it in his cart. RP at 104, 108. After doing this, Greenlee pushed the cart with the computer back toward the general merchandise side of the store. RP at 105.

As he approached the general merchandise exit, Greenlee grabbed the computer from the cart, and ran toward the exit. RP at 107. Greenlee again ran past Ms. Potter and exited the store. RP at 134. Greenlee then entered the backseat of the same light gray car that had been waiting for him the day before, which again drove away. RP at 111, 134.

Matthew Shirley was the asset protection coordinator for the Longview Wal-Mart store and supervised the store's security officers. RP at 82-83. When the second theft occurred on November 22nd, Mr. Shirley contacted the Longview Police Department ("LPD"). RP at 164. LPD Officer Calvin Ripp responded and contacted Mr. Shirley. RP at 164. Mr. Shirley provided Officer Ripp with the security video showing the November 22 theft. RP at 164. Mr. Shirley also provided still photographs from the security video and a receipt for the stolen computer. RP at 165. When dispatched, Officer Ripp was informed of the vehicle's license plate number and that it was described as an older gray or silver Lincoln. RP at 165-66. Using this information, Officer Ripp contacted

Kevin Atkinson who had been arrested while driving a vehicle matching this description. RP at 168. Atkinson provided Officer Ripp with an address. RP at 169.

At the beginning of his shift the next day on November 23, 2010, Officer Ripp asked LPD Captain Robert Huhta if he knew who Greenlee was and showed him the still photograph from the security video. RP at 171. Captain Huhta identified Greenlee in the photograph. RP at 171. Later that day, Officer Ripp returned to Wal-Mart and again met with Mr. Shirley. RP at 170-71. Mr. Shirley informed Officer Ripp of the first theft on November 21, 2010, and showed him security video from the theft on that date. RP at 172.

On November 24, 2010, accompanied by other officers, Officer Ripp went to 1215 30th Avenue. RP at 173. Officer Ripp went to this address, because Atkinson had told him it was where Greenlee had been hanging out. RP at 173. Officer Ripp's purpose in going to this address was to contact Greenlee. RP at 194. When Officer Ripp knocked on the door of the house, he was greeted by an adult female. RP at 174. Officer Ripp asked her if Cory Freeman or Greenlee were inside. RP at 174. The female told Officer Ripp that Freeman was upstairs. RP at 174. In an upstairs bedroom, Officer Ripp observed two people, one of which was

Greenlee. RP at 174-75. Officer Ripp arrested Greenlee, took him to his patrol vehicle, and read him his *Miranda* warnings. RP at 175.

Greenlee told Officer Ripp he did not know anything about the two thefts. RP at 177. Greenlee denied having committed the thefts. RP at 178. Officer Ripp observed that Greenlee was wearing completely white shoes that were very similar to the ones he was seen wearing during the theft on November 22, 2010. RP at 178. Officer Ripp also observed that Greenlee was wearing a coat that looked like the coat that he was seen wearing during the theft on November 21, 2010. RP at 178. At the time he was taken into custody, Greenlee was also wearing a ski mask that was rolled up onto his head like a beanie cap. RP at 179. Officer Ripp pointed out to Greenlee that he was wearing some of the clothes from both days of the thefts. RP at 182. Greenlee told Officer Ripp that the white shoes he was seen wearing in the security video were the “same exact kind of shoes as mine, but they aren’t my shoes because I wasn’t there.” RP at 182.

On December 22, 2010, Greenlee was arraigned out of custody. RP at 1. His jury trial was scheduled for March 14, 2011. RP at 2. On March 10, 2011, the court heard a motion the State had filed for a continuance, because it was discovered that Mr. Shirley would be out of state on vacation from March 5, 2010 to March 17, 2010 and was therefore unavailable for the March 14 trial date. RP at 4, CP at 7. Prior

to the hearing, the State and the defense believed that the continuance had been agreed. RP at 4. However, at the hearing, Greenlee's attorney told the court that Greenlee was opposed to continuing the trial. RP at 4. Greenlee's attorney did not file a responsive motion and orally suggested that Mr. Shirley's testimony be replaced because it was essentially foundational and Wal-Mart had numerous employees. RP at 4. The court noted that the State's motion stated that Mr. Shirley had identified Greenlee on the security footage. RP at 4-5. Greenlee's attorney told the court that Mr. Shirley had not identified Greenlee. RP at 5. The court noted the contradiction, stated that it appeared Mr. Shirley was material, and explained that there was no showing of specific prejudice to Greenlee. RP at 5. The court then found good cause and continued the trial. RP at 5. After reviewing the availability of all the State's witnesses, the State proposed a new trial date of March 28, 2011. RP at 5. Greenlee's attorney agreed to the new date stating, "That's fine by me." RP at 5.

On March 24, 2011, the State moved to continue the trial, because the deputy prosecutor handling the case was involved in a different trial during the week of March 28, 2011. RP at 282. Greenlee's attorney objected to the continuance. RP at 283. The court found good cause for the continuance based on the unavailability of the deputy prosecutor and rescheduled the trial for April 4, 2011. RP at 283.

On April 4, 2011, the case went to trial. RP at 7. Greenlee's attorney filed a motion in limine to suppress identifications of Greenlee by the State's witnesses. CP at 8. The State filed a response to the motions arguing that Captain Huhta and witness Megan Hlavac should be permitted to identify Greenlee, due to having had an extensive history of prior contacts with him. CP at 46-47. In its response the State also argued that if other witnesses could identify Greenlee in court as the person in the video, they should be permitted to. CP at 50.

The court ruled that the in-court identifications of Captain Huhta and Megan Hlavac would be helpful as they had a long history of contacts with Greenlee. RP at 58-62. The court ruled that because Officer Ripp had only had one contact with Greenlee out of court, his identification would not be helpful. RP at 61-62. Because Mr. Shirley's identification would have been based on the video and seeing Greenlee in court, the State conceded that it would not be helpful to the jury; therefore Mr. Shirley would not be asked to identify Greenlee during the trial.¹ RP at 44.

During trial the security videos from both November 21 and November 22 were played for the jury. RP at 89-111. As head of security, Mr. Shirley was familiar with the setup, playback, and operation

¹ Prior to trial, Mr. Shirley had told the State he could identify Greenlee.

of the security system. RP at 82-88. The still photographs of Greenlee taken from these videos were admitted into evidence. RP at 120-24. Mr. Shirley's testimony provided the necessary foundation for playing this security video and admitting the still photographs he provided to the police. RP at 82-88, 120-24. Mr. Shirley also testified to the value of the items taken, and this testimony provided the necessary foundation for the admission of the receipts cancelling out the loss of property that were entered as business records. RP at 112-119.

Megan Hlavac testified that she had known Greenlee for roughly five years, and that she had had at least 50 contacts with him. RP at 138-39. Ms. Hlavac identified Greenlee as the person seen committing the thefts in the still photographs and on the security video footage. RP at 139-143. Captain Huhta testified that he had known Greenlee for almost 10 years. RP at 146. He testified to having several contacts with Greenlee. RP at 147. Captain Huhta identified Greenlee as the person seen committing the thefts in the still photographs and on the security video footage. RP at 148-150.

The hat, all-white shoes, and dark jacket with gray stripes on the arms that Greenlee was wearing when Officer Ripp arrested him were admitted into evidence. RP at 179-181. The booking photo taken the day Officer Ripp arrested Greenlee was also admitted into evidence. RP at

183. Officer Ripp testified to Greenlee's statement that the shoes on the thief were exactly like the ones he was wearing at the time of his arrest. RP at 182. After hearing the evidence, the jury found Greenlee guilty of theft in the third degree for stealing the TV on November 21 and theft in the second degree for stealing the computer on November 22. RP at 268.

IV. ARGUMENT

A. GREENLEE'S TRIAL OCCURRED WITHIN THE TIME ALLOWED BY CrR 3.3.

Because Greenlee was brought to trial in accordance with the rules set forth by CrR 3.3, the speedy trial rule was not violated.² CrR 3.3(a)(1) states: "It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime." Thus, the trial court is vested with the responsibility to ensure a trial occurs according to the totality of the rules set forth by CrR 3.3. For individuals who are not in custody, CrR 3.3(b)(2) requires that trial either occur within 90 days, or within the time specified under CrR 3.3(b)(5).

According to CrR 3.3(b)(5), if any period is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period. CrR 3.3(e) provides a list of periods

² There is also a right to a speedy trial guaranteed under the Sixth Amendment of the United States Constitution and under Article I of the Washington State Constitution. However, Greenlee has not argued that his constitutional speedy trial rights were violated.

that are excluded in the calculation of time for trial. This list includes both continuances granted pursuant to section (f) and unavoidable or unforeseen circumstances beyond the control of the court or the parties. CrR 3.3(e)(3) & (8). CrR 3.3(f)(2) states:

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 a motion by or on behalf of any party waives that party's objection to the requested delay.

Thus, when a party makes a motion to continue a trial beyond the 90-day³ time limit of CrR 3.3(b)(2)(i), the court may grant the continuance provided certain criteria are met: the continuance is required by the administration of justice, the defendant will not be prejudiced in his or her defense, the motion is made before the time for trial has expired. CrR 3.3(f)(2). The court must also state the reasons for the continuance. CrR 3.3(f)(2). If these criteria are met, then the speedy trial rule is not violated when a court continues a case beyond 90 days. *See* CrR 3.3(b)(2)(ii).

Here, Greenlee's argument that his speedy trial rights were violated under CrR 3.3(b)(2) fails for two reasons. First, because Greenlee did not comply with CrR 3.3(d)(3)'s procedures for objecting to the setting

³ For a person held in custody on the charge, the motion must be made before the 60-day period expires. *See* CrR 3.3(b)(1) & (f)(2).

of a new trial date, he waived his right to object; his failure to properly object to this issue in the lower court waives this issue for appeal. Second, the trial court did not abuse its discretion when it continued the trial pursuant to CrR 3.3(f)(2).

1. Because Greenlee did not move the court to set the trial within the time limits required under CrR 3.3(d)(3), he waived his right to object to the setting of the trial dates.

Because Greenlee did not comply with the express provisions of CrR 3.3(d)(3) in objecting to the trial setting, he lost the right to object to the trial date; because his objection was not preserved in the lower court, he has waived this issue on appeal. CrR 3.3(d) provides the method required for a party to object to a trial setting. It states:

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 the court set a trial date within those time limits. Such motion shall be promptly noted for a 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.

CrR 3.3(d)(3). Because Greenlee failed to file a motion to object to the trial setting within 10 days of the setting of the trial date and promptly note the matter for a hearing, he lost the right to object that the trial was beyond the limits of CrR 3.3. *See* CrR 3.3(d)(3).

Timely objections are required so that, if possible, the trial court will have an opportunity to fix an error and still satisfy the speedy trial requirements. *State v. Greenwood*, 120 Wn.2d 585, 606, 845 P.2d 971 (1993). A defendant waives his right to have a case dismissed for violating the speedy trial court rules when he or she fails to bring a motion to dismiss before trial. *See State v. Thomas*, 1 Wn.2d 298, 300, 95 P.2d 1036 (1939). “And any party who fails, for any reason, to move for a trial date within the time limits of CrR 3.3 loses the right to object.” *State v. Bobenhouse*, 143 Wn.App. 315, 322, 177 P.3d 209 (2008) (citing CrR 3.3(d)(3); *State v. Carney*, 129 Wn.App. 742, 748, 119 P.3d 922 (2005)). Thus, just as compliance with the rule is required with regard to the time limits as set forth in CrR 3.3(b)(2), compliance with the proper method for objecting to a trial date as set forth in CrR 3.3(d)(3) is also required.

One instructive case regarding the requirement of making a proper objection is *City of Kennewick v. Vandergriff*, 109 Wn.2d 99, 743 P.2d 811 (1987). Patricia Vandergriff was arraigned for reckless driving and driving while intoxicated on January 31, 1985. *Id.* at 100. Initially, her trial was scheduled for April 1. *Id.* On March 22, Vandergriff waived her right to a jury trial. *Id.* On March 25, the court rescheduled her trial for May 14, which was more than 90 days after her arraignment had occurred. *Id.* Three days later, on March 28, Vandergriff’s attorney objected to the

new date by sending a letter to the court clerk stating that pursuant to JCrR 3.08(f)(1)⁴ the attorney believed 90 days would run out on May 6. *Id.*

However, her attorney did not send a copy of the letter to the prosecutor's office or note the motion onto the judge's docket. *Id.* On May 14, when the case was called for trial, Vandergriff's attorney moved to dismiss and the district court granted the motion dismissing the case for violating the speedy trial rule. *Id.*

The Washington Supreme Court found that the letter was sufficiently explicit to constitute a motion. *Id.* at 102. However, because Vandergriff's attorney failed to serve a copy of this letter to the city attorney, the motion was invalid. *Id.* Because Vandergriff did not bring a proper motion, she waived her right to object under the speedy trial rule, and the case was remanded for a trial on the merits. *Id.* at 103. It should be noted, that while both JCrR 3.08(f)(1) and CrR 3.3(d)(3) share the requirement that a party move the court within 10 days for a trial date within the time limits of the speedy trial rule, CrR 3.3(d)(3) contains the

⁴ JCrR was rescinded in 1987 and was replaced by CrRLJ. Former JCrR 3.08 contained the following language that is substantially similar to that of the current CrR 3.3(d)(3):

[a] party who objects to the date set on the ground that it is not within the time limits prescribed by this rule must, within 10 days after the notice [of the new trial date] is mailed or otherwise given, move that the court set a trial date within those time limits.

Like CrR 3.3(d)(3), failure to make such a motion was a waiver of the provisions of this speedy trial rule. Former JCrR 3.08(f)(2). *See Vandergriff*, 109 Wn.2d at 101.

additional requirement that the moving party promptly note the matter for a hearing. CrR 3.3(d)(3).

Here, as in *Vandergriff*, Greenlee failed to comply with the court rule for objecting to a trial setting outside of the time limits of CrR 3.3. When the court heard the motion to continue due to Mr. Shirley's unavailability, Greenlee's attorney was equivocal—telling the court he had spoken to his client and believed the continuance was agreed, however now his client wanted to go to trial the following week. RP at 4. No written response was provided to the State's motion. RP at 4. Further, although Greenlee opposed the continuance, he never objected to the new trial setting in any form. After trial date was reset, Greenlee neither filed a motion to set the trial within the time limits of CrR 3.3, nor did he note the matter for a hearing. By failing to comply with CrR 3.3(d)(3), Greenlee lost his right to object to the trial date.⁵

Greenlee maintains that because 90th day was not until March 22, the court could have reset the trial for March 18, 21, or 22, after Mr. Shirley became available. *Brief of Appellant* at 15. However, after the date was set, Greenlee failed to comply with CrR 3.3(d)(3) by moving the court to for a trial date on one of these dates and promptly noting the

⁵ "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." CrR 3.3(d)(3).

matter for a hearing. In fact, after the court granted the continuance, the State proposed a trial date of March 28, and Greenlee's attorney stated that the new date was fine with him. RP at 5. Because Greenlee did not comply with the relatively simple two-step process required by the rule, he did not give the lower court the opportunity to fix any error and set a date within the limits. *See Greenwood*, 120 Wn.2d at 606. The record does not reveal the reason Greenlee failed to follow the requirements of CrR 3.3(d)(3), but no matter what that reason was the rule is straightforward: "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." CrR 3.3(d)(3). Because an objection was not properly made in the lower court, Greenlee has waived this issue for appeal. *See Thomas*, 1 Wn.2d at 300; *Greenwood*, 120 Wn.2d at 606.

2. The trial court did not abuse its discretion when it found good cause to continue the trial date.

The trial court did not abuse its discretion in finding good cause to continue the trial date because material witness Matthew Shirley was unavailable, there was a valid reason for his unavailability, he could be made available within a reasonable time, and the continuance did not cause Greenlee to suffer any prejudice. "Unavailability of a material State witness is valid ground for continuing a criminal trial, where there is a

valid reason for the unavailability, where there is reasonable reason to believe the witness will become available within a reasonable time, and where there is no substantial prejudice to the defendant.” *State v. Day*, 51 Wn.App. 544, 549, 754 P.2d 1021 (1988) (internal citations omitted). When a material witness is unavailable for trial, the court has the discretion to continue a trial for a reasonable period of time and may do so outside the confines of the speedy trial period. The continuance was appropriate here.

“[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court.” *State v. Downing*, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (citing *State v. Miles*, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970)). A trial court’s grant or denial of a motion for a continuance will not be disturbed unless there is a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984) (citing *Miles*, 77 Wn.2d at 597-98). “A court reviewing an exercise of discretion can find abuse only if no reasonable person would have taken the view adopted by the trial court.” *State v. Henderson*, 26 Wn.App. 187, 611 P.2d 1365 (1980) (citing *State v. Blight*, 89 Wn.2d 38, 40-41, 569 P.2d 1129 (1977)). A trial court’s decision on a continuance must be judged in consideration of the totality of the circumstances in each case, particularly the reasons presented to the trial

judge at that time the request is made. *See State v. Kelly*, 32 Wn.App. 112, 114-15, 645 P.2d 1146 (1982).

The unavailability of a material State witness is a valid ground for continuing a criminal trial where the witness will become available within a reasonable time and the defendant suffers no resultant prejudice. *State v. Nguyen*, 68 Wn.App. 906, 914, 847 P.2d 936, *review denied*, 122 Wn.2d 1008 (1993). When the State promptly moves for a continuance after discovering a conflict within the speedy trial period to accommodate a police officer's scheduled vacation, this has been found to be good cause to move a trial date outside the speedy trial period. *State v. Grilley*, 67 Wash.App. 795, 799-800, 840 P.2d 903 (1992).

In *State v. Day*, the trial court granted the State's motion to continue a case from October 27, 1986, to a date after November 17, 1986, when the defendant's marriage was set to be dissolved, so that the defendant's current wife could testify against him in a trial for the murder of his former wife. 51 Wn.App. at 548. This permitted the State to avoid the marital privilege restrictions that would have barred her testimony. *Id.* at 550. The trial court found that her testimony was material, relevant, and crucial, and that injustice would occur if she was unable to testify. *Id.* at 548. Because the delay would not prejudice the defendant, and his wife would become available to the State as a witness within a reasonable

period of time, the court did not abuse its discretion in granting the continuance. *Id.* at 550.

In *State v. Yuen*, 23 Wn.App. 377, 379, 597 P.2d 401 (1979), the trial court's grant of a continuance was upheld, when the case was continued beyond the 60-day time period for an in-custody defendant, because two Seattle police officers who had been subpoenaed were unavailable for trial. One officer's father had died and the other could not be found. *Id.* The defense opposed the continuance, contending that these witnesses were unnecessary.⁶ *Id.* The Court of Appeals reviewed the record and determined that the continuance was warranted because the officers possessed material evidence supporting the conviction. *Id.*

Here, Mr. Shirley was unavailable for the initial trial date because he was out of the State on vacation. His testimony was material, because it was necessary to lay the proper foundation for playing the video evidence showing both thefts and to establish the value of the stolen property. A short continuance was all that was needed for Mr. Shirley to become available, thus he could be made available in a reasonable period of time. And, Greenlee, who was out of custody, did not even make an argument for prejudice. The court found Mr. Shirley was a material

⁶ The defense also argued that the State failed to exercise due diligence to ensure the availability of the witnesses, but the court found that the State had exercised due diligence by issuing the subpoenas. *Yuen*, 23 Wn.App. at 379.

witness, that the continuance would not cause Greenlee to suffer any specific prejudice, and, based on Mr. Shirley's temporary unavailability, that there was good cause for the continuance. RP at 5. Thus, it cannot be said that the court abused its discretion in granting the continuance.

Greenlee maintains that because the State's motion stated that Mr. Shirley identified Greenlee, and later Mr. Shirley was not asked to identify Greenlee at trial, the trial court abused its discretion in continuing the trial. This argument is flawed. First, the trial court's grant or denial of a continuance is not judged based on what later comes out at trial, but rather the information before the court at the time the decision is made. *See Kelly*, 32 Wn.App. at 114-15. Further, when the trial court made a determination on the materiality of Mr. Shirley, Greenlee's attorney argued that Mr. Shirley would not be able to identify him. Thus the trial court was aware at the time it made its decision on the continuance, that there was a possibility Mr. Shirley would not identify Greenlee at trial.⁷

Further, this was not the only testimony Mr. Shirley was going to provide. The State's motion also explained that Mr. Shirley was a security officer at Wal-Mart, and he had provided the security footage to the police. Obviously, the security video showing Greenlee committing the

⁷ Mr. Shirley believed he could identify the person on the security video. However, after the defense motion in limine was researched and argued, it became clear that because Mr. Shirley's identification was based on the video evidence, it would not be helpful to have him make an in-court identification of Greenlee at trial.

thefts was crucial evidence to the State's case. Thus, no attempt to argue that Mr. Shirley was immaterial was even made. Rather, his attorney argued that Mr. Shirley could be replaced by another witness because Wal-Mart had "lots and lots of employees." RP at 4. While it is true that Wal-Mart has many employees, it cannot be assumed that they all would be able to provide the proper foundation for the evidence admitted in trial. As head of security at the Longview Wal-Mart on 540 7th Avenue, Mr. Shirley was familiar with the surveillance system, was trained in its operation and playback, and operated the cameras on a routine basis. He also was familiar with the merchandise and the store's security system. It is highly unlikely that another employee, like for example Ms. Potter, would have possessed the ability to testify in the same manner as Mr. Shirley.

The essence of Greenlee's argument was not that Mr. Shirley was not a material witness, but that the State should be required to replace him with another material witness. With the record before the trial court, there was no way to know if this was even possible given the short amount of time until the trial. It appears from his brief that Greenlee is seeking to make a repeat of this argument on appeal. However, no case law is cited suggesting that a court abuses its discretion if it does not order a party with

an unavailable material witness to find another material witness to serve as a replacement at trial.

Finally, Greenlee argues that because the motion stated Mr. Shirley would have become available on before the time for trial ran, the court abused its discretion by setting the trial date at March 28. However, Greenlee only objected to the continuance, he did not object to the new trial date that was set. In fact, when March 28 was suggested as a new date, Greenlee's attorney indicated that the new trial date was fine with him. RP at 5. Thus, no objection was ever actually made to the new trial date. *See* RAP 2.5(a)⁸; CrR 3.3(d)(3)⁹; *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975) (parties must bring purported errors to the trial court's attention and allow the trial court the opportunity to correct them). Because Greenlee did not object when the new trial date was set outside of the initial 90-day period, he waived this issue for appeal. *See supra* A-1. Accordingly, the trial court did not abuse its discretion in granting the continuance, and Greenlee's speedy trial rights under CrR 3.3 were not violated.

⁸ An appellate court "may refuse to review any claim of error which was not raised in the trial court."

⁹ "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."

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EVIDENCE OF GREENLEE'S ARREST, BOOKING PHOTO, AND INFORMATION THAT LED OFFICER RIPP TO GREENLEE'S LOCATION.

The trial court did not abuse its discretion when it admitted evidence of Greenlee's arrest, his booking photo, and information provided to Officer Ripp that led him to Greenlee's location. "The decision whether to admit or refuse evidence is within the sound discretion of the trial court and will not be reversed in the absence of manifest abuse." *State v. Stubsjoen*, 48 Wn.App. 139, 147, 738 P.2d 306 (1987) (citing *State v. Laureano*, 101 Wn.2d 745, 764, 682 P.2d 889 (1984)). Greenlee alleges that evidence of his arrest, the admission of his booking photo, and statements made to Officer Ripp during his investigation were improperly admitted, requiring reversal of his conviction. His argument fails for several reasons. First, because Greenlee did not object to the admissibility of evidence of his arrest at trial, he has failed to preserve this issue for appeal. Second, his booking photo was relevant to helping the jury make a determination regarding Greenlee's identity as the perpetrator. Third, the statements that led Officer Ripp to Greenlee's location were not offered for their truth but to show why Officer Ripp conducted an

investigation. Finally, even if the court erred in the admission of these statements to Officer Ripp, at most the result was harmless error.

1. Greenlee did not object to evidence of his arrest being admitted at trial, therefore he has waived this issue on appeal.

When Officer Ripp testified to arresting Greenlee at trial, Greenlee's attorney did not object, therefore he failed to preserve this issue for review. It is well established that the failure to object to the admission of evidence at trial waives the issue on appeal: "This court has consistently held that, to preserve an alleged trial error for appellate review, a defendant must timely object to the introduction of the evidence or move to suppress it prior to or during the trial. Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts." *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). "[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State v. Jamison*, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). Under RAP 2.5(a), an appellate court "may refuse to review any claim of error which was not raised in the trial court." This rule requires parties to bring purported errors to the trial court's attention, thus allowing the trial court

to correct them.¹⁰ See *State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

Although an argument must be raised at trial to be preserved for review, in certain, limited circumstances, appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration had been satisfied. “The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’” *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). Under RAP 2.5(a), an error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right.

In *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992), the Court of Appeals explained that the parameters of a “manifest error affecting a constitutional right” are not unlimited stating:

RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms.

¹⁰ Requiring parties to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error.

An appellate court must first satisfy itself that the alleged error is of constitutional magnitude before considering claims raised for the first time on appeal. *Id.* at 343. But this does not mean that any claim of constitutional error is appropriate for review. For a reviewing court to consider such a claim, it must be “manifest”, otherwise the word “manifest” could be removed from the rule. *Id.* The court explained: “[P]ermitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts.” *Id.* at 344.

The court then provided the proper approach for analyzing whether an alleged constitutional error may be reviewed on appeal under RAP 2.5(a). *Id.* at 345. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. *Id.* Second, the court must determine whether the alleged error is “manifest”; an essential part of this determination requires a plausible showing that the alleged error had practical and identifiable consequences in the trial. *Id.* The term “manifest” means “unmistakable, evident or indisputable as distinct from obscure, hidden or concealed.” *Id.* An error that is abstract and theoretical, does meet this definition. *Id.* at 346. Third, if the court finds the alleged error is manifest, then the court

must address the merits of the constitutional issue. *Id.* at 345. Fourth, if the court determines an error was of constitutional import, it must then undertake a harmless error analysis. *Id.*

Here, at trial Greenlee did not object to the admission of his arrest or reading of his *Miranda* warnings at trial. In his appeal Greenlee asserts that his constitutional right to a fair trial was violated by the admission of his arrest and *Miranda* warnings. This vague assertion of a constitutional violation falls short of the manifest error affecting a constitutional right standard that is required to raise an issue for the first time on appeal. Because he failed to object to the admission of this evidence at trial, Greenlee failed to preserve this issue for review.

2. The trial court did not abuse its discretion in admitting Greenlee's booking photo, because his identity was at issue in the case.

Because the sole issue at trial was Greenlee's identity, his booking photo was relevant to show what he looked like near the time of the thefts. "Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination more or less probable than it would be without the evidence.'" The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible." *State v. Gregory*, 152 Wn.2d 759, 835, 147 P.3d 1201 (2006) (quoting ER 401; citing *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)).

The trial court has broad discretion in decisions over the admission of evidence. Because identity was at issue in the case, and the booking photo was relevant to show Greenlee's appearance near the time of the theft, the trial court did not abuse its discretion when it permitted the photo to be admitted.

When identity is at issue, the admission of a booking photo may be admissible. *See State v. Mendoza*, 139 Wn.App. 693, 162 P.3d 459 (2007) (distinguishing testimony regarding a booking photo from evidence in *State v. Sanford*, 128 Wn.App. 280, 287, 115 P.3d 368 (2005), where identity had not been at issue and the court had erred in admitting a booking photo). During a trial for robbery in the first degree, the defendant's attorney stated in his opening that the case was based on a "shaky ID" putting the identification issue before the jury. *State v. Rivers*, 129 Wn.2d 697, 711, 921 P.2d 495 (1996). With identity at issue, the booking photo of the defendant, which had been taken on the same day as the crime, was relevant because it showed the "victim's description to the police matched the man arrested shortly after the robbery." *Id.* at 712.

Here, the thefts occurred on November 21, and 22, 2010. The booking photo was taken on November 24, 2010. RP at 173, 183. As in *Rivers*, because identity was at issue, the photo of Greenlee, taken just two days after the second theft, was relevant to show what Greenlee looked

like near the time of the crime. Obviously, several things about a person's appearance can change in four months' time, such as hairstyle, facial hair, and even weight. In a case where the jury was asked to view the security video and determine whether the person on the video was Greenlee, a picture of how he looked near the time when the thefts occurred had great probative value. Further, because Greenlee's only objection at trial was relevance, he cannot now raise a prejudice argument to the admission of the booking photo for the first time on appeal. *See supra*, B-1. Accordingly, the trial court did not abuse its discretion in admitting the booking photo.

3. Because the statements made to Officer Ripp were admitted to show how he came to contact Greenlee, they were not hearsay.

The information provided to Officer Ripp was admissible to show how Officer Ripp came to contact Greenlee, thus, because they were not admitted for their truth, they were not hearsay. "When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible." *State v. Iverson*, 126, Wn.App. 329, 337, 108 P.3d 799 (2005) (citing *State v. Williams*, 85 Wn.App. 271, 280, 932 P.2d 665 (1997)). Greenlee argues that information received by Officer Ripp was improperly admitted over the hearsay objections of Greenlee's attorney. However, because these

statements were admitted to show Officer Ripp's response in conducting his investigation, they were not admitted for the truth of the matter asserted and are not hearsay.

ER 801(c) defines hearsay as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." This rule permits out of court statements to come in at trial, if they are for a purpose other than their truth. For example, in *Iverson*, the protected party in a no contact order violation case did not testify. 126 Wn.App. at 333. The defendant objected to testimony by the officer that the protected party had answered the door at the apartment the defendant was found in. *Id.* The trial court permitted the officer's testimony to the protected party's self-identification not to show that she was the protected party, but only for the fact that she identified herself as the protected party. *Id.* The Court of Appeals explained that had the court admitted the protected party's self-identification for its truth, then the statement would have been hearsay. *Id.* at 336. However, because the statement was admitted to explain why the officers conducted further investigation it was not hearsay, and was therefore admissible. *Id.* at 337.

Here, over defense objection, Officer Ripp was permitted to testify to having been provided vehicle information, that he spoke to Kevin

Atkinson because he was arrested driving the vehicle, that Atkinson provided Officer Ripp with Greenlee's name and an address he could possibly be staying at. These statements were not admitted to show their truth but rather to show how Officer Ripp came to contact Greenlee at this address. As in *Iverson*, because the purpose of admitting the statements was to show why Officer Ripp conducted further investigation, the statements were not admitted for their truth. For this reason, the trial court did not abuse its discretion when it admitted these statements over Greenlee's objection.

Greenlee also argues that these statements were irrelevant and prejudicial. However, Greenlee's only objection to the admission of this evidence was for hearsay. RP at 165, 166, 167, 169, 172, 173. In *State v. Price*, 126 Wn.App. 617, 637, 109 P.3d 27 (2005), the court explained a fundamental rule of appellate procedure: "A party who objects to the admission of evidence on one ground at trial may not on appeal assert a different ground for excluding that evidence." Thus, because Greenlee did not object for relevance or unfair prejudice at trial, he failed to preserve these issues for review.

Finally, Greenlee argues that in rebuttal, the State used these statements substantively, when the prosecutor rebutted Greenlee's attorney's claim in closing that Greenlee had no connection to the car. RP

at 253. However, Greenlee's appeal ignores the fact that during his attorney's cross examination of Officer Ripp he elicited that the information on the getaway car at the Wal-Mart was initially his biggest lead, that Kevin Atkinson was arrested driving the same car later that day, that Kevin Atkinson gave him information, and that this information caused him to go to an address to contact Greenlee. RP at 191-94. This evidence was admitted without objection or limiting instruction, and provided a connection between Greenlee and the car.

During his closing argument, Greenlee's attorney stated:

They said my client hopped in the car. Where is the connection to the vehicle? Only one person was seen in this vehicle, and that was Kevin Atkinson. On the same day as the thefts. My client was never seen near the vehicle. It wasn't parked at the residence where he was arrested. It wasn't, you know, in his name. He wasn't the owner. He had nothing to do with it. You have heard no evidence that puts my client within miles of that vehicle.

RP at 253. On rebuttal, the prosecutor argued that that because Kevin Atkinson was driving the car that had been reported at Wal-Mart, and the information provided by Atkinson led Officer Ripp to an address where Greenlee was found, there was a connection between Greenlee and the car.¹¹ RP at 255. This information had been elicited by Greenlee's attorney during cross examination without limitation, therefore the state

¹¹ It should also be noted that Greenlee did not object when the prosecutor made this rebuttal argument.

was permitted to use it to rebut Greenlee's claim in closing that there was no connection between him and the car. At a minimum, the person seen driving the car that day was acquainted with Greenlee and provided a location where he could be located. Thus, based on the evidence that came out during cross examination there was a connection between Greenlee and car. Greenlee has not shown that the trial court abused its discretion in admitting these statements.

4. Even if the admission of these statements was in error, the error was harmless.

Because the jury observed video evidence that showed Greenlee committing the thefts, heard from two witnesses who had been acquainted with him for several years that identified him on the video, and he was found wearing a distinctive coat matching one of the thefts and distinctive shoes matching the other, any error in admitting the statements connecting him to the car was harmless. "[E]rror is not prejudicial unless within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)). The cumulative error doctrine is "[l]imited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a

defendant a fair trial.” *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. *See State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Alexander*, 64 Wn App. 147, 154, 822 P.2d 1250 (1992).

Analysis of this issue depends on the nature of the error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Wheelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). Under this test, constitutional error requires reversal unless the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Guloy*, 104 Wn.2d at 425. Non-constitutional error requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981); *State v. Russell*, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), *cert. denied*, 115 S.Ct. 2004, 131 L. Ed. 2d 1005.

Here, because the alleged error in admitting the statements is evidentiary in nature rather than constitutional, the appropriate standard

for determining whether such error requires reversal is whether or not there is a reasonable probability that such error materially affected the outcome. In this case, the evidence against Greenlee was so overwhelming, that even if the court erred in admitting the statements, there is still not a reasonable probability that this materially affected the outcome of the case. The jury was provided with security video showing Greenlee committing both thefts, two individuals who had known Greenlee for several years identified him on the security video, and when he was arrested two days later, Greenlee was wearing a coat that matched the one he had worn during the first theft and shoes that he admitted were exactly like the ones worn during the second theft.¹² RP at 182. Under these circumstances, it is not reasonable to conclude that the jury would have reached a different result if the information that tenuously connected Greenlee to the car Atkinson was driving had not been admitted. Accordingly, any error is harmless, and Greenlee's conviction should be affirmed.

¹² At the time of closing arguments, Greenlee wore a jacket to court that appeared to match the one he wore during the second theft also. RP at 260.

C. GREENLEE DID NOT SUFFER INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY CHOSE NOT FILE A MOTION TO SUPPRESS.

Greenlee did not suffer ineffective assistance of counsel because his attorney did not file a motion to suppress his arrest when such a motion would have failed, there was a legitimate strategic reason not to file this motion, and Greenlee did not suffer any prejudice. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wash.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

“If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.” *State v. McNeal*, 145 Wn.App. 352, 362, 37 P.3d 280 (2002). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn.App. 533, 542,

713 P.2d 122 (1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.” *Id.* (citing *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)). It would be nonsensical to conclude that an attorney failed in his duty to provide effective assistance by failing to file a motion to suppress, if such motion was destined to fail. Greenlee’s appeal fails to recognize the difference between entering a home for an legitimate investigatory purpose and entering a home to conduct a search.

Our Supreme Court has stated: “[T]here is a fundamental difference between requesting consent to search a home and requesting consent to enter a home for other legitimate investigatory purposes.” *State v. Khounvichai*, 149 Wn.2d 557, 564, 69 P.3d 862 (2003). In *Khounvichai*, the Supreme Court drew an important distinction between entering into a home to search for contraband or evidence of a crime and entering into a home for other investigatory purposes. *Id.* The former requires a *Ferrier* warning be given prior to consensually entering a residence; the latter does not. *Id.* at 559; *see also State v. Ferrier*, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998). In *Khounvichai*, police responded to a malicious mischief complaint from a woman who said that a man named McBaine had been in her home, left, and then, shortly after, an object broke her window. *Khounvichai* 149 Wn.2d at 559. Officers

responded to an apartment address provided by the woman to question McBaine. *Id.* The officers knocked on the door to the apartment, and a woman named Elizabeth Orr answered. *Id.* The officers asked if McBaine was home and said they wanted to talk to him. *Id.* Orr told the officers that McBaine was her grandson, that he was home, and asked if he was in trouble. *Id.* The officers told Orr they just wanted to talk to McBaine and requested entry. *Id.* Orr consented to the officers' entry into the apartment to contact McBaine. *Id.*

After entering, an officer followed Orr to a bedroom. *Id.* at 560. Orr knocked on the door and called, "there is someone here to see you." *Id.* When the door opened, the officers smelled marijuana. *Id.* McBaine stepped out of the room and upon seeing the officers turned and whispered to two individuals in the room—one of whom was Viengmone Khounvichai. Khounvichai dashed across the room, out of the officers' sight. *Id.* One of the officers was concerned that Khounvichai was going for a weapon and ran into the bedroom where he saw Khounvichai reaching into a closet. *Id.* The officer demanded that Khounvichai show his hands, but Khounvichai did not comply. *Id.* The officer grabbed Khounvichai and a struggle ensued. During the struggle, a bag of cocaine fell out of Khounvichai's hand. *Id.* Khounvichai was convicted in juvenile court of possession of a controlled substance. *Id.* On appeal, he

argued that the evidence should have been suppressed because Orr was not given a *Ferrier* warning. *Id.* The Court of Appeals affirmed the juvenile court's decision; Khounvichai sought review with the Washington Supreme Court. *Id.*

The Supreme Court explained that police are not permitted to enter a home without warrant unless there is an exception to the warrant requirement. *Id.* at 562. The Court also explained that a *Ferrier* warning is required when police gain consensual entry into a home for the purposes of conducting a warrantless search. *Id.* at 563. The Court clarified that when purpose of police entry into a home is not to conduct a search, *Ferrier* warnings are not required. The Court cited two examples of when *Ferrier* warnings were not required. In *State v. Williams*, 142 Wn.2d 17, 28, 11 P.3d 714 (2000), *Ferrier* warnings were not required when police requested consent to enter a home to arrest a visitor pursuant to a valid arrest warrant. *Id.* In *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999), *Ferrier* warnings were not required when police and an agent of the Immigration and Naturalization Services gained consensual entry to a defendant's home to serve a presumptively valid deportation order. *Id.* The Court explained that in *Williams*, it had held that when police gain consensual entry into a home for an investigative purpose, then no *Ferrier* warning is required. *Id.*

The Court noted that there is a “fundamental difference” between requesting consent to search a home and requesting consent to enter for other legitimate investigatory purposes. *Id.* at 564. The Court explained: “*Ferrier* warnings target searches and not merely contacts between police and individuals. In sum, when police seek to conduct a warrantless search of the home, the *Ferrier* warnings achieve their purpose; when police officers seek entry to question a resident, the home is merely incidental to that purpose.” *Id.* The Court concluded: “The *Ferrier* rule applies to situations where police seek entry into a home to conduct a warrantless search for contraband or evidence of a crime. *Id.* at 566 (citing *Williams*, 142 Wn.2d at 27-28.).

Although Greenlee makes no *Ferrier* argument, the *Khounvichai* case is instructive because it shows the important distinction between entering a home for a legitimate investigatory purpose and entering a home to search for contraband or evidence of a crime. As the facts of *Khounvichai*, *Bustamante-Davila*, and *Williams* demonstrate, a legitimate investigative purpose includes contacting an individual other than the one from whom entry is gained. While entering a home to search for evidence of a crime requires a warrant, entering a home with consent to contact a person in that home to further a criminal investigation does not.

Here, as in *Khounvichai*, Officer Ripp's reason for entering the home was not to conduct a search, rather he had a legitimate investigatory purpose. Officer Ripp's stated purpose for entering the home was to try and contact Greenlee or Cory Freeman as part of his investigation. RP at 194. Officer Ripp knocked on the door and asked the woman who answered if Greenlee or Freeman were inside. Just as in *Khounvichai*, she then allowed Officer Ripp and the other officers to enter and directed them to where she said Freeman was upstairs. Any ordinary citizen would be permitted to do exactly the same if they came to the door looking for a person and were invited inside. Officer Ripp's purpose was to make contact as part of his investigation, not to conduct a search of the house; because this purpose was legitimate, a motion to suppress would have been denied.

Perhaps more importantly, the record does not establish that the house was Greenlee's residence. Officer Ripp knocked on the door and was invited in by the woman who answered. She appeared to have had authority over the residence. The record does not establish that Greenlee resided at the house. Moreover, it appears that the woman did not even know Greenlee was in the house, because she directed Officer Ripp to a room she said Freeman was in. However, when the officers entered the room they saw Greenlee and another male. Because the record does not

not establish that the house was Greenlee's residence, it cannot be claimed that he had a privacy interest to exclude the entry of the officers once they were permitted to enter by the woman who answered the door.

Greenlee's attorney may also have had a legitimate trial strategy in not filing such a motion. Although it is true that evidence with regard to what Greenlee was wearing was incriminating, he may also have wanted to permit evidence of the arrest to further support his argument that the police were jumping to a conclusion. After all, Greenlee denied committing the crime and claimed to have been set up. And, Officer Ripp went to the house based on information provided by Kevin Atkinson, who had been arrested driving the getaway car that same day and lied about his own identity. Had the arrest been suppressed, the State would have had no reason to even bring up Kevin Atkinson. Considering the defense was one of mistaken identity, it may have been hoped that having the jury hear that Atkinson was found driving the car would lead them to infer that Atkinson had committed the thefts and was just trying to pin the case on Greenlee.

In addition to overcoming the strong presumption of effective assistance, Greenlee must also show that he was prejudiced. "Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols*, 161 Wn.2d 1, 8,

162 P.3d 1122 (2007) (citing *State v. Reichenbach*, 153 Wn.2d, 126, 130, 101 P.3d 80 (2004)). Here, even if the evidence following the arrest had not been admitted, the jury still would have observed Greenlee committing both thefts on the security video, and heard from two witnesses who had known Greenlee for several years and identified him as the thief. Thus, even if the evidence obtained after the arrest had been suppressed, there is not a reasonable probability that the outcome of the trial would have been different. Accordingly, Greenlee did not suffer any prejudice.

V. **CONCLUSION**

For the above stated reasons, Greenlee's convictions should be affirmed.

Respectfully submitted this 29th day of March, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By:



ERIC H. BENTSON
WSBA # 38471
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahays@comcast.net

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

Signed at Kelso, Washington on March 29th, 2012.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

March 29, 2012 - 2:40 PM

Transmittal Letter

Document Uploaded: 420333-Respondent's Brief.pdf

Case Name: State of Washington v. Floyd A. Greenlee, III

Court of Appeals Case Number: 42033-3

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

jahays@comcast.net