

NO. 08-1-00819-3

COA

**43389-3**

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DIVISION II  
12 APR 26 AM 11:00  
STATE OF WASHINGTON  
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In re the Personal Restraint of

ALBERT YOUNGBLOOD,

Petitioner

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PERSONAL RESTRAINT PETITION

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John Crowley &  
Mitch Harrison  
Attorneys for Appellant  
The Crowley Law Firm, P.L.L.C.  
Smith Tower  
Suite 1015  
506 Second Avenue  
Seattle, Washington 98104  
Tel (206) 625-7500 ♦ Fax (206) 625-1223

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I. STATUS OF PETITIONER

Mr. Youngblood is currently incarcerated in Washington State Prison in Shelton, Washington. He is being held upon his sentence imposed in the case in which he is currently appealing from Clark County Superior Court, cause number 08-1-00819-3. His guilty conviction was entered on November 12, 2009. Mr. Youngblood filed a direct appeal in this court under cause number 397218 - II, but that case was transferred to Division I because of case overload, under cause number 666371. His petition for review was denied and the court issued its mandate on November 21, 2011.

II. STATEMENT OF THE CASE

For the facts section below, Mr. Youngblood's adopts the facts as detailed in Division I's opinion in his direct appeal, which can be found at *State v. Ferguson*, 2011 Wash. App 1276 (Div I 2011). *See* Appendix A (COA 666371-I Opinion). In addition, Mr. Youngblood supplements that facts section with the undisputed facts of that appeal as stated in his Opening Brief in his direct appeal. *See* Appendix B (Appellant's Opening Brief). In its reply, the State adopted this facts section as its own, so there should be no dispute as to the essential facts underlying this PRP. Appendix A at 1.

## 1. Procedural Trial Facts

On May 27, 2008, the State charged Mr. Youngblood and two co-defendants with one count of first degree robbery, two counts of first degree kidnapping, and one count of attempting to elude a pursuing police officer. The State also alleged that each of those offenses were committed while armed with a firearm. As alleged, each of the kidnapping charges and the robbery charge all involved separate victims. Appendix A at 2.

The first trial began on February 9, 2009. *Id.* On the robbery and eluding charges, the jury found all three defendants guilty, also finding that they were armed with a firearm during the commission robbery. However, the jury in the first trial could not agree on the two kidnapping charges. *Id.* at 3-4. After the hung jury in the first trial, the State refiled the kidnapping charges against Youngblood and a second trial was held in May 2009. On May 22, 2009, a jury convicted Youngblood of two counts of first degree kidnapping and found he was armed with a firearm when he committed them. *Id.*

Mr. Youngblood was sentenced to 155 months and 114 months on each of the kidnapping charges and 155 months on the

robbery charge, all to run consecutively, for a total sentence of 329 months.

## **2. Substantive Trial Facts**

At the first trial, witnesses testified to the following facts: Two men wearing hats with eyeholes cut in them entered a Shari's Restaurant in Vancouver, Washington at about 5 AM on May 21, 2008. The men directed two restaurant employees, Javier Rivera and Roberta Damewood, to move from the kitchen area to another part of the restaurant where the mops were kept and for them to lie on the floor. Appendix A at 5.

Damewood testified that she did not see a gun. After five to ten minutes, when it was quiet, Damewood was able to call 911 on her cell phone. Rivera also testified that he did not see a gun. *Id.* at 6. One of the men told Shari's employee Regina Bridges to open the cash register till. She stated that he was wearing a "hoody" over a grayish stocking cap with eyeholes cut in it and that he pointed a handgun at her. She testified that she saw another man wearing a hoody and a cap pulled over his face with eyeholes in it and that he was standing behind Rivera holding a gun. After Bridges opened the till, the man took money from it, put it in his pocket, and both men left. *Id.*

As the suspects left the restaurant, a witness saw the robbers enter a black Lincoln Town Car and leave the scene. Minutes later, police

identified the vehicle and attempted to pull over the vehicle. A short pursuit ensued after the driver failed to stop. Eventually, the three defendants were apprehended and arrested for robbery in the first degree and eluding. *Id.* 7-9.

At the second trial, witness testimony was materially the same as the first trial with one notable exception--Rivera testified that one of the perpetrators had a gun with him. When defense counsel asked Rivera about his prior inconsistent testimony, Rivera conceded that he was untruthful during the first trial because he "was afraid. He acknowledged that no one had threatened him or family members since he testified at the first trial. *Id.* 8-10.

### **3. The Appellate Court Decision**

Mr. Youngblood timely filed his appeal in Division II Court of Appeals. However, that appeal was eventually transferred to Division I because Division II's caseload was backlogged, causing Division I to hear the case.

On appeal, Mr. Youngblood challenged several aspects of his case, only one of which is addressed with this petition. Specifically, Mr. Youngblood argued that the State failed to present sufficient evidence to support his Kidnapping conviction because any restraint involved in the kidnapping was "merely incidental" to the force used to effectuate the

robbery. To support these arguments, Mr. Youngblood relied upon two cases from Division II, *State v. Korum* and *State v. Bybee*. *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *reversed on other grounds* by 157 Wn. 2d 614, 141 P.3d 13 (2006); *State v. Bybee*, 142 Wn. App. 260, 175 P.3d 589 (2007). Both of those cases relied upon this Court's decision in *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

In response, the State accepted Mr. Youngblood's recitation of the facts, but simply argued that the "evidence is sufficient to allow the charges to go to the jury." After hearing oral argument, the court of appeals upheld Mr. Youngblood's kidnapping conviction, holding that "Because *Louis* controls, Youngblood's convictions for first degree kidnapping and first degree robbery do not merge." Appendix A at 10. However, the opinion is devoid of any ruling on Mr. Youngblood's actual assignment of error: that there was insufficient evidence to support kidnapping conviction that was independent of the restraint used to support his robbery conviction.

On June 29, 2011, Mr. Youngblood filed a timely petition for review, in which he argued that the Court of Appeals decision conflicted with both Supreme Court case law and the case law of Division II. On September 27, 2011, the Supreme Court denied Mr. Youngblood's petition for review.

### III. GROUNDS FOR RELIEF

#### **1. Mr. Youngblood's kidnapping conviction was entered in violation of his due process rights because the court failed to dismiss his kidnapping conviction under *State v. Korum*.**

A petitioner may file a PRP if his restraint is unlawful because “[t]he conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington.” RAP 16.4(c)(2). In this case, Mr. Youngblood's kidnapping conviction was entered in violation of his due process rights because the court failed to dismiss his kidnapping conviction under *State v. Korum*, 157 Wn. 2d 614, 141 P.3d 13 (2006) and *State v. Bybee*, 142 Wn. App. 260, 175 P.3d 589 (2007).

#### **a. The ends of justice compel this court to consider Mr. Youngblood's arguments in light of the case law of this Division of the Court of Appeals.**

The State, in response to Mr. Youngblood's PRP, might argue that the court should dismiss this argument of the PRP because this issue was already decided in his direct appeal, after his case was transferred from Division II of this court to Division I. For the reasons detailed below, the court should decline to dismiss this claim on such a technicality because

the interests of justice compel consideration of this issue, which Division II did not itself consider.

The mere fact that an issue was raised on appeal does not automatically bar review in a personal restraint petition; rather, a court must not dismiss a personal restraint petition unless the prior appeal was denied on the same ground *and the ends of justice would not be served by reaching the merits of the issue again. In re Taylor*, 105 Wn. 2d 683, 717 P.2d 755 (1986).

Here, Mr. Youngblood asserts one of the same arguments that he asserted in his direct appeal: that there was insufficient evidence of a kidnapping to support his conviction as described in *State v. Korum*, *supra*, a Division II case that remains good law. *See State v. Bybee*, 142 Wn. App. 260, 175 P.3d 589 (2007) (affirming Division II's adherence to its holding in *Korum*). Although this is the same argument here, this court should consider the argument in his PRP as well because in Mr. Youngblood's direct appeal, the court (1) did not specifically rule on the issue he presented before the court (sufficiency of the evidence and not simply merger) and (2) ignored clearly established Division II case law that was favorable to Mr. Youngblood and review of this issue by Division II and applying Division II case law would serve the interests of justice.

When an appellant preserves particular issues on appeal and they are properly before the court of appeals, the court of appeals *must* consider those issues, as such consideration “is provided as a matter of right” under RAP 4.1 and 6.1. *Courtright Cattle Co. v. Dolsen Co.*, 94 Wn.2d 645, 659, 619 P.2d 344 (1980). Here, Mr. Youngblood sought review in the court with the proper court, Division II of the court of appeals. However, under RCW 2.06.040, his case was transferred into Division I because Division II was experiencing a very high volume of appeals. *See State v. McGary*, 37 Wn. App. 856, 683 P.2d 1125, (1984) (acknowledging the court’s ability to transfer cases from one Division to another but deciding not to transfer in the interests of judicial economy).

Obviously, the transfer for the case from Division II to Division I was no fault of Mr. Youngblood’s. Yet, he was clearly prejudiced by the transfer, because as the opinion denying his direct appeal makes clear, Division I did not properly frame the issue and ignored the case law cited in his brief, which also happened to be controlling in Division II. The court seemed to ignore the heart of Mr., Youngblood’s true argument and misconstrued it as one of “merger” rather than one that is rooted in the “sufficiency of the evidence” and due process.

Because the court misconstrued Mr. Youngblood’s argument on appeal, it never addressed his true arguments and those cases that were

truly favorable to him, namely *Korum* and *Bybee*. Making this even more of an injustice to Mr. Youngblood is the fact that his case was transferred from a division with more favorable case law (Division II), into a division with less favorable case law (Division I). And after that transfer, the case law in Division II was completely ignored.

In short, the interests of justice are certainly served by this court hearing Mr. Youngblood's arguments on the merits because they were not properly considered in his direct appeal.

**b. Under both the case law of Division II and of the Washington Supreme Court, this court must reverse Mr. Youngblood's kidnapping convictions because they were merely incidental to the robberies.**

Previous cases in this court and in Division II have applied the "merely incidental doctrine" separately from the merger doctrine. Specifically, because the restraint of the two victims in this case was only intended to facilitate the robbery, any restraint during the course of the robbery was "merely incidental" to that robbery; thus, under the precedent of this Court and Division II, these facts do not establish the restraint the statute requires to prove kidnapping.

**i. *State v. Green* controls and the merely incidental doctrine applies to the sufficiency of the evidence analysis and the court of appeals erred by not applying it to the facts of this case.**

In *State v. Green*, the defendant was convicted of aggravated first degree murder. 94 Wn. 2d at 216. The State charged both first degree kidnapping and first degree rape as the aggravating factors. Green stabbed a young girl on a sidewalk adjacent to the ground floor of her apartment complex. Several residents heard screaming during the attack and looked outside to see Green pick the victim up and drag her about 20 to 50 feet around a corner to an exterior loading area clearly visible from the outside. One of the residents saw Green holding the then-unconscious victim in the loading area. Green left her on the lawn in the back of the complex. *Id.*

Our Supreme Court held that although [Green] lifted and moved the victim to the apartment's exterior loading area, it is clear these events were actually an integral part of and not independent of the underlying homicide. While movement of the victim occurred, the *mere incidental restraint and movement of a victim* which might occur during the course of a homicide *are not*, standing alone, indicia of a true kidnapping. *Id.* at 226-27. Like other state's Kidnapping statutes, under Washington's kidnapping statute, "a movement of the victim does not constitute an asportation unless it has significance independent of the" underlying

crime, i.e. assault or robbery. *Id.* at 227. Thus, the Court held that there was insufficient evidence of kidnapping because the restraint and movement of the victim was merely “incidental” to and not “an integral part of and was independent of the underlying homicide.” *Id.* (“While movement of the victim occurred, the mere *incidental* restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping.”).

Our Supreme Court has not yet overruled its holding in *Green*, even when confronted with the opportunity to do so. *See Vladovic*, 99 Wn. 2d at 433 (Utter, J. dissenting) (noting that “otherwise, we would have been required to overrule *Green* and our dictum in *Allen*. Yet we did not do so.”). In fact, in *State v. Brett*, this Court again echoed its holding in *Green*, “This court has held and the State concedes that the mere incidental restraint and movement of the victim during the course of another crime which has no independent purpose or injury is insufficient to establish a kidnapping” 126 Wn. 2d 136, 166 (1995). As such, *Green* remains good law and there is no reason for this court to not consider the case in deciding this one.

- ii. **In *State v. Korum*, this court properly applied *Green* to a case that was factually similar to Mr. Youngblood’s.**

Since this Court's decision in *Green*, Division II has applied the sufficiency of the evidence analysis to cases that also involve issues of merger. In *State v. Korum*, this court relied upon *Green* to overturn several kidnapping convictions because they were incidental to the robbery convictions. *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004), *reversed on other grounds by* 157 Wn. 2d 614, 141 P.3d 13 (2006). *Korum* was a case in which three co-defendants—Korum, Durden, and Mellick—were all charged with several counts of robbery for a series of home invasions in which they participated. During the summer of 1997, the defendants planned and executed a series of robberies, in which they would break into the home of known drug dealers, restrain them with duct-tape, and steal drugs, money, and other items. During these invasions, the defendants were armed with firearms.

The two co-defendants—Durden and Mellick—pleaded guilty to first degree kidnapping with a firearm enhancement, first degree robbery, two counts of first degree burglary, and first degree unlawful possession of a firearm. Before his trial, Korum moved to dismiss the kidnapping charges, arguing that they were merely incidental to his robbery charges; the trial court denied the motion. Korum went to trial and the jury convicted him of numerous counts of kidnapping, robbery, assault, and

burglary, each while armed with a firearm. He received a sentence of over 100 years in prison.

Korum appealed, amongst other issues, the trial court's denial of his motion to dismiss the kidnapping charges. This court dismissed several kidnapping convictions because they were "incidental to the robberies" for which the jury also convicted Korum. *Id.* at 689. The State petitioned the Supreme Court for review. The Court affirmed the dismissal of the kidnappings without substantive discussion because the State did not seek review of that part of the decision. *State v. Korum*, Wn. 2d at 260, 623-25.

**c. *State v. Bybee***

After Division II issued its opinion in *Korum*, Korum's co-defendants filed a PRP seeking to overturn their convictions through their guilty pleas. In their PRPs, Bybee and Durdan asked the court to reverse their kidnapping convictions in accordance with Division II's holding in *Korum*. *State v. Bybee*, 142 Wn. App. 260, 175 P.3d 589 (2007). Those kidnapping convictions were factually the same as Korum's, however, Division II decided *Bybee* on procedural grounds rather than substantive legal grounds.

In an attempt to meet one of the exceptions to the one-year time limit for filing a PRP, Bybee and Durdan argued that "their respective kidnapping convictions also *merge* with their robbery convictions under

*Korum* and (2) because convicting a defendant of two merged crimes would violate double jeopardy, we must similarly vacate their kidnapping convictions under *Korum*.” *Id.* at 265. The argument that the decision in *Korum* was rooted in the merger doctrine and implicated double jeopardy was thus, essential for Bybee and Durdan to seek relief via the PRP. However, Division II expressly rejected the argument that its *Korum* decision was rooted in double jeopardy principles.

Thus, with *Bybee*, this court affirmed its holding in *Korum* and impliedly held that, so long as the defendant meets the one year statute of limitations for a PRP, a defendant such as Mr. Youngblood can properly raise a sufficiency of the evidence claim based upon *Korum* and *Green*. Here, as discussed above, Mr. Youngblood’s PRP is properly before this court.

**i. Under *Green* and *Korum*, this court should reverse Mr. Youngblood’s convictions for kidnapping because they merely incidental to his robbery conviction.**

Under the test established in *Green* and elaborated upon in *Korum*, the evidence against Mr. Youngblood was insufficient to support the kidnapping charge. As stated above, under *Green*, a movement that occurs during the commission of a crime does not give rise to the additional charge of kidnapping if the restraint and movement of the victim was

merely “incidental” to and not “an integral part of and was independent of the underlying homicide.” 94 Wn. 2d 216, 227 616 P.2d 628 (1980) (“While movement of the victim occurred, the mere *incidental* restraint and movement of a victim which might occur during the course of a homicide are not, standing alone, indicia of a true kidnapping.”).

Applying this test in *Korum*, Division II set forth several factors to determine whether or not any such restraint was merely incidental to a robbery. The court noted that under the facts of that case, the restraint was insufficient to sustain a kidnapping conviction:

(1) The restraints were for the sole purpose of facilitating the robberies . . . ; (2) forcible restraint of the victims was inherent in these armed robberies; (3) the victims were not transported away from their homes during or after the invasions to some remote spot where they were not likely to be found; (4) although some victims were left restrained in their homes when the robbers left, the duration of the restraint does not appear to have been substantially longer than that required for commission of the robberies; and (5) the restraints did not create a significant danger independent of that posed by the armed robberies themselves.

*Korum*, 120 Wn. App. at 706.

Here, like in *Korum*, the defendant was convicted of robbery and kidnapping based on the same sequence of events and a close look at those events establishes that the restraint used for the robberies was “insufficient to [also] establish a kidnapping.” *See id.* at 706 (citing *Brett*, 126 Wn. 2d at 166).

First, there is no evidence that Mr. Youngblood restrained the victims here for any purpose other than to facilitate the robbery of the Sherri's restaurant. The undisputed facts argued in Mr. Youngblood's direct appeal established that one of the defendants (possibly Mr. Youngblood) simply ordered the two victims of the kidnapping into a closet so they would not interfere with the robbery. No other restraint was used. Thus, "restraining the victim[]" was contemporaneous with the robbery." *See id.* at 707.

Second, the only "forcible restraint" that occurred in this case occurred was used to facilitate the robbery. That forcible restraint occurred when one of the defendants ordered two of the victims into another room in order to complete the robbery. The testimony in the second trial established that a gun was used when the defendants ordered the victims into the "mop" room. Yet, no shred of evidence suggests that any of the defendants pointed the gun at any of the victims for any other purpose than to obtain money from the Sherri's restaurant. In fact, this amount of force is far less intrusive than what occurred in *Korum*, in which Korum and his accomplices actually restrained the victims by binding their limbs with duct tape.

Third, Mr. Youngblood did not transport the victims to a place where they would not likely be found. In fact, the victims in this case were

escorted to a room in the back of the restaurant and left alone while the defendants completed the robbery.

Fourth, the length of the restraint was not longer than necessary to complete the robbery. Here, the robbery happened very quickly. Once inside the restaurant, the defendants directed the two victims into the mop room. According to Ms. Damewood, the robbery lasted no more than five to ten minutes. *See* Appendix B at 8.

Fifth, there was no increased danger to the victims that does not normally accompany an armed robbery. No victims or witnesses were injured. No guns were fired. In fact, none of the evidence at trial suggested that the defendants even pointed a gun at either of the two kidnapping victims. At worst, the testimony in the second trial merely establishes that one of the victims had “seen” a gun at some point. One could argue that the mere act of moving the two victims to a separate room and leaving them alone actually *increased their safety*, but certainly not that it decreased it.

Finally, there is no evidence that any of the defendants intended to commit any crime other than robbing the Shari’s restaurant, i.e. to rape or physically injure the victims. *See, e.g., Saunders*, 120 Wn. App. at 800 (kidnapping was not incidental to rape where the defendant or accomplice

handcuffed, shackled, and taped victim's mouth shut indicated restraint beyond that required in commission of rape).

In sum, after applying the *Korum* factors and a common sense understanding of what constitutes kidnapping, it is clear that the legislature did not intend to define a "kidnapping" so broadly as to convict Mr. Youngblood of two counts of kidnapping and thus increase his sentence by over a decade. *See State v. Woolfolk*, 95 Wn. App. 541, 550, 977 P.2d 1 (1999) (noting that although knowledge was not a requirement for a firearm enhancement, common sense required the court to allow the defendant to argue that a lack of knowledge of the firearm could negate a proof of the enhancement).

The defendants here moved the two victims into a room separate from the main restaurant. They were not transported away from the scene of the crime; they were moved to a room in the same building and left alone and unguarded. They were not tied up; they were not physically restrained. The purpose of moving the victims into the mop room was clear: the defendants wanted the victims *out of harm's way* so that they could complete the robbery.

#### IV. CONCLUSION

Under *Green* and *Korum*, Mr. Youngblood's convictions for kidnapping should be reversed because the kidnappings were merely

incidental to the robbery. Practically speaking, the trial court's failure to vacate his kidnapping convictions on these grounds had a severely prejudicial effect upon Mr. Youngblood, which is embodied in his sentence. "Since kidnapping is recognized as one of the most serious crimes and is punished as such, the additional punishment which may be imposed, absent merger, is far from inconsequential." *Vladovic*, 99 Wn. 2d at 433 (Utter, J. dissenting).

In fact, in this case, when he was convicted only of the robbery charge, Mr. Youngblood faced a guideline sentence of 147 to 176 months. However, when he was later convicted of "kidnapping" two separate victims during the commission of that robbery, his sentencing range doubled and he was ultimately sentenced to 329 months.

In light of the arguments above, this court should vacate Mr. Youngblood's kidnapping conviction because it was merely incidental to his robbery conviction.

DATED this 29<sup>th</sup> day of June, 2011.

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Mitch Harrison, ESQ., WSBA# 43040  
Attorney for Petitioner Mr. Youngblood

**OATH**

After being first duly sworn, on oath, I depose and say: That I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

DATED this 15<sup>th</sup> day of March, 2012.

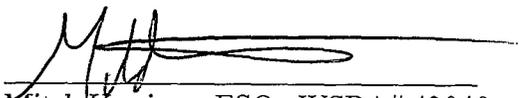


Mitch Harrison, ESQ., WSBA# 43040  
Attorney for Petitioner Albert Youngblood

**STATEMENT OF FINANCES**

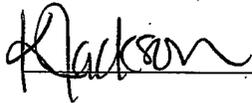
In his previous direct appeal, this court granted Mr. Youngblood's motion to pursue his appeal and have his appellate fees waived at public expense. Because Mr. Youngblood is still destitute, The Crowley Law Firm will be representing Mr. Youngblood pro bono on this PRP. Thus, this court should grant his request to seek discretionary review at public expense for his PRP. The record for this PRP will be the exact same record as that in the direct appeal.

DATED this 15<sup>th</sup> day of March, 2012.

  
\_\_\_\_\_  
Mitch Harrison, ESQ., WSBA# 43040  
Attorney for Petitioner Albert Youngblood

CERTIFICATE OF SERVICE

On April 25, 2012, I filed a copy of the Personal Restraint Petition and this proof of service to the Court of Appeals, Division II by US Mail delivery to: Court of Appeals Division II, 950 Broadway, Ste 300, Tacoma, WA 98402. In addition, I deposited into the United States Postal Service for delivery of a copy of this Petition with proof of service to the Clark County Prosecutor's Office, Appellate Unit, 1013 Franklin Street, PO Box 5000, Vancouver WA 98666-5000. In addition, a copy was also sent to the defendant, Albert Jamaal Youngblood, DOC# 333592, Stafford Creek Correctional Center, 191 Constantine Way, Aberdeen, WA 98520.



Kaitlyn Jackson,  
Paralegal  
The Crowley Law Firm, PLLC  
Smith Tower  
506 2<sup>nd</sup> Ave, Ste 1015  
Seattle, WA 98104  
Phone: (206) 623-1569  
Fax: (206) 625-1223

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**Appendix A**



3 of 112 DOCUMENTS

THE STATE OF WASHINGTON, *Respondent*, v. SAMUEL EUGENE FERGUSON III,  
*Defendant*, ALBERT JAMAAL YOUNGBLOOD, *Appellant*.

NO. 66637-1-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

2011 Wash. App. LEXIS 1276

April 25, 2011, Oral Argument  
May 31, 2011, Filed

**NOTICE:** RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

**SUBSEQUENT HISTORY:** Reported at *State v. Ferguson*, 2011 Wash. App. LEXIS 1316 (Wash. Ct. App., May 31, 2011)

**PRIOR HISTORY:** [\*1]

Appeal from Clark Superior Court. Docket No: 08-1-00819-3. Judgment or order under review. Date filed: 08/07/2009. Judge signing: Honorable John F Nichols.  
*State v. Fitzpatrick*, 159 Wn. App. 1022, 2011 Wash. App. LEXIS 126 (2011)

**COUNSEL:** *Peter B. Tiller*, The Tiller Law Firm, Centralia, WA, for Appellant(s).

*Camara Banfield*, Clark County Prosecuting Attorney's Offi, Vancouver, WA, for Respondent(s).

**JUDGES:** AUTHOR: Linda Lau, J. WE CONCUR: Ann Schindler, J., Ronald Cox, J.

**OPINION BY:** Linda Lau

**OPINION**

¶1 LAU, J. -- A jury convicted Albert Youngblood of first degree robbery and eluding a pursuing police vehicle but failed to agree on two counts of first degree kidnapping. The State refiled the first degree kidnapping charges, and a jury convicted him on both counts. Youngblood appeals, arguing: (1) insufficient evidence to support the kidnapping convictions, (2) improper jury discharge procedures violate double jeopardy, (3) no objection to evidence of fear constitutes ineffective assistance of counsel, and (4) insufficient evidence to support his eluding conviction. Because sufficient evidence supports his convictions, the court properly discharged the jury, and defense counsel's conduct was neither deficient or prejudicial. We affirm Youngblood's convictions.

*FACTS*<sup>1</sup>

1 The State accepted Youngblood's

[\*2] recitation of the facts.

¶2 On May 27, 2008, the State jointly charged Albert Youngblood, Samuel Ferguson, and John Fitzpatrick with one count of first degree robbery, two counts of first degree kidnapping, and one count of attempting to elude a pursuing police vehicle. <sup>2</sup> The State also charged them with committing each offense while armed with a semiautomatic pistol under RCW 9.94A.602 and RCW 9.94A.533(3). Youngblood's, Ferguson's, and Fitzpatrick's cases were joined for trial.

2 The robbery victim was Regina Bridges, while the two kidnapping counts named two separate victims: Roberta Damewood (count 2) and Javier Rivera (count 3).

¶3 Trial began on February 9, 2009, and closing remarks occurred on February 18. On the afternoon of February 20, 2009, the jury sent the court a question--"If we are unable to come to an agreement on a portion of the charges, while agreeing on other portions, what do we do?" After conferring with the parties, the court answered the question--"You will be brought back into the courtroom for further instructions. In the meantime, continue to deliberate while the parties are notified." When the jury returned to the courtroom, the following colloquy occurred:

THE COURT:

[\*3] ...

We're at a very serious stage of the proceedings as you can well imagine. And in response to your question, I have an additional instruction to give your question and ask you. And it's going to be directed to the attention of the foreperson and you're only supposed to answer pursuant to the question I ask and it's going to be a yes or no answer; okay?

Now I'll read the entirety to you. I've called you back into the courtroom to find out whether you have a reasonable probability of reaching a verdict.

First, a word of caution. Because you are in the process of deliberating, it is

essential that you give no indication about how the deliberations are going. You must not make any remark in that courtroom that may adversely affect the rights of either party or may in any way disclose your opinion of this case or the opinions of members of the jury.

I'm going to ask your presiding juror if there's a reasonable probability of the jury reaching a verdict within a reasonable time. The presiding juror must restrict her answer to yes or no when I ask this question and must not say anything else.

Okay. So the question is: "Is there a reasonable probability of the jury reaching their verdict

[\*4] within a reasonable time, as to all the counts, as regarding all the Defendants?"

JURY FOREPERSON: No.

THE COURT: Okay. And is there a reasonable probability of the jury reaching a verdict within a reasonable time as to any of the counts?

JURY FOREPERSON: Yes

8 Report of Proceedings (RP) (Feb. 20, 2009) at 1128-29. The court sent the jury back into the jury room to complete the verdict forms on the counts it had agreed on and then called them out again.

THE COURT: Okay, you may be seated. The jurors are all present. And again I ask the foreperson do you have--reached a verdict on some counts?

JURY FOREPERSON: We have.

THE COURT: And have you signed those verdict forms related to those counts you have agreed upon?

JURY FOREPERSON: Yes.

THE COURT: And you have not been able to reach an agreement on the remaining counts?

JURY FOREPERSON: Correct.

THE COURT: Okay. If you will hand the verdict forms to the bailiff.

8 RP (Feb. 20, 2009) at 1130-31

¶4 The court accepted the jury's guilty verdicts on the first degree robbery and attempting to elude a police vehicle counts.<sup>3</sup> The court then excused the jury, saying, "Okay. With that I do want to thank sincerely the dedication and the work done by the jurors

[\*5] in reaching this determination. I respect that. You are now discharged." 8 RP (Feb. 20, 2009) at 1134. The verdict forms for the kidnapping counts were left blank.

3 The court had previously dismissed the firearm enhancement regarding the charge of attempting to elude a police vehicle at the conclusion of the State's case in chief.

¶5 The State refiled the kidnapping charges against Youngblood and Ferguson,<sup>4</sup> and a second trial was held in May 2009. On May 22, 2009, a jury convicted Youngblood of two counts of first degree kidnapping and found he was armed with a firearm when he committed them.

4 Fitzpatrick entered an *Alford* plea to the kidnapping charges. *State v. Fitzpatrick*, noted at 159 Wn. App. 1022, 2011 WL 198702, 2011 Wash. App. LEXIS 98. *State v. Alford*, 25 Wn. App. 661, 611 P.2d 1268 (1980).

¶6 At the first trial, witnesses testified to the following facts: Two men wearing hats with eyeholes cut in them entered a Shari's Restaurant in Vancouver, Washington at about 5 AM on May 21, 2008. The men directed two restaurant employees, Javier Rivera and Roberta Damewood, to move from the kitchen area to another part of the restaurant where the mops were kept and for them to lie on the floor. Damewood testified that

[\*6] she did not see a gun. After five to ten minutes, when it was quiet, Damewood was able to call 911 on her cell phone. Rivera also testified that he did not see a gun.

¶7 One of the men told Shari's employee Regina Bridges to open the cash register till. She stated that he was wearing a "hoody" over a grayish stocking cap with eyeholes cut in it and that he pointed a handgun at her. She testified that she saw another man wearing a hoody and a cap pulled over his face with eyeholes in it and that he was standing behind Rivera holding a gun. After Bridges opened the till, the man took money from it, put it in his pocket, and both men left. Bridges stated that the

man who had her open the till was wearing white, cotton knit, gardening gloves with blue piping. Jason Godsil and his wife walked into the restaurant as the two men ran out the door. Godsil had seen a black Lincoln town car idling in the parking lot by the door as he entered the restaurant. Bridges called 911 to report the robbery.

¶8 While traveling southbound on Interstate 205 at 4:58 AM, Neil Martin of the Vancouver Police Department saw a black Lincoln town car going northbound on the interstate. Deputy Thomas Yoder and several other

[\*7] police units followed the car. After Deputy Yoder activated his overhead lights, the town car exited the freeway and went into a shopping plaza parking lot and turned around. Detective Thomas Mitchum was standing with his gun drawn in the area between the parking lot and the roadway and was able to see the driver, whom he identified as Ferguson. The car did not stop but went around the police car, which Det. Mitchum described as being parked in a semiroadblock. After the car left the parking lot, Deputy Yoder saw an object tossed from the car that was later identified as a gun wrapped inside a gray hat with eyeholes cut in it.

¶9 The car then reentered the freeway heading northbound and increased its speed to 100 or 110 MPH with several units following it. The car eventually hit a spike strip deployed by officers, exited the highway, and several of its tires degraded and broke up. The car went through three red lights, hit a traffic median, and came to a stop. Deputy Yoder saw three males get out of the car and run down the street. Fitzpatrick was taken into custody by Deputy Jeremy Koch, who stated that Fitzpatrick was breathing hard. Youngblood was arrested by Officer Tim Deisher and

[\*8] was found with a black hat with eyeholes cut in it and money in his pocket. Police found a roll of coins under him after he was arrested. Youngblood was determined to be a possible contributor of DNA (deoxyribonucleic acid) found on the black hat. Police found Ferguson behind a couch on the porch of a house. Inside the town car, police found a pair of white gloves with blue piping and a roll of pennies.

¶10 At the second trial, witness testimony was materially the same as the first trial with one notable exception--Rivera testified that one of the perpetrators had a gun with him. When defense counsel asked Rivera about his prior inconsistent testimony, Rivera conceded that he was untruthful during the first trial because he "was afraid"

[b]ecause you don't know if the person who you're testifying against has family members, have friends that can come after you and hurt you or hurt your family. I go to work at night and my children go to school by themselves. On a time they stay home at--alone for a short period of time. And I do have to go to work to support them.

9 RP (May 19, 2009) at 1247, 1256. He acknowledged that no one had threatened him or family members since he testified at the first

[\*9] trial.

*ANALYSIS*

*Sufficiency of the Evidence--Merger*

¶11 Youngblood first argues that "the first degree kidnapping counts were incidental to the robbery and no separate conviction may be imposed and enforced." Appellant's Br. at 17. He therefore maintains that because the kidnappings were done solely to facilitate the robbery and were not independent crimes, insufficient evidence exists to sustain the kidnapping convictions.

¶12 Youngblood relies on *State v. Korum*, 120 Wn. App. 686, 86 P.3d 166 (2004). There, the State charged

the defendant with several kidnapping charges stemming from a conspiracy to rob drug dealers in a series of home invasions. *Korum*, 120 Wn. App. at 689. The perpetrators restrained the victims with duct tape while searching the homes and stealing drugs, money, and other valuables. *Korum*, 120 Wn. App. at 690-92. The court determined that this restraint of the victims did not constitute separate kidnappings. "[W]e hold as a matter of law that the kidnappings here were incidental to the robberies ... ." *Korum*, 120 Wn. App. at 707 (footnote omitted).

¶13 But in *State v. Louis*, 155 Wn.2d 563, 571, 120 P.3d 936 (2005), the court held that first degree kidnapping, even when incidental

[\*10] to a first degree robbery, does not merge with a robbery conviction. In *Louis*, while robbing a jewelry store, the defendant bound the two owners' hands and feet, covered their eyes and mouths with duct tape, and forced them into a bathroom. The jury convicted him of one count of first degree kidnapping and one count of first degree robbery for each victim.

¶14 On appeal, Louis argued that his convictions for kidnapping and robbery merged because the kidnappings were simultaneous and incidental to the robbery. The court determined the crimes do not merge because proof of one is not necessary to prove the other. It reasoned that proof of kidnapping is not necessary to prove first degree

robbery, and proof of first degree kidnapping requires only the intent to commit robbery, not the completion of robbery. *Louis*, 155 Wn.2d at 571. Because *Louis* controls, Youngblood's convictions for first degree kidnapping and first degree robbery do not merge.<sup>5</sup>

<sup>5</sup> Furthermore, the victims of the kidnappings in this case were different from the victim of the robbery. Under similar facts, the court rejected this same argument in *State v. Vladovic*, 99 Wn.2d 413, 424, 662 P.2d 853 (1983). We likewise reject it

[\*11] here.

*Mistrial*

¶15 Youngblood next contends that his robbery conviction violates his constitutional right not to be twice put in jeopardy for the same offense. The State counters that the court properly discharged the jury based on deadlock and there is therefore no double jeopardy violation. "The double jeopardy clause of the Fifth Amendment protects the criminal defendant from repeated prosecutions for the same offense." *State v. Juarez*, 115 Wn. App. 881, 886, 64 P.3d 83 (2003). It also protects the right of the defendant to be tried by the jury he selected. *State v. Jones*, 97 Wn.2d 159, 162, 641 P.2d 708 (1982) (citing \**Arizona v. Washington*, 434

U.S. 497, 503 n.11, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)).

¶16 When a trial court grants a mistrial without the defendant's consent and after jeopardy has attached, retrial is barred by double jeopardy principles unless the mistrial was justified by manifest necessity. *Juarez*, 115 Wn. App. at 889. Manifest necessity exists when "extraordinary and striking" circumstances clearly indicate that substantial justice cannot be obtained without discontinuing the trial. *Juarez*, 115 Wn. App. at 889 (quoting *State v. Jones*, 97 Wn.2d 159, 163, 641 P.2d 708 (1982)).

¶17 When

[\*12] a jury acknowledges, through its presiding juror and on its own accord, that it is deadlocked, there is a factual basis sufficient to constitute the "extraordinary and striking" circumstance necessary to justify discharge. *Jones*, 97 Wn.2d at 164. Other factors a trial court should consider include the length of deliberations in light of the length of trial and the volume and complexity of the evidence. *State v. Kirk*, 64 Wn. App. 788, 793, 828 P.2d 1128. We accord great deference to a trial court's decision to discharge a jury due to deadlock. *See Jones*, 97 Wn.2d at 163.

its deliberation indicating it was unable to reach a verdict on some of the charges: "If we are unable to come to an agreement on a portion of the charges, while agreeing on other portions, what do we do?" The court summoned the jury and the parties into the court room and asked the presiding juror whether "there [was] reasonable probability of the jury reaching their verdict within a reasonable time, as to all the counts, as regarding all the Defendants?" 8 RP (Feb. 20, 2009) at 1129. The presiding juror replied, "No." 8 RP (Feb. 20, 2009) at 1129. These facts establish

¶18 Here, the jury sent a question to the court during

[\*13] extraordinary and striking circumstances sufficient for the court to exercise its discretion to discharge the jury. See *Jones*, 97 Wn.2d at 164.

¶19 Nevertheless, Youngblood argues that the discharge was improper because the court failed to (1) poll the jurors individually to determine if they agreed with the presiding juror's claim of jury deadlock, (2) "weigh[ ] the minimal 'relevant considerations' prior to discharging the jury,"<sup>6</sup> (3) make discharge findings, (4) formally declare a mistrial on the record, and (5) obtain his consent to discharge the jury. Youngblood's arguments are not persuasive in light of the deference accorded to the trial court.

6 Appellant's Br. at 22. Relevant considerations include the length of the trial and deliberations, along with the complexity of the issues and evidence.

¶20 Division Two of this court held that "the court has the discretion to rely on the representations of the foreman ... ." *State v. Dykstra*, 33 Wn. App. 648, 652, 656 P.2d 1137 (1983). That is precisely what the trial court did here. Before polling the presiding juror, the court cautioned the jury in accordance with WPIC 4.70<sup>7</sup> not to make any remark that may adversely affect the parties. It

[\*14] then instructed the presiding juror to answer "yes" or "no" to its specific and limited questions. The court asked the presiding juror whether there was a reasonable probability that the jury could reach a decision on the kidnapping counts within a reasonable time. The presiding juror answered, "No." The court also asked the parties whether they wanted "any further [jury] polling." In response, the State and Ferguson's counsel declined. Youngblood's counsel did not respond to this question. Under these circumstances, the court properly exercised its discretion to rely on the presiding juror's statement in determining to discharge the jury. *See Dykstra*, 33 Wn. App. at 652.

7 The WPIC committee "Notes for use" to WPIC 4.70, probability of verdict, suggests the use of this instruction "when the jury is brought back into the courtroom during deliberations either because the jury has indicated that it may be deadlocked or the judge is contemplating the possible discharge of the jury as a deadlocked jury."

¶21 Contrary to Youngblood's assertion, the court is not obligated to consider on the record the length of deliberations, length of trial, and complexity of the issues in rendering its decision

[\*15] to declare a mistrial when a jury is deadlocked.<sup>8</sup> Instead, "[i]n exercising that discretion, the judge *should* consider the length of time the jury had been deliberating in light of the length of the trial and the volume and complexity of the evidence." *Jones*, 97 Wn.2d at 164 (emphasis added) (citing *State v. Boogaard*, 90 Wn.2d 733, 739, 585 P.2d 789 (1978)). And we concluded, "There are no particular procedures that the court *must* follow in determining the probability of the jury reaching an agreement." *State v. Barnes*, 85 Wn. App. 638, 657, 932 P.2d 669 (1997) (emphasis added).

<sup>8</sup> Youngblood cites to no case authority suggesting these considerations are mandatory

rather than discretionary.

¶22 Here, the jury announced of its own accord that it was deadlocked. After the court summoned the jury and all parties into the courtroom, the presiding juror confirmed that the jury could not reach a verdict on the kidnapping charges. The court acted well within its discretion when it relied on the presiding juror's representation that the jury was truly deadlocked. In exercising this considerable discretion, it was not required to conduct a more detailed inquiry on the record. *See Barnes*, 85 Wn. App. at 657.

¶23 While

[\*16] it is true the court never expressly declared a mistrial or made oral findings before discharging the jury, "the trial court was not required to expressly find 'manifest necessity,' it is clear that the record must adequately disclose some basis upon which the court determines that the jury necessarily must be discharged." *State ex rel. Charles v. Bellingham Mun. Court*, 26 Wn. App. 144, 149, 612 P.2d 427 (1980). But as discussed above, the presiding juror's responses to the court's WPIC 4.70 inquiry provide a sufficient basis on which to discharge the jury. Following discharge, the court also filed its written findings in a "Memorandum of

Disposition" that "[d]efendant convicted of Rob[bery] 1 and attempt to elude. Jury hung on kidnap charges. Defendant to be held without bail." Youngblood and his counsel signed the disposition order without objection.

¶24 We turn to Youngblood's next contention that "neither [he] nor his attorney gave consent for discharge of the first jury in this case." Appellant's Br. at 22. CrR 6.10, discharge of jury, provides, "The jury may be discharged by the court on consent of both parties *or when it appears that there is no reasonable probability of their reaching*

[\*17] *agreement.*" (Emphasis added.) Under this rule, Youngblood's consent to discharge is not required because the presiding juror answered, "No" when the court asked her if there was a reasonable probability of the jury reaching an agreement within a reasonable time. And as discussed above, this is a reasonable basis on which to discharge the jury.

*Ineffective Assistance of Counsel*

¶25 Youngblood next argues that his trial counsel was ineffective because "Mr. Youngblood's attorney failed to object when Mr. Rivera testified at the second trial that he was afraid for the safety of his family." Appellant's Br. at 23-24. He claims this evidence

prejudiced him because it allowed the jury to speculate that he or a family member "created fear in Mr. Rivera." Appellant's Br. at 28. The State counters that defense counsel first introduced this allegedly prejudicial testimony and that there were tactical reasons for so doing.

¶26 To establish ineffective assistance of counsel, Youngblood must show both deficient performance and resulting prejudice. \**Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard

[\*18] of reasonableness based on a consideration of all the circumstances. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997). There is a strong presumption of effective representation. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Matters that go to trial strategy or tactics do not show deficient performance, and Youngblood bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001). Where a decision not to object to proffered evidence constitutes "a valid tactical decision, [it] cannot provide the basis for an ineffective assistance claim." *State v. Alvarado*, 89 Wn. App. 543, 553, 949 P.2d 831 (1998).

To prove prejudice, Youngblood must show that but for counsel's deficient performance, there is a reasonable probability the outcome of the proceedings would have been different. *McFarland*, 127 Wn.2d at 335.

¶27 Youngblood contends his trial counsel was ineffective for failing to object to the witness's testimony about fear elicited on the State's redirect examination.

[THE STATE]: Why were you afraid, Javier?

[RIVERA]: Because in my country, if you

[\*19] come to a court like this one, like what I'm doing right now, you risk a lot.

[THE STATE]: What do you mean, Javier?

[RIVERA]: Because you don't know if the person you're testifying against you --

[FEGUSON'S COUNSEL]:  
Objection.

[RIVERA]: -- they --

[FEGUSON'S COUNSEL]:  
Foundation. Personal knowledge. What's he testifying from, what somebody told him?

[THE STATE]: Asking him why he --

THE COURT: Why he.

[THE STATE]: -- feels fearful.

THE COURT: Overrule the objection.

[THE STATE]: Thank you.

[THE COURT]: Go ahead.

[RIVERA]: Because you don't know if the person who you're testifying against has family members, have friends that can come after you and hurt you or hurt your family. I go to work at night and my children go to school by themselves. One time they stay home at--alone for a short period of time. And I do have to go to work to support them.

9 RP (May 19, 2009) at 1255-56.

¶28 Although Youngblood's counsel never objected to this evidence, codefendant Ferguson's counsel did object. But the trial court overruled the objection and allowed the witness to explain the basis of his fear. "Where a claim of ineffective assistance of counsel rests on trial counsel's failure to object, a defendant must show that

[\*20] an objection would likely have been sustained." *State v. Fortun-Cebada*, 158 Wn. App. 158, 172, 241 P.3d 800 (2010). And Youngblood did not assign error to the court's evidence ruling. Here, even if defense counsel had timely objected, Youngblood fails to show the court would have sustained the objection.<sup>9</sup>

9 Our review of the record shows Rivera's fear was highly relevant to explain why his testimony changed about seeing a gun between the first and second trial. And defense counsel used the evidence to undermine the witness's credibility.

*Sufficiency of the Evidence--Attempting to Elude*

¶29 Youngblood next argues that insufficient evidence supports his conviction for attempting to elude a police officer based on accomplice liability. The State responds, "The defense took no exceptions to the proposed [jury] instructions," on accomplice liability and any error was invited and "not ... properly preserved for purposes of appeal." Resp't's Br. at 21.

¶30 "In reviewing the sufficiency of the evidence in a criminal case, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond

[\*21] a reasonable doubt." *State v. Hagler*, 74 Wn. App. 232, 234-35, 872 P.2d 85 (1994). A reviewing court interprets all reasonable inferences from the evidence in favor of the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. And circumstantial evidence is as probative as direct evidence. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005).

¶31 To prove attempting to elude a pursuing police vehicle, the State must prove that the defendant was the "driver of a motor vehicle who willfully fail[ed] or

refuse[d] to immediately bring his ... vehicle to a stop and who [drove] his ... vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop ... ." RCW 46.61.024(1). "Attempt to elude," as used in RCW 46.61.024, is given its ordinary meaning of "try" to elude and is unrelated to criminal attempt; thus, there is no requirement that the State prove intent to elude. *State v. Gallegos*, 73 Wn. App. 644, 650, 871 P.2d 621 (1994).

¶32 Under

[\*22] RCW 9A.08.020(3)(a)(i)-(ii), an accomplice is one who, "[w]ith knowledge that it will promote or facilitate the commission of the crime ... encourages ... or aids" another person in committing a crime. In other words, an accomplice associates himself with the venture and takes some action to help make it successful. *In re Welfare of Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). In particular, the evidence must show that the accomplice aided in the planning or commission of the crime and that he had knowledge of the crime. *State v. Trout*, 125 Wn. App. 403, 410, 105 P.3d 69 (2005). Where criminal liability is predicated on accomplice liability, the State

must prove only that the accomplice had general knowledge of his coparticipant's substantive crime, not that the accomplice had specific knowledge of the elements of the coparticipant's crime. *State v. Rice*, 102 Wn.2d 120, 125, 683 P.2d 199 (1984).

¶33 But mere presence of the defendant, without aiding the principal, despite knowledge of the ongoing criminal activity, is not sufficient to establish accomplice liability. *State v. Parker*, 60 Wn. App. 719, 724-25, 806 P.2d 1241 (1991). Rather, the State must prove that the defendant was

[\*23] ready to assist the principal in the crime and that he shared in the criminal intent of the principal, thus "demonstrating a community of unlawful purpose at the time the act was committed." *State v. Castro*, 32 Wn. App. 559, 564, 648 P.2d 485 (1982)); *see also State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); *Wilson*, 91 Wn.2d at 491.

¶34 Here, Youngblood asserts that the evidence is insufficient to show that he acted to solicit, command, encourage, or request that the driver (Ferguson) keep going and not stop for the pursuing police. Viewed in the light most favorable to the State, the evidence supports a

reasonable inference that Youngblood had knowledge of and aided in the planning of the robbery, the getaway, and the consequent attempt to elude police.

¶35 Witnesses testified that two males robbed Shari's Restaurant. Youngblood was arrested with wadded up dollar bills and rolls of coins in his pockets. Youngblood clearly knew that the idling black town car, driven by Ferguson, was waiting outside to flee after the robbery. After he pocketed the money, he and Fitzpatrick ran out of the restaurant and got into the town car, which Ferguson drove out of the Shari's parking lot toward

[\*24] the freeway.

¶36 Once on the freeway, police signaled the town car to stop, but it exited the freeway. One of the three men in the town car threw a handgun and a cap with cut-out eyeholes from the town car driver's side window. Then the town car evaded a police blockade, returned to the freeway without ever stopping, and drove erratically at speeds up to 110 MPH, still failing to stop after a spike strip punctured all of its tires. When the town car finally became stuck on a median, Fitzpatrick, Youngblood, and Ferguson ran on foot from the car and from the police.

¶37 Both Youngblood's actions in the restaurant and Ferguson's actions in driving the getaway town car were actions that in concert helped the robbery "succeed." *State v. Alford*, 25 Wn. App. 661, 666, 611 P.2d 1268 (1980). Youngblood and Ferguson were engaged together, not only in the ongoing robbery, but also in attempting to avoid detection and capture following the robbery. They worked in concert with a "community of unlawful purpose" from the time of the robbery through their joint attempt to elude police. *See contra Castro*, 32 Wn. App. at 564 (no "community of unlawful purpose," no evidence of shared criminal intent of principal,

[\*25] and no accomplice culpability of witness who slept during murder and refused to share proceeds of robbery).

¶38 In addition, evidence of flight is admissible as tending to show guilt. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965). But the evidence must be sufficient to create a reasonable and substantive inference that the defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or that the flight was a deliberate effort to evade arrest and prosecution. *Bruton*, 66 Wn.2d at 112-14. Here, Youngblood not only fled from the robbery but also fled from the town car after it stopped. His continuing

flight showed his complicity in both the robbery and the getaway, which involved attempting to elude the police. A "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Hagler*, 74 Wn. App. at 234-35.

*Statement of Additional Grounds (SAG)*

¶39 Youngblood raises a number of additional arguments in his SAG. He argues that his counsel was ineffective "in failing to request a jury instruction for the lesser-included offense of unlawful imprisonment." SAG at 10 (capitalization omitted). But Youngblood fails

[\*26] to articulate any argument for how this allegedly deficient performance prejudiced him. He has thus failed to establish "a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. Relying on *State v. Recuenco*, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008), Youngblood also argues that there was insufficient evidence to support his firearm enhancement because there was no evidence that the gun was operable. But Division Two of this court specifically rejected this argument because the portion of *Recuenco*

on which Youngblood relies "was not part of *Recuenco's* holding and is nonbinding dicta." *State v. Raleigh*, 157 Wn. App. 728, 735, 238 P.3d 1211 (2010). Youngblood's remaining arguments are either duplicative of his appellate brief, not supported by the record, without merit, or were not raised at trial.

¶40 We affirm Youngblood's judgment and sentence.

COX and SCHINDLER, JJ., concur.

**Appendix B**

NO. 39721-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ALBERT JAMAL YOUNGBLOOD,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable John Nichols, Judge

OPENING BRIEF OF APPELLANT

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Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

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**A. ASSIGNMENTS OF ERROR**

1. Appellant Albert Youngblood's convictions for first degree kidnapping based on conduct incidental to a robbery must be dismissed for insufficient evidence as required by the Fourteenth Amendment and Article I, § 3 of the Washington Constitution.

2. Mr. Youngblood's second trial and his convictions for first degree kidnapping violated his constitutional right not to be twice put in jeopardy for the same offense.

3. The trial court erred by discharging the first jury without considering the length of the deliberations in light of the length of the trial and the complexity of the issues.

4. The trial court erred by discharging the first jury without finding that discharge was necessary to the proper administration of public justice.

5. The trial court erred by discharging the first jury without making a finding of manifest necessity.

6. The trial court erred by discharging the first jury without declaring a mistrial.

7. Mr. Youngblood did not receive effective assistance of counsel because his attorney did not object to evidence by a key witness who stated that he was afraid for his safety and the safety of his family.

8. The trial court erred in permitting a conviction for

attempting to elude a pursuing police vehicle where the evidence that Mr. Youngblood was an accomplice was insufficient.

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

1. A robbery necessarily involves restraining a person to take or retain property from another. A kidnapping may be incidental to the robbery and may not stand as a separate offense. In the present case, Mr. Youngblood's two kidnapping convictions are based on acts inherently part of the robbery. Should both kidnapping convictions be dismissed based on the lack of sufficient, separate evidence establishing those offenses? Assignment of Error 1.

2. Did Mr. Youngblood's second trial and his conviction for two counts of first degree kidnapping violate his constitutional right not to be twice put in jeopardy for the same offense when the jury deadlocked on the kidnapping charges where the judge asked the presiding juror about the possibility of a verdict but did not ask the other jurors if they agreed with the presiding juror's assessment, did not seek Mr. Youngblood's consent to discharge the jury, did not consider the length of deliberations in light of the length of the trial and the complexity of the issues, did not make any findings relating to whether or not the jury should be discharged, and did not declare a mistrial? Assignments of Error 2

through 6.

3. Did the trial court err by discharging the first jury without asking the jurors if they agreed with the presiding juror that they were deadlocked? Assignments of Error 2 through 6.

4. Did the trial court err by discharging the first jury without considering the length of their deliberations in light of the length of the trial and the complexity of the issues involved? Assignment of Error 3.

5. Did the trial court err by discharging the first jury without making a finding that discharge was necessary to the proper administration of public justice or due to manifest necessity? Assignments of Error 4 and 5.

6. Did the trial court err by discharging the first jury without declaring a mistrial? Assignment of Error 6.

7. Did the trial judge's decision to discharge the first jury violate Mr. Youngblood's constitutional right to a verdict from the jury that began deliberations in his case? Assignments of Error 2 through 6.

8. Mr. Youngblood's attorney did not object to inadmissible testimony in the second trial that a witness was afraid for the safety of his family. Was counsel's failure to object to this irrelevant and prejudicial evidence deficient performance that prejudiced the appellant? Assignment of Error 7.

9. Was there sufficient evidence that Mr. Youngblood was an accomplice to the driver of the car—Samuel Ferguson—when Mr.

Ferguson attempted to elude a pursuing police vehicle, and where there was no evidence that Mr. Youngblood encouraged or assisted Mr. Ferguson's failure to stop for the pursuing police vehicles? Assignment of Error 8.

### C. STATEMENT OF THE CASE

#### 1. Procedural history:

Albert Youngblood was charged by information filed in Clark County Superior Court on May 27, 2008, with one count of first degree robbery, contrary to RCW 9A.56.200; two counts of first degree kidnapping,<sup>1</sup> contrary to RCW 9A.40.020; and one count of attempting to elude a pursuing police vehicle, contrary to RCW 46.61.024(1). Appendix A. Clerk's Papers [CP] 1- 2. Each offense was alleged to have occurred while Mr. Youngblood or an accomplice was armed with a firearm. RCW 9.94A.533(3). CP 1-2. He was charged with co-defendants Samuel Ferguson and John Fitzpatrick.<sup>2</sup> CP 1.

Mr. Youngblood was arraigned on June 5, 2008, and waived speedy trial on July 10, 2008 with a new commencement date set for September 4, 2008. CP 5. The trial was continued to December 14, 2008 over Mr. Youngblood's objection on October 27, 2008. Mr. Youngblood moved for continuance on December 11, 2008; Mr. Ferguson and Mr. Fitzpatrick opposed the continuance in order to proceed to trial scheduled.

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<sup>1</sup>The alleged victim in Count 2 was Roberta Damewood. The alleged victim in Count 3 was Javier Rivera. CP 1-2.

<sup>2</sup>Court of Appeals No. 39287-9-II.

for December 15, 2008 and moved to sever their case from Mr. Youngblood's case. The court granted Mr. Youngblood's request for continuance and he waived speedy trial on December 11, 2008 with a new commencement date of February 9, 2009. CP 29.

Trial to a jury began on February 9, 2009, the Honorable John F. Nichols presiding. On February 20, 2009, the jury found Mr. Youngblood, Mr. Fitzpatrick, and Mr. Ferguson guilty of robbery while armed with a firearm, and attempting to elude a police vehicle. 8RP at 1131-33; CP 72, 75, 76. The court had previously dismissed the firearm enhancement regarding the charge of attempting to elude a police vehicle at the conclusion of the State's case in chief. 6RP at 821.

On the afternoon of February 20, 2009, the jury sent a question indicating that it was unable to reach an agreement on a portion of the charges. The Jury Question stated:

If we are unable to come to an agreement on a portion of the charges, while agreeing on other portions, what do we do?

8RP at 1124; Supplemental CP at 202. Appendix B.

The jury was brought into the courtroom and the following exchange took place:

THE COURT: We're at a very serious stage of the proceedings as you can well imagine. And in response to your question, I have an additional instruction to give your question and ask you. And it's going to be directed to the attention of the foreperson and you're only supposed to answer pursuant to the question I ask and it's going to be a yes or no answer, okay?

Now I'll read the entirety to you. I've called you back into the

courtroom to find out whether you have a reasonable probability of reaching a verdict.

First, a word of caution. Because you are in the process of deliberating, it is essential that you give no indication about how the deliberations are going. You must not make any remark in that courtroom that may adversely affect the rights of either party or may in any way disclose your opinion of this case or the opinions of members of the jury.

I'm going to ask your presiding juror if there's a reasonable probability of the jury reaching a verdict within a reasonable time. The presiding juror must restrict her answer to yes or no when I ask this question and must not say anything else.

Okay. So the question is: Is there a reasonable probability of the jury reaching their verdict within a reasonable time, as to all the counts, as regarding all the Defendants?

JURY FOREPERSON: No.

THE COURT: Okay. And is there a reasonable probably of the jury reaching a verdict within a reasonable time as to any of the counts?

JURY FOREPERSON: Yes.

8RP at 1128-29.

Approximately sixteen minutes later, the court brought the jury out again.

THE COURT: Okay. You may be seated. The jurors are all present. And again, I ask the foreperson, do you have—reached a verdict on some counts?

JURY FOREPERSON: We have.

THE COURT: And have you signed those verdict forms related to those counts you have agreed upon?

JURY FOREPERSON: Yes.

THE COURT: And you have not been able to reach an agreement on the remaining counts?

JURY FOREPERSON: Correct.

THE COURT: Okay. If you will hand the verdict forms to the bailiff.

8RP at 1130-31.

The court then accepted the jury's guilty verdicts on Count 1, first degree robbery, and Count 4, attempting to elude a police vehicle. 8RP at 1131-34. After accepting this verdict, the judge excused the jury:

THE COURT: Okay. With that I do want to thank sincerely the dedication and the work done by the jurors in reaching this determination. I respect that. You are now discharged.

8RP at 1134. The verdict forms for Counts 2 and 3 were left blank. CP 73, 74.

The judge did not ask Mr. Youngblood, his counsel, or the prosecuting attorney if they agreed to discharge the jury. 8RP at 1134. The court did not make any findings relating to his decision to discharge the jury, and did not formally declare a mistrial. 8RP at 1134. The State refiled Counts 2 and 3 and Youngblood waived speedy trial on March 31, 2009. CP 91. Mr. Youngblood and Mr. Ferguson went to trial a second time, three months after the first jury was discharged.

The jury returned a verdict of guilty to the charges of first degree kidnapping as to both on May 22, 2009. CP 127, 128, 129, 130.

The matter came on for sentencing on August 7, 2009. The court

sentenced Mr. Youngblood within the standard range. 11RP at 1801-08; CP 160.

Timely notice of appeal by the defense was filed on August 28, 2009. CP 174. This appeal follows.

**2. First trial testimony:**

Two men wearing hats with eyeholes cut in them entered a Shari's Restaurant in Vancouver, Washington at approximately 5 a.m. on May 21, 2008. 2Report of Proceedings [RP] at 116, 119, 143.<sup>3</sup> Once inside the restaurant, the men directed two restaurant employees—Javier Rivera and pie maker Roberta Damewood—to move from the kitchen area to another part of the restaurant where the mops are kept, and for both of them to lie on the floor. 2RP at 120, 121, 122, 123, 143, 148. In the mop room, Ms. Damewood hid her cell phone under some mops. 2RP at 123. Ms. Damewood testified that she did not see a gun. 2RP at 130, 132, 135, 139. After five to ten minutes, when it was quiet, she retrieved her phone and called 911. 2RP at 124, 126. Mr. Rivera also testified that he did not see

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<sup>3</sup>The Verbatim Report of Proceedings consists of thirteen volumes:

1RP February 10, 2009, jury trial (morning);  
2RP February 10, 2009, jury trial; (afternoon);  
3RP February 11, 2009, jury trial (morning);  
4RP February 11, 2009, jury trial (afternoon);  
5RP February 12, 2009, jury trial;  
6RP February 17, 2009, jury trial;  
7RP February 18, 2009, jury trial;  
8RP February 19, 20, 2009, jury trial, April 21, 2009, motion hearing;  
9RP May 19, 2009, second jury trial;  
10RP May 20, 2009, second jury trial;  
11RP May 21, 2009, second jury trial, August 7, 2009, sentencing.  
RP February 9, 2009 (voir dire, first trial); and  
RP May 18, 2009 (voir dire, second trial)

a gun. 2RP at 145, 146. Mr. Rivera stated that the man was wearing gloves but he could see a little bit of his forearms and that his skin was "brownish, dark, black." 2RP at 153.

One of the men directed Shari's employee Regina Bridges to go to the cash register and open the till. 2RP at 168. She stated that he was wearing a hoody over a grayish stocking cap with eyeholes cut in it, and that he pointed a handgun at her. 2RP at 167, 168. She stated that she saw the other man and that he also was wearing a hoody with the hood portion over his head, had a cap pulled over his face with eyeholes in it, and that he was standing behind Mr. Rivera holding a gun. 2RP at 170. Ms. Bridges opened the till using a magnetic swipe card and after she did so, the man took money from the register and put it in his pocket. 2RP at 173, 174. After taking the money, both men went out the front door. 1RP at 65-66. Ms. Bridges stated that the man who had her open the till was wearing white knit cotton gardening gloves with blue piping. 2RP at 196.

Jason Godsil and his wife walked into the restaurant as the two men ran past them out the door. 1RP at 65-66. Mr. Godsil had seen a black Lincoln Town Car idling in the parking lot by the door as he entered the restaurant. 1RP at 65. He went out of the restaurant and saw the car drive slowly out of the parking lot and down 164<sup>th</sup> Street toward Highway 14. 1RP at 69. Ms. Bridges called 911 and said that she thought the men were African American. 2RP at 178, 179.

While traveling southbound on Interstate 205 at 4:58 a.m. on May

21, 2008, Neil Martin of the Vancouver Police Department saw a black Lincoln Town Car going northbound on the interstate. 1RP at 11. He radioed that he has seen a Town Car heading northbound, and police were positioned where I-205 merges with I-5. 4RP at 401. Deputy Thomas Yoder and several other police units followed the car, which was travelling at normal speed on northbound I-5 until they reached the Ridgefield exit, at which time Deputy Yoder activated his overhead lights. 4RP at 403, 404. The Town Car exited the freeway at the Ridgefield exit and went into the Tri Mountain Shopping Plaza and turned around. 4RP at 405, 407, 466. Det. Thomas Mitchum was standing with his gun drawn in the area between the parking lot and the roadway, and was able to see the driver, whom he identified as Mr. Ferguson. 4RP at 409, 469, 473, 474. The car did not stop and went around the police car, which Det. Mitchum described as being parked in a "semi-roadblock." 4RP at 469, 472. After the car left the Tri Mountain parking lot, Deputy Yoder saw an object tossed from the car, which was later identified as a gun wrapped inside a gray hat with eyeholes cut in it. 4RP at 410, 441.

After leaving the parking lot, the car reentered the freeway headed northbound and increased its speed to 100 or 110 miles per hour with several units following it. 4RP at 413, 414, 417.

Continuing northbound into Cowlitz County, the car hit a spike strip deployed by officers. 4RP at 418. The car exited into Longview when several of its tires degraded and broke up. 4RP at 418, 420. The

car continued onto Highway 432 and went through three red lights. 4RP at 420. The car hit a traffic median at the intersection of Oregon Way and 15<sup>th</sup> Avenue and came to a stop. 4RP at 420. Deputy Yoder saw three African American males get out of the car and run down 15<sup>th</sup> Avenue. 4RP at 423. Mr. Fitzpatrick was taken into custody by Deputy Jeremy Koch, who stated that Mr. Fitzpatrick was breathing hard. 4RP at 515, 533. Mr. Youngblood was arrested by Officer Tim Deisher and was found with a black hat with eyeholes cut in it, and currency in his pocket. 4RP at 546. Police found a roll of coins under him after he was arrested. 4RP at 489, 493, 546. Mr. Youngblood was determined to be a possible contributor of DNA found on the black hat. 5RP at 670, 671. Police found Mr. Ferguson behind a couch on the porch of a house. 5RP at 575.

Inside the Town Car police found a pair of white gloves with blue piping and a roll of pennies. 5RP at 591, 597.

**3. Second trial testimony:**

Mr. Rivera testified that early in the morning of May 21, 2008, while he was in the kitchen of Shari's, he turned around and was grabbed by a person, and saw another person pointing a handgun at him. Both were wearing masks. 9RP at 1207, 1208, 1220. The man who had grabbed him took him to the back of the restaurant near the icemaker, where saw Roberta Damewood. The man then took both of them to the room where they keep the cleaning equipment. 9RP at 1209. He stated that the man was wearing a mask and that he could not see his face, but

that his skin was "dark." 9RP at 1210, 1211, 1219. After approximately thirty seconds the man grabbed him and made him lie face down on the floor. 9RP at 1214, 1215. While on the floor he took his wallet and put it under some mops in the room. 9RP at 1233, 1234. The man with the gun stayed in the front of the restaurant. 9RP at 1212. After about two minutes it was quiet and Ms. Damewood got up from the floor, and both of them went toward the front cash register. 9RP at 1217, 1218.

Mr. Rivera said that he did not remember his testimony from the first trial when he said that he saw a person pointing something at him, but he did not know what it was. 9RP at 1245, 1246. Mr. Rivera said that he was untruthful during the first trial because he "was afraid." 9RP at 1247. He stated that he was afraid

[b]ecause you don't know if the person who you're testifying against has family members, have friends that can come after you and hurt you or hurt your family. I go to work at night, and my children go to school by themselves. One time they stay home at --- alone for a short period of time. And I do have to go to work to support them.

9RP at 1256.

He stated that no one had bothered him since he testified at the first trial. 9RP at 1259-60.

Regina Bridges testified that while making coffee at Shari's on May 21, 2008, she saw a man come into the restaurant wearing a silver-grayish stocking hat with eyeholes cut in it, and with a hoody pulled over

the hat. 9RP at 1274, 1275. She said that he had brown, tan, or dark brown skin. 9RP at 1276. He walked up to her and she saw he had a gun which he pointed at her. 9RP at 1275, 1276. He took her back into the kitchen, and she saw another man standing behind Mr. Rivera. 9RP at 1277, 1278. The two men spoke to each other and then the man took her from the kitchen area to the cash register. 9RP at 1280. She told him that he had to use her card to open the register, and he said to "do it." 9RP at 1280. She opened the register and then he took money from the till and put it in his pocket. 9RP at 1280. She said that he was wearing white gardening gloves with blue piping around the wrists. 9RP at 1280. He then said "let's roll" to the other man in the kitchen, who walked toward the pass-through and said "what?" The man said "let's roll" a second time and they both ran out the door. 9RP at 1282, 1283. Ms. Bridges then called 911. 9RP at 1284, 1286-1291. She stated that a hat and gloves entered as exhibits by the State were worn by the man in the restaurant. 9RP at 1292-94. A hat entered as an exhibit contained DNA that included Mr. Youngblood as a possible contributor. 11RP at 1612. Ms.

Damewood said while in the restaurant the morning of May 21, 2008, a man entered the restaurant wearing a mask told her to "go this way" and she went to the mop room with Mr. Rivera behind her. 9RP at 1321. He asked if they had anything on them and she said "no." 9RP at 1323. Ms. Damewood had a cell phone which she threw in a corner when the man stepped away. 9RP at 1323. The man returned and asked if they had a

cell phone and she said "no," and then he left again. 9RP at 1323. He returned a third time and told her to get down on the floor and told Mr. Rivera to come with him. 9RP at 1324. She got down on the floor on her hands and knees. 9RP at 1324. The man told Mr. Rivera to get down on the floor which he did. 9RP at 1325-26. Ms. Damewood heard noises and then called 911 using her cell phone. 9RP at 1326, 1335-38. She did not see a gun held by either man. 9RP at 1344.

#### D. ARGUMENT

4. **THE TWO COUNTS OF KIDNAPPING WERE INCIDENTAL TO THE ROBBERY AND THEREFORE THE STATE PRESENTED INSUFFICIENT EVIDENCE OF KIDNAPPING, AND THE SEPARATE CONVICTIONS VIOLATE MR. YOUNGBLOOD'S RIGHT TO DUE PROCESS OF LAW.**

Mr. Youngblood's first degree robbery conviction rested on the State's contention that he or an accomplice displayed and threatened use of a firearm. CP 1. Likewise, the kidnapping convictions rested on his intent to facilitate the commission of first degree robbery. CP 1-2.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996).

Evidence is sufficient to support a conviction only if, viewing the

evidence in the light most favorable to the prosecution, a rational trier of fact could find each of the elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be reasonably 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).

In the present case, the use of a firearm elevated both offenses: the robbery would not be a first degree robbery without it and the kidnapping would not be a first degree kidnapping without the intent to commit first degree robbery. CP 1-2. The robbery and kidnapping offenses require intentional restraint, and necessitate the same proof. Accordingly, kidnapping was incidental to the robbery and no separate conviction may be imposed and enforced for kidnapping under *State v. Korum* and *In re Pers. Restraint of Bybee*, *infra*.

In *Korum*, 120 Wn.App. 686, 703, 86 P.3d 166 (2004), rev'd on other grounds, 157 Wn.2d 614 (2006), the Court dismissed kidnapping offenses on the grounds they were incidental to robbery. In *Bybee*, 142 Wn.App. 260, 266, 175 P.3d 589 (2007), the Court found that as a matter of law, there was "insufficient evidence to prove kidnappings independent of and with a different purpose than the robberies." *Bybee*, 142 Wn.App.

at 266; *Korum*, 120 Wn.App. at 707.

As charged in the case at bar, the essential elements of first degree kidnapping are intentional abduction “with intent to facilitate commission of any felony or flight thereafter.” CP 1-2; RCW 9A.40.020(1).

“Restrain” is defined in RCW 9A.40.010(1) as “to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty.” Restraint is committed “without consent” if it is “accomplished by . . . physical force, intimidation, or deception . . . .” RCW 9A.40.010(1).

“Abduct” is “to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force.” RCW 9A.40.010(2).

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), *aff'd* 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. Furthermore, this substantial interference with a person's freedom of movement must

not be incidental to the commission of another crime. *Green*, 94 Wn.2d at 227; *Korum*, 120 Wn.App. at 707.

Kidnapping is a serious offense, contemplating serious conduct as its cause, and requires more than interference with a person. *Robinson*, 20 Wn.App. at 884-85. In cases where kidnapping is incidental to another offense, there may be insufficient evidence to prove a separate kidnapping offense. *In re Bybee*, 142 Wn.App. at 265-67. Here, the first degree kidnapping counts were incidental to the robbery and no separate conviction may be imposed and enforced.

The offense of first degree kidnapping involves more than merely moving or holding a person incidental to the commission of another crime. 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*, 94 Wn.2d 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*, the defendant picked up his victim, stabbed her, and then carried her to another part of a building. *Id.* at 226. The *Green* 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. “ *Id.* 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 means of committing another crime. *Id.*

Mr. Youngblood submits that this case is controlled by *Korum*. In that case, 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, again at gunpoint. *Korum*, 120 Wn.App. at 690-91. In another robbery, the defendants tied up seven people with wrist restraints and duct tape at gunpoint. *Id.* at 691.

The *Korum* Court found the restraint, abduction, and use of force “incidental” to the robberies. *Id.* 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 far longer than it took to complete the robberies; and the restraint did not raise a separate and distinct injury.

Similarly, in Mr. Youngblood’s case, the purpose and extent of the movement of Ms. Damewood and Mr. Rivera was to accomplish the

robbery. Nether was restrained by handcuffs or ties, as shown by Ms. Damewood who used a hidden cell phone and called the police, and Mr. Rivera, who was able to extract his wallet and hide it under some mops. Both got up from the floor after a few minutes when it was quiet and went to the front of the restaurant.

As recognized in *Korum* and *Green*, kidnapping may come 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*, 120 Wn.App. at 705. Mr. Youngblood's kidnapping convictions are incidental to the robbery conviction. Where kidnapping is incidental to robbery, the kidnapping must be dismissed. *Korum*, 120 Wn.App. at 707.

2. **MR. YOUNGBLOOD'S KIDNAPPING CONVICTIONS VIOLATED HIS CONSTITUTIONAL RIGHT NOT TO BE TWICE PUT IN JEOPARDY FOR THE SAME OFFENSE.**

The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. Amend. V. A similar prohibition is set forth in Article I, Section 9 of the Washington Constitution. Wash. Const. Article I, § 9. Both constitutions protect an individual from being held to answer multiple times for the same offense:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

*Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Double jeopardy prevents retrial following an acquittal "even though 'the acquittal was based upon an egregiously erroneous foundation.'" *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978), citing *Fong Foo v. United States*, 369 U.S. 141, 143, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962). The constitutional prohibition against double jeopardy "also embraces the defendant's 'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. at 503, quoting *Wade v. Hunter*, 336 U.S. 684, at 689, 69 S. Ct. 834, 93 L.Ed. 974, (1949) A second prosecution may be grossly unfair, even if the first trial is not completed:

[A second prosecution] increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.

Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

*Arizona v. Washington*, 434 U.S. at 504-05, (footnotes omitted.)

Since discharging the jury inevitably implicates the double jeopardy clause, a trial court's discretion to declare a mistrial is not unbridled. *Arizona v. Washington*, 434 U.S. at 514; *State v. Juarez*, 115 Wn. App. 881, 889, 64 P.3d 83 (2003). Discharge of the jury without first obtaining the accused's consent is equivalent to an acquittal, unless such discharge is necessary to the proper administration of public justice. *Juarez*, at 889. A mistrial frees the accused from further prosecution, unless prompted by "manifest necessity." *Juarez*, at 889. To justify a mistrial, "extraordinary and striking circumstances" must clearly indicate that substantial justice cannot be obtained without discontinuing the trial. *Juarez*, at 889.

If the jury "through its foreman and of its own accord, acknowledges that it is hopelessly deadlocked, there would be a factual basis for discharge if the other jurors agree with the foreman." *State v. Jones*, 97 Wn.2d 159 at 164, 641 P.2d 708 (1982).

Under such circumstances, the court must consider the length of the jury deliberations in light of the length of the trial and the complexity of the issues. *State v. Kirk*, 64 Wn. App. 788 at 793, 828 P.2d 1128

(1992). A mechanical focus on any single factor is insufficient to justify a mistrial and discharge of the jury. *State ex rel. Charles v. Bellingham Mun. Court*, 26 Wn. App. 144 at 148-149, 612 P.2d 427 (1980). Where the trial court discharges a hung jury too quickly, the accused's right to a verdict from that jury is abridged. *Jones*, at 163.

In the present case, neither Mr. Youngblood nor his attorney gave consent for discharge of the first jury in this case. Accordingly, the discharge was equivalent to an acquittal unless supported by "extraordinary and striking circumstances" indicating that substantial justice could not be obtained without discontinuing the trial. *Juarez, supra*, at 889.

First, Judge Nichols did not ask the jurors if they agreed with the presiding juror's claim that the jury was unable to reach a verdict on all the counts. 8RP at 1129. Accordingly, he failed to follow the first requirement set forth in *Jones*—determining whether or not the other jurors agreed with the presiding juror, in order to ascertain whether or not discharge was truly warranted. *Jones*, at 164.

Second, there is no indication that Judge Nichols weighed the minimal "relevant considerations" prior to discharging the jury. *Jones, supra*, at 165.

Third, Judge Nichols did not make the findings required for

discharge of a jury short of verdict. He did not find that discharge of the jury was necessary to the proper administration of public justice, prompted by manifest necessity, or supported by extraordinary and striking circumstances that required discontinuation of the trial to obtain substantial justice. *Juarez* at 889.

Fourth, Judge Nichols did not formally declare a mistrial. His failure to do so deprived Mr. Youngblood of the opportunity to object or argue against his decision to discharge the jury.

For all these reasons, Judge Nichols' decision to discharge the jury violated Mr. Youngblood's constitutional right to receive a verdict from the jury he selected during his first trial. His second trial and conviction on the kidnapping charges violated his constitutional right to the protections of the double jeopardy clause. The convictions for kidnapping must be reversed and the case remanded for a new sentencing hearing. *Jones, supra*.

3. **MR. YOUNGBLOOD'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY DID NOT OBJECT TO TESTIMONY THAT MR. RIVERA WAS AFRAID FOR THE SAFETY OF HIS FAMILY**

- a. **Mr. Youngblood had the constitutional right to effective assistance of counsel.**

Mr. Youngblood's attorney failed to object when Mr. Rivera

testified at the second trial that he was afraid for the safety of his family. When asked by the prosecution why he testified that he did not see a gun at the first trial, but testified at the second trial that he had seen a gun, Mr. Rivera stated that he was afraid. 9RP at 1255. He stated that he was afraid:

[b]ecause you don't know if the person who you're testifying against has family members, have friends that can come after you and hurt you or hurt your family. I go to work at night, and my children go to school by themselves. On a time they stay home at --- alone for a short period of time. And I do have to go to work to support them.

9RP at 1256.

Competent defense counsel would have been aware of the evidence rules and law and voiced an objection to this inadmissible testimony and the prejudicial nature of the evidence presented. Moreover, counsel's deficient performance prejudiced Mr. Youngblood.

Persons accused of crimes have the constitutional right to counsel. U.S. Const. amends. 6, 14; Wash. Const. art. I, §§ 3, 22. Counsel provides a critical role in ensuring a defendant receives due process of law and that the adversarial process is fair. *Strickland v. Washington*, 466 U.S. 558, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The right to counsel necessarily includes the right to effective counsel. *Strickland*, 466 U.S. at 86; *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25

L.Ed.2d 763 (1970); *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302, rev. denied, 90 Wn.2d 1006 (1978).

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in *Strickland*. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under this test, the reviewing court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. *Strickland*, 466 U.S. at 687-88; *Thomas*, 109 Wn.2d at 226. To show prejudice under the second prong, the defendant must demonstrate "counsel's errors were so serious as to deprive the defendant of a fair trial." *Strickland*, 466 U.S. at 698.

**b. Defense counsel's performance was deficient because he did not object to Mr. Rivera's testimony.**

When the accused encourages or threatens a witness not to testify against him, the defendant's actions are admissible because they reveal a consciousness of guilt. *State v. Kosanke*, 23 Wn.2d 211, 215, 160 P.2d 541 (1945); *State v. Moran*, 119 Wn.App. 197, 218-19, 81 P.3d 122 (2003)(defendant's letter to friend calling witness obscene names), rev. denied, 151 Wn.2d 1032 (2004); *State v. McGhee*, 57 Wn.App. 457, 788 P.2d 603 (threat against victim admissible to show both consciousness of

guilt and to tie defendant to victim), *rev. denied*, 115 Wn.2d 1013 (1990). However, mere speculation of threats is not admissible to show the defendant's guilty conscience. In order to be admissible, the actions or statements must be made by the defendant or someone acting at his request or with his knowledge. *Kosanke*, 23 Wn.2d at 215.

Here, the State elicited testimony from Mr. Rivera that he was afraid that the defendants or members of their families would hurt him or his family, and that is why he changed his testimony. Any effort to intimidate Mr. Rivera was not admissible to show Mr. Youngblood's guilt unless the efforts were linked to him. Absolutely no evidence was presented that any defendant had threatened Mr. Rivera. Counsel failed to object to this portion of Mr. Rivera's testimony. Counsel did not cite any cases or prepare a memorandum on this issue. Thus, it appears he was not aware of and certainly had not read the relevant cases on this issue.

Effective defense counsel is expected to understand the case law applicable to important issues at trial. *See Thomas*, 109 Wn.2d at 229 ("A reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on pertinent cases). There can be no tactical reason not to move to exclude the testimony.

**c. Mr. Rivera's fear for his and his family's safety was irrelevant and any relevancy**

**was outweighed by its prejudicial effect.**

Only relevant evidence is admissible in Washington. ER 402; *State v. Kinchen*, 92 Wn.App 442, 452, 963 P.2d 928 (1998). Evidence is relevant if it tends to “make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.” ER 401. Even relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Id.*

Mr. Rivera’s fear for his family’s safety was not relevant to any fact that was of consequence in this case. *See Kinchen*, 92 Wn.App. at 452-53 (inflammatory photographs were not relevant to unlawful imprisonment charges, tended to show defendant bad father, and put him on trial for uncharged crimes).

Evidence of the accused’s character is generally not admissible to prove he acted in conformity with that character. ER 404(a). Similarly, evidence of the defendant’s other misconduct may not be used to demonstrate the defendant is a dangerous person or the type of person who would commit the charged offense. ER 404(b); *State v.*

*Everybodytalksabout*, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). The testimony of Mr. Rivera's fear was improper character evidence, as it implied that Mr. Youngblood was a threatening and dangerous person.

**d. Mr. Youngblood was prejudiced by his attorney's deficient performance.**

Mr. Youngblood's defense was that he was not responsible for or involved in the incident. This was based in substantial part upon the lack of credibility of State's witness Mr. Rivera. Mr. Youngblood's defense was seriously damaged when the State produced testimony that Mr. Rivera was afraid for his family. Defense counsel's failure to object to this evidence was highly prejudicial to his client's case. Because defense counsel did not move to suppress the testimony, or ask for a mistrial once the testimony came in, the jury was free to speculate that Mr. Youngblood or a member of his family created fear in Mr. Rivera as substantive evidence against Mr. Youngblood.

Mr. Youngblood's convictions for kidnapping must be reversed.

*Thomas*, 109 Wn.2d at 232.

**4. REVERSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS OF ACCOMPLICE LIABILITY FOR THE OFFENSE OF ATTEMPTING TO ELUDE A PURSUING POLICE VEHICLE**

Under the due process clauses of the state and federal

constitutions, defendants are entitled to be free from conviction upon anything less than constitutionally sufficient evidence. *See State v. Sandstrom*, 442 U.S. 510, 99 S. Ct. 50, 61 L. Ed. 2d 39 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). If the prosecution fails to present such evidence on every essential element of the crime, reversal and dismissal is required. *See State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In this case, this Court should reverse and dismiss the conviction for attempting to elude a pursuing police vehicle because the prosecution failed to present constitutionally sufficient evidence to prove that Mr. Youngblood acted as accomplice. Even viewing the evidence in the light most favorable to the State, there is insufficient evidence that Mr. Youngblood committed the offense. It is uncontroverted that Deputy Mitchum identified Mr. Ferguson as the driver of the car. Moreover, there is no evidence in the record that Mr. Youngblood in any way assisted, encouraged, commanded or otherwise aided Mr. Ferguson when he failed to stop after the car reentered the freeway after leaving the Tri Mountain Shopping Plaza and the time the car was wrecked in Longview. Due to the absence of any evidence that Mr. Youngblood was an

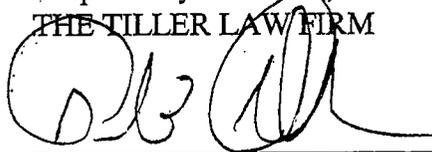
accomplice to the offense, the conviction must be dismissed.

**F. CONCLUSION**

Based on the above, Albert Youngblood respectfully asks this Court to dismiss the conviction for attempting to elude a pursuing police vehicle, and to dismiss the kidnapping convictions as incidental to the robbery and contrary to the prohibition against double jeopardy, or in the alternative, grant him a new trial on the charges of kidnapping.

DATED: June 24, 2010.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P. B. Tiller', is written over a horizontal line. The signature is stylized and cursive.

PETER B. TILLER-WSBA 20835  
Of Attorneys for Albert Youngblood

EXHIBIT A

STATUTES

**RCW 9A.40.010**

Definitions.

The following definitions apply in this chapter:

(1) "Restrain" means to restrict a person's movements without consent and without legal authority in a manner which interferes substantially with his liberty. Restraint is "without consent" if it is accomplished by (a) physical force, intimidation, or deception, or (b) any means including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and if the parent, guardian, or other person or institution having lawful control or custody of him has not acquiesced.

(2) "Abduct" means to restrain a person by either (a) secreting or holding him in a place where he is not likely to be found, or (b) using or threatening to use deadly force;

(3) "Relative" means an ancestor, descendant, or sibling, including a relative of the same degree through marriage or adoption, or a spouse.

**RCW 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.

***RCW 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.

***RCW 9.94A.533***

Adjustments to standard sentences.

(1) The provisions of this section apply to the standard sentence ranges determined by RCW 9.94A.510 or 9.94A.517.

(2) For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by

seventy-five percent.

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. If the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any firearm enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(a) Five years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Eighteen months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced for any firearm enhancements under (a), (b), and/or (c) of this subsection and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (4)(a), (b), and/or (c) of this section, or both, all firearm enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all firearm

enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under \*RCW 9.94A.728(4);

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a firearm enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(4) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any deadly weapon enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the deadly weapon enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a deadly weapon enhancement. If the offender or an accomplice was armed with a deadly weapon other than a firearm as defined in RCW 9.41.010 and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection as eligible for any deadly weapon enhancements, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW

9A.28.020:

(a) Two years for any felony defined under any law as a class A felony or with a statutory maximum sentence of at least twenty years, or both, and not covered under (f) of this subsection;

(b) One year for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

(c) Six months for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both, and not covered under (f) of this subsection;

(d) If the offender is being sentenced under (a), (b), and/or (c) of this subsection for any deadly weapon enhancements and the offender has previously been sentenced for any deadly weapon enhancements after July 23, 1995, under (a), (b), and/or (c) of this subsection or subsection (3)(a), (b), and/or (c) of this section, or both, all deadly weapon enhancements under this subsection shall be twice the amount of the enhancement listed;

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under \*RCW 9.94A.728(4);

(f) The deadly weapon enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun in a felony;

(g) If the standard sentence range under this section exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a

persistent offender. If the addition of a deadly weapon enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced.

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2) (a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2) (c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or \*\*9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(7) An additional two years shall be added to the standard sentence range for vehicular homicide committed while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502 for each prior offense as defined in RCW 46.61.5055.

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. If the offender committed the offense with sexual motivation and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section based on the felony crime of conviction as classified under RCW 9A.28.020:

(i) Two years for any felony defined under the law as a class A felony or with a statutory maximum sentence of at least twenty years, or both;

(ii) Eighteen months for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both;

(iii) One year for any felony defined under any law as a class C felony or with a statutory maximum sentence of five years, or both;

(iv) If the offender is being sentenced for any sexual motivation enhancements under (i), (ii), and/or (iii) of this subsection and the offender has previously been sentenced for any sexual motivation enhancements on or after July 1, 2006, under (i), (ii), and/or (iii) of this subsection, all sexual motivation enhancements under this subsection shall be twice the amount of the enhancement listed;

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements, for all offenses sentenced under this chapter. However, whether or not a mandatory minimum term has expired, an offender serving a sentence under this subsection may be granted an extraordinary medical placement when authorized under \*RCW 9.94A.728(4);

(c) The sexual motivation enhancements in this subsection apply to all felony crimes;

(d) If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence unless the offender is a persistent offender. If the addition of a sexual motivation enhancement increases the sentence so that it would exceed the statutory maximum for the offense, the portion of the sentence representing the enhancement may not be reduced;

(e) The portion of the total confinement sentence which the offender must serve under this subsection shall be calculated before any earned early release time is credited to the offender;

(f) Nothing in this subsection prevents a sentencing court from imposing a sentence outside the standard sentence range pursuant to RCW 9.94A.535.

(9) An additional one-year enhancement shall be added to the standard sentence range for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089 committed on or after July 22, 2007, if the offender engaged, agreed, or offered to engage the victim in the sexual conduct in return for a fee. If the offender is being sentenced for more than one offense, the one-year enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to the enhancement. If the offender is being sentenced for an anticipatory offense for the felony crimes of RCW 9A.44.073, 9A.44.076, 9A.44.079, 9A.44.083, 9A.44.086, or 9A.44.089, and the offender attempted, solicited another, or conspired to engage, agree, or offer to engage the victim in the sexual conduct in return for a fee, an additional one-year enhancement shall be added to the standard sentence range determined under subsection (2) of this section. For purposes of this subsection, "sexual conduct" means sexual intercourse or sexual contact, both as defined in chapter 9A.44 RCW.

(10)(a) For a person age eighteen or older convicted of any criminal street gang-related felony offense for which the person compensated, threatened, or solicited a minor in order to involve the minor in the

commission of the felony offense, the standard sentence range is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the completed crime, and multiplying the range by one hundred twenty-five percent. If the standard sentence range under this subsection exceeds the statutory maximum sentence for the offense, the statutory maximum sentence is the presumptive sentence unless the offender is a persistent offender.

(b) This subsection does not apply to any criminal street gang-related felony offense for which involving a minor in the commission of the felony offense is an element of the offense.

(c) The increased penalty specified in (a) of this subsection is unavailable in the event that the prosecution gives notice that it will seek an exceptional sentence based on an aggravating factor under RCW 9.94A.535.

(11) An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834.

(12) An additional twelve months shall be added to the standard sentence range for an offense that is also a violation of RCW 9.94A.831.

***RCW 46.61.024***

Attempting to elude police vehicle — Defense — License revocation.

(1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a

reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

(2) It is an affirmative defense to this section which must be established by a preponderance of the evidence that: (a) A reasonable person would not believe that the signal to stop was given by a police officer; and (b) driving after the signal to stop was reasonable under the circumstances.

(3) The license or permit to drive or any nonresident driving privilege of a person convicted of a violation of this section shall be revoked by the department of licensing.

EXHIBIT B

DATE: 2/20/09

TIME: 12:00

Do not disclose any information or state how the jury has voted.

FILED

FEB 20 2009

Sherry W. Parker, Clerk, Clerk C

08-1-00819-3

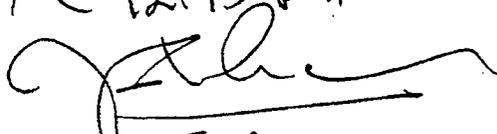
**JURY QUESTION**

If we are unable to come to an agreement on a portion of the charges, while agreeing on other portions, what do we do?

Are we hung or do we have to continue deliberating until we agree?

You will be brought back into the courtroom for further instructions. In the meantime continue to deliberate while the parties are notified.

Feb. 20, 2009 @ 12:15 pm

  
Judge

  
FOREMAN/PRESIDING JUROR

63 (RK)

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COURT OF APPEALS

10 JUN 25 PM 1:12

STAI. DIVISION

BY \_\_\_\_\_  
IDENTITY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ALBERT JAMAL  
YOUNGBLOOD,

Appellant.

COURT OF APPEALS NO.  
39721-8-II

CLARK COUNTY CAUSE  
NO. 08-1-00819-3

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Albert J. Youngblood, Appellant, and Michael Kinnie, Deputy Prosecutor, by first class mail, postage pre-paid on June 24, 2010, at the Centralia, Washington post office addressed as follows:

Mr. Michael C. Kinnie  
Clark County Deputy Prosecutor  
P.O. Box 5000  
Vancouver, WA 98666

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

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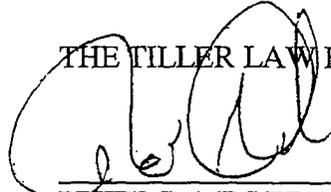
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**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE - P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828

Mr. Albert Jamal Youngblood  
DOC #333592  
W.S.P.  
1313 N. 13<sup>th</sup> Avenue  
Walla Walla, WA 99362-1065

DATED: June 24, 2010.

THE TILLER LAW FIRM



PETER B. TILLER - WSBA #20835  
Of Attorneys for Appellant

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MAILING

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**THE TILLER LAW FIRM**  
ATTORNEYS AT LAW  
ROCK & PINE - P.O. BOX 58  
CENTRALIA, WASHINGTON 98531  
TELEPHONE (360) 736-9301  
FACSIMILE (360) 736-5828