IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	DIVISION ONE
	)	
Respondent,	)	No. 66707-6-I
	)	
v.	)	
	)	
DARIN JEROME GATSON,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	FILED: August 6, 2012
_____	)	

Dwyer, J. — Darin Gatson appeals from his convictions of second degree burglary, possession of a stolen vehicle, and attempting to elude a pursuing police vehicle arising from an incident in which Gatson unlawfully entered the sales office of a car dealership, obtained the keys to a Jeep Wrangler, and thereafter led police on a high speed chase. Gatson asserts that the admission of fingerprint evidence at his trial violated Washington's standard for the admissibility of scientific evidence and, in addition, that the trial court erred by determining that he had used a motor vehicle to commit the felony of possession of a stolen vehicle. He further contends that the trial court erred by granting three continuances pursuant to CrR 3.3 and that the resulting delay violated his constitutional rights to a speedy trial. Determining these contentions to be

without merit, we affirm.

I

On August 29, 2010, at approximately 4:30 a.m., George Ponylite observed a Jeep Wrangler on a car dealership lot with its engine running. A person inside the vehicle waved at Ponylite and then began to drive the Wrangler off of the lot. The vehicle backed up over a curb, "bounced over" a left-hand turn divider, and proceeded in a northerly direction. Suspecting that a crime was in progress, Ponylite immediately contacted the police.

The police located the Wrangler within minutes. Officer Nathaniel Rossi signaled for the vehicle to stop. Instead, the Wrangler accelerated, fleeing at speeds of up to 85 miles per hour. The driver failed to stop even after encountering several police-laid spike strips, which severely damaged the front left tire of the vehicle. After the Wrangler ran a red light and nearly collided with two other vehicles, the police decided to terminate the pursuit.

The police thereafter relocated the vehicle near a highway on-ramp, where it had collided with a light post. The key was still in the ignition but the driver was gone. The police used a K-9 to search the surrounding area. The K-9 led the police to Darin Gatson, who was hiding beneath a bush approximately one block away from the scene of the crash.

Gatson denied that he had taken the Wrangler. He claimed that he was homeless and had been sleeping under the bush. The police discovered the key

to a different vehicle in Gatson's pocket. This key was later determined to fit the ignition of a Jeep Cherokee belonging to the same dealership from which the Wrangler had been stolen.[1] Both the Wrangler key and the Cherokee key were normally stored on a board located within the dealership's sales office.[2] In addition, two latent fingerprints were recovered from inside the stolen Wrangler that matched those of Gatson.

Gatson was thereafter charged by amended information with attempting to elude a pursuing police vehicle (count one), possession of a stolen vehicle (count two), and second degree burglary (count three). He waived his right to a jury trial. Following a bench trial, Gatson was convicted as charged. In addition, the trial court determined that Gatson had "used" a motor vehicle to commit the crimes of eluding a pursuing police vehicle and possession of a stolen vehicle, thus requiring the Department of Licensing to revoke Gatson's driver's license for one year.

Gatson appeals.

II

Gatson first contends that the State's fingerprint evidence should have been excluded at trial because it did not meet Washington's standard for the admissibility of scientific evidence. In the trial court, however, Gatson neither moved to exclude this evidence nor argued that the methodology underlying

[1] The Cherokee could not be started because it had a dead battery.

[2] Although the office showed no signs of forced entry, the police determined that the installation of an air conditioning unit had left room for a person outside the office to reach inside and unlock the door.

fingerprint evidence is not generally accepted within the scientific community. Accordingly, he is not entitled to appellate review of this issue.

In determining the admissibility of evidence based upon novel scientific theories or methods, Washington courts employ the "general acceptance" standard set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). State v. Copeland, 130 Wn.2d 244, 922 P.2d 1304 (1996). "The Frye standard requires a trial court to determine whether a scientific theory or principle 'has achieved general acceptance in the relevant scientific community' before admitting it into evidence." In re Det. of Thorell, 149 Wn.2d 724, 754, 72 P.3d 708 (2003) (internal quotation marks omitted) (quoting In re Pers. Restraint of Young, 122 Wn.2d 1, 56, 857 P.2d 989 (1993)). "Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under ER 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier or fact." State v. Gregory, 158 Wn.2d 759, 829-30, 147 P.3d 1201 (2006).

"When a party fails to raise a Frye argument below, a reviewing court need not consider it on appeal." In re Det. of Taylor, 132 Wn. App. 827, 836, 134 P.3d 254 (2006). "Error may not be predicated upon a ruling which admits . . . evidence unless . . . a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the

context." ER 103(a)(1). A defendant may not couch the failure to raise an evidentiary challenge to scientific evidence as a question of constitutional significance on appeal. In re Det. of Post, 145 Wn. App. 728, 755-56, 187 P.3d 803 (2008) ("Post attempts to sidestep the fact that he did not seek a Frye hearing in the trial court, and, thus, has not preserved an evidentiary challenge for review" (footnote omitted)), aff'd, 170 Wn.2d 302, 241 P.3d 1234 (2010). Moreover, particularly where evidence is based upon a routinely used and "familiar forensic technique," an objection to that evidence must be sufficiently specific to inform the trial court that a Frye challenge is intended. State v. Wilbur-Bobb, 134 Wn. App. 627, 634, 141 P.3d 665 (2006); see also State v. Newbern, 95 Wn. App. 277, 288-89, 975 P.2d 1041 (1999) (declining to review Frye issue on appeal where the defendant did not invoke Frye or otherwise argue that the methodology employed was not accepted within the relevant scientific community).

Here, Gatson did not object to the admission of the fingerprint evidence or request a Frye hearing at trial. He did not contest the proposition that the methodology underlying fingerprint evidence is generally accepted in the relevant scientific community, even when the State's expert testified that his technique and analysis were "accepted in the scientific field." Indeed, Gatson raised no objection either during or before the start of the expert's testimony. Instead, Gatson waited until closing argument to argue that the fingerprint

evidence against him was entitled to no weight and that, even "if the court does put weight into that evidence," it was inadequate to establish his presence in the stolen vehicle.

This argument was insufficient to preserve a Frye issue for appeal. It was neither an objection nor a motion to strike. It was not timely.[3] Nor was it sufficiently specific to apprise the trial court that a Frye challenge was intended. Fingerprint analysis is, of course, a "familiar forensic technique" that is routinely the subject of expert testimony in our trial courts. Wilbur-Bobb, 134 Wn. App. at 634. Because Gatson did not interpose a proper objection to the admission of the fingerprint evidence, he is not entitled to appellate review of this issue.

III

Gatson next contends that the trial court erred by determining that he used a motor vehicle to commit the crime of possession of a stolen vehicle and that, accordingly, the one year revocation of his driver's license pursuant to RCW 46.20.285 was improper. We disagree.

RCW 46.20.285(4) requires the revocation of the driver's license of any person who uses a motor vehicle in the commission of a felony.[4] The statute does not define the term "use," but we have previously relied on the plain and ordinary meaning of this word in determining that, in order for RCW 46.20.285(4) to apply, a vehicle must have been employed in accomplishing the crime. State

[3] Gatson asserts that, because his trial was a bench trial, he was not required to lodge a timely objection to the admission of this evidence. We reject the assertion that the rules of evidence do not apply in a bench trial.

[4] Possession of a stolen motor vehicle is a class B felony. RCW 9A.56.068.

v. Batten, 95 Wn. App. 127, 129-30, 974 P.2d 879 (1999), aff'd, 140 Wn.2d 362, 997 P.2d 350 (2000). The test is whether the felony had some reasonable relationship to the operation of a motor vehicle, or whether use of a motor vehicle contributed in some reasonable degree to the commission of the felony. State v. B.E.K., 141 Wn. App. 742, 746, 172 P.3d 365 (2007) (citing Batten, 140 Wn.2d at 365).

RCW 46.20.285(4) applies even where the vehicle is both the object and the instrumentality of the offense.[5] State v. Dykstra, 127 Wn. App. 1, 12, 110 P.3d 758 (2005). As has been recently explained, "[a]lthough it is possible to take a car without using it (as when, for example, a tow truck is employed)," where the car is used "to accomplish the crime of taking or riding in a motor vehicle without the owner's permission," such facts describe conduct within the ambit of RCW 46.20.285(4). State v. Dupuis, __ Wn. App. __, 278 P.3d 683, 686 (2012). Similarly, we have held that a defendant "used" a stolen car to commit the crime of possession of a stolen vehicle when he drove the vehicle to the state patrol office and attempted to relicense it. State v. Javier Contreras, 162 Wn. App. 540, 547, 254 P.3d 214, review denied, 172 Wn.2d 1026 (2011).

Javier Contreras and Dupuis control the disposition of this issue. The Jeep Wrangler was both the object and instrumentality of the crime. Gatson "used" the vehicle to transport the stolen Wrangler from the car dealership lot,

[5] We review the application of a statute to a specific set of facts de novo. State v. Dupuis, ___Wn. App. ___, 278 P.3d 683, 684 (2012).

thus obtaining possession. Gatson's use of the vehicle contributed "in some reasonable degree" to the commission of the felony. B.E.K., 141 Wn. App. at 746. The trial court correctly ruled that RCW 46.20.285(4) was applicable.

IV

Gatson next contends that the three and one-half month delay between his arrest and the commencement of his trial violated his speedy trial rights under the state and federal constitutions. We disagree.

Both the United States Constitution and the Washington Constitution provide a criminal defendant with the right to a speedy public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22. Our state constitution "requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights." State v. Iniguez, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). Where a defendant claims the denial of constitutional speedy trial rights, our review is de novo. Iniguez, 167 Wn.2d at 280.

The defendant's constitutional rights to a speedy trial attach when a charge is filed or an arrest is made, whichever occurs first. State v. Corrado, 94 Wn. App. 228, 232, 972 P.2d 515 (1999). Some pretrial delay is often "inevitable and wholly justifiable," Doggett v. United States, 505 U.S. 647, 656, 112 S. Ct. 2686, 120 L. Ed. 2d 520 (1992), and any "inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case." Barker v. Wingo, 407 U.S. 514, 522, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). Accordingly, our Supreme Court has adopted "an ad hoc balancing test that examines the conduct of both the State and the defendant to determine

whether speedy trial rights have been denied." Iniguez, 167 Wn.2d at 283. As first articulated by the United States Supreme Court in Barker, to be considered are: (1) the length of pretrial delay, (2) the reason for delay, (3) the defendant's assertion of his or her right, and (4) prejudice to the defendant. 407 U.S. at 530.

In order to trigger such an analysis, however, a defendant must first demonstrate that the "interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." Doggett, 505 U.S. at 651-52 (quoting Barker, 407 U.S. at 530-31). The length of delay that requires us to assess the other Barker factors is "dependent upon the peculiar circumstances of the case." Barker, 407 U.S. at 530-31. In determining whether the length of delay crosses "a line from ordinary to presumptively prejudicial," Iniguez, 167 Wn.2d at 283, reviewing courts have considered the duration of pretrial custody, the complexity of the charges, and the extent to which a case involves a reliance on eyewitness testimony. Iniguez, 167 Wn.2d at 292 (citing Barker, 407 U.S. at 531).

Here, Gatson has not established that the time between his arrest and trial was presumptively prejudicial and, accordingly, no further analysis is necessary. The relevant time period is from the date of Gatson's arrest (August 29, 2010) to the commencement of his trial (December 13, 2010)—a total of 106 days or approximately three and one-half months. Gatson points to no authority indicating that so short a delay should be deemed presumptively prejudicial.

See, e.g., United States v. Sprouts, 282 F.3d 1037, 1043 (8th Cir. 2002) (holding four-month period between indictment and trial on an escape charge was not presumptively prejudicial); United States v. McFarland, 116 F.3d 316, 318 (8th Cir.1997) (determining that lapse of "a little over seven months" between indictment and trial was "too brief a delay to trigger review of . . . Sixth Amendment speedy trial claim"); United States v. Nance, 666 F.2d 353, 360 (9th Cir. 1982) (finding no presumptive prejudice based on five-month delay); cf. Doggett, 505 U.S. at 652 n.1 (noting that lower courts have generally found delay approaching one year to be presumptively prejudicial).

In Iniguez—our Supreme Court's most recent decision regarding a defendant's constitutional speedy trial rights—the court found "presumptive prejudice" based upon a delay of more than eight months. 167 Wn.2d at 291-92. In so deciding, the court found it important that (1) the defendant had remained in custody throughout this period, (2) the charges against him were not complex, and (3) such a lengthy delay "could result in witnesses becoming unavailable or their memories fading," thus impairing his defense. Iniguez, 167 Wn.2d at 292. The court took pains to note that this eight-month delay was, however, "just beyond the bare minimum needed to trigger the Barker inquiry." Iniguez, 167 Wn.2d at 293.

In this case, as in Iniguez, Gatson remained in custody pending trial, and the charges against him were not complex. However, in contrast to Iniguez, the

State's case against Gatson rested on circumstantial evidence rather than eyewitness testimony. Accordingly, there was little danger that the three and one-half month delay resulted in witness memory issues or witness availability problems. Moreover, the time period here at issue is less than half that of the eight-month delay at issue in Iniguez. Given that the eight-month delay in that case was "just beyond the bare minimum" sufficient to require further analysis, the three and one-half month delay in this case—which involved both a shorter period of pretrial confinement and lesser reliance on eyewitness testimony—is insufficient to demonstrate presumptive prejudice.

Because the threshold has not been reached, no further analysis of the Barker factors is required.[6] There was no violation of Gatson's speedy trial rights.

V

Gatson finally asserts that the trial court erred by granting a continuance over his personal objection but at the request of his attorney. By court rule, the bringing of such a motion on behalf of a defendant waives any personal objection to the continuance that the defendant may have. Accordingly, appellate relief is not warranted.

[6] Even if such analysis were necessary, an application of the Barker factors reveals no impairment of Gatson's constitutional rights. The length of delay was minimal, the delay was validly justified by defense counsel's unavailability at the time of the scheduled trial, and there is no indication that Gatson's defense was compromised. Although Gatson personally asserted his speedy trial rights, such actions are entitled to no "talismanic" significance—none of the four Barker factors is "either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial." Barker, 407 U.S. at 533. On balance, the totality of the circumstances demonstrates no violation of Gatson's speedy trial rights.

A defendant who is in custody pending trial is entitled to be tried within 60 days of arraignment. CrR 3.3(b)(1)(i), (c)(1). This 60-day time period, however, excludes "[d]elay granted by the court." CrR 3.3(e)(3). Pursuant to CrR 3.3(f)(2), "[o]n motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." The court must "state on the record or in writing the reasons for the continuance." CrR 3.3(f)(2). "If a trial is timely under the language of this rule . . . the pending charge shall not be dismissed unless the defendant's constitutional right to a speedy trial was violated." CrR 3.3(a)(4).

Here, Gatson was arraigned on September 20, 2010. His trial commenced on December 13—84 days later. The court granted continuances of 7, 14, and 29 days, respectively. Gatson contends that, because these continuances were improperly granted, the resulting delay may not be excluded from the 60-day limit set forth by the court rule. Accordingly, Gatson asserts, his convictions must be reversed and the charges against him dismissed.

We need consider only the last of these continuances to resolve this issue. This final continuance was granted on November 12, 2010, within the time period permitted by rule for a timely trial. Accordingly, if granting that continuance was proper, then the 29-day delay occasioned by that ruling encompassed a period of time excluded from the time for trial calculation. After

the grant of the continuance, when the parties returned for trial, they were, by rule, in the same position as they had been immediately prior to the court's grant of the 29-day continuance: 55 days out from arraignment.

The 29-day continuance was granted by the trial court in response to a motion brought by Gatson's defense counsel, who had another trial scheduled on the same date that Gatson's case was set for trial. It has long been the rule of our state that where a defendant has requested a continuance, the defendant will not be heard to later complain on appeal that "he received what he asked for." State v. Lopez, 74 Wn. App. 264, 268, 872 P.2d 1131 (1994); State v. Dowell, 16 Wn. App. 583, 588, 557 P.2d 857 (1976). More to the point, "[t]he bringing of such motion by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3(f)(2). The plain language of this provision indicates that where defense counsel brings a motion for a continuance on behalf of his client, the defendant may not seek to personally object to the requested delay. CrR 3.3(f)(2). This provision reflects the well-established principle that defense counsel must have full authority to manage the conduct of the trial. See State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967) ("[T]he choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment"). Accordingly, where defense counsel has brought a motion for a continuance, CrR 3.3(f)(2) makes clear that the defendant cannot create an issue for appeal by seeking to personally object

to the granting of defense counsel's request.[7]

Here, because defense counsel brought the motion to continue on Gatson's behalf, Gatson's personal objection to the continuance was waived, and he is not entitled to further appellate review of this issue.[8]

Affirmed.[9]

[7] Gatson relies on Division Two's decision in State v. Saunders, 153 Wn. App. 209, 220 P.3d 1238 (2009), for the proposition that an appellate court may consider a defendant's objection to a continuance that has been granted on his own attorney's motion. However, in that case, at least one of the continuances at issue was granted upon a written agreement of the parties pursuant to CrR 3.3(f)(1). This rule, which does not contain a waiver provision similar to CrR 3.3(f)(2), requires that the agreement be "signed by the defendant." Because the defendant did not sign the written agreement pleading, the continuance based upon this agreement was improperly granted. Saunders, 153 Wn. App. at 218-19. Moreover, insofar as Saunders involved continuances granted pursuant to CrR 3.3(f)(2), the court determined that the trial court's error lay in its failure to state on the record or in writing the reasons for the continuance as required by the rule. Saunders, 153 Wn. App. at 219-20. Neither of these circumstances is presented here.

[8] We note that, even were review of this issue proper, we see no error in the trial court's decision to grant this continuance. The unavailability of defense counsel on the date of Gatson's trial and the reasons given therefor support the trial court's determination that this continuance was required in the administration of justice.

[9] Gatson's appeal includes a statement of additional grounds. He first contends that there was insufficient evidence to support his conviction of burglary in the second degree where there was no direct evidence that he entered the sales office of the car dealership. Such direct evidence, however, is not required. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Here, a key that was normally stored within the dealership's sales office was found in Gatson's pocket upon his arrest. The key to the stolen vehicle was also kept within this office. This evidence supports an inference that Gatson had unlawfully entered the office to take the keys.

Gatson further contends that the charges against him were amended due to prosecutorial vindictiveness. In a pretrial setting, there is no presumption of vindictiveness when the State amends the charging document. State v. Bonisisio, 92 Wn. App. 783, 791, 964 P.2d 1222 (1998). Instead, a defendant must offer proof of actual prosecutorial vindictiveness before an appellate court may invalidate the prosecutor's adversarial decisions made before trial. See State v. McDowell, 102 Wn.2d 341, 344, 685 P.2d 595 (1984). Here, Gatson has offered no proof of prosecutorial vindictiveness beyond the fact that the charges against him were amended prior to trial. Such a showing does not support Gatson's claim.

Finally, Gatson requests that we revisit a prior decision—pertaining to a separate incident involving Gatson—in which we determined that the trial court had correctly calculated Gatson's offender score. State v. Gatson, noted at 155 Wn. App. 1045 (2012). Gatson did not move for reconsideration of our decision and the case was mandated on June 11, 2010. Accordingly, review of this issue would be inappropriate.

We concur: