NO. 31616-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JESUS TORRES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-01248-6

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

TERRY J. BLOOR, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. STATEMENT OF FACTS

A. Facts Regarding Sufficiency of Evidence Issue

Michael Horton purchased a mini motorcycle sometime in late June, 2012. (RP at 49, 50). He had a photo taken with him on it the day he purchased it. (RP at 49-51, referring to Exhibits 1 and 2). The mini motorcycle was distinctive: it had vice grips, electrical tape on the gas tank, a recycling sticker on the right side of the gas tank and the seat had a small tear which was sewn with blue fabric. (RP at 51-53). Someone stole it from his Richland, Washington, home on September 12, 2012. (RP at 53, 84-85).

On October 2, 2012, Horton and his coworker, Ricardo Campos, Jr., were working in a commercial building in Kennewick when Campos saw a man driving the mini motorcycle (RP at 54, 69, 75). He alerted Mr. Horton. (RP at 55). The driver saw Horton and Campos watching him and took some evasive action. (RP at 70). Horton followed the driver and called the police. (RP at 55). Horton and Campos watched as Kennewick Police Officer Christopher Littrell contacted the person they saw driving the mini motorcycle. (RP at 56, 70-71). The defendant was the driver. (RP at 75).

The mini motorcycle had been altered by having the electrical tape torn off, the headlight removed and the seat rewrapped with another blue fabric (RP at 57-58).

The defendant told Officer Littrell that it was a friend's bike and that the friend had built it from the ground up. (RP at 75-76). However, Jeremy Hendricks, a 17-18 year friend of the defendant, testified that a friend dropped off the mini motorcycle for repairs on a throttle cable about two weeks before the defendant's arrest and that it was assembled when it came into his possession. (RP at 94, 100). Hendricks testified that a "Dustin" (unknown last name) asked him to repair it. (RP at 94). However, Hendricks told Officer Littrell that the mini motorcycle came from a "Nick." (RP at 104).

B. Facts Regarding Peremptory Challenges

After the voir dire examination of the potential jurors, the parties exercised their peremptory challenges in court and on the record. (CP 48). Both parties put in writing which jurors they peremptorily challenged. (CP 43).

C. Facts Regarding Restitution Order

The mini motorcycle was damaged in several ways: The electrical harness was missing, the front brake cylinder was broken, the view hole for the fluid was damaged, and the headlight was missing, the carburetor was missing the filter, the seat had been torn and broken and the plastic under the seat had been shattered. (RP at 57-58, 61). The State requested restitution in the amount of $503.35 for Mr. Horton and the defendant did not object. (CP 33).

II. ARGUMENT

A. State's Response to Defendant's Argument Number 1: ("The evidence was insufficient to prove Torres knew the mini-motorcycle was stolen." App. Brief at 5.)

1. Standard on Review:

The standard on review for a challenge to the sufficiency of the evidence is that the evidence is sufficient if, after it is viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Randhawa,* 133 Wn.2d 67, 941 P.2d 661 (1997).

2. There was more than sufficient evidence, when viewed in the light most favorable to the State, for a rational jury to have found the defendant "knew" the mini motorcycle was stolen.

"Knowledge" was defined in jury instruction number eight and was based on WPIC 10.02 and RCW 9A.08.010. (CP 17). Under that definition, the defendant "knew" of the fact that the mini motorcycle was stolen if he was aware of that fact. Also, the jury could find that he had knowledge if he had information which would lead a reasonable person in the same situation to believe it was stolen.

Here, in the light most favorable to the State, the jury could conclude:

- The appearance of the mini motorcycle had been altered in several ways, removing the electrical tape, removing the headlight, and changing the fabric on the seat. A jury could find that the defendant did this to avoid the possibility that it would be recognized.
- The defendant took evasive action when Mr. Horton and Mr. Campos saw him on the mini motorcycle.
- The defendant lied about who owned the mini motorcycle and how it was built. He told Officer Littrell that it belonged to a friend of his who built it from the ground up.

Unfortunately for him, his friend, Jeremy Hendricks, gave a different story. Specifically, Hendricks said that he received the mini motorcycle from "Dustin" about two weeks before the defendant's arrest.

- Mr. Hendricks did not help the defendant's cause by being unable to give a last name, phone number or address for "Dustin." He also gave a contradictory statement to Officer Littrell when he said the owner was "Nick." He also had no explanation for his refusal to speak with the police and his delay in reporting any exculpatory evidence for the defendant, his friend of 17-18 years. (RP at 99-100).

The jury had more than sufficient evidence to conclude both that the defendant had actual knowledge that the mini motorcycle was stolen and to conclude that a reasonable person would have known it was stolen.

B. State's Response to Defendant's Argument Number 2: ("The trial court violated Torres' right to a public trial by hearing peremptory challenges in private." App. Brief at 9.)

1. Standard on Review:

If there was a closure, whether or not the closure was proper is adjudged by application of the five factor test set forth in *State v. Bone–Club,* 128 Wn.2d 254, 261, 906 P.2d 325 (1995). Whether or not a particular portion of a proceeding was required to be held in public is determined by use of the "experience and logic" test in *State v. Sublett,* 176 Wn.2d 58, 72, 292 P.3d 715 (2012). As explained in the lead *Sublett* opinion, the "experience and logic" test requires courts to assess the necessity for closure by consideration of both history (experience) and the purposes of the open trial provision (logic). *State v. Sublett,* 176 Wn.2d at 73. The experience prong asks whether the practice in question historically has been open to the public, while the logic prong asks whether public access is significant to the functioning of the right. *Id.* If both prongs are answered affirmatively, then the *Bone–Club* test must be applied before the court can close the courtroom. *State v. Love*, 176 Wn. App. 911, 916, 309 P.3d 1209 (2013).

The defendant bears the burden of establishing a public trial right violation. *State v. Rainey*, ___Wn. App. ___, 319 P.3d 86 (2014).

2. The defendant has not established that there was a closure, or, even if there was, that the procedure violates the "experience and logic" test.

a. Conducting the peremptory challenges in writing does not constitute a closure of the courtroom.

As stated in *Sublett* at 71, "a closure 'occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.'" Here, the courtroom was not closed. The voir dire was conducted in open court. The peremptory challenges were made in open court. None of the peremptory challenges were contested and the trial judge did not make any decisions regarding those challenges. Whether the peremptory challenges were made verbally or in writing is not important. In either case, the courtroom was open to all and the peremptory challenges were made on the record.

b. Peremptory challenges have been done historically in writing, not verbally.

State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), is instructive. That Court reviewed the history of voir dire and stated:

> [T]he history review confirms that in over 140 years of cause and peremptory challenges in this state, there is little evidence of the public exercise of such challenges, and some evidence that they are conducted privately. Our experience does not require that the exercise of these challenges be conducted in public.[1]

Love, 176 Wn. App. at 919.

The *Love* Court cited *State v. Thomas*, in which the defendant claimed that written peremptory challenges denied a fair and public trial. *State v. Thomas*, 16 Wn. App. 1, 553 P.2d 1357 (1976). The *Thomas* Court noted that this practice was utilized in several counties in the state. *Thomas*, 16 Wn. App. at 13. The State suggests that the common practice in virtually every trial is to conduct the peremptory challenges in court, on the record and in writing. The defendant's argument that the defense attorney and prosecutor should stand up and announce in front of the venire which jurors they do not like is not required by CrR 6.4(e)(2), *Peremptory Challenges-How Taken,* and has never been the common practice in the state.

It is important to know what peremptory challenges are exercised to determine if there was a pattern of race-based challenges. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The standard practice of making the peremptory challenges in writing serves

[1] The *Love* court specifically reserved the issue of whether there was a closure of the courtroom.

this purpose. There is a record of which parties peremptorily challenged which jurors and the order in which those challenges were made. That record is available for public scrutiny and is part of the court file.

The defendant has not shown that the history of exercising peremptory challenges requires verbally stating which jurors are challenged.

c. The defendant's argument also does not pass the "logic" test.

As stated in *Love*,

> The purposes of the public trial right are to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward and to discourage perjury. Those purposes simply are not furthered by a party's actions in exercising a peremptory challenge or in seeking a cause challenge of a potential juror. The first action presents no questions of public oversight, and the second typically presents issues of law for the judge to decide. The written record of these actions—the clerk's written juror record and the court reporter's transcription of the cause challenges at sidebar—satisfies the public's interest in the case and assures that all activities were conducted aboveboard, even if not within public earshot . . . . Neither prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public.

Love, 176 Wn. App. at 919 (emphasis added).

The *Thomas* Court also noted that peremptory challenges are created by the courts or legislature; there is no right to a peremptory

challenge. *Thomas*, 16 Wn. App. at 13.

It does not serve any purpose of the public trial right to require that the attorneys verbally state their peremptory challenges instead of, or in lieu of, stating them in writing.

C. State's Response to Defendant's Argument Number 3: ("The restitution order should be vacated because the State failed to present substantial evidence of the amount of loss." App. Brief at 20.)

1. The defendant did not object to the restitution order in the trial court and should not be allowed to raise the argument for the first time on appeal.

This Court need not address the merits of the defendant's argument because he did not object to the restitution order at the trial court. Under RAP 2.5(a), a party may raise claimed errors for the first time in the appellate court based on 1) lack of trial court jurisdiction, 2) failure to establish facts upon which relief can be granted or 3) manifest error affecting a constitutional right. None of these apply. The defendant has not argued that RAP 2.5(a) is inapplicable.

In *State v. WWJ Corp.*, 138 Wn.2d 595, 980 P.2d 1257 (1999), the Court held that claimed errors by the trial court in imposing fines cannot

be raised for first time on appeal. In *State v. Moen*, 129 Wn.2d 535, 919 P.2d 69 (1996), the Court held that the defendant may challenge a restitution order for the first time on appeal based on the trial court's lack of jurisdiction to impose restitution within the statutory time period. However, the *Moen* Court stated that the imposition of restitution does not involve a constitutional right. *State v. Moen*, 129 Wn.2d 535, 543, 919 P.2d 69 (1996). Likewise, *State v. T.A.D.*, 122 Wn. App. 290, 95 P.3d 775 (2004), held that a challenge to the court's *statutory authority* to order restitution may be raised for the first time on appeal. (Emphasis added.)

In this case, the trial court followed the procedure outlined in RCW 9.94A.753. The trial court determines the amount of restitution at the sentencing hearing. If there is an objection, then the trial court sets a hearing within 180 days. We still do not know if the defendant objects to the restitution amount. In this appeal, the defendant has not stated that he disagrees with the amount of restitution ordered; he only states that there was no supporting evidence.

The defendant's argument ignores the statutory practice. If a defendant objects at sentencing to the State's restitution request, the trial court sets a hearing. If there is no objection, the trial court signs the Judgment and Sentence ordering the requested restitution.

2. If this Court reviews the merits of the argument, the standard on review is abuse of discretion and there is a strong public policy in favor of ensuring that victims are awarded restitution.

Restitution awards are reviewed for an abuse of discretion. *State v. T.A.D.,* 122 Wn. App. at 292. Further, a victim's loss need not be established with specific accuracy. *State v. Kinneman*, 122 Wn. App. 850, 95 P.3d 1277 (2004). If the defendant had objected, the State would have the burden of proving restitution by a preponderance of the evidence, not beyond a reasonable doubt. *State v. Dedonado,* 99 Wn. App. 251, 256, 991 P.2d 1216 (2000). Also, restitution statutes are interpreted broadly in favor of restitution unless there is clearly expressed legislative language to the contrary. *State v. Thomas,* 138 Wn. App. 78, 155 P.3d 998 (2007). There is a strong public policy to provide restitution whenever possible. *State v. Selland*, 54 Wn. App. 122, 772 P.2d 534 (1989).

3. The defendant has not shown that the trial court abused its discretion in entering the restitution order.

To reiterate, the mini motorcycle was badly damaged: The electrical harness was missing, the front brake cylinder was broken, the view hole for the fluid was damaged, the headlight was missing, the carburetor was missing the filter, the seat had been torn and broken, and the plastic under the seat had been shattered. (RP at 57-58, 61). The

amount of restitution ordered, $503.35, seems appropriate. The defendant has presented nothing to show that the trial court abused its discretion in allowing the award.

III. CONCLUSION

There was sufficient evidence to convict the defendant. He was in possession of a stolen vehicle, the appearance of that vehicle had been altered, he tried to evade the owner and the owner's friend when they saw him on the vehicle, and he was untruthful about the construction of the vehicle and to whom it belonged.

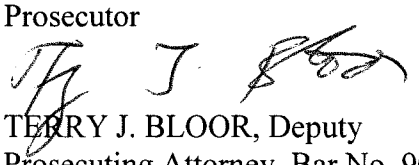
There was no courtroom closure regarding the peremptory challenges. Historically, peremptory challenges are made in open court, on the record, but in writing, not verbally. That was the procedure followed in this case. There is no logical reason why the attorneys should be required to state verbally which jurors they are challenging peremptorily.

Finally, the defendant did not object to the restitution order, possibly because the vehicle was badly damaged and the restitution requested was fair.

The conviction and the restitution order should be affirmed.

RESPECTFULLY SUBMITTED this 27th day of March, 2014.

ANDY MILLER
Prosecutor



TERRY J. BLOOR, Deputy
Prosecuting Attorney, Bar No. 9044
OFC ID No. 91004

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Eric J. Nielsen
Nielsen, Broman & Koch, PLLC
1908 E. Madison Street
Seattle, WA 98122

☒ E-mail service by agreement was made to the following parties:
Sloanej@nwattorney.net

Jesus Torres
DOC # 825222
P.O. Box 769
Connell, WA 99326

☒ U.S. Regular Mail, Postage Prepaid

Signed at Kennewick, Washington on March 27, 2014.

Courtney Sheafer
Legal Assistant