91835-0

SUPREME COURT NO. _____

NO. 31616-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESUS TORRES,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Bruce A. Spanner, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Jesus Torres requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Torres, No. 31616-5-III, filed April 9, 2015. A copy of the opinion is attached as Appendix A. The Court of Appeals denied Torres' motion for reconsideration on May 19, 2015.

B. ISSUES PRESENTED FOR REVIEW

1. During jury selection, the parties exercised peremptory challenges silently on paper. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important part of jury selection privately, did the court violate petitioner's constitutional right to a public trial?[2]

2. A charging document must include all essential elements of the offense. Possession of a stolen motor vehicle requires proof the defendant withheld or appropriated the property to someone other than the true owner.[3] This element is not found in the information in this case. Must appellant's conviction for possession of a stolen vehicle be reversed because the information omits an essential element of the offense?

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[1] State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 629 (1995).

[2] This Court granted review of this issue in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013) (Supreme Ct. No. 89619-4).

[3] State v. Satterthwaite, ___ Wn. App. ___, 344 P.3d 738, 739 (2015).

C. STATEMENT OF THE CASE

1. Procedural Facts

By amended information, the Benton County prosecutor charged Torres with one count of possession of a stolen vehicle and one count of driving while license suspended in the first degree. CP 1-2. With regards to possession of a stolen vehicle, the charging document alleges Torres

> on or about the 2nd day of October, 2012, in violation of RCW 9A.56.068, did possess a motor vehicle knowing it to be stolen, to wit: a minibike, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Washington.

CP 1. The court denied motions to dismiss and for a directed verdict on the possession of a stolen vehicle charge, and the jury found Torres guilty on both counts. 1RP[4] 90-91; 112-13; CP 26, 27.

The court denied Torres' request for a drug offender sentencing alternative and imposed 29 months, the top of the standard range for possession of a stolen vehicle, consecutive to 8 months on the misdemeanor charge. 3RP 9; CP 32, 35. The court also ordered Torres to pay legal financial obligations including $503.35 in restitution. CP 33, 40.

On appeal, Torres argued there was insufficient evidence he knew the motorcycle was stolen, there was insufficient evidence to support the restitution award, and his right to a public trial was violated when the court

[4] There are four volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Feb. 4, Feb. 5, 2013; 2RP – Feb. 4, 2013(voir dire); 3RP – Apr. 24, 2013.

permitted peremptory challenges to be exercised in writing. Shortly before the Court of Appeals decided Torres' case, Division Two of the Court of Appeals decided State v. Satterthwaite, ___ Wn. App. ___, 344 P.3d 738, 739 (2015), holding that the information for possession of a stolen vehicle must include as an essential element that the person "withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto" as provided in RCW 9A.56.140(1). Because Torres' case had not yet been decided, Torres sought to file a supplemental brief raising this issue.

Division Three of the Court of Appeals affirmed Torres' convictions. In its unpublished decision, the court held the evidence was sufficient to find Torres knew the motorcycle was stolen, rejected his public trial challenge under State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013, rev. granted, 181 Wn.2d 1029 (2015), held he waived challenge to the restitution order by failing to object at the restitution hearing, and declined to consider the argument raised in the proffered supplemental briefing on the insufficiency of the information. Torres asks this Court to grant review.

2. Substantive Facts

Police stopped Torres after he rode a mini-motorcycle across the street. 1RP 75. Police were investigating after Michael Horton called to say he had seen someone riding his mini-motorcycle that had disappeared from

his home. 1RP 53, 55, 75. Torres told the police it belonged to a friend who had built it from the ground up. 1RP 75-76.

Torres' friend Jeremy Hendricks testified he was an uncertified mechanic and the bike was dropped off with him for repairs by Dustin and Brittany. 1RP 94-95. He was acquainted with the couple, but did not know their last names. 1RP 94-95. Because they could not pay for the repairs, he kept the bike until they could pay him. 1RP 95. He testified both he and Torres had taken the bike for a test drive, and neither of them knew it was stolen. 1RP 95-96. He testified he does sometimes build devices from spare parts, but has never built a motorcycle of this type. 1RP 96, 100. Although he knew Torres was arrested in October, Hendricks did not speak to police about this until approached by Officer Littrell in January. 1RP 99. Littrell testified Hendricks told him the bike was dropped off by someone named Nick. 1RP 104.

Horton claimed to recognize the bike from the tear in the seat, oil smudges, vise grips where the shifter had broken, and the residue from the electrical tank that had been running along the gas tank. 1RP 52-53, 55, 58-59. Horton testified he paid $200 for the bike, which was below market value. 1RP 54, 64. When he got the bike back, it had significantly more damage. 1RP 57-62. The court admitted Horton's photographs of the bike he lost and police photographs of the bike Torres was found riding. 1RP 49-

50, 59-62. A co-worker of Horton's, who was with him when he saw Torres riding the bike, testified he was certain it was Horton's bike. 1RP 69, 71. The defense agreed the bike was stolen and Torres was seen riding it but argued there was no evidence he knew it was stolen. 1RP 132, 134.

The exercise of peremptory challenges during voir dire appears to have happened entirely on paper. In explaining the process, the court told counsel, "So long as you don't write the word 'waive,' you are free to exercise your peremptory on any juror, whether in the box or out on the benches. Once you write the word 'waive,' then thereafter, you can only exercise peremptories against those who get into the box as the result of the other side's peremptories." 1RP 20. After each side had passed for cause and questioned the potential jurors, the court announced, "It is now time for the attorneys to exercise their peremptory challenges." 2RP 68. The record then reads, "(Whereupon peremptory challenges were made.)" Id. The court then announced, "All right. That concludes the peremptory challenges. I'll check with the clerk to verify my notes are correct." Id.

A brief discussion was then held off the record. Id. Next, the court excused the challenged jurors by name and number. Id. A jury roster was filed with the court the following day that lists the peremptory challenges exercised by each side including each challenged juror's name and number. CP 43. An additional list described the outcome for each

juror including "PD" designations for those excused on peremptory challenges by the defense and "PP" for those excused by the State. CP 45-46. The trial minutes list the peremptory challenges but do not reveal which side challenged which juror. CP 48.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

1. REVIEW IS WARRANTED BECAUSE DIVISION III'S DECISION CONFLICTS WITH PRIOR CASE LAW, AND INVOLVES A SIGNIFICANT QUESTION OF CONSTITUTIONAL LAW THAT SHOULD BE RESOLVED AS A MATTER OF SUBSTANTIAL PUBLIC INTEREST.

Jury selection is a critical part of trial that must be open to the public. State v. Wise, 176 Wn.2d 1, 11, 288 P.3d 1113, 1118 (2012). Even if it were not already clear that the public trial right prohibits closed jury selection proceedings, such proceedings also violate the public trial right under the "experience and logic" test announced in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012).

However, relying on its decision in State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), rev. granted 340 P.3d 228 (2015), as well as State v. Webb, 183 Wn. App. 242, 333 P.3d 470 (2014), rev. denied, 182 Wn.2d 1005 (2015), the Court of Appeals held that silent, on-paper exercise of peremptory challenges does not implicate the public trial right. Torres asks this Court to grant review because that decision conflicts with this Court's

decisions in Wise and State v. Slert, 181 Wn.2d 598, 334 P.3d 1088 (2014), as well as Division II's decision in State v. Anderson, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 2394961 (No. 45497-1-II, filed May 19, 2015); RAP 13.4(b)(1), (2). Additionally, the application of the public trial right to peremptory challenges raises significant constitutional questions of substantial public interest. RAP 13.4(b)(3), (4).

The Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington Constitution guarantee the accused a public trial by an impartial jury.[5] Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010); Bone-Club, 128 Wn.2d at 261-62. Additionally, article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision gives the public and the press a right to open and accessible court proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

While the right to a public trial is not absolute, a trial court may close proceedings to public view only "under the most unusual circumstances." Bone-Club, 128 Wn.2d at 259. Before a closure, the court must first apply

[5] The Sixth Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." Article I, Section 22 provides that "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury . . . ."

on the record the five factors set forth in Bone-Club. In re Pers. Restraint of Orange, 152 Wn.2d 795, 806-09, 100 P.3d 291 (2004).

The public trial right applies to "the process of juror selection, which is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Id. at 804 (quoting Press-Enter. Co. v. Superior Court, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). In Wise, 10 jurors were questioned privately in chambers during voir dire, and six were excused for cause. 176 Wn.2d at 7. The court held the public trial right was violated because jurors were questioned in a room not open to the public without consideration of the Bone-Club factors. Id. at 11-12. Wise does not indicate any reason to depart from this holding when the private part of voir dire is peremptory challenges.

In Slert, the court and counsel reviewed jury questionnaires in chambers and, on the basis of the answers, agreed to excuse four jurors. Slert, 181 Wn.2d at 602. Justice Gonzalez' lead opinion concluded the label of "jury selection" was not determinative and this process was not substantially similar to the voir dire considered in Wise. 181 Wn.2d at 604-05. The lead opinion also noted that, based on the record, it did not appear voir dire had begun at the time of the excusals and it was not clear whether jurors had been sworn in before filling out the questionnaire. 181 Wn.2d at 602, 605-06.

However, Justice Wiggins, concurring in result, concluded that, "It appears that this is a voir dire case that easily could have been decided under *Paumier*[6] and *Wise*." Slert, 181 Wn.2d at 610 (Wiggins, J., concurring in result). Justice Wiggins rejected the public trial violation only because Slert did not preserve the issue by objecting. Id. at 612. Justice Wiggins concluded that "every stage of judicial proceedings," presumably to include the review of the questionnaires in Slert, "must be presumptively open" and may be closed only after application of the Bone-Club factors. Id.

The four dissenters concluded that the dismissal of jurors for cause behind closed doors after review of the questionnaires was voir dire, which this Court has repeatedly held implicates the public trial right. 181 Wn.2d at 612-13 (Stephens, J., dissenting). Thus, five members of this Court appear to agree that jury questionnaires and four-cause dismissals are an integral part of voir dire that must be open to the public.

The recent Anderson decision by Division Two of the Court of Appeals is in accord. In Anderson, for-cause challenges were exercised at a sidebar conference. Slip op. at 2. Although the public was not excluded from the courtroom and the sidebar was not in a physically inaccessible location, the court nonetheless found a closure. Id. at 5-6. The court

[6] State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012).

explained that the entire purpose of the sidebar is to prevent the public from hearing what is being said. Id. at 4-5. "Taking juror challenges at sidebar in this way thwarts public scrutiny just as if they were done in chambers or outside the courtroom." Id. at 5-6. The court held the sidebar conference "constituted a closure of the juror selection proceedings because the public could not hear what was occurring." Id. at 6.

Anderson expressly rejects the reasoning from Love that the Court of Appeals relied on in this case. Slip op. at 9-12. The Love court held that the experience prong of Sublett's "experience and logic" test was not met because traditionally there was no requirement that the proceeding be held in public. Love, 176 Wn. App. at 918. But, as Anderson points out, the correct inquiry is whether the proceeding was traditionally open to the public, not whether it was historically required to be. Slip op. at 10. Like for-cause challenges, peremptory challenges have traditionally been exercised in open court, subject to public scrutiny. See State v. Wilson, 174 Wn. App. 328, 344, 298 P.3d 148 (2013) (differentiating administrative excusals from for-cause and peremptory challenges, which historically occur in open court).

The "logic" portion of the Sublett test also indicates peremptory challenges must be open. As the Anderson court explains, a proceeding should logically be open to the public when public scrutiny can act as a check against abuses. That is particularly the case for peremptory

challenges. Anderson, slip op. at 12. The court noted that the for-cause challenges at issue in Anderson were "less prone to arbitrary or improper exercise than peremptory challenges." Slip op. at 12. Nevertheless, the court held the public has " a vital interest" in overseeing even the for-cause challenges. Slip op. at 12. Moreover, it serves the appearance of fairness to ensure that for-cause challenges are subject to public scrutiny. Slip op. at 12-13. The same is true for peremptory challenges, which are even more susceptible to abuse. Slip op. at 12.

When the public cannot see the jurors who are excused, and by which party, it cannot serve its proper function of acting as a check on racially motivated peremptory challenges. Ignoring race leaves us unable to recognize or remedy the racism, both conscious and unconscious, that, sadly, still rears its ugly head in our judicial system. See generally, State v. Saintcalle 178 Wn.2d 34, 35-36, 44-49, 52, 309 P.3d 326 (2013) (encouraging courts to rise to the challenge presented by unconscious racial bias in jury selection).

For purposes of the public trial analysis, peremptory challenges should not be differentiated from for-cause challenges. Peremptory challenges are unlike administrative excusals of jurors because they do not occur before voir dire. Instead, they occur after the venire is sworn and after jurors are examined in open court. Peremptory challenges are exercised on

the basis of voir dire and strongly implicate the fairness of the overall proceedings. Like the for-cause excusals in Slert and Anderson, they are a substantial part of the jury selection held to be integral in Wise. The court's decision in this case to the contrary is in conflict, and review should be granted under RAP 13.4(b)(1) and (2). This Court's opinion in Saintcalle noting the importance of deterring racially motivated jury selection also demonstrates that application of the public trial right to peremptory challenges is an important constitutional issue of substantial public interest. RAP 13.4(b)(3), (4); Saintcalle, 178 Wn.2d at 41.

2. TORRES' CONVICTION CANNOT BE SUSTAINED IN LIGHT OF SATTERTHWAITE.

a. *Satterthwaite* Requires Reversal of Torres' Conviction.

A charging document is constitutionally deficient under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution when it fails to include all "essential elements" of the crime. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The purpose of the well-established "essential elements" rule is to apprise the defendant of the charges against him and allow preparation of a defense. Id.

When the adequacy of an information is challenged for the first time on appeal, as it is here, the court undertakes a two-pronged inquiry:

"(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If any necessary element is neither found nor fairly implied in the charging document, the court presumes prejudice and reverses. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Torres was charged with possession of a stolen vehicle. "A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1). RCW 9A.56.140(1) provides that "'Possessing stolen property' means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." (Emphasis added.)

The Satterthwaite court held that, "withhold or appropriate" is an essential element of all crimes enumerated in chapter 9A.56 RCW, including possession of a stolen vehicle under RCW 9A.56.068. Satterthwaite, slip op. at 4. "RCW 9A.56.068(1) implicitly incorporates RCW 9A.56.140(1)'s terms because the terms apply to other possession of stolen property offenses in the same chapter and provide the mens rea element of the offense of

possession of a stolen motor vehicle." Satterthwaite, slip op. at 4. The court explained it is the withholding or appropriation of stolen property "that ultimately makes the possession illegal, thus differentiating between a person attempting to return known stolen property and a person choosing to keep, use, or dispose of known stolen property." Id. at 5 (discussing standard from State v. Johnson, 180 Wn.2d 295, 300, 302, 325 P. 3d 135 (2014).

Here, as in Satterthwaite, the information fails to allege that Torres withheld or appropriated the stolen property to the use of anyone other than the true owner or another person entitled to it, as required by RCW 9A.56.140. Satterthwaite, slip op. at 6; CP 1. The information alleges only that Torres possessed stolen property and knew it was stolen. CP 1. Therefore, the necessary fact of "withhold or appropriate" did not appear in the charging document.

Neither can, by a fair construction, the facts of withholding or appropriation be found in the information. Like Satterthwaite, the information in this case also fails to provide even a citation to RCW 9A.56.140. CP 1; Satterthwaite, slip op. at 6 (noting charging document did not cite RCW 9A.56.140). Nothing in the information suggests or implies the missing element that the defendant withheld or appropriated the item to the use of someone other than the true owner. CP 1.

"The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." State v. Armstrong, 69 Wn. App. 430, 433, 848 P.2d 1322 (1993) (citing Kjorsvik, 117 Wn.2d at 101-02). In Satterthwaite, the court concluded, "Because the necessary facts of the essential element of 'withhold or appropriate' do not appear in any form, nor by fair construction can they be found, in the charging document, the charging document was insufficient." Satterthwaite, slip op. at 6. The same is true in this case. Torres' conviction must be reversed. The Court of Appeals decision affirming Torres' conviction is in conflict with Satterthwaite, and review is warranted under RAP 13.4(b)(2).

b. The Court of Appeals Erred in Refusing to Apply *Satterthwaite* to Torres' Case When his Appeal Was Not Yet Final.

A new rule created by appellate decision applies prospectively to all cases in which the appeal is not yet final. State v. Hanson, 151 Wn.2d 783, 790, 91 P.3d 888 (2004) (citing In re Pers. Restraint of St. Pierre, 118 Wn.2d 321, 823 P.2d 492 (1992)). While no rule expressly permits filing a supplemental appellate brief raising an issue based on a new appellate decision, the Rules of Appellate Procedure expressly mandate that the rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). The rules further mandate that cases not

be decided based on noncompliance with the rules "except in compelling circumstances where justice demands." RAP 1.2(a).

There are no compelling circumstances that would justify denying Torres the benefit of the Satterthwaite decision. Torres acted with diligence by requesting permission to file a supplemental brief and submitting the proposed supplemental brief based on Satterthwaite the day after that decision was filed. The Court of Appeals agreed counsel could not reasonably be expected to have anticipated the holding in Satterthwaite so to raise the issue earlier. App. A at 11.

The Court of Appeals' decision to deny Torres the benefit of this new rule of law solely because counsel did not include this issue in the assignments of error in the opening brief is in conflict with the mandate of RAP 1.2(a) to favor decisions on the merits. It also conflicts with Hanson, Pierre, and other cases holding that new appellate decisions are applied prospectively to cases in which the appeal is not yet final. Review is, therefore warranted, under RAP 13.4(b)(1).

Review is also warranted because the Court of Appeals' decision not to permit supplemental briefing based on a new appellate decision conflicts with the Court of Appeals decision in State v. Krajeski, 104 Wn. App. 377, 16 P.3d 69 (2001). RAP 13.4(b)(2). Krajeski was charged with possession of stolen property and unlawful possession of a firearm. Id. at

380. After the appeal was filed, the Washington Supreme Court held that knowledge was an essential element of unlawful possession of a firearm in State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). Krajeski, 104 Wn. App. at 384. Krajeski retained new counsel and moved to file an amended brief assigning error, for the first time, to the deficiency of the information under Anderson. Id. In addition to the Anderson/information issue, Krajeski also sought, for the first time, to assign error to several findings of fact and add a Gunwall[7] analysis. Id. at 386-87.

Division Two declined to consider the findings of fact or the Gunwall analysis because those issues "should have been raised under settled law in his opening brief." Id. at 387-88. By contrast, the court granted Krajeski's motion as to the issue based on the new Supreme Court decision regarding elements that must be contained in the information. Id. at 384. The Court of Appeals should also have granted Torres' motion to raise an issue based on a new appellate court decision regarding the essential elements of the offense.

Review is also warranted because the decision not to apply Satterthwaite in this case infringes on Torres' constitutional right to appeal and to effective assistance of counsel for his appeal. Appellate counsel is ineffective when counsel failed to raise an issue that has merit and the client

[7] State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

is thereby prejudiced. In re Pers. Restraint of Dalluge, 152 Wn.2d 772, 778, 100 P.3d 279 (2004). The outcome of Satterthwaite demonstrates that this issue, which undersigned counsel failed to raise in the opening brief, has merit and that Torres was prejudiced by the inability to achieve the same outcome as Satterthwaite – namely, appellate reversal of his conviction. This Court should grant review under RAP 13.4(b)(3). Finally, the ability of all criminal defendants to obtain the benefits of new appellate decisions that are issued during the pendency of the appeal is an issue with ramifications far beyond Torres' case. Review is, therefore, warranted as a matter of substantial public interest under RAP 13.4(b).

E. CONCLUSION

The Court of Appeals opinion conflicts with decisions of this Court and the Court of Appeals and presents significant questions of constitutional law and public interest. Torres, therefore, requests this Court grant review under RAP 13.4 (b)(1), (2), (3), and (4).

DATED this 18th day of June, 2015.

Respectfully submitted,

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Appendix A

FILED
APRIL 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 31616-5-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JESUS TORRES,	)	
	)	
Appellant.	)	

LAWRENCE-BERREY, J. — Jesus Torres appeals his conviction for possession of a stolen vehicle and first degree driving with a suspended license. He contends that the State failed to prove an essential element of possession of a stolen vehicle, specifically, that he knew the mini-motorcycle was stolen. He also contends that the written procedure for peremptory challenges violated his right to a public trial and that there was no evidence to support the restitution award. He finally contends that there was no evidence to support the restitution award. We reject Mr. Torres's first two contentions, hold that he waived the third, and affirm.

FACTS

On October 2, 2012, Michael Horton and his coworker, Ricardo Campos, Jr., were working in a commercial building in Kennewick when Mr. Campos saw a man driving a mini-motorcycle that resembled one taken from Mr. Horton's home on September 12, 2012. The driver saw Mr. Horton and Mr. Campos watching him and drove away from their location. Mr. Horton followed the driver and called police.

Benton County Police Officer Christopher Littrell investigated and stopped Mr. Torres on the mini-motorcycle. Mr. Torres told police that it belonged to a friend who had built it from the ground up.

Mr. Torres's friend, Jeremy Hendricks, testified that acquaintances named Dustin and Brittany left the bike with him for repairs about two weeks before Mr. Torres's arrest. Mr. Hendricks did not know the last names of the couple. Mr. Hendricks testified that he was an uncertified mechanic and that he was asked to fix the throttle cable. He said that he sometimes builds devices from spare parts, but had never built a motorcycle of this type. When he received the mini-motorcycle, it was assembled.

Mr. Hendricks testified that neither he nor Mr. Torres knew the bike was stolen. Mr. Hendricks said he was keeping the bike until the couple could pay for the repairs. Both men took the bike for a test drive.

Although Mr. Hendricks knew that Mr. Torres was arrested in October, Mr. Hendricks did not speak with police about the mini-motorcycle until approached by Officer Littrell in January. Officer Littrell testified that Mr. Hendricks told him the bike was dropped off by someone named Nick. Mr. Hendricks said he could not provide a telephone number or street address for the person who gave him the mini-motorcycle.

Mr. Horton, the owner of the mini-motorcycle, testified that he recognized the bike from the tear in the seat, oil smudges, vice grips where the shifter was broken, and residue from the electrical tape on the gas tank. Mr. Horton said he paid $200 for the bike, which was below market value. The court admitted Mr. Horton's photographs of the mini-motorcycle he lost and police photographs of the mini-motorcycle Mr. Torres was found riding. The defense agreed that the bike was stolen and Mr. Torres was riding it, but argued that there was no evidence that he knew it was stolen.

During jury selection, the exercise of peremptory challenges occurred on paper. The trial court instructed counsel on the process for writing down the challenges. After each side questioned the potential jurors, the court instructed the attorneys to exercise their peremptory challenges. The court then concluded, "All right. That concludes peremptory challenges. I'll check with the clerk to verify my notes are correct." Report of Proceedings (RP) (Feb. 4, 2013—Jury Voir Dire) at 68.

A brief discussion was held off the record. Then, the trial court individually excused the challenged jurors, identifying each challenged juror by name and number. A jury roster filed with the court the following day listed the peremptory challenges exercised by each side. Additionally, a different list described the outcome for each juror, including a "CD" designation for those excused on challenges by the defense and "CP" for those excused by the State. Clerk's Papers at 45-46. The trial minutes listed the peremptory challenges, but did not reveal which side challenged which juror.

The jury found Mr. Torres guilty of both possession of a stolen vehicle and first degree driving with a suspended license. The court sentenced Mr. Torres to 29 months for possession of the stolen vehicle conviction and 8 months on the driving with a suspended license conviction, to be served concurrently. The court also ordered Mr. Torres to pay legal financial obligations, including $503.35 in restitution. Mr. Torres did not object to restitution.

Mr. Torres timely appealed.

ANALYSIS

A. *Whether the State presented sufficient evidence that Mr. Torres knew that the mini-motorcycle was stolen*

When sufficiency of the evidence is challenged, appellate courts review the record to determine whether the evidence is sufficient for a reasonable person to find every

element of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Sufficient means more than a mere scintilla of evidence; there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). Circumstantial evidence is considered as reliable as direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

A person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle. RCW 9A.56.068(1). Knowledge that the property is stolen is an essential element of possession of stolen property. RCW 9A.56.140. Merely being in possession of the stolen property is insufficient to support a conviction for the offense, but possession coupled with slight corroborative evidence is sufficient to prove guilty knowledge. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). Corroborative evidence may include flight or the absence of a plausible explanation for legitimate

possession. *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999). Here, sufficient evidence supports Mr. Torres's conviction for possession of a stolen vehicle.

First, Mr. Hendricks gave inconsistent statements about who gave him the mini-motorcycle, and he could not give the owner's identifying information to the police. While this does not establish that Mr. Torres knew about the mini-motorcycle's origins, the jury was entitled to draw an inference that Mr. Hendricks's possession was unlawful and that Mr. Hendricks's friend, Mr. Torres, also knew that the possession was unlawful.

Second, the State produced evidence of flight through Mr. Horton. Mr. Horton testified about seeing Mr. Torres on the mini-motorcycle: "That's when he seen that we were watching him and he tried to ride away." RP (Feb. 5, 2013) at 70. Mr. Torres argues that driving away is what one does while riding. However, it is for the jury, not the reviewing court, to decide what inferences to draw from the witness's testimony. We conclude that sufficient evidence exists for a reasonable trier of fact to find beyond a reasonable doubt that Mr. Torres knew the mini-motorcycle was stolen.

B. *Whether the trial court violated Mr. Torres's right to a public trial by conducting written peremptory challenges*

Mr. Torres contends that his convictions should be reversed because the trial court violated his right to a public trial by conducting peremptory challenges in writing.

Whether the right to a public trial has been violated is a question of law that we review de novo. *State v. Sublett*, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to a public trial. In addition, the Washington Constitution promises that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." CONST. art I, § 10.

The right to a public trial extends to voir dire of prospective jurors. *State v. Wise*, 176 Wn.2d 1, 11, 288 P.3d 1113 (2012). However, not every interaction between the court, counsel, and defendant will implicate the public trial right or constitute a closure. *Sublett*, 176 Wn.2d at 71. To determine whether public trial rights attach, courts apply the "experience and logic" test adopted in *Sublett*. *Sublett*, 176 Wn.2d at 72-73. The experience prong asks if historically, the place and process were open to the public. *Id.* at 73 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). The logic prong asks if public access plays a significant positive role in the functioning of the particular process in question. *Id.* (quoting *Press*, 478 U.S. at 8). Both questions must be answered in the affirmative for public trial rights to attach.

Id. And, once public trial rights attach, the trial court must openly consider the five *Bone-Club*[1] factors before closing the proceeding to the public. *Sublett*, 176 Wn.2d at 73.

Directly contrary to Mr. Torres's argument, this court held in *State v. Love*, 176 Wn. App. 911, 920, 309 P.3d 1209 (2013), *review granted*, 181 Wn.2d 1029, 340 P.3d 228 (2015) that the exercise of peremptory challenges in a side bar conference does not violate the public trial right. Applying the experience and logic test from *Sublett*, this court found no evidence that peremptory challenges were historically made in public. *Id.* at 918. The court also found that the public interests were satisfied by recording the challenges in the written public record. *Id.* 918-19.

The holding in *Love* has been adopted by separate divisions of this court. Division Two of this court, addressing facts identical to the ones presented here, determined that a defendant's public right to trial was not violated when counsel conducted written peremptory challenges. *State v. Webb*, 183 Wn. App. 242, 247, 333 P.3d 470 (2014), *review denied*, 182 Wn.2d 1005, 342 P.3d 327 (2015).

We adhere to the rulings in *Love* and *Webb*. The trial court's exercise of written peremptory challenges in an open courtroom did not violate Mr. Torres's right to a public

[1] *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

trial. The public's open access to voir dire proceedings and the timely record made of the peremptory challenges protected the public's right and the open administration of justice.

C. *Whether Mr. Torres's restitution order must be reversed*

The restitution order requires Mr. Torres to pay Mr. Horton $503.35. Mr. Torres argues that the restitution order should be vacated because the State failed to present any evidence of the amount of loss. At trial, the owner testified that the mini-motorcycle was returned to him damaged. However, there was no evidence of the cost of repair. The only testimony touching on value was the owner's testimony that he had purchased the used mini-motorcycle for $200. The State argues that Mr. Torres is precluded from raising this issue on appeal because he failed to preserve it by objecting below.

Where a defendant fails to object to the amount of restitution at the trial court, this is deemed a waiver of the issue and prevents its review on appeal. *State v. Branch*, 129 Wn.2d 635, 651, 919 P.2d 1228 (1996) (citing *State v. Harrington*, 56 Wn. App. 176, 181, 782 P.2d 1101 (1989) (failure to object to amount of restitution order at trial precluded review on appeal).

Defendant attempts to circumvent the above rule by citing RAP 2.5(a)(2), which provides, "a party may raise the following claimed error[ ] for the first time in the appellate court: . . . (2) failure to establish facts upon which relief can be granted."

In *State v. Moen*, 129 Wn.2d 535, 537-38, 919 P.2d 69 (1996), the defendant failed to object to a restitution order that the sentencing court entered after the statutory time for entering such orders expired. The *Moen* court discussed whether to permit the defendant to raise the issue on appeal, despite not having objected below. The *Moen* court noted that the purpose of requiring an objection at the trial level was to give the sentencing court the opportunity to correct its error. Because an objection would not have given the sentencing court the opportunity to correct its error, i.e., the order still would have been entered late, the *Moen* court held that it was proper to review the restitution order despite the lack of objection below. *Id.* at 547. Here, unlike *Moen*, had Mr. Torres raised a timely objection, the trial court could have corrected its error either by inquiring into the factual basis for the restitution amount or by scheduling a restitution hearing. We distinguish *State v. Moen*, follow *State v. Branch*, and hold that Mr. Torres's failure to object below precludes our review of the restitution order.

MR. TORRES'S REQUEST TO EXPAND HIS ASSIGNMENTS OF ERROR

This appeal was submitted for decision without oral argument on October 24, 2014. On March 11, 2015, Mr. Torres filed a motion to file supplemental brief with supplemental assignment of error, and he also filed a supplemental brief. Mr. Torres's motion is motivated by Division Two's recent decision in *State v. Satterthwaite*,

No. 45732-6-II (Wash. Ct. App. March 10, 2015). There, Division Two held that the information charging possession of a stolen motor vehicle was constitutionally deficient because it failed to include an element of the offense found in RCW 9A.56.140(1), i.e., "withhold or appropriate."

Mr. Torres did not raise this issue at the trial court level nor did he raise this issue at the appellate court level through an original assignment of error. He suggests that this court must provide one of two means of effective relief. Either we must permit him to file a supplemental brief so he can raise this issue, or else we must allow him to argue ineffective assistance of counsel for his counsel's failure to timely raise it.

We decline to provide either means of relief. First, there is no rule of appellate procedure that allows an appellant to broaden his assignments of error months after briefing is complete. Rather, the rule requires assignments of error to be made in the opening brief. RAP 10.3(a)(4). Second, Mr. Torres does not cite any authority for his argument that his counsel's failure to anticipate a new rule of law constitutes ineffective assistance of counsel. The new rule is not obvious. Although we decline to agree or disagree with the new rule, we recognize the tension with, and the effort Division Two made to distinguish, *State v. Johnson*, 180 Wn.2d 295, 325 P.3d 135 (2014).

We decline to request additional briefing on this issue because Mr. Torres has failed to make a colorable argument that he received ineffective assistance of counsel in this instance. His motion to file a supplemental brief for the purpose of making a new assignment of error is denied.

STATEMENT OF ADDITIONAL GROUNDS

In his statement of additional grounds for review, Mr. Torres contends that his counsel was ineffective. He maintains that his attorney failed to introduce jailhouse telephone calls from the person who let Mr. Torres borrow the mini-motorcycle, telling Mr. Torres that he did not know that the mini-motorcycle was stolen.

To establish ineffective assistance of counsel, a defendant must prove both, "(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

While the prosecutor referenced jailhouse telephone calls between Mr. Torres and Mr. Hendricks, the record does indicate that Mr. Hendricks said that he did not know the

motorcycle was stolen. Even if Mr. Torres could show that the telephone calls contained the alleged information, Mr. Torres's attorney would not be deficient for failing to introduce the calls. Mr. Hendricks's admission during the telephone conversation was duplicative of his testimony presented at trial. According to Mr. Torres, the telephone calls established that Mr. Hendricks did not know the mini-motorcycle was stolen. However, Mr. Hendricks personally testified to this same fact at trial. Counsel's performance was not deficient. Mr. Torres fails to establish ineffective assistance of counsel.

We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, J.

WE CONCUR:

Korsmo, J.

Fearing, J.

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State v. Jesus Torres

No. 31616-5-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 18th day of June, 2015, I caused a true and correct copy of the **Petition for Review** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 18th day of June, 2015.

x Patrick Mayovsky