NO. 31616-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

JESUS TORRES,

Appellant.

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

The Honorable Bruce A Spanner, Judge

BRIEF OF APPELLANT

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The State failed to present sufficient evidence appellant knew the mini-motorcycle he was riding was stolen.

2. The court erred in denying appellant's motions to dismiss and for a directed verdict.

3. The court violated appellant's constitutional right to a public trial by permitting private exercise of peremptory challenges on paper.

4. The court erred in ordering restitution without sufficient evidence.

Issues Pertaining to Assignments of Error

1. Possession of a stolen motor vehicle requires proof appellant knew the vehicle was stolen. Appellant told police his friend built the mini-motorcycle he was riding. His friend testified he did not build the bike, but is a mechanic, was repairing it and has built vehicles from parts before. Was the evidence insufficient to prove knowledge beyond a reasonable doubt?

2. Jury selection was not open to the public because peremptory challenges were exercised on paper. Because the trial court did not analyze the Bone-Club[1] factors before conducting this important

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

portion of voir dire in private, did the trial court violate appellant's constitutional right to a public trial?

3. A restitution order must be based on easily ascertainable damages, not speculation. In this case, at sentencing, the court awarded restitution in the amount of $503.35. When there was no evidence presented regarding the amount of restitution, should this Court reverse the restitution award?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Benton County prosecutor charged appellant Jesus 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. 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[2] 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

[2] 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.

financial obligations including $503.35 in restitution. CP 33, 40. Notice of appeal was timely filed. CP 41.

2. Substantive Facts

Police stopped Torres after he rode a mini-motorcycle across the street. 1RP 75. Police were investigating because they had received a call from Michael Horton that 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.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE TORRES KNEW THE MINI-MOTORCYCLE WAS STOLEN.

Knowledge that the property is stolen is an essential element of the offense of possession of stolen property. RCW 9A.56.140; RCW 9A.56.160. Mere possession of property that has been stolen is insufficient to convict for possession of stolen property. State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284 (2010) (discussing possession of a stolen firearm) (citing State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). These principles apply equally to the related offense of possession of a stolen

vehicle. See State v. Hayes, 164 Wn. App. 459, 480, 262 P.3d 538 (2011) (pattern jury instruction requires possession be knowing "to supply the mens rea element the legislature must have intended"). Additionally, the to-convict jury instruction required the jury to find, beyond a reasonable doubt, that Torres knew the motorcycle was stolen. CP 16. This instruction is binding as the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900, 902 (1998) (State assumes burden of proving all elements of the offense included without objection in the "to convict" instruction). Torres' conviction should be reversed because the State failed to present evidence he knew the mini-motorcycle was stolen.

When sufficiency of the evidence is challenged, appellate courts review the record to determine whether the evidence was sufficient for a reasonable person to find every element of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) overruled on other grounds by Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). The evidence is viewed in the light most favorable to the State. Jackson, 443 U.S. at 319. Due process requires proof beyond a reasonable doubt of each

and every fact necessary to constitute the charged crime. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

More than a mere scintilla of evidence is needed to meet the beyond-a-reasonable-doubt standard; "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. Miller, 60 Wn. App. 767, 772, 807 P.2d 893 (1991). Although a conviction may be sustained on circumstantial evidence, the existence of a fact cannot rest on guess, speculation, or conjecture. State v. Golladay, 78 Wn.2d 121, 130, 470 P.2d 191 (1970), overruled on other grounds by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976)). "This rule is even more essential in criminal cases where the evidence is entirely circumstantial." Id. In State v. Liles, 11 Wn. App. 166, 521 P.2d 973 (1974), the court explained:

> When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing of some conjecturing on the basis of such evidence is permissible and acceptable. If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal.

Id. at 171 (citation omitted); accord, State v. Harris, 14 Wn. App. 414, 417-18, 542 P.2d 122 (1975).

Knowledge is frequently shown only by circumstantial evidence. But in this case, there were no substantial facts from which a jury could infer

Torres knew the mini-motorcycle was stolen. The record is devoid of the types of evidence that have permitted a jury to infer knowledge in other cases.

For example, only slight additional evidence may be required when the item in question was recently stolen. State v. Withers, 8 Wn. App. 123, 128, 504 P.2d 1151, 1155 (1972) (citing State v. Portee, 25 Wn.2d 246, 170 P.2d 326 (1946)). In the case of a recently stolen firearm, inconsistent statements about the firearm, attempts to sell it, or false or improbable explanations alone may be sufficient. State v. Pisauro, 14 Wn. App. 217, 220-21, 540 P.2d 447, 449-50 (1975). Familiarity with the location of the theft when combined with a dubious explanation has also been held sufficient to show knowledge that property was stolen. State v. Smyth, 7 Wn. App. 50, 499 P.2d 63 (1972).

In this case, there was no indication Torres was familiar with the location of Horton's home where he had kept the bike. Although the mini-motorcycle had been recently stolen, Torres did not give an improbable or dubious explanation. He told police the bike belonged to his friend, who had built it. 1RP 75-76. This explanation was probable in light of Hendricks' testimony that he works as an uncertified mechanic and has, in the past, built motorized devices from parts. 1RP 93, 96. Hendricks, in turn, may have given conflicting statements about how he acquired the bike. 1RP 94, 104.

But this does not amount to evidence that Torres knew whatever Hendricks knew.

In denying Torres' motions to dismiss and for a directed verdict, the trial court acknowledged the evidence of knowledge was thin. 1RP 91. Absent even the minimal circumstances showing knowledge that were present in Pisauro or Smyth, the evidence is insufficient. Torres' conviction for possession of a stolen vehicle should be reversed.

2. THE TRIAL COURT VIOLATED TORRES' RIGHT TO A PUBLIC TRIAL BY HEARING PEREMPTORY CHALLENGES IN PRIVATE.

The public trial right is an "essential cog in the constitutional design of fair trial safeguards." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); U.S. Const. amend. VI;[3] Const. art. I, § 10; Const. Art. I, § 22. Court proceedings may be closed, but a careful procedure must be followed. Bone-Club, 128 Wn.2d at 258-59. Absent consideration, on the record, of the Bone-Club factors, trial closure is structural error requiring reversal. State v. Wise, 176 Wn.2d 1, 13-15, 288 P.3d 1113, 1118 (2012).

Jury selection is a critical part of the trial that must be open to the public. Wise, 176 Wn.2d at 11 (citing Presley v. Georgia, 558 U.S. 209,

[3] Washington's Constitution provides at least as much protection of a defendant's fair trial rights as the Sixth Amendment. State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113, 1117 (2012) (quoting Bone–Club, 128 Wn.2d at 260).

130 S. Ct. 721, 724, 175 L. Ed. 2d 675 (2010)). Peremptory challenges are an integral part of selecting a jury. See State v. Saintcalle, 178 Wn.2d 34, 52, 309 P.3d 326 (2013) (peremptory challenges established by Washington's first territorial legislature over 150 years ago). This should be the end of the inquiry. Courts may not keep this proceeding from the public's view by closing the courtroom. Nor may they achieve the same goal by conducting the challenges silently on paper. Torres' convictions must be reversed because the private exercise of peremptory challenges violated his constitutional right to a public trial.

a. Peremptory Challenges Are Part of Voir Dire and Must Be Open to Public Scrutiny.

"The public trial right applies to jury selection." Wise, 176 Wn.2d at 11 (citing Presley, 558 U.S. 209). To determine whether a specific portion of jury selection implicates the public trial right, this Court has applied the "experience and logic" test, adopted in State v. Sublett. State v. Wilson, 174 Wn. App. 328, 337, 298 P.3d 148 (2013) (citing State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715, 722 (2012)).

Under that test, the court first inquires, "'whether the place and process have historically been open to the press and general public.'" Sublett, 176 Wn.2d at 73 (quoting Press–Enterprise Co. v. Superior Court, 478 U.S. 1, 8-10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). If so, the court

inquires, "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id. The public trial right applies whenever the answer to both questions is "yes." Sublett, 176 Wn.2d at 73. In two recent cases, this Court has deemed the exercise of peremptory challenges to be an integral part of jury selection that must be public under the experience and logic test set forth in Sublett.

In Wilson, this Court held the public trial right was not implicated when the bailiff excused two jurors due to illness before voir dire began. 174 Wn. App. at 347. The Court drew a distinction between administrative removal of potential jurors before voir dire and integral portions of jury selection, including peremptory challenges. Id. at 342-43.

The Court explained, "[B]oth the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, provided such juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added). Similarly, a trial court may delegate hardship and administrative excusals to other staff, "provided that the excusals are not the equivalent of peremptory or for cause juror challenges." Id. Wilson's public trial argument failed because he could not show "the public trial right attaches to any component of jury selection that does not

involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342.

In State v. Jones, 175 Wn. App. 87, 91, 303 P.3d 1084 (2013), this Court held the public trial right was violated when, during a court recess off the record, the clerk drew names to determine which jurors would serve as alternates. The court recognized, "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 101. As in Wilson, the Jones court referred to the exercise of peremptory challenges as a part of jury selection that must be public. Id. The court held the selection of alternate jurors must be public because it is akin to exercising peremptory challenges. Id. at 98 ("Washington's first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

As Wilson and Jones suggest, the "experience" component of the Sublett test is satisfied in this case. "[S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public

process with exceptions only for good cause shown." Press-Enterprise Co., 464 U.S. at 505. The criminal rules of procedure show our courts have historically treated peremptory challenges as part of voir dire on par with for-cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates voir dire as involving peremptory and for-cause challenges. Id. CrR 6.4(b) describes "voir dire" as a process where the trial court and counsel question prospective jurors to assess their ability to serve on the particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of potential jurors before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100 (1), but only so long as "such juror excusals do not amount to for-cause excusals or peremptory challenges traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." Saintcalle, 178 Wn.2d at 74 (González, J., concurring). "The peremptory challenge is an important

'state-created means to the constitutional end of an impartial jury and a fair trial.'" Id. at 62 (Madsen, C.J. concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

While peremptory challenges may be exercised based on subjective feelings and opinions, there are important constitutional limits on both parties' exercise of such challenges. McCollum, 505 U.S. at 48-50. A prosecutor may not challenge a juror based on race, ethnicity, or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); Rivera v. Illinois, 556 U.S. 148, 153, 129 S. Ct. 1446, 173 L. Ed. 2d 320 (2009); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992). Discrimination in jury selection casts doubt on the integrity of the judicial process and the fairness of criminal proceedings. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); Saintcalle, 178 Wn.2d at 41. The exercise of peremptory challenges directly impacts the fairness of a trial, and it is inappropriate to shield that process from public scrutiny.

The public trial right encompasses "'circumstances in which the public's mere presence passively contributes to the fairness of the proceedings by, for example deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny.'" State v.

Slert, 169 Wn. App. 766, 772, 282 P.3d 101 (2012), review granted in part, 299 P.3d 20 (2013) (quoting State v. Bennett, 168 Wn. App. 197, 204, 275 P.3d 1224 (2012)). An open peremptory process safeguards against discrimination by discouraging both discriminatory challenges and the subsequent removal of jurors that have been improperly challenged.[4]

Public trials are a check on the judicial system that provides for accountability and transparency. Wise, 176 Wn.2d at 6. "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Id. at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). Both experience and logic indicate that the exercise of peremptory challenges is a crucial part of a criminal trial that must be open to the public.

b. The Procedure Used in this Case Was Private.

The exercise of peremptory challenges in this case occurred entirely on paper, rather than in public. 2RP 68; CP 43. Information about which side challenged which jurors was put on the record later, but was not open to

[4] But see State v. Love, 176 Wn. App. 911, ____, 309 P.3d 1209, 1214 (2013) (exercise of peremptory challenges "presents no questions of public oversight.").

the public at the time. CP 43, 45-46. This was, for all intents and purposes, a closed, private proceeding.

The public trial right helps assure that trials are fair, deters misconduct by participants, and tempers biases and undue partiality. Wise, 176 Wn.2d at 5. These purposes are only served if the public can actually observe the proceedings. Thus, it is unsurprising that courts have found this right violated when proceedings were held in a location that is not accessible to the public, regardless of whether the courtroom itself was per se closed. See, e.g., State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009) (proceedings in chambers were closed); State v. Leyerle, 158 Wn. App. 474, 477, 483-484, 242 P.3d 921 (2010) (questioning juror in hallway outside courtroom was a closure).

This Court should reject any assertion that the procedure in this case was public. The procedure was akin to a sidebar, which occurs outside of the public's scrutiny, and thus violates the appellant's right to a fair and public trial. Slert, 169 Wn. App. at 774 n. 11 (rejecting argument that no violation occurred if jurors were actually dismissed not in chambers but at a sidebar and stating "if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a portion of jury selection held wrongfully outside Slert's and the public's purview"); see also People v.

Harris, 10 Cal. App. 4th 672, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (exercise of peremptory challenges in chambers violates defendant's right to a public trial).

The purpose of the process was clearly to ensure that jurors did not know which side had excused which juror. Yet jurors were allowed to remain in the courtroom, which demonstrates peremptory challenges were exercised in such a way that those in the courtroom would not be able to overhear. The public could not hear which potential jurors were peremptorily struck, who struck them, and in what order they were struck. See People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

This procedure was closed to the public just as if it had taken place in chambers. Members of the public are no more able to approach the bench and listen to an intentionally private process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same: the public was denied the opportunity to scrutinize events.

The selection process was closed to the public because the public was not able to observe which party exercised which challenges. The ability to examine the jury roster after the fact does not protect the right to

public proceedings. By the time the document was filed and, presumably, available as a public record the next day, the excused jurors were gone, and spectators' memories of their appearance, demeanor, and answers to questioning during voir dire are likely to have faded. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Harris, 10 Cal. App. 4th at 683 n.6.

c. The Convictions Must Be Reversed Because the Court Did Not Justify the Closure Under The Bone-Club Factors.

Conducting peremptory challenges in private and excluding the public from observing that process violated Torres' right to a public trial. *Before* a trial judge closes the jury selection process off from the public, it must consider the five factors identified in Bone-Club on the record. Wise, 176 Wn.2d at 12. Under the Bone-Club test, (1) the proponent of closure must show a compelling interest for closure and, when closure is based on a right other than an accused's right to a fair trial, a serious and imminent threat to that compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object to the closure; (3) the proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; (5) the order must be no broader in its application or

duration than necessary to serve its purpose. Bone-Club, 128 Wn.2d at 258-60; Wise, 176 Wn.2d at 10.[5]

There is no indication the court considered the Bone-Club factors before conducting the private jury selection in this case. 2RP 67-68. Appellate courts do not comb through the record or attempt to deduce whether the trial court applied the Bone-Club factors when it is not apparent in the record. Wise, 176 Wn.2d at 12-13.

Because peremptory challenges were not exercised openly and in public, Torres' constitutional right to a public trial under the state and federal constitutions was violated. The violation of the public trial right is structural error requiring automatic reversal because it affects the framework within which the trial proceeds. Id. at 6, 13-14. "Violation of the public trial right, even when not preserved by objection, is presumed prejudicial to the defendant on direct appeal." Id. at 16. Torres' convictions must be reversed. Id. at 19.

This Court should reject any suggestion that this issue may have been waived. A defendant does not waive his right to challenge an improper closure by failing to object. Id. at 15. The issue may be raised for the first time on appeal. Id. at 9. Indeed, a defendant must have

[5] The Bone-Club requirements are similar to those set forth by the United States Supreme Court. In re Pers. Restraint of Orange, 152 Wn.2d 795, 805-06, 100 P.3d 291 (2004) (discussing Waller, 467 U.S. at 45-47).

knowledge of the public trial right before it can be waived. In re Pers. Restraint of Morris, 176 Wn.2d 157, 167, 288 P.3d 1140 (2012). Here, there was no discussion of Torres' public trial right before the peremptory challenges were exercised in private. 2RP 67-68. There is no waiver, and Torres' convictions must be reversed.

3. THE RESTITUTION ORDER SHOULD BE VACATED BECAUSE THE STATE FAILED TO PRESENT SUBSTANTIAL EVIDENCE OF THE AMOUNT OF LOSS.

A restitution order must be based on "easily ascertainable damages." RCW 9.94A.753 (3).[6] "Restitution is an integral part of sentencing, and it is the State's obligation to establish the amount of restitution." State v. Dedonado, 99 Wn. App. 251, 257, 991 P.2d 1216 (2000). While the claimed loss need not be established with specific accuracy, it must be supported by

[6] RCW 9.94A. 753 (3) provides in relevant part:

> Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury. Restitution shall not include reimbursement for damages for mental anguish, pain and suffering, or other intangible losses, but may include the costs of counseling reasonably related to the offense. The amount of restitution shall not exceed double the amount of the offender's gain or the victim's loss from the commission of the crime.

substantial credible evidence. State v. Griffith, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

If the defendant disputes facts relevant to determining restitution, the State must prove the damages by a preponderance of the evidence. State v. Kinneman, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). "Preponderance of the evidence" means that accounting for all the evidence, the assertion must be more probably true than not true. State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

Although the rules of evidence do not apply at restitution hearings, the State's proof must meet due process requirements, such as providing the defendant with an opportunity to refute the evidence presented, and being reasonably reliable. State v. Strauss, 119 Wn.2d 401, 418-19, 832 P. 2d 78 (1992); State v. Pollard, 66 Wn. App. 779, 784-85, 834 P.2d 51 (1992). On appeal, restitution orders are reviewed for abuse of discretion. State v. Tobin, 161 Wn. 2d 517, 523, 166 P.3d 1167 (2007). The record must permit a reviewing court to determine "exactly what figure is established by the evidence." Pollard, 66 Wn. App. at 785.

The record in this case contains no evidence whatsoever supporting the amount of restitution ordered. Horton testified he bought the mini-motorcycle for $200, this price was below market value, and it was damaged when it was returned to him. 1RP 54, 57-59, 61. At sentencing, the

prosecutor stated, "there is restitution to Michael Horton," but the record contains no evidence to support the $503.35 that the court awarded. 3RP 5; CP 33. The restitution order must be vacated because the State failed to meet its burden to prove the amount of restitution by a preponderance of the evidence. Dedonado, 99 Wn. App. at 257.

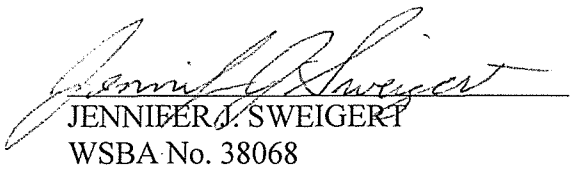
D. CONCLUSION

Torres' conviction for possession of a stolen vehicle must be reversed and dismissed for insufficient evidence. Both his convictions must be reversed because the private exercise of peremptory challenges violated his right to a public trial. Additionally, the restitution order must be reversed for insufficient evidence in the record.

DATED this 31st day of January, 2014.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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State v. Jesus Torres

No. 31616-5-III

Certificate of Service by email

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 31st day of January, 2014, I caused a true and correct copy of the **Brief of Appellant** 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 31st day of January, 2014.

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