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Court of Appeals
Division III
State of Washington
NO. 33874-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JOEL GROVES,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Trooper Paul Carroll's suspicion that Joel Groves had committed a crime arose almost immediately after Mr. Groves was stopped for speeding. The motorcycle Mr. Groves was driving had been salvaged and the license plate he was using belonged to a different motorbike. Even though Mr. Groves called the owner of the bike to have him come down and establish ownership, the trooper called for backup and put Mr. Groves into handcuffs. When it became clear the motorcycle was not stolen, the troopers determined they would still impound it, disregarding the reasonable alternatives to impoundment Mr. Groves had provided the trooper with.

After Mr. Groves left the scene, the troopers lifted the seat off the motorcycle to discover two closed containers. These containers were opened without just cause and in violation of Mr. Groves' state and constitutional rights to be free from unreasonable searches and seizures. Mr. Groves was charged with possession of a controlled substance with intent to deliver and possession of a legend drug.

And even though there was no evidence the motorcycle was stolen, the State relied upon the trooper's suspicions to establish Mr. Groves had a propensity to commit other crimes. This flagrant and ill-

intentioned use of irrelevant and prejudicial evidence constituted misconduct.

B. ASSIGNMENTS OF ERROR

1. The trial court failed to issue findings of fact and conclusions of law as required by CrR 3.6.
2. Reasonable alternatives to impoundment were not considered prior to the warrantless inventory search conducted by the State.
3. The continued search for stolen property during the warrantless search exceeded the scope of a lawful inventory search.
4. The State violated the inventory search exception by opening two closed containers.
5. The State did not establish the inventory search was conducted according to established criteria.
6. The State failed to present sufficient evidence of an intent to deliver a controlled substance.
7. The State failed to present sufficient evidence of possession of a legend drug without a prescription or other lawful authority.

8. The Evidence the motorcycle Mr. Groves was driving could have been stolen, when no such evidence existed, was irrelevant and prejudicial to Mr. Groves.

9. The State committed prosecutorial misconduct by introducing evidence of prior acts designed to prejudice the jury, which was flagrant and ill-intentioned

10. The court imposed legal financial obligations without considering the ability of Mr. Groves to pay.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The consistent and firm enforcement of CrR 3.6(b)'s requirement that the court issue written findings of fact at the conclusion of a suppression hearing contributes to the "fair and expeditious" handling of criminal appeals and is in the interest of both the public and those convicted of crimes. Where the oral findings of fact are not clear and comprehensive, does the failure to issue written findings of fact require dismissal?

2. Impounding a vehicle when reasonable alternatives exist is unreasonable and unconstitutional. Does the failure of the troopers who impounded the motorcycle Mr. Groves was driving, to consider

reasonable alternatives, require suppression of the evidence recovered from the motorcycle?

3. An inventory search may not be used to justify a continued investigation of criminal activity. Was the limited scope of an inventory search exceeded when the troopers opened closed containers to continue their investigation regarding whether the motorcycle was stolen?

4. The legitimate purposes of an inventory search can be accomplished by inventorying closed containers without opening them. Where a closed container in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of that container in an inventory search. Did the State exceed the limited scope of an inventory search by opening closed containers without a warrant or other just cause?

5. Inventory searches must be conducted according to standard criteria. Does the State's failure to establish at the suppression hearing that the troopers conducting the inventory search followed standard criteria require suppression?

6. Possession with intent to deliver requires "substantial evidence as to the possessor's intent" in order to distinguish a naked

possession charge from one of possession with intent to deliver. Does the State's failure to establish substantial evidence of intent to deliver require reversal?

7. An essential element of possession of a legend drug is that the possessor lacked a prescription or other lawful authority. Does the failure of the State to establish this essential element require dismissal of this charge?

8. Evidence of other crimes, wrongs, or acts is generally inadmissible on the principle that the accused must be tried for the crimes charged, not for uncharged crimes. The State introduced extensive evidence about the suspicions the trooper had that the motorcycle Mr. Groves was driving was stolen, even though there was no evidence the motorcycle was stolen, to establish Mr. Groves' propensity to commit other crimes. Did the use of this irrelevant and prejudicial evidence deprive Mr. Groves of his right to a fair trial?

9. Prosecutors have a duty to act impartially and only in the interest of justice. The State relied extensively upon prior act evidence to establish Mr. Groves' propensity for committing crimes. Is reversal required to cure the flagrant and ill-intentioned use of prior act

evidence by the State to establish Mr. Groves' propensity to commit the crimes charged?

10. It is unconstitutional to impose legal financial obligations upon a person who has no present or future ability to pay them. Is remand required where the court failed to determine Mr. Groves' present or future ability to pay legal financial obligations?

D. STATEMENT OF THE CASE

Joel Groves was stopped by Trooper Paul Carroll for speeding. Although Mr. Groves had a valid driver's license, he lacked a motorcycle endorsement. 2B RP 256.¹ The trooper felt Mr. Groves was nervous when speaking to him. 2B RP 257. The motorcycle had been crashed and damaged at some point and had equipment on it which was not original. 2B RP 257-58. The license plate on the motorcycle did not match the bike and appeared to belong to a different motorcycle. 2B RP 262. The trooper became suspicious regarding the ownership of the motorcycle, as Mr. Groves could not provide ownership papers or registration. 2B RP 257. The trooper also noticed the motorcycle had been repainted and the gas tank had been repaired. 2 RP 257.

¹ The transcript consists of three volumes. References to the transcript include the volume and page number.

While investigating the motorcycle as stolen, the trooper placed Mr. Groves into handcuffs. 1 RP 88. The trooper was concerned “until the very end that the bike might be stolen” and called backup units to assist him. 1 RP 77. While Trooper Carroll was able to establish Mr. Groves did not own the motorcycle, there was no evidence it had been stolen. 1 RP 78. Mr. Groves was never charged with possession of stolen property.

Mr. Groves tried to help the trooper establish who owned the motorcycle. He explained that the motorcycle was a salvaged bike which had been purchased by the shop where he worked. 1 RP 104. Mr. Groves told the trooper it belonged to a friend and he had been restoring it at a garage. 1 RP 103-04. Mr. Groves explained the motorcycle belonged to Christian White, which was consistent with the name attached to the motorcycle license plate. 2B RP 258, 262. The trooper determined the motorcycle was not stolen, gave Mr. Groves an infraction ticket for failing to have a motorcycle endorsement and allowed him to leave.

After releasing Mr. Groves, the troopers continued their search of the motorcycle. The troopers removed the seat from the motorcycle and discovered two closed containers in the storage space most

motorcycles have under their seats. 1 RP 94. The troopers opened these closed containers and found the controlled substances. In all, the troopers discovered two bags of methamphetamine inside a zipped container, along with smaller bags. 2B RP 268. The weight of the drugs was under three quarters of an ounce. 2B RP 272. A pipe commonly used to smoke methamphetamines was found with the drugs. 2B RP 268. In a container separate from the drugs, the trooper found a digital scale. 2B RP 269. Mr. Groves was not the subject of a drug investigation and no other evidence indicating an intent to deliver was discovered. The troopers also found one oxycodone pill. 2B RP 268. The State presented no evidence Mr. Groves lacked a prescription for this legend drug.

At trial, the prosecutor Jodi Hammond concentrated in her opening statement upon the suspicions the trooper had about whether the motorcycle was stolen. 2A RP 231. She continued this theme extensively throughout her examination of Trooper Carroll and the only other officer to testify, Deputy Mike McKean. Trooper Carroll discussed his suspicions regarding the lack of markings, mismatched license plates, obscured VIN number, and lack of registration. 2B RP 258, 260, 261, 263. The trooper then explained how “the law allows us

to seize a motorcycle if we have any question about it being stolen” even though he did not claim to be impounding it for this reason. 2B RP 263. The deputy was asked to discuss the bike and told Ms. Hammond the registration did not match the plates, badging had been stripped off and the motorcycle was “odd-looking”. 2B RP 306. The “suspicious bike” theme was returned to in Ms. Hammond’s closing argument. 2B RP 344. Her closing argument then described the motorcycle and the trooper’s investigation of whether it was stolen. 2B RP 345.

Mr. Groves was found guilty of possession of a controlled substance with intent to deliver and possession of a legend drug without a prescription. CP 73-75. He was sentenced to 90 months, consecutive to his conviction in another matter. CP 78-79. The court imposed discretionary legal financial obligations in excess of three thousand dollars, but did not conduct a hearing to determine whether Mr. Groves would ever have the ability to pay these fines and fees. CP 81.

E. ARGUMENT

1. FAILURE OF THE COURT TO ISSUE WRITTEN FINDINGS OF FACT ENTITLES MR. GROVES TO DISMISSAL.

- a. Written findings of fact and conclusions of law are necessary unless the oral findings are clear and comprehensive.*

CrR 3.6(b) states that at the conclusion of the evidentiary hearing, “the court shall enter written findings of fact and conclusions of law.” The consistent and firm enforcement of CrR 3.6 contributes to the “fair and expeditious” handling of criminal appeals and is in the interest of both the public and those convicted of crimes. *State v. Smith*, 68 Wn.App. 201, 209, 842 P.2d 494 (1992).

The failure to enter formal findings and conclusions causes appellate courts to be unsure of exactly what the trial court’s theory was for upholding the search of property. *Smith*, 68 Wn.App. at 208. Where the trial court fails to enter written findings and conclusions of law and the oral findings are not clear and comprehensive, dismissal is the appropriate remedy. *Id.* Remand is not the appropriate remedy where oral findings are not clear and comprehensive. *Id.*

b. The oral findings of the trial court are not clear and comprehensive.

After conducting the CrR 3.6 hearing, the trial court made an oral ruling denying Mr. Groves' motion to suppress. 1 RP 116. The findings are not clear and comprehensive. They fail to provide a sufficient basis for this Court to determine the theory upon which the trial court based its decision to deny Mr. Groves' motion.

In their entirety, the court stated:

I've been trying to figure out what the defense concerns here were, and I think they're -- basically comes down to two different versions of what occurred. I think Mr. Groves' testimony -- seat was locked and locked on is at odds with -- trooper's testimony that the seat was not locked, and just came off.

And one of the reasons we hold these hearings in the courtroom so we can have a judge -- listen to the witnesses and make a credibility determination and I think in this case -- clear that -- take the trooper's testimony as being accurate, -- (inaudible) wasn't a pretext for anything. He was -- (inaudible) -- motorcycle this was. There's no -- no -- registration or other lawfully required documents in the possession of Mr. Groves, -- question surrounding the ownership, I think it would be foolish for law enforcement to do anything other than impound the bike in a situation like this.

So, I'm going to deny the motion.

1 RP 116.

c. The failure to issue written findings of fact entitles Mr. Groves to dismissal.

These findings are insufficient to provide a basis to understand the trial court's theory of why the evidence seized from Mr. Groves should be not suppressed. While Mr. Groves will address the impropriety of the search, these arguments are only based upon suppositions regarding the record, which is not sufficient for this Court to do anything other than guess what the trial court's rationale was for allowing the seized evidence to be used at trial.

The only evidence of Mr. Groves' potential guilt was the evidence seized during the search of the motorcycle. The failure of the trial court to issue written findings of fact and conclusions of law in a timely fashion entitles Mr. Groves to dismissal.

2. THE STATE CONDUCTED A WARRANTLESS AND UNCONSTITUTIONAL SEARCH TO SEIZE THE EVIDENCE USED AGAINST MR. GROVES.

Mr. Groves maintains the lack of findings of fact make it impossible for this Court to understand the trial court's theory for why it found the evidence seized from a closed container during an inventory search should not be suppressed. The analysis of the suppression issue is not intended to waive this issue, but is rather an

attempt to analyze the propriety of the seizure without the benefit of written or clear and comprehensive oral findings.

Should this Court reach the suppression issue, it should find the State failed to present a sufficient basis to justify the warrantless search of the motorcycle. The evidence seized from the motorcycle should be suppressed because the trooper failed to consider reasonable alternatives prior to impounding the motorcycle, exceeded the scope of an inventory search by using it to justify an investigatory stop, opened closed containers without cause and failed to establish that the search was conducted pursuant to standardized procedures.

a. Trooper Carroll failed to consider reasonable alternatives to impoundment before seizing the motorcycle Mr. Groves was riding upon.

RCW 46.55.113 (2)(g) empowers law enforcement officers with the discretionary authority to impound a motorcycle when the motorcycle is operated by a person without a specially endorsed driver's license. *See also* RCW 46.20.500. In order to lawfully impound the motorcycle, the officer must exercise that discretion, and consider reasonable alternatives to impoundment. *State v. Tyler*, 177 Wn.2d 690, 698, 302 P.3d 165 (2013); (citing *State v. Houser*, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980)). Impounding a vehicle when

reasonable alternatives exist is unreasonable and unconstitutional.

Tyler, 177 Wn.2d at 699, *see also* U.S. Const. amends. 4, 14, and Const. art. I, §7.

The Supreme Court has in fact rejected a rule promulgated by the Washington State Patrol that transformed a discretionary authority to impound a vehicle into a mandatory impoundment. *See In re Impoundment of Chevrolet Truck, WA License No.A00125A ex rel. Registered/Legal Owner*, 148 Wn.2d 145, 162, 60 P.3d 53 (2002) (holding the State Patrol exceeded its statutory authority in WAC 204-96-010). Impounding a vehicle under a mandatory policy that exceeds statutory authority is improper. *Chevrolet*, 148 Wn.2d at 162.

Trooper Carroll did not consider alternative arrangements to impoundment. 1 RP 76. According to Trooper Carroll, the State Patrol's policy was to impound any motorcycle where the rider does not have a motorcycle endorsement. 1 RP 75. Because Mr. Groves had no endorsement, the trooper impounded the motorcycle pursuant to their policy and did not consider other alternatives. 1RP 75-76, 80, 93. He did not attempt to make alternative arrangements, such as allowing a licensed driver to drive it away, having it parked safely, or having the motorcycle towed at Mr. Groves' expense. 1RP 76, 80-81.

While the State Patrol’s policy of automatically impounding motorcycles is not a rule promulgated in the Washington Administrative Code, its effects are the same: it removes discretionary authority from individual law enforcement officers. That policy exceeds the statutory authority to impound vehicles imparted by RCW 46.55.113(2)(g). Because Trooper Carroll impounded the motorcycle pursuant to the State Patrol’s policy and failed to consider reasonable alternatives to impoundment, impounding the motorcycle was an unreasonable, unconstitutional seizure. Any search following that seizure was also invalid and unconstitutional, and the evidence from that search must be suppressed. *State v. Gaines*, 154 Wn.2d 711, 716–17, 116 P.3d 993 (2005).

b. Searching for evidence of theft by the trooper falls outside the scope of the inventory search exception.

Washington courts presume warrantless searches are unreasonable, unless the State can prove a “‘carefully drawn and jealously guarded exception’ applies.” *State v. VanNess*, 186 Wn.App. 148, 155, 344 P.3d 713 (2015) (quoting *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013)). A non-investigatory inventory search is proper when conducted for the purpose of securing property, protecting police from dishonest claims of theft, and protecting police and the

public from danger. *Houser*, 95 Wn.2d at 154, *VanNess*, 186 Wn.App. at 162. Because the purposes of the inventory search are at odds with the privacy rights of the vehicle's owner, Washington courts have limited the search to protect against substantial risks to property and not enlarged the search to encompass remote risks. *Tyler*, 177 Wn.2d at 701; (citing *Houser*, 95 Wn.2d at 155); *see also State v. Wisdom*, 187 Wn.App. 652, 674, 349 P.3d 953 (2015) (citing *State v. White*, 135 Wn.2d 761, 771, 958 P.2d 982 (1998)).

Inventory searches are an administrative or caretaking function. *VanNess*, 186 Wn.App. at 162. Inventory searches are not conducted to discover evidence of crime. *Houser*, 95 Wn.2d at 153. Evidence found in the course of an inventory search should be suppressed if the purpose of the search was a warrantless, exploratory search of the vehicle. *Houser*, 95 Wn.2d at 148. The State must show that the search was conducted in good faith and not as a pretext for an investigatory search. *Houser*, 95 Wn.2d at 155.

Trooper Carrol was suspicious "until the very end" that the motorcycle he had seized from Mr. Groves was stolen. 1 RP 77. The trooper testified he removed the seat of the motorbike to try and find ownership documents. 1 RP 93. His purpose in opening the two closed

cases was to continue to investigate whether the motorcycle was stolen. 1RP 94-95. Continued investigation of whether a crime has occurred is outside the scope of a valid inventory search and any evidence found in the course of that investigation must be suppressed. *Houser*, 95 Wn.2d at 155.

c. The trooper exceeded the authority of an inventory search when he opened closed containers found on the motorcycle.

The legitimate purposes of an inventory search can be accomplished by inventorying closed containers without opening them. *Houser*, 95 Wn.2d at 156. Where a closed container in a vehicle gives no indication of dangerous contents, an officer cannot search the contents of that container in an inventory search. *Wisdom*, 187 Wn.App. at 674 (citing *Houser*, 95 Wn.2d at 158); *accord VanNess*, 186 Wn.App. at 163-64, *State v. Dugas*, 109 Wn.App. 592, 597, 36 P.3d 577 (2001) (closed container in a seized jacket should have been inventoried as a unit).

The evidence used against Mr. Groves was discovered in two closed cases, each secured by a zipper. 1 RP 94-96. Trooper Carroll opened each case looking for registration documents. *Id.* Trooper Carroll was required to inventory each case without opening it, absent a

valid exception. *Dugas*, 109 Wn.App at 597. Opening and searching the closed cases was outside the scope of the narrowly drawn inventory search exception, and any evidence discovered in the cases must be suppressed.

d. The State did not establish the inventory search was conducted pursuant to standardized procedures.

Inventory searches must be conducted according to standard criteria. *Colorado v. Bertine*, 479 U.S. 367, 374 n. 6, 375, 107 S.Ct. 738, 743, 93 L.Ed.2d 739 (1987). Inventory searches should follow standardized police procedures which do not give law enforcement officers excessive discretion. *VanNess*, 186 Wn.App. at 162.

Evidence found in a closed container should be suppressed, where there is no policy governing whether or not an officer should open that container. *Florida v. Wells*, 495 U.S. 1, 5, 100 S.Ct. 1632, 109 L.Ed.2d 1 (1990).

The State did not present any evidence at the suppression hearing that standard policy or procedure were followed by the trooper, as is required of a valid inventory search. *Bertine*, 479 U.S. at 375. Because the State failed to prove a standard policy governed Trooper Carroll's search, the search is invalid and the evidence found should be suppressed. *Id.* at 375; *Wells*, 495 U.S. at 5.

3. THE STATE PRESENTED INSUFFICIENT EVIDENCE MR. GROVES INTENDED TO DELIVER A CONTROLLED SUBSTANCE.

a. Intent to deliver a controlled substance requires substantial evidence of intent beyond possession.

The due process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt all facts necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. Const. amend. 14; Const. art. I, § 22); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). Evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 192, 414, 4 P.3d 115 (2000).

Without “substantial evidence as to the possessor’s intent”, courts are wary of turning a simple possession case into a possession with intent to deliver. *State v. Brown*, 68 Wn.App. 480, 483, 843 P.2d 1098 (1993) (citing *State v. Harris*, 14 Wn.App. 414, 418, 542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976)). This is true even if the amount of the controlled substance is greater than what is consistent with personal use, or if the substance is separated into individual baggies. *State v. Campos*, 100 Wn.App. 218, 222, 998 P.2d 893 (2000);

State v. Kovac, 50 Wn.App. 117, 121, 747 P.2d 484 (1987). A police officer's opinion that a person possessed more drugs than normal for personal use is also insufficient to establish intent to deliver. *State v. Lopez*, 79 Wn.App. 755, 768, 904 P.2d 1179 (1995). To be sufficient, the State must also present evidence suggesting an intent to deliver independent of the evidence of possession. *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004).

b. Beyond the naked possession, there was insufficient evidence of Mr. Groves's intent to deliver.

The evidence at trial established Mr. Groves was stopped for speeding. 2B RP 256. Mr. Groves did not have a motorcycle endorsement on his otherwise valid license and the license plate on his motorcycle did not match its identification number. 2B RP 257. The trooper suspected the motorcycle was stolen, but ultimately decided he would let Mr. Groves leave, impounding the motorcycle. 2B RP 261, 265-66.

After Mr. Groves left, the trooper opened a compartment under the rear seat and discovered a zipped container with two bags of methamphetamine, along with smaller bags. 2B RP 268. The weight of the drugs was under three quarters of an ounce. 2B RP 272. A pipe commonly used to smoke methamphetamine was found with the drugs.

2B RP 268. In a container separate from the drugs, the trooper found a digital scale. 2B RP 269.

There was no evidence Mr. Groves was involved in any kind of delivery. He was not the subject of an investigation. He did not have a large quantity of money. There were no ledger books. 2B RP 280.

There was no evidence Mr. Groves intended to sell the methamphetamine recovered from the motorcycle.

Although the trooper speculated the methamphetamine seized from the motorcycle had a street value of \$1,900, this is not necessarily a large amount. 2B RP 288. Recent studies have found much of the drug abuse this country now sees has shifted from low-income urban areas with large minority populations to more affluent suburban and rural areas with primarily white populations. Theodore J. Cicero, Matthew S. Ellis, Hilary L. Surratt, Steven P. Kurtz, *The Changing Face of Heroin Use in the United States: A Retrospective Analysis of the Past 50 Years*, JAMA Psychiatry (July 2014, vol. 71, no. 7). There are many reasons why a user with income is likely to possess a larger amount, including the reduction in the number of transactions the user has with the seller and the reduced likelihood of getting caught. *See, e.g., Kovac*, 50 Wn.App. at 120.

While the State may argue the scale recovered from the motorcycle is sufficient other evidence of an intent to deliver, this Court should reject that argument. There may have been a time when users did not possess scales, but this is no longer the case. *See, e.g.*, The Palm Beach Institute, *The Parent's Guide to Drug Paraphernalia*, available at <http://www.pb institute.com/parents-guide-drug-paraphernalia/> (Both the individual selling the drug and the one buying it would want to ensure that no more is being sold than expected). A person purchasing a larger quantity of a controlled substance is likely to make sure they are getting what they paid for, which can only be done when the purchaser brings their own scale.

c. The State failed to establish sufficient facts to separate this simple possession from a possession with the intent to deliver.

This Court should find there was insufficient evidence of an intent to deliver the controlled substances found in the motorcycle. The drugs on their own, or with the other evidence recovered from the scene, is insufficient for this Court to distinguish between simple possession and possession with an intent to deliver. Because the State failed to establish this essential element, this Court should reverse this conviction.

4. THE STATE FAILED TO ESTABLISH AN ESSENTIAL ELEMENT OF THE CRIME OF POSSESSION OF A LEGEND DRUG.

a. An essential element of possession of a legend drug is that the possession occurred without a prescription or order of a physician.

Basic principles of due process require the State to prove every essential element of a crime beyond a reasonable doubt. *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725, 728 (2006), *as amended* (May 26, 2006) (internal citations omitted); *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996). Under certain circumstances, the State may use presumptions and inferences, although they are not favored in law. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994), *cert. denied*, 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed.2d 212 (1994).

It is unlawful to possess a legend drug, except upon the order or prescription of a physician. RCW 69.41.030. An essential element of this crime is that the possession occurred without “the order or prescription of a physician.” *Id.*

b. The State failed to prove Mr. Groves lacked a prescription or order of a physician.

The State introduced evidence of a pill found under the seat of the motorcycle seized by the State. 2B RP 277. The State introduced evidence the pill had the pharmaceutical identifiers which indicated the

pill contained oxycodone. 2B RP 296. That oxycodone is a legend drug was not challenged.

The State failed, however, to introduce evidence Mr. Groves did not have a prescription for oxycodone. The State did not introduce any evidence to show Mr. Groves was not entitled to possess the oxycodone. The State did not even ask Mr. Groves whether he had a prescription, as he was released before the investigation of the motorcycle was complete. 2B RP 266.

As an essential element of the crime charged, the State was obligated to prove beyond a reasonable doubt Mr. Groves did not have a prescription for the oxycodone. *Cantu*, 156 Wn.2d at 825. Because the State failed to prove this essential element, Mr. Groves is entitled to dismissal of this charge.

5. MR. GROVES' RIGHT TO A FAIR TRIAL WAS DENIED WHEN THE STATE INTRODUCED EVIDENCE SUGGESTING THE MOTORCYCLE HE WAS DRIVING WAS STOLEN, WHEN NO SUCH EVIDENCE EXISTED.

- a. Evidence the motorcycle Mr. Groves was driving could have been stolen, when no such evidence existed, was irrelevant and prejudicial to Mr. Groves.*

Evidence of other acts is generally inadmissible. ER 404(b); *State v. Fisher*, 165 Wn.2d 727, 744, 202 P.3d 937

(2009). Exclusion is grounded on the principle that the accused must be tried for the crimes charged, not for uncharged crimes and accusations. *State v. Emmanuel*, 42 Wn.2d 1, 13, 253 P.2d 386 (1953). Courts must be wary of the potential risk prior act evidence has in prejudicing an accused and be aware of situations “where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.” *State v. Smith*, 106 Wn.2d 772, 774, 725 P.2d 951 (1986) (quoting *State v. Goebel*, 36 Wn.2d 367, 379, 218 P.2d 300 (1950)). The potential high risk of prejudice requires courts to closely scrutinize evidence of prior acts and only admit it if certain criteria are met. *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982).

Prior to admitting evidence of prior acts, a trial court must find by a preponderance of the evidence the prior act, identify the purpose for which the evidence is sought to be introduced, determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against the prejudicial effect. *State v. Foxhoven*, 161 Wn.2d 168, 173, 163 P.3d 786 (2007). The evidence must also be relevant to be admissible. *Fisher*, 165 Wn.2d at 949; ER 402.

The State relied upon prejudicial prior act evidence to convict Mr. Groves of the crimes charged when they introduced evidence implying the motorcycle Mr. Groves was driving could have been stolen. 2B RP 262. This evidence was not relevant to the crime charged. The prejudicial effect deprived Mr. Groves of his right to a fair trial.

The State elicited testimony that Trooper Carroll was suspicious Mr. Groves' motorcycle was stolen soon after Mr. Groves was stopped for speeding. 2B RP 256-57. The trooper testified extensively about the license plate belonging to a different motorcycle than the one Mr. Groves was driving. 2B RP 261. The trooper stated he called a second unit to the scene because he believed the motorcycle was stolen. 2B RP 262. He also told the jury the State Police considered impounding the motorcycle because the trooper had questions about it being stolen, before deciding to impound it because Mr. Groves did not have a motorcycle endorsement instead. 2B RP 263.

The evidence of the motorcycle being stolen should never have been put before the jury. Not only was the evidence irrelevant and highly prejudicial, but the State could not even

prove the motorcycle was actually stolen. 2B RP 281. To the contrary, the evidence suggested the motorcycle was not stolen. This was a motorcycle which needed extensive repairs and had probably been salvaged. 2B RP 257 (motorcycle had dented fuel tank, had been repainted and some of the equipment on it was not original). No witness came forward declaring the motorcycle had been stolen from them. Mr. Groves was never charged with possession of stolen property.

Additionally, the question of whether the motorcycle was stolen bears no relevancy as to whether Mr. Groves committed the crimes charged, all of which deal with whether he possessed controlled substances. *See* ER 403. Instead, the apparent sole purpose of letting the jury know about the investigation of the motorcycle appears to have been to persuade the jury to convict Mr. Groves of the crimes charged. The use of the evidence by the State violated ER 404(b) and deprived Mr. Groves of his right to a fair trial.

b. *The State committed misconduct by suggesting evidence the motorcycle was stolen, when no such evidence existed.*

“As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.” *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). A “fair trial” is one in which the prosecutor representing the State does not throw the prestige of their public office and the expression of their own belief of guilt into the “scales against the accused.” *State v. Monday*, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) quoting *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956); *see also State v. Reed*, 102 Wn.2d 140, 145–47, 684 P.2d 699 (1984). In addition to representing the State, a prosecutor owes a duty to defendants to see their rights to a constitutionally fair trial are not violated. *Monday*, 171 at 676.

Misconduct requires a showing that the prosecutor’s conduct is both improper and prejudicial. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673, 678 (2012) (citing *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011)). Establishing prejudice requires the court to find there was a substantial likelihood the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Where

there is no objection at trial, the errors may be waived unless the court finds the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443. Flagrant and ill-intentioned misconduct occurs where the State preemptively presents evidence of a person's propensity to commit crimes, as occurred here. *Fisher*, 165 Wn.2d at 749.

From the beginning of this case, the State focused upon the suspicions the officer had about the motorcycle Mr. Groves was driving when he was stopped. 2A RP 231. In her opening statement, Ms. Hammond discussed how, from the "beginning of the stop all the way through the end, things just weren't adding up." 2A RP 231. Ms. Hammond discussed in detail the mismatched license plates, the lack of registration, how the motorcycle had been repainted and the suspicions the trooper had about who owned the motorcycle. 2A RP 233.

During cross examination, Ms. Hammond again focused upon the ownership of the motorcycle. Trooper Carroll discussed his suspicions regarding the lack of markings. 2B RP 258. Ms. Hammond asked the trooper to discuss his suspicions about the mismatched license plates. 2B RP 260. The trooper was asked to explain why he had Mr. Groves scratch paint off the motorcycle to reveal the VIN

number, having the trooper again confirm he thought the motorcycle was stolen. 2B RP 261. Ms. Hammond had the officer describe his call for back-up, upon his belief the motorcycle was stolen. 2B RP 262. The trooper then explained how “the law allows us to seize a motorcycle if we have any question about it being stolen.” 2B RP 263.

Ms. Hammond returned to her theme regarding the “suspicious bike” in her closing argument. 2B RP 344. Her closing argument then described the motorcycle and the trooper’s investigation of whether it was stolen. 2B RP 345. The State argued that these suspicions helped to infer Mr. Groves was guilty of the charged crimes.

Arguing extensively about irrelevant and prejudicial evidence constituted misconduct. This misconduct is especially flagrant and ill-intentioned because the State did not have actual evidence the motorcycle was stolen. Hearing about the irrelevant investigation into the status of the motorcycle, which was never established to be stolen, was designed to prejudice the jury against Mr. Groves. As it placed Mr. Groves’ credibility into question, suggesting he was a thief as well as a drug dealer, it affected the jury’s verdict.

The likelihood the misconduct affected the jury’s verdict is especially clear, as there is a substantial likelihood the evidence

presented and the instructions given here could have supported convictions for the lesser charge of simple possession. *See, e.g., Glassman*, 175 Wn.2d at 708. This is especially true given the lack of evidence with regard to Mr. Groves' intent. By putting Mr. Groves' credibility into issue by suggesting he has a propensity to commit crimes, especially where the evidence did not support the accusations, the State strongly insinuated Mr. Groves' guilt on the present charges, because of the prior acts. The prejudice caused by the extensive reliance upon the prior acts constitutes flagrant and ill-intentioned misconduct. Mr. Groves is entitled to a new trial, free from improper and prejudicial argument.

6. LEGAL FINANCIAL OBLIGATIONS WERE IMPOSED WITHOUT DETERMINING WHETHER MR. GROVES HAD A PRESENT OR FUTURE ABILITY TO PAY THEM.

a. Before legal financial obligations may be imposed, the court must make an inquiry into whether a person has the present or future ability to pay.

The legislature has mandated that a sentencing court “shall not order a defendant to pay costs unless the defendant is or will be able to pay them.” RCW 10.01.160(3). Trial courts must make an individualized inquiry into a defendant's current and future ability to pay before imposing legal financial obligations. *State v. Blazina*, 182

Wn.2d 827, 830, 833–34, 344 P.3d 680 (2015); *see also*, *State v. Duncan*, ___ Wn.2d ___, Slip Op. No. 90188-1 (Wash. 2016). Even where the issue is not raised below, RAP 2.5 allows for appellate review, because the pernicious consequences of the “broken LFO systems” on indigent defendants “demand” that the Court reach the issue. *Id.* at 833–34.

Imposing legal financial obligations on indigent defendants causes significant problems, including “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wn.2d at 835. Legal financial obligations accrue interest at a rate of 12%, so even a person who manages to pay \$25 per month toward legal financial obligations will owe more money ten years after conviction than when the legal financial obligations were originally imposed, even when the minimum amount is imposed by the trial court. *Id.* at 836. This, in turn, causes background checks to reveal an “active record,” producing “serious negative consequences on employment, on housing, and on finances.” *Id.* at 837. All of these problems lead to increased recidivism. *Id.* at 837. Thus, a failure to consider a defendant’s ability to pay not only violates the plain language of RCW 10.01.160(3), but

also contravenes the purposes of the Sentencing Reform Act, which include facilitating rehabilitation and preventing reoffending. *See* RCW 9.94A.010.

b. The record does not establish Mr. Groves has a present or future ability to pay legal financial obligations.

In addition to mandatory fees, the court imposed \$3,000 for the drug enforcement fund and \$100 for the crime lab fee. CP 81. Mr. Groves lacks a present and realistically, a future ability to pay these fines. Mr. Groves is 51 years old. CP 3. In addition to his conviction for this offense, he was also convicted under a separate information of assault in the first degree and drive by shooting. CP 78. The two sentences were ordered to be served consecutively. CP 79. Given Mr. Groves' age, it is unlikely he will survive his prison terms and, if he does, he will be well past working age when released.

This Court should find Mr. Groves lacks the current or future ability to pay and remand this matter to trial court with the order to waive all non-mandatory fines and fees.

F. CONCLUSION

Because there are no written findings of fact and the oral findings of the court are not clear and comprehensive, dismissal is required.

Suppression of the evidence used by the State is also required because the State failed to establish the warrantless search of the motorcycle fell within a carefully drawn and jealously guarded exception to the warrant requirement. The search cannot be justified as an inventory search because the trooper failed to consider reasonable alternatives to impound, continued to use the inventory search as an excuse to gather evidence for investigatory purposes, exceeded the scope of a lawful inventory search by opening closed containers, and did not establish the search was conducted according to established protocols.

Reversal of the charge of possession of a controlled substance with intent to deliver is required because the State failed to establish sufficient evidence of an intent to deliver. Dismissal of the charge of possession of a legend drug is required because the State failed to establish an essential element of this charge.

The State introduced irrelevant and prejudicial evidence at Mr. Groves' trial, which should have been excluded under ER 404(b). The use of the prior act evidence by the State, especially where no such actual evidence existed, was flagrant and ill-intentioned misconduct designed to establish Mr. Groves' propensity to commit crimes and other bad acts. The use of the evidence and the misconduct by the State introducing it requires reversal.

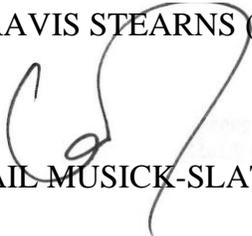
The failure to conduct a hearing to determine whether Mr. Groves is or will be able to pay legal financial obligations requires a new sentencing hearing.

DATED this 29th day of April 2015.

Respectfully submitted,



TRAVIS STEARNS (WSBA 29935)



CAIL MUSICK-SLATER, Rule 9 Extern

Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 33874-6-III
)	
JOEL GROVES,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF MAY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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