

No. 34834-2-III

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

STATE OF WASHINGTON,

Respondent,

v.

AARON LLOYD CARPER

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF SPOKANE

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY.

1. **The failure of the prosecutor to elect or for the court to provide a *Petrich* instruction was manifest constitutional error that prejudiced Mr. Carper.**

The State does not contest that a party may raise, for the first time on appeal, claims of “manifest error affecting a constitutional right.” RAP 2.5(a). BOR at 15. Indeed, “constitutional errors are treated specially because they often result in serious injustice to the accused.” *State v. Lamar*, 180 Wn.2d 576, 582, 327 P.3d 46 (2014) (citing *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)).

Nor does the State appear to contest that the right at stake here—the right to a unanimous jury. BOR at 17. This concession is consistent with Washington case law interpreting Const. art I sections 21 and 22 to require a unanimous verdict. *Lamar*, 180 Wn.2d at 585.

The State does assert, however, that there was no error and that the error was not “manifest.” BOR at 17, 19.

- a. It was error for the prosecution to fail to elect which act it relied on for a conviction or for the court to not instruct the jury that to agree on a specific criminal act.

On appeal, the State argues that because the Information charges Mr. Carper with possession of stolen property between March 8, 2016 and March 10, 2016, and the jury was so instructed in the “to convict”

instruction, that this charge could not have included the entirety of the items reported stolen, valued at between \$7,000 and \$10,000, and which were not found at the Perry street address on those dates. BOR at 19.

However, as argued by the prosecution during Mr. Carper's trial, possession of stolen property may be "constructive," and the State was not limited to showing that Mr. Carper possessed the property at the Perry Street address. RP 297. Indeed, neither the Information or "to convict" instruction included this address. CP 15; 81. "Possessing stolen property" requires only that a person knowingly "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." RCW 9A.56.140. The jury was so instructed. CP 80. Thus, the jury could have convicted Mr. Carper for "concealing or disposing" of the property at any time after the date the property was reported stolen and in Mr. Carper's possession, including between March 8 and 10. This "withholding" certainly would have occurred between March 8 and 10, because the property owners had not recovered many of the high value items they had reported stolen.

And this was precisely the theory propounded by the State, which argued that Mr. Carper was the only person with the means of hauling the property. RP 311. Thus, by arguing that he is the person who would have

been able to “retain or possess” the stolen property, the jury could certainly convict him of concealing, disposing and certainly withholding it between the dates of March 8 and March 10. Were this not the State’s theory, it would not have gone into such detail about the unrecovered property or argued this in closing. RP 313-314.

Because the State failed to make a proper election, and the trial court did not instruct the jury on unanimity, this was constitutional error. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

b. This error was manifest.

The State claims that deprivation of Mr. Carper’s constitutional right to a unanimous jury verdict was not manifest constitutional error. BOR at 17. But Mr. Carper’s case could not be a more clear case of manifest constitutional error, where, based on what the trial court knew at the time, it could have corrected the error, and there are facts on the record sufficient for review. BOR at 17(citing *State v. O’Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010)).

The State notes that Mr. Carper’s defense counsel and the prosecutor “neutralized” the error of encouraging the jury to convict Mr. Carper of either all of the property valued at between \$7,000 and \$10,000. BOR at 25. Because defense counsel addressed the error, the trial court knew of the error at the time. And the facts are fully developed for review

where the prosecution elicited testimony about the unrecovered property on direct, argued it in closing, and defense counsel took time out of its closing to address the error. This is classic manifest error that warrants review by this court.

- c. The State does not rebut the presumption that the error was not harmless.

In *Lamar*, like in Mr. Carper’s case, the issue raised for the first time on appeal was the claim that he was deprived of his constitutional right to a unanimous jury. *Lamar*, 180 Wn.2d at 586. Such a constitutional error is presumed to be prejudicial; thus, “the State bears the burden of showing that it was harmless beyond a reasonable doubt.” *Id.* (citing *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013); see also *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)).

Here, the State argues only that the error was “manifest,” and does not argue that the error was harmless. (BOR 17-18). Thus, like in *Lamar*, where the State “makes no attempt in its briefing to this court to show harmless error,” “the presumption of prejudice stands.” *Lamar*, 180 Wn.2d at 586.

An error is not harmless “if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond

a reasonable doubt.” *Kitchen*, 110 Wn.2d at 411. As analyzed in Mr. Carper’s opening brief, any jury would have had significant reasonable doubt as to either theory presented by the prosecutor, and so this most certainly not harmless error. AOB 11-15. The presumption of prejudice therefore stands.

2. The prosecutor’s conduct was flagrant and ill-intentioned, and it prejudiced Mr. Carper.

Mr. Carper does not challenge the ability of the prosecutor to amend the information as suggested by the Respondent. BOR at 22. This amendment of the Information is simply evidence that the prosecution was aware of the difficulty of having to plead and prove the elements of possession of the Continental trailer, which made its argument to the jury that it could convict Mr. Carper of possessing all the items in the trailer “flagrant and ill-intentioned” as opposed to merely “inarticulate” “inartful” or “ambiguous,” as characterized by the State. BOR at 24, 25.

As argued in Mr. Carper’s opening brief, this conduct permeated the prosecution’s presentation of the case, and would not have been cured with a jury instruction. AOB at 18-19. It is thus not enough to say that the error could have been cured by a specific instruction to the jury, and that the prosecutor did not repeat the inappropriate comment again in rebuttal (BOR at 24 and 25). These efforts to cure the error are not sufficient “in

the context of the entire record and the circumstances at trial.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

3. Juror #14 should not have been dismissed.

The State wrongly asserts that the record does not support Mr. Carper’s contention that the trial court abused its discretion by dismissing Juror #14. BOR at 29. The State ignores the fact that the State rehabilitated the juror clarify that he was not biased in regards to the cooperation agreement when the juror agreed that his bias “has nothing to do with cooperation agreement.” BOR at 30-31.

The State curiously claims that even though the court specifically removed Juror #14 because he said he could not be fair with the cooperation agreement, the court could have dismissed the juror because he showed bias against the defendant. BOR at 31. The defense specifically objected to the removal of the juror, so such a claim should not be considered. Nor should this court consider Appellant’s argument that if the court had not remove d the juror, defendant would now be claiming defense counsel was ineffective retaining the juror. BOR at 32.

See State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)

(Where the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record).

The State cites no authority for the claim that Mr. Carper must demonstrate that the empaneled jury was not impartial. BOR at 33. He was convicted by this jury, due in large part to an incentivized witness's testimony. Juror #14 expressed healthy skepticism about relying on such testimony, but made clear that any bias he had was not based on the cooperation agreement. Mr. Carper was entitled to have this juror remain on the panel, and to was an abuse of discretion by the trial court to dismiss the juror on grounds not supported by the record.

4. Mr. Carper was not convicted of a crime in which a motor vehicle was used.

The State relies on *State v. Contreras* to argue that mere possession of the vehicle is sufficient under RCW 46.20.285(4). 162 Wn. App. 540, 254 P.3d 214 (2011), *review denied*, 172 Wn.2d 1026 (2011); BOR at 34. However, *Contreras* required a “nexus” between the use and possession of the vehicle that is not present in Mr. Carper's case. *Contreras*, 162 Wn. App. at 547.

Contreras involved a defendant who “used” the motor vehicle in a way that Mr. Carper simply did not. The defendant in *Contreras* actually drove the car to the DMV to relicense it. *Id.* Here, there was no such evidence that Mr. Carper “used” the motorcycle by driving it or operating it any fashion, as was central to the defendant's actions in *Contreras*. The

scant evidence that Mr. Carper somehow transported the motorcycle and may have been seen working on it makes it by definition, an object, not instrumentality of the offense as required by RCW 46.20.285(4).

The mandatory license suspension should therefore be vacated.

B. CONCLUSION.

The State's encouragement of the jury to convict Mr. Carper based on multiple acts deprived him his right to a unanimous jury, and amounted to prosecutorial misconduct because it was done pursuant to the prosecution specifically amending the Information to relieve itself of having to prove that Mr. Carper possessed the Continental trailer.

In addition, the trial court improperly dismissed a juror over objection by the defense. These errors require reversal. And where the State failed to show that the motorcycle was an instrumentality of the crime, the mandatory license suspension should be vacated.

DATED this 4th day of August, 2017.

Respectfully submitted,

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