

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 THE STATE
OF WASHINGTON FOR SPOKANE COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Mr. Carper's convictions for possession of stolen property rested on the testimony of an incentivized witness, Ms. Maas, whose implication of Mr. Carper conveniently absolved her and her boyfriend, Mr. Baird, of possessing the stolen property found at the residence where they had been squatting.

At trial, when one of the State's witnesses valued the tools and construction material found at the squatters' residence to be worth less than \$750, the prosecution conflated separate allegations of possession of stolen property in an attempt to establish that Mr. Carper possessed stolen property valued in excess of \$750, without providing a unanimity instruction. The court also erroneously disqualified a juror over defense objection, and imposed a sentencing condition that was not authorized by the jury's verdict.

B. ASSIGNMENTS OF ERROR

1. Mr. Carper was deprived of his constitutional right to a unanimous jury verdict.

2. Prosecutorial misconduct deprived Mr. Carper of his constitutional right to a fair trial.

3. Mr. Carper was denied his constitutional right to a fair and impartial jury when the trial court erroneously granted the State's motion to dismiss a juror for cause.

4. The trial court misapplied RCW 46.20.285 (4) to the facts of Mr. Carper's case. CP 23-36.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, § 21 of the Washington Constitution requires a unanimous jury verdict. This means the jury must unanimously agree on which act constitutes the crime charged. Was Mr. Carper's right to a unanimous jury verdict violated when the trial court failed to provide a unanimity instruction even though the prosecution presented evidence of two different acts for Count I?

2. The Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 22 of the Washington Constitution guarantee a defendant's right to a fair trial. Prosecutorial misconduct abridges this fundamental right. Did the prosecution commit misconduct by amending the Information on the day of trial to relieve itself of having to prove possession of the unrecovered Continental trailer because it was not found at the squatters' residence, while still arguing that Mr. Carper possessed the high-value items which, like the Continental trailer, were never found at the squatters' residence?

3. Defendants have a constitutional right to a fair and impartial jury. U.S. Const. art. VI; Const. art. I §22. Was Mr. Carper deprived of this right where the court erroneously granted the State's motion to dismiss a juror for cause, over objection by the defense, based on facts that are controverted by the trial record?

4. There was no evidence that Mr. Carper used the motorcycle he was convicted of illegally possessing. Did the trial court therefore err in finding that Mr. Carper's conviction for possession of a stolen motor vehicle was a felony in the commission of which he used a motor vehicle under RCW 46.20.285 (4)?

D. STATEMENT OF THE CASE

Brian Baird and his girlfriend, Jessica Maas, were squatters at a South Spokane home. RP 106-108; 282-283. They lived there along with Dennis Swanson and Bonita Mullins, who stayed in a camper in the backyard. RP 108.

Mr. Carper did not live with the squatters. RP 216, 217, 240. He had been at the residence for only about one or two days. RP 217, 240. Though Mr. Carper was Mr. Baird's childhood friend, Ms. Maas didn't like him being there. RP 239, 241.

On March 8, 2016, police were called to investigate "suspicious activity" and "squatters" reported to be residing at the address. RP 106.

Corporal McNees was familiar with Mr. Baird from previous complaints about squatters living in that house. RP 107, 127. When he arrived to investigate the most recent call, he spoke again with Mr. Baird. RP 112. While talking to him in the front yard, Corporal McNees observed a trailer. RP 112.

Mr. Baird said that the owner of the house brought the trailer to the house to haul away garbage. RP 234. This was untrue, as the owner of the house died in 2015. RP 282, 284. Indeed, when Corporal McNees ran the license plate, he found out the trailer had been reported stolen. RP 112.

When he looked in the backyard, Corporal McNees saw a pop-up trailer, a camper trailer, and a flatbed trailer. RP 108. The flatbed trailer had also been reported stolen, along with a motorcycle. RP 110-111, 115, 117.

When Corporal McNees asked about the missing motorcycle, he observed that Mr. Baird “was being deceptive,” denying that he knew about a motorcycle. RP 125. But Dennis Swanson, one of the other squatters, retrieved a motorcycle from inside the house. RP 115. The motorcycle that Mr. Swanson brought out of the house had the ignition removed and the wires were exposed. RP 116.

The trailer in the front yard contained a tool box with a license plate inside. RP 134-135. The license plate belonged to a Continental

trailer belonging to Joseph Neuman that had been reported stolen on March 3, 2016. RP 135-136, 138, 173. Though the Continental trailer was not present, Detective Meyer discovered some items on the property which had been reported stolen with the Continental trailer. RP 137, 139.

Aaron Carper was not a suspect at this point in the investigation, because his name had not come up during his conversation with Mr. Baird or Ms. Maas. RP 123, 126-127.

Indeed, Corporal McNeas did not know Aaron Carper was in the residence that day because Ms. Maas lied to him and told him that no one else was in the house. RP 241. Eventually, Mr. Carper was walked out of the house by another deputy. RP 119.

Detective Meyer then requested a search warrant for the house. RP 139. Mr. Baird, Ms. Maas, Mr. Swanson, and Ms. Mullins were all inside the house when police executed the warrant two days later. RP 138, 140. However, when officers knocked and announced themselves, no one came to the door. RP 139, 150. Officers had to breach the door with a ram to get inside. RP 150. Mr. Carper was not at the residence. RP 250.

The officers' search of the home resulted in additional items that had been reported stolen by Mr. Neuman and Mr. Pierce from the Continental trailer. RP 140. Their Continental trailer was not found on the squatters' property. RP 84. Nor were the majority of "big ticket" items that

they reported stolen along with the Continental trailer nearly a week prior. RP 172, 193-194.

Detective Meyer did not have contact with Mr. Carper during this investigation. RP 146.

Both Ms. Maas and Mr. Baird were charged with crimes based on evidence found when police executed the search warrant. CP 1-2, 15-16; RP 261-262. At trial, Ms. Maas testified against Mr. Carper in exchange for her charge being dismissed. RP 239, 258.

Ms. Maas lied to Corporal McNeas about Mr. Carper being inside the residence on March 8 when he first began investigating the stolen property, and did not initially provide reason for the investigating officer to suspect Mr. Carper when they first located the stolen property at her residence. RP 255, 241, 126-127. However at trial, Ms. Maas claimed that when police arrived on March 8, Mr. Carper “frantically” declared to her that all of the items in the house and the trailers outside were his and not stolen. RP 243. Otherwise, Ms. Maas claimed only indirect knowledge of how the stolen items got there. RP 251.

Mr. Swanson, one of the other squatters, also testified for the State. RP 215. Mr. Swanson did not see who brought the trailers or motorcycle to the residence. RP 229-230.

No fingerprints were taken of the stolen property, because, as explained by Detective Meyer, when items are left in an area open to the public, “anyone’s fingerprints could justifiably be on them.” RP 147. Instead, the items were returned to the property owners. RP 148.

Mr. Carper was charged by way of amended Information, with second degree possession of stolen property for possessing tools and construction material valued in excess of \$750 on March 8-10, 2016. CP 1-2, 15-16. He was also charged with second degree possession of stolen property for a utility trailer found on the squatters’ property; possession of a stolen motor vehicle for the motorcycle found in the squatters’ residence; and possession of stolen property in the third degree for the flatbed trailer found in the yard. CP 1, 15-16.

Mr. Carper was convicted of all counts at a jury trial. CP 17-20; RP 341- 344. The court also found that Mr. Carper’s conviction for possession of a stolen vehicle was a felony in the commission of which a motor vehicle was used, despite no evidence that Mr. Carper operated the motorcycle found inside the squatters’ residence. CP 25, 33; RP 348-349; 357-358. The court’s finding resulted in mandatory license revocation under RCW 46.20.285 (4). CP 33.

E. ARGUMENT

1. The State presented two separate acts of possession of stolen property without a unanimity instruction, thus depriving Mr. Carper of his constitutional right to a unanimous jury verdict.

People accused of crimes in Washington have a right to a unanimous jury verdict. Const. art. I, § 21; *State v. Ortega–Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

When the prosecution presents evidence of multiple acts of misconduct, any of which could be relied on to find the defendant committed the charged crime, “either the State must elect which of such acts is relied upon for a conviction or the court must instruct the jury to agree on a specific criminal act.” *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126, 1127 (2007); *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P.3d 907, 912 (2009) (citing *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984) (“Where multiple acts relate to one charge, the State must elect the act on which it relies to convict the defendant, or the trial court must provide a unanimity instruction—a *Petrich* instruction.”)).

The failure to provide a *Petrich* instruction in multiple acts cases is constitutional error which the appellate court reviews de novo.

Bobenhouse, 166 Wn.2d at 888; *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010).

a. The prosecution presented evidence of multiple acts without a unanimity instruction.

The *Petrich* instruction is required in cases such as Mr. Carper's, where "evidence that the charged conduct occurred at different times and places tends to show that several distinct acts occurred." *State v. Brown*, 159 Wn. App. 1, 14, 248 P.3d 518, 524 (2010) (citing *State v. Fiallo-Lopez*, 78 Wn. App. 717, 724, 899 P.2d 1294 (1995)).

Mr. Carper was charged in Count I of the amended Information with possession of stolen property in the second degree, alleging that between March 8 and March 10, Mr. Carper possessed "tools, construction materials, of a value in excess of seven hundred fifty dollars (\$750)." CP 15.

At trial, the prosecution presented evidence of two acts— possession of *all* the tools and construction material taken from the Continental trailer which were not found at the squatters' property, and possession of the tools and construction material that were found there. RP 172-194, 312, 313-314.

On direct, the State led Mr. Neuman through a list of items which he agreed were contained within his Continental trailer when it disappeared on March 3. RP 173-177. Mr. Neuman estimated that all the items in the Continental trailer were worth between \$10,000 and \$12,000. RP 174. Mr. Pierce estimated the total value of the same items to be about

\$7,000. RP 205. Neither the Continental trailer nor many of the high-value items taken from the trailer were found at the squatters' residence. RP 84, 187, 193-194. Mr. Neuman described the items found at the squatters' residence as "a lot of junk," with a value of about \$500 to \$1,200. RP 187, 188 194, 313. Mr. Pierce estimated the total value of the same items to be around \$700. RP 211.

In closing, the prosecution presented two different acts— first that Mr. Carper possessed stolen property with an estimated worth of \$500-\$1,200 that was recovered from the squatters' residence between March 8 and March 10, as well as the total amount of the property that was located in the Continental trailer taken on March 3, valued at between \$7,000 and \$10,000, but which was not tied to the squatters' residence. The prosecution argued that "the State believes that the evidence shows that the defendant possessed the total amount of tools," but acknowledged it could also find him guilty of just the recovered items. RP 313-314.

These separate acts were not a continuing course of conduct because they occurred at different times and places. *Brown*, 159 Wn. App. at 14. ("To determine whether there is a continuing course of conduct, we evaluate the facts in a commonsense manner considering (1) the time separating the criminal acts and (2) whether the criminal acts involved the same parties, location, and ultimate purpose."). Where the lesser value

items were located at the squatters' residence between March 8 and 10, the high-value items were linked to the initial theft on March 3, when the Continental trailer was reported missing, and may have been possessed any place or anytime thereafter.

The jury instruction did not require the jury to properly distinguish the separate acts of possessing the "total amount of tools" valued at between \$7,000-\$10,000 sometime between March 3 and March 10, which were not at the squatters' residence, and the items found at the squatters' residence between March 8 and 10, which were valued between \$500 and \$1,400. CP 81; RP 277. The prosecution's closing argument encouraged the jury to find Mr. Carper guilty of either of these acts. RP 313-314.

b. The presentation of multiple acts without a unanimity instruction prejudiced Mr. Carper.

Prejudice is presumed where there is neither an election nor a unanimity instruction in a multiple acts case. *State v. Coleman*, 159 Wash. 2d 509, 512, 150 P.3d 1126, 1127 (2007). This presumption of error can only be overcome if no rational juror could have a reasonable doubt as to the alleged acts. *Id.* (citing *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)). Reversal is required in a multiple acts case where the defendant is prejudiced and there is a risk that the jury was not unanimous. *Coleman*, 159 Wn.2d at 515.

Here, where the prosecution's case primarily relied on Ms. Mass's incentivized and contradictory testimony that Mr. Carper possessed the stolen property, a rational juror would certainly have reasonable doubt as to both acts alleged by the prosecution.

Ms. Maas initially lied to police at the beginning of the investigation, but testified for the State on the promise that her charge would be dismissed. RP 239, 258. Ms. Maas gave an account of events that conveniently absolved her and her boyfriend, Mr. Baird, despite the fact that the stolen items were found where Ms. Maas and Mr. Baird were illegally living, and Mr. Baird lied to police about the circumstances of the stolen property being at the house. RP 106-108, 125, 234, 241, 243.

Ms. Maas's testimony also conflicted with the other witnesses at trial. Ms. Mass could not identify the correct color of the motorcycle, but claimed that she saw Mr. Carper working on it in the house. RP 247-248. Mr. Swanson on the other hand, was able to correctly identify the color of the motorcycle, but only saw Ms. Maas's boyfriend, Mr. Baird, working on the motorcycle. RP 221, 225-226.

Ms. Mass claimed that Mr. Carper spent his time in the basement or living room, where several of the stolen items were recovered. RP 251. Police noted no sign of habitation in the basement. RP 157.

The other witness for the State purporting to have knowledge of the stolen property was the other squatter, Mr. Swanson. However, his testimony about Mr. Carper was equivocal and indefinite. *See* RP 217 (“I think he stayed the night one night, might have been two. I can't recall exactly.”); RP 223 (He “believes” Mr. Carper was in the house on March 8.); RP 225 (he had an “impression” about who the tools in the house belonged to.). He wasn't even able to definitively identify Mr. Carper in court. RP 216.

The prosecution argued that Mr. Carper possessed a truck, so he alone would have been able to transport the stolen items to the squatters' residence. RP 311, 312. But this theory again relied on the problematic testimony of Ms. Maas. She testified that Mr. Carper had a white truck, which she claimed had been located near one of the stolen trailers in the front yard. RP 246. However, police did not testify that a white truck was at the squatters' property through any of the police investigation between March 8 and 10. The State introduced no evidence showing that Mr. Carper had such a truck registered in his name. Nor was it established that a truck was even needed to haul the Continental trailer—Mr. Neuman provided only that a small car would not have been able to haul the trailer “very good.” RP 195.

Thus, a rational juror would certainly have had reasonable doubt that Mr. Carper possessed the items found at the squatters' property, and even more doubt that he possessed the items taken along with the Continental trailer, but which were not found at the squatters' residence.

Likewise, any juror would have reasonable doubt as to whether the recovered property exceeded \$750 because Mr. Neuman and Mr. Price gave conflicting testimony about the value of the items they recovered from the squatters' property, and Mr. Pierce valued the items recovered from the squatters' property to be only worth around \$700. RP 187, 188, 194, 211, 313. The prosecution acknowledged that the testimony of Mr. Pierce raised a reasonable doubt that the value of the stolen property exceeded \$750, and requested a jury instruction for a lesser offense of possession of stolen property in the third degree. RP 277.

By presenting the two separate acts without a unanimity instruction distinguishing the low-value property found at the squatters' residence from the unrecovered high-value property that was not located there, the jury was permitted to "aggregate evidence improperly," *Coleman*, 159 Wn.2d at 512, filling in the holes in the State's case as to value and possession. The gaping deficiencies in the State's evidence would cause any rational juror to find reasonable doubt for the elements of both possession and value.

This failure to provide a unanimity instruction differentiating the separate acts of possession prejudiced Mr. Carper. Because he was deprived of his right to a unanimous jury verdict, reversal is required.

2. The prosecution committed misconduct by amending the Information on the day of trial to relieve itself of having to prove possession of the unrecovered Continental trailer, while still arguing that Mr. Carper possessed the high-value items which, like the Continental trailer, were not found at the squatters' residence.

a. Prosecutorial misconduct deprives a defendant of his right to a fair trial.

The prosecutor has a duty to see that the accused receives a fair trial. *State v. Suarez-Bravo*, 72 Wn. App. 359, 367–68, 864 P.2d 426, 432 (1994) (citing *State v. Charlton*, 90 Wn.2d 657, 664–65, 585 P.2d 142 (1978)). In the interest of justice, the prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. *State v. Barajas*, 143 Wn. App. 24, 39, 177 P.3d 106, 114 (2007) (citing *Suarez-Bravo*, 72 Wn. App. at 368)).

Prosecutorial misconduct requires reversal if the prosecutor's conduct was both improper and prejudicial in the context of the entire trial. *State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976, 985, *cert. denied*, 135 S. Ct. 2844, 192 L. Ed. 2d 876 (2015) (citing *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673, 676 (2012)). “Prejudice is established only if there is a substantial likelihood [that] the instances of

misconduct affected the jury's verdict.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126, 135 (2008) (citing *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)).

Even when a defendant does not object, a defendant is entitled to a new trial if the conduct is “so flagrant and ill intentioned that it causes an enduring and resulting prejudice” that it could not have been cured by an admonition to the jury. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43, 46 (2011) (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)). When reviewing a claim that prosecutorial misconduct warrants reversal, the court should review the statements in the context of the entire case. *Id.*

b. The prosecutor's conduct was improper and prejudiced Mr. Carper.

Mr. Carper was originally charged in Count I with second degree possession of stolen property for tools and construction materials, as well as the Continental utility trailer from which the tools and construction materials found at the squatters’ residence were believed to have come. CP 1. The prosecution amended the Information on the day of trial to remove the Continental Trailer, because it was not found at the South Perry Street address where some of Mr. Neuman and Mr. Pierce’s property was found:

“the State's not comfortable essentially having to prove up a possession of that when it's not collocated with all the additional stuff.” RP 84; CP 1, 15.

Like the Continental trailer, the tools valued at between \$7,000 and \$10,000 were not recovered at the squatters' residence, and thus would have had precisely the same evidentiary problems as the Continental trailer, because they too were “not collocated with all the additional stuff.” RP 84. Indeed, had the prosecution sought to prove Mr. Carper possessed the entire amount of missing tools, he could have been charged with possession of stolen property in the first degree rather than possession of stolen property in the second degree. *See* RCW 9A.56.150 (“A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property...which exceeds five thousand dollars in value.”).

Despite its decision to not charge Mr. Carper with the Continental trailer because it was not found with the items found at the squatters' residence, the prosecution continually encouraged the jury to find that Mr. Carper possessed all the tools in the Continental trailer, in order to show that Mr. Carper possessed over \$750 in tools and construction materials.

During closing, the prosecution emphasized Mr. Carper's connection to the squatters' residence to establish that he possessed all of the stolen items that were recovered: “5321 South Perry Street is within

Spokane County and State of Washington, and the reason why that's important is because that's where the property that's alleged to have been stolen was found.” RP 306. The prosecution continually underscored Mr. Carper’s connection to the stolen property and the squatters’ residence, arguing that “the only person in that house who had the means to get this property to 5321 South Perry Street was the defendant.” RP 311.

However, when it came to establishing value, the prosecution encouraged the jury to find that that Mr. Carper possessed *all* the property found within the Continental trailer, which like the trailer itself, was *not* located at the squatters’ residence:

So the State believes that the evidence shows that the defendant possessed the total amount of tools. However, as finders of fact, you are allowed to give weight and credibility to the evidence before you. If you find that the value of the property was less than \$750, then you have the ability to find him guilty not of possession in the second degree [...] but, again, recall the testimony of Mr. Neuman and Mr. Pierce, both of which approximated the value of everything that was in that trailer was well [sic] thousands of dollars. RP 313-314.

Because reference to this separate act was improperly used to bolster the State’s deficient evidence of the value of the items found at the squatters’ residence, there is a substantial likelihood that the misconduct affected the jury's verdict. *See Magers*, 164 Wn.2d at 191. This flagrant and ill-intentioned conduct would not have been cured by an admonition,

because it permeated the State's case. On direct, the prosecution elicited the value of the "big ticket" items that were not located at the squatters' residence, and commingled discussion of this high-value property with the low-value items found on the squatters' residence throughout its closing. RP 172-194; 198-211; 305-309, 312-315.

Such misconduct was prejudicial and deprived Mr. Carper of a fair trial.

Reversal is required.

3. The trial court erred in granting the State's request to dismiss a juror for cause based on facts that are controverted by the trial record.

The defendant has the right to a trial by an impartial jury. Const. art. I § 22; U.S. Const. amend VI; *State v. Perez*, 166 Wn. App. 55, 67, 269 P.3d 372, 378 (2012). The function of *voir dire* is to ferret out prejudices in the venire that threaten the defendant's Sixth Amendment right to a fair and impartial jury. *United States v. Howell*, 231 F.3d 615, 627 (9th Cir. 2000).

A prospective juror must be excused for cause if the trial court determines the juror is actually or impliedly biased. RCW 4.44.170; *State v. Gosser*, 33 Wn. App. 428, 433, 656 P.2d 514, 517 (1982). When a challenge for actual bias is made, the trial court must assess the prospective juror's state of mind. *State v. Wilson*, 141 Wn. App. 597, 606,

171 P.3d 501, 506 (2007) (citing *State v. Jackson*, 75 Wn. App. 537, 542–43, 879 P.2d 307 (1994), *review denied*, 126 Wn.2d 1003 (1995)).

Granting or denying a challenge for cause is within the discretion of the trial court, and will be reversed only for manifest abuse of discretion. *State v. Rupe*, 108 Wn.2d 734, 748, 743 P.2d 210, 219 (1987). A trial court abuses its discretion if its “decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Berniard*, 182 Wn. App. 106, 118, 327 P.3d 1290, 1296 (2014) (citing *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). A court acts on untenable grounds “if its factual findings are unsupported by the record.” *State v. Berniard*, 182 Wn. App. at 118 (citing *Rundquist*, 79 Wn. App. at 793).

The State’s case hinged on testimony from Ms. Maas, whose charge would be dismissed if she testified against Mr. Carper. During *voir dire*, the prosecution asked jurors how they would feel about a testifying witness who received a cooperation agreement from the State. Juror #14 told a personal story about how his neighbor and her friends stole his generator during a windstorm, expressing, “so yeah, I would be a little biased against anything like this for sure.” RP 55. The prosecution clarified, “but that bias has nothing to do with the cooperation agreement. That bias is simply based upon your experience?”

PROSPECTIVE JUROR NO. 14: Mm-hmm.

MR. CASHMAN: Based upon what you said you experienced just now or during the wind storm, you don't think you could set that aside?

PROSPECTIVE JUROR NO. 14: I don't think so because I witnessed all of her associates that came in and out of her house, and they're all cut from the same bolt. I hate to be so firm, but.

RP 55. The State moved to dismiss Juror #14 for cause, based on his story about the windstorm. RP 74. The defense objected to the juror being dismissed for cause, arguing that Juror #14 “said in that case, he couldn't set aside the biases. I don't know that he's ever actually said he could not do it in this particular case. So I would not agree for cause.” RP 74.

The court then summarily dismissed Juror #14 for cause, on the erroneous basis that:

He did say he could not be fair with the cooperation agreement. That would take him out for that. So the Court is going to go ahead and strike him for cause. RP 74.

This finding was based on untenable grounds because its factual findings are not supported by the record. *Berniard*, 182 Wn. App. at 118. The court's reasoning is contradicted by the trial record, because the juror specifically affirmed that any possible bias was not because of the cooperation agreement referenced by the State. RP 55.

It cannot be argued that the juror would have been properly dismissed for actual or implicit bias under RCW 4.44.170, because the court's erroneous dismissal of the juror for cause foreclosed the required assessment of the juror's state of mind as to any potential bias. *See Wilson*, 141 Wn. App. 597 at 606.

This manifest abuse of discretion requires reversal.

4. Mr. Carper's conviction for possession of the stolen motorcycle does not establish that he used a motor vehicle in the commission of a felony as required by RCW 46.20.285 (4).

RCW 46.20.285(4) requires revocation of a driver's license for the period of one year upon receiving a record of the driver's conviction for "any felony in the commission of which a motor vehicle is used." In order for this provision to apply, the vehicle must contribute in some way to the accomplishment of the crime. *State v. Alcantar-Maldonado*, 184 Wn. App. 215, 227–28, 340 P.3d 859, 866 (2014). In other words, for the conviction to support revocation, there must be "some relationship between the vehicle and the commission or accomplishment of the crime." *State v. Dykstra*, 127 Wn. App. 1, 11–12, 110 P.3d 758, 763 (2005) (quoting *State v. Batten*, 140 Wn.2d 362, 365, 997 P.2d 350 (2000)). The application of the statute to a specific set of facts is reviewed de novo. *State v. Dupuis*, 168 Wn. App. 672, 674, 278 P.3d 683, 684 (2012) (citing *State v. Hearn*, 131 Wn. App. 601, 609, 128 P.3d 139 (2006)).

The State asked the court to find that Mr. Carper's conviction for Count III involved a motor vehicle for purposes of RCW 46.20.285 (4), arguing that "by mere fact that it is a motor vehicle, it qualifies under the statute." RP 348-349. However, as argued by defense counsel, there was no evidence that Mr. Carper did anything other than possess the stolen items: "there's no indication that...Mr. Carper stole any of these things." RP 349-350. Despite the lack of evidence that Mr. Carper did anything other than possess the stolen motorcycle, the court found that Count III was "a felony in the commission of which a motor vehicle was used." CP 25, 33.

In *Dykstra*, the court found that where the evidence showed the defendant took possession of the stolen cars by driving them away from the scene, the car was both the object and instrumentality of the crime. *Dykstra*, 127 Wn. App. at 12. This can be contrasted with *Alcantar-Maldonado*, where the mandatory license suspension was vacated because the "car was not the subject of the crime charged, and the crime did not take place inside or from his car." 184 Wn. App. at 230.

Like in *Alcantar-Maldonado*, here there was no evidence that Mr. Carper's crime involved use of the motorcycle. Mr. Carper was not charged with taking the motorcycle, only with possessing it. CP 16. The motorcycle was found in the squatters' living room, and had a punched

ignition with exposed wires. RP 116. When the motorcycle was returned to the owner, he had to repair the missing ignition. RP 271- 273. The motorcycle was reported stolen along with a trailer that was also found at the squatters' residence. RP 117, 269. The prosecution argued that Mr. Carper was the only person with the means of getting all the recovered property to the squatters' residence, because it was alleged that he had a truck that could haul items. RP 311. Thus there was no allegation that Mr. Carper rode the motorcycle as a means of stealing it. These facts put Mr. Carper's cause into the rare category articulated in *Dupuis*, where "it is possible to take a car without using it." 168 Wn. App. at 677.

The evidence in this case shows the motorcycle to be a mere object of the crime, not the subject, or instrumentality of the crime, which would be necessary for the State to establish in order for the court to find that a motor vehicle was used in the commission of a felony under RCW 46.20.285(4).

The mandatory license suspension should therefore be vacated.

F. CONCLUSION

Based on the foregoing, counsel for Mr. Carper respectfully requests that this Court reverse and remand for a new trial, and vacate the mandatory license suspension.

DATED this 5th day of May, 2017.

Respectfully submitted,

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

| | | |
|----------------------|---|-----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| RESPONDENT, |) | |
| |) | |
| v. |) | NO. 34834-2-III |
| |) | |
| AARON CARPER, |) | |
| |) | |
| APPELLANT. |) | |

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