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COA No. 36077-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TEGAN RUSHWORTH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

The Honorable Michael P. Price

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. In Ms. Tegan Rushworth's trial for unlawful, knowing possession of a stolen Ford Expedition, her right to a public trial was violated during *voir dire*, in contravention of Article I, sections 10 and 22 of the Washington State Constitution, and Amendment VI of the United States Constitution.

2. The evidence of knowing possession of a stolen vehicle was insufficient.

3. Individual and cumulative evidentiary error requires reversal of Ms. Rushworth's conviction.

4. This Court should order the \$200 filing fee and the \$100 DNA collection fee stricken.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The barest minimum public trial guarantees of State v. Love, State v. Anderson, and their progeny, require that the trial court's holding of for-cause juror challenges at an unrecorded sidebar must be immediately orally memorialized by the court on the record, in the absence of the preferred practice of having a court reporter transcribe the untranscribed proceeding.

Where the court in this case took challenges in an unrecorded sidebar, and thereafter, merely announced that a jury had been picked, failing to disclose on the oral record that the sidebar had even involved for-cause challenges, was this a “closure,” in violation of the public trial right?

Where the court failed to immediately memorialize the proceeding, can a later-filed, written list of jurors perfunctorily indicating that for-cause challenges were taken but revealing little to nothing of substance, adequately substitute for the notion that members of the public who have heard the court announce after a sidebar that for-cause challenges were taken, and who have just viewed *voir dire* questioning, can evaluate the ultimately empaneled jury by assessing who the court seats on the *petit* panel according their understanding of the legal standards of bias?

2. Was the evidence of knowing possession of a stolen vehicle insufficient to convict, rendering entry of judgment a violation of Due Process under Amendment XIV of the United States Constitution?

3. Lay juries find police officer testimony to be highly persuasive. The trial court failed to exclude and strike multiple instances of improper police testimony, including:

a. Testimony that was inadmissible as irrelevant under ER 401 and ER 402;

b. Testimony that was inadmissible as hearsay under ER 801 and ER 802; and

c. Testimony that was improperly admitted under a ruling that defense counsel “opened the door” to the testimony, which was speculative under ER 602, and which constituted an impermissible invasion of the province of the jury.

Together these instances of error made Ms. Rushworth look like a person who was a drug user, or who could not support her account of proper receipt of the Ford Expedition, or intimated that a non-testifying defendant had told the police that the car was stolen and that the defendant knew it. Do the errors require reversal, individually and/or cumulatively?

4. Should this Court order the \$200 filing fee and the \$100 DNA collection fee stricken?

C. STATEMENT OF THE CASE

1. Procedural history – the police officers presage their improper beliefs about Ms. Rushworth. According to the affidavit of probable cause and the State’s pre-trial contentions, Spokane police officer Mark

Brownell was working in a plain-clothes undercover capacity in an unmarked Tahoe when, on February 27, 2016, he responded to the Knights Inn to arrest a suspect on a warrant. CP 2.

As Officer Brownell and also his partner Officer Scott Lesser, in another vehicle, were arriving at the Knights Inn area and were then pulling into the parking lot, Officer Brownell saw a Ford Expedition “drive right into a parking stall in front of our suspect’s room.” CP 2; 9/12/17RP at 6, 133.

Then, the Ford began backing out of the parking space. CP 2. Officer Brownell stated that he shined a flashlight on the Ford as it drove past his Tahoe, and saw that the warrant suspect was in the passenger seat. CP 2. When Officer Brownell subsequently stopped the Ford a few blocks beyond the motel, he advised the driver, Ms. Rushworth, that the car’s license plate showed it had been stolen.¹ CP 3.

Ms. Rushworth said that she did not know that the Ford was stolen, and she had legally purchased it from Raymond Pfluger

¹ The Ford Expedition had been taken without permission from the home of its owners, the previous month. 9/12/17RP at 139-41 (testimony of Gregory Phelps); 9/12/17RP at 145-46 (testimony of Randolph Lee); 9/12/17RP at 152-55 (testimony of Officer Chan Erdman).

approximately two weeks earlier. CP 3. She told Officer Brownell that her husband Adam Wilkening could verify the purchase, and that the paperwork for the sale was at their home. CP 3. However, when accompanied to her home, Ms. Rushworth looked for the documents of sale amongst various piles of paper in the garage area, but could not locate them. CP 3.

Later, the officers contacted Raymond Pfluger. Pfluger said he had obtained the vehicle knowing it was stolen, that he sold it to Ms. Rushworth for a promise of payment but doubted he would be paid because she had failed to pay him for drugs in the past, and said that he believed Rushworth knew it was stolen. CP 4.

Officer Brownell concluded the affidavit of probable cause with a summary of his beliefs in Rushworth's guilt and lack of credibility. CP 4.

Later-developed information indicated that the Ford Expedition had been taken without permission from the home of its owners, the previous month. 9/12/17RP at 139-41 (testimony of Gregory Phelps); 9/12/17RP at 145-46 (testimony of Randolph Lee); 9/12/17RP at 152-55 (testimony of Officer Chan Erdman).

2. Conviction and sentence.

Following evidence and argument at trial, the jury found Ms. Rushworth guilty of knowingly possessing a stolen vehicle as charged, pursuant to RCW 9A.56.068(1). 9/12/17RP at 130-85; 9/13/17RP at 186-272; CP 40. The court sentenced Ms. Rushworth to a standard range term of 57 months, including Legal Financial Obligations, as discussed *infra*. CP 71-84; 5/4/18RP at 277-87.

Rushworth timely appeals. CP 92.

D. ARGUMENT

1. MS. RUSHWORTH'S PUBLIC TRIAL RIGHT WAS VIOLATED DURING VOIR DIRE WHEN JUROR CHALLENGES WERE HELD AT AN UNTRANSCRIBED, OFF-THE-RECORD SIDEBAR THAT WAS NEVER ORALLY MEMORIALIZED BY THE COURT ON THE RECORD.

(a). The only issue in this public trial assignment of error is whether there was a "closure."

The right to a public trial is guaranteed by Article I, sections 10 and 22 of the Washington State Constitution, and Amendment VI of the United States Constitution. State v. Love, 183 Wn.2d 598, 605, 354 P.3d 841 (2015), cert. denied, 136 S. Ct. 1524 (2016); Const. art. 1, §§ 10, 22; U.S. Const. amend. VI. A defendant may claim for the first time on appeal that this right was violated at trial. State v. Koss, 181 Wn.2d 493, 498, 334 P.3d 1042 (2014). If it was, then the Court of Appeals will presume

the defendant was prejudiced. State v. Strode, 167 Wn.2d 222, 231, 217 P.3d 310 (2009). Whether a court has violated the defendant’s public trial right is a question of law reviewed *de novo*. State v. Smith, 181 Wn.2d 508, 513, 334 P.3d 1049 (2014).

To balance the public trial right and other competing rights and interests, the Court applies a three-step analysis, asking: (1) whether the public trial right attached to the proceeding at issue,² (2) whether the courtroom was closed, and (3) whether the closure was justified. Love, 183 Wn.2d at 605; State v. Wise, 176 Wn.2d 1, 9, 288 P.3d 1113 (2012). “The appellant carries the burden on the first two steps; the proponent of the closure carries the third.” Love, 183 Wn.2d at 605. If there was a closure, the trial court will have been required to apply the weighing test described in State v. Bone-Club, 128 Wn.2d 254, 258, 906 P.2d 325 (1995), before the proceeding may be deemed one justifiably closed to the public. Smith, 181 Wn.2d at 520.

² It is now well-established that the foregoing public trial right attaches to juror challenges. Love, 183 Wn.2d at 606 (explaining that “for cause and peremptory challenges can raise questions about a juror’s neutrality and a party’s motivation for excusing the juror that implicate the core purpose of the right”).

(b). The court was “closed” where no memorialization of the fact of for-cause challenges was made on the record by the court after the sidebar proceedings.

(i). The public would only know that for-cause challenges were even lodged by inspecting later-filed documents, which does not meet the Washington case law regarding immediate memorialization of the proceeding.

At the conclusion of the court’s and the several rounds of the parties’ questioning of the *venire*, 9/12/17RP at 43-117, the trial court indicated to the jury that “a piece of paper” would be used to select the *petit* jury. 9/12/17RP at 117-18. Thereafter, several different proceedings, of undescribed length, each described in the transcript as “(Off the record.),” were held between the court, the court’s judicial assistant, and the attorneys. 9/12/17RP at 118-19. These proceedings were also described by the court as held for purposes of “instructions” for counsel that should have been discussed during prior “motions,” for the task “to pick a jury,” and for selecting a jury. 9/12/17RP at 118-19. The final unreported proceeding was described parenthetically in the verbatim transcript on appeal as “(Peremptory challenges.);” no such language was used in the courtroom. 9/12/17RP at 119.

After these sidebars, the court stated to the *venire* that a jury had been selected, and then began the seating of the final jurors in the jury

box. 9/12/17RP at 119-22. The *petit* jury was then excused and, after a short break, the jury was returned to the courtroom and sworn.

9/12/17RP at 122-24. Opening statements commenced. 9/12/17RP at 130.

At no juncture did the court orally memorialize on the record that the unreported proceedings involved “for-cause” (or peremptory³) challenges. Later, a document was filed, in the form of juror lists and seating charts; the documents indicate that there were for-cause and peremptory challenges, and that at least one of the several for-cause challenges was disputed. Supp. CP ____, Sub # 52 (filed September 13, 2017) (4 pages) (the documents also reveal nothing as to the basis for the challenges, the basis for any agreement, the responses by the opposing party, or the judge’s reasoning).

ii. Under Love and its progeny, including Anderson and subsequent Court of Appeals cases, there is a floor of minimum public trial guarantees below which sidebar juror challenges may not sink, without being deemed unconstitutional “closures.”

The foregoing amounted to closure. The case of State v. Love, supra, has set the basic framework for the minimum guarantees

³ In Love, the Court did hold that “written peremptory challenges are consistent with the public trial right so long as they are filed in the public record.” Love, 183 Wn.2d at 607.

necessary for the public trial right by establishing a floor below which a proceeding will be deemed to have been closed. In addition, comparison to post-Love Court of Appeals decisions also results in there having been a closure here, even under those decisions, which arguably affirm proceedings that descend below the minimum guarantees of Love.

In State v. Love, during *voir dire*, the trial court orally “asked counsel to approach the bench to discuss for cause challenges[.]” (emphasis added.) Love, 183 Wn.2d at 602. The court reporter recorded the sidebar proceeding. Love, 183 Wn.2d at 602. The Supreme Court affirmed - finding no closure - by reasoning that no part of the jury selection process, including the sidebar, was held out of the *sight* of the public in the gallery, and then reasoned that the full verbatim transcript of the sidebar, setting forth the full and exact substance of the for-cause challenges in the proceeding, was ultimately “publically available.” Love, 183 Wn.2d at 607. The Court also relied on the additional fact that the questioning of potential jurors during *voir dire* had been audible to the gallery, and thus the public could “ultimately evaluate the empaneled jury.” Love, 183 Wn.2d at 607; see also State v. Dyson, 189 Wn. App. 215, 229, 360 P.3d 25 (Div. 3, 2015) (sidebar conferences to take juror challenges for cause [in a procedure “identical” to State v. Love] where

the verbatim “transcript of the discussion about for cause challenges [was] publically available . . . comport[ed] with the minimum guarantees of the public trial right”).

Subsequently, the Supreme Court remanded a case petitioned from the Court of Appeals (Division Two), directing reconsideration under Love. In that case, State v. Anderson, 194 Wn. App. 547, 549, 377 P.3d 278 (2016), the intermediate appellate court had deemed that a closure occurred where the defendant made for-cause challenges in a sidebar conference, the judge dismissed those jurors, and later dismissed a fifth juror for cause on the court’s own initiative at another sidebar. Anderson, 184 Wn. App. at 549.

On remand, the Court of Appeals found no closure under the new standards of Love - despite the fact that unlike in Love, the trial court had made no verbatim record of the sidebars. The Court of Appeals instead relied on the fact that the trial court did immediately orally memorialize that for-cause challenges had been heard and ruled on during the sidebar. Anderson, 194 Wn. App. at 549. Division Two held that given that fact, the lack of a transcript did not make the sidebars a closure, because the public could therefore evaluate the empaneled jury, having heard the *voir dire* questioning, learning that for-cause challenges had

been taken, and seeing the final selection of the petit panel. Anderson, 194 Wn. App. at 552–53; see also State v. Henkleman, 189 Wash. App. 1033 (2015) (Div. 3, at pp. 2-3) (No. 33003-6-III) (unpublished, cited pursuant to GR 14.1) (no public trial violation under State v. Love where “[c]ounsel exercised for cause . . . challenges to potential jurors during a sidebar conversation [following which the court placed] the contents of the sidebar . . . on the record” such that “the public . . . were informed of what was discussed during the sidebar.”).

Together, these cases stand for the rule that immediate memorialization of the fact that for-cause challenges were held at the preceding sidebar may be a substitute for verbatim transcription of the sidebar. See also State v. Cruthers, 190 Wash. App. 1046 (2015) (Div. 3, at p. 1) (No. 32965-8-II) (unpublished, cited pursuant to GR 14.1) (appellant’s challenge to exercise of “for cause challenges orally at the bench” would be rejected where the facts were the same as State v. Love); State v. Effinger, 194 Wn. App. 554, 558-62, 375 P.3d 701 (2016), review denied, 187 Wn.2d 1008 (2017) (court heard for-cause challenges at unrecorded sidebar, then announced dismissed jurors on the record; after holding another sidebar for peremptory challenges, announced final jury on the record; all followed by filing of paper record of for-cause and

peremptory challenges); State v. Barrett, 196 Wash. App. 1077 (2016) (Div. 1, at p. 1, p. 5 and n. 36) (No. 75630-3-I) (unpublished, cited pursuant to GR 14.1) (court orally explained reasons for cause-based dismissal of jurors on the record immediately after unrecorded sidebar (“Here, as in Anderson, the judge gave an oral summary of the sidebar immediately after it happened”) (and noting that “[t]he Supreme Court has approved of ‘promptly memorializ[ing]’ sidebars as a substitute for holding them on the record.”) (quoting Smith, 181 Wn.2d at 516 n. 10) (alteration in Barrett).

In Ms. Rushworth’s case, however, the trial court never orally memorialized even the fact that the sidebar proceeding(s) which were held had involved for-cause juror challenges. See 9/12/17RP at 117-30. This dramatically brings the proceedings below the minimum guarantees of Love and even below Anderson.

The State may argue that a member of the public, presumed to be not ignorant of the statutory, court rule, and case decision standards defining bias, could view who was on the final, empaneled jury, and could therefore discern the reason why certain jurors were excused, having also viewed the questioning of the *venire*. See Love, 183 Wn.2d at 607; Anderson, 194 Wn. App. at 552–53.

But this last-ditch analysis, which serves to affirm a conviction in the face of a public trial challenge at the most minimum of levels of the constitutional guarantee, is applied sparingly - Washington case law makes clear that it only pertains where the trial court has memorialized orally in the courtroom that case-specific challenges were indeed made by a party or parties, and ruled upon, at the sidebar. See Love, at 602; Anderson, at 549, 552-53; see, e.g., Effinger, at 558 (trial court conducted “sidebar to allow the parties to exercise for cause challenges [which] procedure was not transcribed [then] announced in open court that nine jurors, identified [by number], were excused[,] then conducted another unrecorded sidebar to allow the parties to exercise their peremptory challenges. Following the third sidebar, the trial court announced the composition of the jury.”) (emphasis added); State v. Streater, 196 Wn. App. 1069 (Div. 2, at p. 4) (No. 47957-5-II) (unpublished, cited pursuant to GR 14.1)) (“In Anderson, we held that no closure occurred when (1) the potential jurors were questioned in open court, (2) the trial court struck jurors for cause at an un-transcribed sidebar conference without first conducting a Bone-Club analysis, and (3) the trial court later memorialized the sidebar on the record by means of a colloquy in which

it identified the jurors that were excused for cause. Anderson, 194 Wn. App. at 549, 552–53.”) (emphasis added.).

iii. This was a closure, because even an attentive, interested member of the public, able to grasp complex proceedings, cannot discern and evaluate the propriety of jury selection when the trial court does not immediately memorialize on the record that the sidebar proceeding involved for-cause challenges.

Here, at no juncture did the court orally memorialize on the record that the off-the-record, unreported proceedings even included “for-cause” challenges. The Washington courts’ limitation of the analysis relying on public viewing of *voir dire* questioning to uphold unrecorded sidebars of for-cause challenges have involved proceedings where the trial court has subsequently, immediately, made clear in open court that for-cause challenges were heard at the sidebar. See Love, Anderson, Barrett, Effinger, and Streater, supra.

This makes sense - in the absence of such a statement by the court, in the courtroom, the public has not been alerted to connect *voir dire* questioning with substantive, i.e., case-specific excusals and thereby evaluate the ultimately selected panel to discern the reasons for cause-based dismissal. For-cause challenges (in contrast to peremptory excusals) rely on required showings of bias under defined legal standards. See State v. Russell, 183 Wn.2d 720, 730-31, 357 P.3d 38 (2015)

(distinguishing hardship and administrative excusals from for-cause excusals) (citing GR 28(a); GR 28(b)(3); RCW 2.36.070; RCW 2.36.100; RCW 2.36.110; CrR 6.4)). Accordingly, these circumstances might not have been a violation of the public trial doctrine if the later written filing had provided information about the bases of any disputed for-cause challenges, and the court’s reasoning, but it did not.

The minimum guarantees of the public trial right that render a proceeding not closed were therefore not present in Ms. Rushworth’s case. See also State v. Cox, 196 Wn. App. 1051 (Div. 2, 2016) (No. 45971-0-II) (unpublished, cited pursuant to GR 14.1) (pursuant to “Love, we evaluate whether . . . the court made a publicly available record of the sidebar conference. [Love,] 183 Wn.2d at 607.”) (holding that trial court’s immediate oral summary of the parties’ for-cause challenges, resulting in a verbatim “transcript of the trial court’s summary of the sidebar conference,” was the equivalent of the “transcript of the sidebar conference itself” that was present in Love); State v. Donnette-Sherman, 196 Wn. App. 1038 (Div. 2, 2016) (No. 47602-9-II, at pp. 2, 5) (no closure where trial court summarized “which jurors had been challenged for cause [and] the reason each [dismissed] juror was excused” thus summarizing the “sidebar in detail on the record [which] permitted the

public to scrutinize the process in much the same manner as a verbatim transcription of the arguments would have allowed.”).

Under prevailing case law, there is a closure if the public does not even know at the time of jury selection that for-cause challenges have been made, and ruled upon, at the sidebar. Where this is not immediately stated on the record by the trial court, there is no ability of the public, however attentive and interested in the proceedings taking place before it, to assess the propriety of the excusals under the legal standards of bias by viewing the ultimately empaneled jury with the benefit of having heard the *voir dire* questioning, and the answers given by the jurors. See State v. Karas, ___ Wn. App. ___, 431 P.3d 1006, 1013 (Wash. Ct. App. Div. 3) (December 13, 2018) (satisfaction of the public trial right allows “an attentive and interested member of the public [to] grasp [the proceedings], whatever the complexity.”).

It would therefore be an untenable extension of Washington’s public trial case law to hold that the public can ‘put two and two together’ by comparing the *voir dire* questions and answers with the ultimate *petit jury*, where the public only learns, by inspection of a later-filed document, that for-cause challenges were made, and certainly not where the document does not contain the bases for the challenges and

the court's reasoning. Oral memorialization is only adequate where it is an adequate substitute for a transcribed sidebar. See Barrett, supra, at p. 1, p. 5 and n. 36; Smith, supra, 181 Wn.2d at 516 n. 10. Accordingly, while a later-filed *verbatim transcription* of the for-cause challenges and the court's reasoning may suffice in the absence of contemporary memorialization of the fact that for-cause challenges were taken, later written documentation of that mere fact - which is all that is available in this case - does not suffice.

(c). Absent *Bone-Club* analysis, reversal is required.

"A public trial is a core safeguard in our system of justice." Wise, 176 Wn.2d at 5. That right is violated where jurors are excused for articulable (i.e., cause-based, case-specific) reasons during an unjustified closure. See State v. Russell, 183 Wn.2d at 730-31. Where the public trial right attaches, and a Bone-Club analysis was not performed, the question whether the public trial right was violated hinges on whether the sidebar or off-the-record proceeding amounted to a "courtroom closure." Love, 183 Wn.2d at 606.

Here, it is undisputed that the trial court did not engage in a Bone-Club analysis. Because there was a closure, the public trial right was violated. "A closure unaccompanied by a Bone-Club analysis on the

record will almost never be considered justified.” Smith, at 520 (citing State v. Bone–Club, 128 Wn.2d at 258). Reversal is required.

2. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MS. RUSHWORTH OF KNOWINGLY POSSESSING A STOLEN VEHICLE.

(a). To convict on a charge of possession of a stolen vehicle, the evidence must be sufficient to allow a jury to find “knowledge,” without which proof entry of judgment violates Due Process.

The protections of Due Process require that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the State, could have found the elements of the crime charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The State was required to prove that Tegan Rushworth knew that the Ford Expedition was stolen. CP 35-37; RCW 9A.56.068(1); see 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 77.21, at 178 (4th ed. 2016); RCW 9A.56.140(1) (possessing

stolen property means to possess stolen property knowing that it has been stolen).

Here, however, the State's evidence consisted only of the following: Ms. Rushworth was driving the Ford Expedition a month after it was taken. 9/12/17RP at 176. She drove away, "revving" her engine, from the Knights Inn around the same time as a police officer (Brownell), in plain clothes and driving an undercover car, shined a flashlight toward the Ford. 9/12/17RP at 167-69. Officer Lesser had arrived nearby in a similar "plain, marked" car (described as one with no emblems, but equipped with lights and sirens), which he had parked outside the motel's parking lot, because Officer Brownell, who was arranged to enter the parking lot, was the officer who was driving an "undercover" car. 9/12/17RP at 169. Lesser was dressed in plain clothes like Officer Brownell, although his outfit also included a police badge on the front of a tactical vest, or the word "police" over his left breast pocket, and a gun holster. 9/12/17RP at 169-71; 9/13/17RP at 191-92. Lesser had approached the parking lot on foot, and the Ford's lights would have illuminated him from about 20 to 25 feet away as it exited the lot, such that the vehicle occupants "kinda saw me with the police uniform right next to my patrol car." 9/13/17RP at 193; 9/12/17RP at 169-71.

Officer Brownell followed the Ford, and it pulled over when he activated his signal lights. 9/12/17RP at 174; 9/13/17RP at 210. When Brownell told the driver, Ms. Rushworth, that the Ford had been reported stolen, Rushworth stated that “they didn’t know it was stolen.” 9/12/17RP at 177. She explained that she had purchased the car two weeks earlier from one Ray Pfluger. 9/12/17RP at 177. When asked if she had proof of the purchase, title, or a witness to the purchase, Rushworth told the officer that she did, and that her boyfriend Adam Wilkening could verify the purchase at their home. 9/12/17RP at 177-78.

The police took Ms. Rushworth to her residence, on Toni Rae Drive. 9/12/17RP at 178. The house was in a nice neighborhood, and there was a Rolls-Royce, and a limousine, among other vehicles, parked at the residence. 9/13/17RP at 214. Officer Brownell stated that when Rushworth and Wilkening looked for the title in their garage, they “appeared they were just wasting time.” 9/12/17RP at 180. Officer Lesser testified that Wilkening and Rushworth “didn’t seem to be looking for it very hard.” 9/13/17RP at 196.

The police left the home, but first retrieved Ms. Rushworth’s iPad from the Ford, at her request. 9/12/17RP at 182-83. When the police subsequently obtained further information about the Ford, which

apparently included learning that Mr. Pfluger had given the car to Ms. Rushworth, they arrested her. 9/13/17RP at 203-04; 9/13/17RP at 216.

b. The State's case lacked proof of knowledge.

The State must prove knowledge that the vehicle in question was stolen. State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). Mere possession of stolen property is not sufficient to infer knowledge, but possession in connection with other evidence tending to show guilt is sufficient. Couet, 71 Wn.2d at 775. Evidence tending to show guilt includes providing an unlikely story or providing a story that the police cannot check or rebut. Couet, at 776 (citing State v. Portee, 25 Wn.2d 246, 253, 254, 170 P.2d 326 (1946)). For example, in Couet, a new car was stolen from a car dealership lot. Couet, 71 Wn.2d at 773-74. After the police saw Mr. Couet driving the car, he told police that his friend lent it to him and that he did not know it was stolen. Id. at 774-75. In affirming the conviction, the Supreme Court held that sufficient evidence supported the finding that Mr. Couet knew the car was stolen because he possessed a recently stolen car and gave an improbable story that the police could not check or rebut. Id. at 776. And in State v. Hudson, the Court of Appeals held that the use of a recently stolen vehicle supported an inference of guilty knowledge when combined with the defendant's

flight from the police. State v. Hudson, 56 Wn. App. 490, 495, 784 P.2d 533 (1990).

In this case, the evidence was inadequate, and does not compare to Couet or Hudson, two cases where the evidence was only marginally adequate. The evidence in this case was circumstantial, and in such instance, the facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

The circumstantial evidence in this case is of such equivocal character that the State's proof was inadequate. Notably, Ms. Rushworth was driving the car with its key, and the police admitted that the Ford's license plate, VIN number, and ignition had not been tampered with in any way. 9/12/17RP at 140; 9/13/17RP at 212; see State v. Priest, 100 Wn. App. 451, 454-55, 997 P.2d 452 (2003) (held: evidence sufficient to prove defendant knew truck was stolen because of broken window and damaged ignition). The police officers' speculation and conjecture that Ms. Rushworth fled from them, aware that they were the police, are not

a valid basis for upholding a jury's guilty verdict where proof requires evidence that Rushworth knew the vehicle she was in was stolen. See State v. Prestegard, 108 Wn. App. 14, 42-43, 38 P.3d 817 (2001).

Further, in cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied by a *pyramiding* of the inferences. State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962). Here, Rushworth's and her boyfriend's inability to locate the bill of sale from Raymond Pfluger or title to the car, in amongst the "piles of paperwork" at the home where Mr. Wilkening plainly brokered vehicles in an informal manner, hardly meant that Rushworth knew the car was stolen. 9/12/17RP at 179-80, 214. Only a pyramiding of inferences from circumstantial evidence would allow an untenable leap from these facts to a conclusion of guilty knowledge.

Similarly, when Officer Brownell asked Ms. Rushworth if Mr. Pfluger was "into shady things," she acknowledged that he had been, but she said that she understood he had been "[t]rying to "clean himself up." 9/13/17RP at 216; 9/12/17RP at 181. It cannot be said that the only conclusion from these facts -- honest admissions by the defendant that she obtained the car from a person who formerly was involved in crime -- is that Ms. Rushworth knew the vehicle was stolen. The evidence was

inadequate under Jackson and the Fourteenth Amendment. Jackson v. Virginia, *supra*, 443 U.S. at 312-13 (reviewing courts must consider “not whether there was any evidence to support a state-court conviction, but whether there was sufficient evidence to justify a ‘rational trier of the facts to find guilt beyond a reasonable doubt.’ “); *cf.* Thompson v. Louisville, 362 U.S. 199, 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960) (under a “no evidence” standard, a reviewing court would affirm the judgment if any evidence supported the conviction).

Ms. Rushworth’s conviction must be reversed, with prejudice.

State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

3. GIVEN THE DEARTH OF EVIDENCE OF KNOWING POSSESSION OF A STOLEN VEHICLE, INDIVIDUAL AND CUMULATIVE EVIDENTIARY ERROR REQUIRES REVERSAL.

(a). The trial court abused its discretion in two related evidentiary rulings.

i. Failure to strike irrelevant evidence that the Knights Inn was a place people go to buy drugs.

The prosecutor asked Officer Brownell if the Knights Inn, where Ms. Rushworth was seen driving into the parking lot, had a lot of “traffic, a lot of activity going on?” RP 167. The officer answered that the Knights Inn was a place which is busy because people go there to buy drugs. RP 167-68. The court sustained the defense objection to lack of relevance

under ER 401 and ER 402, RP 168, but refused to strike the testimony. RP 168. This was grave error. The trial court without question has the authority at any juncture to strike testimony and instruct the jury to disregard it, and should do so when evidence is inadmissible. See ER 103; 5 Teglund, Washington Practice - Evidence sec. 103.8 and n. 4, n. 5 (3rd ed. 2008); see, e.g., State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987). The failure to strike this irrelevant testimony allowed evidence into the trial that irretrievably besmirched Ms. Rushworth. It has been long understood that implications of a link between the defendant and illegal drugs is inherently prejudicial. State v. Tigano, 63 Wn. App. 336, 344–45, 818 P.2d 1369 (1991), review denied, 118 Wn.2d 1021, 827 P.2d 1392 (1992); State v. Crane, 116 Wn.2d 315, 333, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991).

ii. Failure to exclude and strike prejudicial hearsay.

Officer Brownell was asked what Rushworth’s partner, Mr. Wilkening, said when the police accompanied the defendant to her house where she said Wilkening could attest to her proper receipt of the vehicle. RP 179. The court allowed Brownell, over hearsay objection and a motion to strike, to tell the jury that “[h]e [Wilkening] didn’t want to be involved.” RP 179.

This was inadmissible hearsay. ER 801(c) provides that hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 802 provides: “Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.” Here, the trial court admitted blatant hearsay - Mr. Wilkening’s statement was repeated by the officer to show that Wilkening did not want to be involved – portraying him as saying effectively that he could not confirm Rushworth’s assertion. This was evidentiary error that deeply prejudiced Ms. Rushworth because she told the police that Wilkening could attest to her legal purchase of the car. The court abused its discretion.

iii. Failure to exclude testimony to which defense counsel had not opened the door.

During the testimony of Officer Brownell, defense counsel asked the witness if he had contacted Raymond Pfluger, from whom Ms. Rushworth had explained she had obtained the Ford. RP 216. Officer Brownell had contacted Pfluger, and when asked if he was “able to corroborate through your investigation that Mr. Pfluger had, in fact, given or supplied the car to Ms. Rushworth,” Officer Brownell answered, “Yes, sir.” RP 217. There was no objection to this perfectly proper

questioning and admissible testimony. However, on re-direct examination, the prosecutor asked Brownell if Pfluger knew the car was stolen – over defense protest that the door had not been opened – and asked the officer if Pfluger knew that Rushworth knew the car was stolen:

BY MR. NELSON:

Q. Officer Brownell, when you talked to Mr. Pfluger, did he dispel your suspicions that the defendant knew the car was stolen?

MR. STINE: Objection, your Honor.

MR. NELSON: I think the door has been opened, Judge.

THE COURT: So do I. Overruled.

A. Yeah. He knew the car was stolen.

Q. (BY MR. NELSON) Did he know if she knew the car was stolen?

MR. STINE: Objection, your Honor. Asking for speculation.

THE COURT: Sustained.

Q. (BY MR. NELSON) But, based on your conversation with Mr. Pfluger, you elected to file the charge against the defendant; is that correct?

A. That's correct, sir.

RP 217. The court sustained the defense objection that this called for speculation, but the prosecutor circumvented the court's ruling by asking a question about charging the defendant. RP 217.

This testimony was improper. A trial court's decision to allow cross-examination under the open-door rule is reviewed for abuse of discretion. State v. Wilson, 20 Wn. App. 592, 594, 581 P.2d 592 (1978). But the 'door is opened' only where a party has introduced evidence that would be inadmissible if offered by the opposing party – this “opens the door” to explanation or contradiction of that evidence. State v. Avendano–Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). The defense questioning of Officer Brownell was neither objected to nor inadmissible under any theory. However, for the prosecutor to ask Brownell about the mental state of other individuals, including the defendant, was to testify without personal knowledge and without foundation. See, e.g., State v. Contreras, 57 Wn. App. 471, 477, 788 P.2d 1114 (1990) (treating an objection to speculation as an objection to lack of foundation under ER 602 and lack of personal knowledge). ER 602 establishes a foundation requirement - as one commentator notes, “a witness may testify about the state of mind of another, so long as the witness personally witnessed events or heard statements that are relevant to prove the other person’s state of mind.” 5A K. Tegland, Washington Practice: Evidence § 218(2), at 153 (3d ed. 1989). Here, Officer Brownell had no basis to know what Mr. Pfluger knew Ms. Pfluger

knew. He also had no personal knowledge of the defendant's mental state. See ER 602. Finally, it is clear that the State was eliciting an improper opinion from the officer as to his opinion of the credibility and guilt of the defendant. This is improper. Whether such an opinion is expressed directly or through inference, it is equally improper and equally inadmissible because it invades the province of the jury. See State v. Haga, 8 Wn. App. 481, 492, 507 P.2d 159, review denied, 82 Wn.2d 1006 (1973); U.S. Const. amend. VI. This testimony should not have been permitted, and it was highly prejudicial.

(b). Reversal is required.

A trial court's evidentiary error is reversible if it prejudices the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is deemed prejudicial where, within reasonable probabilities, the outcome would have been different but for the error. State v. Bourgeois, 133 Wn.2d at 403.

Further, the cumulative prejudice of multiple errors can be so significant as to prejudice the Fourteenth Amendment Due Process right to a fair trial, and therefore require reversal, even where some errors may not have been perfectly preserved for appeal. U.S. Const. amend. XIV; State v. Salas, 1 Wn. App.2d 931, 952-53, 408 P.3d 383 (2018) (citing

In re Pers. Restraint of Cross, 180 Wn.2d 664, 678, 327 P.3d 660 (2014));
State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994), cert. denied, 514
U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250
(1992).

Under any of the foregoing standards, reversal is required. The irrelevant police testimony made Ms. Rushworth appear to be a drug user, a characterization that would cause the lay jury to believe that she was someone – a person of bad ilk - who would knowingly be driving a car not her own. Further, the use of blatant hearsay wrongly impugned Ms. Rushworth’s claim to police that Mr. Wilkening would support her proper ownership of the car. But, because his statement was hearsay, it was simply incompetent to be admitted. All of this testimony from a respected police officer undoubtedly caused reversible error. Police officer testimony “carries a special aura of reliability.” State v. King, 167 Wn. 2d 324, 331, 219 P.3d 642 (2009). The officer in this case was for all practical purposes allowed to state his opinions of Tegan Rushworth’s guilt to the crime charged. This Court must reverse her conviction.

4. THE \$200 FILING FEE AND THE DNA COLLECTION FEE MUST BE STRICKEN.

At sentencing, the trial court imposed the \$200 filing fee and the \$100 DNA fee, despite Ms. Rushworth's indigency and prior Washington felony convictions at which DNA was required to be collected by law. CP 77-78; Supp. CP ____, Sub # 74 (Order on Legal Financial Obligations) (directing reporting to County Clerk's office following release, to advise clerk of address and financial information); see CP 87-89, 90-91 (Motion and Order of Indigency); CP 44-45, 64-65, 68-69 (parties' sentencing pleadings); CP 73, 85-86 (defendant's agreed Clark County, Washington criminal history).

However, there was no inquiry into ability to pay. The Supreme Court has addressed the impact of Legal Financial Obligations imposed pursuant to RCW 10.01.160 on indigent defendants and their ability to reenter society, in State v. Blazina, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). Addressing the issue in a manner that applies to all Legal Financial Obligations generally, the Court noted that imposition of costs and fees may significantly impact an indigent offender's ability to successfully reenter society, and held that any finding of an ability to pay Legal Financial Obligations must be based on an inquiry and evidence in

the record. The present record does not establish the required on-the-record assessment of ability to pay; and indeed, the court necessarily credited Ms. Rushworth's motion for her order of indigency, in which she noted she had no ability to pay. CP 87-91.

Further, the legislature recently made the previously mandatory \$200 filing fee not imposable on indigent defendants. LAWS OF 2018, ch. 269, § 17(2)(h). Additionally, it is also improper to impose the \$100 DNA collection fee if the defendant's DNA has already been collected as a result of a prior conviction. LAWS OF 2018, ch. 269, § 18.

Our Supreme Court recently held that both these changes apply prospectively to cases on appeal, such as Ms. Rushworth's. State v. Ramirez, 191 Wn. 2d 732, 749-50, 426 P.3d 714 (2018). Applying the change in the law, the Ramirez Court ruled that the trial court had impermissibly imposed legal financial obligations, including the \$200 criminal filing fee, and the DNA fee. Id. Here, as in Ramirez, the changes in the law apply to the present case because it is on direct appeal and not final. Accordingly, this Court should strike the \$200 filing fee, and the DNA fee.

E. CONCLUSION

Based on the foregoing, this Court should reverse Tegan
Rushworth's judgment and sentence.

Respectfully submitted this *25th* day of February, 2019

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36077-6-III
)	
TEGAN RUSHWORTH,)	
)	
APPELLANT.)	

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