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No. 37107-7-III

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

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STATE OF WASHINGTON,

Respondent,

v.

PRESTON DAVID HARDESTY,

Appellant.

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

The Honorable Judge John Antosz

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APPELLANT'S OPENING BRIEF

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Laura M. Chuang, Of Counsel, #36707  
Jill S. Reuter, WSBA #38374  
Eastern Washington Appellate Law  
PO Box 8302  
Spokane, WA 99203  
Phone: (509) 242-3910  
admin@ewalaw.com

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## **A. SUMMARY OF ARGUMENT**

A jury found Preston Hardesty guilty of trafficking in stolen property in the first degree (Count One) and theft in the third degree (Count Two).

During voir dire, Jurors 4 and 26 expressed actual bias about the presumption of innocence. The trial court did not rehabilitate the jurors and they were seated on the jury. Because actual bias of seated jurors is never harmless as it interferes with a defendant's right to a fair and impartial jury, no showing of actual prejudice is required by the appellant. The case must be remanded for a new trial on all counts.

The trial court erred when it refused to grant defense counsel's motion for mistrial due to the presentation of improper opinion evidence. Two of the State's key witnesses in the case opined on Mr. Hardesty's guilt, which is improper opinion testimony. Defense counsel moved in limine prior to trial to prevent the issue, objected and moved to strike when both witnesses improperly invaded the province of the jury by expressing their opinion, and moved for mistrial after both witnesses violated the motion in limine. The trial court erred when it did not grant a new trial.

Finally, the trial court erred when it mistakenly included an extra point in Mr. Hardesty's offender score despite two prior convictions which were designated as same criminal conduct. It is not clear from the record

the trial court would have imposed the same sentence had it known of the error. The case must be remanded for resentencing with the correct score.

### **B. ASSIGNMENTS OF ERROR**

1. Mr. Hardesty did not receive a trial by a fair and impartial jury.
2. The trial court erred by failing to declare a mistrial due to improper opinion testimony.
3. The trial court erred by miscalculating Mr. Hardesty's offender score and resentencing is necessary.

### **C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether Mr. Hardesty received a trial by a fair and impartial jury when two seated jurors expressed actual bias against the presumption of innocence, and the jurors were never rehabilitated by the trial court.

Issue 2: Whether the trial court erred in failing to declare a mistrial when the State's two key witnesses expressed opinions on the defendant's guilt in violation of a defense motion in limine.

Issue 3: Whether the trial court erred in calculating Mr. Hardesty's offender score where two prior convictions were listed as same criminal conduct but were counted separately.

### **D. STATEMENT OF THE CASE**

Around September 18, 2018, Jerry Amoruso went to the salvage yard in Royal City, Washington, to look for a battery he needed. (2RP<sup>1</sup> 81-82, 172, 180-181). After speaking with the manager, Tristina Jensen, Ms. Jensen invited Mr.

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<sup>1</sup> Multiple volumes were transcribed in this case. The transcripts are referred to in this opening brief as follows:

"1RP" was transcribed by Tom R. Bartunek and contains pages 343-449.

"2RP" was transcribed by Tom R. Bartunek and contains pages 1-199.

"3RP" was transcribed by Tom R. Bartunek and contains pages 200-342.

"4RP" was transcribed by Amy Brittingham and contains pages 1-126.

Amoruso to look in a barrel which contained some items brought in by another customer. (2RP 87, 181-183). Mr. Amoruso allegedly recognized several copper bars in the barrel as items that came from his property. (2RP 88, 91-96). Ms. Jensen stated Preston Hardesty had sold these items to the salvage yard. (2RP 181). Law enforcement later arrived to take pictures of the items in the barrels. (2RP 194).

The State charged Mr. Hardesty with trafficking in stolen property in the first degree (Count 1) and theft in the third degree (Count 2). (CP 80-81).

Before the case proceeded to trial, defense counsel moved in limine to prohibit the State from presenting testimony “that a witness believed a crime had occurred or that the defendant committed a crime.” (CP 111; 3RP 45-50). Specifically, defense counsel was concerned Mr. Amoruso would violate the motion due to contentious family history with Mr. Hardesty. (3RP 45-46). The State agreed to instruct its witness, and the trial court granted the motion as written. (CP 111; 3RP 48-50).

Voir dire was conducted. (1RP 344-444). Jurors 4 and 26<sup>2</sup> were seated on the jury. (CP 173-174; 1RP 444). Juror 26 was originally an alternate juror, but he replaced another juror prior to deliberations. (CP 173-174; 3RP 252-260).

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<sup>2</sup> The names of the jurors have not been used in this brief to respect privacy, though the transcript alternates between referring to the jurors by name and number. (CP 173-174; 1RP 344-444).

Juror 4 indicated she had close friends or family members who were involved in a similar case or incident. (1RP 377-378). No further inquiry was conducted on that point. (1RP 377-444). She also indicated she did not want to be on the jury for any reason, as her employer was in the middle of a moving an understaffed restaurant, and the job appeared to be her only source of income. (1RP 388-389).

During voir dire, defense counsel asked the jury their thoughts on the presumption of innocence, inquiring whether the panel understood a defendant was not required to present a defense. (1RP 408-415). Juror 38 indicated he would be more inclined to believe the State's charge was proven if no defense were presented. (1RP 410). Defense counsel then questioned Juror 4 in front of the panel:

[Defense Counsel]: What about you, number four, if I don't present any evidence, you only hear what the state has to say, would you find my client guilty because I didn't do anything?

[Juror 4]: Kind of like what he [Juror 38] said, it would take a little bit of time to give a full answer, but I mean if there isn't anything to back up his defense, then I would assume he would be guilty, but it would just have to depend on the facts.

[Defense Counsel]: So he's presumed to be innocent unless the state overcomes that burden and proves that he's guilty beyond a reasonable doubt. No matter what I do, the state has to prove the charge beyond a reasonable doubt, any doubt for which a reason exists, right? The judge already told you that. Mr. Crawford kind of hit on it a little bit. I'll say it again, knowing that to be true, guilty or not guilty? Based on what I do.

[Juror 4]: This is a very trick question. It—for my personal reason, *it would have to be based on the facts, and it if was a well enough defense—like backed up on about him being not guilty, then maybe I'd go for that route. But if I don't have enough evidence showing that he's not, then I would probably go for guilty.*

[Defense Counsel]: Who else shares that same opinion?

[Juror 29]: It's based on the facts.

[Defense Counsel]: Number 29, 26, 28. Okay, Number 42.

[Juror 42]: Based on the facts.

[Defense Counsel]: Forty-one. Just on the facts. Not whether I present anything.

[Juror 42]: Well, you're not presenting anything— ... You not presenting or doing anything casts doubt. But if the state doesn't provide enough evidence to say that he did commit the crime, he's not guilty.

[Defense Counsel]: Exactly.

[Juror 42]: If he provides enough evidence, then he's guilty. It depends on the facts and the evidence.

[Defense Counsel]: No matter what I do.

[Juror 42]: No matter what you do.

[Defense Counsel]: Because he's presumed innocent unless the state proves the case.

[Juror 42]: Yep.

[Defense Counsel]: They've got to prove it, right?

[Juror 29]: Uh-huh.

[Defense Counsel]: I don't have to do anything. That's a weird position to be in. I'm obviously not going to do nothing.

[Juror 42]: Obviously. But you have a point.

[Defense Counsel]: Yeah. I mean we all kind of understand that the state's got to prove this, the defendant doesn't have to present any evidence that he's not guilty. Right?

Does anyone still think that I have to present evidence that he's not guilty? Number ten?

(1RP 411-415) (emphasis added).

After this exchange with defense counsel, several jurors still refused to understand the presumption of innocence tenet, and continued to believe

the defense had to present evidence in order to be found not guilty. (1RP 414-417). This scenario prompted the trial court to further instruct the jury panel, though no individual inquiry took place:

[The Court]: All right. Let me just say something to the jurors. Some of the questions become a little confusing. The requirement is—let me say this: Every crime, every law has certain elements or facts that have to be proven. And let's just call them A, B, C and D, okay, for a crime. The state's required to prove each element beyond a reasonable doubt. And if the state doesn't meet that burden, regardless of what the defendant did or didn't do, if the state doesn't meet the burden, then your requirement is to render a verdict of not guilty. Because they didn't prove it. Even if the defendant does nothing. To give one simple example, I could give you hundreds, if the state had a case where they needed to prove one of the ABCs or Ds, elements, was prove that a defendant stole over \$750, the defendant didn't contest anything here in court as far as the evidence, your requirement would be to enter a verdict of not guilty because the state didn't meet its burden of proving each element beyond a reasonable doubt, regardless of what the defendant does. Some of the questions can become confusing, I understand that. But I wanted to let everyone know that.

(1RP 417-419).

Despite this instruction from the trial court, one juror continued to openly express uncertainty about the presumption of innocence. (1RP 419-420).

Next, the State finished its portion of voir dire, questioning the panel as a whole whether it understood the presumption of innocence and that the defense was not required to present evidence to prove innocence.

(1RP 425-427). Neither Juror 4 nor Juror 26 affirmatively provided an answer to the State on the record. (1RP 425-427).

Although the State did question two other jurors individually on the presumption of innocence tenet, it never questioned Jurors 4 and 26 individually; neither did the trial court nor the defense. (1RP 425-444). And, neither the trial court nor the parties asked Juror 4 and Juror 26 whether they could set aside their beliefs and follow the law on the presumption of innocence. (1RP 344-444).

The trial court empaneled the jury, including Juror 4 and Juror 26. (CP 173-174; 1RP 444; 3RP 252-260). The case proceeded to a jury trial. (2RP 72-199; 3RP 200-341).

Mr. Amoruso testified first. (2RP 74-147). Although Mr. Hardesty was his stepson, Mr. Amoruso admitted their relationship is contentious. (2RP 74-75, 81, 139). He stated that in September of 2018, Mr. Hardesty was living in a motor home at the end of Mr. Amoruso's property. (2RP 75-76, 81). Mr. Amoruso said he is an electrician and had a lot of spare parts on his property. (2RP 78, 135). On September 18, 2018, Mr. Amoruso went to a salvage yard to replace a battery that went missing in a piece of his equipment. (2RP 82). He spoke to the manager of the yard, Ms. Jensen. (2RP 82). He testified as to the following, and defense counsel objected:

[Mr. Amoruso]: I told [Ms. Jensen] I needed a battery because my other one had either sprouted legs or walked

off. She said okay. And I can't remember exactly what I said, but I said, I don't know, maybe Preston borrowed it and didn't put it back, or something along that line. And she said, Preston, Preston—

[Defense Counsel]: Objection, your Honor, motion in limine number I think it was four.

....

[The Court]: There was an order in limine, he's not to give his opinion about guilt or innocence. I know this is more roundabout, because he's repeating what he said to someone, rather than directly saying that here in court. You know, I think if we look back at the question and answer, we'd see it's probably a non-responsive answer, too....

[The State]: I have no objection to striking the portion where it had legs, that the battery had legs issue.

[The Court]: I think there was also a subsequent comment after battery had legs, right?

[Defense Counsel]: Correct. He blamed my client for that.... That it either grew legs and walked away or Preston took it.

[The Court]: So it is the same one.

(2RP 82-83). Defense counsel requested the entire question and answer be stricken, which the trial court did. (2RP 83-85).

Mr. Amoruso testified that Ms. Jensen told him Mr. Hardesty had been to the salvage yard, and to have a look in a barrel to see if any items in it belonged to him. (2RP 86-96). Mr. Amoruso identified several of the motor control center copper bus bars in the barrel were his, claiming they came from his property and were parts from motor control centers he owned. (2RP 96-121). He testified he never gave Mr. Hardesty permission to take them. (2RP 136). Mr. Amoruso never saw Mr. Hardesty take the bus bars, and although he testified there were items in

the barrel that were his, at other times he seemed to be uncertain as to whether items in the barrel came from his property without physically handling them. (2RP 94-96, 139). He also claimed he knew the Westinghouse motor control center parts in the barrel came from his property because he believed no one else in the area had the same type of motor control center. (2RP 119-121).

Ms. Jensen also testified. (2RP 171-199; 3RP 202-239). Ms. Jensen was the manager and secretary for the scrap yard, and she knew Mr. Hardesty as a customer. (2RP 171, 173). Ms. Jensen explained how she maintained records of what items the company bought by issuing invoice tickets which indicated how much the product weighed and how much was paid to the customer. (2RP 174-176).

Ms. Jensen testified she provided the customer sales records of Mr. Hardesty's to law enforcement. (2RP 176-179). The State asked:

[The State]: Now, what led you to provide those documents to law enforcement?

[Ms. Jensen]: What led me to?

[The State]: Sure. Sure.

[Ms. Jensen]: Well, number one, it was stolen product.

(2RP 179). Defense counsel objected on the basis of the prior motion in limine and moved to strike; the trial court granted the motion and instructed the jury to disregard Ms. Jensen's opinion on guilt. (2RP 179). Defense counsel also moved for a mistrial, citing this was the second

witness to violate the motion in limine. (2RP 180). The trial court reserved on the ruling for a later time. (2RP 180).

Ms. Jensen continued, testifying that around September 17, 2018, she showed Mr. Amoruso a barrel with copper bus bars in it, which had been sold to the salvage yard by Mr. Hardesty. (2RP 181-183). Law enforcement came later to take pictures of the copper bars in the barrel. (2RP 194).

Ms. Jensen testified regarding three receipts, which she believed were the receipts for payment to Mr. Hardesty for bringing in the copper bus bars found in the barrel. (2RP 220-226; State's Exs. 26, 33, 34). Ms. Jensen admitted that as to Exhibit 26, a receipt, she had not actually seen what items Mr. Hardesty brought in to sell, as another employee had filled out the receipt; she had only pre-signed it. (2RP 223, 231; State's Ex. 26). As to Exhibit 33, while she did fill out the receipt and sign it, she did not remember exactly what object Mr. Hardesty had brought in to sell; the receipt only listed the types of metal. (2RP 232; State's Ex. 33). Finally, Ms. Jensen acknowledged she did not fill out the receipt for Exhibit 34 and did not actually see Mr. Hardesty bring in the copper listed on the receipt. (2RP 232-233; State's Ex. 34). She admitted the designation of "copper number two" on a receipt can represent a wide variety of materials. (2RP 235). Law enforcement never requested the salvage

yard's surveillance videos. (2RP 235-236). And Mr. Amoruso allowed the scrap yard to keep the copper bus bars. (2RP 236-237).

A Grant County deputy testified about his investigation into the allegations. (2RP 277-290). He admitted he did not gather the surveillance video from the salvage yard. (2RP 285-286). The deputy also never collected any of the items in the barrel for evidence. (2RP 287-290).

At the close of evidence, defense counsel renewed his motion for mistrial. (3RP 249). He pointed out the State's witnesses, Mr. Amoruso and Ms. Jensen, each violated the motion in limine by opining on the defendant's guilt directly. (3RP 249). Defense counsel stated:

[Defense Counsel]: The state's witnesses have violated the motions in limine twice now about accusing the defendant of committing this crime directly. They've had notice. It's happened twice. The jury has heard that twice. Once I think can be cured with a curative instruction. Twice that bell has been rung now. I don't think we can unring it with a curative instruction at this point.

(3RP 249). Defense counsel added that the trial court had authority to declare a mistrial for violations of the motion in limine. (3RP 250). The trial court denied the motion, stating it thought the prejudice could be cured by an instruction and offered an additional instruction on opinion evidence and that the province of the jury was to decide someone's guilt or innocence. (3RP 252).

After over six hours of deliberation, the jury found Mr. Hardesty guilty of trafficking in stolen property in the first degree (Count One) and theft in the third degree (Count Two). (CP 124, 226-227; 2RP 337).

At sentencing, the trial court calculated Mr. Hardesty's offender score as a fourteen. (CP 248-249, 254). The State represented to the trial court Mr. Hardesty had five convictions that would go unpunished. (4RP 111, 114). However, the understanding of criminal history and judgment and sentence indicate Mr. Hardesty had two prior felonies that were same criminal conduct. (CP 248, 253). The two convictions that were same criminal conduct were a theft in the second degree and identity theft in the second degree, which were committed on the same date, April 13, 2006. (CP 248, CP 253). The trial court sentenced Mr. Hardesty to 75 months of incarceration for trafficking in stolen property in the first degree (Count One), noting the sentence was slightly above the mid-point range. (CP 255; 4RP 122).

Mr. Hardesty timely appealed. (Supp. CP).

#### **E. ARGUMENT**

**Issue 1: Whether Mr. Hardesty received a trial by a fair and impartial jury when two seated jurors expressed actual biases and were never rehabilitated by the trial court.**

Both Jurors 4 and 26 expressed bias during voir dire and were never rehabilitated by the trial court. This structural error requires reversal of Mr.

Hardesty's convictions and remand for a new trial before twelve fair and impartial jurors.

Both the federal and state constitutions "guarantee a criminal defendant the right to trial by an impartial jury." *State v. Guevara Diaz*, 2020 WL 415904, at \*5 (Wn. Ct. App. Div. 1, Jan. 27, 2020)<sup>3</sup>; *State v. Irby*, 187 Wn. App. 183, 192, 347 P.3d 1103 (2015); U.S. Const. amend. VI; Wash. Const. art. I, § 22. The seating of a biased juror violates this right. *Irby*, 187 Wn. App. at 193 (citations omitted); see *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9<sup>th</sup> Cir. 2000).

Pursuant to RAP 2.5(a)(3), a party may raise a "manifest error affecting a constitutional right" for the first time on appeal. *Irby*, 187 Wn. App. at 193; RAP 2.5(a)(3). Because seating a biased juror is never harmless, "the error requires a new trial without a showing of actual prejudice." *Gonzalez*, 214 F.3d at 1111; *Guevara Diaz*, 2020 WL 415904, at \*4. Seating a biased juror is a manifest error. *Id.* at \*4. A defendant cannot waive this right by failing to object at trial. *Id.* at \*4. "A trial judge has an independent obligation to protect that right, regardless of inaction by counsel or the defendant." *Irby*, 187 Wn. App. at 193; *Guevara Diaz*, 2020 WL 415904, at \*6. The judge is obliged to excuse a biased juror even when neither party challenges the juror for cause. *Guevara Diaz*, 2020 WL 415904, at \*6.

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<sup>3</sup> This case is published, but at the time of filing this opening brief, the only available citation was the *Westlaw* citation.

Actual bias means “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). If a juror makes a statement of partiality and there is no subsequent assurance of impartiality, a court should always presume juror bias. *Guevara Diaz*, 2020 WL 415904, at \*5. “A juror will be excused for cause if his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” *State v. Gonzales*, 111 Wn. App. 276, 277-278, 45 P.3d 205 (2002) (internal quotations omitted).

A trial judge “need not excuse a juror with preconceived ideas if the juror can set those ideas aside and decide the case on the evidence presented at the trial and the law as provided by the court.” *Guevara Diaz*, 2020 SL 415904, \*6 (quotations omitted). The question the trial court must answer is “whether a juror with preconceived ideas can set them aside.” *Id.* at \*6. A juror’s silence or answers during group voir dire cannot take the place of individual questioning of a biased juror. *Id.* at \*8; *Irby*, 187 Wn. App. at 196. At times, attempts to rehabilitate a potential juror cannot go far enough to mitigate a categorical statement. *Gonzales*, 111 Wn. App. at 280.

In *Guevara Diaz*, a juror who expressed bias on her questionnaire about the crime charged was not individually questioned about her bias and whether she

would be able to set her preconceived ideas aside. 2020 WL 415904, at \*1, 6. While the trial court and prosecutor asked a series of questions of the entire panel—to include, questions about the panel’s ability to be fair to both sides, and follow the court’s instructions on the law regardless of opinions on what the law ought to be—the court of appeals determined the general affirmative answers of the entire panel to these questions was not enough to cure that particular juror’s bias. *Id.* at \*6-7. The appellate court noted the record did not establish that specific juror could be fair despite the general questioning of the entire panel. *Id.* at \*7. All the record showed was the juror said she could not be fair because of the type of crime charged. *Id.* at \*1, 7. The appellate court concluded this was actual bias, and the trial court should have individually questioned the juror, outside the hearing of other jurors, “because of defense counsel’s viable concern over questioning potentially biased jurors in front of the jury pool.” *Id.* at \*7; *see also Irby*, 187 Wn. App. at 196 (“questions directed to the group cannot substitute for individual questioning of a juror who has expressed actual bias”).

Here, seated Juror 4 demonstrated actual bias when she expressed her belief that if a defendant did not present a defense at trial then she would assume he was guilty. (1RP 412). She stated this belief twice on the record during defense counsel’s questioning of the venire:

[Juror 4]: Kind of like what he [Juror 38] said, it would take a little bit of time to give a full answer, *but I mean if there isn’t anything to back up his defense, then I would*

*assume he would be guilty, but it would just have to depend on the facts.*

...

[Juror 4]: This is a very trick question. It—for my personal reason, *it would have to be based on the facts, and it if was a well enough defense—like backed up on about him being not guilty, then maybe I'd go for that route. But if I don't have enough evidence showing that he's not, then I would probably go for guilty.*

(1RP 412) (emphasis added). No rehabilitation occurred as to Juror 4, and neither party nor the trial court questioned her as to her beliefs individually. (1RP 344-444); *Guevara Diaz*, 2020 WL 415904, at \*7; *Irby*, 187 Wn. App. at 196. Juror 26 indicated he also shared the same opinion as Juror 4. (1RP 412). No rehabilitation or individual questioning occurred as to Juror 26, either.<sup>4</sup> (1RP 344-444).

Furthermore, the blanket instruction from the trial court instructing the jurors as to the presumption of innocence did not cure the problem. (1RP 417-419). Individual questioning to assure that both Juror 4 and Juror 26 could follow the law on the presumption of innocence was never addressed. (1RP 344-444); *Guevara Diaz*, 2020 WL 415904, at \*7; *Irby*, 187 Wn. App. at 196; *Gonzalez*, 111 Wn. App. at 277-278 (“a juror will be excused for cause if his views would prevent or substantially impair the performance of his duties as a juror in

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<sup>4</sup> Juror 26 was originally an alternate, but he replaced another juror prior to deliberations. (CP 173-174; 3RP 252-260).

accordance with his instructions and his oath”) (internal quotations omitted). The trial court must ensure a fair and unbiased jury is seated, and part of the voir dire process is seating a jury that can follow the court’s instructions. *Irby*, 187 Wn. App. at 192; *Guevara Diaz*, 2020 WL 415904, at \*6. If a juror cannot follow a trial court’s instruction regarding the presumption of innocence, the juror has demonstrated actual bias. *Gonzalez*, 111 Wn. App. at 282 (juror demonstrated actual bias when she stated she could not give a defendant the presumption of innocence if a police officer testified).

Juror 4 and Juror 26’s state of mind in reference to the action and defendant showed they could not “try the issue impartially and without prejudice to the substantial rights” of the defense. RCW 4.44.170(2). These jurors were never asked if they could set aside their preconceived beliefs that a defendant should present a defense in order to be found not guilty. *Guevara Diaz*, 2020 SL 415904, \*6 (trial court must ensure “a juror with preconceived ideas can set them aside”); (1RP 344-444).

The trial court erred in allowing Jurors 4 and 26 to remain on the jury when they both expressed bias, were not rehabilitated, and were not asked whether they could set aside their feelings in order to be fair and impartial. Actual bias of a seated juror is never harmless and requires a new trial without a showing of prejudice. *Guevara Diaz*, 2020 WL 415904, at \*4. The trial court “had an independent responsibility not to seat a biased juror.” *Id.* at \*8.

Mr. Hardesty is entitled to a new trial by a fair and impartial jury.

**Issue 2: Whether the trial court erred in failing to declare a mistrial when the State's two key witnesses expressed opinions on the defendant's guilt in violation of a defense motion in limine.**

The trial court erred by denying the defendant's motion for mistrial when two witnesses violated a motion in limine and expressed their personal opinions as to Mr. Hardesty's guilt.

"A witness may not give, directly or by inference, an opinion on a defendant's guilt." *State v. Smiley*, 195 Wn. App. 185, 379 P.3d 149 (2016). Improper opinion testimony on a defendant's guilt can be reversible error because it violates the defendant's constitutional right to a jury trial, "including the independent determination of facts by the jury." *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (citations omitted). Such testimony is unfairly prejudicial because it invades the province of the jury. *Id.* (citations omitted).

To determine whether testimony constitutes an impermissible comment on guilt, the court considers the following factors: (1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. *Demery*, 144 Wn.2d at 759 (citation and quotations omitted). Testimony or argument that is not a direct comment on the defendant's guilt or the veracity of a witness, is otherwise helpful to the jury, and is

based on inferences from the evidence is not improper opinion testimony. *See e.g. City of Seattle v. Heatley*, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). “Some areas, however, are clearly inappropriate for opinion testimony in criminal trials, including personal opinions, particularly expressions of personal belief, as to the defendant's guilt, the intent of the accused, or the veracity of witnesses.” *State v. Quaale*, 182 Wn.2d 191, 200, 340 P.3d 213 (2014).

An improper opinion on guilt violates a defendant’s constitutional right “to have a fact critical to his guilt determined by the jury.” *Quaale*, 182 Wn.2d at 201-02. Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *Quaale*, 182 Wn.2d at 201-02.

Denial of a motion for mistrial when improper testimony is presented is reviewed for abuse of discretion. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). A trial court abuses its discretion when its decision is “manifestly unreasonable or based upon untenable grounds.” *Id.* (citations and quotations omitted).

Here, defense counsel moved in limine to prohibit improper opinion testimony as to Mr. Hardesty’s guilt, and the trial court granted that motion. (CP 111; 3RP 45-50). Yet two of the State’s key witnesses violated that motion: Mr. Amoruso, the alleged victim, and Ms. Jensen,

the salvage yard manager. (2RP 82, 179). The trial court should have granted the defendant's motion for mistrial.

The factors used to prove whether testimony constitutes an impermissible comment on guilt were met in this case. *Demery*, 144 Wn.2d at 759 (setting forth 5 factors). First, the two witnesses involved were essential witnesses to the State's case, and their testimony was key to proving the essential elements of both Counts One and Two. Without Ms. Jensen's testimony, there would not have been enough evidence to prove the charge of trafficking in stolen property in the first degree (Count One), as Mr. Hardesty was accused of selling stolen property to the salvage yard. (2RP 171-199; 3RP 202-239). And without Mr. Amoruso's testimony, the State could not have proven theft in the third degree (Count Two), that items were missing from Mr. Amoruso's property and that he discovered the allegedly missing items at the salvage yard. (2RP 74-147).

As it pertains to the second *Demery* factor, the record shows Mr. Amoruso commented to Ms. Jensen that he "needed a battery because my other one had either sprouted legs or walked off... I said, I don't know, maybe [Mr. Hardesty] borrowed it and didn't put it back, or something along that line...." (2RP 82). Defense counsel objected and the trial court struck the answer, but the comment was a conclusion that Mr. Hardesty took something that did not belong to him. (2RP 82-85). This comment

was improper and invaded the province of the jury because it was a legal conclusion that Mr. Hardesty had stolen something. *Demery*, 144 Wn.2d at 759.

And a second comment on guilt came from the State's witness Ms. Jensen. (2RP 179). Ms. Jensen outright stated the metal product she bought from Mr. Hardesty was stolen:

[The State]: Now, what led you to provide those documents to law enforcement?

[Ms. Jensen]: What led me to?

[The State]: Sure. Sure.

[Ms. Jensen]: Well, number one, *it was stolen product*.

(2RP 179) (emphasis added). Ms. Jensen's comment invaded the province of the jury as it was a direct conclusion as to Mr. Hardesty's guilt. *Quaale*, 182 Wn.2d at 200 (personal expressions as to a defendant's guilt is improper opinion testimony).

The third *Demery* factor requires a consideration of the nature of the charges. *Demery*, 144 Wn.2d at 759. The comments by both witnesses were not just general assertions of guilt or wrong-doing. Mr. Amoruso and Ms. Jensen's comments were direct statements of guilt as to the theft and trafficking in stolen property charges. (2RP 82, 179). Mr. Amoruso's comments that his battery grew legs and walked away along with accusing Mr. Hardesty of taking something and not returning it were direct comments on the State's charge of theft in the third degree. (CP

222; 2RP 82). Likewise, Ms. Jensen's statement that she provided documents to law enforcement because she was dealing with "stolen product" could not be a more direct statement as to Mr. Hardesty's guilt for trafficking in stolen property. (2RP 179). Ms. Jensen made a legal conclusion from the stand, influencing and invading the jury's province of deciding the case.

Fourth, Mr. Hardesty's defense focused on the contentious relationship between Mr. Amoruso and Mr. Hardesty, and how Mr. Amoruso wanted Mr. Hardesty evicted. (2RP 322). The defense also focused on the lack of evidence, including the fact that the copper bus bars in the barrel did not look like they were cut out from a motor control unit, as previously claimed by Mr. Amoruso. (2RP 74-147, 322-326; State's Ex. 11). It was Mr. Amoruso's allegation alone that spurred the charges.

The fifth and final *Demery* factor requires consideration of the other evidence before the jury. *Demery*, 144 Wn.2d at 759. The testimony revealed no surveillance footage existed from the salvage yard, the copper bus bars were not preserved as evidence, and Ms. Jensen either did not handle or could not remember the specifics of the product Mr. Hardesty brought in to sell. (2RP 223, 231-233, 235-236, 285-290; State's Exs. 26, 33, 34). Finally, Mr. Amoruso's pictures of the motor control units on his property showed copper bus bars had obviously been cut out

of the units but the bus bars in the barrel did not appear to be cut. (State's Exs. 3, 6, 8, 11). The evidence was not overwhelming that Mr. Hardesty committed the crimes of theft in the third degree and trafficking in stolen property in the first degree. Also, it cannot be ignored the jury deliberated for most of the day; the jury struggled with its verdict for over six hours. (CP 124).

The trial court erred and defense counsel's motion for mistrial should not have been denied. The trial court's decision was unreasonable as Mr. Hardesty has a constitutional right to have his case determined exclusively by the jury and not the witnesses. *Quaale*, 182 Wn.2d at 201-02. Not once, but *twice* the State's witnesses violated the motion in limine by invading the province of the jury and commenting on the defendant's guilt. *Demery*, 144 Wn.2d at 759. The curative instruction offered by the trial court would not have mitigated the error as the damage was done. (3RP 252). Moreover, the evidence presented does not establish beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error. *Quaale*, 182 Wn.2d at 201-202. The jury deliberated for six hours over two simple counts. (CP 124). The presentation of evidence was tainted with the witnesses' improper opinion testimony.

The trial court erred in not granting a new trial. The case should be reversed and remanded for a new trial.

**Issue 3: Whether the trial court erred in calculating Mr. Hardesty's offender score where two prior convictions were listed as same criminal conduct but were counted separately.**

The trial court sentenced Mr. Hardesty under the incorrect assumption that his offender score was 14 points. A review of his criminal history reflects the trial court erred by counting two prior offenses as separate points when they should have been counted as one point because they were the same criminal conduct. The case should be remanded for resentencing to correct the error and recalculate Mr. Hardesty's offender score.

As a threshold matter, a trial court's calculation of a defendant's offender score is reviewed de novo. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). An offender may challenge erroneous sentences lacking statutory authority for the first time on appeal. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 877, 50 P.3d 618 (2002). A defendant "cannot waive a challenge to a miscalculated offender score" when the error is a legal one leading to an excessive sentence. *Id.* at 874 (remanded for resentencing where prior convictions had "washed out" and were erroneously used to calculate defendant's offender score). "A correct offender score must be calculated before a presumptive or

exceptional sentence is imposed.” *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). Miscalculated offender scores require remand for resentencing unless the record clearly indicates the trial court would impose the same sentence. *Id.*

“In determining the proper offender score, the court ‘may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.’” *State v. Zamudio*, 192 Wn. App. 503, 508, 368 P.3d 222 (2016) (quoting *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012) (quoting RCW 9.94A.530(2))).

The trial court calculates an offender score by adding current offenses, prior convictions, and juvenile adjudications. RCW 9.9A.030(11); RCW 9.94A.589(1)(a). When calculating the offender score for a present nonviolent conviction, as is the case here, prior convictions add “one point for each adult prior felony conviction and one point for each juvenile prior violent felony conviction and ½ point for each juvenile prior nonviolent felony conviction.” RCW 9.94A.525(7).

“A defendant’s current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses ‘encompass the same criminal conduct.’” *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998); *see also* RCW

9.94A.589(1)(a). “[I]f two current offenses encompass the ‘same criminal conduct,’ as defined in RCW 9.94A.400(1)(a) [recodified as RCW 9.94A.589], then those current offenses together merit only one point.” *State v. Haddock*, 141 Wn.2d 103, 108, 3 P.3d 733 (2000); RCW 9.94A.589(1)(a).

Mr. Hardesty acknowledges that the correct calculation of his offender score does not change his standard range for sentencing purposes, because his offender score remains a “nine-plus.” However, where the offender score has been miscalculated, remand is still the proper remedy unless the record makes it clear the trial court would have imposed the same sentence had it known the correct offender score. Here, the trial court miscalculated Mr. Hardesty’s offender score to be 14. (CP 248-249, 253-254). However, the trial court failed to count two of his prior convictions as “same criminal conduct” pursuant to RCW 9.94A.589(1)(a). Two prior convictions committed on August 24, 2006, were for theft in the second degree and identity theft in the second degree and are designated as “encompasses,” which means they are to be counted as same criminal conduct. (CP 248-249, 253-254); RCW 9.94A.589(1)(a). These convictions were meant to be counted as one point and not two separate points in Mr. Hardesty’s offender score. RCW 9.94A.589(1)(a).

Moreover, the record in this case does not make it clear that the same sentence would have been imposed if the trial court knew Mr. Hardesty's correct offender score was a 13 rather than a 14. Instead, the comments by the trial court suggest it felt compelled to impose a slightly above the mid-range because of Mr. Hardesty's higher offender score that would have effectively allowed certain offenses to go unpunished. (4RP 120-122). Had the trial court known Mr. Hardesty had a lower offender score, it is not clear the court would have imposed the same sentence, and remand for resentencing is necessary. *Tili*, 148 Wn.2d at 358 (setting forth this remedy).

Mr. Hardesty respectfully requests this matter be remanded for resentencing to allow the trial court to exercise its discretion based on a correct offender score calculation.

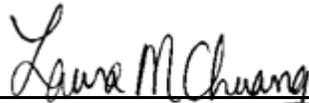
#### **F. CONCLUSION**

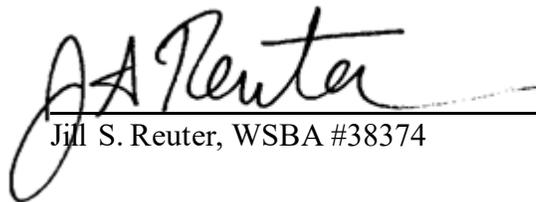
The trial court seated two biased jurors. Because jury bias is never harmless error, Mr. Hardesty is entitled to a new trial with a fair and impartial jury. The case must be remanded for a new trial.

The trial court erred in failing to grant a mistrial where two of the State's key witnesses improperly opined on the defendant's guilt. The case must be remanded for a new trial.

Finally, the trial court erred by including one additional point in Mr. Hardesty's offender score despite there being a designation of same criminal conduct in his criminal history. The case must be remanded for resentencing.

Respectfully submitted this 27th day of March, 2020.

  
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Laura M. Chuang, WSBA #36707  
Of Counsel

  
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Jill S. Reuter, WSBA #38374

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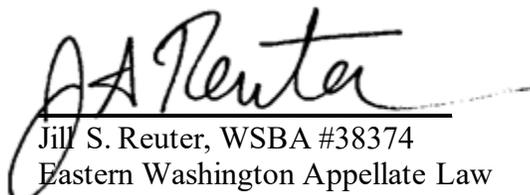
STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 37107-7-III  
vs. ) Grant County No. 18-1-00604-2  
)  
PRESTON DAVID HARDESTY ) PROOF OF SERVICE  
)  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 27, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Preston David Hardesty, DOC No. 943669  
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S-W-F-08-U  
PO Box 769  
Connell, WA 99326

Having obtained prior permission, I also served a copy on the Respondent at [kburns@grantcountywa.gov](mailto:kburns@grantcountywa.gov) using the Washington State Appellate Courts' Portal.

Dated this 27th day of March, 2020.

  
Jill S. Reuter, WSBA #38374  
Eastern Washington Appellate Law  
PO Box 8302  
Spokane, WA 99203  
Phone: (509) 242-3910  
admin@ewalaw.com

**OF COUNSEL NICHOLS LAW FIRM PLLC**

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