

62156-4

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NO. 62156-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES WOODS,

Appellant.

2009 AUG 19 PM 4:43
STATE OF WASHINGTON
JAN TRASEN

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. WHERE APPELLANT'S RIGHT TO A TRIAL BY AN IMPARTIAL AND INDIFFERENTLY CHOSEN JURY WAS VIOLATED, REVERSAL IS REQUIRED.

Under Batson v. Kentucky, a criminal defendant is entitled to a jury comprised of members who are selected pursuant to nondiscriminatory criteria. 476 U.S. 79, 85-86, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).¹ The selection process itself functions as an irreplaceable method of protecting the impartiality of the petit jury.

a. The unjustified and sua sponte excusal of Juror 5 by the trial court tainted the jury selection process, depriving Mr. Woods of a jury that was "indifferently chosen." The trial court below failed to follow formal procedures for jury selection, depriving appellant of his right to a jury indifferently selected from the community. The court failed to allow Mr. Woods to inquire of the potential juror regarding his qualifications to serve, and improperly imputed a "personal connection" to Juror 5 where none was shown to exist, thus

¹ Even though this right does not extend to the right to a petit jury comprised of one's own race -- and indeed, the challenged juror here, Michael Kahrs, was not of the same race as Mr. Woods -- the right to a fair and indifferent selection process is the key to the Batson holding. 476 U.S. at 85-86.

depriving counsel of the opportunity to inquire further, and depriving Juror 5 of the right to explain his qualifications to serve.

b. The improper cause challenge by the trial court was not waived by Mr. Woods' trial counsel, as the right to a fair and impartial jury is a fundamental right. Rather than engage in the proper procedures for instituting a cause challenge, the trial court informally remarked: "Just so you know, juror 5 was excused by the Court." 6/30/08 RP 21. This statement indicated that instead of engaging in any type of procedure, that the trial court had privately excluded Mr. Kahrs – and that this decision had already been made behind closed doors. By making this decision summarily, the trial court made it clear that no further record would be made on the juror's exclusion. Id. It is disingenuous for the State to now argue that appellant's trial counsel failed to object at the time of the exclusion. Respondent's Brief at 7. Trial counsel relied on the trial court's statement that there was a "personal connection there," as stated by the trial court. 6/30/08 RP 21. Only a week later was trial counsel informed that this was not the situation, according to Juror 5. CP 40.

Accordingly, since Washington has no mandatory exclusions from jury service for the legal profession, the trial court's unilateral

and apparently off-record finding that “it would be inappropriate for him as an attorney to be on this case” was insufficient to show cause. 6/30/08 RP 21. This *sua sponte* challenge tainted the jury selection process and deprived appellant of his right to an impartial and fair jury selection process, requiring reversal.

2. WHERE THE TRIAL COURT ABUSED ITS DISCRETION BY ASSESSING RESTITUTION WITHOUT SUFFICIENT EVIDENCE OF CAUSATION, THE RESTITUTION AWARD MUST BE VACATED.

Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008), citing State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (internal citations omitted).

In Griffith, the Supreme Court noted that the defendant had not pled guilty to a crime of theft, but only to the crime of possession of stolen property. 164 Wn.2d at 967. The Griffith court held that the evidence supporting the restitution order was not only “skimpy,” as the State had conceded, but legally insufficient. Id. at 967.

“Culpability for possession of stolen property does not necessarily include culpability for the stealing of the property. The actual thief is guilty of a different crime.” Id. (citing Griffith, 136 Wn.

App. 885, 894, 151 P.3d 230 (Schultheis, J., dissenting) (internal citations omitted).

Here, Mr. Woods had only been in possession of this car for a short period of time, as the State concedes. Respondent's Brief at 22. But for Mr. Woods' possession of the car in question, the stereo would likely still have been pulled out by whomever had originally stolen the complainant's car in this unfortunate matter. To impute the car's stereo's damage to appellant, rather than to the "actual thief," to paraphrase the Griffith Court, would be an abuse of discretion.

Since the State failed to present sufficient evidence causally linking Mr. Woods to the damage incurred to the complainant's property, and because the trial court applied the improper standard of law during the restitution hearing,² the restitution order must be vacated.

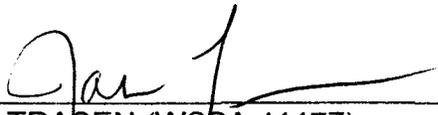
² At a restitution hearing conducted on November 12, 2008, the trial court fashioned its own "eggshell plaintiff" theory: "We kind of take our victims as we find them. And I think there is enough here that connects Mr. Woods to the stolen vehicle, as well as the stolen stereo." 11/12/08 RP 8.

B. CONCLUSION.

For the foregoing reasons and those discussed in Appellant's Opening Brief, Mr. Woods respectfully requests this Court reverse his conviction and order a new trial.

DATED this 12th day of August, 2009.

Respectfully submitted,



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STATE OF WASHINGTON,)	
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Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 19TH DAY OF AUGUST, 2009, A COPY OF **APPELLANT'S REPLY BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

James Woods
5310 26th Avenue S.
Seattle, WA 98118

FILED
CLERK OF COURT
STATE OF WASHINGTON
2009 AUG 19 PM 4:43

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF AUGUST, 2009

x. *Ann Joyce*