IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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STATE OF HAWAIʻI, Plaintiff-Appellee,

vs.

GARY FARIA, Defendant-Appellant.

NO. 24035

APPEAL FROM THE FIRST CIRCUIT COURT
(CR. NO. 00-1-1260)

DECEMBER 30, 2002

MOON, C.J., AND LEVINSON, J.; NAKAYAMA, J., CONCURRING AND DISSENTING; RAMIL, J. CONCURRING IN PART AND DISSENTING IN PART; ACOBA, J., CONCURRING IN PART WITH RAMIL, J. AND DISSENTING TO THE DECISION OF MOON, C.J.

OPINION BY MOON, C.J.

Defendant-appellant Gary Faria appeals from the January 11, 2001 judgment of conviction and sentence of the Circuit Court of the First Circuit, the Honorable Gerald H. Kibe presiding, adjudging him guilty of Unauthorized Entry into Motor Vehicle (UEMV), in violation of Hawaiʻi Revised Statutes (HRS) § 708-836.5 (2000), which states in pertinent part:

> [a] person commits the offense of unauthorized entry into motor vehicle if the person intentionally or knowingly enters or remains unlawfully in a motor vehicle with the intent to commit a crime against a person or against property rights.

On appeal, Faria contends that the trial court abused its discretion when it: (1) failed to give a jury instruction on what constitutes an unlawful "entry" into a motor vehicle; (2) gave a jury instruction on assault in the third degree where assault was not set forth in the indictment nor disclosed before or during the trial; and (3) refused to allow testimony by Honolulu Police Department Officer Cary Okimoto during cross-examination regarding his opinion on the intent of the legislature in enacting the UEMV law. We agree with Faria's first contention that the trial court erred in failing to give a jury instruction on what constitutes "entry," but disagree with his remaining contentions on appeal. We, therefore, vacate Faria's conviction and sentence and remand this case for new trial consistent with this opinion.

I. BACKGROUND

At the time of the incident in February 2000, Faria resided with his wife, Candace Faria (Mrs. Faria), and his two step-daughters, Korey and Kelly, in Kapolei, Hawai‘i. Faria was a former Honolulu police officer, having worked for twenty-eight years before retiring in December 1998. Faria was subsequently employed as a reserve police officer and a deputy sheriff with the Department of Public Safety.

On February 17, 2000, Mrs. Faria got into an argument with her daughter Korey at the Faria residence. Mrs. Faria asked

Korey to leave because she believed Korey was continuing to lie about where she had been going and what she had been doing. Korey agreed to leave, and Mrs. Faria asked her husband to see whether anyone was outside the house waiting to pick up Korey. Faria went outside and observed a car parked just down the road from his house with three individuals sitting inside the vehicle. Faria suspected that they were waiting for Korey. Faria returned to the house, picked up a soda can and a can of mace, and went back outside towards the vehicle. Although Faria did not recognize the two male individuals occupying the front seats of the vehicle, he recognized the female passenger, seated in the middle of the back seat, to be Korey's friend, Christi Gray.

Faria approached the driver's side of the car and attempted to speak with the individuals in the car, but they did not respond and did not make eye contact with him. In a taped interview with Officer Okimoto, Faria related that the driver's side window was open. At trial, Faria testified that he was a minimum of three feet away from the vehicle at that time. The occupant in the front passenger seat, Dwayne Graham, testified that Faria was four or five inches away from the vehicle. The occupant in the driver's seat, Melvin Lyons, testified that Faria was twelve to eighteen inches away from the vehicle.

Faria asked the occupants several questions and became angry because the occupants refused to respond. In frustration,

Faria yelled profanities at the occupants and threw his soda can behind the car. Faria then sprayed the occupants of the vehicle several times with the mace. Lyons testified that: (1) he was sprayed with mace in his face; (2) the whole side of his face was burning; and (3) it was painful. Graham testified that: (1) he saw Faria spraying; (2) he was sprayed in his eyes and on the left side of his face; and (3) he felt a burning sensation and had difficulty breathing.

There is conflicting testimony as to whether Faria's hand entered the vehicle at the time he sprayed the mace. Faria testified that no part of his body entered the vehicle. Gray stated that she did not know if Faria's hand entered the car because she had ducked when he first sprayed the mace into the car. Graham testified that he saw Faria's hand enter approximately "elbow length" into the car. Graham further stated that Faria's "arm was in the vehicle when I got sprayed because I clearly saw his hand . . . his hand came across, came across the front seat and he had got me." Lyons also testified that he saw Faria's arm in the vehicle.

Officer Okimoto testified that he was responsible for investigating the February 17, 2000 incident. He also testified that, at the time of his investigation, he looked at the law on UEMV. However, Officer Okimoto stated that the prosecutor's

office made the decision with regard to the specific charge against Faria and that he did not have a role in that decision.

During cross-examination by defense counsel, Officer Okimoto was asked: "Have you ever been involved in an investigation of an Unlawful Entry into Motor Vehicle before where somebody's person did not enter the vehicle?" The prosecution objected on the ground that the question did not tend to make the existence of a fact that is of consequence to the determination of the action more or less probable. Defense counsel argued:

> First, it is, and I alluded to it this morning at pretrial, but it is one of our major defenses with respect to the legislative intent on this particular crime. And this detective testified that he was the lead detective and he was responsible for the entire investigation. I think that I'm entitled to get into what his background and experience and knowledge is with respect to the intent of the law because, as I've indicated in pretrial, the legislators moved this from a misdemeanor to a Class C felony as a result of the multiple automobile thefts occurring to tourists, and it doesn't fit this fact scenario.

The trial court sustained the objection, stating:

> The officer was not called by the state to express any opinions regarding the validity of the charges being brought. This was a case that was placed before the grand jury by the prosecutor's office, indictment was returned,[1] and it's the prosecutor's office's call ultimately whether or not to take the matter forward should there be probable cause to do so. There's no indication that it was this officer's determination that this case be brought forward at any point along the line. . . . This witness was not the appropriate means by which such information should be conveyed to the jury, and so on that basis the Court rendered its decision as to the relevance of the line of questioning being pursued by the defense.

[1] Faria was indicted for UEMV on June 21, 2000.

Accordingly, Officer Okimoto's opinion testimony on the UEMV law was not allowed into evidence.

During the settling of jury instructions, the prosecution's Instruction No. 1 was modified without objections by either party. Instruction No. 1 stated that "[a] person commits the offense of Unauthorized Entry into Motor Vehicle if he intentionally or knowingly enters unlawfully a motor vehicle, with intent to commit therein a crime against a person."

The prosecution also submitted proposed supplemental jury instructions on assault in the third degree and its material elements. Supplemental Instruction No. 1 (Supp. Instr. 1), as modified by the court, stated:

> Assault in the Third Degree is a crime against a person. A person commits the offense of Assault in the Third Degree if he intentionally causes bodily injury to another person.
>
> There are two material elements to this offense, each of which must be proven beyond a reasonable doubt.
>
> These two elements are:
> 1. On or about February 17, 2000, in the City and County of Honolulu, Hawai'i, the Defendant caused bodily injury to another person; and
> 2. The Defendant did so intentionally.

Defense counsel objected to Supp. Instr. 1, stating that the instruction was

> confusing and prejudicial to the defense because State's instruction number 1 sets forth the elements of the crime for which the defendant was charged, and the offense is an Unauthorized Entry into a Motor Vehicle.
>
> It has been a major part of the defense's theories that there was no prosecution with the intent to commit a crime therein against a person or against property rights for this late . . . there was nothing during evidence, the taking of the evidence, that went to the commission of a crime against

> a person or property rights as the case unfurled and unfolded without any disclosure . . . prior to this jury instruction . . . .
>
> There are many crimes, Terroristic Threatening, a Harassment that could have been charged or that could have been the intent of the crime. But now that the evidence has been taken and it looks perhaps most like assault, only at this late period of the trial is the jury going to receive an instruction about Assault Third which they have not had up until this point. So I think it is very confusing and prejudicial to the . . . defendant. For those reasons, we strenuously object.

The trial court allowed the instruction, explaining that similar instructions were given in State v. Mahoe, 89 Hawai‘i 284, 972 P.2d 287 (1978), and that this court in Mahoe "saw nothing wrong" in giving such instruction. The trial court further stated: "I believe that [inclusion of the jury instruction on assault] would be appropriate for proper instruction . . . as to the applicable law that the elements of the offense which the State contends the defendant intended to commit at the time the vehicle was entered be given to the jury."

The trial court subsequently instructed the jury in relevant part as follows:

> In the indictment defendant is charged with the offense of Unauthorized Entry into a Motor Vehicle. A person commits the offense of Unauthorized Entry into a Motor Vehicle if he intentionally or knowingly enters unlawfully a motor vehicle with intent to commit therein a crime against a person.
>
> There are two material elements . . . to this offense, each of which the prosecution must prove beyond a reasonable doubt. These two elements are: one, on or about February 17, 2000, in the City and County of Honolulu, State of Hawai‘i, the defendant intentionally or knowingly entered unlawfully a motor vehicle; and, two, when the defendant unlawfully entered the motor vehicle, the defendant at the time had the intent to commit therein a crime against a person.
>
> Assault in the Third Degree is a crime against a person. A person commits the offense of Assault in the Third Degree if he intentionally causes bodily injury to another person. There are

> two material elements to this offense, each of which must be proven beyond a reasonable doubt.
>
> These two elements are: One, on or about February 17, 2000, in the City and County of Honolulu, State of Hawai'i, the defendant caused bodily injury to another person; and, two, the defendant did so intentionally.
>
> 'Bodily injury' means physical pain or any impairment of physical condition.

During deliberations, the jury sent out two communications to the court. The first communication stated: "Does the mace entering the car constitute entry by the person spraying the mace?" The court responded: "You are referred to the court's instructions previously given to you." The second communication stated: "What is the range (distance) that this mace can spray in evidence?" The court responded: "You must rely upon your collective recollection of the evidence presented." There were no objections by either party to the court's responses.

On October 25, 2000, the jury returned a verdict of guilty of UEMV. On January 11, 2001, Faria was sentenced to probation for five years, ordered to pay $100.00 to the Crime Victim Compensation Fund, and to perform 100 hours of community service. This timely appeal followed.

II. STANDARDS OF REVIEW

A. Jury instruction

> "'When jury instructions or the omission thereof are at issue on appeal, the standard of review is whether, when read and considered as a whole, the instructions given are prejudicially insufficient, erroneous, inconsistent, or misleading,'" State v. Kinnane, 79 Hawai'i 46, 49, 897 P.2d 973, 976 (1995) . . . .

> "'[E]rroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial.'" State v. Pinero, 70 Haw. 509, 527, 778 P.2d 704, 716 (1989) . . . .
>
> [E]rror is not to be viewed in isolation and considered purely in the abstract. It must be examined in the light of the entire proceedings and given the effect which the whole record shows it to be entitled. In that context, the real question becomes whether there is a reasonable possibility that error may have contributed to conviction. . . .

State v. Jenkins, 93 Hawai'i 87, 99-100, 997 P.2d 13, 25-26 (2000)(some citations omitted).

State v. Lagat, 97 Hawai'i 492, 495-96, 40 P.3d 894, 898-99 (2002) (some citations omitted) (brackets in original).

"Jury instructions to which no objection has been made at trial will be reviewed only for plain error. If the substantial rights of the defendant have been affected adversely, the error may be considered as plain error." State v. Aganon, 97 Hawai'i 299, 302, 36 P.3d 1269, 1272 (2001) (internal citations and quotation marks omitted), reconsideration denied, 97 Hawai'i 299, 36 P.3d 1269 (2002).

B. Exclusion of Testimony

> In Hawai'i, admission of opinion testimony is a matter within the discretion of the trial court, and only an abuse of that discretion can result in reversal . . . . Generally, to constitute an abuse of discretion, it must appear that the trial court clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant.

State v. Toyomura, 80 Hawai'i 8, 23-24, 904 P.2d 893, 908-09 (1995) (citations, quotation marks, and brackets omitted)).

III. DISCUSSION

A. Instruction on what constitutes "entry"

Faria contends that the definition of unlawful "entry" was outcome determinative and, therefore, the trial court plainly erred[2] in failing to instruct the jury on what constitutes "entry" into a motor vehicle. Faria points to jury communication No. 1 (asking whether the mace entering the vehicle constituted "entry" by the person spraying the mace) as evidence that the absence of an instruction defining "entry" was outcome determinative and prejudicial to his defense.

The Hawai'i Penal Code does not provide a definition of "entry" in the UEMV statute nor in the burglary statutes, see HRS §§ 708-810 and 708-811 (1993), upon which the UEMV statute is modeled. Moreover, this court has not construed the term "entry" in the context of either statute.

As previously indicated, under the UEMV statute, "[a] person commits the offense of [UEMV] if the person intentionally or knowingly enters . . . unlawfully in a motor vehicle with the intent to commit a crime[.]" HRS § 708-836.5. The language, however, is unclear as to what specific conduct must be proven to establish that a person "entered" a vehicle in order to constitute unauthorized "entry."

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[2] There is no evidence in the record that either party: (1) contested the meaning of the word "entry" in the UEMV statute; (2) requested the trial court to define "entry" in the jury instructions; or (3) objected to the trial court's response to the jury communication no. 1. However, this court may notice plain error or defects affecting substantial rights although they were not brought to the attention of the trial court. See Hawai'i Rules of Penal Procedure Rule 52(b) (2000); see also Hawai'i Rules of Appellate Procedure Rule 28(b)(4).

Although words with commonplace meanings need not necessarily be defined for a jury, an instruction should be given where words are susceptible to differing interpretations, only one of which is a proper statement of the law. See, e.g., State v. Shabazz, 98 Hawai'i 358, 385, 48 P.3d 605, 632 (App. 2000) (stating that because the common meaning of "consent" subsumed both express and implied consent, the jury should have been given a more specific definition). The word "enter" is susceptible to more than one meaning. Sears v. State, 713 P.2d 1218, 1219 (Alaska Ct. App. 1986). "Enter" could mean an intrusion into a place by a person's whole body, by part of the body, or by an instrument appurtenant to the person's body.

Many jurisdictions have defined "entry," generally or in varying forms, as an intrusion with the whole or any part of the body, hand, or foot, or with any instrument or weapon, introduced for the purpose of committing a crime. See, e.g., Hebron v. State, 627 A.2d 1029, 1038 (Md. 1993) ("the term 'entering' . . . requires that some part of the body of the intruder or an instrument used by the intruder crosses the threshold, even momentarily, of the house"); Sears, 713 P.2d at 1220 (an intruder enters by entry of his whole body, part of his body, or by insertion of any instrument that is intended to be used in the commission of a crime); State v. Ervin, 573 P.2d 600 (Kan. 1977); State v. Sneed, 247 S.E.2d 658, 659 (N.C. Ct. App.

1978); Edelen v. United States, 560 A.2d 527, 530 (D.C. 1989); State v. Nichols, 572 N.W.2d 163, 164 (Iowa Ct. App. 1997); People v. Valencia, 46 P.3d 920, 929 (Cal. 2002); Griffin v. State, 815 S.W.2d 576, 578 (Tex. Crim. App. 1991).

Courts in some jurisdictions define "entry" more narrowly as occurring when any part of the person's physical body crosses the threshold. However, although those courts have not expressly addressed the question whether an intrusion of an instrument appurtenant to the person's body crossing the threshold is sufficient to satisfy the element of "entry," neither do they expressly preclude the definition utilized by a number of other jurisdictions. See generally State v. Fernandes, 783 A.2d 913, 917 (R.I. 2001); State v. Johnson, 587 S.W.2d 636, 637-38 (Mo. Ct. App. 1979); People v. King, 463 N.E.2d 601, 602-03 (N.Y. 1984); Commonwealth v. Gordon, 477 A.2d 1342, 1348 (Pa. Super. Ct. 1984).

Based on the foregoing discussion, we hold that, for purposes of the UEMV statute, "entry" is defined as the least intrusion into a motor vehicle with the whole physical body, with any part of the body, or with any instrument appurtenant to the body introduced for the purpose of committing a crime against a person or against property rights.[3]

[3] For example, if a person is standing on the outside of a vehicle and swings a baseball bat into an open window, striking an occupant in the head, but no part of his body actually crosses the threshold, the wielding of the (continued...)

In the present case, it is undisputed that the spray emitting from the mace can entered the vehicle; however, whether the spray (without either the can or any part of Faria's body) crossing the threshold constituted entry within the meaning of the UEMV statute is a question of law that the trial court's instructions should have resolved for the jury. Valencia, 46 P.3d at 929-30 (holding that a trial court's instructions must resolve a legal issue for the jury, and may not invite the jury to resolve the question for itself). It is well-settled that

> [t]he trial court is the sole source of all definitions and statements of law applicable to an issue to be resolved by the jury. Moreover, it is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide, and he or she shall state to them fully the law applicable to the facts. And faced with inaccurate or incomplete instructions, the trial court has a duty to, with the aid of counsel, either correct the defective instructions or to otherwise incorporate it into its own instructions.

Culkin, 97 Hawai'i at 214, 35 P.3d at 241 (quoting Kinnane, 78 Hawai'i at 50, 897 P.2d at 977).

As previously indicated, the jury was instructed that:

> A person commits the offense of Unauthorized Entry into a Motor Vehicle if he intentionally or knowingly enters unlawfully a motor vehicle with intent to commit therein a crime against a person. There are two material elements of this offense -- to this offense, each of which the prosecution must prove beyond a reasonable doubt. These two elements are: one, on or about February 17, 2000, in the

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[3](...continued)
baseball bat, which is appurtenant to the person's body and which crosses the threshold, is sufficient, under the definition we announce today, to complete the offense. On the other hand, suppose a person is standing on the outside of a vehicle and throws a rock through an open window, which strikes an occupant in the head. Because the rock is not appurtenant to the person's body at the point it crosses the threshold into the vehicle, the act of throwing the rock is insufficient to complete the offense.

> City and County of Honolulu, State of Hawai‘i, the defendant intentionally or knowingly entered unlawfully a motor vehicle; and, two, when the defendant unlawfully entered the motor vehicle, the defendant at the time had the intent to commit therein a crime against a person.

In response to the jury's question as to whether the spray entering the vehicle constituted entry by the person doing the spraying, the trial court referred the jurors to instructions that failed to define the specific conduct that constituted entry for purposes of the UEMV statute. However, "[m]erely informing the jury that it should consider the court's instructions as a whole cannot obviate an error of *omission* where the remaining instructions fail to provide the crucial information." State v. Jenkins, 93 Hawai‘i at 108-09, 997 P.2d at 34-35 (italics in original) (citations omitted).

The jury's question to the court demonstrates that it may have been confused, or at least unclear, as to what constituted "entry" for purposes of UEMV. In the absence of a definition, the jury could have concluded that the spray emitting from the mace container constituted "entry" by Faria sufficient to satisfy that requirement in the UEMV statute. Because the spray, which was not appurtenant to any part of Faria's body, was insufficient to satisfy the UEMV statute, the jury would have had to conclude that either the can (appurtenant to Faria's hand) or some part of Faria's body crossed the threshold of the vehicle. However, in light of the jury communication, we cannot be sure what the jury decided in rendering its verdict. We, therefore,

conclude that there is a reasonable possibility that the inadequate jury instructions and the trial court's failure to clarify and/or define "entry" confused the jury and that such confusion resulted in substantial prejudice to Faria or contributed to his conviction. Accordingly, we hold that the trial court committed plain error when it failed to define the specific conduct that constituted entry for purposes of the UEMV statute. Cf. Culkin, 97 Hawai'i at 219, 35 P.3d at 244 (holding that the circuit court committed plain error because there was a reasonable possibility that the misleading jury instructions contributed to the defendant's conviction).

We now turn to Faria's other two points of error on appeal and address them below.

B. Instruction as to Assault

Faria disputes the trial court's interpretation of Mahoe and argues that the trial court erroneously instructed the jury on the offense of assault where assault was not in the indictment as the predicate crime. We disagree.

In Mahoe, this court held that the defendant's rights were violated because the prosecution did not elect one of two distinct acts (harassment or assault) upon which it was relying to support the burglary charge, nor did the court give a unanimity instruction. Mahoe, 89 Hawai'i at 287, 972 P.2d at 290. In the present case, the inclusion of the assault

instruction informed the jury that assault in the third degree was the only predicate crime to be considered and prevented the jury from speculating as to the crime Faria intended to commit when he entered the car.

Furthermore, this court held in Lagat that, within the context of burglary statutes and, by extension, the UEMV statute, "the particular crime intended to be committed is . . . [not] an essential element which must be alleged[.]" Lagat, 97 Hawai'i at 498, 40 P.3d at 900 (quoting State v. Robins, 66 Haw. at 314-15, 660 P.2d at 41. "[A]lthough it certainly may be preferable for the prosecution to allege the particular crime intended to be committed under the UEMV statute, we refuse to require it where no unfair surprise or prejudice results." Lagat, 97 Hawai'i at 499, 40 P.3d at 901 (holding that it was transparent from the record that no unfair surprise nor resulting prejudice ensued from the prosecution's failure to list in the indictment the charge of assault, which was the alleged predicate offense for UEMV, and the jury instructions on assault were not erroneous). As in Lagat, it should not have come as a surprise to Faria that the predicate offense for UEMV was assault.

Accordingly, pursuant to this court's reasoning in Lagat, we reject Faria's contention that the trial court's jury instructions on assault were erroneous.

C. Exclusion of testimonial evidence

Faria contends that the opinion testimony of Officer Okimoto would have indicated that the legislature did not intend for the UEMV statute to apply to the facts of this case. Faria argues that the trial court's failure to permit opinion testimony by Officer Okimoto was prejudicial to the outcome and was an abuse of the trial court's discretion.

"The right to confront and to cross-examine a witness is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." State v. El'Ayache, 62 Haw. 646, 649, 618 P.2d 1142, 1144 (1980) (per curiam) (citations omitted). Therefore, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Hawai'i Rules of Evidence (HRE) Rule 403 (2000). Furthermore, a lay witness's testimony "in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness, and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." See Toyomura, 80 Hawai'i at 25, 904 P.2d at 909 (quoting HRE Rule 701).

The trial court sustained the prosecution's objections to the defense counsel's cross-examination questions on the

following grounds: (1) the officer was not called by the prosecution to express any opinions regarding the validity of the charges being brought; (2) there was no indication that it was Officer Okimoto's determination that this case be brought forward at any point, and, therefore, his opinion regarding the validity of the charges was not relevant; and (3) the question whether the alleged offense falls within the intended scope of the statute was a question of law to be addressed by the court, which, in turn, instructed the jury on the applicable law. We agree with the reasoning of the trial court. Admission of Officer Okimoto's opinion testimony on the legislative intent and the scope of the UEMV law would have misled the jury on a question of law that was reserved for determination by the court.

In light of the broad discretion accorded to a trial court in making evidentiary "judgment calls," we hold that the trial court did not abuse its discretion in limiting the scope of cross-examination to the subject matter of direct examination and precluding admission of Officer Okimoto's testimony because his opinion on the scope of the UEMV law was not relevant. See State v. White, 92 Hawai'i 192, 206, 990 P.2d 90, 104 (1999) (trial court did not abuse its discretion in limiting the scope of cross-examination).

Moreover, with regard to Faria's contention that the legislature did not intend to deter Faria's particular conduct by the UEMV statute, this court has noted that,

> [t]he construction of [the UEMV statute] is a question of law which the appellate court reviews de novo. . . . Departure from the literal construction of [the UEMV statute] is justified only when such construction would produce an absurd and unjust result and the literal construction is clearly inconsistent with the purposes and policies of the statute.

Lagat, 97 Hawai'i at 499, 40 P.3d at 901 (quoting State v. Villeza, 85 Hawai'i 258, 272-73, 942 P.2d 522, 534-35 (1997) (noting that [the UEMV statute] plainly states that it is unlawful to enter into a motor vehicle in order to, among other things, commit a crime against a person). Thus, the UEMV statute specifically penalizes the conduct Faria was found to have engaged in by the jury. Accordingly, Faria's contention is without merit.

IV. CONCLUSION

Based on the foregoing, we vacate Faria's conviction and sentence and remand this case for a new trial consistent with this opinion.

On the briefs:

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