SUPREME COURT NO. 90575-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SCOTT E. COLLINS,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION TWO

Court of Appeals No. 71058-3-I
Cowlitz County No. 09-1-01275-7

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, SCOTT E. COLLINS, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Collins seeks review of the June 23, 2014, unpublished decision of Division One of the Court of Appeals affirming his convictions and sentence.

C. ISSUES PRESENTED FOR REVIEW

1. Mistrial was necessitated when a law enforcement officer testified he suspected that Collins committed a string of burglaries, in violation of the court's in limine ruling and despite the prosecutor's warning that such testimony was prohibited. Where the officer either intended to cause a mistrial or was indifferent to the risk of a mistrial, did retrial violate Collins's constitutional right to be free from double jeopardy?

2. Three stolen firearms were found during a search of Collins's home, and Collins was convicted of three counts of possession of a stolen firearm. Because he has a prior felony conviction, he was also convicted of three counts of unlawful possession of a firearm based on these same three guns. The trial court imposed separate consecutive sentences on each offense, for a total sentence of 480 months (40 years).

Where there was no evidence that Collins used the guns or engaged in any violent conduct, is the resulting sentence so grossly disproportionate to the offenses committed as to constitute cruel punishment in violation of the constitution?

D. STATEMENT OF THE CASE

The Cowlitz County Prosecuting Attorney charged Scott Collins with five counts of burglary, three counts of unlawful possession of a firearm in the first degree, three counts of possession of a stolen firearm, four counts of possession of stolen property in the second degree, one count of possession of a stolen vehicle, three counts of possession of stolen property in the third degree, and one count of possession of 40 grams or less of marijuana. CP 94-101. The unlawful possession of a firearm charges were severed for trial, and the case proceeded to jury trial on the remaining charges. 1RP[1] 83; CP 51. The Court granted the defense motion to dismiss the burglary charges for insufficient evidence. 3RP 409-410. Defense counsel asked that the prosecutor advise his witnesses carefully regarding the court's ruling. 3RP 446. The parties agreed that

[1] The Verbatim Report of Proceedings is contained in 11 volumes, designated as follows: 1RP—12/30/10, 1/6/11, 1/20/11, 3/24/11, 7/28/11, 8/2/11, 1/12/12; 2RP—1/17-18/12; 3RP—1/19/12; 4RP—1/20/12, 1/27/12, 2/6/12; 5RP—2/7/12; 6RP—2/21/12; 7(A)RP—2/22/12 a.m.; 7(B)RP 2/22/12 p.m.; 8RP—2/23/12; 9RP—2/28/12; 10RP—2/29/12, 3/20/12, 3/27/12.

the State would not be presenting evidence suggesting that Collins committed the burglaries, just that burglaries had occurred. 3RP 446-47.

The State first called Steven Brent, who testified that his house had been burglarized. 3RP 479. An officer who had served the search warrant at Collins's house testified next. 3RP 516. The State's third witness was Cowlitz County Sheriff's Deputy Danny O'Neill, a law enforcement officer with over 40 years of experience. 3RP 533-34. He testified that he responded to Brent's call reporting the burglary. When the prosecutor asked him if he talked to Brent about "what he might do to be proactive about the burglary," O'Neill responded, "I told him I had a suspect that I felt was probably involved in several of the north-end burglaries that was living –." 3RP 535.

Defense counsel moved for a mistrial, arguing that testimony that Collins was a suspect in a rash of burglaries violated the court's rulings on the motions in limine and was highly prejudicial. 3RP 536. The prosecutor responded that he did not expect O'Neill to answer as he did and was not seeking to elicit the testimony O'Neill provided. He did not object to defense counsel's motion for a mistrial, however. 3RP 537. The court granted the mistrial, stating there was a specific motion in limine on the topic, which was granted. 3RP 539.

Defense counsel filed a motion to dismiss the case, arguing that retrial was barred by double jeopardy, because the prosecutor had deliberately provoked a mistrial or was indifferent to the likelihood of a mistrial when eliciting prohibited testimony. CP 125-133. The court asked for a written response from the prosecutor. The court stated that, given Deputy O'Neill's forty years of experience as a law enforcement officer, it was difficult to understand how he would have testified as he did if he had been appropriately advised of the court's rulings. 4RP 556.

The prosecutor then filed a declaration in response to defense counsel's motion and the court's concern. The prosecutor stated that he had told Deputy O'Neill before he testified that he was not to discuss the burglaries, because those charges had been dismissed. The prosecutor also stated he informed O'Neill of the court's other rulings, as he had been instructed to do. CP 134, 136. When asking Deputy O'Neill about what he told Brent, the prosecutor expected O'Neill to answer that he had told Brent to check Craigslist and search the area for his property. The prosecutor stated he did not intentionally provoke a mistrial and did not expect O'Neill to testify as he did. CP 137.

The court ruled that while the case had been poorly marshaled by all concerned, it could not make a finding of intentional misconduct on the part of the prosecutor. It also did not find mismanagement to a level that

required dismissal. The court denied the defense motion to dismiss. 4RP 600-01.

Collins waived his right to a jury trial on the unlawful possession of firearms charges, and the case proceeded to a bench trial. 4RP 617-18; CP 154. Collins stipulated that he had previously been convicted of second degree burglary. 4RP 652. Law enforcement officers who participated in a search of Collins's home on December 6, 2009, testified that three firearms were located in the search. A .22 caliber revolver was found on his coffee table, covered with a newspaper; a shotgun was found on the kitchen floor, covered with a sheet; and a semi-automatic handgun was found in the pocket of a jacket on the living room floor. 4RP 697, 722, 726. Steven Brent testified that the shotgun and the revolver found in Collins's home had been stolen from his home the day before. 4RP 664, 687.

The court found that the State had proven beyond a reasonable doubt that three guns were found in Collins's house. The guns were all easily accessible, and constructive possession of the guns could be inferred from Collins's dominion and control of the premises. 5RP 858-62. The court entered an oral ruling concluding Collins was guilty of three counts of unlawful possession of a firearm. 5RP 862.

Next the case proceeded to a jury trial on the remaining counts. The final amended information charged three counts of possession of a stolen firearm, two counts of possession of stolen property in the second degree, one count of possession of a stolen vehicle, six counts of possession of stolen property in the third degree, one count of possession of less than 40 grams of marijuana, and the three counts of unlawful possession of a firearm in the first degree which had been decided by the court. CP 155-161.

Brent testified he returned home from work on December 5, 2009, to discover that his house had been broken into. 6RP 930, 932-33. He called police to report the burglary. The next day, he and a friend drove around the area, trying to locate his missing property. 6RP 935. He found his bicycle and fish net leaning against the back of a house on Ross Road. 6RP 936-37. Around 1:00 p.m., Brent called the sheriff's office to report what he had found. 6RP 938, 953-54. He waited on Ross Road until deputies arrived with a search warrant around 7:00. 6RP 938, 943.

Collins was the only person home when deputies executed the search warrant. 7(A)RP 1062. The house and garage were a mess, with items and clothing strewn everywhere. 6RP 958, 984, 992; 7(A)RP 1066-67, 1079; 7(B)RP 1234. The deputies found three stolen firearms, a stolen Dodge Durango, a bag of marijuana, as well as various other stolen items

in the house and garage. 6RP 972-73, 991; 7(A)RP 1070, 1130; 7(B)RP 1233, 1236; 8RP 1269, 1287.

Two deputies were sent to the home of Collins's parents, Jim and Norma Collins. 7(A)RP 1149-50. There they found a stolen trailer, with a stolen license plate, which contained items stolen from Brent's house. 7(A)RP 1154-55.

Norma Collins testified that her grandson, Chris Collins, had come to their home early in the morning and asked to use the tractor. The next morning when she woke up, the trailer was in their driveway. 7(B)RP 1177. When the police came to her house the next evening, they asked about the trailer. She told them what she saw and then gave a written statement in which she said someone pulled into the driveway, and she discovered it was Collins. He asked to use the tractor to pull a trailer out of the ditch. 7(B)RP 1179-82. Norma explained that when she wrote in her statement that she discovered it was Collins, she meant that the police had told her Collins was there. 7(B)RP 1185. She did not see Collins; she saw Chris. 7(B)RP 1186. One of the deputies then testified that Norma had said she saw Collins and never said anything about Chris. 7(B)RP 1212.

The defense presented evidence that Chris Collins and Jessica Hudson had both been arrested in this case. 9RP 1438. They had lived at

the Ross Road house with Collins until November 2009 and continued to have access to the house after they moved. 9RP 1440, 1443. Hudson's car was at the house when the search warrant was executed. 9RP 1442. Chris had been convicted for possession of the stolen Durango and possession of property belonging to Brent. 9RP 1507-08. Hudson pled guilty to possession of the stolen Durango, and she testified she had driven it to the Ross Road house. 9RP 1573-74.

When the jury returned guilty verdicts on all counts, the State argued that the sentences on each of the three counts of unlawful possession of a firearm and each of the three counts of possession of a stolen firearm must run consecutively, and concurrent to the remaining offenses. 10RP 1703-04. It recommended a mid-range sentence on each offense, asking the court to impose a total sentence of 555 months. 10RP 1705.

Defense counsel argued that the sentence proposed by the State was so disproportionate to the type of offenses, all non-violent property crimes, as to shock the conscience. 10RP 1711-12. Counsel argued that the firearm offenses did not have to be sentenced separately or consecutively, but instead should merge with other offenses involving the same criminal conduct. 10RP 1713-15. Counsel urged the court to determine that the sentence proposed by the State constituted cruel

punishment in violation of the state and federal constitutions. 10RP 1715-19, 1736.

The court ruled that consecutive sentences for the firearm offenses were mandated by RCW 9.41.040. 10RP 1731-32. It imposed sentences at the lower end of the standard range, running the six firearm charges consecutively to each other. 10RP 1733-34. The court imposed a sentence on each count of possession of stolen property, as well as possession of a stolen vehicle and possession of marijuana. Those sentences were run concurrent with each other and with the firearm sentences. 10RP 1740. The court imposed a total sentence of 480 months. 10RP 1740-41; CP 296-312.

Collins appealed, arguing that retrial after the mistrial violated double jeopardy, as did conviction of multiple counts of possession of stolen property, and that the 40 year sentence constituted unconstitutionally cruel punishment. The State conceded that the eight convictions for possession of stolen property violated double jeopardy. On June 23, 2014, the Court of Appeals issued a decision vacating all but one of the convictions for possession of stolen property but affirming the remaining convictions and holding that the consecutive sentences did not violate the constitution.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. RETRIAL FOLLOWING THE MISTRIAL VIOLATED COLLINS'S CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY, AND ALL CHARGES EXCEPT THE UNLAWFUL POSSESSION OF FIREARM CHARGES SHOULD BE DISMISSED.

The United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Washington State Constitution guarantees, "No person shall ... be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. Jeopardy attaches once the jury is selected and sworn. State v. Eldridge, 17 Wn.App. 270, 276, 562 P.2d 276 (1977), review denied, 89 Wn.2d 1017 (1978).

In general, double jeopardy does not bar retrial after a mistrial granted with the defendant's consent. State v. Rich, 63 Wn. App. 743, 747, 821 P.2d 1269 (1992). Retrial is barred, however, when the prosecutor intended to goad the defendant into moving for a mistrial. Oregon v. Kennedy, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); State v. Benn, 161 Wn.2d 256, 270, 165 P.3d 1232 (2007), cert. denied, 128 S.Ct. 2871 (2008). The federal standard focuses on the intent of the government actor, holding that unless intentional misconduct was specifically intended to provoke a mistrial, double jeopardy does not bar a

retrial. Oregon v. Kennedy, 456 U.S. at 674-76; State v. Lewis, 78 Wn. App. 739, 743, 898 P.2d 874 (1995).

The Oregon Supreme Court has held that its constitution is more protective than the federal constitution on this issue. In Oregon, retrial is barred when improper official conduct is so prejudicial as to require a mistrial, and if the official knows the conduct is improper and either intends or is indifferent to the resulting mistrial. State v. Hopson, 113 Wn.2d 273, 279-80, 778 P.2d 1014 (1989); State v. Kennedy, 295 Or. 260, 276, 666 P.2d 1316, 1324 (1983). Under this standard, a specific intent to cause a mistrial need not be shown. Hopson, 113 Wn.2d at 280 (citing State v. Kennedy, 666 P.2d at 1324). Retrial is barred when "the conscious misconduct of a State actor creates a risk of mistrial in the absence of actual intent to obtain a second chance to try the case." Lewis, 78 Wn. App. at 743.

The Washington constitution's double jeopardy provision was patterned after the Oregon provision, and the language of the two provisions is very similar. Hopson, 113 Wn.2d at 277-78. This Court has not yet ruled upon the parameters of Washington's double jeopardy provision. See Hopson, 113 Wn.2d at 275 (facts of that case would not merit relief under either federal or Oregon standard).

In Hopson, a pretrial ruling prohibited reference to the defendant's criminal record. When a fire investigator testified, however, he said he attempted to locate Hopson by running his name through the computer system, and he obtained Hopson's criminal record and history. The defense motion for a mistrial was denied, but when the investigator later referred to an old booking photograph, a renewed motion was granted. Hopson, 113 Wn.2d at 275-76. In determining whether the witness's violation of the pretrial ruling barred retrial following the mistrial, this Court noted that under the Oregon standard, "neither inadvertent actions nor conscious actions that were not designed to prejudice the defendant bar retrial." Hopson, 113 Wn.2d at 282. Retrial could be barred only by intentional misconduct, and the record failed to show that the fire inspector intentionally disregarded the court's ruling. Moreover, the record showed that the fire inspector was an inexperienced witness, and his improper testimony was likely the result of "excitability, negligence, or nervousness that would not meet the Oregon standard to bar retrial even if the bar applied to witnesses." Id. at 282-83.

In this case, mistrial was necessitated when Deputy O'Neill started to testify, in violation of the court's ruling, that he suspected Collins had been involved in a string of burglaries. 3RP 535-39. The record supports a finding that this was intentional misconduct on the part of Deputy

O'Neill. Immediately before he testified, the prosecutor instructed O'Neill regarding all the court's rulings and specifically told him not to discuss the burglaries, because those charges had been dismissed. CP 136. Unlike the fire inspector in Hopson, Deputy O'Neil was not a novice witness; he has over forty years of experience in law enforcement. Given the prosecutor's instructions before he testified, and the fact that his testimony did not even respond to the prosecutor's question, it can only be surmised that O'Neill deliberately violated the court's ruling in an effort to prejudice Collins. Whether he intended to provoke a mistrial or simply did not care whether one would result, the intentional misconduct by this state official should bar retrial in this case.

This Court said in Hopson that it would determine whether the federal or Oregon standard is the more appropriate interpretation of the Washington constitution "when a set of facts that would require different results under the Oregon and federal analyses is before the court...." Hopson, 113 Wn.2d at 283-84. This is such a case. O'Neill's conduct in disregarding the trial court's rulings and the prosecutor's instructions, in order to ensure the jury knew he suspected Collins had committed a string of burglaries, is the sort of reckless, prejudicial government misconduct which justifies dismissal under the Oregon standard. This misconduct "reflect[ed] a willingness to risk placing the defendant repeatedly in

jeopardy for the same offense." Lewis, 78 Wn. App. at 745; Hopson, 113 Wn.2d at 280.

The trial court did not specifically address the Oregon test. It determined that the prosecutor did not intentionally provoke a mistrial and that there was not enough evidence of prosecutorial mismanagement to require dismissal. 4RP 601. Had the court addressed the relevant test, it would have seen that dismissal was required by the reckless conduct of Deputy O'Neill, a state actor. See Kennedy, 295 Or. at 276 (focus is on "improper official conduct"). This case raises the "rare and compelling set of facts" where not only was a mistrial necessary but retrial was barred. See Lewis, 78 Wn. App. at 743 (quoting Hopson, 113 Wn.2d at 283-84). This Court should apply the Oregon standard and dismiss the charges presented to the jury in this case. The Court of Appeals's holding to the contrary presents a significant question of constitutional law and an issue of substantial public importance which should be reviewed by this Court. RAP 13.4(b)(3),(4).

2. THE SENTENCE OF 40 YEARS FOR NON-VIOLENT PROPERTY OFFENSES IS GROSSLY DISPROPORTIONATE TO THE GRAVITY OF THE OFFENSES AND VIOLATES THE CONSTITUTIONAL PROHIBITION OF CRUEL PUNISHMENT.

Both the state and federal constitutions prohibit punishment that is grossly disproportionate to the crime for which it is imposed. State v.

Fain, 94 Wn.2d 387, 395-97, 395 P.2d 720 (1980); State v. Morin, 100 Wn.App. 25, 29, 995 P.2d 113 (2000); Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). The Washington constitution is more protective than the federal constitution. State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); State v. Thorne, 129 Wn.2d 736, 772–73, 921 P.2d 514 (1996); Fain, 94 Wn.2d at 392–93, 617 P.2d 720; see Wash. Const. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). A punishment clearly permissible for some crimes may be unconstitutionally disproportionate for others. Fain, 94 Wn.2d at 396 (citing Coker v. Georgia, 433 U.S. 584, 591-92, 97 S.Ct. 2861, 2865-2866, 53 L.Ed.2d 982 (1977)). A sentence is grossly disproportionate if it is clearly arbitrary and shocking to the sense of justice. State v. Smith, 93 Wn.2d 329, 344-45, 610 P.2d 869, cert. denied, 449 U.S. 873 (1980).

While proportionality review is generally conducted as to each individual sentence, where a consecutive sentence is shockingly long, the cumulative sentences may violate the constitutional ban on cruel and unusual punishment. Wahleithner v. Thompson, 134 Wn.App. 931, 937, 143 P.2d 321 (2006). Such is the case here. Collins received a sentence of 40 years based on the presence of three firearms in his home at the time a search warrant was executed. There was no evidence Collins ever used

the firearms and no violent crimes were committed in conjunction with these possessory offenses. Under these circumstances, disproportionality review should be applied to this shockingly long cumulative sentence.

In considering whether a sentence is grossly disproportionate, the court must consider the following factors: "(1) the nature of the offense, (2) the legislative purpose behind the [sentencing] statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in Washington." Fain, 94 Wn.2d at 397. No one factor is dispositive. State v. Gimarelli, 105 Wn. App. 370, 380-81, 20 P.3d 430 (2001).

First, the nature of the offenses does not support the lengthy sentence in this case. Collins was found in constructive possession of three stolen firearms and convicted of three counts of possession of a stolen firearm. Because he had a qualifying prior felony conviction, he was also convicted of three counts of unlawful possession of a firearm based on those same three guns. Notably, no allegations of any violence were ever made, and Collins was cooperative when the search warrant was executed, resulting in these charges. Moreover, Collins has no history of violent crime. See CP 300-301.

Next, while the Hard Time for Armed Crime Act authorizes consecutive sentences for each of the firearm offenses, RCW 9.41.040(6),

this act was intended to reduce the frequency of dangerous crimes against persons. Laws of 1995, ch. 129, sec. 1. As noted above, there was no evidence of any violent or dangerous acts against persons in this case. Moreover, legislative purpose behind the Sentencing Reform Act includes ensuring proportionate and just punishment. RCW 9.94A.010. This goal is undermined by the 40 year sentence imposed in this case.

The third factor to consider is the punishment Collins would have received for the same offense in other jurisdictions. Our closest neighbor states of Oregon, California, and Idaho do not have statutory schemes that require consecutive sentencing comparable to the Hard Time for Armed Crime Act. And cases from other jurisdictions which have upheld consecutive sentences for firearm offenses have not gone so far as to find a 40 year sentence constitutional. See e.g., United States v. Segler, 37 F.3d 1131 (5th Cir.1994) (consecutive 60-month sentence for unlawful possession); Hudgins v. Wainwright, 530 F.Supp. 944 (Fla.Dist.Ct.App.1981) (consecutive 15-year sentence for unlawful possession), aff'd, 715 F.2d 578 (11th Cir.1983), cert. denied, 466 U.S. 944 (1984); State v. Parkhurst, 706 A.2d 412 (R.I.1998) (consecutive 5-year sentence for theft of firearm); State v. Cashman, 23 Kan.App.2d 580, 932 P.2d 469 (1997) (consecutive sentence of 2-5 years for unlawful possession).

Finally, this Court must consider the punishment imposed for other offenses in Washington. The offenses sentenced consecutively here are Class B felonies. Crimes in this category by statute carry a maximum penalty of 10 years. RCW 9A.20.021(1)(b). Collins's 40 year sentence effectively confines him for the remainder of his life, a sentence commensurate with the maximum penalty for a Class A felony. RCW 9A.20.021(1)(a).

The sentence imposed in this case is shocking to the sense of justice that the Legislature attempted to create in establishing sentencing standards. It is grossly disproportionate to the offenses being punished, and it constitutes cruel punishment in violation of the Washington constitution. The Court of Appeals's holding to the contrary presents a significant question of constitutional law and an issue of substantial public importance which should be reviewed by this Court. RAP 13.4(b)(3),(4).

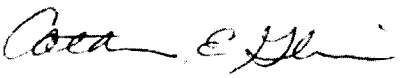
F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Collins's convictions and sentence.

DATED this 22nd day of July, 2014.

Respectfully submitted,

GLINSKI LAW FIRM PLLC



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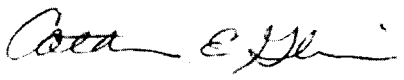
Certification of Service by Mail

Today I caused to be mailed a copy of the Petition for Review in *State v. Scott Collins,* Court of Appeals Cause No. 71058-3-I as follows:

Scott E. Collins DOC# 918160
Monroe Correctional Complex
PO Box 777
Monroe, WA 98272-0777

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
July 22, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. SCOTT EUGENE COLLINS, Appellant.	)	No. 71058-3-I DIVISION ONE UNPUBLISHED OPINION FILED: June 23, 2014

SCHINDLER, J. — Scott Eugene Collins seeks reversal of multiple jury convictions arguing double jeopardy barred retrial following a mistrial. In the alternative, Collins asserts the eight convictions for possession of stolen property violate double jeopardy and imposition of a consecutive sentence under the "Hard Time for Armed Crime Act" (HTACA), LAWS OF 1995, chapter 129, section 21 (Initiative Measure No. 159), for the three counts of possession of a stolen firearm and the three counts of unlawful possession of a firearm violates the prohibition against cruel punishment. We hold the retrial did not violate double jeopardy and the court did not err by imposing the consecutive sentences under the HTACA. We accept the State's concession that the eight convictions for possession of stolen property violate double jeopardy and all but one of the convictions must be vacated. Accordingly, we affirm in part, reverse in part, and remand for resentencing.

FACTS

Steven Brent worked as a corrections officer at the Cowlitz County Jail. On December 5, 2009, Brent got off work at 4:00 p.m. When he arrived home, Brent "knew something was wrong" because "my dog came in from around the outside of my garage and my dog is an inside dog," and there was a "two-inch skid mark the full length of the driveway." Brent said the front door was "kicked in, the doorframe was busted," and "[c]lothes, anything that was on the dressers were just thrown and a random pattern[.] Every room in the house was ransacked." A number of his belongings were stolen, including his 12-guage shotgun and a .22 caliber pistol revolver, a mountain bike, televisions, "computers, wood splitter, chainsaws, boat, trailer, boat loaders, [and] fishing gear." Brent estimated the value of the stolen property was between $12,000 and $15,000. Brent called 911 to report the burglary.

Cowlitz County Sherriff Deputy Danny O'Neill responded to the 911 call. Deputy O'Neill suggested Brent find out whether his next-door neighbor noticed "unusual vehicles . . . in the driveway" and check Craigslist. Deputy O'Neill told Brent that he "suspected his property went to 1306 Ross Street in Kelso."

The next day, Brent and a friend "went to the pawnshops first then we started driving around town" looking for the stolen property before going to 1306 Ross Street. When they went to the house located at 1306 Ross Street, Brent saw his stolen mountain bike and his fishing net in the alleyway. Brent called the police. The police verified that Scott Eugene Collins lived at 1306 Ross Street and obtained a warrant to search the house. When the police executed the search warrant, they found property

that had been stolen from Brent and a number of other victims, including a semi-automatic pistol and a Dodge Durango. The police also found marijuana.

The State charged Collins with burglary in the first degree while armed with a firearm, residential burglary, three counts of unlawful possession of a firearm in the first degree, three counts of possession of a stolen firearm, eight counts of possession of stolen property, possession of a stolen vehicle, identity theft in the second degree, and possession of 40 grams or less of marijuana.

Collins filed a motion to dismiss the burglary charges under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), and filed a motion to sever the three counts of unlawful possession of a firearm. The court granted the motion to sever. The court reserved ruling on the motion to dismiss the burglary charges.

At the beginning of trial, the defense moved to exclude any reference to "the felony possession of a firearm charges." The prosecutor agreed to instruct the witnesses "not to mention the fact that Mr. Collins is a convicted felon or that he was investigated for the unlawful possession of firearms in the first degree."

Following jury selection, the court granted the defense motion to dismiss the burglary charges. The defense attorney asked the State to "please advise your witnesses carefully how to handle the -- you know, the issues regarding the burglary discussions or anything." The prosecutor argued the witnesses should be allowed to testify about the burglaries:

> The fact that they were burglarized is self-evident from the fact that . . . they lost their stuff, so if they can't say, we were burgled, how did their stuff get taken? . . . [T]hey need to testify to the fact that it's stolen.

The court agreed, "I don't see -- that doesn't prejudice your Client because he's not charged with burglary."

The court instructed the jury not to consider the burglary charges:

> When we first started this trial a couple of days ago, I read to you a number of charges that you were going to be considering in this case, and that list is now changed. You -- you were originally -- you will not be presented information related to the five counts of alleged burglary, and nor will you be asked to consider those charges in your deliberations.

The State called Brent as the first witness to testify at trial. The State then called Deputy O'Neill. During direct examination, the prosecutor asked Deputy O'Neill whether he talked "to Mr. Brent about what he might do to be proactive about the burglary" and, if so, what he told Brent. In response, Deputy O'Neill testified, "I told [Brent] I had a suspect that I felt was probably involved in several of the north-end burglaries that was living --." The defense objected.

Outside the presence of the jury, the defense attorney moved for a mistrial. The attorney argued Deputy O'Neill violated the motion in limine order by suggesting Collins was a prior suspect in "a rash of other burglaries" and the testimony was "extremely prejudicial."

The prosecutor argued there was "no bad faith in asking . . . that question" and pointed to the "very specific testimony in . . . Deputy O'Neill's report that relates to that question." The prosecutor argued, in pertinent part:

> [T]he question was framed in such a way, what did you tell him to do? I was not attempting to elicit anything about that, . . . Deputy O'Neill had directed Mr. Brent to look on Craigslist for his property and then to go sit outside 1306 Kelso. And so that explains why the victim, Mr. Brent, and [his friend] went and sat outside 1306, North Kelso. They saw the -- they saw the bicycle there. That -- that's the context for that.

The court granted the motion for a mistrial. The court ruled, in pertinent part:

> I'm concerned about the statement and . . . what I can do about that with the jury. I mean, I think that's an unfortunate circumstance, but I don't know that, given that the issue's raised and a mistrial's been requested, I think that probably, much to my dissatisfaction, I don't really have any opportunity -- any ability to not do that. We had specific motion in limine on that, which was granted. I'm not going to make any other rulings with regards to dismissal. If that is something that Counsel wishes to bring in a formal motion, which probably needs to be set for some sort of -- a little more extended than I can do at this time. I'm not going to dismiss the case. So the case will -- will remain pending and will need to be reassigned.

Following the decision to grant a mistrial, Collins filed a "Motion to Dismiss Due to Prosecutorial Mismanagement/Misconduct" under CrR 8.3(b). Collins argued that because the prosecutor "admittedly failed to properly instruct its witnesses as instructed by the court, . . . such conduct is recklessly indifferent to both the court ruling and the defendant's rights, and impermissibly provoked a mistrial and requires dismissal of this case with prejudice."

Defense counsel filed a declaration in support of the motion to dismiss. The defense attorney states that "Deputy O'Neill's response was verbatim from his report" and the defense was "forced to called [sic] for a mistrial." The attorney states that "[a]fterwards, [the] Prosecutor . . . apologized, and said he should have given better instruction to the deputy." The attorney also states that "more information is needed to assist the court to determine whether the prosecution actually instructed their witnesses regarding the defense's motion in limine as ordered by the court."[1]

The State filed a response. In his declaration, the prosecutor states that he neither intentionally nor recklessly attempted to cause the mistrial, nor did he intend to elicit information that would be in violation of the motions in limine. The prosecutor

[1] Emphasis in original.

states that he told Deputy O'Neill about the rulings in limine and instructed Deputy O'Neill "not to discuss the burglaries that had been charged in this case and that they had been dismissed." The prosecutor refers to Brent's testimony that he went "to pawn shops with his friend looking for his stolen property and that he had ultimately ended up outside 1306 Ross where he saw his bicycle and fishing net." The prosecutor also states that he did not prepare a "script of questions" for the direct examination of Deputy O'Neill but, "instead[,] I used a copy of his police report from the incident." The prosecutor explained that "[t]he question I asked was directly based on the following paragraph from the police report (2nd paragraph of attached report)" and provided a copy of the police report. Deputy O'Neill's police report states, in pertinent part:

> I explained to the victim in this case things he could do to help me with the case. I asked if he would check Craigs list [sic] for his boat, I asked him to check with his next door neighbor for unusual vehicles seen in the driveway. I told him I suspected his property went to 1306 Ross Street in Kelso. I told him he could drive by if in the area and report anything he thought was his.

The court rejected the argument of mismanagement or intentional misconduct by the prosecutor and denied the motion to dismiss under CrR 8.3(b).

The trial on the three counts of unlawful possession of a firearm in the first degree began on February 6, 2012. Collins stipulated to a bench trial. Collins also stipulated that he had previously been convicted of second degree burglary. The court found Collins guilty of three counts of unlawful possession of a firearm in the first degree.

The retrial on the other counts began on February 21. The jury convicted Collins of possession of a stolen Dodge Durango; two counts of possession of stolen property in the second degree belonging to Brent and Brian MacArthur; six counts of possession

of stolen property in the third degree belonging to Sabrina Little, Douglas Johnson, Kenneth McDermott, Christopher Farmer, Gary Grasser, and Tiffany Ostreim; three counts of possession of a stolen firearm; and possession of 40 grams or less of marijuana.

In the sentencing memorandum, the State argued RCW 9.41.040(6) and RCW 9.94A.589(1)(c) of the Hard Time for Armed Crime Act (HTACA) required imposition of a consecutive sentence for the three counts of possession of a stolen firearm and the three counts of unlawful possession of a firearm to run concurrently with the standard-range sentence on the other convictions.

In the defense sentencing memorandum, the defense asserted the HTACA permitted an exceptional sentence downward where the presumptive sentence would be " 'clearly excessive' " under RCW 9.94A.535(1)(g) and "grossly disproportionate to the gravity of the offense." The defense argued the court should impose a low-end standard-range sentence between 72 and 87 months.

At sentencing, the court rejected the request for an exceptional sentence downward. The court ruled that the HTACA required imposition of a consecutive sentence for each of the six convictions for possession of a stolen firearm and unlawful possession of a firearm. With an offender score of 23, the standard-range for possession of a stolen firearm was 72 to 96 months and was 87 to 116 months for unlawful possession of a firearm. The court imposed a consecutive 72-month sentence for each of the three counts of possession of a stolen firearm and a consecutive 88-month sentence for each of the three counts of unlawful possession of a firearm, totaling 480 months. The court imposed a concurrent standard-range sentence for

possession of stolen property, possession of a stolen motor vehicle, and possession of marijuana. Collins appeals.

ANALYSIS

Retrial

Collins contends that conducting a retrial following the decision to grant a mistrial violated his constitutional right against double jeopardy. The Fifth Amendment to the United States Constitution and article I, section 9 of the Washington State Constitution prevent the State from putting a person in jeopardy twice for the same crime. The Fifth Amendment states, in pertinent part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Washington Constitution also guarantees that "[n]o person shall . . . be twice put in jeopardy for the same offense." WASH. CONST. art. I, § 9. Whether the retrial violates double jeopardy is a question of law we review de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

As a general rule, double jeopardy does not bar retrial after a defendant moves for a mistrial. Oregon v. Kennedy, 456 U.S. 667, 672-73, 102 S. Ct. 2083, 72 L. Ed. 2d 416 (1982). However, there is a narrow exception to the general rule. Where "the governmental misconduct in question is intended to 'goad' the defendant into moving for a mistrial," a defendant may "raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Kennedy, 456 U.S. at 676.

In Kennedy, the prosecutor asked an expert witness whether the reason he had never done business with the defendant was " 'because he is a crook.' " Kennedy, 456 U.S. at 669. The United States Supreme Court held that the double jeopardy clause of

the Fifth Amendment did not bar retrial because the prosecutor did not intentionally cause a mistrial. Kennedy, 456 U.S. at 679.

On remand, the Oregon Supreme Court adopted a different test under the Oregon Constitution:

> [A] retrial is barred by . . . the Oregon Constitution when improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. When this occurs, it is clear that the burden of a second trial is not attributable to the defendant's preference for a new trial over completing the trial infected by an error. Rather, it results from the state's readiness, though perhaps not calculated intent, to force the defendant to such a choice.

State v. Kennedy, 295 Or. 260, 276, 666 P.2d 1316 (1983). However, because the trial court found that the prosecutor did not act in "bad faith," the Oregon Supreme Court concluded that the "criteria for imposing a constitutional bar against a second trial were not met." Kennedy, 295 Or. at 277-78. The court also stated that even intentional prosecutorial misconduct does not bar a mistrial if it "does not reflect a willingness to risk placing the defendant repeatedly in jeopardy for the same offense." Kennedy, 295 Or. at 277. Further, the court stressed that the difference between the standards for double jeopardy under the federal and Oregon constitutions "actually is quite narrow." Kennedy, 295 Or. at 272.

> The sole issue is whether . . . there is room for a double jeopardy bar beyond the case of an intentionally provoked mistrial when a prosecutor "harasses" the defendant with what the prosecutor knows to be prejudicial error. [A] guarantee against "harassment" implies a requirement of some conscious choice of prejudicial action before the guarantee bars correction of the error by a new trial. Negligent error, "gross" or otherwise, is not enough.

Kennedy, 295 Or. at 272-73.

Collins urges us to adopt Oregon's interpretation of its textually similar double jeopardy clause. Collins does not claim prosecutorial misconduct barred the retrial. Instead, Collins argues the "intentional misconduct on the part of Deputy O'Neill" barred the retrial and violated double jeopardy. State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989), controls. In Hopson, the court squarely considered and rejected the same argument.

In Hopson, a state fire investigator referred to the defendant's " 'booking photograph' " after he was told not to mention criminal history. Hopson, 113 Wn.2d at 275-76. After the second reference to the booking photograph, the court granted the defense motion for a mistrial. Hopson, 113 Wn.2d at 276.

On appeal, the defendant urged the court to adopt the Oregon standard and hold that the retrial violated double jeopardy because the witness either intended to cause or was indifferent to the resulting mistrial and knew his conduct was prejudicial. Hopson, 113 Wn.2d at 277-78, 280. The Washington Supreme Court rejected the attempt to "extend the Oregon application" to the conduct of the state fire investigator witness, noting that the Oregon court had never applied its test to the conduct of a witness. Hopson, 113 Wn.2d at 282. The court emphasized the "narrow difference" between the two tests, noting that both "require a 'rare and compelling' set of facts." Hopson, 113 Wn.2d at 283. The court also concluded that where the witness's testimony was inadvertent or even grossly negligent, the testimony "would not meet the Oregon standard to bar retrial even if the bar applied to witnesses." Hopson, 113 Wn.2d at 282-

83.[2] Here, as in Hopson, even if Deputy O'Neill's testimony was even grossly negligent, neither federal law nor the Oregon standard barred retrial.

Unit of Prosecution

In the alternative, Collins contends the eight convictions for possession of stolen property violate double jeopardy. Double jeopardy protects a defendant from being convicted more than once under the same statute if the defendant commits only one crime. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002). If a defendant is convicted of multiple violations of the same statute, the court must determine what unit of prosecution the legislature intends as the punishable act under the statute. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005).

A person commits the crime of possession of stolen property in the second degree if he "possesses stolen property, other than a firearm . . . or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value." RCW 9A.56.160(1)(a). Possession of stolen property in the second degree is a class C felony. RCW 9A.56.160(2). Possession of stolen property in the third degree is a gross misdemeanor. RCW 9A.56.170(2).

The State concedes that under State v. McReynolds, 117 Wn. App. 309, 71 P.3d 663 (2003), seven of the eight convictions for possession of stolen property must be dismissed. We accept the State's concession as well taken. In McReynolds, we held

[2] The court cites to other jurisdictions that "refused to apply the bar in similar circumstances." Hopson, 113 Wn.2d at 283. See, e.g., State v. Maddox, 185 Ga. Ct. App. 674, 365 S.E.2d 516 (1988) (police officer's testimony in drunk driving trial was not attributable to prosecutorial misconduct where prosecutor did not actively aid or encourage the officer but rather had specifically instructed him not to refer to defendant's prior convictions); State v. Fuller, 374 N.W.2d 722 (Minn. 1985) (the Minnesota Supreme Court reversed a court of appeals decision where the lower court had barred retrial based on a prosecutorial duty to properly instruct witnesses); see also State v. Butler, 528 So.2d 1344 (Fla. Dist. Ct. App. 1988) (prosecutor's failure to warn a state detective serving as a witness not to mention a stolen car did not bar retrial).

that because the simultaneous possession of property stolen from multiple owners constituted one unit of prosecution of the crime, the multiple convictions for possession of stolen property violated double jeopardy. McReynolds, 117 Wn. App. at 339-40.

HTACA

Collins asserts that imposition of a consecutive sentence under the HTACA for the three convictions of possession of a stolen firearm and the three convictions of unlawful possession of a firearm violates his constitutional right against cruel punishment. We review a constitutional challenge to the court's sentencing decision de novo. State v. Cubias, 155 Wn.2d 549, 552, 120 P.3d 929 (2005).

Under RCW 9.41.040(6) of the HTACA, the court must impose a consecutive sentence for unlawful possession of a firearm in the first or second degree and for felony possession of a stolen firearm. RCW 9.41.040(6) states, in pertinent part:

> Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

Article I, section 14 of the Washington Constitution provides that "[e]xcessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted." The State constitutional proscription against "cruel punishment" affords greater protection than its federal counterpart. WASH. CONST. art. I, § 14; State v. Fain, 94 Wn.2d 387, 392-93, 617 P.2d 720 (1980).

To determine whether a sentence is grossly disproportionate to the crime for which it is imposed and thus violates the prohibition against cruel and unusual punishment, it is necessary to consider (1) the nature of the offense, (2) the legislative

purpose behind the sentencing statute, (3) the punishment the defendant would have received for the same crime in other jurisdictions, and (4) the sentence the defendant would receive for other similar crimes in Washington. Fain, 94 Wn.2d at 397; State v. Rivers, 129 Wn.2d 697, 712-13, 921 P.2d 495 (1996). No single factor is dispositive. State v. Gimarelli, 105 Wn. App. 370, 380-81, 20 P.3d 430 (2001). "Only on the very rare occasion when a consecutive sentence is shockingly long has a court held cumulative sentences cruel and unusual." Wahleithner v. Thompson, 134 Wn. App. 931, 937, 143 P.3d 321 (2006).

The HTACA "carves out an area of criminal offenses, armed crime, and limits its scope to increasing penalties for armed crime." State v. Broadaway, 133 Wn.2d 118, 127-28, 942 P.2d 363 (1997).[3] The HTACA targets crimes involving firearms as warranting increased levels of punishment. The statutory provisions enacted as part of the HTACA " '[d]istinguish between the gun predators and criminals carrying other deadly weapons and provide greatly increased penalties for gun predators.' " In re Pers. Restraint of Cruze, 169 Wn.2d 422, 431, 237 P.3d 274 (2010)[4] (quoting LAWS OF 1995, ch. 129, § 1(2)(c)). "It is the province of the Legislature, if it so chooses, not the appellate courts, to ameliorate any undue harshness arising from consecutive sentences for multiple firearm counts." State v. Murphy, 98 Wn. App. 42, 49 n.8, 988 P.2d 1018 (1999).[5]

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[3] Emphasis in original.

[4] Alteration in original, emphasis in original.

[5] In Murphy, we held the plain language of RCW 9.41.040(6) required the court impose a consecutive sentence for each of the 10 firearm theft and unlawful possession of a firearm convictions. Murphy, 98 Wn. App. at 48-49. See also McReynolds, 117 Wn. App. at 342-43 (holding the statute required court to run each of defendant's multiple counts of possession of a stolen firearm and unlawful possession of a firearm convictions consecutively).

RCW 9.94A.589(1)(c) also underscores the legislature's intent to require consecutive sentences for certain firearm offenses. RCW 9.94A.589(1)(c) states, in pertinent part:

> If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

Because Collins concedes that several other jurisdictions have similar statutory schemes, he fails to show that he would have been punished more leniently outside of Washington. Federal law also imposes enhanced penalties for armed crime, and federal courts have upheld consecutive sentences for firearm crimes. See, e.g., United States v. Segler, 37 F.3d 1131, 1134-35 (5th Cir. 1994) (upholding consecutive 60-month sentence for unlawful possession of a firearm); Hudgins v. Wainwright, 530 F. Supp. 944, 948-49 (S.D. Fla. 1981) (upholding consecutive 15-year sentence for unlawful possession of a firearm), aff'd, 715 F.2d 578 (11th Cir. 1983), cert. denied, 466 U.S. 944, 104 S. Ct. 1928, 80 L. Ed. 2d 473 (1984). In Washington, possession of a stolen firearm and unlawful possession of a firearm in the first degree are class B felonies that carry a maximum sentence of 10 years. RCW 9A.56.310(6); RCW 9.41.040(1)(b); RCW 9A.20.021(1)(b). With an offender score of 23, the court imposed a low-end standard-range sentence for each of Collins' six firearm convictions.

We conclude that under the Fain factors, the imposition of consecutive sentences for the six firearm convictions does not constitute cruel punishment.

We affirm in part, reverse in part, and remand for resentencing on one count of possession of stolen property.

WE CONCUR: