COA No. 73740-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JASON GARCIA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George F. Appel

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

A. ASSIGNMENTS OF ERROR

1. In J.T. Garcia's trial on a charge of robbery, the 911 recording of Mr. Losey, one of the two accusers, was inadmissible as hearsay.

2. Mr. Losey's conversation with the 911 operator was "testimonial;" its admission violated J.T. Garcia's Sixth Amendment confrontation rights under Crawford v. Washington.[1]

3. Mr. Garcia's convictions for first degree robbery and possession of stolen property cannot stand under Washington's statutory scheme in Title 9A Chapter 56, under State v. Melick;[2] further, as remedy, both convictions must be reversed for a new trial under Milanovich v. United States.[3]

4. Trial counsel was ineffective under the Sixth Amendment for failing to propose Milanovich – type jury instructions that would preclude the jury from convicting Mr. Garcia on both counts, requiring reversal of both counts.

5. Mr. Garcia's conviction for possession of stolen property must be vacated as violative of Double Jeopardy.

---

[1] Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

[2] State v. Melick, 131 Wn. App. 835, 837-41, 129 P.3d 816 (2006).

[3] Milanovich v. United States, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. After a motel clerk called 911 and reported that two guests were saying they were robbed, the operator asked to speak with Bret Losey, one of the accusers. During Losey's calm, almost laconic statements to the operator, he alleged that "J.T." Garcia was involved in the robbery. His statements were not made under any exciting effect of the robbery incident, but only under the newly-arising stress of his speculation that he would be shot because he was "snitching." Did the trial court abuse its discretion in admitting the hearsay?

2. Did the erroneous admission of the 911 conversation materially affect the outcome of trial, within reasonable probabilities, where the two complainants, Mr. Losey and Ms. Morcom, recanted their naming of J.T. Garcia, and did not consistently identify J.T. Garcia as being the robber?

3. Was Losey's 911 conversation "testimonial" under Crawford, where his statements to the operator merely reported past facts, where there was no ongoing emergency, and no actual call for help, and where the conversation demonstrated Losey's awareness that he was "snitching" by making inculpating

descriptions and statements, and thus truly "bearing witness" against a person?

4. Does the confrontation error of admitting the 911 recording require reversal under the constitutional error standard, where the evidence that J.T. Garcia was in fact the robber, or one of two robbers, was entirely muddled and inconsistent, rather than overwhelming, and considering also that the defendant's explanations to police for being in the motel room around the time of incident, and for having Morcom's debit cards, were completely plausible?

5. Must Mr. Garcia's convictions for both robbery and possession of stolen property – debit cards taken in the robbery -- be reversed for a new trial where the two convictions cannot stand under Melick and Milanovich?

6. Was trial counsel ineffective for failing to propose Melick and Milanovich – type jury instructions that would preclude the jury from convicting Mr. Garcia on both counts? As remedy, must both the robbery conviction and the possession conviction be reversed?

7. Must the defendant's judgment and sentence for possession of stolen property be vacated under constitutional

Double Jeopardy rules, where Mr. Garcia was also convicted of robbery?

C. STATEMENT OF THE CASE

1. <u>Procedural history</u>. J.T. Garcia was charged with allegedly being a person who robbed Bret Losey and Shana Morcom in a room at a Motel 6 in Snohomish County. CP 84-85. Shortly after the incident, J.T. Harrison was apprehended by police with the gun used, and proceeds of the robbery; he was later found guilty at a jury trial in April, 2015. CP 86-90. The appellant, Jacob T. Garcia, was contacted by police on an unrelated matter some days after the incident, and was found to have debit cards in Shana Morcom's name. CP 84-90. Mr. Garcia admitted that around the time of the reported robbery, he had been drug socializing with various acquaintances in a room or rooms at the Motel 6; however, he was not involved in any robbery. He had found the debit cards at a different motel, in Lynnwood, some days afterwards.[4] CP 84-90; CP 78.

The two alleged victims recanted before J.T. Garcia's May, 2015 trial, and Morcom repeated her recantation in testimony at the

[4] In closing argument, the State mocked Mr. Garcia's statement to police that he did not try to return the debit cards to the owner because he was too busy. 5/7/15RP at 402-03.

trial, explaining that her heavy drug usage caused her to not realize what the actual events of that evening were. Supp. CP ___, Sub # 44 (State's Trial Memorandum, May 4, 2015); 5/5/15RP at 99-109.

For his part, Mr. Losey had also told defense investigators, before trial, that it was J.T. Harrison, but not J.T. Garcia, who perpetrated the robbery of him and Ms. Morcom. Supp. CP ___, Sub # 44 (State's Trial Memorandum, at pp. 8-9). Mr. Garcia had been in the motel room during drug socializing at some point, but was not the robber; Losey stated that Ms. Morcom had forced him to say it was J.T. Garcia, which was what she was claiming. When the investigating detective had threatened him in order to obtain a statement, Losey simply wrote down the same accusation that Ms. Morcom was writing. Supp. CP ___, Sub # 44 (State's Trial Memorandum, at pp. 8-9).

However, Bret Losey did not testify at either Harrison's trial or Garcia's trial, because he had been hospitalized, after having been injured along with Deputy John Sadro, in a serious motor vehicle accident in April, during trial, while being transported as a

witness. 5/7/15RP at 371-74; see Harrison VRP – 4/20/15RP at 771-78.[5]

However, Mr. Losey's conversation with the 911 operator, in which Losey had named an acquaintance at the motel, J.T., who had long brown hair [Garcia], as being the robber, was admitted into evidence. 5/4/15RP at 12, 16-17.

Mr. Garcia was convicted by the jury on charges of first degree robbery with a firearm enhancement, unlawful possession of a firearm, and possession of stolen property (the debit cards stolen from Ms. Morcom), and was sentenced to standard range terms of imprisonment including 29 months on the possession count. CP 3-14.

Mr. Garcia timely appealed from his judgment and sentence. CP 1-2.

2. Evidence, including recantation. On the day of the crime, Losey and Morcom had appeared at the Motel 6 office, where they claimed to the clerk, and later to deputies, that they had

[5] Mr. Losey's continuing unavailability was addressed at several junctures during Mr. Garcia's trial, including based on information from Swedish Hospital regarding his medical status and inability to appear. He had been served with a subpoena. 5/7/15RP at 371-74; see Crawford, 541 U.S. at 45; State v. Smith, 148 Wn.2d 122, 132, 59 P.3d 74 (2002).

been robbed at gunpoint in their room five minutes previously. 5/6/15RP at 244-48, 257-58.[6]

The Motel clerk dialed 911 and reported the basics of what she had been told, and then (in the portion admitted for the jury) had Mr. Losey speak with the operator, at the operator's request. Losey stated that he and Shana Morcom had been robbed, and that an acquaintance named "J.T.," who had long brown hair, was the perpetrator. Losey complained that his car was locked and expressed fear that he will be shot for "snitching." Later in the 911 call, Losey seems to use the word "they," referring to two people. Supp. CP ___, Sub # 41 (Garcia exhibit list, exhibit 44); see Unredacted 911 CD; see Part D.1, infra.[7] 5/6/15RP at

[6] Various implementaria of substantial drug usage was found in the Motel 6 room, along with a soda can, cigarettes, and a hair sample with DNA from Mr. Garcia on them, which confirmed what Mr. Garcia always admitted – that he had been in that motel room with people that were drug socializing. 5/6/15RP at 259-60, 281-83; 5/6/15RP at 316-18; CP 78.

[7] In admitting the 911 recording, the trial court relied in part, on its prior hearsay and confrontation clause reasoning from the earlier trial of J.T. Harrison with the same prosecutor (albeit different defense counsel). See 5/4/15RP at 12, 17-19; see Harrison VRP of 4/20/15RP at 771-822 (motion to transfer COA VRP pending). At that trial, the court stated with apparent dissatisfaction with Harrison's defense counsel that another basis for allowing the recording without confrontation was that counsel had agreed to its admission, but then suddenly withdrew that agreement when it was learned that Mr. Losey would be unable to testify. Harrison VRP of 4/20/15RP at 770-822; but see Crawford, 541 U.S. at 543-47 (testimonial statements of non-testifying accuser may not be admitted).

Deputies were able to use the GPS signal from Ms. Morcom's cell phone to track the device to a home in Everett. During surveillance, officers spotted and arrested J.T. Harrison, a short-haired male who somewhat matched a description given by a worker in the area of the Motel and later identified by the complainants. During a drive-by show-up, Mr. Losey concluded to the deputy that he was only 25 percent sure of his identification, after the arrestee was removed from the car he was sitting in as Mr. Losey watched. 5/6/15RP at 204-07, 218-19, 227, 267-69, 308-12. In a subsequent search of a garage, police located a .38 caliber revolver, along with belongings of Morcom and Losey. Police also determined that Harrison had changed into different clothes while inside the garage. 5/6/15RP at 211, 238; 5/6/15RP at 272-73, 313-15, 324-27. Amber Mark, the homeowner, was familiar with J.T. Harrison; she told the police that he frequently carried a .38 handgun on his person. 5/6/15RP at 239, 243-44.

Approximately a week later, appellant J.T. Garcia was contacted by a police officer in Lynnwood on an unrelated matter. Mr. Garcia had debit cards on his person in the name of Ms. Morcom. 5/6/15RP at 333, 346-48. He stated he had found them

in phone book at the Extended Stay motel he was staying in. 5/6/15RP at 349-50.

However, Shana Morcom recanted her accusation of J.T. Garcia before trial, and also at trial. 5/5/15RP at 99-100. She had become acquainted with Mr. Garcia because he was hanging around the same motel where she and Mr. Losey were doing drugs, and may have been in their room the same day as the robbery. 5/5/15RP at 100-05. She testified that she was heavily intoxicated by drugs at the time, and asserted that the reason for her false accusations of Mr. Garcia, at the time, and afterwards was a result of the drugs she was using. 5/5/15RP at 107, 152-59, 165; 5/6/15RP at 277, 348-49. The accusation and description Ms. Morcom gave to law enforcement came from her boyfriend, Mr. Losey. 5/5/15RP at 125-28, 135. Ms. Morcom contacted the defense investigator when she needed to correct what she had said at the time, and also spoke with the deputy prosecutor about it. 5/5/15RP at 107-09. She stopped accusing Mr. Garcia as being involved, after she completed a drug sobriety program; she did think, however, that J.T. Harrison was in fact part of what happened. 5/5/15RP at 166-68.

D. ARGUMENT.

1. BRETT LOSEY'S CALM, UN-EXCITED 911 CONVERSATION WAS INADMISSIBLE HEARSAY, AND HIS STATEMENTS WERE "TESTIMONIAL."

a. Mr. Losey was calm during his 911 conversation, rather than under the excitement of the robbery event. Brett Losey's recorded 911 conversation was erroneously admitted as an excited utterance, and it violated confrontation under the Sixth Amendment and Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).[8]

The evidence indicated that Losey and Morcom had showed up at the Motel 6 office. The motel clerk dialed 911 and told the operator that occupants of one of the motel's rooms had told her that they had been robbed at gunpoint "five minutes ago."

After obtaining initial details from the clerk regarding the incident and learning that no one was injured, the operator asks to speak with Mr. Losey. The clerk was at first asking Losey for answers to the operator's questions, and then relaying them.

[8] Mr. Garcia's counsel objected below. See State v. O'Cain, 169 Wn. App. 228, 235, 279 P.3d 926 (2012).

Unredacted 911 CD; see also Garcia exhibit 44 (911 recording, as redacted and played for Garcia's jury at 5/6/15RP at 201).[9]

While speaking with the operator and answering her questions about what had happened, Mr. Losey calmly asserts that "yup," he knew "the person" who had robbed them. Unredacted 911 CD. In the recording, he says that the person was named "J.T." with long brown hair, although Losey stated at that time that he did not know the person's last name. Losey continues to provide answers to the operator's several questions, including stating he does not know where the persons went, and waits while the operator types information that he provides, including his statement that there are no injuries. Unredacted 911 CD.

In the recording, Losey answers further questions regarding the gun allegedly used. Asked where the person went, Losey

[9] The trial court assessed the hearsay and confrontation issues by properly listening to the Unredacted 911 CD recording, which includes the initial portion of the call, in which the Motel 6 clerk is speaking with the operator before the operator asks to speak with Mr. Losey (Mr. Losey is relaying information to the clerk, who then relays it to the 911 operator). "Garcia exhibit no. 44" is the redacted 911 call as played for Mr. Garcia's jury in this case. The prosecutor did not place the Unredacted 911 CD into evidence in either Mr. Harrison's or Mr. Garcia's trial. The exhibit supplementally designated and referred to herein as "Undredacted 911 CD" is a track from Mr. Garcia's trial counsel's working copy of the Unredacted 911 CD, including the motel clerk's portion. That track is referred to herein as "Unredacted 911 CD," and it has been included with the electronic filing and service of the Appellant's Opening Brief. Undersigned counsel anticipates that the Respondent will agree in its Brief of Respondent that the track is indeed the entire 911 recording.

states that he does not know because “they” told him and his girlfriend (Ms. Morcom) to go in the bathroom after the robbery and wait (they only then went to the motel office). Losey annoyedly complains that his car keys were stolen and that he did not know how he would get into his vehicle, which was locked. Unredacted 911 CD.

Losey then gives more details describing the person he is accusing, and tells the operator that they will therefore be able to apprehend him; he makes sounds as if he is chortling. Unredacted 911 CD, at time point 3:28 to 3:30.

After being asked what make of getaway car or cars might have been involved (Losey did not know one way or the other), Mr. Losey states, “I’m afraid he’s going to shoot me though, I’m snitching.” Unredacted 911 call, at time point 3:38 to 3:44. The operator then continues to obtain further details, and then when she asks Mr. Losey if he will wait in the motel office for the police to contact him there, he seems to glumly respond that he will. Undredacted 911 CD.

(i). Standard of Review.

This Court of Appeals has said that it reviews evidentiary rulings, such as whether statements qualify as an excited

utterance, for abuse of discretion. State v. Briscoeray, 95 Wn. App. 167, 171, 974 P.2d 912 (1999); see also State v. Lough, 125 Wn.2d 847, 856, 889 P.2d 487 (1995).

However, in the particular circumstances of this case the standard of review should be *de novo*. See State v. Wood, 45 Wn. App. 299, 311, 725 P.2d 435, 442 (1986) (reviewing *de novo* the fact-finding court's legal conclusions where based on stipulated documentary evidence). Such review is appropriate where this Court of Appeals has the same documentary evidence before it – the 911 CD – that the trial court assessed.

Further, an abuse of discretion occurs if the court commits legal error. State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995) (no deference to excited utterance ruling where issue at hand is whether statement was made while the declarant was still excited by being "under the influence of the event.") (citing 6 J. Wigmore, Evidence § 1747, at 195 (1976)). A trial judge must act within the discretion accorded by the applicable evidence rule, and the appellate courts will review the interpretation of an evidentiary rule *de novo* as a question of law. State v. Gunderson, 181 Wn. 2d 916, 921-22, 337 P.3d 1090 (2014) (citing State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003)).

Here, Mr. Garcia is arguing that under ER 803(a)(2), the declarant must be speaking under the *continued excitement of the event reported* (i.e., the robbery), and that the trial court effectively disregarded that rule. See, e.g., Brown, 127 Wn.2d at 758 (testimony of declarant that she had good reason to fabricate during her statement nevertheless rendered it inadmissible as a matter of law as an excited utterance). And this Court has the 911 recording. *De novo* review is appropriate for all of these reasons.

(ii). Hearsay error.

In any event, the trial court abused its discretion when it held that Mr. Losey's 911 conversation was an excited utterance. State v. Briscoeray, 95 Wn. App. at 171 (applying abuse of discretion standard). It was manifestly unreasonable to deem his utterances "excited."

Although hearsay is generally inadmissible, ER 803(a)(2) provides that "excited utterances" are admissible. State v. Magers, 164 Wn.2d 174, 187, 189 P.3d 126 (2008). A statement may be an excited utterance if

> (1) a startling event occurred, (2) the declarant made the statement while under the stress or excitement of the event, and (3) the statement relates to the event.

Magers, 164 Wn.2d at 187–88. Crucially, the declarant must make the statement while he or she is still so much under the influence of the event that the statement "could not be the result of fabrication, intervening actions, or the exercise of choice or judgment." State v. Strauss, 119 Wn.2d 401, 416, 832 P.2d 78 (1992).

First, it is true that in the recording, the Motel 6 clerk said the complainants told her that the robbery occurred only five minutes earlier (this statement was made before the operator asked to speak with Mr. Losey). See Unredacted 911 CD. But the amount of passage of time is not the qualitative determinant, one way or the other, for an excited utterance. See, e.g., Strauss, 119 Wn.2d at 417; State v. Flett, 40 Wn. App. 277, 278–79, 287, 699 P.2d 774 (1985) (both holding that an extended passage of time after the event reported did not preclude the required excitement from continuing if caused by that event).

Instead, courts also consider the declarant's observable level of emotional stress when making the statement. Strauss, 119 Wn.2d 416–17. Here, during Losey's questioning by the 911 operator, Losey speaks laconically, and at one point sounds primarily annoyed that his car is locked. As to any impression relating to the incident, Losey states, at most, that he did not

currently recall a certain detail of the robber's physical appearance, because, he said, he had a gun pointed at him at that time. Unredacted 911 CD.

The trial court did not have an adequate basis to conclude that the 911 conversation showed that Mr. Losey was under such excitement from the *robbery* that it was continuing, and produced an excited remark about the robbery. The 911 recording shows no excitement, of any level or type, and certainly none that could possibly "still" Mr. Losey's "reflective faculties." State v. Chapin, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The court noted that Mr. Losey's voice sounds "fairy measured" in the beginning of the call, but reasoned that he was still under the excitement of the event under the Rule, because he stated that the robbery had just occurred. The court found that becoming aware he might face consequences from reporting the event (being shot) caused him to become agitated. 5/4/15RP at 12, 16-17. The court also concluded that Mr. Losey was afraid of the persons involved in the incident. 5/4/15RP at 16-17.

There is no excitement here that satisfies ER 803(a)(2). State v. Dixon, 37 Wn. App. 867, 873, 684 P.2d 725 (1984) (properly restrictive application of the rule ensures the

trustworthiness it requires). Mr. Losey makes a calculation about his description of the person -- implying that this will ensure J.T. will be arrested. Then at some point, Losey says he is afraid because he might get shot because he is snitching. Stress, if any, that Mr. Losey felt was not continuing since the incident, and Losey did not make an excited remark caused by the robbery and relating to it. Magers, 164 Wn.2d at 187–88.

The trial court abused its discretion under ER 803(a)(2).

b. The 911 conversation was "testimonial."

(i). Standard of review.

An alleged violation of the confrontation clause is reviewed *de novo*. State v. Jasper, 174 Wn. 2d 96, 108, 271 P.3d 876, 883 (2012) (documentary review of laboratory certification documents) (citing Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999)).

(ii). The trial court erroneously ruled that Losey's statements were not "testimonial."

The trial court indicated it was resting its confrontation ruling on its holding in Mr. Garrison's prior trial that the circumstances of the 911 call rendered the case similar to Davis v. Washington. 5/4/15RP at 20-21. At that trial, the court had ruled that under

Davis, an excited utterance is not "testimonial." Harrison VRP of 4/20/15RP at 788, 795.

Later, the court allowed the Garcia parties to provide further argument. 5/4/15RP at 67. The prosecutor contended, as he had done in Mr. Harrison's trial, that under Davis v. Washington, a statement that is admissible as an excited utterance "does not invoke a confrontation issue," that Mr. Losey was still under the excitement of the event (as per the court's *hearsay* ruling), and that there was an ongoing emergency "because" the robbers had fled. 5/4/15/RP at 68-72; see Harrison VRP of 4/20/15RP at 788.[10]

The following day, the trial court announced that the circumstances were akin to Davis, and stated it would not reconsider its confrontation ruling. 5/5/15RP at 83.

This was error. First, there is no rule that excited utterances cannot be testimonial. In actuality, the reasoning of Davis and its focus on the primary purpose for which statements were obtained forecloses any per se rule that excited utterances cannot be testimonial. State v. Bird, 136 Wn. App. 127, 136, 148 P.3d 1058

[10] Defense counsel argued that the hearsay question does not decide the Crawford confrontation analysis, and urged the court that the call was testimonial because there was no ongoing emergency, such as a person dialing 911 and seeking help for events currently occurring, such as a beating. 5/4/15RP at 74-75.

(2006); see State v. Ohlson, 162 Wn. 2d 1, 16-17, 168 P.3d 1273 (2007).

In confrontation analysis, the State bears the burden of proving that challenged statements are non-testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009). Even if the speaker is frightened, or excited, that emotional state does not establish an ongoing emergency. Koslowski, 166 Wn.2d at 423.

The general rule under Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), is that "testimonial" statements are those that primarily report the defendant's conduct, rather than seek help for an ongoing emergency, and they are inadmissible at trial against a defendant unless the accuser appears and testifies. See also Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

Here, first, the person who called 911 and gave the address for police to respond to was the (also non-testifying) motel clerk. Unredacted 911 CD. As the defense argued, Losey's subsequent conversation was not a summoning of help, rather, it involved the operator asking Mr. Losey questions about what had occurred, and about the description of who was involved. 5/4/15RP at 19-20.

The United States Supreme Court has stated that "testimonial" statements will always include that class of

> statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Crawford, 541 U.S. at 51–52. The Washington Supreme Court is in accord that statements of that character – even though they are far less formal than prior testimony or affidavits (the other two typical classes of testimonial statements) -- are nonetheless testimonial. State v. Hudlow, 182 Wn. App. 266, 282-83, 331 P.3d 90 (2014) (citing State v. Chambers, 134 Wn. App. 853, 860, 142 P.3d 668 (2006)).

Where this type of statement is at issue, in order to distinguish cries for help to meet an ongoing emergency, from circumstances that would lead the speaker to believe his statements would be available to inculpate the accused in the future, the court will look to the "primary purpose" of the statements.

The purpose of the parties to the call must be objectively evaluated, assessing the purpose that reasonable participants would have had, as ascertained from the individuals' statements,

actions and circumstances. See Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 1156, 179 L.Ed.2d 93 (2011).

Under the primary purpose doctrine, the question is whether the purpose was to summon help for an ongoing emergency, or the person was simply making statements of past fact, describing the criminal allegations. State v. Koslowski, 166 Wn.2d at 418-19; Davis, 547 U.S. at 830 (when a questioner seeks to determine from the person, not what is happening, "but rather what happened," the statements are testimonial). When the person is relating past events potentially relevant to a criminal prosecution, the statements are testimonial. State v. Houston-Sconiers, ___ Wn. App. ___, 365 P.3d 177, 182 (Wash. Ct. App. 2015) (quoting Davis, 547 U.S. at 822).

Under these standards, Mr. Losey's 911 conversation was testimonial. The motel clerk made the call to 911, and thereafter, Mr. Losey is asked to describe events occurring in the past. There were no injuries, something that was confirmed twice during the call. Unredacted 911 CD. Instead of calling for help, Losey demonstrates his express calculation that his physical description of the perpetrator will be successful to apprehend him, when he

then tells the operator, “So, he’s uh duh, definitely you can get him.” Unredacted 911 CD, at time point 338-42.

Significantly, Losey affirmatively is aware that he is “snitching” – i.e., bearing witness against a person. Unredacted 911 CD, at time point 3:28 to 3:30. Losey is making a series of statements to the 911 operator that demonstrate his knowledge that they will result in the alleged suspect being apprehended, and prosecuted on criminal charges. Objectively viewed, a listener could only conclude that Mr. Losey was making statements that he “would reasonably expect to be used prosecutorially.” Crawford, at 51-52.

The ongoing emergency in Davis, which the trial court below relied on, was different. It involved a 911 call made while there was an immediate threat and emergency situation in the form of the defendant’s presence in the home, and an apparent risk of assault to the caller who needed help now. The primary purpose of the caller was to seek help from the police to meet the threat. Davis, 547 U.S. at 828.

Of course, the fact that Losey “called” 911 is no bar to testimoniality. Although Losey was speaking on the telephone, there was some degree of formality to the questioning, given that

lying to 911 is at least a gross misdemeanor. See RCW 9A.84.040 (False Reporting); S.M.C. 12A.16.040 (providing that a person is guilty of false reporting if he makes a verbal statement relating to a crime to a Seattle Police Department 911 emergency operator); see also City of Yakima v. Irwin, 70 Wn. App. 1, 4, 851 P.2d 724 (1993) (upholding law making it a crime to willfully make a false, misleading or exaggerated police report, in violation of Yakima Municipal Code (Y.M.C.) 6.48.010; Davis, 547 U.S. at 826-27 (noting that solemnity aspect which can support testimoniality may be shown by existence of criminal penalties for making a deliberate falsehood to investigating officer); see also Navarette v. California, ___ U.S. ___, 134 S. Ct. 1683, 1688, 1694, 188 L. Ed. 2d 680 (2014) (proof of veracity and reliability in assessing informant's tip can be supported by the 911 system's discouragement of false reports by recording and tracking of location, because “a reasonable officer could conclude that a false tipster would think twice before using such a system.”); State v. Williams, 241 Wis.2d 631, 678, 623 N.W.2d 106 (Prosser, J., concurring) (it is well understood in today's society that 911 calls are recorded, that information about the source of a call is obtained, and that it is a crime to initiate false statements to 911 dispatchers), cert. denied,

534 U.S. 949, 122 S.Ct. 343, 151 L.Ed.2d 259 (2001); accord, State v. Hopkins, 128 Wn. App. 855, 869, 117 P.3d 377 (2005) (Quinn-Brintnall, C.J., dissenting in case regarding informant's firearm tip to police).

Here, compared to the 911 call in Davis, there is no presence or proximity of the robber. Davis, 547 U.S. at 822; see also People v. Trevizo, 181 P.3d 375, 379 (Colo. Ct. App. 2007) (holding that statements made in a 911 call were testimonial where "there was no immediate threat to the victim, [and] defendant had left the scene"). It is true that the caller Losey desired that the perpetrator be apprehended and that the operator was going to use the information to help police do so. However, the danger at the scene had dissipated – Losey and the clerk make clear that he and Morcom were told to wait in the motel bathroom until they fled. Unredacted 911 CD. There was simply no "bona fide physical threat." Davis, 547 U.S. at 822.

In this respect, the fact that the perpetrators fled in cars is, in this case, a probative fact for determining whether statements were made during an ongoing emergency, even though, in a domestic assault case, flight may not on its own defeat the State's effort to establish non-testimoniality. See State v. Reed, 168 Wn. App. 553,

567–68, 278 P.3d 203, review denied, 176 Wn.2d 1009 (2012); see Koslowski, 166 Wn.2d at 432 (no ongoing emergency where assailants fled the scene in a car).

The Koslowski Court made clear that "the mere fact that the suspects were at large and that [a sergeant] relayed [that] information . . . to officers in the field" did not show there was still an ongoing emergency. Koslowski, 166 Wn.2d at 421, 428 (victim's statements were testimonial, because they were made after the danger had passed and there was no longer an ongoing emergency or a need for immediate assistance).

Mr. Garcia's case is unlike State v. Ohlson, supra,[11] 162 Wn.2d 1, 5-6, 18-19, 168 P.3d 1273 (2007) (ongoing emergency even though assailant had briefly fled scene because he had repeatedly been coming and leaving the area where he threatened victim). In Ohlson, the defendant tried to run over the victim at 45 miles per hour, and he then repeatedly drove back and forth past the person, yelling general racial slurs. State v. Ohlson, 162 Wn.2d at 7. The Court emphasized that the officer's questioning of the person a few minutes later was designed to meet an ongoing threat

[11] The Ohlson decision, as noted supra, determined as a doctrinal matter that excited utterances may also be testimonial, although it also ruled that the statements at issue in the case were not testimonial.

to the public by a man seemingly on a race-based rampage. Ohlson, 162 Wn.2d at 11-12. The case does not stand for any proposition that an ongoing emergency finding would be supported by the flight away from the scene, by a robbery suspect after taking property. See also State v. Williams, 136 Wn. App. 486, 503, 150 P.3d 111 (2007) (911 call was proved non-testimonial including because caller stated they were in actual danger, and gang assailants roved neighborhood); State v. Pugh, 167 Wn.2d 825, 832, 225 P.3d 892 (2009) (911 call was non-testimonial because caller called needing medical help moments after assault by husband, who was walking outside the apartment).

And, this is not a case in which the defendant was believed to be going on a public shooting spree, like in Michigan v. Bryant, 562 U.S. 344, supra. There, the Court stated that whether an ongoing emergency actually existed is among the most important circumstances informing the primary purpose question. Id. (citing Davis, 547 U.S. at 828-30, and Crawford, 541 U.S. at 65). An emergency existed in Bryant because the shooter, although he had fled, appeared to be on a random public rampage of violence and needed to be caught for public safety reasons. Bryant, 131 S. Ct. at 1157. That is not the case here, following a routine robbery

between persons using the Motel 6 as a drug repose. Even Bryant recognized that in the usual situation, an ongoing emergency *dissipates* when the suspect "flees with little prospect of posing a threat to the public." Bryant, 562 U.S. at 365.

Notably too, in Bryant, the accuser's answers to the officers' questions were punctuated with inquiries about when emergency medical services would arrive to stop his bleeding; this showed the victim did not have a primary purpose "to establish or prove past events potentially relevant to later prosecution" when he spoke with police. Bryant, 131 S. Ct. at 1157.

In this case, Mr. Losey objectively showed his primary purpose by naming someone he hoped would be arrested, and by further expressly realizing that he was bearing witness -- against the person he named as the robber. The trial court erred, because the State did not meet its burden to prove that Losey's 911 conversation was not testimonial.

d. Reversal is required.

Evidentiary errors such as erroneous admission of hearsay will require reversal if, within reasonable probabilities, the result would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)

(citing State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). The improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Bourgeois, 133 Wn.2d at 403.

Here, the 911 call was the State's sole piece of meaningfully credible evidence, not subject to the witness contradictions and impeachment of everything that came later. The jury would have relied on the 911 call. During closing argument, the deputy prosecuting attorney urged the jury to do so. Faced with Losey's and Morcom's recantations and the other inconsistencies in the case, the State told the jury to find Mr. Garcia guilty based on the 911 call in which Losey had told the operator that the robber or one of the robbers was J.T., a person Losey knew, who had long brown hair like Mr. Garcia. 5/7/15RP at 394-99 (State's closing argument). The prosecutor urged the jury that Losey's naming of J.T. Garcia in the 911 call could be relied on to convict, because it was made just after the robbery. 5/7/15RP at 425-27 (State's rebuttal closing argument).

As to confrontation, a constitutional error requires reversal unless the appellate court is assured beyond a reasonable doubt

that it was harmless. State v. Hudlow, 182 Wn. App. at 284-85 (citing State v. Anderson, 171 W.2d 764, 770, 254 P.3d 815 (2011)); Chapman v. California, 386 U.S. 18, 21–22, 87 S.Ct. 824, 17 L.Ed.2d 705, reh'g denied, 386 U.S. 987, 87 S.Ct. 1283, 18 L.Ed.2d 241 (1967).

Under this standard, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. The Washington courts have also employed the "overwhelming untainted evidence" test and asked if the other evidence is so overwhelming that it necessarily leads to a finding of guilt on the crime. State v. Hudlow, 182 Wn. App. at 284-85 (applying test to Crawford error) (citing State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

What actually occurred during the ongoing drug party at the Motel 6, Room 227, is difficult to guess. Mr. Garcia's criminal case leaves one wondering, in the first place, if there were one or two robbers at the Motel 6, and the evidence that Mr. Garcia was one of them is muddled at best. There were namings and identifications of Mr. Garcia prior to trial, but the testifying complainant was able to defend, in court, her determination that Mr. Garcia was absolutely not J.T. that was involved.

Constitutional errors are presumed to be prejudicial, requiring reversal unless the State meets its burden of proving that the error was harmless. Chapman v. California, 386 U.S. at 24. Here, the State substantially employed the 911 call to argue that it should lead directly to conviction. As seen from closing argument, it was hoped by the State that the 911 call would make the difference. Further, in this case the totality of the State's untainted inculpatory evidence at trial was not overwhelming, and affirmative conflicting evidence – including the defendant's own statements – countered the State's proof, with the result that the 911 error was not harmless beyond a reasonable doubt. This Court should reverse.

2. WHERE MR. GARCIA WAS FOUND GUILTY OF TAKING THE DEBIT CARDS BY ROBBERY AND POSSESSION OF THE SAME STOLEN PROPERTY, THIS VIOLATES STATE V. MELICK AND DOUBLE JEOPARDY. IN THE ALTERNATIVE, COUNSEL WAS INEFFECTIVE.

a. The *Melick* doctrine of statutory intent precludes convictions for robbery and possession of the same stolen property. In State v. Melick, the Court of Appeals held that under Washington's statutory scheme, a taker of a motor vehicle could not also be convicted for an additional count of possession of stolen

property, based on the same vehicle. State v. Melick, 131 Wn. App. at 837-41 (citing State v. Hancock, 44 Wn. App. 297, 298-99, 721 P.2d 1006 (1986)). In Melick, the defendant was charged with taking a motor vehicle without permission under former RCW 9A.56.070(2)(a), and possessing that same vehicle as stolen property under RCW 9A.56.140(1) and .150.

The Melick Court rejected the defendant's double jeopardy challenge, but concluded that both convictions could not stand, under Washington's statutory scheme. Melick, 131 Wn. App. at 841.

The question was deemed one of Legislative intent, and it was noted that the same intent may be evidenced in a variety of theft and possession statutes. Melick, 131 Wn. App. at 841 (citing Milanovich v. United States, 365 U.S. 551, supra; United States v. Gaddis, 424 U.S. 544, 547, 96 S. Ct. 1023, 1026, 47 L. Ed. 2d 222 (1976). Hancock, cited in Melick, discerned this principle as a matter of statutory intent after reviewing the theft and possession of stolen property statutes, RCW 9A.56.020 -- .050, and the statutes for possession of stolen property under RCW 9A.56.140. Hancock, 44 Wn. App. at 301 (also holding that subsequent amendments

placing these crimes in different subsections of Title 56 did not change the intent of the statutory scheme as a whole).

These principles necessarily extend to robbery, given that robbery is theft, but with the additional element that the taking was accomplished by force or threat. See State v. Shcherenkov, 146 Wn. App. 619, 624, 191 P.3d 99 (2008) (citing State v. Redmond, 122 Wn.2d 392, 393, 210 P. 772 (1922)). Notably, just as the statutes at issue in Melick were both Title 56 offenses, in the present case, first degree robbery and second degree possession of stolen property share that same characteristic. RCW 9A.56.200; RCW 9A.56.160(1)(c). Mr. Garcia's case falls squarely under Melick's reasoning.[12]

As remedy, both of Mr. Garcia's convictions, for second degree possession of stolen property under RCW 9A.56.160(1)(c) (possession of a stolen access device), and for first degree robbery under RCW 9A.56.200, must be vacated. Although the defense certainly did not concede guilt on any of the substantive counts, the

[12] The fact that Mr. Garcia possessed the stolen debit cards when he was contacted by DOC officers four days after the robbery is not consequential under Melick. As the Melick Court noted, in Hancock, a case applying essentially the same rule, the person possessed the goods for 24 days after the theft, and the Court of Appeals nonetheless still found that the defendant could not be convicted of both offenses. Hancock, 44 Wn. App. at 301–02 and n. 4 (cited with approval in Melick, 131 Wn. App. at 843).

defense at various stages of the case did acknowledge that Mr. Garcia did not deny being in the motel room at some point during the drug activity throughout the Motel 6, and arguably had an opportunity to purloin or wrongly possess the cards. CP 78 (Defendant's Trial Brief); Supp. CP ___, Sub # 31 (Memorandum of Authorities on Severance, March 31, 2015, at pp. 1, 5). Where the evidence is such that it is highly difficult to say which count a factfinder, unallowed to convict on both, would convict upon, this requires that both convictions be set aside and the case remanded for a new trial. Milanovich v. United States, 365 U.S. at 554-55.

b. Ineffective assistance requires reversal of both the robbery and possession convictions, for a new trial. In Melick, the issue whether the Washington criminal code permits convictions for both taking and possession arose in the context of jury instructions. The Court observed that Milanovich v. United States provided authority that the jury in such a case should be instructed,

> that if it finds that the defendant committed the taking crime, it must stop and not reach the possession charge. Only if the fact finder does not find sufficient evidence of the taking can it go on to consider the possession charge.

Melick, 131 Wn. App. at 841. Mr. Garcia's counsel was deficient for failing to propose jury instructions on the Melick rule, at a time before verdict to preclude the improper twin convictions.

The Sixth Amendment and the Washington Constitution guarantee a criminal defendant the right to effective representation. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. amend. 6; Wash. Const. art. I, sec. 22. To make out ineffective assistance of counsel based on the failure to propose a jury instruction, the defendant must show (1) that he was entitled to the instruction, and (2) that the failure to request the instruction was not a legitimate tactical decision. State v. Powell, 150 Wn. App. 139, 154–55, 206 P.3d 703 (2009).

The Melick rule is established law, and a party is entitled to an instruction where it is a correct statement of the law and not misleading. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). Further, there was no tactical basis to not seek a Melick instruction, such an instruction would have jibed with an argument that there was, at best, only guilt as to count 2, the far less serious count.

The deficiency was prejudicial. Mr. Garcia bears the burden on appeal to prove both prongs of the Strickland test, i.e.,

deficiency, and that "but for" counsel's deficient performance, the result of the proceeding would have been different. State v. Humphries, 181 Wn.2d 708, 720, 336 P.3d 1121 (2014). Here, this is established, especially where the evidence might allow a lay jury to find that Mr. Garcia was aware of facts or information that would lead a reasonable person in the same situation to believe the debit cards were stolen items, and where the primary defense theory was that Harrison committed the robbery and that Mr. Garcia was not involved. 5/7/15RP at 418-9 (defense closing argument); see CP 33-63 (Jury Instructions - instruction no. 15, defining knowledge; instruction no. 18, 'to-convict' instruction for possession).

Reversal is required, on both counts, for the same reasons as in Milanovich. Mr. Garcia's case seems a prime example of a case where the State's evidence was so inconsistent on the question whether Mr. Garcia was guilty on either count, and yet where the jury could conclude that the defendant committed the second count, of possession, and only that count. A properly instructed jury would have understood it was precluded from convicting for robbery and possession, and in these circumstances, might have convicted Mr. Garcia only for possession, or on both counts. Significantly, in this case, there was highly plausible

evidence that Mr. Garcia merely possessed stolen access devices, a factor that weighs in favor of the remedy of reversing both convictions rather than merely vacating the possession judgment. Reversal for a new trial is required. Milanovich v. United States, 365 U.S. at 554-55; State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988) (adopting prejudice test from Strickland, 466 U.S. at 687).

c. Alternatively, Double Jeopardy requires that the possession conviction be vacated.[13] Double Jeopardy analysis requires that the conviction for possession of stolen property must be vacated. The Double Jeopardy clauses of the state and federal constitutions protect against multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend. 5; Wash. Const. art. I, sec. 9; Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993); see also In re Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004). The issue is one of Legislative intent, because it is the Legislature that has the power

[13] Double jeopardy violations are, in general, manifest constitutional errors that may be raised for the first time on appeal under RAP 2.5. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

to define criminal offenses and set punishments. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995).

A conviction and sentence will violate the constitutional prohibition against double jeopardy if, under the "same evidence" test, the two crimes are the same in law and fact; such violation requires vacation of the conviction that forms the proof of the other. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); State v. Freeman, 153 Wn.2d 765, 777, 109 P.3d 753 (2005); Blockburger v. United States, 284 U.S. at 304.

In Blockburger, the United States Supreme Court enunciated a rule for analysis of Legislative intent and Double Jeopardy questions, in cases of convictions under two different criminal statutes. If each statutory provision requires proof of an additional fact which the other does not, Double Jeopardy has not been offended by the judgment and punishment on both offenses. Blockburger, 284 U.S. at 304.

Importantly, the specific inquiry under Blockburger is whether the evidence proving one crime also proved the second crime. Orange, 152 Wn.2d at 820-821. This is examined by looking to the charging theories and proof of the case rather than merely examining the statutory elements. Orange, at 819-820; see

Dixon, 509 U.S. at 698 (Double Jeopardy was violated where the defendant was convicted of contempt, for violating conditions of release by possessing drugs, and also of the substantive offense of drug possession).

In the present case, the State charged Mr. Garcia with robbery and possession of stolen property, and employed the debit cards he was found to have on his person as alleged evidence of his involvement in that robbery. CP 84-85 (amended information); 5/7/15RP at 402-03 (closing argument). The prosecutor contrasted the items of property found in the garage where Mr. Harrison was arrested, with the debit cards that Ms. Morcom stated Mr. Garcia had no permission to take, but which were taken from her motel room. 5/7/15RP at 400, 406. The State's evidence of robbery of the debit cards proved the second crime, possession of stolen access devices under RCW 9A.56.160(1)(c).

Because Mr. Garcia was found guilty of possession of stolen property under RCW 9A.56.160 subsection (1)(c) for possessing a stolen access device (the debit cards), the possession conviction contains no statutory elements, such as dollar value of the property possessed, that arguably might defeat a Double Jeopardy challenge that looked solely at the statutory elements of robbery

and possession. Cf. State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983) (concluding that a Double Jeopardy violation does not occur if there is an element in each offense not included in the other and proof of one does not necessarily prove the other).

The fact that it might be possible under different circumstances to commit robbery of property without committing possession of that stolen property, is also not relevant to the Double Jeopardy inquiry. Orange, at 819-820; see Dixon, 509 U.S. at 698; see also In re Francis, 170 Wn. 2d 517, 524, 242 P.3d 866, 869 (2010) ("We do not consider the elements of the offenses in the abstract; that is, we do not consider all the ways in which the State could have charged an element of an offense, but rather we consider how the State actually charged the offense.").

As charged and proved, Mr. Garcia could not commit robbery of the debit cards without also possessing them as stolen access devices. Double Jeopardy was therefore violated. Orange, at 819-820; Dixon, 509 U.S. at 698.[14] Mr. Garcia's conviction for

[14] The Melick Court declined to conclude that the twin convictions at issue there violated Double Jeopardy, Melick, 131 Wn. App. at 838–43, but the legislative intent discerned by the Melick Court is the very sort of indicia that Double Jeopardy doctrine centrally attempts to determine. In re Francis, 170 Wn. 2d at 523 (The question whether two offenses are separate offenses "hinges upon whether the legislature intended them to be separate."); see also William S.

possession of stolen property must be vacated. State v. Womac, 160 Wn.2d 643, 650, 160 P.3d 40 (2007).

E. CONCLUSION

Based on the foregoing, Mr. Garcia respectfully requests that this Court reverse his convictions and remand for a new trial.

DATED this 15th day of March, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS
Washington State Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2710
e-mail: oliver@washapp.org

McAninch, Unfolding the Law of Double Jeopardy, 44 S. C. L. Rev. 411, 483-84 (1993).

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73740-6-I
	)	
	)	
JASON GARCIA,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF MARCH, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA [sfine@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	JASON GARCIA 304548 MCC-WASHINGTON STATE REFORMATORY PO BOX 777 MONROE, WA 98272	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 15TH DAY OF MARCH, 2016.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711