

66248-1

66248-1

No. 66248-1-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

PEDRO POLO, Appellant.

BRIEF OF RESPONDENT

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STATE OF WASHINGTON
APPEALS DIV 1

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court collaterally estopped Polo from litigating each element of the offense when the trial court declined to instruct the jury that Polo's previous conviction conclusively established an element of the charged offense or impermissibly limit argument.
2. Whether the trial court acted within its discretion to admit Polo's previous conviction as one piece of substantive evidence to be considered by the jury in determining Polo's guilt on the possession of a stolen vehicle offense.
3. Whether the trial court acted within its discretion to deny Polo's request for mistrial where the record reflects there was no serious irregularity during jury selection that would warrant a new trial.
4. Whether Polo's sentence, specifically section 5.7 of the judgment and sentence should be corrected on remand pursuant to the Court of Appeal's previous mandate.

C. FACTS

Pedro Polo was charged and previously convicted following a jury trial in 2009 of driving while under the influence (count 3) and possession of a stolen motor vehicle.(count 2). CP 51-59. On appeal, Polo asserted for the first time that the information charging him with unlawful possession of a stolen motor vehicle was constitutionally insufficient and

that section 5.7 of his judgment and sentence erroneously stated count 3 “is a felony in the commission of which a motor vehicle was used” for purposes of driver’s license revocation under RCW 46.20.285. See, BOA at 3. The state conceded error on appeal and the matter was remanded back to the trial court to dismiss count one, unlawful possession of a motor vehicle, without prejudice and to correct section 5.7 of the judgment and sentence. CP 40. The Court of Appeals issued the mandate in that matter June 11th 2010.

Upon remand, Polo was re-charged with unlawful possession of a stolen vehicle. CP 81-83. The deputy prosecutor asserted the doctrine of collateral estoppel precluded Polo from contesting the ‘possession’ element of the unlawful possession of a stolen vehicle charge based on Polo’s previous conviction for driving while under the influence in the first trial. CP 101-103. Polo objected. RP 5-6. Initially, the court agreed with the State determining it would instruct the jury that as a matter of law Polo was in possession of the vehicle he was driving predicated on his driving while under the influence conviction. RP 6. Polo continued to object, asserting that such an instruction would impermissibly direct a verdict and constituted an impermissible judicial comment on the

evidence. RP 22-23. After hearing Polo's cumulative concerns, the trial court then reversed itself and determined it would not instruct the jury what if any conclusion to reach regarding Polo's previous conviction. Instead, the trial court determined it would be more appropriate to permit the state to introduce a redacted version of Polo's driving while under the influence judgment and sentence as substantive evidence to be considered along with all of the other evidence, by the jury. RP 34. The court determined that the probative value of admitting the judgment and sentence outweighed any prejudice in introducing this evidence. RP 36-38. The redacted judgment and sentence demonstrated Polo was convicted of driving while under the influence on the same day he was alleged to be unlawfully in possession of the Zender vehicle. RP 39-40. While the prosecutor continued to assert Polo should not be allowed to argue he was not in possession of the stolen vehicle based on the driving while under the influence conviction, the trial court ultimately explained the state had the burden to prove each element of the charged offense and Polo could argue the evidence.

THE COURT: I don't dictate to either side how either side presents its case. They can present their case in the manner they propose and I will make rulings in accordance with how they're posed and the probative value of that.

RP 38. The Court then later stated:

You may argue what the evidence is through your client's testimony he was not driving but you cannot, I don't think you can come to the conclusion that he was not driving, the ultimate fact. You can certainly argue the evidence.

RP 40. Polo's attorney then questioned the court:

I can certainly argue you have to prove all of the elements. Is that still the position, he does not have to prove the elements of possession?

RP 40-41. The court then clarified that yes, the state still had to prove all of the elements of the offense and that he would permit the state to introduce the prior judgment as proof of one of the elements of the offense. RP 40-39. The trial court had previously explained the prosecutor was not affirmatively using the doctrine of collateral estoppel to prove the 'possession' element of the charged offense:

THE COURT: He intends to prove possession through the conviction.

MR.CHALFIE: Well, I understand, but he is not asking the court for an instruction.

MR.RICHEY: That's right.

MR.CHALFIE: So he is withdrawing that collateral estoppel argument.

THE COURT: He would not go forward with the collateral estoppel. He would not be asking the court to instruct the jury that the defendant was driving on that day, or in possession of the vehicle. He intends to prove that element through the prior conviction.

RP 33-34. The court thereafter authorized admission of a redacted copy of Polo's driving under the influence judgment and sentence to minimize any potential prejudice. Supp CP __ (Pla. Ex.25), RP 74-75.

During closing argument the prosecutor argued the state had proven all of the elements of the charged offense, including that Polo was in 'possession' or control of the stolen vehicle. RP 164. The State did not rely solely on Polo's previous conviction but instead reviewed all of the pieces of substantive evidence that demonstrated Polo had unlawfully taken and then crashed the Zender vehicle into a tree. The prosecutor argued the evidence at the scene; the blood, Polo's injuries, damage to the Zender vehicle, the Volvo hat Polo was wearing and his previous conviction overwhelmingly demonstrated Polo unlawfully possessed the stolen truck. While the focus of argument was whether the state had shown Polo 'unlawfully' possessed the Zender vehicle, the state relied on multiple pieces of evidence to demonstrate the possession element. RP 164, 175. Polo's attorney countered by arguing "it's interesting in this

case he tells you he has all these elements to prove and he says they're all proven or you don't need to consider them. I think you do need to consider them." RP 170. Polo then argued there was insufficient evidence presented by the state to prove Polo *knew* the vehicle he was driving in was stolen. Id.

Following a jury trial Polo was convicted of unlawful possession of a stolen vehicle. CP 12-20. Polo was given a standard range sentence of 4 months. At sentencing, the parties failed to correct section 5.7 of the judgment and sentence pertaining to Polo's driving while under the influence conviction as previously ordered corrected by the Court of Appeals. Polo timely appeals. CP 2-11

1. Substantive facts

On Saturday January 25th, 2009 deputies from the Whatcom County Sherriff's Office investigated a pick up truck that had crashed into a tree off of Pacific Highway and Slater road in Whatcom County. RP 63. The truck was registered to an equipment rental company owned by Brian Zender and his brother. RP 45-6, 116. Zender identified the truck as one usually driven by his brother back and forth from work. RP 46. Zender last saw the truck on January 23rd 2009 parked at his business 'Zender

Trucking and Equipment' business on Bennett drive in Bellingham. RP 44, 46. Normally, keys for Zender business vehicles were left in the business, in a hideakey on the truck or occasionally, in the ignition. RP 4, 58-59. At the scene of the crash, Zender noticed his company truck was totaled and the airbag had been deployed. RP 50. Zender also confirmed his company had not given anyone permission to drive the vehicle and reported the truck stolen. RP 47.

Polo was detained by law enforcement about 50-75 yards away from the crash scene. RP 63. Deputy Boyd noticed Polo was intoxicated, had fresh blood on his clothes, nose and wrist. RP 101. She also noticed there were small glass fragments embedded in the "Volvo" stocking cap he was wearing. Id. The "Volvo" stocking cap Polo was wearing was later identified as belonging to Zender's brother who often left his stocking cap in center console of the company truck. RP 55, 54,103. Zender testified that his employees have shirts with Volvo rents on it and hats and stocking caps with blue "Volvo" lettering on them. RP 54.

Deputy Boyd testified Polo's injuries were consistent with the deployment of the Zender truck's airbag at the time of the crash and the shattered windshield when the truck crashed. RP 101, 156. Following

Polo's arrest and advisement of his Miranda warnings, Deputy Boyd asked Polo if he'd like to talk to her and Polo responded, "yeah, but I wasn't driving." RP 123. Boyd then asked where he had come from Polo responded, he had walked from Alderwood Avenue to the AM/PM at Bennett and Bakerview. RP 119. Polo stated that after leaving the Bennett AM/PM he crossed over Bakerview to Pacific Highway and headed north. RP 120. Polo claimed he saw the truck drive by really fast, heard a crash but did not see anyone. Id. He then walked into the AM-PM at Slater and Pacific Highway and purchased a beer. Id. When asked how he got his injuries, Polo stated he sustained them at his girlfriend's home-where he had gotten into a fight. RP 124. Following a jury trial, Polo was convicted of unlawful possession of a stolen vehicle. CP 21.

D. ARGUMENT

- 1. The trial court did not preclude Polo from litigating the 'possession' element of the charged offense pursuant to the doctrine of collateral estoppel by admitting Polo's previous driving while under the influence conviction as substantive evidence or by impermissibly limiting argument.**

Polo asserts the trial courts admission of his driving while under the influence conviction from his first trial in his second trial as a piece of

substantive evidence and allegedly limiting closing argument was tantamount to directing a verdict on an element of the offense which violated his right to a jury trial and right to present a defense under the federal and state constitutions. BOA at 9.

The record reflects however, contrary to Polo's argument, that the trial court did not impermissibly direct a verdict by admitting Polo's previous conviction as evidence or by limiting argument. The trial court did not instruct the jury that as a matter of law that Polo's conviction proved the possession element of the charged offense. Nor did the trial court permit the state to introduce Polo's prior conviction in a manner that deprived the jury of making an independent determination of Polo's guilt on each element of the charged offense. Finally, the record reflects the trial court clarified Polo could argue based on the evidence presented at trial and the state continued to have the burden to prove each element to the jury beyond a reasonable doubt.

Introduction of Polo's prior conviction as relevant substantive evidence was well within the trial court's discretion and did not divest the jury of its fact finding function, Polo of his right to present a defense or of

the state of its burden to prove each element of the charged offense beyond a reasonable doubt. Polo's conviction should be affirmed.

The doctrine of collateral estoppel precludes a party from relitigating issues that have been raised and litigated by the parties in a prior proceeding. State v. Baines, 150 Wn.2d 905, 84 P.3d 245 (2004). Whether previous litigation should be given collateral estoppel effect in a subsequent litigation depends on whether: (1) the issue decided in the prior adjudication is identical to the one presented in the current action, (2) the prior adjudication must have resulted in a final judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party or in privity with a party to the prior adjudication, and (4) whether precluding relitigation of the issue will not work an injustice on the party against whom collateral estoppel is to be applied. Id.

In Washington State the doctrine of collateral estoppel has been used affirmatively in civil litigation and has been asserted defensively in criminal litigation. *See*, Kyreacos v. Smith, 89 Wn.2d 425, 429-30, 572 P.2d 723 (1977) (criminal conviction for murder given preclusive effect in subsequent wrongful death civil action), Seattle-First National Bank v. Cannon, 26 Wn.App. 922, 927-28, 615 P.2d 1316 (1980) (holding

conspiracy and embezzlement convictions conclusively established wrongful taking of funds in subsequent civil litigation.), State v. Barton, 5 Wash.2d 234, 105 P.2d 63 (1940) (acquittal for murder did not preclude subsequent prosecution for robbery), State v. Williams, 132 Wn.2d 248, 253-4, 937 P.2d 1052 (1997) (doctrine of collateral estoppel applies in the criminal arena through the concept of the Fifth Amendment guaranty against double jeopardy).

No Washington court however, has specifically addressed whether a prosecutor can affirmatively invoke the doctrine of collateral estoppel to direct a verdict on an element of the offense where the issue was previously litigated in the criminal courts in an earlier proceeding. In State v. Mullin-Coston, 152 Wn.2d 107, 95 P.3d 321 (2004), however, the Washington State Supreme Court did consider application of nonmutual collateral estoppel in a criminal case. Specifically, the court considered whether the state would be bound in Mullin-Coston's case by a prior jury verdict in a co-defendant's case. The court held a defendant could not assert nonmutual collateral estoppel defensively based on the verdict of a separate co-defendant. In so holding, the court considered Washington's accomplice liability statute and the analysis set forth in Standefer v. United

States, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980), wherein the United State's Supreme Court rejected nonmutual collateral estoppel in federal prosecutions. In reaching its decision, the Standefer court determined that traditional policy reasons for applying collateral estoppel in civil cases were outweighed by various competing concerns and protections in the criminal context. State v. Mullin-Coston, 152 Wn.2d at 113.

In discussing the limitations of the doctrine of collateral estoppel in the criminal context the Mullin-Coston court, *citing* Standefer, noted generally that the “prosecution in a criminal case cannot obtain a directed verdict or judgment notwithstanding the verdict, no matter how clear the evidence of guilt.” State v. Mullin-Coston, 152 Wn.2d at 112. This language suggests the affirmative use of collateral estoppel in a criminal case to instruct the jury in manner that divests the jury of its fact finding function thereby directing a verdict on any element of a charged offense would be problematic. But contrary to Polo's argument, that is not what happened in this case.

The trial court did not permit the state to affirmatively use the doctrine of collateral estoppel below to divest the jury of its fact finding

function on any element of the charged offense. While the deputy prosecutor sought to affirmatively preclude Polo from contesting the 'possession' element of the charged offense based on his driving under the influence conviction, the court ultimately declined to do so. RP 36-38. Instead, the trial court only permitted the state, after weighing whether the probative value of Polo's previous conviction with potential prejudice, to admit Polo's previous conviction as a piece of substantive evidence to be considered by the jury with all of the evidence presented in determining whether the state proved each element beyond a reasonable doubt.

Admitting Polo's judgment and sentence into evidence substantively is very different from giving the same document collateral estoppel effect. The doctrine of collateral estoppel essentially renders a previous legal determination conclusive on the parties in subsequent litigation. Admitting Polo's previous conviction as substantive evidence did not render the legal determination that Polo was driving while under the influence the same day he allegedly unlawfully possessed the Zender truck conclusive on Polo's jury in this second prosecution as to any element. As acknowledged in the very case Polo relies:

As an ordinary piece of evidence, a judgment is subject to evaluation by the fact finder, who can accept or reject such

evidence as it deems appropriate. On the other hand, as collateral estoppel a judgment will have the effect of establishing as a matter of law facts determined in the prior proceeding ...

United States v. Pelullo, 14 F.3d 881 (3rd Cir. 1994). The Pelullo case illustrates the important distinction between admitting a previous conviction as substantive evidence versus instructing the jury as a matter of law that such previous conviction establishes an element of the charged offense. In Pelullo, the trial court admitted Pelullo's previously litigated wire fraud conviction *and instructed the jury that this conviction as a matter of law established Pelullo had committed a predicate wire fraud offense required to obtain the RICO conviction*. The court held this affirmative use of collateral estoppel was improper because it deprived Pelullo of his right to have a jury determine every element of the crime. The Pelullo court decided nonetheless, that Pelullo's prior conviction would be admissible as evidence of an element of the charged offense if the trial court determined on remand that the probative value of this evidence was not substantially outweighed by its prejudice.

By admitting Polo's prior conviction as substantive evidence, the jury in this case in contrast to Pelullo was not divested of its responsibility to determine whether the state had proven each element, including the

‘possession’ element of the charged offense beyond a reasonable doubt. All the jury knew from Polo’s conviction was that he was convicted of driving while under the influence on the same day he was alleged to have unlawfully possessed a stolen vehicle. Supp. CP __ (sub nom). This evidence standing alone was not conclusive as to whether Polo was in unlawful ‘possession’ of the stolen vehicle at the time and place in question. See RP 6. Even when combined with Deputy Boyd’s testimony linking Polo’s conviction to the Zender vehicle, the jury remained free to accept or reject such evidence in reaching its verdict.

So long as a trial court determines within its discretion that the probative value of the evidence outweighs the prejudice to a defendant, Washington Courts permit the introduction of previous convictions against the accused to prove any fact essential to obtaining a judgment. State v. Mayes, 20 Wn.App. 184, 579 P.2d 999 (1978); *see also* ER 404 (b)¹, ER

¹ Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. ER 404(b). To admit evidence of other wrongs the trial court must (1) find by a preponderance of the evidence that the misconduct occurred (2) identify the purpose for which the evidence is sought to be introduced, (3) determined whether the evidence is relevant to prove an element of the crime charged and (4) weigh the probative value against the prejudicial effect.

803(a)(22)². Clearly, Polo's prior conviction was relevant to whether he was in possession of the Zender truck on the day in question. Moreover, the facts related to Polo's driving while under the influence conviction were so intertwined with the facts alleged to support the unlawful possession of the Zender vehicle charge, the exclusion of such relevant evidence would impermissibly limit the state's ability to prove its case. A court's decision to admit or exclude evidence is reviewed for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008. 'An abuse of discretion occurs when the trial court bases its decision on untenable grounds or exercises discretion in a manner than is manifestly unreasonable.' State v. Valdobinos, 122 Wn.2d 270, 279, 858 P.2d 199 (1993).

Polo maintains however that even though the court did not instruct the jury or comment in such a way as to direct a verdict on the 'possession' element of the charged offense based on Polo's previous

² ER 803(a)(22)(b) Judgment of previous conviction. Evidence of a final judgment, entered after the trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against for purposes other than impeachment, judgments against persons other than the accused. Then pendency of an appeal may be shown but does not affect admissibility.

conviction, the court nonetheless directed a verdict by admitting as substantive evidence a redacted copy of Polo's previous conviction and by, allegedly precluding Polo from arguing he was not in 'possession' of the vehicle based on the judgment. BOA at 20.

While the deputy prosecutor did request the court preclude Polo from arguing Polo wasn't driving the vehicle in question, based on his previous conviction, the court ultimately explained following Polo's continued objection, that Polo could argue the evidence and the state maintained the burden to prove each element of the charged offense beyond a reasonable doubt. RP 38, 40,

Polo argues however, that as in State v. Ignito, 87 N.J. 204, 432 A.2d 912 (1981), introduction of his prior conviction combined with the trial courts alleged limitation on closing argument amounted to collaterally estopping him from litigating the 'possession' element of the charged offense. In Ignito however, the state obtained a conviction for possession of firearm by a felon by admitting a prior conviction for illegal transfer of weapons based on conduct arising from the same transaction and relying solely on this conviction to prove the 'possession' element of the charged offense. On appeal the New Jersey appellate court found the introduction

the prior conviction in this manner was ‘indistinguishable from collateral estoppel’ because the singular reliance on the conviction deprived the jury of its independent ability to determine if the state proved the required elements beyond a reasonable doubt.

In contrast to Ignito, the record reflects the trial court in this case did not introduce Polo’s previous conviction in a manner that deprived the jury of its fact finding function or of Polo’s ability to argue the evidence. Polo’s previous conviction was admitted and argued in distinct contrast to Ignito, as one of many pieces of evidence admitted that demonstrated to Polo unlawfully possessed the stolen vehicle on the evening in question. Moreover, Polo’s prior conviction was not presented, nor relied on as a legal conclusion that foreclosed Polo from arguing his theory of the case or the jury from reaching a different conclusion. Particularly where the trial court clarified that Polo could argue any theory supported by the evidence admitted and that the state still carried the burden to prove each element of the charged offense beyond a reasonable doubt. Under these circumstances, admission of Polo’s previous conviction did not amount to affirmatively invoking the doctrine of collateral estoppel. As Pelullo suggests the admission of Polo’s prior conviction as a piece of substantive

evidence—given its relevance to the essential facts sought to be proved by the state including possession was appropriate. Moreover, admission of Polo’s conviction is consistent with the Washington rules of evidence that permit the admissibility of judgments of previous convictions where such evidence is relevant to essential facts sought to be proved.

a. Harmless Error

Even if the trial court’s comments could have been construed as precluding Polo from arguing a theory that he was not in ‘possession’ of the Zender vehicle or, that the admission of his previous conviction amounts to affirmative use of the doctrine of collateral estoppel doctrine in a manner that deprived him of his right to a jury trial on each element of the charged offense, error if any, even construed as constitutional was harmless.

Polo contends the alleged error here is subject to automatic reversal, relying on cases wherein there were fundamental instructional omissions or misstatements of law by the trial court. BOA at 24. There is nothing in this record that demonstrates the trial court gave erroneous instructions or misstatements to the jury. Moreover, the record reveals the trial court appropriately instructed the jury that to return a guilty verdict

the state had to prove each of the elements of the charged offense beyond a reasonable doubt. CP 22-36. The harmless error analysis suggested by Polo is therefore inapplicable.

The appropriate analysis would be to determine whether the alleged constitutional error in admitting evidence that may have infringed on Polo's constitutional rights, was harmless pursuant to the 'untainted evidence' test. State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (2001). Under this analysis a constitutional error is harmless beyond a reasonable doubt if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same verdict in absence of the error. State v. Russell, 125 Wn.2d 24, 882 P.2d 747 (1994).

The facts of this case, even in the absence of the admission of Polo's driving while under the influence decision and even if Polo had argued he never drove the Zender truck, would have resulted in the same verdict. Polo was found at the scene of the accident, was wearing a particular hat that could only have come from the interior of the stolen truck and had injuries consistent with the accident and deployment of the Zender truck's airbag. Moreover, Polo's assertion that he just happened to walk from the area the truck was stolen from in Bellingham to the Slater

road AM/PM where the Zender truck had crashed on a bitterly cold evening was implausible. These facts overwhelmingly place Polo in the Zender truck at the time of the accident and standing alone, could only lead a reasonable jury to conclude Polo was guilty. Error if any was harmless beyond a reasonable doubt. Polo's conviction should be affirmed.

2. The trial court did not abuse its discretion denying Polo's request for a mistrial where nothing in the record demonstrates one statement by a potential juror could have tainted the jury pool to such a degree as to warrant a new trial.

Following jury selection, Polo moved for a mistrial claiming he was entitled to a new trial because a prospective juror had allegedly tainted the jury pool by stating he worked for DOC and was aware of Polo from his files. CP 93-100, RP 43. The trial court denied his request.³ Polo argues on appeal the trial court erred denying Polo's motion for mistrial.

Appellate review of a trial court's denial of a defendant's motion for a mistrial is for an abuse of discretion. State v. Mak, 105 Wn.2d 692, 701, 719, 718 P.2d 407, *cert. denied*, Mak v. Washington, 479 U.S. 995,

³ According to Polo's opening brief, the transcripts for jury selection were requested April 14th, 2011 and not yet available. See BOA at 5-6.

107 S.Ct. 599, 93 L.Ed.2d 599 (1986). An appellate court finds an abuse of discretion only “when no reasonable judge would have reached the same conclusion.” State v. Hopson, 113 Wn.2d 273, 778 P.2d 1014 (1989) *citing*, Sofia v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989). Granting a motion for mistrial is appropriate “only when the defendant has been so prejudiced that nothing short of a new trial can insure that a defendant will be tried fairly.” State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) *quoting*, State v. Mak, 105 Wn.2d at 701. In determining whether an irregularity warrants reversal, the appellate court examines the seriousness of the irregularity, whether it involved cumulative evidence; and whether the trial court properly instructed the jury to disregard it. State v. Mak, 105 Wn.2d at 701.

There an insufficient record in this case to support Polo’s allegation that the prospective juror’s alleged statement was a serious irregularity that warrants a new trial. Even if Polo’s attorney’s statement recounting his recollection of the alleged irregularity accurately reflects the record, a prospective juror’s statement that he may have known Polo from DOC files, without more, is not sufficiently prejudicial on its face to warrant reversal. Additionally, this was an isolated statement. Under

these circumstances the alleged irregularity was not serious enough to warrant a new trial, let alone an instruction from the judge to prospective jurors to disregard it because a cautionary instruction would likely draw more attention to the statement. A statement most jurors likely did not understand the import of. The jury was instructed “Your decisions as jurors must be made solely upon the evidence presented during these proceedings. The evidence that you are to consider during deliberations consists of the testimony you heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or stricken from the record, then you may not consider it in reaching your verdict.” CP 22-36, instruction 1. Jurors are presumed to follow instructions. State v. Mak, 105 Wn.2d at 702. Under these circumstances, a mistrial was not warranted.

3. Section 5.7 of the judgment and sentence should be corrected pursuant to the Court of Appeal’s mandate issued June 15th 2010.

Following Polo’s conviction for felony possession of a stolen vehicle and driving while under the influence, the sentencing court erroneously found that Count III, Polo’s misdemeanor conviction, was a felony “in the commission of which a motor vehicle was used” for driver’s

license revocation purposes pursuant to RCW 46.20.285. CP 17.

Presumably, the sentencing court meant to reference Polo's felony conviction, Count I, for unlawful possession of a stolen vehicle. On June 15th 2010 this court issued the mandate ordering in part, the trial court to correct Polo's judgment and sentence. It appears the parties failed to make the required correction prior to re-charging and prosecuting Polo for count 1, unlawful possession of a stolen vehicle. The state again concedes the error on the face of Polo's judgment and sentence requires correction. The state submits this matter should be remanded back to the trial court to correct the judgment and sentence pursuant to this Court's initial mandate to ensure section 5.7 is stricken or corrected if it applies to Polo's conviction for unlawful possession of a stolen vehicle.

E. CONCLUSION

For the reasons set forth above, the state respectfully requests Polo's conviction for unlawful possession of a stolen vehicle be affirmed and this matter remanded back to the trial court for correction of Polo's judgment and sentence.

Respectfully submitted this 11th day of August, 2011.

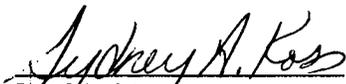


Kimberly Thulin, #21210
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to appellant's counsel, Jennifer Winkler, addressed as follows:

**NIELSEN, BROMAN & KOCH, PLLC
1908 E. MADISON STREET
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Legal Assistant

08/11/2011
Date