

69307-7

69307-7

NO. 69307-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANTWAN RECHE,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA BENTON

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. A defendant has a constitutional right to present a defense, but the right does not extend to irrelevant or inadmissible evidence. Here, the defense sought to bolster its voluntary intoxication defense by admitting audio recordings of the defendant screaming obscenities and screeching incoherently during his arrest. Where the audio recordings lacked the requisite foundation and included hearsay statements, and evidence regarding the defendant's behavior during his arrest was duplicated by witness testimony, did the trial court act within its discretion by suppressing the recordings?

2. Constitutional error is harmless if the reviewing court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." Here, the trial court suppressed an audio recording that captured screaming during the defendant's arrest. Where numerous witnesses testified to that same fact, was any error in suppressing the admission of the actual audio recordings harmless?

3. There is a long-standing principle that prohibits a defendant who is charged with theft from being convicted of both theft and possession of the same property, unless possession of

the specific property is otherwise illegal. Here, the defendant was convicted of robbery in the second degree and possession of a stolen vehicle where the robbery was premised on the taking of the same vehicle. Should this Court accept the State's concession of error and vacate the possession conviction?

4. Two charges violate double jeopardy when they are the same in law and in fact. Second degree robbery and possession of a stolen vehicle are the same neither in law nor in fact. Do the dual charges against the defendant survive a double jeopardy challenge?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

Antwan Reche was charged and convicted at trial of robbery in the second degree, possession of a stolen vehicle, hit and run, and reckless endangerment for taking Vanessa McGough's car from her and crashing it. CP 11-13. The State stipulated that the robbery in the second degree and the possession of stolen vehicle charges arose from the same criminal conduct, and so the charges

did not score against each other. 7RP 5.<sup>1</sup> Reche was sentenced within the standard range. CP 85.

## **2. SUBSTANTIVE FACTS**

### **a. The Crimes.**

As Seattle Central Community College student Vanessa McGough was walking toward her car after class on November 17, 2011, she noticed someone approaching her from behind. 3RP 7. The defendant, Antwan Reche, came up very close behind her, and told her to put her keys and her cellular phone on the ground and step away from her car. 3RP 7-8, 13. As Reche spoke, McGough noticed that he was holding an object under his shirt with his left hand, but McGough could not recognize what it was. 3RP 13.

Frightened, McGough obeyed Reche and placed her keys and phone on the ground and backed away from him. 3RP 7-8. Reche set the phone on top of a nearby car, but took the keys. 3RP 8. McGough asked Reche for permission to remove her backpack from the backseat, and Reche permitted her to do so, telling her not to "make a scene." 3RP 8, 17. Reche told McGough

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<sup>1</sup> This brief will cite to the Verbatim Report of Proceedings as follows: 1RP (6/27/12); 2RP (6/28/12); 3RP (7/2/12); 4RP (7/3/12); 5RP (7/9/12); 6RP (7/10/12); 7RP (8/3/12).

not to call the police for "10 to 15 minutes," then entered McGough's car and sped away soon thereafter. 3RP 8. McGough flagged down another driver, who called 911 on her behalf. 3RP 19.

Reche drove out of sight, but took a wide turn a few blocks away and swerved into oncoming traffic, crashing into several cars before careening into another car and totaling McGough's vehicle. 3RP 80-83. Reche exited the crashed car and looked around, took off his jacket, and began to sprint in the middle of the street away from the scene. 3RP 85-87, 108. One of the witnesses who saw the accident screamed, "Stop him!" and a member of a local bar's security staff, James Joseph, tackled Reche and held him there until police arrived. 3RP 87, 100-05. After Joseph had pulled Reche to the ground, Reche told him, "You are not going to take me down, bitch." 3RP 110. Joseph testified that Reche also told him that "he wanted to get back to his kids," and Joseph replied that it was "too late for that." 3RP 112-13.

Reche was somewhat calm while Joseph had him pinned, but when police arrived, he struggled violently, kicking, rolling away, and screaming. 3RP 115. Seattle Police Officer Brian Blase testified that he believed that Reche was unconscious when Blase

first arrived on the scene, but when officers attempted to place Reche under arrest, he began to have a seizure. 4RP 46. Reche screamed and ranted and kicked at the officers, saying, among other things, that he "didn't take it." 4RP 47. Reche was arrested after a struggle and taken to Harborview Medical Center in an ambulance. 4RP 51-53.

**b. Voluntary Intoxication Defense And Audio Of Arrest.**

A voluntary intoxication instruction was submitted to the jury that read as follows:

No act committed by a person while in a state of voluntary intoxication is less criminal by reason of that condition. However, evidence of intoxication may be considered in determining whether the defendant acted or failed to act with intent.

CP 57; WPIC 18.10.

Joseph, the man who tackled Reche, testified that he thought that Reche's behavior at the scene was possibly an act, although he acknowledged to initially believing that Reche was intoxicated. 3RP 115-17. Saphiloff, the witness who first saw Reche run from his car, testified that she believed he was under the influence of drugs or alcohol. 3RP 98-99. Another witness who

saw Reche right after he crashed, Thomas Bennett, testified that he heard Reche yelling once the police arrived, screaming “nonsense” about the Occupy Seattle protests; he believed that Reche was under the influence of something. 3RP 145, 154.

A K-9 Police Officer, Brian Blase, testified that when he arrived on the scene, Reche was unconscious and pinned down by Joseph. 4RP 44-45. Blase told the jury that after he handcuffed Reche, Reche woke up and became very agitated:

He was upset. He was kicking at the firefighters, screaming, yelling for us to let him go, ranting about -- he was part of the Occupy Seattle camp, so all of his friends around were also part of that.

So a lot -- he was saying a lot of things about working for the system and the man and how he shouldn't be. It didn't make a lot of sense. He was extremely upset.

... I know he said, 'I didn't take it.'... Eventually after paramedics arrived, it was determined that he needed to go to Harborview to be evaluated, and I rode up to the hospital with him in the ambulance.

4RP 46-47.

Blase was asked on the stand to describe Reche's demeanor during the ambulance ride; he said that Reche was still screaming, but suddenly, “it was like he had passed out.” 4RP 48. Blase added that Reche did the same thing at the scene: “He would be screaming, yelling, kicking, and then he would go into, kind of

like, almost a catatonic state where he would just kind of be there.”

4RP 48. On cross examination, Blase testified that he believed Reche was either under the influence of drugs or mentally ill.

4RP 52.

Seattle Police Officer and Drug Recognition Expert Eric Michl testified that he believed that Reche was under the influence of drugs, but that he still appeared to understand what he was doing. 4RP 124-25.

State Toxicologist Sarah Swenson testified that Reche’s blood work from the day of the incident revealed that he had both cannabinoids and amphetamines in his system, consistent with marijuana and methamphetamine use. 4RP 70-78. On cross examination, she said that methamphetamine can cause hallucinations and psychosis. 4RP 82-83. Officer Michl seconded Swenson’s testimony about the effects of methamphetamine causing hallucinations and psychosis, and added that it can make users “ramble and mumble and make nonsensical statements,” and exhibit “paranoia.” 4RP 109.

Reche testified at trial that he had used methamphetamine on the day of the crash because he was self-medicating in response to some upsetting events in his life. 5RP 24, 67-68. As

of November 17, 2011, Reche had been using methamphetamine for about six months. 5RP 19. Because of the euphoric effects of the methamphetamine, he had not slept for at least a week leading up to his encounter with McGough, and had used the drug that very day. 5RP 20-21.

Reche testified that he had a memory of being "crouched behind" a car in the dark when he first saw McGough. 5RP 26. He claimed that he approached her from behind and "she looked shocked, like she would scream... and dropped her keys on the ground," saying, "you can take my car.... I just want my backpack." 5RP 26-27. While he admitted having told her to not call the police, he testified that he only told her that because he was paranoid that the FBI was after him. 5RP 28-29. Reche said that he felt as if the world was caving in around him and he felt compelled to drive to a nearby shopping area, Westlake Mall. 5RP 27. He remembered speeding off and driving, but did not recall crashing into other cars. 5RP 82-83. Reche explained his mental state that day as being in a "down" phase of a methamphetamine high combined with lack of sleep, and he was therefore not truly in "control" of his actions. 5RP 20, 40-41, 51. He testified that the last thing he remembered

was being tackled before blacking out, and then waking up in the ambulance. 5RP 32.

The audio of Reche's arrest was recorded on two separate police car dash-mounted cameras. Ex. 18. Because the cameras were not pointed toward Reche, he is not seen on the video (the cameras point away from the scene entirely), but some of the verbal interaction between the police, the witnesses and Reche was recorded by the camera microphones attached to the police officers. Ex. 18. At the conclusion of the State's case, Reche sought to admit the audio of the videos as evidence of his intoxication, to further his "voluntary intoxication defense." 5RP 73.

The two videos, shot from different angles, captured similar audio for the same point of time. Ex. 18. Most of the pertinent audio is of Reche screaming hysterically, howling, moaning, and hurling insults, and calling someone a "nigger." Ex. 18. At one point on the video, Reche can be heard saying, "I didn't take it." 5RP 90. Other witnesses' and police officers' voices are also captured, some making comments about Reche's perceived condition, including, "yeah, he is really out of it... He doesn't know what's going on... Oh, he is unconscious... Oh, now he's seizing

up.” 5RP 76, 78; Ex. 18. The speakers are off camera during the entire exchange. Ex. 18.

The prosecutor objected to the videos being played in their entirety:

We have no idea who is making these statements. We cannot say if it is an officer or not. There were people from the fire department. There were witnesses. And throughout the video, you hear the officers speaking with different witnesses that were there. Without knowing who is saying what, I don't think it's proper.

I also think it is improper to be playing to the jury statements that were made by random people without knowing who they are. It's hearsay, and we have no idea who they are.

The other thing is that there are several statements, some that are made by the defendant's friend, to the effect that he had taken drugs...

What I'm objecting to is playing the entire video when people are talking and we don't know who these people are.

5RP 75-76.

The trial judge watched the video and voiced some concerns about its admissibility, saying that Reche began to convulse only “once he[was] apprehended,” rendering his behavior “suspect.”

5RP 89. The trial judge was also concerned that jurors had no way of connecting the audio to what was actually happening off camera: “The witness has testified that up until the time that the police apprehended him, he was at least in and out of consciousness. But

the manic behavior, which is what it appears to sound like, the videos don't assist the Court in visualizing anything, frankly." 5RP 89.

Reche's attorney argued that the audio on the videos bolstered her claim that Reche was not in control of his faculties, and offered as an example the fact that Reche said, "I want to see my babies," when, in fact, he has no children. 5RP 91.

After hearing argument and reviewing the videos, the trial court declined to admit them:

I think your case – I think the theory of your case is not diminished by this being excluded. I think you can still argue through your client's own testimony and the testimony of the other witnesses what his condition was, the veracity of the statement about babies as indicative of him being delusional.

I'm troubled in part because the video does not assist the jurors in understanding this. The terrifying sounds of your client on this audio portion of the video is very difficult to weigh in terms of whether it is his medical condition or what's going on at the scene. It's very difficult to know because you are not looking at it. It's troubling to the Court...

Frankly, I think it's distracting to the jurors. They need to be focused on whether or not your client could form the intent based upon voluntary intoxication. I think he has testified amply to that fact. Your theory of the case is squarely in front of this jury.

I don't think that the video or its audio portion really should be admitted... I'm going to exclude it

under 403. I think it's confusing. I'm not satisfied that it really assists the jury in understanding the facts.

5RP 91-92.

**C. ARGUMENT**

**1. THE SUPPRESSION OF THE VIDEOS WAS WITHIN THE TRIAL COURT'S DISCRETION.**

Reche contends that his due process right to present a defense was violated when the court excluded the audio of his arrest captured on the dash-mounted cameras. But Reche was permitted to present his defense, and did so extensively; the court here simply excluded the playing of video that captured some of Reche's screams and insults during his arrest, while still permitting Reche to thoroughly present his voluntary intoxication claim. A trial court abuses its discretion when excluding evidence only if it does so on untenable grounds; here, the videos lacked the requisite foundation, included hearsay statements, were duplicated by witness testimony that was already admitted, and did nothing to assist the jury. The trial judge, therefore, acted within her discretion when she suppressed them.

This Court reviews a trial judge's decision to exclude evidence for abuse of discretion. Minehart v. Morning Star Boys

Ranch, Inc., 156 Wn. App. 457, 463, 232 P.3d 591, review denied, 169 Wn.2d 1029 (2010). A trial judge abuses her discretion only if she lacks tenable grounds or reasons to exclude the evidence or if the decision was manifestly unreasonable. Yousoufian v. Office of Ron Sims, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). A decision is manifestly unreasonable if the trial court, “despite applying the correct legal standard to the supported facts, adopts a view that no reasonable person would take.” Yousoufian, 168 Wn.2d at 459 (internal quotation marks omitted) (quoting Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006)).

A defendant has a constitutional right to present a defense, but the right does not extend to irrelevant or inadmissible evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (irrelevant evidence); State v. Aguirre, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010) (inadmissible evidence); State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (defendant has right to present a defense ““consisting of relevant evidence that is not otherwise inadmissible”” (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992))). If the defendant’s evidence is relevant and admissible, then it is the State’s burden to demonstrate that “the evidence is so prejudicial as to disrupt the fairness of the

fact-finding process at trial.” State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). A criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022, cert. denied, 508 U.S. 953 (1993).

Evidence Rule (ER) 901 states that an exhibit is authenticated when there is “evidence sufficient to support a finding that the matter in question is what its proponent claims.” When a recording of voices is offered as evidence, the recording “must be authentic in the sense that the speakers’ voices are identified in the recording, and the recording is in fact a recording of the conversation in question.” State v. Robinson, 38 Wn. App. 871, 691 P.3d 213 (1984).

After reviewing the videos, the trial judge expressed multiple concerns. 5RP 91-92. First, there was the question of foundation, which was left unresolved. While the State agreed to stipulate that the video recordings contained accurate audio recordings of the arrest, the defense never presented the means by which they would authenticate the various voices on the video. 5RP 70-76;

Ex. 18. Reche never established how he would lay the foundation for the admissibility of the videos under ER 901.<sup>2</sup>

The difficulties are apparent. The video captured voices of many individuals, one of whom is clearly Reche, but many of whom are unidentified, rendering their statements, where they do actually assert something (like their observation that Reche is “completely out of it”), hearsay from a declarant who is not only unavailable, but unidentified. While Reche argues that this could have been cured by having witnesses identify the voices, there is nothing in the record to suggest that the witnesses, even if secured and re-sworn to testify, could identify the myriad faceless voices presented on the audio, nor was there any proposed remedy for the countless hearsay and potential confrontation issues this could have sparked.

The hearsay issues are compounded by Reche’s own self-serving hearsay on the video, where he stated unequivocally, “I didn’t take it.” Ex. 18; 5RP 90. While Reche could argue that it was not being admitted to prove the truth of the matter it asserted, it is nevertheless an out-of-court statement that appears to respond

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<sup>2</sup> The trial judge also questioned the credibility of Reche’s audio display in the videos, where Reche seems to begin his ranting only after the arrest. 5RP 90-92. The State concurs with Reche that his credibility should not have played a role in the decision to suppress the video, as credibility is a question for the jury.

directly to the charge of robbery and deny its commission, making any “not for the truth” argument questionable and unpersuasive.

Further, as the trial court stated, the exclamations made by Reche are altogether divorced from any action – without the accompanying visual evidence, the audio provides very little for the fact finder other than capturing the disembodied screams of Reche over an extended period of time. Ex. 18; 5RP 89. The judge said that “the terrifying sounds of [Reche] on this audio portion of the video [are] very difficult to weigh in terms of whether it is his medical condition or what’s going on at the scene.” 5RP 89. In other words, without seeing or knowing exactly what is happening to Reche to prompt each of his outbursts, the screams themselves do not tell the jury much about his mental state, as those screams could be attributed to a variety of factors that cannot be understood absent their missing visual accompaniment. As the judge ruled, “It’s very difficult to know because you are not looking at it.” 5RP 89.

The trial judge ultimately suppressed the video under ER 403,<sup>3</sup> ruling that it only served to “distract” the jury. 5RP 92. The fact that Reche screamed and yelled obscenities during his interaction with the police was uncontested at trial, and was elicited via various witnesses, making a recording of the same potentially duplicative, and certainly not helpful or especially relevant for the jury. The trial court’s decision to suppress the evidence, then, was not untenable, and was within its discretion.

Citing State v. Young, Reche argues that ER 403 does not extend “to the exclusion of crucial evidence relevant to the central contention of a valid defense.” Brief of Appellant at 16; State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987). Young was a vehicular homicide case where Young claimed that it was his now-deceased passenger, Seltzer, who grabbed the steering wheel while Young was driving and forced the accident that caused Seltzer’s death (his death was the basis for the vehicular homicide charge). Id. at 408-09.

Young attempted to introduce evidence from several other witnesses that Seltzer had, on numerous other occasions, grabbed

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<sup>3</sup> ER 403 reads as follows: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

the steering wheel of other drivers as they were trying to drive. Id. at 409. The trial judge, relying on ER 403, declined to admit the evidence. Id. at 409-10. The court of appeals reversed, holding that “evidence of Mr. Seltzer’s conduct on the night of the accident was highly probative and crucial to Mr. Young’s theory of defense, that it was Mr. Seltzer and not he that caused the accident.” Id. at 413. After all, absent the testimony of these other witnesses, Young was left with no evidence to buttress his own self-serving testimony that Seltzer was indeed responsible for the crash. That Seltzer grabbed the wheel of his car was Young’s sole defense, and it relied almost entirely on these witnesses, making the evidence of Seltzer’s prior actions “crucial” evidence in the presentation of Young’s defense.

The same cannot be said for the audio on the video tape in the case against Reche. Reche was never barred from presenting his voluntary intoxication defense. Most of the civilian and police witnesses testified that Reche did indeed appear to be under the influence, unpredictable, and out of control. 3RP 98-99, 115-17, 145, 154; 4RP 46-48. The State’s own experts testified that Reche had methamphetamine in his system which could cause hallucinations, paranoia and psychosis. 4RP 70-78, 109. The jury

instructions permitted the jury to consider the effects of the drugs on Reche's capacity to form the requisite intent to commit his crimes. CP 57. The testimony of various witnesses, including Reche, established that he was saying nonsensical things (like saying he wanted to see his "kids," when his testimony revealed that he was childless), rambling, and vacillating between consciousness and a catatonic state. 4RP 46-49, 109; 5RP 20-22, 27, 40-41, 51.

Unlike in Young, the trial court here permitted Reche to advance his defense, and Reche did so through numerous witnesses. The screaming on the videos was not "crucial" to Reche's case. It cannot reasonably be argued that Reche was somehow denied his right to present his voluntary intoxication defense.

**2. EVEN IF THE TRIAL COURT ERRED IN SUPPRESSING THE VIDEOS, ANY ERROR WAS HARMLESS.**

Even if the court abused its discretion when it suppressed the videos of Reche's arrest, any error was harmless because there was no reasonable probability that excluding this evidence affected the jury's verdict. Constitutional error is harmless if the reviewing court is "convinced beyond a reasonable doubt that any reasonable

jury would have reached the same result without the error.” State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing State v. Whelchel, 115 Wn.2d 708, 728, 801 P.2d 948 (1990)).

Here, the video would have permitted the jury to hear what they already knew – that Reche was screaming obscenities, that he denied taking “it,” and that he sounded extremely agitated. Ex. 18. The crux of the controversy at trial was whether Reche had the mental wherewithal to form the requisite intent to commit the crimes charged. 6RP 12. The mere fact that Reche was high on methamphetamine is not in and of itself a defense, as was explained to the jury in its instructions. CP 57.

Reche’s attorney addressed the issue of Reche’s actual intent to commit the crimes in her closing argument:

We have witnesses, Mr. Bennett, saying, “I heard the rambling. I heard the screaming.” We heard a lot of talk about Mr. Reche screaming for his babies.

Mr. Reche has no children. He has no babies. Was this a hallucination? A delusion? Probably. The would be consistent with methamphetamine use...

...

What happened with Ms. McGough is not what a carjacking would be like because Mr. Reche did not intend to rob Ms. McGough of the car. He didn’t intend it.

6RP 37, 40.

Reche's argument would have been exactly the same had the jury actually heard his statements on the videos, and just as convincing. The precise volume of his screeches, or his particular choice of racial epithets as they were captured on the videos, ultimately elucidated very little about Reche's actual intent at the time of the crimes, and contributed next to nothing additional after the testimony of the eyewitnesses, the drug recognition expert, the toxicologist, and Reche himself. There is no likelihood that a reasonable juror would have changed his or her verdict due merely to hearing the actual audio instead of hearing a description of the screams from the various witnesses. Any error was harmless.

**3. BECAUSE A THIEF CANNOT GENERALLY BE CONVICTED AS A POSSESSOR FOR THE SAME STOLEN PROPERTY, THE POSSESSION CONVICTION SHOULD BE VACATED UNDER THESE FACTS.**

Reche contends that he should not have been convicted of both robbery in the second degree and possession of a stolen vehicle based on these facts because of the legal principle that "one cannot be both the principal thief and the receiver of stolen goods." State v. Melick, 131 Wn. App. 835, 841, 129 P.3d 816 (2006). Melick describes the appropriate approach in such a case:

If the State charges both theft [or in this case, TMV] and possession arising out of the same act, the fact finder must 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.

Id. The State concedes that under the precise facts presented here, this principle prohibits two separate convictions against Reche for robbery and possession. Vacation of the possession of a stolen vehicle charge is the proper remedy.<sup>4</sup>

**4. BECAUSE THE CHARGES ARE SEPARATE IN FACT AND IN LAW, RECHE'S DOUBLE JEOPARDY CLAIM SHOULD BE REJECTED.<sup>5</sup>**

Reche argues that his convictions for both second degree robbery and possession of a stolen vehicle violate double jeopardy. But because each offense includes elements of fact and law not included in the other, the dual convictions survive.

When a single act or transaction violates multiple criminal statutes, double jeopardy prevents multiple punishments if the

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<sup>4</sup> The doctrine of "same criminal conduct" now codified under RCW 9.94A.598 appears to effectively negate the need for this principle. It was this doctrine, after all, that barred Reche's conviction of possession of a stolen vehicle from affecting his offender score at sentencing. 7RP 5.

<sup>5</sup> Although this Court would ordinarily not need to rule on the double jeopardy claim in light of the State's concession in Section C.3, supra, the State nevertheless responds to the double jeopardy claim to ensure that the analysis of claims under Melick and claims under double jeopardy remain separate.

legislature did not intend the crimes to be treated separately. Albernaz v. United States, 450 U.S. 333, 343-44, 101 S. Ct. 2221, 67 L. Ed. 2d 275 (1977). Double jeopardy in this context is purely a question of legislative intent. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). When the legislature authorizes separate punishments, convictions for multiple crimes based on the same act do not violate double jeopardy. Albernaz, 450 U.S. at 343. If the statutes in question do not expressly state that multiple punishments are authorized, courts must turn to principles of statutory construction to determine whether the crimes may be punished separately. Calle, 125 Wn.2d at 777.

The law in this area is not a model of clarity, but rather “a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator.” Albernaz, 450 U.S. at 343. For purposes of navigation, however, the applicable test was announced by the United States Supreme Court:

[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). The Washington Supreme Court has expressed this principle as follows:

In order to be the "same offense" for purposes of double jeopardy the offenses must be the same in law and in fact. If there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other, the offenses are not constitutionally the same and the double jeopardy clause does not prevent convictions for both offenses.

Calle, 125 Wn.2d at 777 (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). If two crimes are not the same in law and in fact under this test, the crimes are different for double jeopardy purposes unless there is clear evidence of legislative intent to the contrary. Calle, 125 Wn.2d at 780.

Second degree robbery and possession of a stolen vehicle are two separate offenses. A person commits robbery in the second degree when he "unlawfully takes personal property from the person of another" against her will "by the use or threatened use of immediate force, violence, or fear of injury." RCW 9A.56.190. A person commits possession of a stolen vehicle merely by possessing "a stolen motor vehicle." RCW 9A.56.068.

Reche concedes that even the most recent Washington case he relies upon for his argument that he cannot be convicted of being both “thief and possessor” explicitly rejects a double jeopardy claim in the same circumstance. In Melick, Melick was convicted of both taking a motor vehicle and possession of stolen property for the same vehicle. 131 Wn. App. at 838. This Court held that because the taking a motor vehicle statute required proof that the offender drove away a motor vehicle, an element not required by the possession charge, “the offenses are not the same” and therefore double jeopardy did not apply. Id. at 840. Proof of one offense, after all, would not necessarily “prove the other.” Id.

This is even more applicable in the case at hand, where the possession of a stolen vehicle statute does not begin to address the various acts required to constitute a robbery, and vice versa. As in Melick, a double jeopardy analysis here does not apply because the crimes are different in fact and in law.

But Reche argues that this particular holding of Melick is incorrect, contending that the differences in the elements of possession of a stolen vehicle and robbery in the second degree

are merely superficial. A common sense approach to both statutes, however, shows stark differences between the two; one can certainly commit one crime without committing the other. A robbery requires that an offender actively take property from another using force or fear, while possession requires only the knowing, passive act of retaining property. RCW 9A.56.190 and RCW 9A.56.068. Additionally, the possession of stolen vehicle charge is narrow and applies only to *possession of a vehicle*, while the robbery charge anticipates the *taking of any property*. These differences are clear on their face, and Reche's insistence that the charges are the same is misplaced.

In sum, these crimes are not the same because each offense contains elements that the other does not, and each requires proof of facts that the other does not. Accordingly, these crimes are presumed to be separate offenses unless there is "clear evidence of contrary [legislative] intent."

These two statutes serve different purposes. The robbery statute is "designed to discourage the taking of property from the person of another by use or threatened use of force, and serves to protect individuals from the loss of property and threat of violence

to their persons.” State v. Cole, 117 Wn. App. 870, 877, 73 P.3d 411 (2003). The session notes regarding the retooling of the car theft statutes in 2007 make it clear that the legislative intent behind the stolen vehicle statutes was particular to thefts involving vehicles:

Automobiles are an essential part of our everyday lives. The west coast is the only region of the United States with an increase of over three percent in motor vehicle thefts over the last several years. The family car is a priority of most individuals and families. The family car is typically the second largest investment a person has next to the home, so when a car is stolen, it causes a significant loss and inconvenience to people, imposes financial hardship, and negatively impacts their work, school, and personal activities. Appropriate and meaningful penalties that are proportionate to the crime committed must be imposed on those who steal motor vehicles;

...

(2) It is the intent of this act to deter motor vehicle theft through a statewide cooperative effort by combating motor vehicle theft through tough laws, supporting law enforcement activities, improving enforcement and administration, effective prosecution, public awareness, and meaningful treatment for first time offenders where appropriate. It is also the intent of the legislature to ensure that adequate funding is provided to implement this act in

order for real, observable reductions in the number of auto thefts in Washington state. [sic]

2007 Wn. Legis. Serv. Ch. 199 (T.S.H.B. 1001) (West). While certainly complementary, the legislative intent behind each statute is different.<sup>6</sup>

Reche relies on State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009), to argue that even where the elements of two charges facially differ, the court may nonetheless find they “encompass the same offense” for purposes of double jeopardy. Brief of Appellant at 27-28. But in Hughes, the two charges were the same both in law and in fact; that is not the case here.

Hughes was charged with one count of rape of a child in the second degree and one count of rape in the second degree based on the victim's inability to consent, both for one act of intercourse with a 12-year-old child with cerebral palsy. Hughes, 166 Wn.2d at 679. The reviewing court reiterated the “same evidence” test for

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<sup>6</sup> Reche is correct in pointing out that part of the legislative intent behind the possession of stolen vehicle statute was to raise the level of punishment for car theft crimes, but this is still a separate legislative intent than protecting its citizenry from the violence inherent in robbery crimes.

double jeopardy analysis: “If each offense includes an element not included in the other, and each requires proof of a fact the other does not, then the offenses are not constitutionally the same...” Id. at 682. The Hughes court reasoned that both offenses arose from the single act of sexual intercourse with the same victim, and both required proof of non-consent based on the victim's status; they were; therefore, the same in law and in fact. Id. at 683.

The court's ruling in Hughes was narrowly limited to the facts and law for those two particular charges: rape of a child in the second degree and rape based on the lack of consent of the victim. In State v. Smith, 165 Wn. App. 296, 266 P.3d 250, review granted, 173 Wn.2d 1034 (2012), the court showed just how narrow the Hughes ruling really was. In Smith, the defendant was charged with first degree rape and second degree rape of a child against the same victim for the same single sexual act. Id. at 319. The reviewing court held that the offenses were the same in *fact*, but because first degree rape required “forcible compulsion” and rape of a child required proof of the victim's inability to consent, the court

held that the offenses were not the same in *law*. Id. at 311. The court noted that the Calle court's "same evidence" test distinguished between "two sex crimes because one required proof of force and the other a particular victim status," which was on all fours with its holding in Smith. Smith, 165 Wn. App. at 322. Because the charges in Smith involved an offense that required forcible compulsion and another that did not, the court found that the offenses were separate in law and the Hughes analysis simply did not apply. Smith, 165 Wn. App. at 322-23.

The two offenses at issue here are even more distinct from each other than those analyzed in Smith. Here, the specific act of possessing a vehicle was all that was required for the possession offense; the possession offense required no threat, no potential violence, and no taking, all of which were required by the robbery charge. As in Smith, the offenses here are simply inapposite to those in Hughes and Reche's comparison is less than compelling.

As the court in Melick properly found, convictions involving theft and possession of the property taken are not barred by double jeopardy, but instead by a long-standing legal doctrine: "While the dual convictions are not barred by double jeopardy, another

doctrine nevertheless prevents both convictions from standing... 'one cannot be both principal thief and the receiver of stolen goods.'" Melick, 131 Wn. App. at 841. This prohibition is not triggered because the act of robbery and the act of possessing stolen property are one and the same, as Reche contends. Rather, the prohibition acknowledges the legislative intent in separately prosecuting those who knowingly possess stolen property after the theft or robbery is completed, or in situations where the taking cannot be proven, but the possession can be: "Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the robbers themselves." Id. This is not the same as saying that the offenses are one and the same; it is only an assurance that a defendant, at least under these facts, will not be targeted for both.

In sum, Reche's convictions for robbery and possession are not the same offense for double jeopardy purposes because they are not the same in law or in fact. This Court should reject Reche's double jeopardy claim, but vacate the possession of stolen property claim based on the State's concession in Section C (3) of this brief.

**D. CONCLUSION**

For the reasons stated above, this Court should affirm Reche's convictions for robbery, hit and run, and reckless endangerment, and vacate his possession of a stolen vehicle conviction.

DATED this 8 day of May, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer J. Sweigert, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. ANTWAN RECHE, Cause No. 69307-7 -I, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 8<sup>th</sup> day of May, 2013

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Name

Done in Seattle, Washington