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COURT OF APPEALS  
DIVISION II

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NO. 37268-1-II  
COURT OF APPEALS, DIVISION II BY Chm  
DEPUTY

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STATE OF WASHINGTON,

Respondent,

vs.

LORN A. DOOLEY,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Christine A. Pomeroy, Judge  
Cause No. 07-1-01312-5

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not dismissing Dooley's conviction for possession of stolen property in the first degree where the offense was the same in law and fact as his conviction for trafficking in stolen property in the first degree and where the legislature has not authorized separate punishments for the two crimes.
02. The trial court erred in not dismissing Dooley's conviction for possession of stolen property in the first degree where the offense was incidental to, a part of, or coexistent with his conviction for trafficking in stolen property in the first degree.
03. The trial court erred in not taking count II, trafficking in stolen property in the first degree from the jury for lack of sufficiency of the evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in not dismissing Dooley's conviction for possession of stolen property in the first degree where the offense was the same in law and fact as his conviction for trafficking in stolen property in the first degree and where the legislature has not authorized separate punishments for the two crimes? [Assignment of Error No. 1].

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02. Whether the trial court erred in not dismissing Dooley's conviction for possession of stolen property in the first degree where the offense was incidental to, a part of, or coexistent with his conviction for trafficking in stolen property in the first degree? [Assignment of Error No. 2].
03. Whether the trial court erred in not taking count II, trafficking in stolen property in the first degree from the jury for lack of sufficiency of the evidence that the property transferred to the recycling center was either stolen or that Dooley was a participant? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Lorn A. Dooley (Dooley) was charged by information filed in Thurston County Superior Court on July 17, 2007, with possession of stolen property in the first degree, count I, and trafficking in stolen property in the first degree, count II, contrary to RCWs 9A.56.150(1) and 9A.82.050. [CP 3].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8-9]. Trial to a jury commenced on October 10, the Honorable Christine A. Pomeroy presiding.<sup>1</sup> The jury returned verdicts of guilty as charged, Dooley was given a DOSA sentence of half of the

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<sup>1</sup> Dooley was tried with his co-defendant Joseph Vladeff.

midpoint of his standard range and timely notice of this appeal followed.  
[CP 48-49, 79, 91-100].

02. Substantive Facts: Trial

On June 18, 2007, two controller boxes were reported missing from outside the fenced area at Burlington Northern Santa Fe Railroad (BNSF). On the same day, a black El Camino with a controller box in the back was seen in the area on railroad property. [RP 29, 41, 93-101, 103, 170]. Joseph Vladeff's black El Camino was later identified as looking like the same vehicle. [RP 180-83]. The electronic gear inside the controller boxes was worth at least \$20,000, and parts of this equipment were later discovered at Vladeff's residence. [RP 171-180, 241].

Three days later, on June 21, at approximately 6:30 in the morning, a spool of underground wire was reported stolen from inside the locked-fenced compound owned by BNSF. It was estimated there was about 2,000 feet of wire on the spool, with a "(v)alue somewhere between \$6,000 and \$8,000." [RP 208].

That same morning, on his way to a reported fire in a wooded area, Officer Bruce Brenna observed Dooley emerging from a nearby wooded area and getting into Vladeff's black El Camino and then being driven to what turned out to be the driveway to Vladeff's residence. [RP 213-19].

A trail leading from where Brenna had initially observed Dooley exiting the woods, led to the area of the reported fire in the woods. [RP 222-23].

Officer John Weiks arrived at Vladeff's residence around 8:30 that morning and contacted Dooley, who was sitting in the passenger seat of Vladeff's El Camino in the driveway. [RP 53-55, 89]. Dooley, who was dirty and had black soot on his arm and smelled like smoke, denied going near the fire and explained that he didn't have a permanent address and sometimes stayed at Vladeff's residence. [RP 53-56, 85-87, 223].

At the scene of the fire in the woods, there was a charred area with thousands of feet of copper wire with its insulation burned off. [RP 56, 61, 111, 114]. The wire was identified as that taken from BNSF on June 21. [RP 209]. A well-traveled trail, capable of accommodating a motor vehicle, led from the scene of the fire to Vladeff's residence, a distance of somewhere between 1,200 feet and 1,500 feet. [RP 57-59, 89-90, 115]. Pieces of wire were found on various parts of the trail. [R 63-64, 116].

When interviewed, Vladeff informed the police that he was aware that property belonging to BNSF was on his property, explaining that another person who had used his car had brought it there. [RP 236, 241]. He never said he was aware that the property was stolen. [RP 266]. He had also become aware of the fire on the morning of June 21 and had been told it was out of control. [RP 250].

D. ARGUMENT

01. DOOLEY'S CONVICTIONS FOR  
POSSESSION OF STOLEN PROPERTY  
IN THE FIRST DEGREE AND  
TRAFFICKING OF STOLEN PROPERTY  
IN THE FIRST DEGREE VIOLATE THE  
CONSTITUTIONAL PROHIBITION  
AGAINST DOUBLE JEOPARDY.

Article 1, section 9 of the Washington State Constitution and the Fifth Amendment to the United States Constitution provide that no person should twice be put in jeopardy for the same offense. Double jeopardy may be violated by multiple convictions even if the sentences are concurrent. State v. Calle, 125 Wn.2d 769, 775, 888 P.2d 155 (1995). A double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, reviewed denied, 143 Wn.2d 1009 (2001) (citing RAP 2.5(a) and State v. Adel, 136 Wn.2d 629, 631, 965 P.2d 1072 (1998)); See also State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). The issue is whether the Legislature intended to authorize multiple punishments for criminal conduct that violates more than one criminal statute. State v. Calle, 125 Wn.2d at 772.

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses "clearly involve different legal elements, if there is clear evidence that the

Legislature intended to impose only a single punishment.” In the Matter of Personal Restraint of Anthony C. Burchfield, 111 Wn. App. 892, 897, 46 P.3d 840 (2002) (citing State v. Calle, 125 Wn.2d at 780). Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977).

Here, neither the trafficking nor the possession of stolen property statutes contain specific language authorizing separate punishments for the same conduct. RCW 9A.82.050; RCW 9A.56.150. The offenses are thus not automatically immune from double jeopardy analysis. Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” Id. Division III of this court has held that in a prosecution for trafficking in stolen property in the first degree, the trial court committed reversible error in not instructing the jury on the lesser-included offense of possession of stolen property. State v. Knight, 54 Wn. App. 143, 155, 772 P.2d 1042, reviewed denied, 113 Wn.2d 1014, 779 P.2d 730 (1989). And since each element of a lesser offense must be a necessary element of the offense charged, which is the “legal test” under State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978), it cannot be claimed that the offenses here at issue do not violate the prohibition against double jeopardy under this prong. See State v. Zumwalt, 119 Wn. App. 126, 130, 82 P.3d 672 (2003). The question is whether each offense, as charged and proved, includes elements not included in the other. State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005); State v. Calle, 125 Wn.2d at 777.

Possession of stolen property constitutes a continuing course of conduct, and the receipt of stolen property cannot be viewed as a discrete criminal act separate from the later possession and disposition of the property. State v. McReynolds, 117 Wn. App. 309, 338-39, 71 P.3d 663 (2003). Here, then, since the jury was instructed that it could find Dooley guilty of possession of stolen property in the first degree if it found, in part, that he or an accomplice knowingly received, retained, possessed, or disposed of stolen property [Court's Instruction No. 16, CP 68, RP 309], it is not possible to say by which method the jury found guilt beyond a reasonable doubt, with the result that, for purposes of this double jeopardy analysis, it must be assumed that the jury found Dooley guilty based on his or his accomplice's disposition of the property, and, in consequence, Dooley's conviction for the offense would derive from the same act and conduct as did his conviction for trafficking in stolen property in the first degree.

The State argued to the jury that Dooley was guilty of trafficking in stolen property in the first degree because he or his accomplice disposed of the property stolen from BNSF knowing it was stolen.

Now traffic, as the judge said, means to sell, transfer, distribute, dispense, or otherwise dispose. Now, when you take stolen property and you sell it to an outfit like South Sound Recycling, obviously you're selling, and that's what we're talking about

here. We're talking about at this depository, if you will, a whole load of property belonging to the Burlington Northern Railroad.

[RP 319-20].

Concomitantly, the jury could have also found Dooley guilty of possession of stolen property in the first degree because he or his accomplice disposed of the stolen property, knowing it was stolen, with the additional finding that the property was valued at over \$1,500.

When viewed in terms of what was charged and proved, the evidence required to prove each crime was sufficient to warrant a conviction for the other, with the inescapable result that the two crimes constitute one offense under Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). State v. Freeman, 153 Wn.2d at 777. The two convictions were the same in law and in fact, and because the legislature has not authorized separate punishment for the two crimes, double jeopardy bars Dooley's conviction for possession of stolen property in the first degree.

Of course, the "same evidence" test is not always dispositive. Burchfield, 111 Wn. App. at 897. This court may also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id.; State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). This merger doctrine is simply another way, in addition to the "same evidence" test, by which this court may determine

whether the Legislature has authorized multiple punishments. “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” *Id.* The question is whether there is clear evidence that the legislature intended not to punish the conduct at issue with two separate convictions. *Calle*, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms the element.” [Emphasis Added]. *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, the crime of possession of stolen property occurred in furtherance of the crime of trafficking in stolen property: The commission of the possession of stolen property was required to prove trafficking in stolen property, that is, that Dooley knew the property was stolen. Thus the lesser crime of possession of stolen property in the first degree was incidental to the greater crime of trafficking in stolen property in the first degree and merges into the greater. See *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005).

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02. THERE WAS INSUFFICIENT EVIDENCE THAT THE PROPERTY TRANSFERRED TO THE RECYCLING CENTER WAS EITHER STOLEN OR THAT DOOLEY WAS A PARTICIPANT.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

A conviction of first degree trafficking in stolen property requires the State to prove that the defendant or his or her accomplice transferred or disposed of the property to another knowing it was stolen. RCW 9A.82.050, .010(19). Stolen property is defined as “property that has been obtained by theft, robbery, or extortion.” RCW 9A.82.010(16). And a

person “knows or acts knowingly or with knowledge when: (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010(1)(b).

Here, there was insufficient evidence that the property transferred to South Sound Recycling was stolen or that Dooley was a participant. The State’s case was predicated on two thefts from BNSF, occurring on June 18 and 21, 2007. As demonstrated by State’s Exhibits 51-54, Dooley transferred property to the recycling center on four occasions, represented by three dates: June 4 (twice), 11 and 12, all occurring before the reported thefts of property from BNSF. [State’s Exhibits 51-54]. And the one transaction that occurred during the relevant period was the sale made by Vladeff to the recycling center on June 19. [State’s Exhibit 50]. But even here there is no evidence as to actually what was specifically transferred or where it came from or any indication that Dooley was either involved in this transaction, aware of it or in any way benefited from the transaction.

The evidence and reasonable inferences do not meet the test that any rational trier of fact, after viewing the evidence most favorably to the State, could have found beyond a reasonable doubt that the property transferred to the recycling center was either stolen or that Dooley was an

accomplice to the transfer made by Vladeff on June 19, with the result that his conviction for trafficking in stolen property in the first degree must be reversed and dismissed.

E. CONCLUSION

Based on the above, Dooley respectfully requests this court to reverse and dismiss his convictions and or to remand for resentencing consistent with the arguments presented herein.

Dated this 8<sup>th</sup> day of July 2008.

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STATE OF WASHINGTON  
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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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