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COURT OF APPEALS  
DIVISION II

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No. 37268-1-II

STATE OF WASHINGTON  
BY \_\_\_\_\_

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

LORN A. DOOLEY

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine A. Pomeroy, Judge  
Cause No. 07-1-01312-5

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BRIEF OF RESPONDENT

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## A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Dooley's convictions for possession of stolen property in the first degree trafficking in stolen property in the first degree violate double jeopardy.

2. Whether there was sufficient evidence to convict Dooley of trafficking stolen property in the first degree.

## B. STATEMENT OF THE CASE.

The State generally accepts the defendant's statement of facts.

## C. ARGUMENT

1. Dooley's convictions for possession of stolen property in the first degree and trafficking in stolen property in the first degree do not violate the constitutional prohibition against double jeopardy because the offenses are not the same in both law and fact.

The Washington constitution provides the same protection against double jeopardy as does the federal double jeopardy clause. *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007). Washington adheres to the "same evidence" rule first adopted in 1896. The "same evidence" test is similar to that articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). This rule controls unless the legislature clearly indicated that multiple punishments were not intended. *Womac*, 160 Wn.2d at 652.

The first tool of statutory construction is to inquire whether the offenses are the same both in law and in fact. If so, conviction for both offenses violates double jeopardy. *State v. Cole*, 117 Wn. App. 870, 875, 73 P.3d 411 (2003), (cites omitted). Thus, under the “same evidence test,” multiple crimes do not violate double jeopardy if they are not identical in both law and fact. See *id.* Crimes are not identical in law if each offense includes an element not included in the other, and proof of one does not necessarily also prove the other. *In re Percer*, 150 Wn.2d 41, 50, 75 P.3d 488 (2003).

If the crimes committed are not the same in law, “there is a strong presumption that the Legislature intended separate punishment for each offense, even if they are committed by a single act. *State v. Cole*, 117 Wn. App. 870, 875, 73 P.3d 411 (2003) (citing *State v. Calle*, 125 Wn.2d 769, 780, 888 P.2d 155 (1995)). Such presumption “should be overcome only by clear evidence of contrary intent.” *State v. Calle*, 125 Wn.2d at 780.

In *State v. Melick*, 131 Wn. App. 835, 129 P.3d 816 (2006), the court held that the defendant’s convictions for taking of a motor vehicle, and possession of stolen property did not violate double jeopardy. *Id.* at 840. After concluding that the legislature neither

expressly, nor impliedly authorized separate punishments for the crimes in question, the court applied the “same evidence test.” *Id.* at 839-40. In arriving at its holding, the court reasoned that the crime of taking a motor vehicle “requires that the offender have driven away a motor vehicle, which first degree PSP does not require. First degree PSP, on the other hand, requires that the property be over \$1,500 in value, which TMV does not require. The offenses are not the same under this test.” *Id.* at 840.

In this case, the “same evidence test” controls because there is no clear indication of the legislature’s intent in the statute. Applying the test, Dooley’s convictions for possession of stolen property in the first degree and trafficking in stolen property in the first degree do not violate double jeopardy because, as in *Melick*, proof of one offense does not also prove the other offense. That is, if the defendant trafficked in stolen property, it does not necessarily follow that the defendant is also guilty of possessing stolen property in the first degree. Conversely, if the defendant possessed stolen property in the first degree, it does not necessarily follow that the defendant also trafficked in stolen property. The two crimes with which Dooley has been convicted do not violate double jeopardy under the “same evidence test” because proof that the defendant

trafficked in stolen property, like taking of a motor vehicle, does not require that the property be worth over \$1,500. See RCW 9A.82.050. Thus, proof that Dooley trafficked in stolen property does not necessarily prove that Dooley also possessed stolen property in the first degree because Dooley could have trafficked in stolen property valued at an amount less than \$1,500. This is the same reasoning upon which the court in *Melick* relied in holding that proof of taking a motor vehicle does not also prove possession of stolen property. *Id.*

Furthermore, as was the case in *Melick*, proof of possession of stolen property does not necessarily prove the other crime with which the defendant was charged. Trafficking in stolen property requires that the defendant somehow be involved in the theft of property for the sale to others, or that the defendant knowingly traffics in stolen property. See RCW 9A.82.050. To “traffic” means to either dispose of stolen property, or possess with the intent to dispose of such property; see RCW 9A.82.010(19). To possess stolen property, on the other hand, it is sufficient for the defendant to retain or receive without the intent to dispose. See RCW 9A.56.140 (“dispose of stolen property” included in the definition of “possess stolen property, but subsection reads in the disjunctive,

and dispose is included along with receive, retain, or conceal provide *alternative* definitions.).

A similar analysis was undertaken by this court in its recent decision in *State v. Walker*, 143 Wn. App. 880, 181 P.3d 31 (2008). In that case, this court held that the defendant's two convictions for first degree theft and first degree trafficking in stolen property did not violate double jeopardy. *Id.* at 889. This court reasoned that the crimes contained unique elements in that "a person could steal (i.e., intend to deprive an owner) of its property without intending to sell or dispose of the property to a third party and could sell property to another knowing that it was stolen without having been the thief." *Id.* at 887. Because the crimes for which Dooley was convicted are not the same in law, this court should assume under *Cole*, that the legislature intended separate punishments for each offense. This presumption "should be overcome only by clear evidence of contrary intent." *Cole*, 117 Wn. App. at 875. In this case, no such evidence is present. In *State v. Valentine*, 108 Wn. App. 24, 29 P.3d 42 (2001), the court noted that the purposes of the pertinent statutes may be a source of such evidence. *Id.* (citing *Calle*, in which the court found no comparable intent in rape and incest statutes, and *State v. Birgen*, 33 Wn. App. 1, 14, 651 P.2d 240

(1982), in which the court found that statutory scheme intends one punishment for a single act of intercourse).

The State also notes this court's determination in *Walker*, that the defendant's convictions did not rest upon the "same evidence" in holding his convictions did not violate double jeopardy. *Walker*, 143 Wn. App. at 887. This court underwent the "same evidence" analysis after concluding that the offenses in question were not the same in law. In that case, the defendant was convicted at trial of first degree trafficking in stolen property, and first degree theft of stolen property. *Id.* at 883. This court, in concluding that the convictions were not the same in fact, reasoned that the State, in part relied on evidence that Walker had "recently sold cedar blocks to a nearby mill using a stolen cedar salvage permit," as well as his post-arrest statements to an officer in proving that the defendant trafficked in stolen property. *Id.* at 888. This court determined that the evidence relied on to prove trafficking, did not completely prove the crime of theft, nor did the evidence relied upon to prove that the defendant stole the cedar, also prove that he trafficked the stolen cedar. *Id.* The evidence establishing theft of the cedar included testimony of an Officer who witnessed the defendant splitting the cedar blocks, the conclusion that one of the

cedar trees had been cut down recently, and the fact that “Walker and his friends had a relatively sophisticated system for cutting and loading the cedar blocks. *Id.* at 888-89. According to this court, this evidence did not completely prove that the defendant trafficked in stolen property because he could have intended to keep it for his own personal use. *See id.*

This case is analogous to *Walker*. While it is less likely that the defendant could have been using the copper wire for his own personal use, it is true that the State, at least in part, relied on the defendant’s previous transactions with South Sound Recycling to establish his intent to sell, or traffic the stolen items. This evidence was separate from the evidence, including testimony of the black car at BNSF on the day of the theft and the BNSF property located at Dooley’s co-defendant’s residence, used to prove that the defendant possessed stolen property in an amount greater than \$1,500.

Given that under *Melick*, the two offenses in this case have different elements, there must be clear evidence to rebut the presumption that the legislature intended to authorize separate punishments. Such evidence is neither present in the case law, nor is it apparent from the statutory code. Indeed, the Supreme Court of

Washington noted that our state courts have only “occasionally found a violation of double jeopardy *despite* a determination that the offenses involved clearly contained different legal elements.” *State v. Womac*, 160 Wn.2d at 652 (See e.g., *State v. Johnson*, 92 Wn.2d 671, 679-80, 600 P.2d 1249 (1979) (applying merger doctrine); *State v. Potter*, 31 Wn. App. 883, 887-88, 645 P.2d 60 (1982)).

Therefore, the presumption that the legislature intended to authorize separate punishments is not overcome in this by overwhelming evidence and the convictions do not violate double jeopardy given that (1) the legislative intent is unclear in the statute, (2) the offenses are clearly distinct as a matter of law, and (3) the State relied, at least in part, on separate evidence to establish trafficking and possession.

Dooley also argues that an application of the merger doctrine “is another means by which this court may determine whether the Legislature has authorized multiple punishments,” and that the possession of stolen property in the first degree was incidental and merges into trafficking in stolen property. Appellant’s brief at 10. However, the merger doctrine applies when, as this court correctly stated, “the degree of one offense is raised by the

conduct that the Legislature has separately criminalized.” *State v. Leming*, 133 Wn. App. 875, 890, 138 P.3d 1095 (2006). Merger “only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime...the State must prove not only that a defendant committed that crime... but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes.” *Id.*

In *State v. Freeman*, 153 Wn.2d 765, 778, 108 P.3d 753 (2005), which the defendant cites, second degree assault merged with first degree robbery where the State had to prove assault in furtherance of the robbery in order to prove first degree robbery. This case can be distinguished from *Freeman* because, as previously stated, the State need not prove possession of stolen property in the first degree in order to prove trafficking in stolen property in the first degree. Dooley could have knowingly trafficked in stolen property in an amount less than \$1,500, and therefore, not possessed stolen property in the first degree.

Thus, Dooley’s convictions for possessing stolen property in the first degree and trafficking in stolen property in the first degree do not merge because it was not necessary for the State to prove that the defendant possessed stolen property in the first degree to

prove that he trafficked in stolen property in the first degree. Furthermore, Dooley's two convictions do not violate the constitutional prohibition against double jeopardy because they are not the same in law and fact. If this court holds that Dooley's convictions violate double jeopardy, the proper remedy is for this court to vacate the lesser of the two sentences.

2. There was sufficient evidence at trial to support Dooley's conviction of trafficking stolen property in the first degree.

When viewed in the light most favorable to the prosecution, the evidence establishes that any rational trier of fact could find Dooley guilty of trafficking stolen property in the first degree. Dooley was clearly engaged with co-defendant Vladeff in an on-going operation to sell aluminum and copper for money. Even if the evidence is insufficient to establish that Dooley specifically sold property stolen from BNSF on June 18 and 21 to the South Sound Recycling center, a rational trier of fact could find beyond a reasonable doubt that Dooley possessed or obtained control of stolen property with the *intent* to sell or dispose of stolen property.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the respondent. *Id.* at 201. Also, circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Furthermore, this court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Lastly, it is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

A person who is guilty of trafficking in the first degree is one who “organizes, plans, finances, directs, manages, or supervises theft of property for sale to others, or who knowingly traffics in stolen property.” RCW 9A.82.050(2). “Traffic” means to “sell, transfer, distribute, dispense, or otherwise dispose of stolen

property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell transfer, distribute, dispense, or otherwise dispose of the property to another person.” RCW 9A.82.010(19). Contrary to Dooley’s assertion, there was sufficient evidence presented at trial such that any rational trier of fact could have found Dooley guilty of trafficking stolen property in the first degree.

In this case, evidence presented at trial demonstrated that on June 21, 2007, Dooley was seen by Officer Brenna with his shirt off, walking away from the site where the copper wire was burned. RP at 213. Dooley was then picked up by his co-defendant, Vladeff, who was driving a dark El Camino, the same type of car spotted at BNSF in the early morning hours of June 18<sup>th</sup> with a controller box in the back. That day, two controller boxes were reported missing. When picked up by the officer on the 21<sup>st</sup>, Dooley had small scratches on his arms and there was black soot all over his hands and arms. RP at 55. The officer later interviewed the defendant and smelled the odor of smoke on him. RP at 223. At the burn site there were thousands of feet of copper wire with black sheathing. RP at 56. This was identified as the same copper wire stolen from BNSF on June 21<sup>st</sup>. RP at 209.

There were two thefts of BNSF property on June 18 and 21, and four separate times Dooley sold property to the recycling center. Three times the transfers took place before the 18<sup>th</sup> of June, and the fourth time the transfer occurred the day after the first theft from BNSF. State's exhibits 50-54. On co-defendant Vladeff's property, a come-along and bolt cutters were found by Officer Brenna. RP at 65 ("a come-along is a tool used to winch things, pull things closer to a location. It can be used...to pull wire); RP at 232-34. Also, padlocks securing the fence at BNSF were missing after the burglary. RP at 26. Additionally, a trail led from the burn-site to the house. There was testimony that Vladeff indicated to Officer Brenna that the "oversized doghouse" was brought to his house sometime in the days before the 21<sup>st</sup> by an individual to whom Vladeff occasionally lent his El Camino. RP at 240-41. A portion of the aluminum that was obtained from the item was taken to South Sound Recycling and sold. RP at 241. Also, Officer Weiks testified that the defendant told him he was staying at Vladeff's residence on and off.

This evidence establishes beyond a reasonable doubt that Dooley was guilty of possession of stolen property, and trafficking in stolen property. By examining the evidence, any reasonable juror

could conclude that Dooley not only possessed, but trafficked stolen property as well. The evidence that Dooley smelled of smoke and was covered in black soot overwhelmingly establishes that Dooley was involved in the burning of the black sheathing off the copper wire that was stolen from BNSF earlier that day. The reasonable inference from the fact that Dooley was burning the sheathing off the copper wire that had just recently been stolen was that he was preparing it so that it could be sold to South Sound Recycling. Officer Stahle testified that burning insulation off of copper wire is “not something you normally see” and “most people, if the wire is stolen, they get more for raw product than they do for insulated stuff, and burning it is a faster way of getting rid of it than stripping it by hand.” RP at 114. Furthermore, Dooley has a history of transacting with South Sound Recycling. As late as June 12<sup>th</sup> Dooley sold aluminum and insulated copper wire to the recycling center, and Dooley transferred property on three other occasions as well. Because the evidence establishes a connection between Vladeff and Dooley, and because they both sold property to South Sound Recycling on multiple occasions within a week or two of the BNSF thefts and the burning of the copper wire, it is reasonable to

conclude that the defendants were involved in on-going criminal activity that consisted of trafficking in stolen property.

The evidence also establishes that Dooley acted in concert with his co-defendant Vladeff, considering (1) the close proximity of the burn site to Vladeff's residence, (2) the trail leading from the residence to the burn site, (3) the fact that Vladeff picked up Dooley in the black El Camino, and (4) the testimony that a friend to whom he often lent the El Camino sold part of an "oversized doghouse" to the recycling center around the same date that the controller boxes were seen in the El Camino.

Each piece of evidence, if examined in isolation, may not be able to convince a juror beyond a reasonable doubt that the defendant is guilty of trafficking stolen property. However, the totality of the evidence is overwhelmingly sufficient for *any* reasonable juror to conclude that defendants Vladeff and Dooley were actively involved in an operation whereby they sold stolen property to the South Sound recycling center for money.

Dooley contends that "there was insufficient evidence that the property transferred to South Sound Recycling was stolen or that Dooley was a participant." Appellant's brief at 12. The State contends that there is sufficient evidence for a rational trier of fact

to find that stolen property was sold to South Sound Recycling Center because evidence demonstrated that Vladeff made a sale to the recycling center around the same time that the controller boxes were stolen, and Vladeff received the “oversized doghouse” from a friend. RP at 241. Moreover, Dooley fails to acknowledge that he may have trafficked in a stolen item without having sold it to the recycling center. A defendant may traffic a stolen item if he or she is to “buy, receive, possess, or obtain control of stolen property, with intent to sell transfer, distribute, dispense, or otherwise dispose of the property to another person.” RCW 9A.82.010(19). Thus, the defendant may fulfill the statutory requirements by simply possessing stolen property with the *intent* to dispose of such property. A reasonable trier of fact will conclude that Dooley had such intent after examining the substantial evidence demonstrating that Dooley (1) was actively involved in burning the sheathing off of copper wire stolen from BNSF so as to prepare it to be sold; and (2) had a history of sales of aluminum and copper to South Sound Recycling.

#### D. CONCLUSION.

The State respectfully asks this court to affirm Dooley’s convictions for possession of stolen property in the first degree and

trafficking in stolen property in the first degree. Such convictions were supported by sufficient evidence at trial, and they do not violate the constitutional prohibition against double jeopardy.

Respectfully submitted this 5<sup>th</sup> of September, 2008.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, No. 37268-1-II, on all parties or their counsel of record on the date below as follows:

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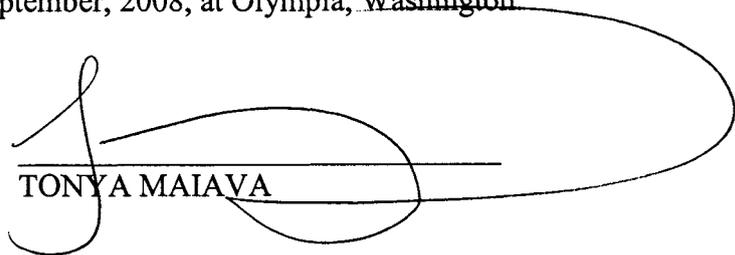
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DIVISION II

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

Dated this 5<sup>th</sup> day of September, 2008, at Olympia, Washington

  
\_\_\_\_\_  
TONYA MAIAVA