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A. ASSIGNMENTS OF ERROR

1. The introduction of expansive evidence of offenses for which appellant Jeffrey McPhee was acquitted violated the doctrine of collateral estoppel under the Fifth Amendment and the principles of fundamental fairness protected by the right to due process of law.

2. The State violated the state and federal constitutional double jeopardy provisions when it retried McPhee for possession of a Remington shotgun and Enfield rifle.

3. The trial court erred in not dismissing both counts of possession of a stolen firearm because the State failed to establish the *corpus delicti* for the offenses independent of McPhee's admissions to the police.

4. There was insufficient evidence to convict McPhee of possession of stolen firearms as alleged in Count I and Count II of the second amended information.

5. McPhee's constitutional right to effective assistance of counsel was violated.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The doctrines of collateral estoppel and fundamental fairness bar a prosecution in which the accused is required to relitigate matters for

which he had been acquitted. Did the State's reliance on evidence of residential burglary and possession of stolen firearms, crimes for which McPhee was acquitted in a preceding trial, to prove matters that were inherent in the jury's verdict acquitting him violate collateral estoppel and fundamental fairness? Assignment of Error 1.

2. Whether McPhee was twice put in jeopardy for possession of a stolen firearm—a Remington shotgun and an Enfield rifle—where he was previously acquitted of possession of stolen firearms—a Benneli shotgun and Weatherby rifle—where the latter two weapons were acquired under identical circumstances as the Remington shotgun and Enfield rifle? Assignment of Error 2.

3. Whether the State failed to establish the *corpus delicti* for the offense of possession of a stolen firearm as alleged in Counts I and II? Assignment of Error 3.

4. Absent McPhee's statements to law enforcement, was the evidence presented at trial sufficient to convict McPhee of possession of a stolen firearm? Assignment of Error 4.

5. Was McPhee's constitutional right to effective assistance of counsel violated when counsel failed to object to the relevancy of evidence

of the burglary of Miller's house, from which the weapons were obtained, and where McPhee had previously been acquitted of the Miller burglary? Assignment of Error 5.

C. STATEMENT OF THE CASE

1. Procedural history:

Jeffrey McPhee [McPhee] was charged by amended information filed in Pacific County Superior Court on June 8, 2007, with one count of residential burglary, four counts of possession of stolen firearms, and one count of possession of stolen property in the second degree. Clerk's Papers [CP] at 1-4.

Trial to a jury began on November 27, 2007. On November 29, 2007 the jury found McPhee not guilty of residential burglary and not guilty of two counts of possession of a stolen firearm. CP at 5. The latter two counts pertained to a Weatherby rifle (Count II) and a Benneli super 90 shotgun (Count III). Supplement Clerks Papers at 255, 256. The remaining verdict forms for two counts of possession of a stolen firearm, two counts of possession of stolen property, and a lesser included count of possession of stolen property in the third degree, were left blank. CP at 5. After the jury was dismissed the State moved for mistrial regarding the two counts of

possession of stolen firearms and second degree possession of stolen property (Counts IV, V, and VI of the amended information). An order declaring a mistrial was entered December 28, 2007. CP at 11.

McPhee was charged by second amended information on March 17, 2008 with two counts of possession of a stolen firearm¹, contrary to RCW 9A.56.310(1),² and one count of possession of stolen property in the second degree. CP at 107-09. Counts I and II in the second amended information were the same allegations contained in Count IV and Count V in the amended information filed prior to the first trial on June 8, 2007. CP at 3, 107-09.

Defense counsel moved to suppress evidence as a result of the traffic stop of the pickup truck in which MCPhee was a passenger. The court entered a Memorandum Decision denying the motion on September 20, 2007. Second Supp. CP at 257. The court heard an additional motion to suppress pursuant to CrR 3.5 and CrR 3.6 on July 13, 2007. The court found that the detention of MCPhee following the traffic stop by members of law enforcement on February 9, 2007 was lawful, that MCPhee was properly advised of his constitutional rights, that he knowingly, intelligently, and

¹Count I of the second amended information pertains to a Remington shotgun, Count II pertains to an Enfield rifle. CP at 107-09.

²RCW 9A.56.310(1) states:

A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers,

voluntarily waived those rights and agreed to talk to police, and that his statements to police were therefore admissible. The court also found that the seizure of the two firearms, a pair of binoculars, and pair of tusks from the back of a pickup truck stopped by police on February 9, 2007 was lawful. Findings of Fact and Conclusions of Law were entered on March 18, 2008. CP at 167-72.

Trial to a jury on the charges of possession of stolen firearms and second degree possession of stolen property as alleged in the second amended information commenced March 17, 2008, the Honorable Michael Sullivan presiding.

Defense counsel moved in limine to exclude statements McPhee made to Pacific County Deputy Sheriff Daree Smith that McPhee told him “I know I’m in a lot of trouble and I want to cooperate,” and his statement that he “bought the guns from a guy named Bill who lives in Ilwaco [Washington],” that he had talked to Bill about a house where he had been working, that he had seen guns and a big screen television in the house, and that about a week later Bill showed him the guns, binoculars, and a set of tusks that he had for sale. 1RP at 4. Counsel argued that Deputy Smith would testify that McPhee said he knew about the Miller house because he had been there when he was working for Steve Neva at the house next door,

sells, or is in control of a stolen firearm.

and was looking for a place to hook up a water hose. 1RP at 7. Defense counsel argued that McPhee's statements to Deputy Smith were strong evidence that McPhee knew the guns were stolen and that this would be seen in conjunction that McPhee was working at a construction site next to the Miller house, where the burglary had occurred, a crime for which he had been previously acquitted. 1RP at 6-7. McPhee's counsel argued that the statements would lead the jury to the conclusion that McPhee had an integral part in a burglary: that he had told Bill about the house and that Bill had committed the burglary and then provided the stolen items to McPhee. 1RP at 13. Counsel noted that the testimony from the first trial was that the weapons were not visible from outside the house, "so the State's going to have to make the argument that our—the only way our client would have had knowledge about these weapons is to have been inside the house." 1RP at 16. Judge Sullivan ruled that the statements were admissible and issued the following limiting instruction prior to opening statements:

Testimony has been introduced that the home of Ronald Miller was burglarized and that four firearms were taken, in addition to a pair of field binoculars and some tusks. This evidence has been introduced solely for the limited purpose of determining whether or not these items were in fact stolen from Ron Miller's residence. You should not consider this testimony for any other purpose.

Further, any testimony you hear regarding any statements made by the defendant or any other

witness, regarding any firearms or Ronald Miller's home, has been introduced solely for the limited purpose of determining whether the defendant had knowledge that the two firearms named in Counts I and II were stolen.

You are further advised that during the previous court trial the jury found the defendant not guilty of committing the burglary at Ronald Miller's residence. Further, the jury also found the defendant not guilty in the same trial of possessing two other firearms, the Weatherby rifle and the Benelli shotgun. The fact that the jury found the Defendant not guilty of the three offenses mentioned above must not be considered by you in reaching a verdict in this case. Further, in the course of your deliberations you must not re-consider these three not guilty verdicts reached by the prior jury.

1RP at 17-26. CP at 156.

Defense counsel agreed to the wording of the limiting instruction.

1RP at 26.

Following the State's case-in-chief, defense counsel moved to dismiss the case upon failure to establish *corpus delicti*. 2RP at 71. Counsel argued that the entirety of the case was based on McPhee's statements and that the State presented no independent evidence establishing guilt. 2RP at 71. The court denied the motion, ruling that there was sufficient evidence to support *corpus delicti*—that McPhee showed the police where the guns were and therefore it can be inferred that he had knowledge of them.³ 2RP at 80,

³The trial court's ruling is not supported by the testimony, which is that McPhee was

81. McPhee assigns error to court's ruling denying the motion to dismiss and the court's interpretation of the testimony. McPhee submits that the evidence shows that McPhee was taken by Dale McGinnis, Steve Neva, and David Kochis against his will to a location off of Sandridge Road in Long Beach, Washington, that the men got two guns, a pair of binoculars, and a set of tusks from the brush, and put them in McGinnis' pickup truck. 1RP at 40, 41. Police arrived as the two vehicles containing the men went back down the road to get back to Sandridge. 1RP at 43.

The defense moved to dismiss Count III, pertaining to the tusks and binoculars, and the court granted the motion. 2RP at 88. The court denied the State's motion to amend Count III to possession of stolen property in the third degree. 2RP at 89.

No objections or exceptions to the court's instructions to the jury were made. 2RP at 132.

The jury returned a verdict of guilty to the charge of possession of stolen firearms as alleged in Counts I and II. CP at 160, 161.

The matter came on for sentencing on April 4, 2008. Judge Sullivan found that the two offenses involved the same criminal conduct under RCW 9.94A.589. CP at 212. The court sentenced McPhee within the standard

confronted by Neva, McGinnis, and Kochis, and was driven to another location where McPhee had placed two guns. The testimony shows that the police were called by Miller, and that the police arrived at the scene as the two vehicles the men used to get the guns were leaving the area where the guns had been placed by McPhee. 1RP at 70.

range. 3RP at 29; CP at 216.

Timely notice of appeal by the defense was filed on April 4, 2008. CP at 224. The State filed a cross–appeal on April 18, 2008, regarding the trial court’s decision to dismiss Count III and the court’s ruling denying the State’s motion to amend Count III from possession of stolen property in the second degree to possession of stolen property in the third degree. CP at 228-243.

This appeal follows.

2. Trial testimony:

Pacific County Sheriff’s Office received a report of a burglary at the residence of Ronald Miller, located on the Long Beach Peninsula on January 29, 2007. 1Report of Proceedings [RP] at 56, 58. Police determined that four weapons, a pair of spotting binoculars and a set of ivory tusks were taken from Miller’s house. 2RP at 20. Miller testified that when he returned from an overnight trip on January 29, 2007, he discovered that the binoculars and four guns were missing from his house. 1RP at 56, 57. He said the guns that were missing were a Remington automatic shotgun, a Benelli shotgun, an Enfield military rifle, and a hunting rifle with a scope. 1RP at 57. One or two weeks later he realized that a set of ivory tusks were also missing. 1RP at 59.

He stated that he has a large television in his living room. 1RP at 58.

Approximately a week after the burglary Miller placed an advertisement in *The Chinook Observer* in which he listed the missing items and offered a reward for the return of the items. 1RP at 64, 2RP at 21, Miller stated that a few days after placing the ad, he was contacted by David Kochis. 1RP at 66. He gave Kochis a \$500 reward. 1RP at 66. He then contacted Steve Neva, who had previously done work on a house located next to Miller's house. 1RP at 67. Miller arranged to meet with Neva and Kochis, and then they met Dale McGinnis, whom Miller had known for many years. 1RP at 68. Miller called detective Daree Smith of the Pacific County Sheriff's Department and told him "who was involved" based on his conversation with Neva and Kochis and "the likely way of getting the stuff[.]" 1RP at 70. He stated that he kept Smith "in the loop as far as what we were up to there." 1RP at 70. Miller called Det. Smith on February 9, 2007 and told him that "we were en route to try to recover the stolen items and he went—he went there too." 1RP at 70.

On February 9, McGinnis, Neva, and Kochis went to McPhee's girlfriend's house in order to get the guns that belonged to Miller. 1RP at 38, 48. McGinnis stated that it was an organized plan to go to her house to

obtain the guns. 1RP at 48. He said that the two other men who went with them to the house were “a couple of young kids . . .” 1RP at 51.

McGinnis had known Miller for about twenty years. 1RP at 36. He also was friends with Steve Neva. 1RP at 37. McGinnis testified that he went there “to go see if I could look at the guns and claim them for Ron [Miller].” 1RP at 38. McGinnis drove a red pickup truck, following Neva, and Kochis and McPhee in a second vehicle. 1RP at 40, 41. McGinnis stated that McPhee showed Neva and Kochis where the guns were located and he saw them lifting the items out of the brush. 1RP at 41. They put the guns, binoculars, and tusks in the back of McGinnis’ pickup truck. 1RP at 42, 43. McGinnis said that McPhee was one of the men who was carrying the items from the brush. 1RP at 42. McGinnis said that he participated in this because Ron Miller is a friend and “his guns were stolen and had an opportunity to get ‘em back for him so I was doing what I could do.” 1RP at 46.

On February 9, 2007, police stopped McGinnis’ red pickup truck and silver SUV as the vehicles were on 67th Street, which is off of Sandridge. 1RP at 76, 78. Deputy Clark stated that he had been dispatched to the area, and that “they were going to call when they were coming out.” 1RP at 77.

The deputy stated that he had just arrived in the area of 67th when he received a call from dispatch that the vehicles were on the way out. 1RP at 78. McPhee, who was a passenger in the silver SUV, was ordered out of the vehicle at gunpoint by Deputy Larry Cark of the Pacific County Sheriff's Office. 1RP at 80; 2RP at 9. Deputy Clark stated that when the vehicles were stopped, Kochis was driving the silver SUV, which was traveling behind the red pickup truck. 1RP at 80. McGinnis was the driver of the red truck, and Neva was a passenger in that vehicle. 1RP at 80, 81.

Police obtained a shotgun, a rifle, binoculars and tusks from the back of the pickup truck. 1RP at 80, 2RP at 39. The serial numbers on the two weapons matched serial numbers provided by Miller. 2RP at 39, 42.

Deputy Clark read McPhee his constitutional warnings. 1RP at 83. McPhee told police that he had bought the weapons from an individual named Bill and that he was living out of his car. 2RP at 13, 29. He stated that he bought the guns for \$100 from a man named Bill. 2RP at 29. He stated that he had told Bill about a place he had been working next to and that house had guns in it. 2RP at 30. He stated that he saw Bill about a week later, and that at that time he had four guns, a set of tusks, and binoculars that he wanted to sell. 2RP at 30. He told Bill that he was not interested in the

guns or binoculars, but that he would buy the tusks because he thought he could resell them for a profit. 2RP at 30. He said that Bill told him that it was take all the items or none of them and that he would not sell the tusks individually, so he bought all of the items for a total of \$100. 2RP at 30. Detective Smith stated that McPhee said that he “kind of knew” that the items were stolen, but that he thought he could buy the material and resell it for a profit. 2RP at 32. Deputy Smith said that he said that “I knew they were stolen and it was just kind of a stupid thing to do.” 2RP at 32. McPhee told Smith that he hid the items in the bushes and that he said that he didn’t have room in his car and that his girlfriend wouldn’t allow guns in the house. 2RP at 35, 36. Deputy Smith also said that McPhee said that he hid the guns because he thought they were stolen. 2RP at 37.

Det. Clark stated that after McPhee was arrested and given his warnings, McPhee stated: “I know I’m in trouble but I want to cooperate.” 1RP at 84. He stated that he asked McPhee if it seemed strange that he could buy the items for \$100.00, and that he said “[w]ell, I figured they were stolen but I figured I could sell them for more that I paid for them.” 1RP at 85.

McPhee testified that he bought tusks, a pair or binoculars, and four guns from someone named Bill. 2RP at 104. He was sleeping in his car in

Ilwaco and he had very little money. 2RP at 105. He stated that Bill said that the items belonged to his brother, that he had them in the back his truck and asked McPhee if wanted to buy them. 2RP at 106. McPhee stated that he was only interested in the tusks. 2PR at 106. Bill told him that he was leaving town and wanted to get rid of the remainder of the contents of his brother's storage unit, so it was take it all or take nothing. 2RP at 107. Bill told him he would accept \$100.00 for all of the items. 2RP at 107. McPhee took the guns and planned to take them to his friend Nick Herrick's house to determine what he should do with them. 2RP at 108. He showed Herrick the guns and then stated that

[T]hey were interested in the guns but were concerned—they were interested in the guns but were concerned that they might have been stolen or used in a crime and that it would be customary to contact the Sheriff's Department and ask if they had been stolen and used in a crime and hand over the serial numbers, so we made plans to do that and Nick contacted the Sheriff's Department.

2RP at 109.

McPhee stated that the telephone call to the Sheriff's Department was not returned. 2RP at 109. McPhee left one gun with Herrick and one with Jeremy Baker. 2RP at 115.

After McPhee took the guns to Herrick, he needed a place to keep the

two guns he had.⁴ McPhee said girlfriend wouldn't let him keep the guns at her apartment, so he planned on storing them in a trailer that belonged to a friend named Jason, who was out of town at the time. 2RP at 110. McPhee stated that Jason was out of town and he was the only one who had a key to the trailer. 2RP at 113. He wrapped the guns in plastic and placed them approximately 20 to 30 yards from Jason's trailer, next to the driveway on 67th Street. 2RP at 110, 111. McPhee stated that he placed the guns near the trailer because the area around the trailer had been cleared, so he took them to the edge of the clearing where there was a large stump. 2PR at 114.

McPhee was confronted at his girlfriend's house by McGinnis and Neva and told that the guns were stolen. 2RP at 114, 116. He told them that he didn't know that they were stolen and offered to take them to the location on 67th to pick up the weapons. 2RP at 115. He stated that they "forced [him] more or less, into their vehicle, which was a silver Four Runner."⁵ 2RP at 116-17. McGinnis pulled in behind the vehicle and they went to 67th. 2RP at 117. He led them down the driveway, and Neva, Kochis, and another man named Steven Edwards picked up the material and put it in McGinnis' truck. 2RP at 117. He stated that he did not carry any of the items and that "[t]hey

⁴ These were the Remington shotgun and Enfield rifle.

⁵ The record does not indicate that this resulted in charges against any of the men.

didn't want me touching any of it." 2RP at 117. The vehicles were stopped by police as they left the area and he was arrested. 2RP at 118.

McPhee told police that he first became aware that the guns were stolen when he was confronted the morning of February 9 by the men who went to his girlfriend's house. 2RP at 119. He stated he had not hidden the guns, and that he was planning to place them in the trailer when Jason, the owner of the trailer, returned the next day. 2RP at 120.

D. ARGUMENT

1. **COLLATERAL ESTOPPEL AND PRINCIPLES OF FUNDAMENTAL FAIRNESS BAR THE STATE FROM FORCING McPHEE TO RELITIGATE THE CHARGE OF RESIDENTIAL BURGLARY FOR WHICH HE WAS PREVIOUSLY FOUND NOT GUILTY.**

- a. **Collateral estoppel forbids the State from forcing a party to relitigate an issue when that issue was already decided against the State.**

The doctrine of collateral estoppel is a component of the Fifth Amendment's protection against double jeopardy, applicable to the states through the Fourteenth Amendment. *Ashe v. Swenson*, 397 U.S. 436, 443, 25 L.Ed.2 469, 90 S.Ct. 1189 (1970); *State v. Dupard*, 93 Wn.2d 268, 272-3, 609 P.2d 961 (1980). Because it is of constitutional magnitude, a claim of

former jeopardy premised on collateral estoppel may be raised for the first time on appeal.⁶ *State v. Kassahun*, 78 Wn.App. 938, 948, 900 P.2d 1109 (1995); RAP 2.5(a)(3).

Collateral estoppel means simply that “when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties.” *Ashe*, 397 U.S. at 442. When a person has been acquitted of criminal charges, the State cannot force him or her to relitigate that prior case.

An examination of the facts in *Ashe* and *United States v. Dowling*, 493 U.S. 342, 110 S.Ct.668, 107 L.Ed.2d 708 (1990), are useful in explaining the doctrine. *Ashe* allegedly participated in the robbery of six people during a poker game, and was charged with six separate counts of robbery. *Ashe*, 397 U.S. at 439. The prosecution first tried *Ashe* for one count of robbery against one of the poker players, and *Ashe* was acquitted due to insufficient evidence of his identity as one of the robbers. *Id.* In a second trial for robbery against another one of the poker players, the prosecution offered stronger identity testimony and *Ashe* was convicted. *Id.* at 440. *Ashe* never disputed that the

⁶Defense counsel opposed the State’s motion for mistrial of the first trial, arguing that the State is barred from retrying *McPhee* by prosecution of the double jeopardy clauses of the State and Federal constitutions, and by operation of the doctrine of collateral estoppel. CP at 5-10.

robbery occurred, only that he was not one of the robbers. *Id.* at 445. Since the first jury's verdict could only have rationally been based on the lack of proof of Ashe's identity as one of the robbers, the first verdict estopped the State from prosecuting Ashe on any of the remaining five counts. *Id.* at 446.

In *Dowling*, the defendant was charged with committing a bank robbery in which the robber wore a ski mask and carried a small pistol. 493 U.S. at 344. The prosecution introduced evidence that two weeks after this robbery, Dowling had entered a woman's home wearing a mask and carrying a small handgun, in order to prove Dowling's identity as the bank robber under Fed. E. Rule 404(b).⁷ *Id.* at 345. Dowling had been acquitted of burglary and attempted robbery offenses related to this other incident. *Id.* at 344-45. Dowling objected to testimony about the burglary incident on grounds of double jeopardy, collateral estoppel, and fundamental fairness. The trial court admitted the evidence but, immediately after the witness testified and during final jury instructions, the court told the jurors that Dowling, "had been acquitted of robbing Henry [the complainant in the

⁷ Fed. E. Rule 404(b) provides, Other crimes, wrongs, or acts. 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. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

burglary incident], and emphasized the limited purpose for which Henry's testimony was being offered." *Id.* at 350-52. During the burglary trial Dowling had not disputed the fact that he entered the home, but instead argued that no robbery occurred. *Id.* at 351. Since identity was not necessarily the issue on which the not guilty verdict rested, evidence relating to the burglary was not barred by collateral estoppel. *Id.* at 348. There is a lower standard of proof to admit ER 404(b) evidence, and a not guilty verdict does not necessarily mean the prosecution could not prove a fact by a preponderance of the evidence. *Id.* Finally, the *Dowling* Court rejected the fundamental fairness argument, because "[e]specially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of Henry's testimony merits this kind of condemnation." *Id.* at 352.

Consistent with other courts, Washington applies four requirements to trigger collateral estoppel:

(1) the issue decided in the prior adjudication must be identical with the one presented in the second; (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation; and (4) application of the doctrine must not work an injustice.

Harrison, 148 Wn.2d at 561.

Courts decide issues of fundamental fairness under the due process

clause by determining “whether the introduction of this type of evidence is so extremely unfair that its admission violates ‘fundamental conceptions of justice.’” *Dowling*, 396 U.S. at 352 (quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)).

Collateral estoppel and fundamental fairness principles operate in the case at bar to preclude the prosecution from relying upon substantial evidence of a residential burglary and the two counts of possession of a stolen firearm in which McPhee was acquitted of being complicit.

b. Here, the court should have barred the State from forcing McPhee to defend himself against allegations of which he was already acquitted.

The jury verdict in the prior case firmly decided the issue for which the prosecution sought to use the evidence in the case at bar. The prosecution charged McPhee with the following crimes against Miller in the first trial: residential burglary, four counts of possession of stolen firearms, and one count of possession of stolen property in the second degree. CP at 1-4. In the prior trial, the State alleged that McPhee participated in the burglary, but the jury found McPhee did not commit burglary of Miller’s house. Yet in the case at bar, the State used knowledge of the whereabouts of the weapons

to prove McPhee had knowledge that the weapons were stolen. While the jury's not guilty verdict was a general verdict, it could only have rested upon McPhee's lack of participation in efforts by others to burglarize Miller. Thus, the prosecution was estopped from using the same evidence against McPhee in the case at bar for a purpose already decided in McPhee's favor. By operation of the collateral estoppel rule, the State is barred from introducing evidence at trial of McPhee's knowledge that the two weapons were stolen. In order to prove the crimes of possession of stolen firearms, the State needed to prove that McPhee possessed, carried, delivered, sold or was in control of a stolen firearm, and that he acted with knowledge that the firearms had been stolen, and that he withheld or appropriated the firearm to the use of someone other than the true owner. WPIC 77.13. Using *Ashe* as a model, the trial court erred by not finding which ultimate facts were determined by the jury to enable it to acquit McPhee of residential burglary and the other two counts of possession of a stolen firearm. From the evidence presented during the second trial, it is clear that McPhee briefly possessed the Enfield rifle and Remington shotgun at the same time and manner as the other guns charged in the first trial, for which he was acquitted. McPhee, in fact, testified that he left the firearms referenced in Counts II and III of the amended information

with other people prior to putting the two remaining weapons in the brush off 67th. 2RP at 116. Thus the acquittals were almost certainly based on the State's failure to prove knowledge. In order for the State to establish the facts charged in Count I and II of the second amended information, the State must again make a showing that McPhee had knowledge that the firearms were stolen. Because counts I and II are identical charges with identical elements as those in counts IV and V of the second amended information, the preclusion effect of collateral estoppel bars the State from relitigating the issue of knowledge as to counts I and II. Furthermore, because the jury rejected the State's theory proposed in the first trial that McPhee committed residential burglary of Miller's house and therefore knew that he was in possession of stolen weapons, the State was estopped from presenting evidence that a burglary occurred to establish that McPhee had or should have had knowledge that the guns were stolen. The Limiting Instruction provided to the jury at the beginning of the case [CP at 156] as well as the testimony of Miller, who described the burglary of his house, substantial evidence that a burglary occurred.

The trial court did not weigh the fact of McPhee's acquittal in assessing the unfairly prejudicial impact of the testimony regarding the

burglary, as discussed below. It is unacceptable for a jury to rely upon evidence of crimes of which a person has been acquitted to draw inferences that McPhee was culpable here. It was fundamentally unfair to prosecute him based upon evidence of his complicity in another crime and force him to defend himself against conduct of which he had been acquitted. Therefore, because McPhee's possession of the Remington shotgun and the Enfield rifle contemporaneously throughout the times as alleged in the amended information, and because the State had a full and fair opportunity to fully litigate the issue in the first trial, the resulting general verdict reached by the jury regarding residential burglary and possession of the Weatherby rifle and Bellini shotgun, which had to be based upon the "knowledge" element, estopped the State from presenting evidence of McPhee's knowledge as to the charges in Counts I and II.

Moreover, the facts of *Ashe* clearly apply to this case regarding Counts I and II. In *Ashe*, he was charged with six separate counts of robbery.

Ashe, 397 U.S. at 439. He was first tried for one count of robbery against one of the poker players, and Ashe was acquitted due to insufficient evidence of his identity as one of the robbers. *Id.* In a second robbery trial against another one of the poker players, Ashe was convicted. *Id.* at 440. The Court

found that the first jury's verdict could only have rationally been based on the lack of proof of Ashe's identity as one of the robbers, the first verdict estopped the State from prosecuting Ashe on any of the remaining five counts. *Id.* at 446. Here, McPhee was charged in the amended information with four counts of possession of a stolen firearm, all allegedly acquired at the same time, place, and manner. The four weapons in dispute were a Weatherby rifle (Count II), a Benneli super 90 shotgun (Count III), a Remington shotgun (Count IV), and an Enfield rifle (Count V). CP at 1-4. He was acquitted of possession of the Weatherby rifle and Benneli shotgun. SCP at 255, 256. The first jury's verdicts in Count II and Count III acquitting McPhee could only have been based on his lack of knowledge that they were stolen, since he did not deny that he had possessed the guns when he bought them from Bill. The first verdict therefore estopped the State from prosecuting McPhee on the remaining two counts pertaining to the Remington shotgun and Enfield rifle. See, *Ashe* at 446.

c. Reversal is required.

The admission of substantial evidence that McPhee had knowledge of burglary of which he had been acquitted and the prosecution of McPhee for possession of the Remington and Enfield weapons violated the doctrine of

collateral estoppel and was fundamentally unfair. As an error of constitutional magnitude, reversal is required unless the prosecution proves beyond a reasonable doubt it was harmless. *Chapman v. California*, 386 U.S. 18, 23-24, 87 S.Ct.824, 17 L.Ed.2d 705 (1967) (a constitutional error which possibly influenced the jury adversely cannot be harmless).

2. **THE STATE VIOLATED THE STATE AND FEDERAL CONSTITUTIONAL DOUBLE JEOPARDY PROVISIONS WHEN IT PROSECUTED McPHEE FOR POSSESSION OF THE REMINGTON SHOTGUN AND ENFIELD RIFLE.**

By permitting the State to try McPhee for possession of the Remington shotgun and Enfield rifle, the court violated McPhee's state and federal rights not to be put in jeopardy twice.

The Double Jeopardy Clause of the United States Constitution guarantees that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. 5. The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969). The Double Jeopardy Clause encompasses three separate constitutional provisions, one of which protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23

L.Ed.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, *review 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)). Rights afforded a defendant by the state and federal constitutions are not a mere matter of form subject to dissembling or the splitting of hairs. Here, the State originally tried McPhee for possession of a Weatherby rifle, a Benneli shotgun, a Remington shotgun, and an Enfield rifle. CP at 2-4. It is uncontroverted that the weapons were acquired at the same time and that they originated from Miller's house. McPhee placed the Remington shotgun and Enfield rifle near Jason's trailer; the other two weapons were left with two other individuals. The issue of possession of the Benneli shotgun and Weatherby rifle was decided adversely to the State in the first trial; McPhee was acquitted of possession of stolen firearms regarding the two weapons. 5CP at 255, 256.

There is no question jeopardy attached to the not guilty verdicts entered regarding the Benneli shotgun and Weatherby rifle. As stated in *State v. Corrado*, "a verdict of acquittal...is a bar to a subsequent prosecution for

the same offence,” and an acquitted defendant may not be retried even when “the acquittal was based upon an egregiously erroneous foundation.” 81 Wn.App. 640, 647, 915 P.2d 1121 (1996).

As stated in *Ashe v. Swenson*, 397 U.S. 436, 445-46 (1970)

The ultimate question to be determined, then in the light of *Bentley v. Maryland*, *supra*, is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, *North Carolina v. Pearce*, 395 U.S. 711, 717, it surely protects a man who has been acquitted from having to “run the gauntlet” a second time. *Green v. United States*, 355 U.S. 184, 190.

In *Ashe*, discussed *supra*, the Court held that the defendant who was acquitted of robbing one victim could not be prosecuted for robbing a second victim of the same robbery. The court reasoned the State had failed to prove the identity in the first case and could not re-litigate identity in the second case. 397 U.S. at 446. Accordingly, the State cannot re-litigate the issue of possession of the Remington shotgun and Enfield rifle, where the weapons were acquired in precisely the same way as the Benneli and Weatherby, without violating the double jeopardy clauses of the state and federal constitutions. Consequently, his convictions must be reversed.

3. **McPHEE'S CONVICTIONS FOR TWO COUNTS OF POSSESSION OF A STOLEN FIREARM MUST BE REVERSED AND DISMISSED BECAUSE THE STATE FAILED TO ESTABLISH THE *CORPUS DELICTI* FOR THE OFFENSE INDEPENDENT OF MCPHEE'S ADMISSIONS TO THE POLICE.**

McPhee made several inculpatory statements to the police on February 9, 2007. Deputy Clark asked McPhee if he thought it was strange that he could get the guns, binoculars and tusks for \$100.00. 1RP at 85. Clark testified that McPhee told him that "I figured they were stolen but I figured I would sell them for more than I paid for them." 1RP at 85. Deputy Smith said that McPhee told him that he had told Bill that he had been working next to a house and told Bill that the house had a big screen TV and guns in it. 2RP at 30. He stated that McPhee told him that he had seen Bill a week later and that he had guns, binoculars, and tusks that he wanted to sell. 2RP at 30. Smith said that McPhee stated that he "knew they were stolen and it was just kind of a stupid thing to do." 2RP at 32. He told Smith that he knew about the Miller house because he had been working with Neva and that went over to Miller's house to hook up a water hose. 2RP at 33. Smith said that McPhee told him that he put the guns in the bushes because he had

gotten “scared[,]” that he thought the guns were stolen, and that he didn’t have room in his car and that his girlfriend wouldn’t let him have guns in her house. 2RP at 36, 37.

Those admissions, however, could only be considered if there was independent *prima facie* proof of the *corpus delicti*. This required the State to prove McPhee’s knowingly possessed or controlled a stolen firearm. Because the State failed to prove McPhee knowingly received, possessed, conceal, or disposed of stolen property, testimony regarding his statements was improper.

This Court should therefore reverse his convictions.

Under the *corpus delicti* rule, a jury may not convict a defendant of a crime based on his or her confession alone. *State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). The rule requires evidence, independent of a criminal defendant’s statements, “that a crime was committed by someone.” *City of Bremerton v. Corbett*, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986). The basis for this is that a defendant’s statements, standing alone, are insufficient to support an inference that the admitted crime was committed. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). There must be *prima facie* evidence of the charged offense independent of the defendant’s admissions. *State v. Aten*, 130 Wn.2d at 656. “‘Prima facie’ in

this context means there is ‘evidence of sufficient circumstances which would support a logical and reasonable inference’ of the facts sought to be proved.” *Id.* (quoting *State v. Vangerpen*, 125 Wn.2d at 796). But if the independent evidence is consistent with an inference of either innocence or guilt, it does not sufficiently establish the *corpus delicti* of a crime. *State v. Aten*, 130 Wn.2d at 658-660. The State bears the burden of producing evidence sufficient to satisfy the *corpus delicti* rule. *State v. Riley*, 121 Wn.2d at 22, 32, 846 P.2d 1365 (1993). When reviewing the sufficiency of the evidence in considering whether the State has met this burden, a court must take the evidence in the light most favorable to the State. *State v. Pineda*, 99 Wn.App. 65, 77-78, 992 P.2d 525 (2000).

McPhee was charged and convicted of possession of a stolen firearm under RCW 9A.41.040, which, in part, required corroborating evidence that MCPhee possessed, carried, delivered, sold or was in control of a stolen firearm, that he acted with knowledge that the firearm had been stolen, and that he withheld or appropriated the firearm to the use of someone other than the true owner. *Id.*

The State failed to carry this burden. Here the only evidence that MCPhee suspected or knew that they were stolen was his statement to police.

When the police stopped the red pickup truck driven by McGinnis on February 9, the guns were in the bed of the truck. McPhee was in a second vehicle. Thus, except for McPhee's admissions, there was no evidence that he suspected or knew that they were stolen, with the result that his convictions for possession of a stolen firearm must be reversed and dismissed.

4. **ABSENT MCPHEE'S STATEMENTS, THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN MCPHEE'S CONVICTION FOR POSSESSING STOLEN FIREARMS.**

To affirm McPhee's convictions for possession of a stolen firearm, there must be proof that he was the perpetrator of the crime. However, independent of McPhee's statements, no evidence was presented that he possessed the guns. This Court should therefore reverse his convictions.

In every criminal prosecution, the state must prove every element of the crime charged beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hundley*, 126 Wn.2d

418, 421, 894 P.2d 403 (1995); *State v. Chapin*, 118 Wn.2d 681, 692, 826 P.2d 194 (1992); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

Even under this generous standard, the state failed to meet its burden to prove Counts I and II of the second amended information charging McPhee with possession of a stolen firearm. CP 107-09.

It is not contested that the State proved the Remington shotgun and Enfield rifle were stolen and that McPhee possessed them for a short period of time after purchasing them from Bill. The State, however, failed to prove beyond a reasonable doubt that McGhee knew the weapons were stolen.

Mere possession of recently stolen property is insufficient to establish that the possessor knew the property was stolen. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). Possession of recently stolen property, however, coupled with slight corroborative evidence, is sufficient to prove guilty knowledge. *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999).

Courts have found a damaged ignition, an improbable explanation, or fleeing when stopped, indicative of the slight corroborative evidence sufficient to show a defendant knew he was in possession of stolen property.

See State v. Hudson, 56 Wn. App. 490, 495, 784 P.2d 533, *rev. denied*, 114 Wn.2d 1016, 791 P.2d 534 (1990) (defendant admitted taking a car from the street without asking anyone where it came from, he had no explanation, and he fled when stopped); *State v. Ford*, 33 Wn. App. 788, 790, 658 P.2d 36 (1983) (defendant admitted he did not know who owned the car he was driving and he offered no explanation for his possession); *State v. Couet*, 71 Wn.2d 773, 776, 430 P.2d 974 (1967) (defendant was driving a car and gave improbable explanation for his possession); *State v. Womble*, 93 Wn. App. 599; 605, 969 P.2d 1097 (1999) (sufficient evidence because defendant offered both an arguably implausible explanation and fled when confronted).

The complete absence of corroborative evidence, however, requires reversal. For example, in *State v. L.A.*, 82 Wn. App. 275, 918 P.2d 173 (1996), the owner testified his car was taken without permission. Police officers saw the defendant driving the car the next day. They followed her, activated their emergency lights, and pulled the car over. The defendant did not flee. The officers testified that the car had a broken rear window. There was no other testimony of other damage to the car. 82 Wn. App. at 276. The Court found that the “absence of corroborative evidence such as a damaged ignition, an improbable explanation or fleeing when stopped, there is not

sufficient evidence to support the finding that [the defendant] knew the [car] was taken unlawfully.” 82 Wn. App. at 276.

McPhee bought the guns from Bill and testified that he did not become aware they were stolen until he was confronted on February 9. RP at 119. Miller testified the guns were taken during a recent burglary at his house. The guns, however, lacked physical indicia that they were stolen, such as a scraped off or removed serial numbers. Moreover, the fact that the guns were placed outdoors wrapped in plastic is not corroborative evidence sufficient to show MCPhee knew he was in possession of stolen property. MCPhee didn't expect to have to have guns to store; he wanted the tusks so that he could resell them, but Bill wouldn't sell them individually; he had to buy the guns as well. MCPhee was living in his car, so he couldn't keep them there. He knew his girlfriend would not let MCPhee keep guns in her house. He knew that he could keep them at his friend Jason's house, but stated that Jason was in Yakima and that he did not have a key to the trailer, so he stored them nearby wrapped in plastic until Jason returned. 2RP at 113-14.

Mere possession of recently stolen property is insufficient to show knowledge that an item is stolen, *Couet, supra*. MCPhee's possession of the guns without corroborating evidence was insufficient to prove he knew the

weapons were stolen. The State offered no evidence that demonstrated there was anything about the guns to indicate to McPhee that they were stolen. The fact that McPhee possessed both the Remington shotgun and Enfield rifle from the Miller burglary was insufficient to prove he knew the guns were stolen. No court has held that a defendant's possession of two recently stolen items, from the same home, is sufficient corroborative evidence to prove knowledge. Possession of multiple items from the same burglary still amounts to mere possession.

Because the State failed to provide even slight corroborative evidence to show McPhee knew the Remington shotgun and Enfield rifle were stolen, there was insufficient evidence to convict him of the crimes of possession of a stolen firearm. This court, therefore, should reverse McPhee's convictions in Counts I and II.

5. **McPHEE'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN DEFENSE COUNSEL WAS VIOLATED WHEN DEFENSE COUNSEL FAILED TO OBJECT TO THE RELEVANCY OF TESTIMONY REGARDING THE BURGLARY OF MILLER'S HOUSE**

- a. **A criminal defendant is guaranteed the effective assistance of counsel.**

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right ... to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. Similarly, Article I, § 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. art. I, § 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *McMann v. Richardson* 397 U.S. 759, 771 n. 14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn. App. 270, 275, 27 P.2d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez*, at 275.

The test for ineffectiveness assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91 Wn. App. 429, 957 P.2d 1278, citing *Strickland, supra*. Furthermore, the defendant must show a reasonable probability that, but for counsel’s errors,

the result of the proceeding would have been different. *Holm, supra*, at 1281. Finally, a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

b. Deficient performance.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.2d 575, 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853, 866, 16 P.3d 610 (2001).

A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 111 (2000).

i. Counsel's performance was deficient.

Defense counsel was ineffective for failing to object to irrelevant

testimony regarding the fact of and details surrounding the Miller burglary.

Under ER 402, relevant evidence is admissible unless otherwise rendered inadmissible. Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

For evidence to be relevant, it must satisfy two requirements, (1) the evidence must have a tendency to prove or disprove a fact [probative value], and (2) that fact must be of consequence in the context of the other facts and the substantive law at issue [materiality]. 5 K. Tegland, *Washington Practice*, § 82 (3d ed. 1989); *State v. Rice*, 48 Wn.App. 7, 12, 737 P.2d 726 (1987).

Facts of consequent include facts offering direct or circumstantial evidence of an element of a crime or defense. The relevancy of the evidence depends on the circumstances of each case and relationship of the facts to the ultimate issue in the particular case. *Rice*, 48 Wn.App. at 12.

Here the State charged McPhee with two counts of possession of a stolen firearm. A fact of consequence the State had to prove beyond a reasonable doubt was that McPhee possessed, concealed, or disposed of the firearms and that he knew that the weapons were stolen. RCW 9A.56.310.

McPhee acknowledged that he possessed the firearms. The State needed only evidence limited to the fact that the items were stolen. The State instead sought to elicit testimony regarding the Miller burglary. 1RP at 56-65. While defense counsel objected to the prejudicial nature of the testimony, and objected on the basis of ER 104 and ER 508,⁸ he failed to object on the grounds the evidence was irrelevant. 1RP at 11-13.

Had defense counsel made a relevancy objection, the trial court would have granted it. Testimony regarding the burglary did not make a fact of consequence—whether he knew the weapons were stolen—more or less probable.

The record in this case reveals no tactic or strategy for the failure of defense counsel to make a relevancy objection. Where the failure to object is unjustified on grounds of trial tactics, it constitutes deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 917 P.2d 563 (1996) (counsel's failure to object to the introduction of defendant's prior convictions for drug dealing was not a tactical decision but deficient performance). Because there is simply no legitimate reason for defense counsel's failure to move to exclude the burglary evidence under ER 401 and ER 402, defense counsel's performance fell below an objective standard of reasonableness.

**ii. Counsel's deficient performance prejudiced
McPhee**

⁸ CP at 24-25.

Defense counsel's failure to properly object to the burglary testimony was prejudicial, because McPhee was initially charged with burglary. Evidence of the burglary invited the jury to make an improper assumption that McPhee must have committed the burglary, a charge for which he was previously acquitted.

Defense counsel's failure to move for exclusion of this prejudicial evidence under ER 401 and 402 likely adversely affected the verdict, and adversely affected McPhee's right to a fair trial. *State v. Dawkins*, 71 Wn.App. 902, 911, 863 P.2d 124 (1993); *Strickland*, 466 U.S. at 693. As a result, reversal is required.

F. CONCLUSION

Based on the above, Jeff McPhee respectfully requests this court to reverse and dismiss his convictions of possession of a stolen firearm.

DATED: November 5, 2008.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Jeffrey McPhee

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFREY D. McPHEE,

Appellant.

COURT OF APPEALS NO.
37610-5-II

PACIFIC COUNTY NO.
07-1-00030-3

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant was delivered by first class mail to the Court of Appeals, Division 2, and copies were mailed to, Jeffrey D. McPhee, Appellant, and Mr. David John Burke, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on November 5, 2008, at the Centralia, Washington post office addressed as follows:

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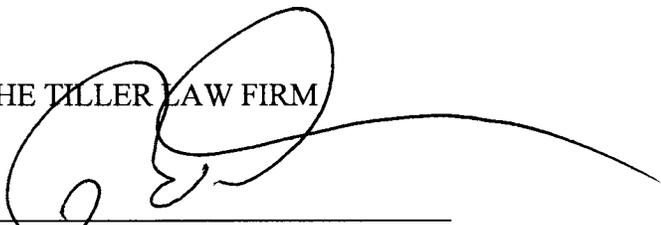
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