

NO. 37610-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent

v.

JEFFREY D. McPHEE,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

The Honorable Michael J. Sullivan, Judge

CROSS-APP./
RESPONDENT'S OPENING BRIEF

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A. STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence introduced in Jeffrey McPhee's second trial did not violate the doctrine of collateral estoppel under the Fifth Amendment and did not violate principles of fundamental fairness or due process.

2. The State did not violate the constitutional prohibitions against double jeopardy when it retried McPhee for possession of a Remington shotgun and an Enfield rifle.

3. The trial court did not err in failing to dismiss both counts of possession of a stolen firearm on the ground of *corpus delicti*.

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

5. McPhee received effective assistance of counsel. Defense counsel made a pretrial motion prevent the introduction of evidence as to the burglary; but the evidence

was admitted for purposes of proving that the weapons were stolen and that McPhee had knowledge that they were stolen.

B. STATE'S REPOSE TO ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The doctrine of collateral estoppel prevents the State from relitigating those matters which had been decided in a previous trial. Where the matters for which the defendant is retried have never been previously decided, they are not barred by collateral estoppel. Appellant's Assignment of Error 1.

2. Because McPhee had never been acquitted of possession of a stolen firearm with respect to the Remington shotgun or the Enfield rifle on February 9, 2007, double jeopardy was not offended when the State retried McPhee for those crimes. The circumstances under which McPhee acquired those items is not dispositive of the issue because the evidence showed that these weapons were possessed on a different day, in a different place, and under different circumstances, than

those weapons which were the subject of the prior acquittals.

Appellant's Assignment of Error 2.

3. *Corpus delicti* is not at issue because the State presented *prima facie* evidence, independent of McPhee's confessions to the police, that the crimes of possession of a stolen firearm had been committed by someone. Appellant's Assignment of Error 3.

4. McPhee's constitutional right to effective assistance of counsel was not violated when the State was permitted to present evidence of the burglary at the Miller's residence. The defendant moved in limine to exclude evidence of said burglary, and the State responded to said motion. The trial court decided that the evidence was admissible with a limiting instruction. Because the State bore the burden of proving that the firearms and other items in McPhee's possession were in fact stolen, and that McPhee knew they were stolen, the facts surrounding the burglary were relevant to the crimes charged. Furthermore, the jury was asked to consider the evidence of the

burglary, and the circumstances surrounding it, only for purposes of deciding whether the firearms were in fact stolen and in deciding whether the defendant knew they were stolen.

C. THE STATE'S ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing Count 3, possession of stolen property in the second degree, on the ground of insufficient evidence of market value in the area where the crime was committed.

2. Having found that the State presented insufficient evidence of the market value of the items in the area where the crime was committed, the trial court erred in refusing to permit the jury to consider the lesser included crime of possession of stolen property in the third degree.

D. RESPONDENT'S COUNTERSTATEMENT OF THE CASE

1. Procedural history.

Jeffrey D. McPhee was charged by information, on June 8, 2007, with one count of residential burglary, occurring between January 28, 2007, and January 29, 2007; four counts of

possession of a stolen firearm, occurring on various dates; and one count of possession of stolen property in the second degree, occurring on or about February 9, 2007. CP 1-4. The four counts of possession of stolen firearms were charged as follows: Count 2 pertained to a Weatherby Rifle possessed on or about January 31, 2007, at 1513 B 250th in Ocean Park; Count 3 pertained to a Benelli super 90 shotgun possessed on or between January 28, 2007, and February 2, 2007, in Pacific County, Washington; Count 4 pertained to a Remington shotgun possessed on or about February 9, 2007, at 67th and Sandridge Road; and Count 5 pertained to an Enfield rifle possessed on or about February 9, 2007, at 67th and Sandridge Road. CP 2-3.

At a jury trial held on November 27, 28, and 29, 2007, the defendant was found not guilty of Counts 1, 2, and 3. CP 5. The jury was deadlocked as to Counts 4, 5, and 6. *Id.* The court declared a mistrial as to Counts 4, 5, and 6. CP 11.

After the first jury trial, the State amended the information a second time, on March 17, 2008, such that counts 1, 2, and 3 of the second amended information corresponded to Counts 4, 5, and 6 from the first jury trial. CP 107-109. The second jury trial on these three counts commenced on March 17, 2008.

Defense counsel moved in limine to exclude from the second trial evidence of the burglary at the Miller residence, evidence of the items that were stolen from the Miller residence, and testimony relating to any conversation or any statement made about the burglary or relating to knowledge of the home, its location, or the defendant's presence near it or in it. CP 24-26. Defense counsel argued that such evidence was "irrelevant, misleading, inflammatory, and prejudicial given the rejection of the State's charge of residential burglary in the first trial." CP-19. Defense counsel specifically moved in limine to exclude evidence that the defendant had worked near the Miller residence, had observed some of the items in the home prior to

the burglary, and told Deputy Smith about a conversation he had with a person named "Bill." CP 19.

The State responded to the defense motions in limine by arguing that the evidence in question was not ER 404(b) evidence at all. CP 98. Instead, the State argued, the evidence of the conversation with Bill provided circumstantial evidence of the essential element of knowledge. CP 99. The State also pointed out that the prosecution had the burden of proving that the guns were stolen in the first place, which was another essential element of the crime charged. CP 99.

In pretrial arguments, the State proposed that any prejudicial effect of such evidence could be cured with a limiting instruction. 1RP(3/2008) 8. Defense counsel argued extensively in favor of excluding or restricting such evidence. 1RP 8-16. The trial court ruled, over the defense objections, that the evidence could come in with a curative instruction to be read to the jury prior to the opening statements. 1RP 17. The trial court then spent a considerable amount of time in

formulating an appropriate curative instruction, while listening to argument from both sides on this head. 1RP 17-32. The curative instruction that was finally given, as a part of the packet of final jury instructions, read as follows:

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 had been introduced for the limited purpose of determining whether or not these items were in fact stolen from Ronald Miller's residence. You should not consider this testimony for any other purpose.

Further, any testimony you hear regarding 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 a previous 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 to wit: 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. CP 140.

The court decided that this curative instruction would be read to the jury prior to opening statements, and would also be included in the final packet of jury instructions. 1RP(3/2008) 26-30¹.

The second trial resulted in a verdict of guilty as to Counts 1 and 2 of the second amended information, and a dismissal of Count 3 of the second amended information. The defendant was sentenced to six months in jail, with one month converted to community service work. CP 231-243. This sentence was within the standard sentencing range for the offenses.

2. Trial testimony.

a. Testimony from the first trial (11/2007).

i. Ronald Miller.

¹The Verbatim Report of the Proceedings omits the court's first reading of this instruction to the jury as well as opening statements of counsel. 1RP-33. The Verbatim Report also omits the court's second reading of this instruction to the jury. 3RP-135. However, the record is clear that this instruction was included in the packet of jury instructions. See 3RP 134. See also CP 140.

Ronald Miller testified that he resides at the residence where the burglary was alleged to have occurred.

1RP(11/2007) at 30. He had left on January 28, 2007, for an overnight trip, and when he returned the following day, he came to the realization that his home had been burglarized.

1RP(11/2007) at 30-32. The items missing from his home included a large pair of field binoculars, a .378 Weatherby rifle, a Remington automatic 12-gauge shotgun, a Benelli automatic 12-gauge shotgun, an Enfield .303 military rifle, and a set of tusks. 1RP(11/2007) at 31-40. Mr. Miller reported the incident to the Pacific County Sheriff's Office on or about January 29, 2007, and the initial investigation was handled by Deputy Smith. 1RP(11/2007) 40-41. Sometime after reporting the burglary to the police, Mr. Miller placed an advertisement in a local newspaper, *The Chinook Observer*. 1RP (11/2007) 43.

The advertisement read:

Reward for information leading to the arrest and conviction of person or persons who entered my home on or about January 28th and stole one very large pair of

military binoculars, one Remington 12-gauge shotgun, one Benelli 12-gauge automatic shotgun, one old Enfield military .303 caliber rifle, and one Weatherby .378 caliber rifle with Nikon scope.² 1RP(11/2007) 44.

The date of publication of this advertisement was February 7, 2007. 1RP(11/2007) 44. Sometime later, Mr. Miller received a telephone call from David Kochis in response to the ad.

1RP(11/2007) 46. After speaking with David Kochis, Mr. Miller got in touch with Steve Neva for the purpose of recovery the stolen property. 1RP(11/2007) 46. Miller later paid Kochis a \$500 reward for responding to the ad. 1RP(11/2007) 50.

Four individuals subsequently made contact with Jeffrey McPhee for the purpose of retrieving the stolen property. *Id.* This was the same date (February 9, 2007) that McPhee was arrested. 1RP(11/2007) 51-52.

ii. Nicholas Herrick

Nicholas Herrick testified that he was an acquaintance of Jeffrey McPhee 1RP(11/2007) 67. Herrick testified that he was contacted by McPhee in January or February. 1RP(11/2007)

² Telephone number omitted.

69. McPhee had told Nicholas Herrick that he had picked up some guns and wanted to know if Herrick might be interested in buying any of them. 1RP(11/2007) 70. Around January 31st, McPhee brought the guns to the job site where Herrick was working on Willows Road in Ilwaco, which is located in Pacific County. 1RP(11/2007) 71-74. At that time, McPhee had the guns in his car, a white Dodge Shadow. 1RP(11/2007) 73. During this encounter, Herrick ended up taking possession of the Weatherby rifle. 1RP(11/2007) 74. Herrick subsequently turned the rifle over to Deputy Clark of the Pacific County Sheriff's Office. 1RP(11/2007) 76. Herrick made an in-court identification of the Weatherby rifle, later introduced into evidence as Exhibit Number 4, as the rifle that he had obtained from Jeffrey McPhee. 1RP(11/2007) 74. Herrick testified that he was cautious, that he had asked McPhee if the guns were legitimate, and that he told McPhee that he would be calling the Sheriff's Department to check them out. 1RP(11/2007) 75. According to Herrick, McPhee had denied that the weapons

were stolen at that time. 1RP(11/2007) 84. On cross-examination, Herrick confirmed that the date he acquired the rifle from McPhee was approximately January 31, 2007.

1RP(11/2007) 87.

iii. Jeremy Baker

Jeremy Baker testified that he was acquainted with Jeffrey McPhee through Nick Herrick. 1RP(11/2007) 109. He learned from Nick Herrick that McPhee had some guns for sale.

1RP(11/2007) 111. Baker met with McPhee on the same day that McPhee met with Herrick at 2815 Willows Road in Ilwaco.

1RP(11/2007) 110-111. Working backwards from the date of his written statement, Baker was able to calculate an approximate date for this meeting of February 2, 2007, or about

one week prior to the events of February 9th. 1RP(11/2007)

112. Baker identified Exhibit 1, the Benelli shotgun, as being nearly identical to the one he had been interested in purchasing from Jeffrey McPhee for a couple of hundred dollars.

1RP(11/2007) 113-114.

iv. Steve Neva

Steve Neva testified that he had known Jeffrey McPhee for a few years. 1RP(11/2007) 124. Sometime prior to his arrest, Jeffrey McPhee had worked with Neva at a job site that was right next to Ron Miller's residence. 1RP(11/2007) 125. While they were working at that job site, Jeffrey McPhee had gone next door to the Miller residence to use the electrical power. 1RP(11/2007) 136-137.

Neva testified that McPhee had approached him about some guns for sale about one week prior to the day McPhee was arrested. 1RP(11/2007) 128-129. Neva also testified that about a week prior to this, McPhee had wanted to borrow his truck to unload a house. 1RP(11/2007) 130-032. Later, Neva came to believe that the guns McPhee was trying to sell had come from Miller's residence. 1RP(11/2007) 138.

Neva agreed to help Mr. Miller get his guns back. 1RP(11/2007) 138; 2RP(11/2007) 10. Neva testified that he was one of the individuals who went to where Jeffrey McPhee

was living to retrieve the guns. 2RP(11/2007) 10. McPhee led the group of four to the place where the guns and other property were located. 2RP(11/2007) 13. Neva described the area as being nearby to a trailer in the woods. Id. Neva said that the guns were under some brush without any covering for protection together with the tusks and binoculars. 2RP(11/2007) 13-14.

v. Dale McGinnis

Dale McGinnis testified that he went along with the others to retrieve the stolen items from the brush. 2RP(11/2007) 38-48 McGinnis described the location as being by the sanitary dump in Long Beach. 2RP(11/2007) 48.

vi. Larry Clark

Deputy Larry Clark testified as to McPhee's arrest on February 9, 2007. 2RP(11/2007) 52-97. He identified the location as being near 67th just east off of Sandridge. 2RP(11/2007) 52. Law enforcement personnel had been alerted that the suspect was in the vicinity, and they were waiting for

the vehicles carrying the suspect and the stolen property to emerge from the wooded area. 2RP(11/2007) 56-57.

vii. Deputy Smith

Deputy Smith testified that McPhee's arrest took place on February 9, 2007. 2RP(11/2007) 105-107. McPhee was sitting in the back of Deputy Clark's patrol car that day when Deputy Smith first contacted him. 2RP(11/2007) 107. McPhee stated that he knew he was in a lot of trouble and that he was willing to cooperate. 2RP(11/2007) 108. He stated that he had obtained the guns in Ilwaco from a guy named "Bill." Id. McPhee related a conversation that he had with Bill in which McPhee told him about place on the bay with a big screen TV and some guns. Id. Subsequently, Bill approached McPhee regarding some guns and binoculars that he wanted to sell. 2RP(11/2007) 109. McPhee said that Bill wanted a hundred dollars for everything. 2RP (11/2007) 109-110. Deputy Smith asked McPhee if he thought that was rather unusual that someone would sell all of those items for just a hundred dollars.

2RP(11/2007) 110. McPhee told Deputy Smith that he thought they were stolen, but that he needed the money because he was broke. Id at 110-111. Deputy Smith testified that, when asked why he had hidden the items in the brush, McPhee told him, "his girlfriend would have them around, he was living out of his car, and he got scared and knew they were stolen."

2RP(11/2007) 114.

viii. Jeffrey McPhee

Jeffrey McPhee admitted to approaching Nicholas Herrick to see if he might be interested in buying any of the guns. The defendant testified that when he took the guns to Mr. Baker and Mr. Herrick, he had transported them in his vehicle, a Dodge Shadow, in the back seat on top of all of his clothes and other belongings. 3RP(11/2007) 189-190. He denied knowing, prior to February 9, 2007, that the guns were stolen. 3RP(11/2007) 175. He testified as to being confronted by Mr. Neva, Mr. McGinnis, Mr. Kochis, and Mr. Edwards on February 9, 2007. 3RP(11/2007) 174. McPhee told them that

two of the guns were with Nick Herrick and Jeremy Baker and that the guns he hadn't yet sold were on his friend's property on 67th. 3RP(11/2007) 176. He testified that he had placed the guns in the bushes on his friend's property "for safe keeping." 3RP(11/2007) 179. McPhee was aware that the guns would be exposed to the elements while they were lying out in the brush, but stated his belief that any resulting damage could be repaired. 3RP(11/2007) 190-191. He also admitted that, prior to the day of his arrest, the guns had been lying in the brush for approximately two to three days. 3RP(11/2007) 189.³

b. Testimony from the second trial (3/2008)

The Respondent is in agreement with the Appellant's summary of the testimony from the second jury trial, held on March 18-19, 2008. The only thing that should be added is that three of the witnesses from the first trial, Nicholas Herrick,

³ This would make the date the guns were placed in the brush (February 6 or 7) roughly correspond to the date of publication of Miller's ad in the *Chinook Observer*, i.e., February 7, 2007. 1RP(11/2007) 44.

Jeremy Baker, and Steve Neva, did not testify in the second trial.

E. ARGUMENT

1. The evidence introduced in Jeffrey McPhee's second trial did not violate the doctrine of collateral estoppel under the Fifth Amendment and did not violate principles of fundamental fairness or due process.

McPhee argues, "[c]ollateral 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 two counts of possession of a stolen firearm in which McPhee was acquitted of being complicit. *Appellant's Opening Brief at 20.*

a) The appellant bears the burden of proving that the doctrine of collateral estoppel applies.

Collateral estoppel bars relitigating a fact which (1) was decided by the prior jury trial and (2) determines the ultimate fact or issue in the current case. *State v. Eggleston*, 164

Wash.2d 61, 78, 187 P.3d 233 (2008), citing *Dowling v. United States*, 493 U.S. 342, 348, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). The law is well settled in the State of Washington that the party asserting the doctrine of collateral estoppel bears the burden of proof. *McDaniels v. Carlson*, 108 Wash.2d 299, 303, 738 P.2d 254 (1987). The moving party must satisfy four requirements: (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. *State v. Williams* 132 Wash.2d 248, 254, 937 P.2d 1052 (1997), citing *State v. Cleveland*, 58 Wash.App. 634, 639, 794 P.2d 546 (1990) (quoting *Beagles v. Seattle-First Nat'l. Bank*, 25 Wash.App. 925, 929, 610 P.2d 962 (1980); accord *Rains v. State*, 100 Wash.2d 660, 665, 674 P.2d 165 (1983).

Here, only the third requirement has been satisfied. What is clearly not satisfied are the first and second requirements. The issues decided in McPhee's first trial are not identical with those decided in the second trial; and the first trial did not result in a final judgment on the merits as to the issues relitigated in the second trial.

b) The issues for which McPhee was acquitted in the first jury trial, while loosely related in fact and in law to those of the second trial, were materially distinct in several ways.

There were three crimes for which McPhee was acquitted in the first trial: (1) burglarizing the Miller residence between January 29, 2007, and January 28, 2007; (2) knowingly possessing a stolen Weatherby rifle on or about January 31, 2007; and (3) knowingly possessing a stolen Benelli super 90 shotgun between January 28, 2007, and February 2, 2007. These crimes are separate and distinct from the crimes for which he was subsequently retried, which were, (4) knowingly

possessing a stolen Remington shotgun on February 9, 2007, at 67th and Sandridge; (5) knowingly possessing a stolen Enfield rifle on February 9, 2007, at 67th and Sandridge; and (6) knowingly possessing a stolen set of field binoculars and a stolen set of tusks on February 9, 2007, at 67th and Sandridge. It is possible for a person to be innocent of the crime of the original theft of an item while still being guilty of subsequently possessing the item, knowing that it was stolen. Therefore, the burglary acquittal has little relation to any of the other charges in this case, except that knowledge that the various items had been acquired during a burglary would have provided knowledge that the items were stolen.

As for the relationship between the possession of the Weatherby on January 31 and the Benelli between January 28th and February 2nd, the testimony established that these acts occurred at a different time and place, and under different circumstances, than the subsequent possession of the Remington shotgun and the Enfield rifle on February 9, 2007,

the day McPhee was arrested. The Weatherby and the Benelli were both possessed at the time McPhee was attempting to sell these items to Nicholas Herrick and Jeremy Baker, most likely, prior in time to the date of publication of Mr. Miller's advertisement in the *Chinook Observer*. It is very possible that, at this time, considering all of the surrounding circumstances, there was reasonable doubt that McPhee really knew the weapons were stolen. For example, Nick Herrick stated that McPhee represented to him at that time that the guns were legitimate. 1RP(11/2007) 75. McPhee never said anything to Herrick or Baker indicating that he knew the guns were stolen at that time. Id. The guns were brought to Nick Herrick's job site on Willows Road in Ilwaco. 1RP(11/2007) 71-74 This was approximately a week prior to the possession that subsequently occurred near 67th and Sandridge Road on February 9th. 1RP(11/2007) 87. At the time McPhee brought the Weatherby and the Benelli to Nick Herrick and Jeremy Baker, he transported them openly, and without any hint of

furtiveness, in his car. 3RP(11/2007) 189-190. Under these circumstances, a reasonable jury might well have concluded there was reasonable doubt that McPhee knew these guns were stolen—*at that time*.

The acts for which McPhee was retried and subsequently convicted were quite different. They involved different items, a Remington shotgun, an Enfield rifle, a set of tusks, and a pair of field binoculars. The date was approximately a week to ten days after the possession of the Weatherby rifle and the Benelli shotgun. The date, February 9, 2007, was also two days after the date of publication of Ron Miller's ad in the *Chinook Observer*. The location was not the job site on Willows Road in Ilwaco, but rather, the recently cleared wooded area near 67th and Sandridge. The circumstances were quite different. Instead of being transported openly in McPhee's car, the stolen items were now hidden in some bushes, in a place where they were exposed to the elements. 2RP(11/2007) 13-14. See also 3RP(11/2007) 190-191. And on February 9, 2009, McPhee

admitted to a law enforcement officer that he knew the guns were stolen, and that this was one of the reasons why he hid them in the brush in the first place. 2RP(11/2007) 114. Finally, McPhee's explanation for why he hid them in the field was improbable. He testified that he placed them in the brush for safekeeping because his car was too full after moving out of his girlfriend's studio, and the items were cumbersome.

3RP(11/2007) 189-191. He admitted that placing these items out in the open might result in temporary damage to the guns due to oxidation. *Id.* All of these actions took place well after the events for which McPhee had been acquitted.

The time difference between the possession of the first two weapons versus the second two weapons, the tusks, and the binoculars, is significant. Both Herrick and Baker had testified, in the first trial, that the guns were brought to them about a week prior to the date of McPhee's arrest. McPhee's testimony fixed the date when he hid the guns in the bush at about two to three days before his arrest. 3RP(11/2007) 179-189. The

evidence that McPhee knew the items were stolen on or about February 9th was considerably stronger because of the circumstances under which the items were then stored and because of his statements to the police that he hid them there because he knew they were stolen. The jury may have concluded that the evidence was much stronger that McPhee knew the items were stolen on February 9th than it was a week earlier.

In summary, the differences between the crimes for which McPhee was acquitted and those for which he was later found guilty include different items, different place, different day, and different circumstances.

c) The prior adjudication never resulted in a final judgment on the merits as to the last three counts.

The first trial resulted in a deadlocked jury as to Counts 4, 5, and 6. CP 11. The only verdict that would have been a final judgment on the merits would have been a verdict of not guilty as to those three counts. Because there was no verdict,

there was no final judgment on the merits, and McPhee's argument necessarily fails.

d) Appellant incorrectly argues that the doctrine of collateral estoppel bars the use of the same evidence in the second trial as was used in the first trial.

Appellant's first assignment of error is that, "[t]he 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." *Appellant's Opening Brief at 1.*

Collateral estoppel bars the relitigation of *issues* previously decided. It is not a doctrine that bars the use of specific *evidence* to prove a fact or set of facts. *State v. Eggleston*, 164 Wash.2d 61, 71, 187 P.3d 233 (2008), citing *Dowling v. United States*, 493 U.S. 342, 348, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). All of the evidence used in the first trial to attempt to show that McPhee committed a burglary was

also admissible in the second trial to prove (1) that the weapons were stolen and (2) that the defendant must have known they were stolen as of February 9, 2007.

In order for the doctrine of collateral estoppel to apply, the State must have sought to relitigate the issues that were decided in the first trial. *State v. Brooks*, 38 Wash.App. 256, 263, 684 P.2d 1371, *review denied*, 103 Wash.2d 1005 (1984). Here, the State never asked the jury to decide whether the defendant committed the crimes for which he was acquitted in the first trial. Therefore, those issues that were conclusively decided in the first trial were never re-litigated.

e) Appellant incorrectly argues that the trial court in McPhee's second trial had an obligation to find 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.

Appellant argues, "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." *Appellant's Opening Brief at 21*. The actual test is whether the first jury could have based its verdict on something other than the issues which Mr. McPhee seeks to foreclose from consideration in the second trial. *Eggleston at 73-74*.

In deciding whether to apply collateral estoppel in the case of a general verdict, the court's inquiry "must be set in a practical frame and viewed with an eye to all the circumstances and proceedings." *Eggleston at 73*, citing *Sealfon v. United States*, 332 U.S. 575, 579, 68 S.Ct. 237, 92 L.Ed. 180 (1948). Where "a rational jury could have grounded its [general] verdict upon an issue other than that which the defendant seeks to foreclose from consideration," collateral estoppel will not preclude its relitigation. *Eggleston at 73-74*, citing *Ashe*, 397 U.S. at 444, 90 S.Ct. 1189 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L.REV. 1, 38-39 (1960)).

Here, a rational jury could have grounded its "not guilty"

verdicts on a number of factors other than McPhee's lack of knowledge that the firearms were stolen on or about February 9, 2007. Such factors might include insufficient evidence that McPhee actually committed the burglary and thefts as well as insufficient evidence of knowledge that the firearms were stolen as of January 31 through February 2nd. The jury may have believed there was *some* evidence that McPhee knew about the burglary from the very beginning, but that such evidence was not sufficient to overcome the hurdle of proof beyond a reasonable doubt as to the period of January 31st through February 2nd. But those factors, taken together with the additional factors that were present on February 9, 2007, might have been sufficient to prove the latter charges. It is not for the trial court to determine which ultimate facts or issues were decided by the first jury, but rather, whether the prior acquittal could have been based on something other than the issue the appellant seeks to foreclose from consideration.

2. The State did not violate the constitutional prohibitions against double jeopardy when it retried McPhee for possession of a Remington shotgun and an Enfield rifle.

a.) The State concedes that double jeopardy applies to the crimes for which Mr. McPhee was acquitted during the first trial.

After the first jury trial, it would have been a violation of the prohibition against double jeopardy to retry Jeffrey McPhee for the burglary, for the possession of the Weatherby rifle, or for the possession of the Benelli shotgun.

b) Double jeopardy does not apply to the crimes for which Mr. McPhee was retried.

As mentioned above, the differences between the crimes for which McPhee was acquitted and those for which he was later found guilty include different items, different place, different day, and different circumstances. They are clearly not the "same offense" for all of the reasons already discussed.

c) By statute, each stolen firearm possessed constitutes a separate offense.

RCW 9A.56.310(3) provides that each stolen firearm possessed is a separate offense. This lends additional support to the respondent's argument that none of the crimes for which McPhee was convicted were the "same offense," for double jeopardy purposes, as those for which he was acquitted.

3. The trial court did not err in failing to dismiss both counts of possession of a stolen firearm on the ground of *corpus delicti*.

As the appellant has correctly stated in his brief, under the *corpus delicti* rule, a jury may not convict a defendant of a crime based on his confession alone. *Appellant's Opening Brief at 29, citing State v. Allen, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996)*. There must be *prima facie* evidence that the crime for which the defendant was charged was committed by someone. *Id.* The appellant correctly states the law regarding *corpus delicti* rule. *Appellant's Opening Brief at 29-30*. "*Prima facie*" means there is evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved, and this evidence must be more

consistent with an inference of guilt than with innocent behavior. *Id.* And in considering whether the State has met its burden, a reviewing court must indeed view the evidence in the light most favorable to the State. *Id.*, citing *State v. Pineda*, 99 Wash.App 65, 77-78, 992 P.2d 525 (2000).

But the evidence to be considered by the court, in deciding whether the State has met its burden, must include the in-court testimony of the defendant himself. *State v. Liles-Heide*, 94 Wash.App. 569, 572-73, 970 P.2d 349 (1999) (when a defendant testifies following the trial court's denial of her *corpus delicti* objection, the appellate court reviews the record as a whole, including the defendant's testimony, to determine whether there was sufficient independent evidence to support the inference that the crime occurred). Here, McPhee testified at trial that he had purchased two rifles, two shotguns, a set of field binoculars, and a set of tusks from a person he knew only as "Bill," for a price of \$100.00 2RP (3/2008) 104-107. This was at a time when McPhee had only \$114.00 in his wallet and

was living out of his car. 2RP (3/2008) 107. He testified that, at the time he purchased the items, he was mainly interested in the tusks, which he believed were ivory. 2RP (3/2008) 106. McPhee believed the tusks might be valuable. 2RP (3/2008) 122. After trying to sell some of the guns to Steve Neva, Nick Herrick, and Jeremy Baker, he placed the remaining weapons, the tusks, and the binoculars, unsecured, in a wooded area next to a driveway. 2RP (3/2008) 109-114. His testimony from the previous trial was read into the record wherein McPhee had testified that the guns were there for two to three days before he went to pick them up. 2RP (3/2008) 67. McPhee testified that his reason for placing the items in the brush near 67th was that his girlfriend, Adele, was not a big fan of weapons and would not let him keep the items in her apartment. 2RP (3/2008) 110. While this explanation might very well explain his need to find a location to store the guns other than her apartment, it does not explain why he would need to leave the valuable ivory tusks there.

The defendant's own testimony, along with the testimony of Dale McGinnis as to the location of the items in the recently-cleared wooded area on February 9, 2007, provides ample circumstantial evidence of guilty knowledge. First of all, the circumstances and the terms of the sale under which McPhee testified he acquired the items, if true, would be sufficient for a reasonable person in his situation to think they were stolen. Secondly, these items, which were believed to be of value, were then left in an unsecured, beside a driveway, in a manner suggesting that the intent of the person placing them there was to hide them. These circumstances are more consistent with guilt than with innocence. A person who innocently believed that these valuable items were not stolen would not be likely to leave them in an unsecured location with little or no protection from the elements. That same reasonable person would not be likely to leave firearms in a place where they might be discovered by children.

4. There was sufficient evidence to convict McPhee of possession of stolen firearms as alleged in Count 1 and Count 2 of the second amended information.

Appellant argues that, "[a]bsent McPhee's Statements, the evidence was insufficient to sustain McPhee's conviction for possessing stolen firearms." *Appellant's Opening Brief* at 31. It is not necessary for the state to meet its burden of proof beyond a reasonable doubt entirely with evidence other than the defendant's statements. *State v. Paige*, 147 Wash.App. 749, 856, 199 P.3d 437 (2008). The *corpus delicti* rule only requires the state to prove facts, independent of the defendant's out-of-court statements, sufficient to make out a prima facie case of the crime charged. *Id.* If that hurdle has been cleared, the reviewing court may consider all of the evidence, including the defendant's out-of-court statements, in deciding whether there has been sufficient evidence to support a verdict of guilty.

As the appellant points out, possession of stolen property, coupled with even slight corroborating evidence, is sufficient to prove guilty knowledge. *Appellant's Opening Brief* at 32,

citing State v. Womble, 93 Wn.App. 599, 604, 969 P.2d 1097 (1999). Even an improbable explanation can be the basis of proof that a defendant knew he was in possession of stolen property. *Id.*, citing *State v. Hudson*, 56 Wn.App. 490, 495, 784 P.2d 533, *rev. denied*, 114 Wn.2d 1016, 791 P.2d 534 (1990). Here, McPhee's explanations, both to Deputy Smith and during his own in-court testimony, were highly improbable. He stated that he innocently placed the stolen items in the brush because his girlfriend was not a big fan of guns. 2RP(3/2008) 110. But this would not explain why he would have left the tusks, which he believed to contain valuable ivory, or the field binoculars, in that same unsecured location. 2RP(11/2007) 170-171. That part of McPhee's part testimony made no sense at all.

And then the court must consider McPhee's confessions to both Deputy Clark and Deputy Smith, in which he explained that he knew the guns were stolen, both at the time he purchased them from Bill and at the time he hid them in the brush. 1RP(3/2008) 85; 2RP(3/2008) 32-36.

The evidence was overwhelming that, on or about February 9, 2007, McPhee knew the firearms were stolen and that he constructively possessed them by keeping them hidden in a remote location, thereby withholding them from their rightful owner.

5. McPhee received effective assistance of counsel when Defense counsel made a pretrial motion to prevent introduction of evidence as to the burglary.

Defense counsel moved in limine to exclude from the second trial evidence of the burglary at the Miller residence, to include evidence of the items that were stolen from the Miller residence, testimony from the owner of the weapons and property that his home had been burglarized, testimony relating to any conversation or any statement made about the burglary relating to knowledge of the home, its location, or the defendant's presence near it or in it. CP 24-26. Defense counsel argued that such evidence was "irrelevant, misleading, inflammatory, and prejudicial given the rejection of the State's

charge of residential burglary in the first trial." CP-19.

Defense counsel also moved in limine to exclude evidence that the defendant had worked near the Miller residence, had observed some of the items in the home, and told Deputy Smith about a conversation he had with a person named "Bill." CP-19

The evidence was not offered to prove a prior "bad act" on the part of Jeffrey McPhee. The State successfully argued that the evidence in question was therefore not properly characterized as ER 404(b) evidence. CP-98. Instead, the evidence of the conversation with Bill provided compelling circumstantial evidence of the essential element of knowledge. CP-99. The State also pointed that the prosecution had the burden of proving that the guns were stolen in the first place, which was another essential element of the crime charged. CP-99.

In pretrial arguments, the State proposed that any prejudicial effect of such evidence could be cured with a limiting instruction. 1RP (3/2008) 8. The trial court ruled, over

the defense objections, that the evidence could come in with a curative instruction to be read to the jury prior to the opening statements. 1RP 17. The trial court then spent a considerable amount of time in formulating an appropriate curative instruction, while listening to argument from both sides on this head. 1RP(3/2008) 17-32. The curative instruction that was finally given, was included as a part of the packet of final jury instructions⁴. CP 140.

The court decided that this curative instruction would be read to the jury prior to opening statements, and would also be included in the final packet of jury instructions. 1RP(3/2008) 26-30.

To prevail on an ineffective assistance of counsel claim, the defendant must show that (1) defense counsel's representation was deficient in that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *State v. McFarland*, 127 Wash.2d

⁴ For the full text of this instruction, see page 8, *supra*.

322, 334-35, 899 P.2d 1251 (1995) (applying two-prong test of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

a) Defense counsel's representation was not deficient.

Defense counsel did object in advance to the introduction of the evidence complained of. The evidence was admitted, over objection, with a curative limiting instruction.

b) The defendant was not prejudiced.

As argued above, neither collateral estoppel nor double jeopardy prohibited the State from introducing evidence of the burglary or of the various evidence suggesting that McPhee had knowledge of the burglary, such as the fact that he was present at the Miller residence approximately a week prior to the burglary; that he may have had an opportunity at that time to view items inside the residence; that he had a conversation with a person named Bill approximately a week prior to acquiring

the stolen property in which he talked about a residence next to a job site where he had worked, and describing in detail many of the items located in that residence; and of course, his admissions to the police that he knew that the property was stolen at the time he secluded it near 67th and Sandridge. Had defense counsel repeated the same objection during the course of the trial, he would not be likely to have prevailed, since the court had already ruled that the evidence would be admissible with a curative instruction, and since the evidence complained of was necessary to prove one or more essential elements of the crime charged.

In summary, defendant's lawyer was not deficient in his performance; it did not fall below recognized standards; and the defendant was not prejudiced in any way.

6. The court abused its discretion by dismissing Count 3.

After the State had rested its case-in-chief, defense counsel successfully moved the court to dismiss Count 3,

possession of stolen property other than a firearm in the second degree, on the ground that the State had not proved the market value of the property at the time and in the approximate area of the act. 2RP(3/2008) 82-89. The court denied the State's motion to amend the Count to the lesser included crime of possession of stolen property in the third degree. Id.

a) The owner of property is presumed to know the value of his own property.

The owner of items of property may testify as to the value of that property without having to be qualified as an expert in the field. *State v. Hammond*, 6 Wash. App. 459, 461-462, 493 P.2d 1249 (1972):

The prevailing rule is that the owner of a chattel may testify as to its market value without being qualified as an expert in this regard. *McCurdy v. Union Pac. R.R.*, 68 Wash.2d 457, 413 P.2d 617 (1966).

Professor Wigmore states the rule to be:

"The Owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be

left to the jury; and courts have usually made no objections to this policy." (Footnote omitted.) 3 J. Wigmore, Evidence §716, 56 (1970).

In *Wicklund v. Allraum*, 122 Wash. 546, 211 P. 760 (1922) the court, in addition to citing the Wigmore rule, further stated that the general rule requiring that a proper foundation be laid, showing the witness to have knowledge upon the subject before he can qualify to testify as to market value, does not apply to a party who is testifying to the value of property which he owns. The owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales. The weight of such testimony is another question and may be affected by disclosures made upon cross-examination as to the basis for such knowledge, but this will not disqualify the owner as a witness. Although there are variations of phraseology in its statement, the foregoing principles are recognized as comprising the general rule followed in nearly all jurisdictions, and are equally applicable in criminal as well as civil cases.[FN1]

FN1. The general rule permitting an owner to testify as to the value of property without qualifying as an expert is relied upon in the criminal field as noted by the following cases: *Lewis v. State*, 165 Ala. 83, 51 So. 308 (1909); *Luker v. State*, 23 Ala.App. 379, 125 So. 788 (1930); *Johnson v. State*, 190 Ark. 979, 82 S.W.2d 521 (1935); *People v. Henderson*, 238 Cal.App.2d 566, 48 Cal.Rptr. 114 (1965); *State v. Endorf*, 219 Iowa 1321, 260 N.W. 678 (1935); *Young v. Commonwealth of Kentucky*, 286 S.W.2d 893 (Ky.1955); *Mercer v. State*, 237 Md. 479, 206 A.2d 797 (1965); *Benton v. State*, 228 Md. 309, 179 A.2d 718 (1962); *People v. Johnson*, 215 Mich. 221, 183 N.W. 921 (1921); *State v. Kelly*, 365 S.W.2d 602 (Mo.1963); *State v. Johnson*,

293 S.W.2d 907 (Mo.1956); *Whitley v. State*, 36 N.M. 248, 13 P.2d 423 (1932); *State v. Rooks*, 62 R.I. 251, 4 A.2d 905 (1939); *Murphy v. State*, 161 Tex.Cr.R. 87, 275 S.W.2d 104 (1955); *State v. Myers*, 5 Utah 2d 365, 302 P.2d 276 (1956); Annot. 37 A.L.R.2d 1000 s 25 (1954).

State v. Hammond, 6 Wash. App. 459, 461-462, 493 P.2d 1249 (1972).

Ronald Miller, the owner of the field binoculars, testified at trial that they were worth \$1500. 1RP(3/2008) 57. Mr. Miller also testified that the field binoculars were a unique item and that he had paid the equivalent of \$1500 for them at a store in Ilwaco, Washington, by trading for them other property that was worth \$1500. 1RP (3/2008) 63. Based on this testimony, the court should have allowed the case to go to the jury as to Count 3, possession of stolen property in the second degree, since the state had only to prove that the value of the property (i.e., of the field binoculars and the tusks) was greater than \$250.00. Because the item was a unique item, to wit, Chinese military spotting binoculars, the testimony of the owner was sufficient to establish the market value of the item on the date in question and in the approximate geographical area where the

crime was committed. There is no requirement that the state produce an independent expert witness for purposes of establishing the "market value" of the item.

The only reason the trial court gave for its decision granting the motion to dismiss, after hearing argument from both sides, was as follows: "[U]sually someone comes in that establishes the market value through [a] more direct process." 2RP (3/2008) 88. Unfortunately, this is not the law, and the trial court therefore abused its discretion in granting the motion to dismiss Count 3.

b) Even if the trial court were correct in finding that there was insufficient evidence as to value, the trial court abused its discretion in denying the State's motion to amend Count 3 to the lesser included crime of possession of stolen property in the third degree.

RCW 10.61.010 provides that a defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information. It is not necessary for the State to charge the

lesser included offense separately. Since the value was the only element of the offense cited by the defense for dismissing the charge for insufficiency of the evidence, Count 3 should have proceeded to the jury for consideration of the lesser included offense of possession of stolen property in the third degree. Such an amendment would not prejudice McPhee, because he was already placed on notice of the lesser included offense when the state charged him with the more serious offense. RCW 10.61.010.

CrR 2.1(d) provides that a court may amend an information at any time before verdict or finding if substantial rights of the defendant are not prejudiced. The State may not amend a criminal charge after the State has rested its case in chief, unless the amendment is to a lesser degree of the same charge or a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 491, 745 P.2d 854 (1987).

The court abused its discretion by dismissing Count 3 outright when the only defect complained of was insufficiency

of the evidence as to the value of the property stolen. The proper remedy would have been to amend the charge to the lesser included crime of possession of stolen property in the third degree.

F. CONCLUSION

The State asks this Court to affirm the convictions of Jeffrey McPhee for possession of a stolen firearm; and also to find that the superior court abused its discretion in dismissing Count 3 for insufficiency of the evidence as to market value; and to find that the superior court abused its discretion by refusing to allow Count 3 to be considered by the jury with respect to the lesser included offense.

The evidence introduced in Jeffrey McPhee's second trial did not violate the doctrine of collateral estoppel under the Fifth Amendment and did not violate principles of fundamental fairness or due process.

The State did not violate the constitutional prohibitions against double jeopardy when it retried McPhee for possession

of a Remington shotgun and an Enfield rifle. Those crimes were separate from the crimes for which he was acquitted in the first jury trial.

The trial court did not err in failing to dismiss both counts of possession of a stolen firearm on *corpus delicti* grounds. There was sufficient evidence, absent Mr. McPhee's confessions to the police, to make out a *prima facie* case for possession of stolen firearms.

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

McPhee received effective assistance of counsel. Defense counsel made a pretrial motion in limine to prevent the introduction of evidence as to the burglary; but the evidence was admitted for the limited purposes of proving that the weapons were stolen and that McPhee had knowledge that they were stolen. Because the court provided the jury with a

limiting instruction, Mr. McPhee was in no way prejudiced by the admission of this evidence.

DATED this 17th day of April, 2009.

Respectfully submitted,

DAVID J. BURKE
PACIFIC COUNTY PROSECUTING
ATTORNEY

BY: David Bustamante
DAVID BUSTAMANTE, WSBA #30668
Attorney for the Respondent

APPENDIX A
PROOF OF SERVICE

PROOF OF SERVICE

On the 20th day of April, 2009, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Jeffrey David McPhee
8121 Old Naches Highway
Naches, WA 98937

On the 20th day of April, 2009, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Peter Tiller
The Tiller Law Firm
P.O. Box 58
Centralia, WA 98531-0058

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct,

Signed this 20th day of April, 2009, at South Bend, Washington.


David Bustamante

FILED
COURT OF APPEALS
DIVISION II

09 APR 21 PM 12:56

PROOF OF SERVICE
BY _____
STATE OF WASHINGTON
DEPUTY

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David Bustamante

COURT OF APPEALS
DIVISION II

09 APR 22 PM 1:53

STATE OF WASHINGTON

BY _____
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