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COURT OF APPEALS
DIVISION II

No. 40736-1-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent

vs.

VERNON I. MALO,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY

The Honorable Wm. Thomas McPhee, Judge

Cause No. 09-1-01656-2

PATRICIA A. PETHICK, WSBA NO. 21324
Attorney for Appellant

P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not dismissing Malo's convictions for possession of stolen property in the second degree (Counts II-IV) where the possession of stolen property was incidental to, a part of, or coexistent with his conviction for identity theft in the second degree (Count I).
2. The trial court erred in failing to take the case from the jury for lack of sufficient evidence to prove beyond a reasonable doubt that Malo was guilty of identity theft in the second degree (Count I) and theft of a motor vehicle (Count V).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not dismissing Malo's convictions for possession of stolen property in the second degree (Counts II-IV) where the possession of stolen property was incidental to, a part of, or coexistent with his conviction for identity theft in the second degree (Count I)? [Assignment of Error No. 1].
2. Whether there was sufficient evidence elicited at trial to prove beyond a reasonable doubt that Malo was guilty of identity theft in the second degree (Count I) and theft of a motor vehicle (Count V)? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Vernon I. Malo (Malo) was charged by second amended information filed in Thurston County Superior Court with one count of identity theft in the second degree (Count I), three counts of possession of stolen property in the second degree—access devices (Counts II-IV), one count of theft of a motor vehicle (Count V), one count of theft in the second degree (Count VI), one count of unlawful possession of a

controlled substance—methamphetamine (Count VII), and one count of bail jumping (Count VIII). [CP 16-18].

Prior to trial, Malo made a CrR 3.5 motion to exclude statements he made to Lacey Police Detective Keith Mercer as the statements were obtained after he was represented by counsel and counsel was not present when the police interrogated him. [4-12-10 RP 4-54]. The State conceded that the statements were not admissible and would not be used in its case in chief. [4-14-10 RP 55-56].

Malo was tried by a jury, the Honorable Wm. Thomas McPhee presiding. Malo had no objections and took no exceptions to the court's instructions. [Vol. II RP 291-292]. The jury found Malo guilty as charged on all eight counts. [CP 44, 45, 46, 47, 48, 49, 50, 51; Vol. II RP 372-378].

The court sentenced Malo to standard range sentences of 51-months on Count I, 29-months on Count II, 29-months on Count III, 29-months on Count IV, 51-months on Count V, 29-months on Count VI, 24-months on Count VII, and 51-months on Count VIII based on an offender score of 12 (the court determined that Counts II-IV constituted the same or similar criminal conduct and counted as one crime for purposes of calculating Malo's offender score) with the sentences running

concurrently for a total sentence of 51-months. [CP 52-53, 54-60, 61-71; 5-19-10 RP 3-5, 24-27].

A timely notice of appeal was filed on May 20, 2010. [CP 72-83].

This appeal follows.

2. Facts

On October 19, 2009, at approximately 4:30 PM, Ruth Greening (Greening) went to LA Fitness in Lacey for a work out parking her Puget Sound Energy work vehicle outside the gym leaving her purse containing her checkbooks and credit cards inside the vehicle. [Vol. I RP 169-170, 197-198; Vol. II RP 206, 212-215]. When Greening came out of LA Fitness at approximately 5:30 PM, her work vehicle was gone. [Vol. I RP 198-199]. Greening called the police and reported the vehicle stolen. [Vol. I RP 162-163, 199]. Greening's work vehicle was found a short time after she reported it stolen in a nearby Safeway parking lot with the door lock punched. [Vol. I RP 166; Vol. II RP 204].

On October 19, 2009, at approximately 5:10 PM, Jesse Clark (Clark), the loss prevention officer for Shopko in Lacey, observed two men in the electronics department seeming to be interested in the computers and iPod Touches. [Vol. I RP 39-41]. One of the men appeared to be removing the security device attached to a computer eventually taking a Sony Vaio computer. [Vol. I RP 42-43, 56]. The

second man, later identified as Malo, opened a box in a shopping cart he was pushing and the first man placed the computer inside the box. [Vol. I RP 43, 57]. The first man also removed a security device from an iPod Touch and slipped it into his pocket. [Vol. I RP 56]. The two men then proceeded to the checkout register. [Vol. I RP 43-44, 57]. Malo walked away from the checkout register while the first man was paying only approaching to purchase a Jones soda at the end of the transaction. [Vol. I RP 44]. Neither Malo nor the other man paid for the Sony Vaio computer worth \$799.99 or the iPod Touch worth \$199.99. [Vol. II RP 225-226].

Malo, pushing the shopping cart, and the other man left Shopko when Clark started after them for shoplifting. [Vol. I RP 44]. Clark confronted the two men outside Shopko, and Malo pushed the shopping cart toward Clark while the other man ran off. [Vol. II RP 226-227, 242]. Clark called the police while Malo walked off. [Vol. I RP 63, 158, 182; Vol. II RP 227]. Malo began circling a black Ford F-150 Harley Davidson Special pick-up truck. [Vol. II RP 227]. When the police arrived, Malo ran away from the truck. [Vol. II RP 228, 242]. Malo was apprehended by the police and arrested. [Vol. I RP 65-66, 87; Vol. II RP 229, 243]. The police impounded the truck and Malo, who at first denied any connection to the truck, eventually providing a key to the truck so that it could be towed. [Vol. I RP 67-68, 88-90; Vol. II RP 228]. Shopko is only

minutes away from the LA Fitness where Greening's work vehicle was found. [Vol. I RP 177-178].

The truck was inventoried pursuant to a search warrant and checkbooks, two Harborstone VISA debit/credit cards, a COSTCO American Express card all belonging to Greening were found in the truck. [Vol. I RP 68-69, 90-92, 97-100]. Also recovered from the passenger door pocket of the truck was a small pink bag containing glass smoking pipes, a baggie of vegetable matter, and a baggie of crystalline substance that when tested was found to contain methamphetamine. [Vol. I RP 104-107, 145]. A number of tools including a multi-purpose screw driver and scissors capable of punching the lock on a car door were also found. [Vol. I RP 114-118].

Malo was charged with a number of crimes and arraigned on November 3, 2009. [11-3-09 RP 3-5]. On January 4, 2010, Malo appeared before the court and a hearing was scheduled for January 20, 2010. [1-4-10 RP 3-6; Vol. II RP 258-264]. On January 20, 2010, Malo did not appear as required and a bench warrant was issued. [1-20-10 RP 3; Vol. II RP 258-264].

Malo did not testify.

D. ARGUMENT

- (1) MALO MAY NOT BE CONVICTED OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE (COUNTS II-IV) WHERE THESE CRIMES WERE INCIDENTAL TO, A PART OF, OR COEXISTENT WITH HIS CONVICTION FOR IDENTITY THEFT IN THE SECOND DEGREE (COUNT I).

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

A three-prong test is applied to determine legislative intent. First, multiple convictions constitute double jeopardy even if the offenses “clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment.” In the Matter

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

Here, the identity theft in the second degree statute contains language acknowledging that separate punishments are allowed unless the crimes at issue constitute the same or similar criminal conduct pursuant to RCW 9.94A.589. RCW 9.35.020(4). This statutory acknowledgement appears to recognize the potential for a violation of double jeopardy principles particularly where the possession of stolen property in the second degree statute contains no such provision. RCW 9A.56.160(1)(c). While it is true that the court at sentencing found that Malo’s three convictions for possession of stolen property in the second degree (Counts II-IV) constituted the same or similar criminal conduct and should be considered as one offense, the court did not recognize that the same principle applied to Malo’s conviction for identity theft in the second degree (Count I). Thus, the offenses at issue here are thus not automatically immune from double jeopardy analysis. In re Burchfield, 111 Wn. App. at 896.

Second, when, as here, the Legislature has not expressly authorized multiple punishments for the same act, this court applies the “same evidence test,” which asks “whether each offense has an element not contained in the other.” *Id.* The statute under which Malo was convicted of possession of stolen property in the second degree (Counts II-IV) requires possession of an access device (financial information). RCW 9A.56.160(1)(c). The identity theft in the second degree statute requires possession of financial information with the intent to commit any crime. RCW 9.35.020(1) and (3). These offenses appear to contain the same elements and, therefore, may be established by the “same evidence.” In fact, the State argued during closing argument that Malo’s possession of Greening’s access devices constituted identity theft as follows:

You have account cards for her Harborstone accounts. You have other financial information. You have account information, her bank access devices. The State submits that you have both financial information and the means of identifying or identification information of Ruth Greening in respect to identity theft.

Now, the other aspect is what other crimes did they go ahead and have the intent to commit? Obviously, they had the intent on the identity theft to commit the next round of charged crimes that I did, three different counts of possession of stolen property in the second degree.

[Vol. II RP 323-324]. Thus the prohibition against double jeopardy may be violated here by applying the same evidence test.

The “same evidence” test, however, is not always dispositive. In re Burchfield, 111 Wn. App. at 897; In re Personal Restraint of Percer, 150 Wn.2d 41, 50-51, 75 P.3d 488 (2003). This court must also determine whether there is evidence that the Legislature intended to treat conduct as a single offense for double jeopardy purposes. Id. This merger doctrine is simply another way, in addition to the “same evidence” test, by which this court may determine whether the Legislature has authorized multiple punishments. State v. Frohs, 83 Wn. App. 803, 811, 924 P.2d 384 (1996). “Thus, the merger doctrine is simply another means by which a court may determine whether the imposition of multiple punishments violates the Fifth Amendment guarantee against double jeopardy....” Id. The question is whether there is clear evidence that the Legislature intended not to punish the conduct at issue with two separate convictions. State v. Calle, 125 Wn.2d at 778. If a defendant is convicted of two crimes, his or her second conviction will stand if that conviction is based on “some injury to the person or property of the victim or others, *which is separate and distinct from and not merely incidental to the crime of which it forms the element.* [Emphasis Added]. State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979).

Here, given the State's closing argument, set forth above, it is clear that Malo's convictions for possession of stolen property in the second degree (Counts II-IV) constituted "the intent to commit a crime" element required for his conviction of identity theft in the second degree (Count I). This court should construe this as evidence that the first crime (identity theft in the second degree) was not completed as the second crimes (possession of stolen property in the second degree) were in progress, then the possession of stolen property in the second degree convictions were *incidental to, a part of, or coexistent with* identity theft in the second degree, with the result that the second convictions (possession of stolen property in the second degree (Counts II-IV)) will not stand under the reasoning in State v. Johnson, *supra*. This seems especially true given the fact that it has long been the law that the constitutional protections against double jeopardy prevent convictions of both theft and possession of stolen property based on the same property. *See State v. Melick*, 131 Wn. App. 835, 129 P.3d 816 (2006); State v. Hancock, 44 Wn. App. 297, 721 P.2d 1006 (1986).

The Washington Supreme Court has observed that “[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon spurious distinctions between the charges.” State v. Adel, 136 Wn.2d at 635. Accordingly, if this court determines that the possession of stolen property in the second degree convictions (Counts II-IV) “were incidental to, a part of, or coexistent” with the identity theft in the second degree (Count I), then Malo’s convictions in Counts II-IV cannot be sustained on these facts and must, therefore, be reversed.

Caselaw from our State Supreme Court supports this conclusion. Formerly, as set forth in State v. Wanrow, 91 Wn.2d 301, 588 P.2d 1320 (1978), the State Supreme Court rejected an argument that a defendant cannot be convicted of both felony murder and the underlying felony. The court upheld both convictions by considering statutory merger and due process finding neither was principle violated. However, in State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), the State Supreme Court apparently reversed this decision by analyzing the issue in terms of double jeopardy.

In Womac, the defendant was charged in three separate counts and convicted of homicide by abuse, felony murder based on criminal mistreatment, and assault. The trial court accepted all three convictions,

but imposed sentence only on the homicide by abuse. On appeal, the appellate court remanded the case for resentencing on the homicide by abuse and conditionally dismissed the felony murder and assault convictions so long as the homicide by abuse conviction withstood further appeal. The State Supreme Court vacated the felony murder and assault convictions on double jeopardy grounds holding Womac had in actuality committed a single offense against a single victim yet was held accountable for three crimes in violation of double jeopardy prohibition against multiple punishments for a single offense. In doing so, the State Supreme Court engaged in the three-part analysis set forth above. The State Supreme Court determined that double jeopardy was violated even though Womac received no sentence on the felony murder and assault convictions as “conviction” in itself, even without imposition of sentence, carries an unmistakable onus which has a punitive effect. In sum, the court held:

As this court noted in Calle, “[i]t is important to distinguish between charges and convictions—the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, *even though convictions may not stand* for all offenses where double jeopardy protections are violated.

[Citations omitted]. State v. Womac, 160 Wn.2d at 657-58.

That is what exactly what has happened here. The State properly filed an information charging multiple counts (identity theft in the second degree as well as counts of possession of stolen property in the second degree), obtained convictions on these multiple counts and even obtained a sentence on those convictions (not withstanding the fact that the possession of stolen property convictions were treated as same or similar criminal conduct), but all the convictions cannot stand given double jeopardy principles for the reasons set forth above. This court should reverse Malo's convictions on Counts II-IV.

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT MALO WAS GUILTY OF IDENTITY THEFT IN THE SECOND DEGREE (COUNT I) AND THEFT OF A MOTOR VEHICLE (COUNT V).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence,

and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rationale trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (*citing* State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

a. Count I—Identity Theft In The Second Degree.

Here, Malo was charged and convicted in Count I of identity theft in the second degree. [CP 16-18, 44]. As instructed by the court in Instruction No. 15, [CP 32], the essential elements of this crime are as follows:

- 1) That on or about October 19, 2009, the defendant knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person;
- 2) That the defendant did so with intent to commit or aid or abet any crime; and
- 2) That the acts occurred in the State of Washington.

[Emphasis added].

In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Malo intended to commit a crime with Greening's financial information. The sum of the evidence presented at trial consists of the fact that the truck to which Malo had the key contained Greening's financial information (checkbooks and credit cards). This evidence establishes that Malo possessed, at least constructively, the financial information (crimes for which he was also convicted—Counts II-IV) not that he intended to commit a crime with the financial information. In fact, that is what the State argued in closing—that Malo's possession of the items was a crime and enough to prove the element of intent to commit a crime necessary for an identity theft conviction—failing to recognize that possession of the financial information was a separate element of the crime. [Vol. II RP 323-324]. Moreover, this argument constitutes the improper pyramiding of inferences condemned in Bencivinga, supra; speculation as to what Malo could have or would have done with Greening's financial information. The evidence does not establish that Malo intended to commit a crime with Greening's financial information. He could have simply found the items and stowed in the truck, after all he did not attempt to use the credit

cards to purchase anything from Shopko. Given these facts it cannot be said that Malo intended to commit a crime with Greening's financial information and was guilty of identity theft in the second degree.

This court should reverse and dismiss Malo's conviction on Count I.

b. Count V—Theft Of A Motor Vehicle.

Here, Malo was charged and convicted in Count V of theft of motor. [CP 16-18, 48]. As instructed by the court in Instruction No. 24, [CP 38], the essential elements of this crime are as follows:

- 1) That on or October 19, 2009, the defendant wrongfully obtained or exerted unauthorized control over a motor vehicle;
- 2) That the defendant intended to deprive the other person of the motor vehicle; and
- 3) That the acts occurred in the State of Washington.

In order to sustain this charge and conviction, the State bore the burden of proving beyond a reasonable doubt that Malo wrongfully obtained or exerted unauthorized control of Greening's Puget Sound Energy work vehicle (stole Greening's vehicle). This is a burden the State cannot sustain.

The sum of the evidence elicited at trial consists of the fact that Greening's work vehicle was stolen while she was at LA Fitness, that the

door lock was punched, that the van was found nearby at Safeway, that items belonging to Greening that she had left in the vehicle were found in a truck to which Malo had a key a short time after Greening's vehicle was stolen, and that tools were found in the truck that are capable of punching a car door lock (a multi-purpose screwdriver and scissors). None of this evidence establishes that Malo was the person who stole Greening's work vehicle. Greening did not see who stole her vehicle and Malo's fingerprints were not found on the vehicle. Moreover, the tools found in the truck are common place and no evidence was presented that they in fact were the tools that punched out Greening's vehicle's door lock. With regard to items belonging to Greening found in the truck, Malo may found the items after Greening's vehicle had been stolen by someone else and merely stowed them in the truck. The evidence does not establish beyond a reasonable doubt that Malo was guilty of theft of a motor vehicle.

This court should reverse and dismiss Malo's conviction for theft of a motor vehicle (Count V).

E. CONCLUSION

Based on the above, Malo respectfully requests this court to reverse and dismiss his convictions for identity theft (Count I) and theft of a motor vehicle (Count V) and/or find that his convictions for possession of stolen property in the second degree—access devices (Counts II-IV) violate double jeopardy principles as his was convicted of identity theft (Count I) for the same access devices.

DATED this 12th day of November 2010.

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 12th day of November 2010, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Vernon I. Malo
DOC# 774185
Larch Corrections Center
15314 N.E. Dole Valley Rd.
Yacolt, WA 99326

Jon Skindar
Thurston County Dep. Pros. Atty.
2000 Lakeridge Drive SW
Olympia, WA 98502
(and the transcript)

COURT OF APPEALS
DIVISION II
10 NOV 15 PM 2:40
STATE OF WASHINGTON
BY
DEPUTY

Signed at Tacoma, Washington this 12th day of November 2010.

Patricia A. Pethick
Patricia A. Pethick