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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BENN CHAPPELLE,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Was Chappelle's right to double jeopardy violated by her convictions for Count II: Theft of a Motor Vehicle and Count IV: Possession of a Stolen Vehicle?
- B. The State concedes the statement regarding Chappelle giving his mother stolen property was outside the CrR 3.5 hearing, prejudicial, and warrants reversal and remand for a new trial on Count III: Trafficking in Stolen Property.

II. STATEMENT OF THE CASE

Cowlitz County Superior Court Judge Gary Bashor owns 120 acres of land in Lewis County located on Westside Highway. RP 64, 153. Judge Bashor visited his property on December 10, 2017 and found sometime between Thanksgiving and that day someone had cut the fencing and stolen a number of items. RP 64-65, 68, 74-86, 90-91.

Judge Bashor saw an ATV, which had been locked in a building, and a trailer, that previously had been in an open shed, out in the open. RP 75. The trailer was full of items it did not previously contain such as, scuba gear, helmet, and other odds and ends. RP 76. There were four motorcycles and a go-kart taken out of one of the shop bays. RP 81. The go-kart was a Briggs and Stratton Howard child's go-kart. RP 81. The motorcycles included a 1978 Yamaha GT 80, yellow, dirt bike; a 1981 z50, bright yellow,

little mini-bike; a red, possibly 2003, Honda 70 dirt bike; and a 1968 Hodaka motorcycle with a chrome gas tank. RP 82.

Judge Bashor noticed there were a lot of other things missing, bicycles, and Chevron cars. RP 90. The Chevron car, collector cars had been stored in a storage building. RP 90-91. Judge Bashor contacted the police and Detective Humphrey from the Lewis County Sheriff's Office came out to the property to investigate the matter. RP 89; 152-53.

Judge Bashor began looking for his property online. RP 91-92. Judge Bashor found some of his property and law enforcement went out with him each time Judge Bashor went to go contact the person with the stolen property. RP 92-93. Detective Humphrey contacted Gary Forkner, Jr. because he had listed a yellow, Yamaha 80 for sale on the internet. RP 161. After speaking with Mr. Forkner, Jr., Detective Humphrey spoke to Gary Forkner, Sr. RP 161. Detective Humphrey than began focusing his investigation on Robert Hyatt and Chappelle. RP 161.

Detective Humphrey had contact with Mr. Hyatt and Chappelle on December 14, 2017. RP 161-62. Detective Humphrey and Detective Frase contacted Mr. Hyatt and Chappelle in the afternoon, on the city streets of Vader. RP 162. Chappelle admitted

to going to the property with Mr. Hyatt and bringing the go-kart and Chevron toy cars back to Chappelle's residence. ID 23.¹ Chappelle insisted it was Mr. Hyatt who came up with the idea to go out to Judge Bashor's property. *Id.* Chappelle asserted he simply stayed on the outside of the fencing and assisted by pushing the go-kart back to his house. *Id.* Chappelle offered to help the police obtain other items that had been stolen from Judge Bashor's property. *Id.* Chappelle agreed to allow detectives to search his residence. *Id.*; RP 172-73.

Detective Humphrey and other members of the Lewis County Sheriff's Office searched Chappelle's mother's residence. RP 174. They located a black go-kart, a yellow Honda z50, RV batteries, and the Chevron collector cars. RP 184.

The State charged Chappelle with Count I: Burglary in the Second Degree, Count II: Theft of a Motor Vehicle, Count III: Trafficking in Stolen Property in the First Degree, and Count IV: Possession of a Stolen Vehicle. CP 14-16. Chappelle elected to have his case decided by a jury. See RP. Immediately preceding

¹ The recorded statement, as played for the jury was not transcribed. The record reflects Ex. 23 (the audio of the recorded statement) is identical to ID 23 (the transcript) and ID 23 is identical to Ex. 1 from the CrR 3.5 hearing, which has been designated as part of this record. See RP 168-71. The State will file a supplemental designation of Clerk's papers for ID 23.

trial there was a CrR 3.5 hearing. RP 23-45. The State sought to admit Chappelle's statements from his recorded interview with Detective Humphrey. *Id.* The trial court ruled the statements contained in Exhibit 1 were admissible. RP 44-45; Ex. 1. Ultimately, Chappelle was acquitted of Count I: Burglary in the Second Degree, and convicted of the other three counts as charged. CP 57-60. Chappelle was sentenced to 18 months in prison. CP 99. Chappelle timely appeals his convictions. CP 106-116.

The State will supplement the facts as necessary in its argument section below.

III. ARGUMENT

A. CHAPPELLE'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WERE NOT VIOLATED BY HIS CONVICTIONS FOR COUNT II AND COUNT IV.

Chappelle argues his convictions for Count II: Theft of a Motor Vehicle and Count IV: Possession of a Stolen Vehicle violate his right to be free from double jeopardy. Brief of Appellant 7-9. Chappelle argues because a person may not be convicted of both theft and possession of stolen property at the same time his convictions for both offenses cannot stand. Chappelle's analysis is flawed and his convictions do not violate his right to be free of double jeopardy.

1. Standard Of Review.

Double jeopardy claims are reviewed de novo. *State v. Barbee*, 187 Wn.2d 375, 382, 386 P.3d 729 (2017).

2. A Review Of The Entire Record Makes It Manifestly Apparent The State Was Not Seeking To Impose Punishment Upon Chappelle Using The Same Property For Theft Of A Motor Vehicle And Possession Of A Stolen Vehicle, Therefore, The Convictions For Counts I And IV Do Not Violate Double Jeopardy.

The Fifth Amendment of the United States Constitution and Article One, Section Nine of the Washington State Constitution provide that no person shall be put in jeopardy twice for the same offense. “In Washington, a defendant is subject to double jeopardy if convicted of two or more offenses that are identical in law and in fact.” *State v. Taylor*, 90 Wn. App. 312, 318, 950 P.2d 526 (1998), citing *State v. Calle*, 125 Wn.2d 769, 777, 888 P.3d 155 (1995). This analysis is commonly known as the *Blockburger* test. *State v. Marchi*, 158 Wn. App. 823, 829, 243 P.3d 556 (2010), citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). The remedy for a double jeopardy violation is vacation of the lesser of the offenses. *Marchi*, 158 Wn. App. at 829.

There are two parts to the double jeopardy analysis. *Marchi*, 158 Wn. App. at 829. “[W]hether the two charged crimes arose

from the same act and, if so, whether evidence supporting conviction of one crime was sufficient to support conviction of the other crime.” *Id.*, citing *In re Pers. Restraint Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). When a single transaction violates two statutes, the question then becomes, does each require proof of an additional fact? *Blockburger*, 284 U.S. at 304.

Double jeopardy claims may be raised for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011); see *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Jury instructions lack clarity when “the need to find that each count arises from a “separate and distinct” act in order to convict” is not expressly stated in the jury instructions. *Mutch*, 171 Wn.2d. at 662; quoting *State v. Berg*, 147 Wn. App. 923, 925, 198 P.3d 529 (2008); see *State v. Carter*, 156 Wn. App. 561, 568, 234 P.3d 275 (2010). When flawed jury instructions are given to a jury, a defendant will *potentially* receive multiple punishments for the same offense, but that does not necessarily mean a defendant has received multiple punishments for the same offense. *Id.* at 663 (emphasis added).

When considering a double jeopardy claim, “review is rigorous and is among the strictest” when a court looks to the entire

trial record for consideration. *Id.* at 664. When considering the totality of the court record, if the record lacks clarity that it was “*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense,” and that each count was based on a separate act, a double jeopardy violation has occurred. *Id.*, quoting *Berg*, 147 Wn. App. at 931 (emphasis added by Court in *Mutch*).

Chappelle argues his right to be free of double jeopardy was violated because he was convicted of theft of a motor vehicle and possession of a stolen vehicle and case law dating back to the 1970 prohibits such convictions. Brief of Appellant 7-9. Chappelle asserts the State’s failure to specify which vehicle it was charging Chappelle with, instead of relying upon a *Petrich* jury instruction, meant it was unknown which vehicle the jury unanimously concluded Chappelle stole and possessed. *Id.* at 8-9. Chappelle acknowledges the jury could have concluded he stole and possessed two different vehicles, but argues it was more likely the jury convicted him of possessing and stealing the one vehicle he admitted to stealing and was storing at his home, the Honda motorcycle. *Id.* at 9. Chappelle ignores the State’s election, in its

closing argument, of the motor vehicles which constituted each count. See, RP 291.

Predating the current theft statute, when theft and possession of stolen property were contained within the larceny statute, the Court of Appeals determined it violated double jeopardy to convict a person of theft and possession of stolen property for the same property. *State v. Hite*, 3 Wn. App. 9, 11-13, 472 P.2d 600 (1970). “It is the holding of a majority of jurisdictions that one cannot be both the principal thief and the receiver of stolen goods.” *Hite*, 3 Wn. App. at 12 (internal citations omitted). Yet, if one continues to read, the opinion goes on to state evidence that a defendant “was the thief and no more” in a charge of receiving, withholding, or concealing, would allow the State to convict a defendant of a crime they have not been charged with. *Id.* at 13.

In 1975 our modern theft statute was enacted, separating out into different statutes theft and possession of stolen property. Laws of 1975, 1st Ex. Sess., ch. 260, §§ 9A.56. This Court held the rule prohibiting convictions for possession of stolen property and theft “survived the 1975 legislative changes” to the statutory scheme. *State v. Hancock*, 44 Wn. App. 297, 301, 721 P.2d 1006 (1986).

In all of the cases cited by Chappelle there is one common thread, the defendant is charged with possessing and stealing the same property. *Hancock*, 44 Wn. App. at 298-302 (prosecution based upon theft of cheese from the food bank and possession of the stolen cheese); *Hite*, 3 Wn. App. 9 (two separate prosecutions, one for receiving stolen leaf-cutter bee boards and the second for stealing the same leaf-cutter bee boards was barred); *State v. Stahlman*, 2017 Wn. App. LEXIS 1802 (unpublished opinion, No. 34375-8-III, Aug. 1, 2017) (prosecution for stealing wheel and tire and possession of the stolen tire and wheel). In Chappelle's case the prosecutor did not prosecute Chappelle for stealing and possessing the same items. RP 290-91. This distinction is of import when considering the double jeopardy analysis.

The trial court's failure to instruct the jury there must be separate and distinct conduct for each count is not fatal to the State's position, Chappelle's convictions do not violate double jeopardy. *Mutch*, 171 Wn.2d 663-66. In Chappelle's matter the jury was given the unanimity instruction for the theft of a motor vehicle count and the possession of a stolen vehicle count individually, but not that the jury must find the item stolen was distinct from the item possessed. CP 60-91 (see, 76-79, 88-87). A rigorous and strict

review by this Court is permitted of the entire record, presented to the jury, which would include the evidence, arguments, and jury instructions. *Mutch*, 171 Wn.2d at 664. Only if this Court can determine it was “manifestly apparent to the jury the State was not seeking to impose multiple punishments for the same offense and that each count was based upon a separate act” will the Court find there was no double jeopardy violation. *Id.* (citations and original emphasis omitted).

The deputy prosecutor in his closing argument stated:

Possession of a stolen vehicle. Now, I want to make sure that this part is clear. I want to make sure that this is clear for your analysis and for the record. What the state is saying constitutes the offenses of possession of a stolen vehicle are contained in Exhibit 15, and this is specifically the yellow Honda 50 motorcycle and the go-kart that had an engine when it was there. They located the engine at the residence. Mr. Bashor testified that the engine was attached to the go-kart when he left it.

So for your purposes on the possession of the stolen property, this is all the state is saying the defendant stole -- or it's not stolen property, sorry, a stolen vehicle. Those are the vehicles that the state is alleging constitute that offense.

When it comes to theft of a motor vehicle, all the other vehicles that were stolen comprise that offense, if that makes sense. Let's say I think there were five things stolen. The yellow motorbike and the go-kart that I just showed you are the possession of a stolen vehicle. The three other motorcycles are the theft of a

motor vehicle. And we've got pictures of those. You had testimony that those were taken.

RP 290-91. The deputy prosecutor made it clear, the vehicles the State were alleging Chappelle had stolen were separate and distinct from the stolen vehicles the State alleged Chappelle possessed for purposes of the two charged offenses. RP 290-91; CP 76-79, 88-87.

Therefore, unlike the line of cases cited by Chappelle, *Hancock*, *Hite*, and *Stahlman*, the State was not attempting to convict Chappelle of possessing and stealing the same item. This Court should apply the analysis set forth by the Supreme Court in *Mutch* as it applies in a factual scenario such as the one presented in Chappelle's case. The State in its argument clearly elected which items it was presenting for which counts and the possession and theft charges did not contain the same items. This Court should find the State did not violate double jeopardy by convicting Chappelle of theft of a motor vehicle and possession of a motor vehicle. Chappelle's convictions should be affirmed.

B. THE STATE CONCEDES THIS COURT MUST REVERSE AND REMAND COUNT III: TRAFFICKING IN STOLEN PROPERTY DUE TO THE ADMISSION OF A STATEMENT ATTRIBUTED TO CHAPPELLE OUTSIDE THE TRIAL COURT'S CrR 3.5 RULING.

Chappelle argues, and the State concedes, a statement attributed to Chappelle was admitted into evidence that fell outside the scope of the CrR 3.5 hearing. Brief of Appellant 9-12. The State concedes the admission of such a statement was in error, not harmless, and requires this Court to reverse the Trafficking in Stolen Property count and remand the matter back to the trial court to allow the State to retry Count III.

1. Standard Of Review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

2. The Admission Of The Improper Statement, Outside The Scope Of The CrR 3.5 Was Prejudicial, And Therefore Requires Reversal and Remand For Retrial For Count III: Trafficking In Stolen Property.

Chappelle did not object to Detective Humphrey's testimony regarding Chappelle's statement about the Chevron cars. RP 184. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167

Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, *citing* RAP 2.5(a). There is a two-part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O'Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*).

No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

Prior to admitting statements of a defendant at trial the trial court shall conduct a hearing to determine whether the statement is admissible. CrR 3.5(a). The trial court shall determine the disputed and undisputed facts, make a conclusion regarding disputed facts, and a conclusion as to whether the statement(s) is admissible and why. CrR 3.5(c).

In this matter the trial court held a CrR 3.5 hearing where the State sought to admit statements Chappelle made in a recorded interview he gave Detective Humphrey. RP 23-28; Ex. 1. The trial court ruled Chappelle was not in custody, and even if he was, *Miranda*² was given. RP 44. The trial court found the interview was an interrogation. *Id.* The trial court found Chappelle voluntarily made the statement, therefore, the entire contents of the recorded statement was admissible. RP 44-45; Ex. 1.

During Detective Humphrey's direct examination the following exchange occurred:

Q. Did you locate any motor vehicles specifically?

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

A. Yes. I located the black go-kart, and I also located the yellow Honda Z50. We located the RV batteries from Mr. Bashor's RV, and we located the collector cars that Mr. Chappelle had told me he gave to his mother.

RP 184. Nowhere in Chappelle's taped statement with Detective Humphrey does Chappelle state he gave his mother the Chevron collector cars. See, Ex. 1.

The evidence the State presented for the Trafficking in Stolen Property, Count III, was the Chevron cars were stolen, located in a closet in a common area of Chappelle's house, and were given to Detective Humphrey after Detective Humphrey inquired of Chappelle's mother if Chappelle had given her some collector cars. RP 90, 192.

A. I asked her if her son, Mr. Chappelle, had given her some collector cars.

Q. And I don't want you to say what her response was, but did she have an answer?

A. Yes.

Q. Okay. And were you ultimately provided with the collector cars that you had asked about?

A. Yes. Ms. McGinnis walked over to a closet off of the living room area of the residence and pulled out a tub, a plastic tub, that contained several of the collector cars that were stolen from Mr. Bashor.

RP 192. Therefore, the only evidence the State had to support the Trafficking in Stolen Property charge, without Chappelle's statement, was circumstantial evidence. The State cannot in good faith argue Chappelle was not prejudiced by the admission of the improper statement.

The State agrees with Chappelle, pursuant to *State v. Jasper*, 174 Wn.2d 96, 120, 271 P.3d 876 (2012), reversal of Count III: Trafficking in Stolen Property, and retrial of that count is the appropriate remedy due to the violation in this matter. The State cannot show the statement was lawfully obtained since it was outside the scope of the CrR 3.5 hearing. Yet, the Court does not simply strike out the erroneous evidence and do a de novo review of the remaining evidence to determine if there is sufficient evidence to sustain a defendant's conviction. *Jasper*, 174 Wn.2d at 120. Therefore, reversal of Count III: Trafficking in Stolen Property, and remand for retrial on that count is appropriate.

IV. CONCLUSION

The convictions for Count II and Count IV do not violate Chappelle's right to be free from double jeopardy and the Court should affirm the convictions. The State concedes the testimony regarding Chappelle's statement he gave stolen property to his mother was outside the scope of the CrR 3.5 hearing, prejudicial, and warrants reversal and remand for retrial on Count III: Trafficking in Stolen Property.

RESPECTFULLY submitted this 16th day of April, 2019.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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