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Court of Appeals
Division II
State of Washington
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No. 52338-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

BENN CHAPPELLE

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

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A. Assignment of Errors

Assignment of Errors

1. Mr. Chappelle was erroneously convicted of both theft of a motor vehicle and possession of a stolen vehicle.
2. The State erroneously admitted an alleged statement attributed to Mr. Chappelle without first proving its voluntariness pursuant to CrR 3.5.

Issues Pertaining to Assignment of Errors

1. Mr. Chappelle was convicted of both theft of a motor vehicle and possession of a stolen vehicle. Does it violate double jeopardy to convict a person of both stealing a vehicle and possessing the same stolen vehicle?
2. Did the State erroneously admit an alleged statement attributed to Mr. Chappelle without first proving its voluntariness pursuant to CrR 3.5?

B. Statement of Facts

Benn Chappelle was charged by Second Amended Information with Second Degree Burglary, Theft of a Motor Vehicle, First Degree Trafficking in Stolen Property, and Possession of a Stolen Vehicle. CP, 14. The Theft of a Motor Vehicle and Possession of a Stolen Vehicle

charges did not specify which motor vehicle was being charged and the trial court instructed the jury using a *Petrich* instruction with both charges. CP, 14-15, CP, 79, 88. The First Degree Trafficking in Stolen Property named “collector cars” in the Second Amended Information. CP, 15. The jury acquitted him of the Burglary charge, but convicted him of the other three offenses. CP, 92.

Cowlitz County Superior Court Judge Gary Bashor owns a vacation property in Lewis County. RP, 64. On December 10, 2017, he visited the property with his fifteen year old son to work on some dirt bikes. RP, 73. When he arrived, he discovered that the fence had been cut and some items appeared out of place. RP, 73-74. Upon closer inspection, he discovered a lot of missing items, including scuba and fishing equipment. RP, 79. Four motorcycles and a go-kart were taken. RP, 81. Also missing was a collection of Chevron collector cars, miniature toy cars that used to be sold at Chevron stations. RP, 74, 90-91. Judge Bashor called 911 and Detective Jeff Humphrey responded. RP, 89, 153.

After taking the initial report, Detective Humphrey started an investigation to locate the stolen property and identify suspects. RP, 161. For reasons not important to this appeal, Detective Humphrey identified Robert “Bobby” Hyatt and Benn Chappelle as possible suspects. RP, 161.

On December 14, 2017, Detective Humphrey located the two of them together in Vader, Washington. RP, 162. They were both interviewed. RP, 163. In his statement, Mr. Chappelle admitted going to the Bashor property, but said he stood outside the fence while Mr. Hyatt went inside. Exhibit 23, page 3. Mr. Chappelle admitted assisting in the removal of the go-kart and, sitting on the seat of the go-cart was a box of Chevron cars. Exhibit 23, page 4. He wheeled the go-cart to his house. Exhibit 23, page 4. In the statement, there is no further information about what happened to the Chevron cars.

Mr. Chappelle lived with his mother, identified in the record as Ms. McGinnis, in Vader. RP, 174, 183, 195. Detective Humphrey sought and obtained a search warrant for the Chappelle residence. RP, 173. Ms. McGinnis was present at the time of the search. RP, 185. Inside the residence, he located the stolen go-kart and stolen Honda motorcycle. RP, 184. During his testimony, Detective Humphrey testified as follows:

Q: Did you locate any motor vehicles specifically?

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. Defense counsel did not object to this statement and neither party followed up on the statement.

Detective Humphrey was also searching the house for the stolen Chevron toy collector cars. RP, 185. He initially searched Mr. Chappelle's bedroom but did not locate them. RP, 185. He then asked Ms. McGinnis about the toy cars. RP, 185. This prompted a lengthy discussion outside the presence of the jury about Ms. McGinnis' statements as constituting hearsay. RP, 186. The trial court sustained the hearsay objections, although the court did allow a modified question to be asked. RP, 190-91. When the jury returned, the following colloquy between the prosecutor and the detective occurred:

Q: So, again, what did you ask her?

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. The toy cars were photographed and collected to be returned to the owner. RP, 174-75, 192.

Robert Hyatt testified in the State's case-in-chief. RP, 111. Most of his testimony related to the burglary charge, which the jury acquitted Mr. Chappelle of. At sentencing, the trial court credited defense counsel's "very, very effective cross-examination" of Mr. Hyatt for the acquittal. RP, 10 (August 21, 2018). Important for purposes of this appeal, Mr. Hyatt was not asked about the toy Chevron cars.

The prosecutor twice told the trial court he did not believe he could prove the Trafficking in Stolen Property charge. RP, 138-39. Predictably, at the conclusion of the State's case-in-chief, the defense moved to dismiss the Trafficking charge. Defense counsel summed up the evidence as follows: "The only evidence that we have that relates to the collector cars is that they were found at a house in a common area where Mr. Chappelle was living and that his mother knew where they were." RP, 241. The State responded that there was circumstantial evidence that Mr. Chappelle "had given" the Chevron cars to his mother because she knew where they were in his house. RP, 243-44. The State also referenced Detective Humphrey testimony, saying, "I did not admit it, but it was testified to in response to a question that Mr. Chappelle actually admitted to giving the cars to his mother. It was a very quick statement, but it was said." RP, 243. The trial court denied the motion. RP, 246.

CrR 3.5 Hearing

Prior to trial, the Court conducted a hearing pursuant to CrR 3.5 to determine the voluntariness of Mr. Chappelle's pretrial statements. RP, 23. The only witness to testify was Detective Jeff Humphrey. RP, 23. Detective Humphrey testified he contacted Mr. Chappelle walking on the streets of Vader on December 14, 2017. RP, 24. No *Miranda* rights were read at that time. RP, 34. Detective Humphrey advised him he wanted to speak with him. RP, 26. There was some conversation at that time, although the record does not disclose what that conversation was except that Detective Humphrey told Mr. Chappelle why he wished to speak with him. RP, 37. Detective Humphrey transported him to a nearby fire station. RP, 26. Upon arriving at the fire station, Detective Humphrey conducted a recorded interview. At the beginning of the recording, Detective Humphrey read Mr. Chappelle his *Miranda* rights. RP, 38. A transcript of the hearing appears in the record as Exhibit 23.

At the conclusion of the hearing, the trial court clarified exactly which statements the State was seeking to admit. RP, 42. Specifically, the State was not seeking to admit any statements made prior to or after the recorded statement. RP, 42. The prosecutor confirmed that was the case. RP, 42. The trial court admitted the statements. RP, 44.

C. Argument

1. Mr. Chappelle was erroneously convicted of both theft of a motor vehicle and possession of a stolen vehicle.

A person may not be convicted of both theft and possession of stolen property of the same item, *State v. Hancock*, 44 Wn.App. 297, 721 P.2d 1006 (1986); *State v. Hite*, 3 Wn.App. 9, 472 P.2d 600 (1970). In *Hancock*, the defendant and a co-conspirator (who was working with law enforcement) stole a large shipment of cheese and stored it in the co-conspirator's barn. Three weeks later, the two of them met with an undercover police officer posing as a buyer and arranged the sale of the cheese. After the cheese was loaded onto a U-Haul truck, the defendant was arrested and charged with first degree theft (for the initial theft) and first degree possession of stolen property (for loading the cheese onto the U-Haul truck three weeks later).

The Washington Supreme Court reversed the possession of stolen property charge on double jeopardy grounds, holding that "a man who takes property does not at the same time give himself the property he has taken." *Hancock* at 301, citing *State v. Flint*, 4 Wn.App. 545, 483 P.2d 170 (1971). The *Flint* case quotes Justice Frankfurter when he characterized the principle that a person cannot be simultaneously convicted of both stealing an item and possessing an item as "horn book

law.” *Flint* at 547, citing *Milanovich v. United States*, 365 U.S. 551, 558, 81 S.Ct. 728, 732, 5 L.Ed. 733 (1961) (Justice Frankfurter, dissenting). The Supreme Court was not deterred from this conclusion by the fact that the theft occurred three weeks before the possession charge, holding that the defendant was in continuous constructive possession of the stolen cheese for the entire three weeks.

The *Hite/Hancock* line of cases, first articulated in 1970, remains good law in Washington and was cited as recently as 2017 in an unpublished case. In *State v. Stahlman*, 200 Wn.App. 1013 (2017), unpublished (cited as persuasive authority pursuant to GR 14.1), the defendant was convicted of Third Degree Theft and Third Degree Possession of Stolen Property for the same wheel and tire. The Court of Appeals dismissed the Third Degree Possession of Stolen Property charge, citing *Hancock*.

Mr. Chappelle was convicted of Theft of a Motor Vehicle and Possession of a Stolen Vehicle. The State did not specify which motor vehicle it was charging Mr. Chappelle with, choosing instead to rely on a *Petrich* instruction. CP, 79, 88. Because the jury was instructed on its requirement to be unanimous in its verdict, the jury necessarily concluded unanimously that Mr. Chappelle both stole a specific motor vehicle and

possessed a specific motor vehicle. While it is possible the jury concluded the motor vehicle he stole was different than the vehicle he possessed, it is more likely the jury concluded the vehicle he admitted stealing, the Honda motorcycle, was the same vehicle he was storing at his house. Because it is impossible to determine whether the jury convicted him of stealing and possessing the same or different motor vehicles, the *Hancock* analysis requires dismissal of the Possession of Motor Vehicle charge.

2. The State erroneously admitted an alleged statement attributed to Mr. Chappelle without first proving its voluntariness pursuant to CrR 3.5.

During the trial testimony, the following colloquy occurred:

Q: Did you locate any motor vehicles specifically?

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. Defense counsel did not object to this statement and neither party followed up on the statement.

It is impossible to determine on this record when, where, and under what circumstances Mr. Chappelle “told [the detective] he gave [the collector cars] to his mother.” This statement does not appear anywhere in the recorded interview and there were no follow up questions to clarify the

context of the statement. Exhibit 23. Additionally, as the prosecutor later acknowledged (“I did not admit it. . .” RP, 243), the statement was nonresponsive to the question and seemed to take everyone by surprise, including the prosecutor. Because the alleged statement was necessarily made either before or after the recorded statement¹, it was not subjected to the voluntariness inquiry required by CrR 3.5. To the contrary, the prosecutor explicitly stated at the CrR 3.5 hearing that he was not seeking to admit any statements made before or after the recorded statement. RP, 42.

The admission of a defendant’s statement without a CrR 3.5 hearing is an error of constitutional magnitude that may be raised for the first time on appeal. *State v. S.A.W.*, 147 Wn.App. 832, 197 P.3d 1190 (2008). In this case, Mr. Chappelle requested a CrR 3.5 hearing. The admission of a statement attributed to the defendant without the requisite CrR 3.5 hearing is comparable to not having a CrR 3.5 hearing at all. The statement should, therefore, not have been admitted and the fact that

¹ There is a third possibility – that the statement was not made at all, at least by Mr. Chappelle. Ms. McGinnis’ statement that Mr. Chappelle gave her the toy cars was properly suppressed by the Court as hearsay. RP, 190-91. Based upon the record as a whole, it appears likely that the detective misstated his testimony, attributing to Mr. Chappelle a statement that was not made by him, but rather by his mother. The fact that neither party inquired further about the circumstances of the statement corroborates this conclusion. Even the prosecutor seemed surprised by the testimony. But the State is entitled to all the evidence and reasonable inferences therefrom.

defense counsel failed to timely object to the statement does not preclude review.

The unsupported statement that Mr. Chappelle “gave” the collector cars to his mother took on gargantuan importance at the conclusion of the State’s case-in-chief when defense counsel moved to dismiss the charge of Trafficking in Stolen Property. Defense counsel argued that the only evidence of Mr. Chappelle’s alleged trafficking was that Ms. McGinnis retrieved the collector cars for Detective Humphrey on his request. The prosecutor responded, “I did not admit it, but it was testified to in response to a question that Mr. Chappelle actually admitted to giving the cars to his mother. It was a very quick statement, but it was said.” RP, 243.

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 could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). But for the inadmissible statement attributed to Mr. Chappelle about “giving” the collector cars to his mother, there would be insufficient evidence to support this conviction. On direct review, however, the remedy when a reviewing court determines that a defendant's conviction must be reversed

because evidence was erroneously admitted against him is a retrial rather than dismissal, even if the remaining properly-admitted evidence would be insufficient to support the conviction. *State v. Jasper*, 174 Wn.2d 96, 120, 271 P.3d 876 (2012).

D. Conclusion

This Court should reverse and dismiss the charge of Possession of a Stolen Vehicle. The charge of Trafficking in Stolen Property should be reversed and remanded for a new trial.

DATED this 31st day of January, 2019.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

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

STATE OF WASHINGTON,) Court of Appeals No.: 52338-8-II
)
Plaintiff/Respondent,) DECLARATION OF SERVICE
)
vs.)
)
BENN CHAPPELLE,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On January 31, 2019, I e-filed the Supplemental Designation of Clerk’s Papers and the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated said documents to be sent to Lewis County Deputy Prosecuting Attorney Sara I Beigh via email to: sara.beigh@lewiscountywa.gov, through the Court of Appeals transmittal system.

On January 31, 2019, I deposited into the U.S. Mail, first class, postage prepaid, the original Supplemental Designation of Clerk’s Papers, for filing with Lewis County Superior Court, to:

Superior Court Clerk
Lewis County Clerk’s Office
345 W Main Street, 2nd Floor
Chehalis, WA 98532

////

1 On January 31, 2019, I deposited into the U.S. Mail, first class, postage prepaid, true and correct
2 copies of the Supplemental Designation of Clerk's Papers and the Brief of Appellant to the
3 defendant:

3 Benn Chappelle, DOC #718277
4 Washington State Penitentiary
5 1313 North 13th Avenue
6 Walla Walla, WA 99362

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

9 DATED: January 31, 2019, at Bremerton, Washington.

10 

11 _____
12 Alisha Freeman
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THE LAW OFFICE OF THOMAS E. WEAVER

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