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NO. 69307-7-I

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

REC'D
FEB 11 2013
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ANTWAN RECHE,

Appellant.

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

The Honorable Monica Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to present a defense when it excluded the police recordings of appellant's arrest.

2. The court erred in entering judgments for both robbery and possession of a stolen vehicle because the same person cannot be both the thief and the possessor of stolen property.

3. The court violated double jeopardy by entering judgments for both robbery and possession of stolen property.

Issues Pertaining to Assignments of Error

1. Accused persons enjoy a fundamental due process right to present a complete defense. Appellant argued voluntary intoxication negated intent. Several witnesses testified he appeared highly intoxicated but opined his impairment was feigned. Two police recordings captured the sounds of appellant's ranting and police officers' narration of his behavior. Did the Court violate appellant's right to present a defense by excluding these recordings that would have permitted the jury to judge for itself the extent of appellant's intoxication?

2. Under State v. Melick,¹ the same person may not be criminally liable both as the thief and as the possessor of stolen property. Did the court err in entering judgment against appellant for both second-

¹ State v. Melick, 131 Wn. App. 835, 841, 129 P.3d 816 (2006).

degree robbery and possession of a stolen vehicle based on a single act of taking a car?

3. Double jeopardy protects against dual convictions for the same offense. Do the dual convictions for robbery and possession of a stolen vehicle violate double jeopardy when the evidence required to prove the robbery necessarily also proves possession of a stolen vehicle?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County prosecutor charged appellant Antwan Reche with one count of second-degree robbery, one count of possession of a stolen vehicle, one count of hit and run – attended, one count of hit and run – unattended, and one count of reckless endangerment. CP 11-13. The jury found Reche not guilty of hit and run – unattended, but found him guilty on the other counts. CP 77-81. The court imposed concurrent standard range sentences on the two felonies and suspended concurrent sentences on the two misdemeanors. CP 85, 91. Notice of appeal was timely filed. CP 111.

2. Substantive Facts

On November 17, 2011, Reche was homeless and living in a tent at the Occupy Seattle demonstration at Seattle Central Community College.

5RP² 15-17. He had recently taken up methamphetamine as a way to cope with his dismal situation. 5RP 18-19, 42-44, 67. That morning, his girlfriend had broken up with him, declaring she did not love him and was now dating his best friend. 5RP 19, 22-23. He was also unable to take his prescribed medication for his bipolar disorder because his backpack had been stolen. 5RP 67-68. Reche turned to the euphoric high of methamphetamine. 5RP 24.

Unfortunately, methamphetamine also causes hallucinations, paranoia, and psychosis. 4RP 67, 82-83. He testified he did not remember large chunks of the day, however some additional memories were later triggered by reading police reports. 5RP 36, 39, 62-63. He recalled waking up in a backyard in the Capitol Hill neighborhood in the dark and believing the FBI was after him. 5RP 24-25. He could not explain why, but had a desperate need to get to Westlake Mall downtown. 5RP 27. He recalled riding a broken-down bicycle he found in the backyard. 5RP 25-26. Then he woke to find himself crouched beside a car. 5RP 26. A woman dropped her keys and told him he could take the car. 5RP 26-27. Grateful to have a warmer and faster alternative to the bicycle, he got in the car. 5RP 30.

² There are seven volumes of Verbatim Report of Proceedings referenced as follows: 1RP – June 27, 2012; 2RP – June 28, 2012; 3RP – July 2, 2012; 4RP – July 3, 2012; 5RP – July 9, 2012; 6RP – July 10, 2012; 7RP – Aug. 3, 2012.

Reche did not have a driver's license and, in fact, had never even learned to drive a car. 5RP 30-31, 47, 81. Although he tried to be careful, he testified, he bumped the cars in front and behind as he maneuvered out of the parallel street parking spot. 5RP 47. After he drove away, he did not remember crashing into any other cars. 5RP 82-83.

He did recall eventually stopping when the car broke down. 5RP 32. Still believing the FBI was chasing him, he got out of the car and ran. 5RP 32. He did not get far before he was tackled from the side and thrown to the ground. 5RP 32. He recalled feeling as though his whole body was shutting down and everything around him went black. 5RP 32-33. He recalled yelling at the police not to let the "feds" take him. 5RP 33. He woke up again in the ambulance and again in the hospital, repeatedly asking for his meds, referring to prescription medication for his bipolar disorder. 5RP 34.

At trial he testified he had taken methamphetamine both that day and the day before. 5RP 20-21. He had already blacked out at least once. 5RP 24. The initial high caused by methamphetamine usually lasts a day or two, but with continued use, the "down" phase can come more quickly. 5RP 51, 66. Black-outs can happen during any stage of the intoxication, and they are worsened by lack of sleep. 5RP 66. At the time of this incident, he had not slept in at least a week. 5RP 20. He testified at the time of these events he was in the "down" phase of intoxication and was in a dream-like state where

he was not in control. 5RP 40-41. He was “devastated” to hear Vanessa McGough’s account of the evening’s events. 5RP 35.

McGough testified she dropped her keys because a man suddenly appeared, about one foot behind her as she tried to get into her car. 3RP 7, 12, 14. It was dark, and she claimed he told her in a stern voice to drop her keys and step away from the car. 3RP 7-8, 25. He appeared to be holding something on the left side under his shirt. 3RP 13. She did not see any weapon or even a balled up fist. 3RP 34. When he noticed the phone in her hand, he told her to put that on the ground as well. 3RP 15. He placed her phone on a nearby parked car and instructed her to wait 10 to 15 minutes before calling the police. 3RP 15-16, 37.

She told him he could take the car, but asked to retrieve her backpack containing her books and notes from her college classes. 3RP 16-17. He told her not to make a scene and then stepped away so she could retrieve her bag without turning her back to him. 3RP 17, 39, 41. He did not ask for money or try to take her wallet or phone. 3RP 37-38, 40.

McGough began to walk away while the man sat in her car without moving for a minute or two. 3RP 19, 23. When she flagged down a passing motorist to call 911, her car was still in its spot. 3RP 43. According to McGough, the man had no trouble pulling out of the parking spot without hitting the adjacent cars. 3RP 23-24. She was still on the phone with 911

when the car accelerated rapidly and began fishtailing and driving erratically. 3RP 24. About 30 seconds after she saw her car speed away, McGough heard a crash. 3RP 8, 45. She later retrieved her phone from above an adjacent car and found a drumstick. 3RP 34. McGough later testified the man did not seem intoxicated during her encounter with him. 3RP 24.

McGough was on the phone with her fiancé Kristopher Buitrago when the man approached her. 3RP 57. Buitrago called 911 after she abruptly stopped talking and he heard muffled tones of fear in her voice. 3RP 58. Both Buitrago and McGough's 911 calls were played for the jury. 3RP 21-23, 61-62; Exs. 3, 9.

Martine Saphiloff saw the white car speed through an intersection without stopping at the stop sign. 3RP 81-82. She testified it made a wide turn, collided with an oncoming car, and kept going, subsequently hitting three or four parked cars. 3RP 81, 84. Janet Berdine was in the first car that was hit. 3RP 159. She testified the white car struck her car head on and kept going, without stopping to see if she or her husband was all right or give contact or insurance information. 3RP 161-62.

Saphiloff watched as the car appeared to stall at the next intersection. 3RP 82. The driver got out, looked around, and took off running while trying to take off his jacket. 3RP 82, 88, 97. She gave chase while yelling, "Stop him." 3RP 82. By the time she caught up, another man, Saphiloff's

employee on his way to work, had tackled the man and both were on the ground. 3RP 82, 87, 90.

Saphiloff testified the man kept repeating he wanted to see his babies. 3RP 90-91. He then appeared to pass out, but she wondered if he was “playing possum.” 3RP 90. She testified he appeared to be under the influence of alcohol or narcotics. 3RP 98-99.

Saphiloff’s employee, James Joseph did not see the initial collision, but saw the car speed down the street and stop when the car stalled. 3RP 106-08. He testified the man got out, looked around, took off his jacket, and ran diagonally toward the sidewalk in Joseph’s direction. 3RP 108-09. When the man got close, Joseph lunged forward and tackled him to the ground. 3RP 110. Joseph testified the man told him “You are not taking me down, Bitch.” 3RP 110. Joseph testified the man did not appear intoxicated at first. 3RP 112. He did not swerve or waver as he ran and said he wanted to get back to his kids. 3RP 112-13.

Joseph testified the man was initially calm, but when the police arrived, he began struggle, kicking and rolling side to side. 3RP 115. The struggle continued when paramedics arrived. 3RP 115. Joseph testified the man’s behavior was not normal and seemed more like involuntary spasms or possibly an act. 3RP 116-17. Although he initially appeared sober, after the police arrived, Joseph assumed the man must be intoxicated. 3RP 115-16.

Although at trial Joseph testified he believed the convulsions were an act, he admitted he did not think so at the time. 3RP 116-17, 128. At the time, he believed the man was passing in and out of consciousness due to drug use. 3RP 134.

Thomas Bennett also witnessed the aftermath of the collision on Pine Street. 3RP 137. He testified that after the white car stopped, the driver got out, appeared to look around to get his bearings, and then fled until he was tackled. 3RP 137-38, 141-43. He testified no one was screaming, and the scene was relatively calm until the police arrived. 3RP 145. Then the driver started to struggle to get away. 3RP 145. He also heard the driver yelling a lot, most of it nonsense, some of it about the Occupy Seattle protests. 3RP 145. Bennett testified the nonsense ramblings suggested the driver was not sober. 3RP 154.

Officer Brian Blasé responded to the report of the collision on Pine and testified that, when he arrived, the driver was unconscious. 4RP 42, 44. As he was arresting the driver on suspicion of hit and run, the driver began having what Blasé described as a seizure. 4RP 46. He testified the man became very agitated when he awoke in handcuffs and began kicking firefighters, screaming to be let go, and ranting about Occupy Seattle in a way that did not make sense. 4RP 46. He also heard him say, "I didn't take it." 4RP 47. He testified that statement was entirely spontaneous and not

prompted by any question. 4RP 47. Another officer picked up McGough and brought her to the scene of the accident where she identified Reche as the man who took her car. 3RP 26; 4RP 36-37.

Blasé accompanied Reche to Harborview Hospital in the ambulance. 4RP 48. He testified that in the ambulance, Reche continued to scream and be upset, followed by passing out into a catatonic state, followed by becoming agitated again. 4RP 48. Although he was repeatedly asked his name, even when he appeared awake, Blasé testified, Reche was either unable or unwilling to give his name. 4RP 53-55. Blasé concluded Reche was either mentally ill or under the influence. 4RP 52-53.

Officer Eric Michl, a drug recognition expert, responded to the hospital, read implied consent warnings to an unresponsive Reche, and authorized a blood draw based on what he had been told of the accident and Reche's behavior. 4RP 96-99, 104. He testified Reche appeared to be in a deep sleep, similar to what occurs during the "down" phase of methamphetamine intoxication. 4RP 98. Reche did not respond when spoken to and did not react when his blood was drawn. 4RP 98, 106-07. He testified he could not determine how impaired Reche was that night without more information, but in his opinion, Reche was under the influence. 4RP 111. Based on what he had heard, he believed Reche was too impaired to drive, but knew what he was doing. 4RP 124-25.

Forensic scientist Sarah Swenson analyzed Reche's blood and found methamphetamine was present at .32 milligrams per liter. 4RP 75. She testified methamphetamine is sometimes used medicinally as a last resort, and a therapeutic level would be between .02 and .2 milligrams per liter. 4RP 65-66. It can cause impairment including hallucinations, paranoia, psychosis and lack of sleep, which can in turn, cause additional impairment. 4RP 67, 78-79, 82-83. While any level above .2 is non-therapeutic, it is impossible to gauge an individual's impairment based on the amount of methamphetamine in the blood. 4RP 76-78

Under ER 403, the court excluded the video recordings made by on-board cameras on the responding officers' patrol cars. 5RP 91-92; Ex. 18. Reche argued they provided additional support for his voluntary intoxication defense because he could be heard screaming in the background and other witnesses and officers could be heard commenting that he was "really out of it," and at times appeared unconscious and at other times appeared to be having convulsions. 5RP 76-78; Ex. 18. The court concluded that, because Reche could not be seen on the video but only heard, it would be too difficult for the jury to weigh the significance of the "terrifying" sounds. 5RP 91-92. The court opined that excluding the video would not diminish Reche's ability to put on his defense. 5RP 91-92.

At sentencing, the State agreed the convictions for second-degree robbery and possession of a stolen vehicle “merged,” and each offense could not be counted as a point in the offender score for the other. 7RP 5-6. However, the court entered judgment on both convictions. CP 82.

C. ARGUMENT

1. THE COURT VIOLATED RECHE’S RIGHT TO PRESENT A DEFENSE WHEN IT EXCLUDED AUDIO-VIDEO RECORDINGS ILLUSTRATING HIS VOLUNTARY INTOXICATION DEFENSE.

Accused persons enjoy a fundamental due process right to present a complete defense. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 338 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). Both the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution guarantee the right to offer testimony and compel the presence of witnesses. Washington, 388 U.S. at 19, 23; State v. Hudlow, 99 Wn.2d 1, 14-15, 459 P.2d 514 (1983). Courts must safeguard the right to present a defense ““with meticulous care.”” State v. Maupin, 128 Wn. 2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)).

The right to present evidence is subject only to the following limitations: (1) the evidence sought to be admitted must be relevant; and (2)

the right to introduce relevant evidence must be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the fact-finding process. Hudlow, 99 Wn.2d at 15-16; see also Washington, 388 U.S. at 20-23 (Sixth Amendment requires permitting defense to present relevant testimony despite government's concerns for perjury). Relevant defense evidence must be admitted unless the State can show "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process." Jones, 168 Wn.2d at 720. It is an unreasonable abuse of discretion to exclude evidence the defense has a constitutional right to present. State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000).

Reche's due process right to present a defense was violated when the court excluded audio-visual recordings that would have helped establish his voluntary intoxication defense. The recordings were relevant to resolving the testimony that Reche appeared extremely intoxicated but some witnesses believed his impairment was feigned. The recordings would have given the jury an opportunity to hear what the witnesses heard, so they could decide for themselves whether Reche's behavior was genuine. No compelling state interest justified denying the jurors the opportunity to gauge for themselves the authenticity and extent of Reche's impairment.

a. The Proposed Defense Exhibit Was Relevant to Establish Reche's Voluntary Intoxication Defense.

Evidence is relevant if it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. The right to present a defense includes to the right to present the defendant’s version of the facts to the jury “so it may decide where the truth lies.” Washington, 388 U.S. at 19; State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). The audio-visual recordings in Exhibit 18 were relevant because they would have allowed the jury to hear for itself and “decide where the truth lies” in interpreting whether Reche’s apparently severe intoxication was authentic.

Voluntary intoxication may be considered in determining whether an accused person was able to form the mental state required for criminal liability. RCW 9A.16.090. “[V]oluntary intoxication is relevant to the trier of fact in determining ... whether the defendant acted with a particular degree of mental culpability.” State v. Coates, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). Reche argued he was unable to form the intent to steal due to voluntary intoxication from methamphetamine. 6RP 27-41. The eyewitness testimony was conflicting. Nearly every witness agreed he appeared to lose consciousness at times and, at other times, raved as if he

were extremely intoxicated. 3RP 90, 98-99, 115-16, 134, 154; 4RP 44, 46, 48, 52-53, 128. Yet several witnesses opined this may have been an act. 3RP 90, 112, 116-17, 125. The State argued in closing this was merely an act because he did not appear intoxicated until the police arrived. 6RP 8-9, 44-45.

Exhibit 18, the audio-video recordings made by the officers' on-board cameras, is relevant because it would have allowed the jury to judge for itself "where the truth lies." Washington, 388 U.S. at 19. Although the action is out of the camera's visual field, the recording captured Reche's screams and struggles with officers. Ex. 18. Reche can be heard moaning, screaming, sobbing, yelling for help, and swearing at officers. Ex. 18, track 2 at 11:08, 12:35, 13:11, 13:44-20:20. Officers can be heard declaring he is "out of it," "totally out of control," and "high on meth." Ex. 18, track 1 at 33:32, 35:25. Another officer essentially narrates the arrest, announcing Reche is unconscious, then that he is breathing, and then that he is "seizing up." Ex. 18, track 2 at 4:13. This evidence is relevant because it would have helped the jury assess the varying witness opinions regarding Reche's mental state.

b. The State Has No Compelling Interest that Might Justify Excluding Evidence Tending to Establish Reche's Defense.

A defendant is allowed to present even minimally relevant evidence unless the State can demonstrate a compelling interest for excluding the evidence. State v. Darden, 145 Wn. 2d 612, 621, 41 P.3d 1189 (2002). Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it. Hudlow, 99 Wn.2d at 15-16.

“Evidence relevant to the defense of an accused will seldom be excluded, even in the face of a compelling state interest.” Reed, 101 Wn. App. at 715 (citing Hudlow, 99 Wn.2d at 16). When the evidence is highly probative, “there can be no state interest compelling enough to preclude its introduction.” Reed, 101 Wn. App. at 709 (citing Hudlow, 99 Wn.2d at 16).

The trial court excluded the video recordings under ER 403, under which the court “may” exclude relevant evidence if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence. 5RP 92. The court questioned the credibility of Reche's behavior, citing the testimony that he did not begin to struggle until police arrived. 5RP 89. The court reasoned the recordings did not help jurors understand and keeping them out would not diminish the defense theory of the case. 5RP 91. These reasons are

insufficient to outweigh Reche's fundamental due process right to present relevant evidence.

i. ER 403 Is Not a Compelling Interest in Violating Reche's Right to Present a Complete Defense.

"ER 403 does not extend to the exclusion of crucial evidence relevant to the central contention of a valid defense." State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987) (citing 5 K. Tegland, Washington Practice, § 105; United States v. Wasman, 641 F.2d 326 (5th Cir. 1981)). The defendant's constitutional rights take precedence over evidence rules, and the state must show a "compelling" interest, to outweigh the heft of those rights. See Washington, 388 U.S. at 16 (State's interest must be high); State v. McDaniel, 83 Wn. App. 179, 187, 920 P.2d 1218 (1996) (applying balancing test to evidence that would be excluded under evidence rules). In short, when an evidentiary rule would limit the defendant's right to present his case, "the court must evaluate whether the interests served by the rule justify the limitation." State v. Baird, 83 Wn. App. 477, 481-82, 922 P.2d 157 (1996) (citing Rock v. Arkansas, 483 U.S. 44, 53-55, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987)). The court failed to do that here.

The court's concern for confusing the jury due to the inability to see could easily be cured. 5RP 85. Witnesses who were present, Reche and the

officers, could have identified their voices so the jurors could more easily determine who was speaking. 5RP 85.

The video is not cumulative because it would permit the jury to listen and determine for itself whether Reche appeared impaired and to what extent, rather than merely relying on eyewitness descriptions and opinions. There is no substitute for allowing jurors to hear for themselves what was going when Reche was arrested. The potential for some confusion is minimal compared to Reche's right to defend himself.

ii. Concerns for Credibility Only Make It More Important to Meticulously Safeguard the Defense's Right to Present Its Case.

The court also engaged in improper weighing of credibility. The credibility of the evidence is not a concern under ER 403 or the balancing test required before excluding relevant defense evidence. The fact that Reche's credibility was in doubt makes it more important, not less, to admit the video recordings. When a case is a "swearing match" contest of relative credibility, courts give more latitude in allowing a defendant to introduce evidence relevant to credibility, or in cross-examination on that issue. See State v. York, 28 Wn. App. 33, 36, 651 P.2d 784 (1980).

The jury, not the judge, is tasked with assessing the credibility of witness testimony and evidence. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995) (quoting State v. Crotts, 22 Wash. 245, 250-251, 60 P. 403

(1900)). Exhibit 18 would have given jurors the tools they needed to exercise their role. In watching and listening to the video, jurors could have better assessed the various opinions on Reche's mental state. They could have listened to him, and determined for themselves whether they believed he was genuine.

iii. Other Evidence Rules Do Not Bar Admission of this Relevant Evidence.

During argument on this issue, the court wondered aloud if Exhibit 18 would be considered self-serving hearsay. The answer is no. First of all, the so-called ban on self-serving hearsay is an oversimplification. ER 801 provides an exception to the general ban on hearsay to statements made by a party and offered by that party's opponent. There is no corresponding exception for hearsay when offered by the same party who made the statements.

But Reche's statements in the recording are not hearsay and, thus, no exception is required. Reche's own utterances do not fall under the hearsay rules because they are not offered for the truth of the matter asserted. ER 801. Indeed, the relevance of the recordings lies in the nonsensical and incoherent screaming, sobbing, and swearing. These utterances are not offered to prove that what he said was true. The officers' statements that Reche was unconscious, then breathing, then seizing up are offered for the

truth of the matter and thus are hearsay. ER 801. But they are admissible under the exception for present sense impressions. ER 803. This is likely why the trial court did not exclude the evidence on hearsay grounds. The State made no demonstration that, in this case, the hearsay prohibition could amount to a compelling interest warranting infringement of Reche's constitutional due process right to present his defense. But even if it had, the hearsay rules do not justify excluding this probative evidence.

- c. The State Cannot Show Beyond a Reasonable Doubt that a Jury Would Have Rejected Reche's Voluntary Intoxication Defense If It Had Been Able to Evaluate His Behavior from the Recording.

Constitutional error is presumed prejudicial unless the State proves "beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." Jones, 168 Wn.2d 724. The State cannot meet that burden here.

It is true the video is not conclusive evidence one way or the other regarding the extent of Reche's intoxication and whether it prevented him from acting intentionally. But it also cannot be said conclusively whether hearing the evidence would have swayed the jury toward believing Reche's defense. Though some witnesses claimed his symptoms appeared feigned, jurors could easily have come to a different conclusion or at least found reasonable doubt upon hearing his outbursts for themselves.

In evaluating the likely impact of excluded evidence on the trial, courts must assume the excluded evidence is true. State v. R.H.S., 94 Wn. App. 844, 849, 974 P.2d 1253 (1999). When the evidence or testimony “if believed, would establish a defense,” its exclusion is not harmless beyond a reasonable doubt. Id. Here, the video excluded by the trial court would have helped Reche establish his defense. The violation of his right to present that defense requires reversal.

2. RECHE’S CONVICTION FOR POSSESSION OF A STOLEN VEHICLE MUST BE VACATED BECAUSE ONE PERSON CANNOT BE BOTH THE THIEF AND THE POSSESSOR OF THE STOLEN PROPERTY.

In passing laws against theft and possession of stolen property, the Legislature did not intend that a thief be convicted of both crimes for one act of taking the same item. State v. Hancock, 44 Wn. App. 297, 298-99, 721 P.2d 1006 (1986). In other words, a thief may not also be convicted as the possessor of the stolen goods. State v. Melick, 131 Wn. App. 835, 841, 129 P.3d 816 (2006); Hancock, 44 Wn. App. at 301. The remedy for erroneous dual convictions is to vacate the possession conviction. Melick, 131 Wn. App. at 843-44. Reche’s dual convictions for robbery and possession of a stolen vehicle violate this principle, and his possession conviction should be vacated.

Before 1975, the larceny statute prohibited both unlawfully taking property and knowingly receiving stolen property. Hancock, 44 Wn. App. at 300. In 1975, those offenses were recodified as separate statutes prohibiting theft and possession of stolen property. Id. at 301. The court held recodification into separate statutes did not alter the legislative intent that the same act of theft should not be punished under both statutes. Id.

This principle extends to robbery as well, since robbery is nothing more than the taking of property (*i.e.* theft) with the additional element of force or fear. State v. Shcherenkov, 146 Wn. App. 619, 624-25, 191 P.3d 99 (2008) (quoting State v. Redmond, 122 Wash. 392, 393, 210 P. 772 (1922)). While no Washington case is directly on point, federal cases have concluded dual convictions for robbery and possession of the stolen item cannot stand. United States v. Gaddis, 424 U.S. 544, 547, 96 S. Ct. 1023, 47 L. Ed. 2d 222 (1976); Milanovich v. United States, 365 U.S. 551, 554, 81 S. Ct. 728, 729, 5 L. Ed. 2d 773 (1961); Heflin v. United States, 358 U.S. 415, 420, 79 S. Ct. 451, 3 L. Ed. 2d 407(1959). In prohibiting receipt of stolen property, “Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the . . . robbers themselves.” Milanovich, 365 U.S. at 554 (quoting Heflin, 358 U.S. at 420).

The same is true of the possession of a stolen vehicle statute at issue here. The legislative history shows no sign of intent to impose dual

convictions for robbery in which the item taken is a motor vehicle and possession of that same stolen motor vehicle. Indeed, the history of the 2007 statute prohibiting possession of a stolen vehicle, ultimately codified as RCW 9A.56.068, shows the contrary.

RCW 9A.56.068 began as House Bill 1001 and was designed to rectify a perceived problem in sentencing vehicle theft offenses. Final Bill Report, Engrossed 3rd Substitute House Bill 1001, 60th Leg. Reg. Sess. (2007). At the time, possession of a stolen motor vehicle was not a separate offense from possession of stolen property. Id. For a person with no prior offenses, the standard range punishment was 0-60 days if the item was worth less than \$1,500 and 0-90 days if it was worth more than that amount. Id. The testimony in favor of the bill pointed out that no “hard time” was imposed until the *seventh* theft. Id. This was seen as inappropriate in light of the societal damage caused by motor vehicle theft. Id.

The new law made two major changes to how automobile theft offenses are treated in Washington. First, both motor vehicle theft and possession of a stolen vehicle were made separate offenses categorized as class B felonies regardless of the value of the car. Final Bill Report, E3SHB 1001, 60th Leg. Reg. Sess. (2007). Second, prior motor vehicle theft offenses were tripled in the offender score for a current motor vehicle theft offense so that recidivists would be punished more harshly. Id. The goal was to

remedy the perceived under-punishment of theft and possession of stolen property when the property at issue was a motor vehicle. House Bill Report, HB 1001, 60th Leg. Reg. Sess. (2007).

This perceived under-punishment of auto theft offenses does not exist when a person is convicted of second-degree robbery for taking a motor vehicle. Second-degree robbery, regardless of the value of the property, is already a class B felony. RCW 9A.56.210. Second-degree robbery is also classified as a violent offense, and all prior violent offenses are doubled in the offender score. RCW 9.94A.030(54); RCW 9.94A.525(8). With a seriousness level of four, the standard range for a first robbery offense is three to nine months. RCW 9.94A.510; RCW 9.94A.515. Because of the doubling, a second offense results in an offender score of two and “hard time,” a standard range of 12+ to 14 months. The problem the Legislature intended to remedy by creating a separate offense of possession of a stolen vehicle does not exist when the offender is convicted of robbery.

In seeking to increase punishment for motor vehicle theft, the Legislature did not expressly contravene the holdings in Melick or Hancock. The Legislature is presumed aware of judicial interpretation of statutes. State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000). Absent a sign of intent to overrule a pre-existing judicial interpretation, statutes are presumed intended to be consistent with that interpretation. Id. If the Legislature

intends to contradict Melick and Hancock and create multiple punishments for theft or robbery and possession of stolen motor vehicles, it must say so expressly. Since it did not, the robbery and possession of a stolen vehicle statutes should be interpreted as consistent with Melick and Hancock.

The Legislature's intent in prohibiting possession of a stolen motor vehicle was to ensure that anyone possessing a stolen motor vehicle be guilty of a class B felony. It was not to make that person guilty of two class B felonies. Under the rule that one cannot be both the thief and the receiver of the stolen property, Reche's conviction for possession of a stolen vehicle must be vacated. Melick, 131 Wn. App. at 840-41, 844.

3. DUAL CONVICTIONS FOR ROBBERY AND POSSESSION OF THE STOLEN VEHICLE VIOLATE DOUBLE JEOPARDY.

Under the double jeopardy provisions of the United States and Washington constitutions, a defendant may not be convicted more than once for the same offense. U.S. Const. amend. V; Const. art. I, § 9; Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977); State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005). If an act supports charges under two statutes, the court must determine whether the Legislature intended to authorize multiple punishments. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). If the statutes at issue do not expressly disclose legislative intent regarding multiple punishments, the court considers

whether the offenses are identical in fact and in law. Id. at 777; State v. Louis, 155 Wn.2d 563, 569, 120 P.3d 936 (2005) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). Entering multiple convictions for the same offense in violation of double jeopardy is manifest constitutional error, which may be reviewed for the first time on appeal. See RAP 2.5 (a); State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).

Reche's dual convictions for robbery and possession of a stolen vehicle violate double jeopardy. First, the legislative intent is clear that there not be multiple punishments. Second, under the Blockburger test, the offenses are the same in fact and law. The remedy is to vacate the conviction for possession of a stolen motor vehicle.

- a. Reche's Dual Convictions Violate Double Jeopardy Because the Legislature Did Not Intend to Punish Twice for Robbery and Possession of the Stolen Item.

The Court in Melick held the doctrine that one cannot be both the thief and the receiver of stolen goods is separate and distinct from constitutional double jeopardy protection. Melick, 131 Wn. App. at 840-41. It concluded dual convictions for theft and possession of stolen property did not violate double jeopardy under the Blockburger test because each offense contains an element not required in the other. Melick, 131 Wn. App. at 839-40 (citing Blockburger, 284 U.S. at 304). However, this conclusion is

incorrect. The Blockburger test is not a per se test for double jeopardy. Calle, 125 Wn.2d at 778. It is designed to ferret out legislative intent. Id. When it is clear the legislature did not intend to impose multiple punishments, multiple convictions violate double jeopardy regardless of the Blockburger test. Calle, 125 Wn.2d at 778.

As discussed above, both prior judicial interpretations and the legislative history of the 2007 possession of a stolen vehicle statute show the Legislature did not intend to impose dual punishments for robbery and possession of a stolen vehicle. See argument section C.1. supra. The intent was to ensure that possession of a stolen vehicle resulted in one class B felony, not two. Id. Therefore, dual convictions violate double jeopardy. Calle, 125 Wn.2d at 778.

b. In this Case, Robbery and Possession of a Stolen Vehicle Are the Same Offense in Fact and in Law.

Even if this Court applies the Blockburger test because the robbery and possession statutes do not expressly state whether dual convictions are intended, the two convictions cannot stand. RCW 9A.56.068; RCW 9A.56.210; Calle, 125 Wn.2d at 777. Under Blockburger, “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does

not. Blockburger, 284 U.S. at 304. Also known as the “same elements” or “same evidence” test, the Blockburger analysis finds a double jeopardy violation when “the evidence required to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other.” In re Pers. Restraint of Orange, 152 Wn.2d 795, 818, 820, 100 P.3d 291, 303 (2004) (quoting State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896)).

The court engages in a commonsense, rather than mechanical, comparison of elements. See, e.g., Orange, 152 Wn.2d at 817-18 (merely comparing elements at abstract level misapplies the Blockburger test). Even if the elements facially differ, the court may nonetheless find they encompass the same offense. State v. Hughes, 166 Wn.2d 675, 684, 212 P.3d 558 (2009). In Hughes, the Washington Supreme Court held dual convictions for second-degree rape and second-degree rape of a child were the same offense in fact and law despite facially different elements. Id. at 683-84. First, the court concluded the two offenses were the same in fact because they resulted from the same act of sexual intercourse with the same victim. Id. at 684. Similarly, here, the robbery and possession of stolen vehicle also resulted from the same act of taking McGough’s car.

Next, the Court concluded that, despite facially different elements, second-degree rape and second-degree rape of a child were the same offense

in law. Id. at 683-84. Under a technical application of Blockburger, the State argued these were separate offenses because each requires proof of a fact the other does not: rape of a child requires proof of the age of the victim, while second-degree rape requires proof of non-consent due to mental incapacity or physical helplessness. Hughes, 166 Wn.2d at 682-83. But the court agreed with the defense that the differences between the means of proving non-consent, via status as a child or via mental incapacity or physical helplessness were “illusory.” Id. at 683-84.

The differences between the elements of second-degree robbery and possession of a stolen vehicle are also superficial. A person commits possession of a stolen vehicle by knowingly possessing a stolen motor vehicle. RCW 9A.56.068; 11A Washington Practice, Pattern Jury Instructions, Criminal WPIC 77.21, comment (2008) (incorporating knowing mental state from possession of stolen property and presuming Legislature did not intend to create a strict liability offense). Second-degree robbery requires proof of unlawfully taking property from the person or in the presence of another by use or threat of force, violence or fear. RCW 9A.56.190; RCW 9A.56.210. It also requires intent to steal. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). Robbery and possession of a stolen vehicle are, in this case, the same offense because possessing a

stolen vehicle contains no element that is not subsumed within the elements of robbery.

The superficial differences vanish when applied to one act of robbery involving a motor vehicle. Superficially, robbery does not require possessing the item taken. RCW 9A.56.190. But one cannot take an item without possessing it, at least momentarily. Robbery does not require that the item taken be a motor vehicle, but motor vehicles are included in the more general category of property required for robbery. Robbery does not appear to require knowledge that the property is stolen, but such knowledge is inevitable when the thief and possessor are the same person. Knowledge that the property is stolen is part and parcel of the intent to steal. One cannot wrest an item from another unlawfully and by force without knowing that the item obtained has been stolen.

The evidence that proves the robbery in this case necessarily also proves possession of a stolen vehicle. The differences between the elements are purely superficial. Under the “same evidence” test, the two offenses are the same, and Reche’s dual convictions violate double jeopardy. Hughes, 166 Wn.2d 683-84; Orange, 152 Wn.2d at 820; see also Brown, 432 U.S. at 167-70 (dual convictions for automobile theft and joyriding violate double jeopardy).

c. The Remedy Is to Vacate the Possession Conviction.

Under double jeopardy principles, Reche's conviction for possession of a stolen vehicle must be reversed. It is well established that when two convictions violate double jeopardy, the crime that carries the lesser penalty must be unconditionally vacated. State v. Turner, 169 Wn.2d 448, 465-66, 238 P.3d 461 (2010).

The fact that the court merged the two offenses for sentencing and did not count them against each other in the offender score is immaterial. "[E]ven a conviction alone, without an accompanying sentence, can constitute 'punishment' sufficient to trigger double jeopardy protections." Id. at 454-55. The lesser conviction violates double jeopardy in and of itself because it may result in future adverse consequences and, at the very least, carries a societal stigma. Id.; State v. Womac, 160 Wn.2d 643, 656-58, 160 P.3d 40 (2007). Double jeopardy is violated even when the person is not sentenced for the second conviction. Womac, 160 Wn.2d at 656-59. Reche's conviction for possession of a stolen vehicle must be unconditionally vacated because it violates double jeopardy.

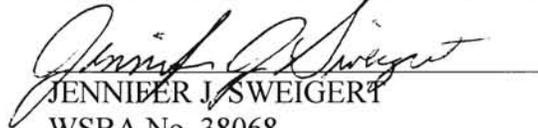
D. CONCLUSION

Reche's convictions should be reversed because the Court violated his right to present a defense by excluding relevant evidence of his voluntary intoxication. Alternatively, Reche's conviction for possession of a stolen vehicle should be vacated as violating both double jeopardy and the common law rule that one cannot be both the thief and the receiver of stolen property.

DATED this 11th day of February, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 69307-7-1
)	
ANTWAN RECHE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF FEBRUARY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTWAN RECHE
DOC NO. 359839
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF FEBRUARY, 2013.

x Patrick Mayovsky

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STATE OF WASHINGTON
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