NO. 43334-6-II
Cowlitz Co. Cause NO. 09-1-01275-7

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SCOTT E. COLLINS,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

I. ISSUES

1. Where a witness' testimony directly violates the trial court's motion in limine ruling, thus resulting in a mistrial, did retrial violate the appellant's constitutional right to be free from double jeopardy?

2. Where the state charges two counts of possession of stolen property in the second degree, one count of possession of a stolen vehicle, and six counts of possession of stolen property in the third degree, does the conviction of more than one count of possession of stolen property violate the appellant's constitutional right to be free from double jeopardy?

3. Where the appellant was convicted of three counts of possession of a stolen firearm and three counts of unlawful possession of a firearm in the first degree, does the court violate the constitutional protection against cruel punishment by running each count consecutive?

II. SHORT ANSWERS

1. No. The inadvertent testimony of a witness, even if the witness were grossly negligent, would not give rise to the level of misconduct to bar retrial; therefore, the appellant's double jeopardy rights were not violate.

2. Yes. The simultaneous possession of multiple victims' stolen property is one unit of prosecution. However, the possession of a stolen vehicle conviction is a separate unit of prosecution that does not violate the Appellant's double jeopardy rights.

3. No, the Appellant's counsel's performance was not ineffective.

III. FACTS

The State agrees with the Appellant's statement of facts.

IV. ARGUMENTS

1. RETRIAL, FOLLOWING THE TRIAL COURT'S GRANTING OF THE APPELLANT'S MOTION FOR A MISTRIAL, DID NOT VIOALTE THE APPELLANT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

Generally, where a defendant requests a mistrial, double jeopardy does not bar retrial. *State v. Wright*, 131 Wn. App. 474, 484, 127 P.2d 742 (2006) (*citing United States v. Scott*, 437 U.S. 82, 99, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)). However, where a prosecutor's intent is to goad the defendant into moving for a mistrial, retrial is barred by double jeopardy. *State v. Benn*, 161 Wn.2d 256, 270, 165 P.3d 1232 (2007), cert. denied 128 S.Ct. 2871 (2008); *see also Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). Under the federal test, the court "must be able to find that the State was *intentionally* trying to provoke a mistrial." *State v. Lewis*, 78 Wn. App. 739, 743, 898 P.2d 874 (1995). The Oregon standard "bars reprosecution where 'improper official conduct is so prejudicial that it cannot be cured by means short of a mistrial, and if the official knows that the conduct is improper and prejudicial and either intends or *is indifferent* to the resulting mistrial or reversal.'" *Id.* (*quoting State v. Kennedy*, 295 Or. 260, 276, 666 P.2d 1316 (1983).

The Oregon standard has **not** been adopted by the State of Washington. *Lewis*, 78 Wn. App. at 746; *see also State v. Hopson,* 113 Wn.2d 273, 283, 778 P.2d 1014 (1989). Nevertheless, concluding that retrial was barred by double jeopardy concerns under either the federal or Oregon standard should only occur with a " 'rare and compelling' set of facts." *Hopson,* 113 Wn.2d at 283. "The inadvertent testimony of a witness, even if the witness were grossly negligent, would not give rise to the level of misconduct required for a bar." *Id.* at 282.

Here, the Appellant requested and was granted a mistrial. 3RP 536-539. The Appellant asserts that this Court should utilize the Oregon standard and determine that Deputy O'Neill's testimony was the "sort of reckless, prejudicial government misconduct which justifies dismissal." As stated above, Washington has not formally adopted the Oregon standard. Instead, the State asserts that the federal standard is the applicable test. Interestingly enough, even if the Court were to apply both the federal and Oregon standards, a bar of retrial would still not be appropriate.

As the trial court determined, there was no intentional misconduct by the State. 4RP 601. Deputy O'Neill was instructed by the State in regards to the court's ruling on the motion in limine. CP 136. Deputy O'Neill seemingly violated the motion in limine by testifying that "...I

had a suspect that I felt was probably involved in several of the north-end burglaries that was living..."[1] 3RP 535. The State maintained that it did not intend to elicit this testimony from Deputy O'Neill. 3RP 537. Instead, the State, following Deputy O'Neill's report, expected Deputy O'Neill to testify that he instructed Mr. Brent to check Craigslist advertisements. 3RP 537.

Under the federal standard, the record contains nothing in regards to intentional misconduct on part of the prosecution. In applying the federal standard and concluding that retrial was not barred, the *Hopson* court looked at other jurisdictions handling of cases involving almost identical issues. *Hopson*, 113 Wn.2d at 283; *see also State v. Maddox,* 185 Ga.App. 674, 365 S.E.2d 516 (1988) (police officer's testimony in drunk driving trial was not attributable to prosecutorial misconduct where prosecutor did not actively aid or encourage the officer but rather had specifically instructed him not to refer to defendant's prior convictions); *State v. Fuller,* 374 N.W.2d 722 (Minn.1985) (the Minnesota Supreme Court reversed a Court of Appeals decision where the lower court had barred retrial based on a prosecutorial duty to properly instruct witnesses);

[1] The interesting issue here is that the Appellant's defense was that the Appellant's son, Christopher Collins, was responsible for all of the stolen property within the house. Much of the motions in limine dealt with "other suspect" testimony that the Appellant sought to admit. The Appellant's trial counsel referenced "other suspects" in her opening argument. Although not specifically addressed, a curative instruction could have cured this issue. Deputy O'Neill did not state that Appellant was his suspect. Given the nature of the Appellant's defense, this testimony could have been beneficial to her case.

see also State v. Butler, 528 So.2d 1344 (Fla.Dist.Ct.App.1988) (prosecutor's failure to warn a state detective serving as a witness not to mention a stolen car did not bar retrial).

The record in this case, likewise, does not support the Appellant's argument that the Oregon standard, if applicable, bars retrial. The Appellant asserts that we must surmise that "Deputy O'Neill deliberately violated the court's ruling in an effort to prejudice Collins" and "the intentional misconduct by this state official should bar retrial in this case." The Appellant fails to recognize that the Oregon standard does not apply to witnesses. *Hopson* addressed this very issue:

> Appellant would have this court extend Oregon application in two respects. First, he would have the double jeopardy bar apply to a stat state fire inspector who is a witness, not an officer of the court. Thus, he would extend the category of state officials subject to the rule beyond that clearly delineated in either *Rathbun* or *Kennedy II*. Applying this rule to a court official such as a bailiff, whose job involves contact with juries on a daily basis is far different from applying it to a state fire inspector.

Hopson, 113 Wn.2d at 28. The *Lewis* court expanded on this issue:

> The State is held "only to the consequence of what its official knew to be prejudicial misconduct.... Incompetence, thoughtlessness, or excitability of the state's officers may lead to a mistrial, but it does not reflect a willingness to risk placing the defendant repeatedly in jeopardy for the same offense."

Lewis, 78 Wn. App. at 745 (*quoting State v. Kennedy*, 666 P.2d at 1326-27).

Therefore, despite Deputy O'Neill's failure to follow the court's ruling, there is not showing of intentional prosecutorial misconduct or indifference. Despite the Appellant's numerous assertions, the Oregon standard is not applicable in this case. Under the federal standard, retrial is not barred because the State did not intentionally cause the mistrial. Therefore, the Appellant's argument is without merit.

2. THE STATE AGREES WITH THE APPELLANT'S ARGUMENT THAT MULTIPLE COUNTS OF POSSESSION OF STOLEN PROPERTY IS ONE UNIT OF PROSECUTION; HOWEVER, THE CONVICTION FOR POSSESSION OF A STOLEN VEHICLE IS A SEPARATE OFFENSE AND DOES NOT VIOLATE DOUBLE JEOPARDY.

The State agrees that the simultaneous possession of various items of property stolen from multiple owners constitutes a single unit of prosecution of the crime of possession of stolen property. *State v. McReynolds*, 117 Wn. App. 309, 335-39, 71 P.3d 663 (2003).[2] This analysis, however, would apply only to the two counts of possession of

[2] The State could find no authority to support an argument that separate property and separate victims would justify separate charges. The *McReynolds* holding is interesting in that if a person possesses 3 stolen cell phones, with a value of $300, that belong to 3 different people, the State could not charge 3 counts of possession of stolen property in the third degree, a gross misdemeanor. Instead, the State, in order to address each victim's loss, would charge 1 count of possession of stolen property in the second degree, a felony.

stolen property in the second degree and possession of stolen property in the third degree. The lone count of possession of a stolen vehicle survives the Appellant's argument.

A person commits the crime of possession of stolen property in the second degree if "he...possesses stolen property, other than a firearm...or *a motor vehicle*, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value..." RCW 9A.56.160(1)(a) (emphasis added). Possession of stolen property in the second degree is a class C felony. RCW 9A.56.160(2). A person commits the crime of possession of a stolen vehicle if he possesses a stolen vehicle. RCW 9A.56.068(1). Possession of a stolen vehicle is a class B felony. RCW 9A.56.068(2).

Clearly, based upon the unambiguous and clear statutory language, the legislature intended on possession of a stolen vehicle to be separate crime and unit of prosecution than possession of stolen property. Possession of stolen property in the second degree, as defined by RCW 9A.56.160, specifically excludes motor vehicle. The legislature went so far as to make possession of a stolen vehicle a separate crime with a higher maximum sentence.

The State agrees that the Appellant's right against double jeopardy would require all but one of his multiple convictions for possession of

stolen property in the second and third degree to be reversed. Given that the evidence supported a finding that the value of the stolen property was well in excess of $750, the lone remaining count would be possession of stolen property. In regards to the possession of stolen property conviction, it is clear from the plain language of the statute that this is a separate offense. Therefore, the State requests the court deny the Appellant's request to reverse this conviction.

3. THE TRIAL COURT DID NOT VIOLATE THE APPELLANT'S RIGHT AGAINST CRUEL PUNISHMENT WHEN ISSUING SIX CONSECUTIVE SENTENCES FOR THREE COUNTS OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE AND THREE COUNTS OF POSSESSION OF A STOLEN FIREARM.

Each of the Appellant's convictions for unlawful possession of a firearm in the first degree and possession of a stolen firearm must run consecutive to one another per RCW 9.41.040(6) and RCW 9.94A.589(1)(c).

> Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

RCW 9.41.040(6). This sentencing provision was enacted as part of the "Hard Time for Armed Crime Act," whose purpose was to provide greatly increased penalties for "those offenders committing crimes to acquire firearms,: and "to reduce the number of armed offenders by making the carrying and use of the deadly weapon not worth the sentenced received upon conviction." 1995 c 129 Section 21 (Initiative Measure No. 159). The legislature specifically intended to make sentences for armed felons extreme. Further, the imposition of consecutive sentences under this statutory provision is not subject to appeal under RCW 9.94A.535 because it is not a departure from the enumerated guidelines in RCW 9.94A.589(1).

Courts have specifically held that the statute requires multiple unlawful possession of firearm and possession of stolen firearm sentences to be run consecutive to one another. In *State v. Murphy*, 98 Wn. App. 42, 988 P.2d 1018 (Div. 2, 1999), the defendant was convicted of burglary in the first degree, five counts of unlawful possession of a firearm in the second degree, and five counts of possession of a stolen firearm (the same firearms). The trial court sentenced the defendant to 14 months on each of the unlawful possession charges and ran them concurrent with one another, 3 months on each of the possession of stolen firearms charges and ran them concurrent with one another. The court then ran the stolen

firearm charges consecutive to the unlawful possession charges, for a total of 17 months of prison. *Id.* at 45.

The state appealed, contending that the statute should be read as required each firearm offense to run consecutive, as opposed to each group of offenses. The Court of Appeals held that the state's interpretation was correct. *Id.* at 49. RCW 9.41.060(6) deals with the question of consecutive sentences in a specific manner, thereby overriding the general requirement of the Sentencing Reform Act to run current offenses concurrently. *Id.* at 48. The court read the plain language of the statute to require the court to run each of the sentences imposed for firearm crimes consecutive to one another. *Id.* The court went on further to note that it is up to the legislature, not the appellate courts, to deal with any unintended harsh consequences from the sentences. *Id.*

The clear language of the Hard Time for Armed Crime Act required the trial court to run the sentence for each firearm crime consecutive to one another. The trial court followed exactly what the legislature intended. The Appellant wants this court to ignore its previous holding in *Murphy* and the legislature's clear and unambiguous intentions. At the time of sentencing, the Appellant had 27 previous felony convictions, 13 of which he was currently serving a sentence. CP 296-

313. His 40 year sentence was a direct result of his past criminal conduct and his current offenses.

V. CONCLUSION

Following the federal standard, the mistrial, requested by the Appellant, did not bar retrial; therefore, his double jeopardy rights were not violated. The State agrees that multiple convictions for possession of stolen property are one unit of prosecution; however, possession of a stolen vehicle is a separate offense and unit of prosecution. Finally, the court's imposition of consecutive sentences for each firearm conviction was in accordance with statutory guidelines.

The State requests this court to remand to the trial court to address the possession of stolen property issue. All other claims made by the Appellant are without basis in law and must be denied.

Respectfully submitted this 15th day of April, 2013

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CERTIFICATE OF SERVICE

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on April 16th, 2013.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

April 16, 2013 - 9:46 AM

Transmittal Letter

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