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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BENN EARL CHAPPELLE, Appellant.	No. 52338-8-II UNPUBLISHED OPINION

MAXA, C.J. – Benn Chappelle appeals his convictions of theft of a motor vehicle, possession of a stolen vehicle, and first degree trafficking in stolen property. We hold that (1) Chappelle was not improperly convicted of theft and possession of the same vehicle because the State elected different vehicles for the two convictions; and (2) as the State concedes, the trafficking conviction was based on inadmissible evidence. Accordingly, we affirm Chappelle's convictions of theft of a motor vehicle and possession of a stolen vehicle, but we reverse his conviction of first degree trafficking in stolen property and remand for a new trial on that charge.

FACTS

A go-cart, four motorcycles, and various items of personal property were stolen from property in Lewis County. The stolen personal property included a set of collector toy cars.

Lewis County Sheriff's detective Jeff Humphrey investigated, and he identified Chappelle as a possible suspect. Humphrey located Chappelle and interviewed him about the

theft without giving *Miranda* warnings.[1] The record does not indicate whether or not Chappelle was in custody at that time. Humphrey then conducted a recorded interview after reading Chappelle his *Miranda* rights. Using these statements, Humphrey was able to obtain a search warrant for Chappelle's mother's home, where Chappelle was living. There, officers seized a go-cart, a yellow Honda 50 motorcycle, and several collector toy cars.

The State charged Chappelle with second degree burglary, theft of a motor vehicle, possession of a stolen vehicle, and first degree trafficking in stolen property. The trial court conducted a CrR 3.5 hearing and ruled that the statements Chappelle made in his recorded interview were admissible. The State did not seek to admit any other statements from Chappelle.

At trial, Humphrey testified that Chappelle told him that he gave the collector cars to his mother. But no such statement was contained in the recorded interview that the trial court admitted.

In closing argument, the prosecutor told the jury that the possession of a stolen vehicle charge related to the yellow Honda 50 motorcycle and the go-cart and the theft of a motor vehicle charge related to the other three motorcycles.

A jury acquitted Chappelle of the burglary charge and convicted him of theft of a motor vehicle, possession of a stolen vehicle, and first degree trafficking in stolen property. Chappelle appeals his convictions.

ANALYSIS

A. CONVICTIONS OF BOTH THEFT AND POSSESSION OF THE SAME PROPERTY

Chappelle argues that his convictions of theft of a motor vehicle and possession of a stolen vehicle were impermissible because a person cannot be convicted of both theft and

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

possession of the same property. He argues that the jury likely convicted him of stealing and possessing the same yellow Honda 50 motorcycle the officers seized from his mother's home. We disagree.

The general rule is that a person cannot be convicted of theft and possession of the same property. *State v. Melick*, 131 Wn. App. 835, 840-41, 129 P.3d 816 (2006); *State v. Hancock*, 44 Wn. App. 297, 301, 721 P.2d 1006 (1986). If both theft and possession are charged arising from the same act, the jury should be instructed that it can convict on either charge but not both. *Melick*, 131 Wn. App. at 841.[2]

However, the record here shows that the State was very specific as to the vehicles underlying each charge during closing argument:

> 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. . . .
>
> So for your purposes on the possession of 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.*

Report of Proceedings (RP) at 290-91.

The State clearly identified that each charge was for different vehicles. Nothing in the record suggests otherwise. This election establishes that Chappelle was not convicted of theft

[2] Chappelle argues in his statement of issues that convicting a person of theft and possession regarding the same property violates double jeopardy, and he briefly mentions double jeopardy in his analysis. The State analyzes the issue under double jeopardy principles. However, the court in *Melick* concluded that a double jeopardy analysis is not required for this situation. 131 Wn. App. at 839-40.

and possession of the same property. *Cf. State v. Carson*, 184 Wn.2d 207, 227, 357 P.3d 1064 (2015) (stating that the State's clear identification of the act upon which a charge is based is sufficient for jury unanimity purposes). Therefore, we affirm Chappelle's convictions of theft of a motor vehicle and possession of a stolen vehicle.

B. FIRST DEGREE TRAFFICKING IN STOLEN PROPERTY

Chappelle argues, and the State concedes, that his conviction of first degree trafficking in stolen property must be reversed because it was based on a statement by Chappelle that was not addressed in a CrR 3.5 hearing. We accept the State's concession.

CrR 3.5(a) states that when a defendant's statement is to be offered into evidence, the trial court must conduct a hearing to determine whether the statement is admissible. This rule is intended to prevent "the admission of *involuntary, incriminating* statements." *State v. Williams*, 137 Wn.2d 746, 751, 975 P.2d 963 (1999). The CrR 3.5 hearing protects a defendant's right "to have the voluntariness of an incriminating statement assessed prior to its admission into trial." *Id.* at 754.

The failure to hold a CrR 3.5 hearing does not necessarily render a defendant's statement inadmissible at trial. *State v. Vandiver*, 21 Wn. App. 269, 272, 584 P.2d 978 (1978); *see also State v. Falk*, 17 Wn. App. 905, 908, 567 P.2d 235 (1977) (stating that "the mere failure to hold a CrR 3.5 hearing does not render an otherwise admissible statement inadmissible"). A defendant's rights have not been violated " '[i]f a review of the record discloses that there can be no issue concerning voluntariness.' " *Vandiver*, 21 Wn. App. at 272 (quoting *State v. Toliver*, 6 Wn. App. 531, 534, 494 P.2d 514 (1972)); *see also State v. Mustain*, 21 Wn. App. 39, 43, 584 P.2d 405 (1978). Therefore, remand for a CrR 3.5 hearing is unnecessary "where there [is] no question of the confession's voluntariness." *Williams*, 137 Wn.2d at 751.

Chappelle did not object to Humphrey's testimony about his statement. But the trial court's failure to hold a CrR 3.5 hearing before admitting a defendant's incriminating statement can constitute a manifest error affecting a constitutional right that may be raised for the first time on appeal. *State v. S.A.W.*, 147 Wn. App. 832, 838-39, 197 P.3d 1190 (2008).

Here, the State's theory of the case was that Chappelle trafficked in stolen property by giving the collector cars to his mother. The only evidence supporting this theory was Humphrey's testimony that during the search of Chappelle's mother's home "we located the collector cars *that Mr. Chappelle had told me he gave to his mother*." RP at 184 (emphasis added). But the statement Humphrey attributed to Chappelle was not part of Chappelle's statement to Humphrey and was not admitted during the CrR 3.5 hearing.

Although the trial court did not conduct a CrR 3.5 hearing regarding the statement Chappelle allegedly made to Humphrey, the statement was admissible if a review of the record shows no issue regarding the voluntariness of the statement. *See Vandiver*, 21 Wn. App. at 272. However, the record here reveals nothing at all about the circumstances of the statement. Humphrey's interview of Chappelle occurred without *Miranda* warnings before Chappelle gave his formal statement that was addressed in the CrR 3.5 hearing. We cannot say on this record that there is no issue regarding the voluntariness of this statement.

Because the record is unclear regarding the admissibility of Chappelle's statement and the State concedes, we agree that Chappelle's conviction based solely on that statement cannot stand. Both parties agree that the remedy for the improper admission of evidence is a retrial rather than a dismissal of the charges. *See State v. Jasper*, 174 Wn.2d 96, 120, 271 P.3d 876 (2012) (holding that retrial is the remedy for admitting evidence in violation of the confrontation clause).

We reverse Chappelle's conviction of first degree trafficking in stolen property and remand for a new trial on that charge.

CONCLUSION

We affirm Chappelle's convictions of theft of a motor vehicle and possession of a stolen vehicle, but we reverse his conviction of first degree trafficking in stolen property and remand on that charge.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Maxa, C.J.
MAXA, C.J.

We concur:

Melnick, J.
MELNICK, J.

Sutton, J.
SUTTON, J.