

NO. 43334-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

SCOTT E. COLLINS,

Appellant.

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

The Honorable Gary Bashor, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR.....	1
Issues pertaining to assignments of error	1
B. STATEMENT OF THE CASE.....	2
C. ARGUMENT.....	11
1. RETRIAL FOLLOWING THE MISTRIAL VIOLATES COLLINS’S CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY, AND ALL CHARGES EXCEPT THE UNLAWFUL POSSESSION OF FIREARM CHARGES SHOULD BE DISMISSED.....	11
2. CHARGING AND CONVICTING COLLINS EIGHT TIMES FOR THE CRIME OF POSSESSION OF STOLEN PROPERTY, WHERE HE COMMITTED ONLY ONE UNIT OF THE CRIME, VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.....	15
3. THE SENTENCE OF 40 YEARS FOR NON-VIOLENT PROPERTY OFFENSES IS GROSSLY DISPROPORTIONATE TO THE GRAVITY OF THE OFFENSES AND VIOLATES THE CONSTITUTIONAL PROHIBITION OF CRUEL PUNISHMENT.....	19
D. CONCLUSION.....	23

TABLE OF AUTHORITIES

Washington Cases

<u>State v. Adel</u> , 136 Wn.2d 629, 965 P.2d 1072 (1998)	16
<u>State v. Benn</u> , 161 Wn.2d 256, 165 P.3d 1232 (2007), <u>cert. denied</u> , 128 S.Ct. 2871 (2008)	11
<u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000).....	17
<u>State v. Eldridge</u> , 17 Wn.App. 270, 562 P.2d 276 (1977), <u>review denied</u> , 89 Wn.2d 1017 (1978)	11
<u>State v. Fain</u> , 94 Wn.2d 387, 395 P.2d 720 (1980).....	19, 20
<u>State v. Gimarelli</u> , 105 Wn. App. 370, 20 P.3d 430 (2001).....	20
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	12, 13, 14, 15
<u>State v. Lewis</u> , 78 Wn. App. 739, 898 P.2d 874 (1995).....	12, 15
<u>State v. Manussier</u> , 129 Wn.2d 652, 921 P.2d 473 (1996)	19
<u>State v. McReynolds</u> , 117 Wn. App. 309, 71 P.3d 663 (2003).....	16, 17, 18
<u>State v. Morin</u> , 100 Wn.App. 25, 995 P.2d 113 (2000)	19
<u>State v. Rich</u> , 63 Wn. App. 743, 821 P.2d 1269 (1992).....	11
<u>State v. Smith</u> , 93 Wn.2d 329, 610 P.2d 869, <u>cert. denied</u> , 449 U.S. 873 (1980).....	20
<u>State v. Thorne</u> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	19
<u>Wahleithner v. Thompson</u> , 134 Wn.App. 931, 143 P.2d 321 (2006)	20

Federal Cases

<u>Coker v. Georgia</u> , 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) .	19
<u>Hudgins v. Wainwright</u> , 530 F.Supp. 944 (Fla.Dist.Ct.App.1981).....	22

Oregon v. Kennedy, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); 11

Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983)... 19

United States v. Bell, 349 U.S. 81, 75 S.Ct. 620, 99 L. Ed. 905 (1955)... 16

United States v. Segler, 37 F.3d 1131 (5th Cir.1994)..... 22

Other Cases

State v. Cashman, 23 Kan.App.2d 580, 932 P.2d 469 (1997) 22

State v. Kennedy, 295 Or. 260, 666 P.2d 1316, 1324 (1983) 12, 15

State v. Parkhurst, 706 A.2d 412 (R.I.1998)..... 22

Constitutional Provisions

U.S. Const. amend. V 11, 16

Wash. Const. art. I, § 9 11, 16

Statutes

RCW 9.41.040..... 10

RCW 9.41.040(6) 21

RCW 9.94A.010 21

RCW 9A.20.021(1)(a)..... 22

RCW 9A.20.021(1)(b)..... 22

RCW 9A.56.140(1) 17

Rules

RAP 2.5 17

A. ASSIGNMENTS OF ERROR

1. Retrial following a mistrial violated appellant's constitutional protections against double jeopardy, and the charges presented to the jury should be dismissed.

2. Appellant's eight convictions for possession of stolen property, where he committed only one unit of the crime, violated his constitutional right to be free from double jeopardy.

3. The sentence of 40 years for non-violent property offenses is grossly disproportionate to the gravity of the offenses and violates the constitutional prohibition of cruel punishment.

Issues pertaining to assignments of error

1. Mistrial was necessitated when a law enforcement officer testified he suspected appellant committed a string of burglaries, in violation of the court's in limine ruling, despite the prosecutor's warning that such testimony was prohibited. Where the officer either intended to cause a mistrial or was indifferent to the risk of a mistrial, did retrial violate appellant's constitutional right to be free from double jeopardy?

2. Appellant was convicted of eight counts of possession of stolen property, relating to property belonging to eight different people. Where all eight offenses were based on the same course of conduct

committed in the same period of time, does conviction of more than one count of possession of stolen property violate double jeopardy?

3. Three stolen firearms were found during a search of appellant's home, and appellant was convicted of three counts of possession of a stolen firearm. Because he has a prior felony conviction, he was also convicted of three counts of unlawful possession of a firearm based on these same three guns. The trial court imposed separate consecutive sentences on each offense, for a total sentence of 480 months (40 years). Where there was no evidence that appellant used the guns or engaged in any violent conduct, is the resulting sentence so grossly disproportionate to the offenses committed as to constitute cruel punishment in violation of the constitution?

B. STATEMENT OF THE CASE

The Cowlitz County Prosecuting Attorney charged Scott Collins with five counts of burglary, three counts of unlawful possession of a firearm in the first degree, three counts of possession of a stolen firearm, four counts of possession of stolen property in the second degree, one count of possession of a stolen vehicle, three counts of possession of stolen property in the third degree, and one count of possession of 40 grams or less of marijuana. CP 94-101. The unlawful possession of a

firearm charges were severed for trial, and the case proceeded to jury trial on the remaining charges. 1RP¹ 83; CP 51.

Following jury selection and opening statements, the court discovered that the defense *Knapstad* motion to dismiss the burglary charges had not been ruled upon. 3RP 366. After hearing argument from the parties, the court determined there was insufficient evidence that Collins committed the burglaries, and it dismissed those charges. 3RP 409-410. Defense counsel asked that the prosecutor advise his witnesses carefully regarding the court's ruling. 3RP 446. The parties agreed that the State would not be presenting evidence suggesting that Collins committed the burglaries, just that burglaries had occurred. 3RP 446-47.

The jury was informed that the burglary charges would not be presented to them for deliberations, and the case proceeded. 3RP 475. The State first called Steven Brent, who testified that his house had been burglarized. 3RP 479. An officer who had served the search warrant at Collins's house testified next. 3RP 516.

The State's third witness was Cowlitz County Sheriff's Deputy Danny O'Neill, a law enforcement officer with over 40 years of

¹ The Verbatim Report of Proceedings is contained in 11 volumes, designated as follows: 1RP—12/30/10, 1/6/11, 1/20/11, 3/24/11, 7/28/11, 8/2/11, 1/12/12; 2RP—1/17-18/12; 3RP—1/19/12; 4RP—1/20/12, 1/27/12, 2/6/12; 5RP—2/7/12; 6RP—2/21/12; 7(A)RP—2/22/12 a.m.; 7(B)RP 2/22/12 p.m.; 8RP—2/23/12; 9RP—2/28/12; 10RP—2/29/12, 3/20/12, 3/27/12.

experience. 3RP 533-34. He testified that he responded to Brent's call reporting the burglary. When the prosecutor asked him if he talked to Brent about "what he might do to be proactive about the burglary," O'Neill responded, "I told him I had a suspect that I felt was probably involved in several of the north-end burglaries that was living –." 3RP 535.

Defense counsel objected and asked to address the court without the jury present. 3RP 535. The jury was removed from the courtroom, and defense counsel moved for a mistrial. 3RP 536. Counsel argued that testimony that Collins was a suspect in a rash of burglaries violated the court's rulings on the motions in limine and was highly prejudicial. 3RP 536. The prosecutor responded that he did not expect O'Neill to answer as he did and was not seeking to elicit the testimony O'Neill provided. He did not object to defense counsel's motion for a mistrial, however. 3RP 537.

Defense counsel further moved to dismiss the case with prejudice due to prosecutorial mismanagement. Counsel argued that this evidence was specifically excluded in the motions in limine, and the prosecutor was instructed to advise his witnesses of the court's rulings to ensure no improper testimony was presented. 3RP 538.

The court granted the mistrial, stating there was a specific motion in limine on the topic, which was granted. 3RP 539. The court deferred ruling on the motion to dismiss, saying counsel needed to file a formal motion. 3RP 539.

Defense counsel filed a motion to dismiss the case, arguing that retrial was barred by double jeopardy, because the prosecutor had deliberately provoked a mistrial or was indifferent to the likelihood of a mistrial when eliciting prohibited testimony. CP 125-133. The court asked for a written response from the prosecutor. The court stated that, given Deputy O'Neill's forty years of experience as a law enforcement officer, it was difficult to understand how he would have testified as he did if he had been appropriately advised of the court's rulings. 4RP 556.

The prosecutor then filed a declaration in response to defense counsel's motion and the court's concern. The prosecutor stated that he had told Deputy O'Neill before he testified that he was not to discuss the burglaries, because those charges had been dismissed. The prosecutor also stated he informed O'Neill of the court's other rulings, as he had been instructed to do. CP 134, 136. When asking Deputy O'Neill about what he told Brent, the prosecutor expected O'Neill to answer that he had told Brent to check Craigslist and search the area for his property. The

prosecutor stated he did not intentionally provoke a mistrial and did not expect O'Neill to testify as he did. CP 137.

The court ruled that while the case had been poorly marshaled by all concerned, it could not make a finding of intentional misconduct on the part of the prosecutor. It also did not find mismanagement to a level that required dismissal. The court denied the defense motion to dismiss. 4RP 600-01.

Collins waived his right to a jury trial on the unlawful possession of firearms charges, and the case proceeded to a bench trial. 4RP 617-18; CP 154. Collins stipulated that he had previously been convicted of second degree burglary. 4RP 652. Law enforcement officers who participated in a search of Collins's home on December 6, 2009, testified that three firearms were located in the search. A .22 caliber revolver was found on his coffee table, covered with a newspaper; a shotgun was found on the kitchen floor, covered with a sheet; and a semi-automatic handgun was found in the pocket of a jacket on the living room floor. 4RP 697, 722, 726. Steven Brent testified that the shotgun and the revolver found in Collins's home had been stolen from his home the day before. 4RP 664, 687. The defense presented evidence that Collins's son Chris and Chris's fiancé had lived with Collins sometime in the fall of 2009, prior to the search. 5RP 787, 796, 802, 806.

The court found that the State had proven beyond a reasonable doubt that three guns were found in Collins's house. The guns were all easily accessible, and constructive possession of the guns could be inferred from Collins's dominion and control of the premises. 5RP 858-62. The court entered an oral ruling concluding Collins was guilty of three counts of unlawful possession of a firearm, although it entered no written findings of fact or conclusions of law. 5RP 862.

Next the case proceeded to a jury trial on the remaining counts. The final amended information charged three counts of possession of a stolen firearm, two counts of possession of stolen property in the second degree, one count of possession of a stolen vehicle, six counts of possession of stolen property in the third degree, one count of possession of less than 40 grams of marijuana, and the three counts of unlawful possession of a firearm in the first degree which had been decided by the court. CP 155-161.

Brent testified he returned home from work on December 5, 2009, to discover that his house had been broken into. 6RP 930, 932-33. He called police to report the burglary. The next day, he and a friend drove around the area, trying to locate his missing property. 6RP 935. He found his bicycle and fish net leaning against the back of a house on Ross Road. 6RP 936-37. Around 1:00 p.m., Brent called the sheriff's office to report

what he had found. 6RP 938, 953-54. He waited on Ross Road until deputies arrived with a search warrant around 7:00. 6RP 938, 943.

Collins was the only person home when deputies executed the search warrant. 7(A)RP 1062. The house and garage were a mess, with items and clothing strewn everywhere. 6RP 958, 984, 992; 7(A)RP 1066-67, 1079; 7(B)RP 1234. The deputies found three stolen firearms, a stolen Dodge Durango, a bag of marijuana, as well as various other stolen items in the house and garage. 6RP 972-73, 991; 7(A)RP 1070, 1130; 7(B)RP 1233, 1236; 8RP 1269, 1287.

Two deputies were sent to the home of Collins's parents, Jim and Norma Collins. 7(A)RP 1149-50. There they found a stolen trailer, with a stolen license plate, which contained items stolen from Brent's house. 7(A)RP 1154-55.

Norma Collins testified that her grandson, Chris Collins, had come to their home early in the morning and asked to use the tractor. The next morning when she woke up, the trailer was in their driveway. 7(B)RP 1177. When the police came to her house the next evening, they asked about the trailer. She told them what she saw and then gave a written statement in which she said someone pulled into the driveway, and she discovered it was Collins. He asked to use the tractor to pull a trailer out of the ditch. 7(B)RP 1179-82. Norma explained that when she wrote in

her statement that she discovered it was Collins, she meant that the police had told her Collins was there. 7(B)RP 1185. She did not see Collins; she saw Chris. 7(B)RP 1186. One of the deputies then testified that Norma had said she saw Collins and never said anything about Chris. 7(B)RP 1212.

The defense presented evidence that Chris Collins and Jessica Hudson had both been arrested in this case. 9RP 1438. They had lived at the Ross Road house with Collins until November 2009 and continued to have access to the house after they moved. 9RP 1440, 1443. Hudson's car was at the house when the search warrant was executed. 9RP 1442. Chris had been convicted for possession of the stolen Durango and possession of property belonging to Brent. 9RP 1507-08. Hudson pled guilty to possession of the stolen Durango, and she testified she had driven it to the Ross Road house. 9RP 1573-74.

When the jury returned guilty verdicts on all counts, the State argued that the sentences on each of the three counts of unlawful possession of a firearm and each of the three counts of possession of a stolen firearm must run consecutively, and concurrent to the remaining offenses. 10RP 1703-04. It recommended a mid-range sentence on each offense, asking the court to impose a total sentence of 555 months. 10RP 1705.

Defense counsel argued that the sentence proposed by the State was so disproportionate to the type of offenses, all non-violent property crimes, as to shock the conscience. 10RP 1711-12. Counsel argued that the firearm offenses did not have to be sentenced separately or consecutively, but instead should merge with other offenses involving the same criminal conduct. 10RP 1713-15. Counsel urged the court to determine that the sentence proposed by the State constituted cruel punishment in violation of the state and federal constitutions. 10RP 1715-19, 1736.

The court ruled that consecutive sentences for the firearm offenses were mandated by RCW 9.41.040. 10RP 1731-32. It imposed sentences at the lower end of the standard range, running the six firearm charges consecutively to each other. 10RP 1733-34. The court imposed a sentence on each count of possession of stolen property, as well as possession of a stolen vehicle and possession of marijuana. Those sentences were run concurrent with each other and with the firearm sentences. 10RP 1740. The court imposed a total sentence of 480 months. 10RP 1740-41; CP 296-312.

Collins filed this timely appeal. CP 314.

C. ARGUMENT

1. RETRIAL FOLLOWING THE MISTRIAL VIOLATES COLLINS'S CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY, AND ALL CHARGES EXCEPT THE UNLAWFUL POSSESSION OF FIREARM CHARGES SHOULD BE DISMISSED.

The United States Constitution guarantees that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. The Washington State Constitution guarantees, “No person shall ... be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. Jeopardy attaches once the jury is selected and sworn. State v. Eldridge, 17 Wn.App. 270, 276, 562 P.2d 276 (1977), review denied, 89 Wn.2d 1017 (1978).

In general, double jeopardy does not bar retrial after a mistrial granted with the defendant's consent. State v. Rich, 63 Wn. App. 743, 747, 821 P.2d 1269 (1992). Retrial is barred, however, when the prosecutor intended to goad the defendant into moving for a mistrial. Oregon v. Kennedy, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982); State v. Benn, 161 Wn.2d 256, 270, 165 P.3d 1232 (2007), cert. denied, 128 S.Ct. 2871 (2008). The federal standard focuses on the intent of the government actor, holding that unless intentional misconduct was specifically intended to provoke a mistrial, double jeopardy does not bar a

retrial. Oregon v. Kennedy, 456 U.S. at 674-76; State v. Lewis, 78 Wn. App. 739, 743, 898 P.2d 874 (1995).

The Oregon Supreme Court has held that its constitution is more protective than the federal constitution on this issue. In Oregon, retrial is barred when improper official conduct is so prejudicial as to require a mistrial, and if the official knows the conduct is improper and either intends or is indifferent to the resulting mistrial. State v. Hopson, 113 Wn.2d 273, 279-80, 778 P.2d 1014 (1989); State v. Kennedy, 295 Or. 260, 276, 666 P.2d 1316, 1324 (1983). Under this standard, a specific intent to cause a mistrial need not be shown. Hopson, 113 Wn.2d at 280 (citing State v. Kennedy, 666 P.2d at 1324). Retrial is barred when “the conscious misconduct of a State actor creates a risk of mistrial in the absence of actual intent to obtain a second chance to try the case.” Lewis, 78 Wn. App. at 743.

The Washington constitution’s double jeopardy provision was patterned after the Oregon provision, and the language of the two provisions is very similar. Hopson, 113 Wn.2d at 277-78. The Washington Supreme Court has not yet ruled upon the parameters of Washington’s double jeopardy provision. See Hopson, 113 Wn.2d at 275 (facts of that case would not merit relief under either federal or Oregon standard).

In Hopson, a pretrial ruling prohibited reference to the defendant's criminal record. When a fire investigator testified, however, he said he attempted to locate Hopson by running his name through the computer system, and he obtained Hopson's criminal record and history. The defense motion for a mistrial was denied, but when the investigator later referred to an old booking photograph, a renewed motion was granted. Hopson, 113 Wn.2d at 275-76. In determining whether the witness's violation of the pretrial ruling barred retrial following the mistrial, the Washington Supreme Court noted that under the Oregon standard, "neither inadvertent actions nor conscious actions that were not designed to prejudice the defendant bar retrial." Hopson, 113 Wn.2d at 282. Retrial could be barred only by intentional misconduct, and the record failed to show that the fire inspector intentionally disregarded the court's ruling. Moreover, the record showed that the fire inspector was an inexperienced witness, and his improper testimony was likely the result of "excitability, negligence, or nervousness that would not meet the Oregon standard to bar retrial even if the bar applied to witnesses." Id. at 282-83.

In this case, mistrial was necessitated when Deputy O'Neill started to testify, in violation of the court's ruling, that he suspected Collins had been involved in a string of burglaries. 3RP 535-39. The record supports a finding that this was intentional misconduct on the part of Deputy

O'Neill. Immediately before he testified, the prosecutor instructed O'Neill regarding all the court's rulings and specifically told him not to discuss the burglaries, because those charges had been dismissed. CP 136. Unlike the fire inspector in Hopson, Deputy O'Neil was not a novice witness; he has over forty years of experience in law enforcement. Given the prosecutor's instructions before he testified, and the fact that his testimony did not even respond to the prosecutor's question, it can only be surmised that O'Neill deliberately violated the court's ruling in an effort to prejudice Collins. Whether he intended to provoke a mistrial or simply did not care whether one would result, the intentional misconduct by this state official should bar retrial in this case.

The Washington Supreme Court said in Hopson that it would determine whether the federal or Oregon standard is the more appropriate interpretation of the Washington constitution "when a set of facts that would require different results under the Oregon and federal analyses is before the court..." Hopson, 113 Wn.2d at 283-84. This is such a case. O'Neill's conduct in disregarding the court's rulings and the prosecutor's instructions, in order to ensure the jury knew he suspected Collins had committed a string of burglaries, is the sort of reckless, prejudicial government misconduct which justifies dismissal under the Oregon standard. This misconduct "reflect[ed] a willingness to risk placing the

defendant repeatedly in jeopardy for the same offense.” Lewis, 78 Wn. App. at 745; Hopson, 113 Wn.2d at 280.

The trial court did not specifically address the Oregon test. It determined that the prosecutor did not intentionally provoke a mistrial and that there was not enough evidence of prosecutorial mismanagement to require dismissal. 4RP 601. Had the court addressed the relevant test, it would have seen that dismissal was required by the reckless conduct of Deputy O’Neill, a state actor. See Kennedy, 295 Or. at 276 (focus is on “improper official conduct”). This case raises the “rare and compelling set of facts” where not only was a mistrial necessary but retrial was barred. See Lewis, 78 Wn. App. at 743 (quoting Hopson, 113 Wn.2d at 283-84). This Court should apply the Oregon standard and dismiss the charges presented to the jury in this case.

2. CHARGING AND CONVICTING COLLINS EIGHT TIMES FOR THE CRIME OF POSSESSION OF STOLEN PROPERTY, WHERE HE COMMITTED ONLY ONE UNIT OF THE CRIME, VIOLATED HIS CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

Collins was charged with five counts of possession of stolen property based on items, belonging to five people, found at the Ross Road property during the execution of the search warrant. He was charged with two counts of possession of stolen property based on the stolen trailer and

license plate found in his parents' driveway. And he was charged with another count based on items stolen from Steven Brent, located at the house and in the trailer. CP 155-161. 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). Collins's multiple convictions for possession of stolen property based on a single unit of the crime violated his constitutional right to be free from double jeopardy.

The double jeopardy clause of the United States Constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. Washington's constitution provides that no individual shall "be twice put in jeopardy for the same offense." Const. art. I, § 9. Double jeopardy principles prohibit prosecution for multiple charges under the same statute if the defendant commits only one unit of the crime. United States v. Bell, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L. Ed. 905 (1955); State v. Adel, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998). When a defendant is charged with multiple counts of the same offense, the court must determine the unit of prosecution the Legislature intended as the punishable act under the statute. Adel, 136 Wn.2d at 634.

Although Collins did not raise a double jeopardy challenge below, he may raise the issue for the first time on appeal, as it is a manifest error affecting a constitutional right. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000); RAP 2.5.

In McReynolds, the court addressed the unit of prosecution for possession of stolen property. Possession of stolen property is defined by statute as

knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140(1). While the value of the property possessed determines the degree of the crime², the definition applies to all degrees, so the unit of prosecution remains the same. McReynolds, 117 Wn. App. at 335. The court in McReynolds noted that the offense rests upon possession of “property” without reference to its value or ownership. Furthermore, the offense has never been defined by the identity of the property’s original owner. Id. at 335-36. Instead, the unit of prosecution rests upon the act of possession, which is a continuing offense and may encompass property owned by different people. Id. at 339. Possession of property owned by different people, or of various values, constitutes a

² RCW 9A.56.150-.170.

single crime, so long as the act of possession occurs as a continuous course of conduct. Id.

The defendants in McReynolds possessed an array of property belonging to different people over the same 15-day period, and they were convicted of multiple counts of first and second degree possession of stolen property. Id. at 332-33. The Court of Appeals ruled that these acts constituted a single act of possession and thus should have been one offense for the purposes of double jeopardy. Id. at 339.

Here, as in McReynolds, Collins was convicted of multiple counts of possession of stolen property for property possessed at the same time and by the same general conduct. Each count related to a different property owner, but the separate counts all alleged that Collins possessed the stolen property “on or about December 6, 2009.” CP 155-161. Five of the counts related to property discovered during execution of a search warrant at Collins’s premises, two counts related to property Collins was alleged to have left in his parents’ driveway that same day, and the last count related to property found at both Collins’s residence and in his parents’ driveway. Id. The multiple counts plainly involve property possessed in a continuous course of conduct and thus constitute a single unit of prosecution. See McReynolds, 117 Wn. App. at 335-36. The State’s division of this single unit of prosecution based on the owner of the

property, and Collins's multiple resulting convictions, violate double jeopardy, and all but one of the convictions for possession of stolen property must be reversed. Id. at 339-40.

3. THE SENTENCE OF 40 YEARS FOR NON-VIOLENT PROPERTY OFFENSES IS GROSSLY DISPROPORTIONATE TO THE GRAVITY OF THE OFFENSES AND VIOLATES THE CONSTITUTIONAL PROHIBITION OF CRUEL PUNISHMENT.

Both the state and federal constitutions prohibit punishment that is grossly disproportionate to the crime for which it is imposed. State v. Fain, 94 Wn.2d 387, 395-97, 395 P.2d 720 (1980); State v. Morin, 100 Wn.App. 25, 29, 995 P.2d 113 (2000); Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983). The Washington constitution is more protective than the federal constitution. State v. Manussier, 129 Wn.2d 652, 674, 921 P.2d 473 (1996); State v. Thorne, 129 Wn.2d 736, 772-73, 921 P.2d 514 (1996); Fain, 94 Wn.2d at 392-93, 617 P.2d 720; see Wash. Const. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted."). A punishment clearly permissible for some crimes may be unconstitutionally disproportionate for others. Fain, 94 Wn.2d at 396 (citing Coker v. Georgia, 433 U.S. 584, 591-92, 97 S.Ct. 2861, 2865-2866, 53 L.Ed.2d 982 (1977)). A sentence is grossly disproportionate if it is clearly arbitrary and shocking to the sense

of justice. State v. Smith, 93 Wn.2d 329, 344-45, 610 P.2d 869, cert. denied, 449 U.S. 873 (1980).

While proportionality review is generally conducted as to each individual sentence, where a consecutive sentence is shockingly long, the cumulative sentences may violate the constitutional ban on cruel and unusual punishment. Wahleithner v. Thompson, 134 Wn.App. 931, 937, 143 P.2d 321 (2006). Such is the case here. Collins received a sentence of 40 years based on the presence of three firearms in his home at the time a search warrant was executed. There was no evidence Collins ever used the firearms and no violent crimes were committed in conjunction with these possessory offenses. Under these circumstances, disproportionality review should be applied to this shockingly long cumulative sentence.

In considering whether a sentence is grossly disproportionate, the court must consider the following factors: “(1) the nature of the offense, (2) the legislative purpose behind the [sentencing] statute, (3) the punishment the defendant would have received in other jurisdictions for the same offense, and (4) the punishment meted out for other offenses in Washington.” Fain, 94 Wn.2d at 397. No one factor is dispositive. State v. Gimarelli, 105 Wn. App. 370, 380-81, 20 P.3d 430 (2001).

First, the nature of the offenses does not support the lengthy sentence in this case. Collins was found in constructive possession of

three stolen firearms and convicted of three counts of possession of a stolen firearm. Because he had a qualifying prior felony conviction, he was also convicted of three counts of unlawful possession of a firearm based on those same three guns. Notably, no allegations of any violence were ever made, and Collins was cooperative when the search warrant was executed, resulting in these charges. Moreover, Collins has no history of violent crime. See CP 300-301.

Next, while the Hard Time for Armed Crime Act authorizes consecutive sentences for each of the firearm offenses, RCW 9.41.040(6), this act was intended to reduce the frequency of dangerous crimes against persons. Laws of 1995, ch. 129, sec. 1. As noted above, there was no evidence of any violent or dangerous acts against persons in this case. Moreover, legislative purpose behind the Sentencing Reform Act includes ensuring proportionate and just punishment. RCW 9.94A.010. This goal is undermined by the 40 year sentence imposed in this case.

The third factor to consider is the punishment Collins would have received for the same offense in other jurisdictions. Our closest neighbors states of Oregon, California, and Idaho do not have statutory schemes that require consecutive sentencing comparable to the Hard Time for Armed Crime Act. And cases from other jurisdictions which have upheld consecutive sentences for firearm offenses have not gone so far as to find

a 40 year sentence constitutional. See e.g., United States v. Segler, 37 F.3d 1131 (5th Cir.1994) (consecutive 60-month sentence for unlawful possession); Hudgins v. Wainwright, 530 F.Supp. 944 (Fla.Dist.Ct.App.1981) (consecutive 15-year sentence for unlawful possession), aff'd, 715 F.2d 578 (11th Cir.1983), cert. denied, 466 U.S. 944 (1984); State v. Parkhurst, 706 A.2d 412 (R.I.1998) (consecutive 5-year sentence for theft of firearm); State v. Cashman, 23 Kan.App.2d 580, 932 P.2d 469 (1997) (consecutive sentence of 2-5 years for unlawful possession).

Finally, this Court must consider the punishment imposed for other offenses in Washington. The offenses sentenced consecutively here are Class B felonies. Crimes in this category by statute carry a maximum penalty of 10 years. RCW 9A.20.021(1)(b). Collins's 40 year sentence effectively confines him for the remainder of his life, a sentence commensurate with the maximum penalty for a Class A felony. RCW 9A.20.021(1)(a).

The sentence imposed in this case is shocking to the sense of justice that the Legislature attempted to create in establishing sentencing standards. It is grossly disproportionate to the offenses being punished, and it constitutes cruel punishment in violation of the Washington

constitution. The sentence must be reversed and the case remanded for resentencing.

D. CONCLUSION

Retrial following the mistrial violated Collins's constitutional protections against double jeopardy, and the charges presented to the jury should be dismissed. In addition, Collins's eight convictions for possession of stolen property, where he committed only one unit of the crime, violated his constitutional right to be free from double jeopardy, and all but one of those convictions must be dismissed. Finally, the sentence of 40 years for non-violent property offenses is grossly disproportionate to the gravity of the offenses and violates the constitutional prohibition of cruel punishment. This Court must remand for resentencing.

DATED this 21st day of December, 2012.

Respectfully submitted,



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Certification of Service

Today I forwarded a copy of the Brief of Appellant in *State v. Scott*

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I certify under penalty of perjury of the laws of the State of Washington
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Catherine E. Glinski
Done in Port Orchard, WA
December 21, 2012

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