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CLERK OF SUPREME COURT
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SUPREME COURT NO. _____
COA NO. 57407-8-L

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
STATE OF WASHINGTON
APR 11 2007
P.M. 4:47

REC'D

APR 04 2007

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

L.U. (D.O.B. 2/17/89),

Petitioner.

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

The Honorable James Noe, Judge
The Honorable Philip Hubbard, Judge

PETITION FOR REVIEW

DANA M. LIND
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. IDENTITY OF PETITIONER

Petitioner L.U. asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the published Court of Appeals decision in State v. L.U., __ Wn. App. __, __ P.3d (No. 57407-8-I, filed March 5, 2007), attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Whether, in the state's case against petitioner for taking a motor vehicle without permission (TMVWOP) and vehicular prowling, admission of petitioner's confession violated his Fifth Amendment right against self incrimination where: petitioner initially denied writing graffiti found in the complainant's stolen car; the interviewing detective subsequently promised petitioner he would not be charged with writing the graffiti to the dashboard; and petitioner immediately confessed to writing it, as well as other facts from which it could be inferred he rode in the car knowing it was stolen?

2. Whether petitioner's convictions for TMVWOP and vehicular prowling for one incident involving the same car violate double jeopardy?

D. STATEMENT OF THE CASE

On February 7, 2005, someone stole Jean Layer's Honda Civic. CP 1, 4. When police recovered it two days later, someone had written on the dashboard: "Fuck Officer [sic] Gillette [sic] 4rm C-loc, Bear, Bam Bam, Don't trip." CP 2. Officer Gillette is a school resource officer at SeaTac School. CP 8.

Several months later, Gillette arrested L.U. on an unrelated warrant. CP 2. Because Gillette suspected that L.U. or one of his friends might have written the message on Layer's dashboard, however, he asked Detective Ryan Mikulcik to question L.U. about it. RP 27.¹ Apparently, at some time prior, Gillette had been the target of graffiti that included a death threat. CP 2. Based on L.U.'s subsequent statements to Mikulcik, L.U. was charged with TMVWOP and vehicular prowling. CP 2.

In advance of his adjudicatory hearing, L.U. moved to suppress his statements on grounds they were coerced and involuntary. CP 7-19. A CrR 3.5 hearing was held at the beginning of L.U.'s adjudicatory hearing.

Mikulcik testified that he first advised L.U. of his constitutional rights, including the juvenile warning. RP 28. After L.U. signed a form waiving his rights, Mikulcik showed L.U. a picture of the dashboard

¹ Unless indicated otherwise, "RP" refers to the CrR 3.5 and adjudicatory hearings held on October 17, 2005.

message and asked whether L.U. wrote it. RP 35, 37. L.U. said he did not. RP 37.

During the ensuing 30-minute interview, Mikulcik asked what the word "4rm" meant. L.U. said it meant "from," and that he also writes "from" as "4rm." RP 37-38, 41.

Mikulcik testified he told L.U. he would not charge him with malicious mischief for the vandalism of Layer's car if L.U. told him "about another crime" not involving Layer's car, but involving Gillette and graffiti. RP 38. According to Mikulcik, his intent was "to find out who was making death threats against Officer Gillette, and I was hoping that he would tell me that, and for that, I wouldn't charge him with the malicious mischief or the vandalism." L.U. denied committing the other crime, but admitted being in Layer's car, knowing it was stolen, and writing the dashboard message. RP 39-40, 46.

With L.U.'s assistance, Mikulcik subsequently wrote the following statement for L.U.:

I was in a Honda Civic that was stolen. I was in the passenger seat and I cannot remember who was driving. I have been in many stolen cars and I know this one was stolen because the ignition was damaged. I used a marker and wrote on the dash board "F---- Officer [sic] Gillette [sic] 4rm c-loc, bear bam bam, don't [sic] trip," I have not written anything else about officer Gillette and have never

¹ Unless indicated otherwise, "RP" refers to the CrR 3.5 and adjudicatory hearings held on October 17, 2005.

written anything threatening. This is the only thing I have written about him. I hope it wasn't take [sic] as a threat or the wrong way.

CP 9; RP 40-41.

Mikulcik acknowledged that he and L.U. have a friendly relationship and that he treated him "as a friend" during the interview. RP 31, 44. It was Mikulcik's expectation that L.U. would believe him when he said he would not charge L.U. with vandalism. RP 44.

Like Mikulcik, L.U. testified that he initially said no when asked if he was the dashboard writer. RP 53. L.U. admitted writing on Layer's dashboard only after Mikulcik said, "if you admit saying that you did this, then you would ... you won't get charged with the graffiti." RP 54. L.U. thought he meant the "whole car, the whole charge of the car." RP 54, 56. And because L.U. had known Mikulcik since middle school, he thought Mikulcik "was going to be okay with it," meaning he would "drop all the charges." RP 54-55.

At the close of the CrR 3.5 testimony, L.U. argued that his will was overborne by Mikulcik's promise of immunity and that his statement was therefore involuntary and inadmissible.

So was there an overcoming or overbearance of Sola's [L.U.'s] will? We know that he started out saying he did not write the graffiti. We know that he did write the graffiti. Something changed that. In between the two times, both Sola and the detective admit that the detective

did promise him that he would not charge him with the graffiti. Sola has testified that's why he changed his mind and said what he did. That's why, because he got the promise, that he wouldn't be charged. That is an overbearance of his will to resist.

The state has argued that, oh, deceit is used all the time in police interrogations, and it's true. But this is more than a deceit about what evidence the police officer might have in order to convince the accused person or the suspect to change his mind. This is a promise, a fair-faced promise not to file charges.

RP 80-81.

The court ruled L.U.'s statements were admissible, however, reasoning that courts had approved of more significant or serious police deceptions than the one used against L.U. CP 46; RP 83. Based on L.U.'s written statement, the court found him guilty of the charged offenses. RP 118-19.

On appeal, L.U. argued his confession should have been suppressed because it was induced by Mikulcik's promise of immunity and therefore involuntary. Brief of Appellant (BOA), at 9-18. In a published opinion, the court of appeals disagreed, however, finding it was unreasonable for L.U. to believe the officer's offer of immunity applied to all charges relating to the car. Appendix, at 4-5.

L.U. also argued that his convictions for TMVWOP and vehicular prowling for one incident involving the same car violated double jeopardy, specifically the merger doctrine. BOA, 18-20. Division One disagreed,

noting that its decision directly conflicts with Division Three's in State v. Lass, 55 Wn. App. 300, 777 P.2d 539 (1989). Appendix, at 5-6.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

1. THE COURT OF APPEALS DECISION INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT.

The admission of a confession obtained by a false offer of immunity involves a significant question of state and federal constitutional law as well as an issue of substantial public interest that should be determined by this Court. Such confessions are inherently suspect and necessarily untrustworthy. This Court should accept review. RAP 13.4(b)(3), (4).

The Fifth Amendment provides "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Malloy v. Hogan, 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Use of a defendant's involuntary statements at trial violates this fundamental protection. See e.g. Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); Mead School Dist. 354 v. Mead Education Ass'n, 85 Wash.2d 278, 534 P.2d 561 (1975). In determining whether a confession is involuntary, the inquiry is whether, under the totality of the circumstances, the

confession was coerced. State v. Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997); State v. Rupe, 101 Wn.2d 664, 678-79, 683 P.2d 571 (1984). Circumstances include the condition of the defendant, the defendant's mental abilities, and the conduct of the police. Id.

In assessing the totality of the circumstances, a court must consider any promises or misrepresentations made by the interrogating officer. Broadaway, 133 Wn.2d at 132 (citing United States v. Springs, 17 F.3d 192, 194 (7th Cir.), cert. denied, 513 U.S. 955, 115 S.Ct. 375, 130 L. Ed. 2d 326 (1994); United States v. Walton, 10 F.3d 1024, 1028-29 (3d Cir. 1993)). A promise of immunity may invalidate the defendant's resultant confession. See e.g. State v. Setzer, 20 Wn. App. 46, 579 P.2d 957 (1978), overruled on other grounds in, Broadaway, 133 Wn.2d at 132. The court must determine whether there is a causal relationship between the promise and the confession. Broadaway, 133 Wn.2d at 132 (citing Walton, 10 F.3d at 1029-30). The inquiry is whether the defendant's will was overborne. Broadaway, 133 Wn.2d at 132 (citing Rupe, 101 Wn.2d at 679).

In this case, L.U.'s confession was the direct result of Mikulcik's promise of immunity. Mikulcik and L.U. both testified L.U. initially denied writing on the dashboard. Mikulcik further testified that it was not until he told L.U. he would not charge him with the malicious mischief for

the vandalism of Layer's car if L.U. told him about another crime – apparently some other graffiti on a wall – that L.U. confessed to being in the stolen Honda and writing on its dashboard. L.U.'s understanding of Mikulcik's offer was slightly different. He testified he did not confess to writing on Layer's dashboard until after Mikucik promised him, "if you admit saying that you did this, then you would ... you won't get charged with the graffiti." RP 54.

It appears Mikulcik hoped L.U. would confess to facts supporting a felony harassment charge. Whether L.U.'s understanding of Mikulcik's precise offer was somewhat mistaken, his statement was nevertheless involuntary because his understanding of having immunity for charges relating to Layer's car was reasonable. See e.g. United States v. Cahill, 920 F.2d 421, 427 (7th Cir. 1990) ("A defendant's perception that he is providing testimony under a grant of immunity does not make the statement involuntary, unless the perception was reasonable").

According to Mikulcik's own testimony, he told L.U. he would not charge him with the vandalism of Layer's car if he confessed to it. Obviously, L.U. could not admit to authoring the graffiti without also placing himself in the stolen car. Although Mikulcik also L.U. about a separate instance of graffiti (purportedly on a wall somewhere), they focused predominately on the graffiti in Layer's car. That was the

message Mikulcik had L.U. copy in his own handwriting. It was the purported existence of similarities between that message and L.U.'s own handwriting that the two discussed. Regardless of Mikulcik's subjective intent or expectation in offering immunity, it was his offer that led directly to L.U.'s confession. This direct connection shows L.U.'s will was overborne and his statement therefore involuntary.

Confessions that are induced by a false offer of immunity are inherently suspect. Setzer, 20 Wn. App. at 51 (confession induced by thrusting before the defendant a false expectation that by confessing he becomes immune to an enhanced penalty is inherently suspect and necessarily untrustworthy) (citing Lutton v. Smith, 8 Wn. App. 822, 509 P.2d 58 (1973)). Indeed, such confessions are involuntary as a matter of law in Oregon.

When a confession to a crime is obtained as the result of an offer of immunity as to that crime, there is no further factual inquiry as to whether the confession was voluntarily made; the legal assumption is that the defendant's will was overborne. As a matter of law, the confession is held to be involuntary.

State v. Aguilar, 133 Or. App. 304, 307, 891 P.2d 668 (1995); see also United States v. Gonzales, 736 F.2d 981 (4th Cir. 1984) (if the defendant's testimony was induced by the government's promise of immunity, it is involuntary and must be suppressed); United States v. Brimberry, 744

F.2d 580, 587 (7th Cir. 1984) (“it is ‘beyond question that, in our system of justice, any agreement made by the government must be scrupulously performed and kept.’”)

The government’s actions in this case in informing L.U. that he would not be charged with vandalizing Layer’s car and then using his resultant admissions should not be condoned. Agreements made by the government should be scrupulously performed and kept. This Court should accept review of this issue of substantial public interest arising under the state and federal constitutions. RAP 13.4(b)(3).

2. DIVISION ONE’S DECISION CONFLICTS WITH THE DECISION OF ANOTHER DIVISION, INVOLVES A SIGNIFICANT QUESTION UNDER THE STATE AND FEDERAL CONSTITUTIONS AND AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THIS COURT.

The United States and Washington State constitutions protect against double jeopardy. U.S. Const. amend. V; Wash. Const. art. 1, § 9. The state may bring multiple charges arising from the same criminal conduct in a single proceeding. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005) (citing State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997)). Courts may not, however, enter multiple convictions for the same offense without offending double jeopardy. Freeman, at 770-71 (citing State v. Vladovic, 99 Wn.2d 413, 422, 662

P.2d 853 (1983) (quoting Albernaz v. United States, 450 U.S. 333, 344, 101 S. Ct. 1137, 67 L. Ed. 2d 275 (1981)). "Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense." Freeman, 153 Wn.2d at 771 (quoting In re Pers. Restraint of Orange, 152 Wn.2d 795, 815, 100 P.3d 291 (2004)).

To determine legislative intent, this Court first considers any express or implicit legislative intent. Evidence of Legislative intent may be clear on the face of the statute, found in the legislative history, the structure of the two statutes, the fact the two statutes are directed at eliminating different evils, or any other source of Legislative intent. Freeman, at 773 (citing Ball v. United States, 470 U.S. 856, 864, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985)); State v. Calle, 125 Wn.2d 769, 776, 779-80, 888 P.2d 155 (1995).

If Legislative intent is not clear, however, the Court may turn to other aids in determining legislative intent, such as the merger doctrine. Freeman, 153 Wn.2d at 772-73. Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, the Court presumes that that the legislature intended to punish

both offenses through a greater sentence for the greater crime. Freeman, 153 Wn.2d at 773.

Division Three held in State v. Lass² that Lass could not be convicted of TMVWOP and vehicular prowling for stealing a truck.

[former] RCW 9A.56.070,^[3] which defines and prohibits taking a motor vehicle without permission, requires a showing that the motor vehicle taken did not belong to the defendant and that it was intentionally taken without the owner's permission or rightful possession. State v. Jamerson, 74 Wash.2d 146, 443 P.2d 654 (1968); State v. Medley, 11 Wash.App. 491, 524 P.2d 466 (1974). Second degree vehicle prowling requires a showing of unlawfully entering or remaining in a motor vehicle with intent to commit a crime therein. RCW 9A.52.100. Mr. Lass had to unlawfully enter the truck in order to take it without permission. We find no additional steps were necessary to complete both charges; hence, merger is proper.

Lass, 55 Wn. App. at 308 (emphasis added).

Based on Lass, L.U. argued below that his convictions likewise violated the merger doctrine because no steps additional from those required for taking a motor vehicle without permission are required to commit vehicular prowling. In other words, any time someone commits TMVWOP, he or she necessarily commits vehicular prowling as well.

² State v. Lass, 55 Wn. App. 300, 777 P.2d 539 (1989).

³ Now codified as RCW 9.56.075.

L.U. argued the Legislature did not intend to punish for both, however. BOA, at 19.

As the court of appeals correctly noted, whether “additional steps were necessary to complete both charges” is not the test for applying the *merger* doctrine. Appendix, at 6. However, it is the test for double jeopardy under Blockburger v. United States,⁴ which is another tool this Court uses to determine Legislative intent. See Freeman, 153 Wn.2d at 772.

If each crime contains an element that the other does not, this Court presumes that the crimes are not the same offense for double jeopardy purposes. Calle, 125 Wn.2d at 777; Blockburger, 284 U.S. at 304 (establishing "same evidence" or "same elements" test); State v. Reiff, 14 Wash. 664, 667, 45 P. 318 (1896) (double jeopardy violated when "the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other") (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

When applying the Blockburger test, however, this Court does not consider the elements of the crime on an abstract level. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two

⁴ 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

offenses or only one, is whether each provision requires proof of a fact which the other does not." Orange, 152 Wn.2d at 817 (quoting Blockburger, 284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 338, 342, 31 S. Ct. 421, 55 L. Ed. 489 (1911))).

Although L.U. initially interpreted Lass as relying on the merger doctrine, it appears the court was instead relying on the Blockburger test to find that the two offenses merged, in other words, constituted one offense. As Division Three correctly noted, vehicular prowling⁵ does not require any additional steps to complete than required of TMVWOP.⁶ L.U. had to unlawfully enter the car in order to take it or ride in it unlawfully. The two offenses are accordingly the same for double jeopardy purposes.

Although there was additional injury to Layer's property – i.e. the graffiti on the dashboard – the damage does not turn the conduct at issue into separate offenses, as the court of appeals alternatively found. Appendix, at 7. Vehicular prowling itself does not require additional damage to property. Upon unlawfully entering the vehicle with the intent

⁵ A person is guilty of second degree vehicular prowling if he or she enters or remains unlawfully in a vehicle "with intent to commit a crime against a person or property therein." RCW 9A.52.100.

⁶ A person is guilty of second degree TMVWOP if he or she, without permission of the owner, intentionally takes or drives away any automobile, or voluntarily rides in the automobile knowing it was unlawfully taken. RCW 9A.56.083.

to drive or ride in it, the crime is complete. In any event, property damage is incidental to TMVWOP, as is evident from numerous restitution cases. See e.g. State v. Hiett, 154 Wn.2d 560, 115 P.3d 274 (2005).

Because Division One's published decision in this case directly conflicts with Division Three's, this Court should accept review. RAP 13.4(b)(2). This conflict will likely lead to disparate charging decisions and therefore raises a constitutional issue of substantial public interest. This Court should accept review. RAP 13.4(b)(3), (4).

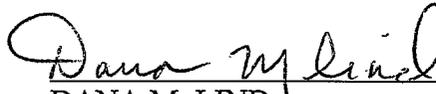
F. CONCLUSION

For the reasons stated above, this Court should accept review.

Dated this 4th day of April, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



DANA M. LIND

WSBA 28239

Office ID No. 91051

Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 57407-8-1
Respondent,)	
)	DIVISION ONE
v.)	
)	
L.U., b.d. 02-17-89,)	PUBLISHED OPINION
)	
Appellant.)	FILED: March 5, 2007
_____)	

AGID, J. – L.U. was convicted of taking a motor vehicle without permission and vehicle prowling after he confessed to writing graffiti in a stolen car. He contends that his confession should not have been admitted at trial because it was coerced by a detective's promise that L.U. would not be charged with a crime for the graffiti. L.U. also argues that his two convictions violate the merger doctrine. Because we conclude that the detective did not coerce L.U. into confessing and the Legislature did not intend that L.U.'s two crimes merge, we affirm.

On February 7, 2005, someone stole Jean Layer's Honda Civic. When police recovered it two days later, the steering column and ignition were damaged. Someone had written on the dashboard: "Fuck Officer [sic] Gilette [sic] 4rm C-loc, Bear, Bam Bam, Don't trip."

Three months later, King County Sheriff Deputy Timothy Gillette arrested L.U. on an outstanding warrant. Deputy Gillette, who had been the target of threats made in other graffiti similar to that found in Layer's car, had information that L.U. and some of his friends were involved in gang activity that included graffiti. The deputy asked Detective Ryan Mikulcik to talk to L.U. about the graffiti and the threats toward Deputy Gillette. Detective Mikulcik had known L.U. since L.U. was in middle school, and the two were friendly. Detective Mikulcik, unarmed and wearing plain clothes, brought L.U. to a 4 x 4 foot interview room and read him his rights.

L.U. denied writing the graffiti, but Detective Mikulcik thought that L.U.'s handwriting was similar to the writing in Layer's car. When Detective Mikulcik asked L.U. what "4rm" meant, L.U. said that was how he writes "from."

Detective Mikulcik told L.U. that he would not charge L.U. for writing the graffiti in the car if L.U. gave him information about another incident involving graffiti. L.U. thought the detective meant that he would not be charged with any crime related to the car. He then confessed to writing the graffiti on the dashboard:

I was in a Honda Civic that was stolen. I was in the passenger seat and I cannot remember who was driving. I have been in many stolen cars and I know this one was stolen because the ignition was damaged. I used a marker and wrote on the dash board "Fuck Officer Gilette [sic] 4rm c-loc, bear bam bam, don't trip." I have not written anything else about Officer Gillette and have never written anything threatening. This is the only thing I have written about him. I hope it wasn't taken as a threat or the wrong way.

The State charged L.U. by second amended information with one count of second degree taking a motor vehicle without permission and one count of second degree vehicle

prowling. Before trial, L.U. asked the court to suppress his confession. He argued that Detective Mikulcik coerced him into confessing by promising not to charge him with a crime. Both L.U. and Detective Mikulcik testified at the suppression hearing. Afterward, the court admitted L.U.'s confession and found him guilty as charged.

L.U. first argues that the trial court erred when it denied the motion to suppress his confession. A confession is involuntary or coerced if, based on the totality of the circumstances, the defendant's will was overborne. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); State v. Burkins, 94 Wn. App. 677, 694, 973 P.2d 15, review denied, 138 Wn.2d 1014 (1999). Some of the factors we consider when deciding whether a statement was voluntary include the defendant's age, mental condition, physical condition, and experience. Burkins, 94 Wn. App. at 694. The court must also consider the conduct of the interrogating officers and any promises or misrepresentations they made. Broadaway, 133 Wn.2d at 132. Even if a police officer deceived the defendant to obtain a confession, however, the statement is voluntary unless the officer's behavior overcame the defendant's will to resist. Burkins, 94 Wn. App. at 695. "The inquiry is whether the Defendant's will was overborne." Broadaway, 133 Wn.2d at 132.

If there is substantial evidence in the record from which the trial court could have found by a preponderance of the evidence that the confession was voluntary, we will not disturb the trial court's determination of voluntariness on appeal. Burkins, 94 Wn. App. at 694. Findings of fact entered following a CrR 3.5 hearing, if unchallenged, are verities on appeal. Burkins, 94 Wn. App. at 695.

After L.U.'s CrR 3.5 hearing, the trial court found that although L.U. first denied having written the graffiti on the dashboard, he admitted writing it after Detective Mikulcik said he would not be charged "with the graffiti to the dashboard." Because L.U. does not challenge that finding, it is a verity. Burkins, 94 Wn. App. at 695. L.U. argues that his confession was the direct result of Detective Mikulcik's promise of immunity. But, as the court found, the detective promised immunity only for the graffiti. He did not promise immunity for any other crimes relating to Layer's car.

L.U. contends it was reasonable for him to believe that the offer of immunity applied to all charges relating the car. He cites a federal case from the Seventh Circuit for the rule that "[a] defendant's perception that he is providing testimony under a grant of immunity does not make his statement involuntary, unless the perception was reasonable." United States v. Cahill, 920 F.2d 421, 427 (7th Cir. 1990), cert. denied, 500 U.S. 934 (1991). But L.U.'s perception was not reasonable. Detective Mikulcik interviewed L.U. only to find out about threats made toward Deputy Gillette. The detective testified that he and L.U. did not talk about car theft or any other crimes. Even when L.U.'s attorney asked him whether the detective told him he was investigating a stolen car, L.U. responded, "He said -- he just asked me about this car, and then he just asked me about some other graffiti[sic] and (inaudible) I don't know." L.U. then said he could not remember whether Detective Mikulcik told him the car was stolen.

L.U. may have believed that he would not be charged with any crimes relating to Layer's car if he confessed to writing the graffiti. But his mistaken belief was unreasonable

and he did not confess because Detective Mikulcik misrepresented his intentions.

Considering the totality of circumstances, L.U.'s confession was voluntary. The trial court properly admitted it.

L.U. next contends that his convictions for second degree taking a motor vehicle without permission and second degree vehicle prowling violate the merger doctrine. We disagree. Merger is a judicial doctrine used to determine whether the Legislature intended to impose multiple punishments for an act that violates more than one statute. State v. Eaton, 82 Wn. App. 723, 729, 919 P.2d 116 (1996). The doctrine applies only

where the Legislature has clearly indicated that in order to prove a particular degree of crime (*e.g.*, first degree rape) the State must prove not only that a defendant committed that crime (*e.g.*, rape) but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes (*e.g.*, assault or kidnapping). . . .

State v. Vladovic, 99 Wn.2d 413, 421, 662 P.2d 853 (1983). Thus, it applies where a crime is elevated to a higher degree by proof of an act that is prohibited elsewhere in the criminal code. Eaton, 82 Wn. App. at 730.

Vehicle prowling does not elevate the crime of taking a motor vehicle without permission to a higher degree. To convict L.U. of taking a motor vehicle without permission in the second degree, the State must prove that he,

without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle . . . that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

RCW 9A.56.075. To be guilty of second degree vehicle prowling, the defendant must enter or remain unlawfully in a vehicle "with intent to commit a crime against a person or property therein[.]" RCW 9A.52.100. Vehicle prowling does not elevate the taking a motor vehicle crime to a higher degree. The merger doctrine does not apply.

We recognize that Division Three of this court held to the contrary in State v. Lass, 55 Wn. App. 300, 777 P.2d 539 (1989). Like L.U., Lass was convicted of taking a motor vehicle without permission¹ and second degree vehicle prowling. In Lass, the court acknowledged that under the merger doctrine,

when an offense is proven which elevates another crime to a higher degree, "an additional conviction cannot be allowed to stand unless it involves some injury to the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element."

Lass, 55 Wn. App. at 308 (quoting State v. Johnson, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979), cert. dismissed, 446 U.S. 948 (1980)). Despite that acknowledgment, the Lass court concluded that second degree vehicle prowling and taking a motor vehicle without permission merged because "no additional steps were necessary to complete both charges." Lass, 55 Wn. App. at 308. Because that is not the test for applying the merger doctrine, we disagree with the court's reasoning in Lass. In any event, Lass would not be persuasive in L.U.'s case because L.U.'s criminal act involved an injury to property (the

¹ L.U. was found guilty of second degree taking a motor vehicle without permission. When Lass committed his crimes, there were no higher or lower degrees of the crime of taking a motor vehicle without permission. See former RCW 9A.56.070 (1987).

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graffiti on the dashboard) that was not merely incidental to the crime of taking a motor vehicle without permission.

L.U.'s arguments on appeal fail. His judgment and sentence is affirmed.

Ajid, J.

WE CONCUR:

Denz, J.

Grosse, J.