

NO. 74637-5-I

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

FILED  
Sep 02, 2016  
Court of Appeals  
Division I  
State of Washington

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STATE OF WASHINGTON,

Respondent,

v.

DMITRIY V. NAGORNYUK,

Appellant.

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BRIEF OF RESPONDENT

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## **I. ISSUES**

1. Was there sufficient evidence presented for a rational trier of fact to find the essential elements of count 1 second degree taking a motor vehicle and count 2 possession of a stolen vehicle proved beyond a reasonable doubt?

2. Under the facts in this case, did the trial court properly apply a double jeopardy analysis when it sentenced the defendant to only the greater of the two offenses?

3. Does the judgment and sentence erroneously contain reference to the lesser charge that should have been vacated under double jeopardy?

4. If the state substantially prevails on appeal, should the defendant be required to pay the costs of appeal?

## **II. STATEMENT OF THE CASE**

The defendant was charged by amended information with count one: taking a motor vehicle without permission and count two: possession of a stolen vehicle. After a two day jury trial, the jury convicted the defendant as charged. CP 22-3, 56-7.

According to his testimony, on June 9, 2015, Jose Sandoval spent the night at a friend's apartment in Everett. He parked his 1995 red Honda Accord outside. The next morning, June 10, 2015,

when he got up to go to work, his Honda was gone. He immediately reported his Honda stolen to the Everett Police Department. 1 RP 174-5.

June 10, 2015, Sergeant Santos of the Tulalip Police was working patrol on the night shift. At approximately 6:30 p.m., he saw a '90s maroon Honda Accord with two people inside. The driver was a male with short hair and there was a female passenger with a lot of hair. Sgt. Santos said his attention was drawn to the Honda because it is the number one stolen vehicle his agency deals with on a daily basis. He turned around to follow the Honda. He saw the Honda cross to the southeastern entrance to the Quil Ceda Casino complex. As he waited for traffic to clear so he could follow, Sgt. Santos could see the Honda pass the entrances to two of the parking areas. The Honda was out of his sight for a short time, but he went to the northern parking lot which was in the direction the Honda was traveling when he last saw it. He didn't see it in the northeastern parking lot, but as soon as he entered the north central parking area, he saw a woman standing in front of the Honda. 1 RP 134-7, 139-40, 171.

Sgt. Santos pulled in about 30 feet behind the Honda. He noticed the defendant standing at the open trunk going through the

items in the trunk. Sgt. Santos said he could clearly see him picking up items, looking at them, and setting them back down. He even saw him lift the cover for the spare tire well and look around that area. The female was standing at the front of the Honda holding some bags. Because the trunk was up, Sgt. Santos couldn't see the license plate. While he was waiting, he watched as the female walked away with the bags. The defendant took a pair of neon shoes, shut the trunk lid, and started to walk toward the casino. The engine was still running and there was no one else in the vehicle. Sgt. Santos was able to see the license plate to run it. He got an alert that the vehicle was listed as stolen. 1 RP 140-3; 145.

Sgt. Santos immediately contacted and detained the defendant as he was walking away. Sgt. Santos explained to the defendant why he was detaining him. The defendant said he didn't know the car was stolen. Officer Santos placed the defendant in handcuffs and put him in the back of his patrol car. He attempted to direct in-coming officers to the location of the female, but she was able to get into a black Lincoln town car and get away. 1RP 143-7.

Sgt. Santos removed the keys from the ignition. Sgt. Santos testified that he had over twenty years of experience in law enforcement with extensive training. He searched the defendant incident to arrest and located a metal file in his pants pocket. Sgt. Santos examined the keys and saw that they had been "shaved" or filed down. Sgt. Santos explained to the jury that Honda keys are similar. By filing down the teeth of the keys you essentially create a master key that works on just about every Honda vehicle of the 1980s and 1990s age bracket. 1 RP 133-4, 146; 162-3.

After Sgt. Santos had advised the defendant of his constitutional rights, the defendant said that someone else was driving the car and that two people had walked off prior to Sgt. Santos's arrival. When Sgt. Santos asked him about taking the shoes from the trunk, the defendant said the driver told him that since he was homeless, he could search the car for something to sell to get some money. 1 RP 149-50.

The court admitted photographs taken of the Honda at the scene, the keys and the file. The court also admitted the actual shaved keys and the file. State's exhibit 3 was a photograph of the backseat. It showed that the backseat contained women's shoes,

flip-flops, a water bottle, clothing, and some garbage. 1 RP 154-64.

Mr. Sandoval arrived to pick up his vehicle. He did not give anyone permission to take his vehicle. He identified the neon shoes as belonging to his girlfriend. He had some tools in bags that were missing from the car. The keys Sgt. Santos had found in the ignition were not his. The bags of food in the backseat did not belong to him either. The front license plate had been removed and was in the front passenger seat and the stereo was missing. 1 RP 175-80.

The defendant testified that in June of 2015, he was staying at his sister's house. On June 10<sup>th</sup>, he was trying to find a ride to his friend's house in Marysville. He asked some random strangers at a gas station if they were heading towards Marysville, and they said they were. They said they were going to the casino. In the car were a male driver and two females. According to the defendant, he sat in the backseat next to one of the females. When they got to the casino, the driver and front seat passenger got out. The driver told him they were going in to cash a check. He told the defendant to stay by the running car because the battery was in poor condition and they would not be able to start the car again if they turned it off.

According to the defendant, since he had told the driver he was short on money, the driver also told him to look in the trunk and maybe he would find something to sell. The defendant testified that he did not know these people and had never met them before, but he went to the trunk and started looking for something to sell. The defendant did not explain why he left the running car when Sgt. Santos arrived. 2 RP 189-91, 194-5, 200.

The defendant also explained the metal file in his pocket as a small knife for sharpening a blade he used to open canned goods because he had no place to live. He had earlier testified that he was staying at his sister's house 2 RP 189, 193.

The jury convicted the defendant as charged. CP 22-3.

At sentencing, the State argued that the two offenses were the same criminal conduct and merged for the purpose of sentencing. The defendant was then only sentenced on count 2, possession of stolen property. 4 RP 253, CP 4-6.

The defendant is 23 years old. At the sentencing hearing, the defendant's attorney informed the court that the defendant had not been working for a couple of years. He had some drug issues, but he had attended drug treatment and was looking forward to a life without drugs. His plan was to either live with his sister or move

to North Dakota to live with his father and have a fresh start. 4 RP 255-6.

### III. ARGUMENT

#### A. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT BOTH CONVICTIONS.

There is sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A challenge to the sufficiency of the evidence admits the truth of the States' evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007). Evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered), State v.

Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991). Credibility determinations are for the trier of fact and are not subject to review. State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

The to-convict instructions are irrelevant to a challenge to the sufficiency of the evidence claim. A reviewing court must evaluate the sufficiency of the evidence based on the essential elements of the charged crime as enacted by the legislature, disregarding any additional elements or false alternative means set out in a to-convict instruction. State v. Tyler, \_\_\_ Wn. App. \_\_\_ No. 73564-1-I (August 15, 2016).

**1. There Was Sufficient Evidence To Support The Conviction Of Count 1 Second Degree Taking A Motor Vehicle Without Permission.**

“A person is guilty of taking a motor vehicle without permission in the second degree if he or she, 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(1). “The State need only prove that the vehicle belonged to another and that the defendant intentionally used it

without permission.” State v. Hudson, 56 Wn. App. 490, 494, 784 P.2d 533, 534–35 (1990).

Here, the State’s evidence showed that on June 10, 2015, the Honda belonged to Mr. Sandoval. Mr. Sandoval testified that he did not know the defendant and did not give him permission to take or drive his vehicle. When Sgt. Santos first saw the stolen Honda, there were only two people in the car, a male driver and a female passenger. When Sgt. Santos contacted the stolen Honda in the parking lot of the casino, the defendant was rummaging through the contents of the trunk and a female was standing in front of the car holding some bags. The female left upon seeing Sgt. Santos. The defendant attempted to leave with items from the trunk but was stopped by Sgt. Santos. When the defendant attempted to leave, the Honda was unsecured and the engine was running. The Honda had been started with shaved keys and the defendant had a tool for shaving keys in his pocket. The defendant offered no explanation of permission from anyone for driving Mr. Sandoval’s Honda. Assuming the truth of State’s evidence, there is ample proof to support the charge of second degree taking a motor vehicle.

The defendant does attempt to rely on his testimony that he was a passenger in the vehicle, but this does not comport with assuming the truth of the State's evidence. He appears to be attempting to have this court weigh the persuasiveness of the evidence rather than defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the weight of the evidence. This argument should be disregarded.

**2. There Was Sufficient Evidence To Support The Conviction Of Count 2 Possession Of Stolen Vehicle.**

"A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1). Possession is defined by use of the definition of 'possession of stolen property' State v. Tyler, \_\_\_ Wn. App. \_\_\_ No. 73564-1-I (August 15, 2016). Possession of stolen property is defined as "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).

Here, the State's evidence showed the Honda had been stolen sometime between 10:00 p.m. June 9<sup>th</sup> and 7:00 a.m. the morning of June 10<sup>th</sup>. At 6:30 p.m. June 10<sup>th</sup>, the defendant was

the only person actually in contact with the car when Sgt. Santos pulled up. The defendant was outside the car, exercising dominion and control over the contents of the car. Even by his own statement, he had been left in charge of a running automobile. He was in possession of the Honda. There is ample evidence so show the defendant knew the vehicle was stolen, not the least of which being his taking the neon shoes from the trunk and walking away from the Honda while its engine was still running when Sgt. Santos arrived.

**B. UNDER THE FACTS IN THIS CASE, THE TRIAL COURT PROPERLY APPLIED DOUBLE JEOPARDY AND ONLY ENTERED SENTENCE ON THE GREATER OFFENSE, POSSESSION OF STOLEN VEHICLE.**

The State may bring, and a jury may consider, multiple charges arising from the same criminal conduct in a single proceeding. However, the double jeopardy clauses of the Fifth Amendment of the United States Constitution and article 1, section 9 of the Washington Constitution prohibit multiple punishments for the same offense. State v. Weber, 127 Wn. App. 879, 884, 112 P.3d 1287, 1290 (2005), aff'd, 159 Wn.2d 252, 149 P.3d 646 (2006). In determining whether multiple convictions violate double jeopardy, the court must first consider any express or implied

legislative intent. If legislative intent is not clear, the court must next turn to the Blockburger test. State v. Melick, 131 Wn. App. 835, 839, 129 P.3d 816, 818 (2006). Under the Blockburger (same evidence) test, the court presumes that the legislature did not intend to punish criminal conduct twice when the evidence required to support a conviction upon one of the charged crimes would be sufficient to warrant a conviction upon the other. State v. Freeman, 153 Wn.2d 765, 776, 108 P.3d 753, 759 (2005). "Accordingly, if the crimes, as charged and proved, are the same in law and in fact, they may not be punished separately absent clear legislative intent to the contrary. We consider the elements of the crimes as charged and proved, not merely as the level of an abstract articulation of the elements." Id. at 777.

A person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle. RCW 9A.56.068. Possessing stolen property is defined 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. Although these two convictions are not the same crime in law because the statutory elements differ, absent

clear legislative intent to the contrary, two convictions constitute double jeopardy when the evidence required to support a conviction for one charge is also sufficient to support a conviction for the other charge, even if one charge has additional elements. State v. Ralph, 175 Wn. App. 814, 823, 308 P.3d 729, 734 (2013).

Under the State's theory of the case, the defendant was driving the stolen Honda when he was first observed by Sgt. Santos. He was still in possession of the stolen Honda when he was seen a few minutes later by Sgt. Santos in the parking lot of the casino going through the contents of the trunk of the Honda while the Honda's engine was still running. Under the State's theory, the defendant was in continuous control of the stolen Honda, the difference being that at one point, the Honda was moving. At sentencing, the State conceded the two offenses arose from the same act of being in possession or control of the stolen Honda and agreed the offenses merged. The defendant agreed the two counts merged and the court found the counts merged. 4 RP 253, 254, and 261.

The remedy for convictions on two counts that together violate the protection against double jeopardy is to vacate the conviction on the lesser offense. In the Matter of the Pers. Restraint

of Burchfield, 111 Wn. App. 892, 899, 46 P.3d 840 (2002). “The facts of this case dictate that we follow the straightforward approach of vacating the offense that carries the lesser sentence as the lesser offense.” State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646, 655 (2006). It appears it was the intent of the court and the parties that there be a finding of double jeopardy and the defendant would be sentenced on only the greater offense, possession of stolen vehicle. In this case, the offense of taking a motor vehicle in the second degree would be the lesser offense.

If the court, however, relies on the defendant's theory at trial double jeopardy does not apply. The defendant asserted that he was not in possession of the stolen Honda because he was a passenger, not the driver. Under this theory, the defendant committed taking a motor vehicle by knowingly riding in the stolen Honda. He then received possession of the stolen vehicle when the driver left him with the Honda with the engine running. Under these facts, the defendant committed two separate and distinct offenses and double jeopardy would not apply. The defendant could properly be convicted of both offenses.

The defendant argues that even under his theory, he could only be convicted of count 1 second degree taking a motor vehicle,

relying on the doctrine that "one cannot be both the principal thief and receiver of stolen goods" as set forth in State v. Hancock, 44 Wn. App. 297, 301, 721 P.2d 1006 (1986). The defendant relies on the application of this doctrine that,

If the State charges both theft (or in this case, TMV) and possession arising out of the same act, the fact finder must be instructed that if it finds that the defendant committed the taking crime, it must stop and not reach the possession charge. Only if the fact finder does not find sufficient evidence of the taking can it go on to consider the possession charge.

State v. Melick, 131 Wn. App. 835, 841, 129 P.3d 816, 819 (2006).

However, Melick also stands for the doctrine that convictions of both theft and possession to stand, if there is "a possession separate in time or by actor from the original theft." Melick, 131 Wn. App. at 843. The facts in Melick are different from the facts in this case. In Melick, the State presented evidence that the defendant was the person who initially stole or took the vehicle in question. Melick was the "principal thief". Here there is no evidence who was the "principal thief". There was no evidence presented to show that the defendant stole the vehicle. The defendant was charged with taking a motor vehicle in the second degree, not on the theory that he had been the primary thief or taker of the vehicle, but on the

theory of he was voluntarily riding in or driving another's vehicle with knowledge it was unlawfully taken. RCW 9A.56.075.

The defendant could easily have been the receiver of stolen goods under the facts of this case and therefore the jury could properly decide both offenses. Since the State's theory of the case places the defendant in possession of the stolen Honda from the point he was seen driving to the point he was contacted by Sgt. Santos, double jeopardy applies. The defendant was properly convicted of only the greater charge, possession of stolen vehicle.

Melick and Hancock are based on doctrine established by Helfin v. United States, 358 U.S. 415, 79 S.Ct. 451, 3 L.Ed.2d 407 (1959); and Milanovich v. United States, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961); as interpreted by United States v. Gaddis, 424 U.S. 544, 547, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976). However, the Supreme Court has since reaffirmed that the Blockburger test is the rule of statutory construction that should apply absent a clear indication of contrary legislative intent or where the legislative history is silent. Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed 275 (1981). The court should decline to apply the Melick doctrine.

**C. THE JUDGMENT AND SENTENCE INCORRECTLY INCLUDED REFERENCE TO THE VACATED CHARGE OF TAKING A MOTOR VEHICLE SECOND DEGREE.**

The State concedes the judgment and sentence erroneously contains reference to count 1, second degree taking a motor vehicle. “To assure that double jeopardy proscriptions are carefully observed, a judgment and sentence must not include any reference to the vacated conviction—nor may an order appended thereto include such a reference; similarly, no reference should be made to the vacated conviction at sentencing.” State v. Turner, 169 Wn.2d 448, 464–65, 238 P.3d 461, 468–69 (2010). The matter should be remanded to enter an order vacating count 1 taking a motor vehicle without permission second degree and correcting the judgment and sentence to remove any reference to that count.

**D. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THE DEFENDANT SHOULD BE REQUIRED TO PAY THE COSTS OF APPEAL.**

“The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.” RCW 10.73.160(1). Appellate courts have discretion to deny costs. State v. Nolan, 141 Wn.2d 620, 621, 8 P.3d 300, 300 (2000).

The defendant has requested this court exercise its discretion and deny any appellate costs the State may request should the State be the substantially prevailing party on appeal. The defendant bases this request on the fact the trial court found the defendant indigent at the time of sentencing and State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016).

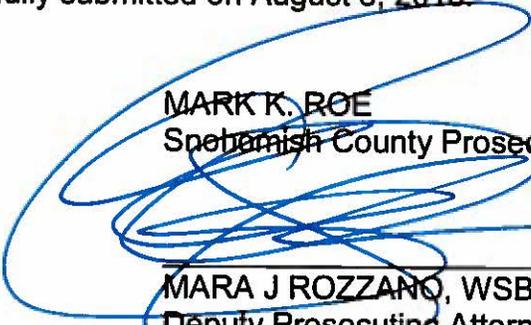
However, the defendant's situation is substantially different from that of Mr. Sinclair. Mr. Sinclair was 66 years old and had received a 280 month prison sentence. Sinclair, 192 Wn. App. at 393. The defendant is 23 years old and received a sentence of 60 days, which he had already served at the time of sentencing. Although the defendant was unemployed at the time of the incident and either living with his sister or homeless, there was nothing indicating he was unable to work. At sentencing, the defendant told the court that he was eager for a fresh start; that he had attended drug treatment and was looking forward to a life without drugs. 2 RP 189-91, 4 RP 255-6. This is not a situation where the defendant would be released from prison having to face a substantial and compounded repayment obligation in addition to the difficulties of finding housing and employment. This is an individual who presented to the sentencing court as having a plan for

housing, having addressed his drug addiction and at 23 years old, was ready for a fresh start and a life without drugs. There is nothing in the record to indicate the defendant is not perfectly capable of obtaining employment and paying the costs of appeal if imposed. Under these circumstances of this case, should the commissioner or clerk of the court impose cost, RCW 10.73.160(4) provides a sufficient safeguard against manifest hardship to the defendant or his family.

#### **IV. CONCLUSION**

For the reasons stated above, the State respectfully requests this Court to affirm defendant's conviction and remand for entry of a new order vacating count 1, and amending the judgment and sentence to remove any reference to count 1, taking a motor vehicle in the second degree. Should the defendant not substantially prevail, he should be required to pay appellate costs.

Respectfully submitted on August 8, 2016.

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

THE STATE OF WASHINGTON,

Respondent,

v.

DMITRIY V. NAGORNYUK,

Appellant.

No. 74637-5-1

DECLARATION OF DOCUMENT  
FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 23rd day of September, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to David Donnan, Washington Appellate Project, [david@washapp.org](mailto:david@washapp.org); and [wapofficemail@washapp.org](mailto:wapofficemail@washapp.org).

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of September, 2016, at the Snohomish County Office.



Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office