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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. DAIQUIRI HALL et al., Defendants and Appellants.	C060359 (Super. Ct. No. 07F07270)

APPEAL from a judgment of the Superior Court of Sacramento County, Renard F. Shepard, Judge. Reversed in part and affirmed in part.

Richard M. Doctoroff, under appointment by the Court of Appeal, for Defendant and Appellant, Hollins.

Gideon Margolis, under appointment by the Court of Appeal, for Defendant and Appellant, Hall.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Julie A. Hokans, Supervising Deputy Attorney General, Judy Kaida and Larenda Delaini, Deputies Attorney General, for Plaintiff and Respondent.

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* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of parts I, II, III and V of the Discussion.

Defendants Daiquiri E. Hall and Kelvin Anthony Hollins each were convicted of multiple criminal charges arising from a robbery. On appeal, both defendants assert their federal constitutional rights were violated by an impermissibly suggestive field showup and imposition of an upper term sentence. They also both contend they were wrongly convicted of two counts of receiving stolen property instead of one.

Separately, Hollins contends his constitutional rights were violated by the admission of other crimes evidence and by the use of a juvenile adjudication to double his sentence. For his part, Hall contends he was wrongly convicted of both carrying a concealed firearm and carrying a loaded firearm in a public place because the latter offense is necessarily included in the former.

We agree defendants each could be convicted of only one count of receiving stolen property, but otherwise we reject their arguments. Accordingly, we will reverse their convictions on one of the counts of receiving stolen property (on which their sentences were stayed pursuant to Penal Code[1] section 654) and will otherwise affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2007, Denise Galvan was selling clothes for a living. On the evening of July 29, Galvan received a telephone

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[1] All further undesignated section references are to the Penal Code.

call from someone who called himself Kevin and said he needed some clothes. She agreed to meet him at an address in Sacramento, and she persuaded Michelle Ezell (the mother of her brother's child) to go with her. They went in a car Galvan had rented.

When they arrived at the address, two young men wearing dark hooded sweatshirts (later identified as defendants) came down the driveway. Galvan got out of the car, leaving it running, and Ezell remained in the front passenger seat. Galvan opened the door to the backseat, where the clothes were, and talked to defendants about buying the clothes. When she noted they were not even trying to look at the clothes and asked them if they lived there or had any money, Hall put a gun to her head and said, "Break your . . . self. Give me everything." Galvan gave him about $17 and started begging him not to shoot her. Ezell jumped from the car and ran, spilling three cell phones in her lap on the ground. Hall turned to look, and Galvan took the opportunity to run too. Defendants got in the car and drove away.

After a few minutes, Galvan found someone who let her use a phone to call 911. When the police arrived, Galvan and Ezell returned to the location of the robbery, where Ezell's cell phones had fallen to the ground, but the phones were no longer there.

Meanwhile, another police officer on patrol located the car and followed it. As he did so, it pulled over and the two occupants fled, disregarding his command to get down.

Other police officers and a police dog arrived and began searching the area for the suspects. One of the officers found a handgun about 30 feet from the car and another handgun about 40 feet further away. They continued searching and in a nearby backyard found four cell phones and two black sweatshirts. An air unit told the officers there was someone on the roof of a shed in the adjacent yard, and the officers ordered him to come to them. He did so, and it turned out to be Hall. Shortly thereafter, Hollins was found in another adjacent yard.

After responding to the scene of the robbery, the police took Galvan and Ezell to view a suspect, whom both victims said was not one of the perpetrators. The police then took them to another location, where they were first shown Hollins, then Hall, both of whom they recognized as the perpetrators. After identifying defendants, Ezell also identified her cell phones.

Defendants were jointly charged with two counts of carjacking (one for each victim), two counts of robbery (one for each victim), and two counts of receiving stolen property (one for the cell phones and one for the car). Hall was also charged with carrying a concealed firearm and carrying a loaded firearm in a public place. The carjacking and robbery charges included various enhancements, and there was an allegation that Hollins had a prior serious felony conviction for robbery.

The jury found Hall not guilty of the carjacking charges or of robbing Ezell, but guilty of robbing Galvan and of the receiving stolen property and firearm charges. The jury also found the enhancement allegations on the robbery charge true.

The jury found Hollins not guilty of the carjacking and robbery charges but guilty of the receiving stolen property charges. In a bifurcated proceeding, the court found that Hollins had a prior juvenile adjudication for robbery that could be used as a sentence enhancement.

The court sentenced Hall to the upper term of five years on the robbery charge based on the determination that the manner in which the crime was carried out indicated planning, Hall had engaged in violent conduct indicating a serious danger to society, and his criminal conduct was of increasing seriousness. The court added a consecutive 10 years for a firearm enhancement, then imposed but stayed pursuant to section 654 the middle term of two years on each of the remaining charges of receiving stolen property, carrying a concealed weapon, and carrying a loaded firearm in a public place.

The court sentenced Hollins to the upper term of three years on one of the receiving stolen property charges (count six) because he was on probation, his criminal behavior was increasing in seriousness, and he engaged in violent conduct which indicates a serious danger to society. The court doubled the term to six years based on his prior conviction, then imposed a two-year term for the other receiving stolen property charge (count five), doubled that term, but stayed it pursuant to section 654.

DISCUSSION

I

Admission Of Other Crimes Evidence

Before trial, the prosecutor moved to admit evidence of a carjacking Hollins had committed in December 2006. The People argued evidence of the prior carjacking was relevant to prove modus operandi and lack of mistake or accident. Over Hollins's objection, the court concluded the evidence was relevant for both purposes and was not more prejudicial than probative and therefore was admissible.

At trial, three witnesses testified about the December 2006 carjacking. The court admonished the jury that the testimony was admitted for the limited purpose of showing lack of mistake or accident or a common plan or scheme of Hollins's and was to be used for no other purpose.

On appeal, Hollins contends the trial court violated his constitutional due process rights by admitting evidence of the December 2006 carjacking because "[f]acts relating to the earlier carjacking had no probative value whatsoever [and] were highly inflammatory and severely prejudicial to Hollins's right to a fair trial."

Assuming for the sake of argument that admission of the other crimes evidence was irrelevant and/or more prejudicial than probative, as Hollins argues, he has shown a violation of state law, but not necessarily a violation of his federal constitutional rights. (See *People v. Ashmus* (1991) 54 Cal.3d 932, 984 fn. 14 ["A state-law violation is *not* automatically a

violation of federal constitutional due process"].) For the admission of other crimes evidence to violate the constitutional right to due process, the evidence must be "'"of such quality as necessarily prevents a fair trial."'" (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384.) A due process violation is shown only if the erroneous admission of the propensity evidence "'"had substantial and injurious effect or influence in determining the jury's verdict."'" (*Id.* at p. 1385.)

Here, Hollins has not shown that the admission of evidence of the December 2006 carjacking had any such effect on the jury. Indeed, given that the jury *acquitted* him of the carjacking and robbery charges and convicted him only of receiving stolen property, we believe such a showing would be impossible. In any event, Hollins's bare statement that "[w]ithout the added evidence of the [prior] carjacking, [he] would have been acquitted" of the receiving stolen property charges as well falls far short of a showing that admission of the prior crimes evidence was so injurious that it violated his right to due process.

Because, at best, Hollins has shown only a violation of state law, the prejudicial effect of that error (if any) must be evaluated under the reasonable probability standard of *People v. Watson* (1956) 46 Cal.2d 818, which requires reversal only when "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Id.* at p. 836.) Hollins makes no effort, however, to show prejudice under the *Watson* standard. Instead, as we have

noted, he merely asserts, without analysis, that he "would have been acquitted" of all charges if the other crimes evidence had not been admitted.

In the absence of any persuasive showing by Hollins, and in light of the fact that the jury acquitted him of the most serious charges in this case, including those that were closest to the prior incident (the carjacking charges) and thus most likely to be the subject of any prejudicial effect, we conclude that Hollins has failed to show prejudicial error, let alone a violation of his constitutional rights, in the admission of evidence of the December 2006 carjacking.

II

Challenge To The Field Showup

Before trial, defendants each moved to exclude evidence of the victims' out-of-court identifications of them as "the product of an impermissibly suggestive procedure." They also sought to exclude any in-court identification of them by the victims as tainted by the out-of-court identifications. Each defendant requested an evidentiary hearing on his motion if the court was not inclined to grant the motion on the papers.

In arguing that the field showup was impermissibly suggestive, Hollins did not point to anything specific, but asserted only generally that "the identification procedures indicated that police believed Mr. Hollins to be responsible for the crime charged and those feeling[s] were conveyed to [the victims]. Further, the identification procedures led the

eyewitness to identify [Hollins] on a basis of factors other than independent recollection."

In his motion, Hall was more specific. He asserted that "the police gave [the victims] several verbal and non-verbal clues that the police believed that they caught the right m[e]n," specifically by: (1) telling the victims "the police dog bit one of the suspects"; and (2) "initially displaying at least one of the defendant[s] to [the victims] as he [wa]s being taken out of the back of the police car while in handcuffs and while under the control of a police officer." Hall admitted he had "no direct evidence that the police told Galvan that the dog bit a defendant," but he argued that it was reasonable to conclude such a communication occurred based on "Galvan's statement during the field show up 'I hope that dog bit the shit out of him'."

In arguing for an evidentiary hearing, both defendants asserted only that a hearing was "needed so that defense counsel may explore and present to the court the extent of the taint."

In opposition to the motion, the prosecutor asserted defendants had failed to meet their burden of showing that the field showup gave rise to a very substantial likelihood of irreparable misidentification.

At the hearing on the motions, Hall stood on his papers and reiterated his request for an evidentiary hearing, suggesting he wanted to inquire into the extent to which the victims communicated with each other before the out-of-court

identifications, as well as inquiring into how Galvan learned a police dog was used.

For his part, Hollins asserted "there [wa]s enough confusion and enough issues have arisen that would make a[n evidentiary] hearing, a very prudent move in order to determine . . . how [the victims'] identification of [defendants] was influenced."

The prosecutor continued to argue that defendants had not met their burden and further asserted that no evidentiary hearing was justified because even if the court assumed everything defense counsel said was true, the court would still have to deny the motion.

The court concluded the showup did not "rise[] to the occasion that there is an irreparable misidentification here." The court further concluded that it did not "rise[] up to the point where we need to do a[n evidentiary] hearing and bring [the victims] in and find out what they knew about the dogs." Hollins pressed for an evidentiary hearing as to Ezell at least because "she did not provide any description to police" before the showup and therefore "her identification clearly could have been tainted by Ms. Galvan's description and her identification." The court denied that request.

On appeal, defendants contend the trial court denied them due process of law when it denied their challenge to the victims' identifications because the field showup was impermissibly suggestive. They also assert that the trial court abused its discretion and denied them due process of law when it

refused to grant them an evidentiary hearing. We disagree on both points.

"'The issue of constitutional reliability depends on (1) whether the identification procedure was unduly suggestive and unnecessary [citation]; and if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances . . . . If, and only if, the answer to the first question is yes and the answer to the second is no, is the identification constitutionally unreliable.' [Citation.] In other words, '[i]f we find that a challenged procedure is not impermissibly suggestive, our inquiry into the due process claim ends.'" (*People v. Ochoa* (1998) 19 Cal.4th 353, 412.)

"Defendant[s] bore the burden of showing an unreliable identification procedure." (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.) "The standard of review for a claim of undue suggestiveness remains unsettled . . . ." (*Id.* at p. 413.) Nevertheless, just as in *Ochoa*, we conclude that "even under independent review, the record is clear that [the field showup] was not unduly prejudicial. Thus, there is no need to consider reliability under the totality of the circumstances . . . ." (*Ibid.*)

"To begin with, '[t]he "single person showup" is not inherently unfair.' [Citation.] More important yet as it relates to this case: for a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness--i.e., it

must, wittingly or unwittingly, initiate an unduly suggestive procedure. . . . 'A procedure is unfair which suggests in advance of identification by the witness the identity of the person suspected by the police.'" (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413, fn. omitted.)

Defendants do not point to anything about the field showup here that was unduly suggestive. Hollins asserts the showup was "inherently unfair, because it provided the witnesses their first opportunity to view the faces of the suspects in better lighting conditions," but he fails to explain how better lighting could be deemed to improperly suggest to the witnesses that defendants were the perpetrators. Similarly, Hollins's assertion that the victims "were together and could communicate with each other during the showup" does not identify anything unduly suggestive about the showup procedure. Hollins's reference to the conducting officer's supposed lack of experience is likewise to no avail because the fact that he may have been a rookie and may have conducted only a few other showups does not identify anything unduly suggestive about the showup he conducted here.

In assessing a claim of an unduly suggestive identification procedure, "'The question is whether anything caused defendant to "stand out" . . . in a way that would suggest the witness should select him.'" (*People v. Cunningham* (2001) 25 Cal.4th 926, 989-990.) Because defendants have failed to identify anything about the field showup procedure here that suggested

the victims should identify defendants as the perpetrators, their due process claims fail.

As for their claims that the trial court abused its discretion in refusing to conduct an evidentiary hearing, those claims fail also. Defendants do not point to anything specific they believe an evidentiary hearing would have revealed that would have supported their claims that the showup procedure was unduly suggestive. Hollins asserts only generally that "[t]he court's failure to allow testimony left unanswered many questions" and that his "due process right took a back seat [*sic*] to [the victims'] convenience." Hall does nothing more than echo the latter point. This is plainly insufficient to persuade us the trial court acted outside the bounds of reason and thereby abused its discretion in refusing to conduct an evidentiary hearing.

III

Multiple Convictions For Receiving Stolen Property

Defendants contend they could not be convicted of both counts of receiving stolen property because, as Hollins puts it, "receipt/possession of more than one item of stolen property at the same time constitutes a single offense." We agree.

"[T]he elements of receiving stolen property are (1) stolen property; (2) knowledge that the property was stolen; and (3) possession of the stolen property." (*People v. King* (2000) 81 Cal.App.4th 472, 476.) "[T]he simultaneous reception of several articles of stolen goods constitutes but a single offense regardless of the fact that the articles so received may

have been previously stolen from several different owners." (*People v. Smith* (1945) 26 Cal.2d 854, 858; see also *People v. Mitchell* (2008) 164 Cal.App.4th 442, 461-462.) "[I]f the evidence shows that goods stolen from different sources were received on a single occasion, there is but one offense of receiving stolen property. However, this rule is inapplicable when there is evidence from which the jury might infer that the goods were not received at the same time or in the same transaction." (*People v. Bullwinkle* (1980) 105 Cal.App.3d 82, 92.)

Here, count five charged defendants with receiving the cell phones, while count six charged them with receiving the car. The People argue that convictions on both counts are permissible because "the facts demonstrate there were independent factual bases for [the] receipt of [the] cellular telephones and the [car]" because of the circumstantial evidence that defendants picked up Ezell's cell phones from where they had fallen on the ground.[2] Based on this evidence, the People argue that "the jury could have convicted [defendants] of receiving [Ezell]'s stolen cellular telephones when [they] picked them up from the street

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[2] There was also evidence Galvan had a cell phone with her, but it was in the car, and thus it came into defendants' possession the same time the car did. The People's argument that "the jury could have convicted [defendants] of . . . receiving [Galvan]'s cellular telephone when [they] took it from the [car]" ignores the fact that they already had possession of that cell phone along with the car.

before [they] entered the [car]" and "of receiving the stolen [car] when [they] drove away in it."

Defendants both assert that the time when a person received possession is not an element of the crime of receiving stolen property. That may be true, but the time of receipt nonetheless is material when, as here, there are multiple charges of receiving stolen property because, under the rule on which defendants rely, multiple convictions are prohibited only when multiple items of stolen property were received "simultaneous[ly]" (*People v. Smith*, *supra*, 26 Cal.2d at p. 858), "at the same time" (*People v. Willard* (1891) 92 Cal. 482, 488), or on a "single" occasion (*People v. Lyons* (1958) 50 Cal.2d 245, 275). The question, which the People do not adequately acknowledge or address, is how fine the concept of "the same time" or "a single occasion" can be parsed. Assuming the factual scenario the People posit to support the multiple convictions, were Ezell's cell phones received at a different time, or at the same time, as the car?

Where, as here, the items of stolen property were received, at most, moments apart, from the same source or sources, we believe the rule precluding multiple convictions applies because there was effectively only one transaction. Here, defendants scooped up Ezell's cell phones at essentially the same time they absconded with Galvan's rental car. Indeed, for all practical purposes, this case is no different than *People v. Smith*, *supra*, 26 Cal.2d at page 854. There, one Stepzinski took a number of radios he had stolen from automobiles to the defendant's shop.

(*Id.* at pp. 855-856.) Three of the radios "still had the cut wires attached to them." (*Id.* at p. 856.) Stepzinski "carried two radios into the shop and placed them on the counter. He then returned to his car and brought in two more which he placed on the floor." (*Id.* at pp. 856-857.) After the defendant had "picked up two of the radios and moved them behind the service counter," "[p]olice officers . . . entered the shop and arrested the two men." (*Id.* at p. 857.)

On these facts, the Supreme Court held that the "defendant received the stolen goods [i.e., three of the radios] in a single transaction at the time and place mentioned, and, in our opinion, such evidence proved but a single offense." (*People v. Smith*, *supra*, 26 Cal.2d at p. 859.) Thus, even though the defendant received one or two of the stolen radios moments after receiving the other stolen radio or radios (because Stepzinski brought only two radios into the shop initially), the Supreme Court concluded there was only one offense.

The same is true here. Because, even under the People's theory, defendants received the cell phones only a moment before receiving the car, they each could be convicted of only one count of receiving stolen property. Consequently, as to each defendant, the conviction on the other count must be reversed.[3]

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[3] We will reverse defendants' convictions on count five, because both defendants' sentences on count five were stayed pursuant to section 654 and therefore the reversal will have no effect on their aggregate sentences.

IV

Multiple Firearm Convictions

Hall was convicted of two firearm offenses: (1) carrying a concealed firearm (§ 12025, subd. (b)(6)); and (2) carrying a loaded firearm in a public place (§ 12031, subd.(a)(2)(F).) He contends that the latter offense is necessarily included in the former and therefore his conviction for the latter offense cannot stand. He is wrong.

"In California, a single act or course of conduct by a defendant can lead to convictions 'of any number of the offenses charged.' [Citations.] But a judicially created exception to this rule prohibits multiple convictions based on necessarily included offenses." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034, italics omitted.) "In deciding whether an offense is necessarily included in another, we apply the elements test, asking whether '"'all the legal ingredients of the corpus delicti of the lesser offense [are] included in the elements of the greater offense.' [Citation.]"' In other words, 'if a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.'" (*Id.* at p. 1034.)

Section 12025 makes it a crime to carry a concealed firearm. A person is guilty of carrying a concealed firearm if he or she "(1) [c]arries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person"; "(2) [c]arries concealed upon his or her person any pistol,

revolver, or other firearm capable of being concealed upon the person"; or "(3) [c]auses to be carried concealed within any vehicle in which he or she is an occupant any pistol, revolver, or other firearm capable of being concealed upon the person." (§ 12025, subd. (a).)

Subdivision (b) of section 12025 specifies different punishments for carrying a concealed firearm depending on various other factors. As applicable here, the statute makes the crime punishable "[b]y imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, by a fine not to exceed one thousand dollars ($1,000), or by both that fine and imprisonment" (i.e., a "wobbler") if "(A) Both the pistol, revolver, or other firearm capable of being concealed upon the person and the unexpended ammunition capable of being discharged from that firearm are either in the immediate possession of the person or readily accessible to that person, or the pistol, revolver, or other firearm capable of being concealed upon the person is loaded as defined in subdivision (g) of Section 12031" and "(B) The person is not listed with the Department of Justice pursuant to paragraph (1) of subdivision (c) of Section 11106, as the registered owner of that pistol, revolver, or other firearm capable of being concealed upon the person."

Section 12031 makes it a crime to carry a loaded firearm in a public place. "A person is guilty of carrying a loaded firearm when he or she carries a loaded firearm on his or her person or in a vehicle while in any public place or on any

public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory." (§ 12031, subd. (a).) Like section 12025, section 12031 specifies different punishments depending on various other factors. As applicable here, the statute makes the crime of carrying a loaded firearm in a public place punishable "by imprisonment in the state prison, or by imprisonment in a county jail not to exceed one year, or by a fine not to exceed one thousand dollars ($1,000), or both that fine and imprisonment" (again, a wobbler) "[w]here the person is not listed with the Department of Justice pursuant to Section 11106, as the registered owner of the handgun." (§ 12031, subd. (a)(2)(F).)

Hall asserts that "[t]he elements of [the crime defined in] section 12025, subdivision (b)(6) are . . . carrying a concealable, loaded, unregistered firearm." He further asserts that "[t]he only element in section 12025, subdivision (b)(6) which is not present in section 12031, subdivision (a)(2)(F) is the 'concealed' aspect of the [latter] statute." In other words, he contends that a person who carries a concealed, loaded firearm that is not registered to him is guilty of violating both statutes and can be convicted of only the greater offense -- carrying a concealed weapon.

Hall is mistaken because he has not accounted for one of the elements of the crime defined by section 12031: the requirement that the firearm be carried *in a public place* -- that is, "while in any public place or on any public street in an incorporated city or in any public place or on any public

street in a prohibited area of unincorporated territory." (§ 12031, subd. (a).) There is *no* such requirement in section 12025. Thus, a person who carries a concealed, loaded firearm that is not registered to him in a *private* place may be guilty of violating section 12025 without violating section 12031. Because the latter offense is not necessarily included in the former, Hall's two convictions were proper.

V

Sentencing Issues

Both defendants challenge the trial court's imposition of the upper term sentence on federal constitutional grounds, asserting that under *Cunningham v. California* (2007) 549 U.S. 270 [166 L.Ed.2d 856] they were "constitutionally entitled to a jury trial and proof beyond a reasonable doubt on sentencing factors used in aggravation (other than prior convictions), before they may be used to support an upper-term sentence."

These arguments are misplaced because defendants' crimes occurred in July 2007, *after* the California Legislature amended the determinate sentencing law in response to the *Cunningham* decision with urgency legislation that took effect on March 30, 2007. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 836, fn. 2; Stats. 2007, ch. 3, § 2.) Under the determinate sentencing law as amended, the trial court has discretion to choose between the lower, middle, and upper terms, and an upper term sentence may be imposed without any additional fact finding by the court. (Pen. Code, § 1170, subd. (b).) Thus, defendants' *Cunningham* arguments have no merit.

Hollins contends the trial court violated his federal constitutional rights when it used his juvenile adjudication as a "strike" to double his sentence. In a case decided after Hollins filed his opening brief, our Supreme Court rejected an identical argument. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1010.) We are bound by that decision. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

Defendants' convictions on the first count of receiving stolen property (count five) are reversed. In all other respects, the judgments are affirmed. The trial court shall prepare amended abstracts of judgment reflecting this disposition and forward a certified copy of each abstract to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

SCOTLAND, P. J.

BLEASE, J.