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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

HOMER ALVIN MARCHBANKS, JR.,

Defendant and Appellant.

A107811

(Sonoma County
Super. Ct. No. SCR33824)

Homer Alvin Marchbanks, Jr., appeals from a judgment on a jury verdict of guilty of receiving a stolen vehicle, vandalism and receiving a stolen engine and transmission. (Pen. Code, §§ 496d, subd. (a), 594, subd. (a), 496, subd. (a).)¹ He argues that the trial court abused its discretion by denying his request for new counsel to file a motion for new trial. He also contends that he cannot be convicted of receiving a stolen vehicle and receiving the stolen engine and transmission from the same vehicle. We agree with both of defendant's arguments, and will remand the matter with directions to appoint independent counsel for the purpose of filing a new trial motion. We also vacate the conviction for receiving a stolen engine and transmission.

FACTUAL BACKGROUND

Defendant's trial was a credibility contest, primarily between defendant and Nigel Wilson, the owner of a business named Bullet Proof Performance. Wilson claimed that defendant stole a 2003 Cobra Mustang and put the engine in his own car, and defendant

¹ Unless otherwise indicated, all statutory references are to the Penal Code.

claimed that he merely paid Wilson to install a new engine in defendant's vehicle. Other witnesses supported other versions of the facts at the trial. Defendant's counsel failed to bring out the fact that defendant told a consistent version of the facts to a detective at the time of his arrest. If the jury had known of defendant's prior consistent statement, that knowledge may have tipped the balance in defendant's favor. We set out the facts in some detail to demonstrate the importance of credibility in this case.

The Prosecution Case

A first amended information, filed on May 28, 2004, charged defendant in count one with receiving a stolen vehicle (§ 496d, subd. (a)), in count two with vehicle theft (Veh. Code, § 10851, subd. (a)), in count three with vandalism (§ 594, subd. (a)), in count four with receiving a stolen engine and transmission (§ 496, subd. (a)), and in count five with altering vehicle information numbers (VIN) (Veh. Code, § 10802). It also alleged a 1997 conviction of vehicle theft pursuant to section 666.5.

A salesman at Henry Curtis Ford in Petaluma testified that in early October of 2003, he saw a light-skinned Black male with curly hair and "a little scruff on his face," drive a red 2003 Cobra Mustang off the lot. He did not mention the incident at the time because he assumed the person was a customer. At some later time in October, employees of the dealership began checking on the location of the car and determined that it had been stolen.² Later, at the trial, the salesman could not identify defendant as the thief, but stated that he fit the characteristics of the man who took the car.

Detective John Evans, a California Highway Patrol Officer and investigator with the county auto theft task force, testified that on October 13, 2003, he observed Wilson and another person in a pickup truck dumping parts of a newer vehicle in a field. Evans went to Bullet Proof Performance and spoke with Wilson. Evans saw a number of vehicles in a field behind the shop, including the shell of the stolen Mustang sitting on a trailer with a tarp thrown over it.

² The evidence indicated that a reasonable sales price for that vehicle would have been between \$25,000 and \$40,000. The handmade custom engine alone had a retail value of \$15,000.

As the situation developed, Wilson changed his story several times. When Evans asked Wilson about the car, Wilson first said he bought it for \$800 at a swap meet. Wilson initially denied that various parts in the shop belonged to the Mustang, but later admitted that some of the parts came from the car. Another officer with Evans found the motor from a 1999 Cobra Mustang registered to defendant in the shop.

Evans spoke with Wilson again on October 16, at which time Wilson offered a second story, claiming that he bought the Mustang shell from a Hispanic gentleman. By the end of that interview, Wilson offered a third story, stating that defendant brought the new Mustang to the shop and began stripping it. Wilson told Evans that he then left for a couple of days to see his girlfriend.

Wilson's next version of the facts was that he was going to get the Mustang shell from defendant in return for letting defendant use the shop, but he denied helping to dispose of the stolen car's parts. When Evans reminded Wilson that he had seen him disposing of the stolen parts, Wilson said he must have bumped his head and forgotten about that incident. Wilson was arrested that day for receiving stolen property.³

Also on October 16, Evans was called to the scene where defendant had been stopped after trying to evade another officer. The VIN on the black 1999 Mustang that defendant was driving matched defendant's car, but when Evans looked under the car, he saw the undercarriage was red, the same color as the stolen Mustang. Defendant was detained, and the car was taken to Henry Curtis Ford where a mechanic removed the engine and other parts and identified them as belonging to the 2003 Cobra Mustang taken from their lot.

Wilson testified that he let defendant store his 1999 Cobra Mustang on the premises. The car was not running because the transmission was bad. One Thursday in early October, defendant drove into his shop in a brand new 2003 Cobra Mustang. The next day, Wilson left defendant in charge of the shop while he went to Truckee to see his old roommate. When Wilson returned to the shop on Sunday, he saw that defendant had

³ Wilson was charged with six felony counts in connection with this incident. He pled guilty to one count of possession of stolen property and had already been sentenced by the time of defendant's trial.

been chopping up the new car and panicked. He called defendant and told him to get the remains of the car out of his shop, but Evans saw the car before defendant complied.⁴

Wilson testified that defendant never talked to him about putting a new engine in his car and never paid him any money for that purpose. The engine from defendant's car was sitting in the shop, and Wilson testified that he thought it had been stolen from the shop at a later date. He denied that he ever sold it to anyone.⁵ Wilson admitted that he and Sal Inferrera were trying to get rid of the car when Evans saw them.

Salvatore Inferrera testified that on a Monday or Tuesday in October, Wilson asked him to keep an eye on the shop while Wilson went snowboarding in Truckee for a week. This testimony conflicted with Wilson's testimony that he left defendant in charge and was only gone for the weekend.

Inferrera said that he checked the shop on Wednesday, the day after Wilson left and saw defendant driving a red 2003 Cobra. Defendant invited him to "check out my new car." Inferrera believed a car like that would cost \$40,000. Inferrera left the shop and returned later and defendant told him he was going to put the engine of the new car into his 1999 Mustang, to make it look like a sleeper. A sleeper is a car that looks plain, but is in fact very fast. Defendant told Inferrera that he bought the car, but Inferrera thought he was lying and had borrowed it from someone.

When Inferrera returned to the shop again, the red Cobra was in disrepair, with the hood partially off. Defendant's 1999 Mustang was pulled in facing the new car, and the motor and subframe were sitting on the ground. Inferrera began to worry because there is no need to totally disassemble a car to do a motor swap, but he had no way to reach Wilson.

⁴ Wilson admitted that he had installed a roll cage on the 2003 Mustang, to make it look like a race car, "to help cover it up." The roll cage was worth \$2,500, but Wilson was willing to dispose of it with the Mustang shell because someone had given it to him.

⁵ Brad Eskra testified that he bought a 1999 Cobra Mustang motor from Wilson in the spring of 2004. He paid \$2,700 in cash. Wilson "just wanted to get rid of it" and had no paperwork on the motor. It was stipulated that the police examined that engine and determined that it was the engine from defendant's 1999 Mustang.

Inferrera testified that Wilson called him from the road and that he told Wilson what had been happening in the shop. This statement contradicted Wilson's claim that he first learned of the dismantling of the new car when he returned to his shop. Inferrera agreed to help Wilson to get rid of the cut-up parts. Inferrera was given immunity for his testimony at defendant's trial.

The Defense Case

Defendant testified and admitted that he pled guilty to stealing a Mustang in 1996.⁶ Defendant stated that he had taken his car to Wilson in April of 2003 because there was a problem with the engine. Wilson proposed putting a 2003 Cobra engine in the car and defendant agreed to pay \$2,800, plus his old engine and supercharger for the new engine. Defendant believed it would impress judges at auto shows if he had a 2003 Mustang Cobra engine in his 1999 model. Defendant testified that he did not work on his car and never went to Bullet Proof Performance by himself.

In October, defendant's mother told him Wilson had called and left a message that he had gotten an engine. His mother confirmed that in October of 2003, she took a telephone call from Wilson who told her he had an engine for defendant's car. She and defendant's father lent defendant \$1,000 towards the purchase of the engine.

Defendant went to the shop with his sister and her friend Belinda and paid Wilson the money. The car was already up on the jack stand and Wilson was working on it. Defendant denied stealing or even seeing the red 2003 Cobra from the Henry Curtis Ford lot. Defendant's sister, Alicia Marchbanks, and her friend Belinda corroborated defendant's testimony. They testified that they were with defendant when he went to Wilson's shop in October of 2003. Alicia heard Wilson say that he had a motor for defendant's car. Both Alicia and Belinda testified that defendant gave Wilson between \$2,000 and \$2,500 in cash.

On rebuttal, the prosecutor recalled Detective Evans. Evans testified that when defendant was arrested, he listed several items he had replaced in his car, but failed to

⁶ A Santa Rosa police officer testified that defendant had stolen a 1993 Mustang in 1996 from a different Ford dealership and altered the vehicle to conceal its identity.

mention the new engine despite repeated questioning. Defendant testified on surrebuttal that the first statement Evans made to him was that the engine in his car was stolen. Evans then asked if anything else had been replaced on the car, and defendant told him of the other items.

After the court finished giving preliminary jury instructions and excused the jury for the day, defense counsel asked if he could recall Evans briefly because the detective's report indicated that during the interview, defendant told Evans that he took his Mustang to Wilson and paid him \$2,800 to install an upgraded motor. Counsel explained that Detective Evans' report supported defendant's testimony that he paid Wilson to put in a new motor.

The next day, the court denied the request, stating: "And I just believe that under [Evidence Code section] 352, that it would be undue consumption of time. And so I'm denying your request." In closing argument the prosecutor argued that defendant was lying because if he had paid Wilson for the new engine, he would have told Evans when he was arrested.

On June 14, 2004, the jury reached a verdict. The jury acquitted defendant of count five, altering vehicle identification numbers. It convicted defendant of count one, receiving a stolen motor vehicle, count three, vandalism, and count four, receiving the stolen engine and transmission. The jury was unable to reach a verdict on the vehicle theft charge and the court declared a mistrial as to that count. That charge was subsequently dismissed on motion of the prosecutor.

Three months later, in September of 2004, defendant, in pro. per., filed a motion for a new trial based, inter alia, on his counsel's failure to question Evans on the statement in his report to the effect that defendant claimed to have paid Wilson \$2,800 for the new engine. On September 10, the court held a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). The public defender stated "certainly, the issue is there. And I think Mr. Marchbanks is correct that it would be problematic for me or my office to argue whether that was ineffective assistance of counsel."

The court ordered appointment of “Harry Allen’s office” to consult with defendant about filing a motion for a new trial. The court conceded that it would put the public defender in “a very awkward position to vigorously research and argue ineffectiveness of counsel when it is one’s own counsel that is being scrutinized.” Ms. Thistlethwaite agreed to accept the appointment on behalf of Harry Allen’s office and convey the information to Mr. Retana.⁷

When court reconvened the following Monday, defendant, the public defender and the prosecutor were present. No representative of Harry Allen’s office appeared. The court announced it wanted to set the matter for a hearing on defendant’s motion for a new trial. Defendant asked about his motion for new counsel and the public defender’s conflict. The court denied the motion and told defendant there was no conflict. Defendant inquired about representing himself, but withdrew his motion for a new trial and asked to be sentenced.

The following day the court denied probation and sentenced defendant to the midterm of three years for count one, receiving a stolen vehicle. The court imposed two two-year terms for counts three (vandalism) and four (receiving the stolen engine and transmission) and stayed them pursuant to section 654. The court imposed restitution of \$5,000, a restitution fine and credited defendant with 314 days. Defendant filed his notice of appeal at that time.

DISCUSSION

Defendant argues that counsel’s failure to elicit his statement to Detective Evans undermined his credibility, which was the cornerstone of his defense. He contends that the trial court erred when it denied his request for conflicts counsel to review his motion for a new trial. Finally, he contends that he cannot be convicted of both receiving the stolen vehicle and receiving its engine and transmission. For the following reasons, we agree and will remand the matter for appropriate action.

⁷ Attorney Walter Rubenstein, of Harry Allen’s office, had been appointed earlier in the trial to represent Salvatore Inferrera. This was apparently the attorney’s office that was routinely used by the court in cases of potential conflicts.

Defendant's Failure to Pursue the New Trial Motion Was Not a Waiver

Respondent argues that it is undisputed that defendant withdrew his motion for a new trial, so there was no error because the court never ruled on the abandoned motion. This argument misses the point of the appeal. Defendant did not abandon his motion until the court failed to carry out its order appointing independent counsel to consult with defendant on the motion. At that point, defendant found himself alone in court with only the attorney he had accused of ineffective legal assistance to give him legal advice. He is not arguing that the court erred in denying a motion for new trial that the court never heard, he is arguing that the court improperly denied him independent counsel for purposes of the new trial motion. Failure to litigate the motion under these circumstances is not a waiver of the issues defendant tried to raise.

Failure to Cross-Examine Evans Was the Result of Counsel's Error

Defendant's claim that counsel's representation fell below acceptable standards presented an arguable issue. "Every criminal defendant has a constitutional right to competent legal representation. [Citations.] To establish a claim of ineffective assistance of counsel, the accused must show that the trial attorney's representation was deficient, in that it fell below an objective standard of reasonableness, and that the accused was prejudiced by the trial attorney's deficient performance. [Citations.] To establish prejudice, the accused must show that but for the trial attorney's assertedly deficient representation it was reasonably probable that the outcome of the proceeding would have been more favorable to the accused." (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 931-932 [citing *People v. Pope* (1979) 23 Cal.3d 412, 424; *People v. Ledesma* (1987) 43 Cal.3d 171, 215-218; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688].)

In this case, the record on appeal shows that defense counsel had no tactical reason for failing to elicit defendant's consistent statements when cross-examining Evans during the rebuttal testimony. Counsel asked Evans if he told defendant why he was being detained, and failed to follow up when Evans said that defendant never mentioned that he had a new engine in his car. After the court gave some preliminary jury instructions, counsel sought to reopen the evidence to confirm that Evans' report reflected that

defendant told him he paid Wilson to install a new engine. Counsel told the court it was “relevant and important” evidence that was reflected in the police report. In light of these circumstances, there is no reasonable explanation for this omission except that counsel overlooked the statement in the police report.

This case is not similar to cases such as *People v. Sanchez* (1995) 12 Cal.4th 1, 47, 59, where there was no showing that cross-examination would have revealed any new information. In defendant’s case, the showing was made that cross-examination would have informed the jury that despite Evans’ repeated claim that defendant never mentioned the new engine, defendant had in fact consistently claimed that he paid Wilson to put a new engine in his car.

Prejudice, specifically, a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different, is discernable from the nature and circumstances of this case. Only Inferred, who had been given immunity for his part in this scheme, confirmed Wilson’s version of the story, and his testimony contradicted Wilson’s in some details. Defendant had several witnesses that confirmed his version of the facts including two witnesses to his payment to Wilson for the engine.

Credibility was the main issue in this trial. The jury did not agree that defendant stole the car. It acquitted him of altering VIN numbers. Counsel’s omission potentially deprived defendant of the important evidence that he had maintained that he paid Wilson to put in the engine from the beginning of the case. If the jury believed that fact, it may have discredited the testimony that defendant was the one who replaced the engine or had any knowledge that it was stolen.

Like the trial court, we are not finding that counsel’s omission constitutes ineffective legal assistance, but the events during and after the trial raised at least one, and possibly more, valid and arguable issues as to counsel’s performance that should have been raised in a motion for new trial.⁸

⁸ One of the other points defendant raised was that counsel asked a witness how many times he knew of a car being stolen off a lot and the witness answered only the two

Defendant's Claims Were Not Assessed by the Trial Court

Respondent argues that when a claim of inadequacy of counsel is based on events that the trial court observed, the court can resolve a new trial motion based on such claims without appointing new counsel. Respondent relies on (*People v. Bolin* (1998) 18 Cal.4th 297, 346 (*Bolin*), and *People v. Barnett* (1998) 17 Cal.4th 1044, 1112 (*Barnett*)). Respondent contends that it does not matter if defendant's trial counsel had a conflict in advising him on the new trial motion because the trial court could determine whether counsel had been ineffective without further input.

We note that the *Bolin* court also stated: “ ‘If, on the other hand, the defendant's claim of inadequacy relates to matters that occurred outside the courtroom, and the defendant makes a “colorable claim” of inadequacy of counsel, then the trial court may, in its discretion, appoint new counsel to assist the defendant in moving for a new trial. [Citations.]’ ” (*Bolin, supra*, 18 Cal.4th at p. 346.) It is a logical conclusion that if a matter occurred in the courtroom, but the trial court either failed to observe it or was unable to recall it, the court cannot resolve a claim of inadequacy without assistance.

Bolin and *Barnett* are distinguishable on at least two grounds, most notably the fact that defendants in those cases did not express their belief that trial counsel had a conflict that would impact their ability to represent them in a new trial motion. In *Bolin*, defendant's current attorney asked the court to appoint new counsel to make a new trial motion that would involve issues of ineffective assistance of defendant's previous attorney who had been relieved after a prior *Marsden* hearing. (*Bolin, supra*, 18 Cal.4th at pp. 346-347.) At no time did defendant in *Bolin* express dissatisfaction with his current counsel and that attorney's own performance was not an issue.

incidents involving defendant. Defendant noted that Officer Fravel's report showed many more instances, but counsel failed to bring out that information. Fravel had testified that he logged 30 to 40 stolen vehicles a month in Santa Rosa. Counsel admitted he was sorry he had asked the question about stolen cars and did not know what the answer would be when he asked. Defendant also argued that counsel failed to correct Highway Patrol Officer Thomsen's statement that the engine defendant traded to Wilson was not a more expensive Cobra engine. This point was relevant to the reasonableness of the amount defendant gave Wilson in exchange for the 2003 engine.

In *Barnett*, the defendant sought on several occasions to replace his court appointed counsel and continued to do so even after his first counsel was replaced. (*Barnett, supra*, 17 Cal.4th at pp. 1082, 1084, 1088.) In response to defendant’s several *Marsden* motions, the court held hearings, heard defendant’s complaints and had counsel testify as to his qualifications and handling of the case. (*Id.* at p. 1089.) The court noted that although defendant was frustrated, “he also described [counsel] as ‘a great guy’ and made no reference to an irreconcilable conflict. [Counsel] did not join in the motion for substitution or otherwise suggest that such a conflict existed.” (*Id.* at p. 1092.)

In this case, unlike *Bolin* and *Barnett*, defendant and his counsel, as well as the trial court itself recognized that counsel would have a conflict trying to assess a motion for new trial based on counsel’s own performance.

In addition, the trial court in this case was unable to make a reasoned assessment of defendant’s complaint because neither the court nor counsel could remember the details of the event as evidenced by the repetitive questioning of defendant. In *Bolin*, the court was able to observe prior counsel’s trial performance and there was no evidence in the record contrary to the trial court’s assessment of counsel’s representation. (*Bolin, supra*, 18 Cal.4th at p. 347.) Similarly in *Barnett*, the court observed counsel’s performance throughout the trial and inquired extensively into the tactical decisions challenged by defendant. Furthermore, the record affirmatively established that the court in *Barnett* understood and responded appropriately to the defendant’s objections. (*Barnett, supra*, 17 Cal.4th at pp. 1107-1111.)

In this case, defendant tried to explain to the court that the main ground for a motion for new trial was that counsel: “undermined my credibility by not bringing out the issue of the \$2,800 during the trial.” Defendant pointed out that counsel’s omission allowed the prosecutor to argue that defendant was lying or had changed his story.⁹ The

⁹ The prosecutor argued: “Just as he told Detective Evans he didn’t have any other work done on his car above headers or rims. Something else, when he’s sitting there being arrested for something, by his own testimony, the engine in your car is stolen, Detective Fravel told him that outright. He still tells him the only work he had done . . . he doesn’t give his story up about [Wilson]. It’s not reasonable. Why wouldn’t you say

court responded by asking defendant again to explain why counsel could not prepare a new trial motion on that ground. Defendant tried several times to explain to the court why he felt counsel had erred and could not vigorously argue a motion based on his own errors. The court continued to ask defendant why counsel could not represent him. Defendant tried again and again to explain.

Finally, defense counsel admitted he could not recall the incident, stating: “I’m not really following the issue regarding the money. . . .” Counsel recalled that he wanted to recall the detective and ask something that would have helped defendant’s credibility. Counsel said he did not know if that would constitute ineffective assistance of counsel, but conceded: “But certainly, the issue is there. And I think Mr. Marchbanks is correct that it would be problematic for me or my office to argue whether that was ineffective assistance of counsel.”

After counsel finished responding to the other points defendant raised, the court examined the clerk’s notes and noted that defendant testified, Evans testified on rebuttal and that defendant testified on surrebuttal. The court stated: “So, I don’t know about the denial of the court to put on evidence. Because it looks like, you know, each side rested, was allowed to put on rebuttal and surrebuttal.” The court did not appear to grasp defendant’s argument that his consistent statement at the time of his arrest was misrepresented in the testimony.

Despite the court’s apparent lack of recall of the incident, the court agreed to appoint independent counsel. “I’m going to do this. I do believe it puts the Public Defender’s Office in a very awkward position to vigorously research and argue ineffectiveness of counsel when it is one’s own counsel that is being scrutinized.

that right away? Why wouldn’t you say that from the get-go, my engine is stolen? Okay. I got that engine from—and wouldn’t that be your reaction if you’re told that? By his testimony, or even if you’re told, wouldn’t your reaction be you legitimately got the engine work done? Wouldn’t you say, I’ve done my headers, changed the rims, changed the catalytic converter, got a new engine, 2003 supercharged, blah blah? He wouldn’t say that if you were a 13-year Mustang enthusiast about your car? It doesn’t make sense.”

Without making a finding, because I don't make a finding. I do not make a finding that [counsel] in any way provided ineffective assistance of counsel. I will, however, try again by appointing Harry Allen's office to sit down and talk to you about their belief as to whether or not you have a valid basis to pursue a new trial motion on the basis of ineffective assistance of counsel. It's just humanly and practically impossible to ask yourself to say, did I do a lousy job." Defendant agreed, and the court repeated: "That's just humanly ridiculous."

The court continued the case over the weekend, appointed the Allen office, and the appointment was accepted by an attorney in court who agreed to notify that office. When court reconvened on the following Monday, the trial court asked defendant if he waived time for sentencing for purposes of arguing the motion for new trial. Defendant asked, "So the motion for new counsel was denied?" The court responded: "Yes. Your motion for new counsel is denied. This court does not find that you were ineffectively represented by counsel, and I need to do that before I would appoint new counsel." Defendant asked, "So you didn't find a conflict either?" The court replied: "No, no conflict either. So this motion needs to be heard, and the People will need at least ten days to respond, right?"

Defendant asked about representing himself, and the court gave him a form regarding *Faretta* and recessed. (*Faretta v. California* (1975) 422 U.S. 806.) When the case resumed, the public defender told the court that defendant wished to represent himself, but would withdraw the motion for new trial and be sentenced immediately. The court granted this request and set the matter for sentencing the next day.

This series of events reveals careless and contradictory handling of defendant's concerns. When he raised the issue of his counsel's admitted omission, the court assigned independent counsel to advise defendant on the merits of a possible motion for new trial. When court resumed at the next session, the court reneged on that disposition for no apparent reason, and forced defendant to go forward on the motion with his current counsel, a scenario the court itself had called "just humanly ridiculous." Conflicts counsel never appeared prior to the court's abrupt withdrawal of its September 10 order.

In such a situation, where the defendant has made a potentially valid claim of inadequacy of counsel, the trial court is authorized to appoint new counsel and is not required to make an affirmative finding of ineffective assistance of counsel before appointing new counsel. (*Bolin, supra*, 18 Cal.4th at p. 346.) When the court in this case stated it could not appoint counsel without finding ineffective assistance, it erred. By denying defendant the opportunity for impartial legal advice on his claim, it prejudiced defendant's right to have the issue decided. Credibility was the key issue in the defense and it cannot be said on this record that the evidence of a consistently maintained version of the facts would not have impacted the jury's consideration. We will remand the matter with directions to appoint new counsel to consult with defendant for the purpose of filing a motion for a new trial. As the trial court itself remarked: "You're entitled to have that."

Defendant May Not Be Convicted of Possession of the Mustang and of Its Engine

Defendant argues that he was improperly convicted of both possession of the 2003 Cobra Mustang in count one, and possession of the engine and transmission in count four. He is correct, and the respondent concedes the issue.

The prosecutor conceded that the engine and transmission in count four came from the stolen Mustang in count one. "The long-standing rule is that ' . . . the theft of several articles [at the] same time constitutes but one offense . . . ' " (*People v. Dominguez* (1995) 38 Cal.App.4th 410, 420; *People v. Smith* (1945) 26 Cal.2d 854, 859 [where goods received in single transaction, only one conviction is supported]; see also *People v. Garza* (2005) 35 Cal.4th 866, 881 [conviction for theft of vehicle bars conviction for receiving the same vehicle as stolen property].) We will vacate the conviction on count four.

CONCLUSION

The case is remanded to the superior court with directions to appoint independent counsel for the purpose of filing a motion for a new trial. The judgment as to count four, receiving a stolen engine and transmission, is reversed and stricken. The clerk of the superior court is ordered to correct the abstract of judgment accordingly. When the case

is final, the superior court clerk is to prepare a corrected abstract of judgment which reflects the foregoing modification and forward it to the Department of Corrections.¹⁰

Marchiano, P.J.

We concur:

Swager, J.

Margulies, J.

¹⁰ Concurrently with the filing of this opinion in the instant case, we have filed an order denying appellant's petition for writ of habeas corpus in case number A110084 as moot in light of our disposition of this appeal.