NO. 42519-0

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CATHERINE ANN BETTS,

Appellant.

BRIEF OF RESPONDENT

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11. Should the trial court's sentence be affirmed when the trial court based its exceptional sentence on the jury finding aggravating factors were proven on two of the offenses and the trial court clearly articulated a multitude of proper grounds?

II. STATEMENT OF THE CASE

A. Facts

The defendant served as the Cashier for the Clallam County Treasurer's Office from 2003 until these crimes were discovered on May 19, 2009. RP 677, 1112. In this role the defendant was responsible for the accounting for the treasurer's office Real Estate Excise Tax program. RP 693. Real Estate Excise Taxes (REET) are a tax imposed upon the sale of real property. RP 678. That tax is collected by the

treasurer's office in the county in which the property is sold. RP 678, 683. The treasurer's office is then required to file a monthly tax return with the Washington State Department of Revenue detailing the amount of REET tax collected and remitting the appropriate portion of that tax to the state. RP 680, 728, 737. The REET payments made into the county are referred to as unexpected revenue because the county has no way of knowing how much will be paid at any given time. RP 683.

The Clallam County Treasurer's Office accounted for this income by having the defendant submit a daily reconciliation of the payments made and the affidavits (numbered statements indicating payment of REET that was then required to file the transfer of deed). RP 692, 747. The defendant was responsible for generating these daily reconciliations and did so using an Excel spreadsheet. RP 747. The defendant also summarized this data on a monthly report that was utilized by the Clallam County Treasurer's Office to file the monthly Real Estate Excise Tax Return with the Washington State Department of Revenue. RP 747-49. These monthly REET tax returns were not filed by the defendant; however, they reported the data that the defendant supplied. RP 747-48. The defendant was aware that the data she supplied was used to file the tax returns with the department of revenue. RP 751, 1180.

The defendant also maintained the cash drawer for the Clallam County Treasure's Office. RP 699. This maintenance required daily balancing of the funds in the cash drawer and accounting for any outgoing cash payments. RP 754-55. The defendant testified that she did this by physically counting the cash on hand each day along with any checks taken in and balancing that against any transaction reports that would detail any expenditures. RP 1130-32. The amount of money flowing through the cash drawer on a daily basis could range from several hundred dollars to more than one hundred thousand dollars. RP 756. Other employees had smaller cash boxes but those were usually just brought out the last week of April or the last week of October. RP 1120, 1182.

The defendant was having problems balancing the accounts for which she was responsible around May 19, 2009. RP 709-10, 758-66. Other members of the staff attempted to assist the defendant with this issue. RP 709, 757. The defendant ultimately confessed that she had stolen money from the Clallam County Treasurer's Office. RP 711, 766, 1138.

An investigation was instigated by the Washington State Auditor's Office and the Port Angeles Police department when they were notified. RP 714. The Washington State Auditor's Office assigned Jim Brittain to investigate the possible theft of government funds. RP 830. His

investigation focused on the methods that had been utilized to steal the funds and determining an amount stolen. RP 838-43. The Port Angeles Police Department assigned Detective Corporal Jason Viada to the investigation. RP 1017. Detective Viada's investigation focused on the defendant's bank accounts and expenditures while she was employed as the Cashier for the Clallam County Treasurer's Office. RP 1017-19.

Mr. Brittain found five different schemes were utilized to under report the amount of REET money taken into the Clallam County Treasurer's Office. RP 847. Each of these schemes involved reports and forms processed or created by the defendant. RP 914. It was discovered that several employees of the treasurer's office also accessed these forms and reports and that it was common practice to share passwords within the office. RP 783, 806. This possible excuse for the conduct however, is eliminated by a full understanding of the theft scheme at play. RP 914-15. Minimizing the reported REET income was only half of the scheme; the other half was removal of money from the Cashier's cash drawer to offset the falsely minimized REET income. RP 913-15. Following his meticulous review of the documents Mr. Brittain concluded that a minimum of $617,000 was stolen from Clallam County and that no one but the Cashier Cathy Anne Betts could have accomplished the theft. RP 905, 914.

The police investigation revealed that the defendant had cash deposits into her bank account of nearly $150,000 above and beyond any explainable income source. RP 1033. Additionally the defendant made credit card payments of over $66,000 dollars from June of 2007 to September of 2009. RP 1035. The defendant was unable to explain the source of any of this income. RP 1185.

III. LAW AND ARGUMENT

A. The defendant, as an apparent strategic maneuver, never moved for a change of venue – the Trial Court cannot be faulted for failing to grant a motion that was never made

A litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct 1208, 89 L. Ed. 2d 321 (1986). Failure to object at trial will operate as a waiver of the right to assert that error on appeal. *State v. Fagalde*, 85 Wn.2d 730, 731, 530 P.2d 86 (1975). A defendant who fails to raise a challenge to venue waives that challenge. *State v. Dent*, 123 Wn.2d 467, 479-80, 869 P.2d 392 (1994). The defendant asserts that the trial court erred by failing to grant a change of venue motion; however, no

such motion was made by the defense.[1] There is simply no error by the trial court in failing to grant a motion when that motion was never made – the issue is waived.

A possible change of venue motion was actually first raised by the prosecutor. RP 61. After a brief discussion of the issue the trial court instructed the defense counsel that if they decided to bring a motion for change of venue then they should do that and make it part of the record. RP 65. The defense counsel replied "we will". RP 65. After two full days of both individual and group voir dire, however, defense counsel did not make a motion for a change of venue. "A party can not submit to a trial, and then, because the result is adverse, attack the venue." *Schroeder v. Schroeder*, 74 Wn.2d 853 at 855, 447 P.2d 604 (1968).

Decisions on motions to change venue are reviewed for an abuse of discretion. *State v. Crudup*, 11 Wn. App. 583, 524 P.2d 479, *review denied*, 84 Wn.2d 1012 (1974). The trial court in this matter allowed counsel broad range in the questioning of potential jurors, including individual questioning of jurors who indicated any familiarity with the case, or who expressed some hint of bias in the jury questionnaire. This

[1] The decision not to move for a change of venue appears to be a strategic one on the part of the defense team. The defense strategy repeatedly invited the jury to blame the mismanagement of the Clallam County Treasure's Office for the missing funds. This argument is much easier to sustain to a jury would feel a direct connection with that office – a sense that they worked for them. Had the trial court *sua sponte* changed venue it would have thwarted this strategy and become an appealable issue.

questioning took two full court days with selection going over into a third. A review of the record reveals that the trial court was intimately involved in the selection of the jury including questioning potential jurors itself when some indication of bias was suggested. It is certainly not an abuse of discretion for a trial court who has utilized all the tools and safeguards this trial court did to ensure a fair and impartial jury to fail to grant a motion for a change of venue when such a motion was never made. *Dent, supra.*

B. Substantial evidence supports the trial court's unchallenged findings and conclusions that the defendant's statements to co-workers were admissible

A challenged finding will be upheld on appeal if the record contains substantial evidence to support that finding. *State v. Broadway*, 133 Wn.2d 118, 130 942 P.2d 363 (1997). Substantial evidence exists where there is sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.

State v. Halstien, 122 Wn.2d 109, 128, 857 P.2d 270 (1993). The record here provides just such assurances.

The trial court held an evidentiary hearing to address the defense contention that the statements the defendant made to her co-workers should be suppressed as being the product of coercion under *Garrity v. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

Following the hearing, the court entered findings of fact and conclusions of law. CP 188-193. Error has not been assigned to those findings and conclusions, so they are considered verities on appeal. *In re Riley*, 76 Wn.2d 32, 454 P.2d 820, *cert denied*, 396 U.S. 972, 90 S. Ct. 461, 24 L. Ed. 2d 440 (1969).

The defendant challenged the admission of statements made to co-workers on the grounds that her employment relationship made those statements inherently coerced and therefore inadmissible under *Garrity*. CP 200-209 (Motion to Suppress Statements and Evidence (Garrity)). Following an evidentiary hearing the following Findings Based Upon Facts were entered:

> 3. The defendant's initial whispered requests that Ms. Stallard not look further into the accounting discrepancy were entirely voluntary and not elicited by any questions.
> 4. The defendant's statements to Ms. Stallard made outside the Auditor's Office were made after the defendant had begun to cry and were in response to Ms. Stallard asking "What is wrong?".
> 5. The encounter outside the Auditor's Office was not coercive.
> 6. The defendant's statements made in Ms. Scott's Office were made in response to Ms. Scott asking "What happened?" when the defendant and Ms. Stallard returned to her office and it appeared that the defendant had been crying.
> 7. The encounter in Ms. Scott's office was not coercive.

CP 192. The trial court entered Conclusions of Law based upon these findings that stated:

> 4. The statements that the defendant made in this case were not the result of such pressures or other coercion such that the statements were rendered involuntary.
> 5. The statements made by the defendant as outlined above are admissible in the State's case in chief.

In so far as error has not been assigned to these findings and conclusions they are considered verities on appeal, and this Court's inquiry can conclude. *Broadway*, 133 Wn.2d at 130.

Even if the findings and conclusions had been properly challenged on appeal the admission of the statements was still proper. The defendant testified during the evidentiary hearing to determine the admissibility of her statements. The defendant testified that she whispered "Don't look any further." to Ms. Stallard while they were reviewing her work in an effort to assist the defendant in reconciling an accounting error. RP 145. The defendant further testified that she confessed to stealing money from the county to both Ms. Stallard and Ms. Scott. CP 145-146. The defendant admitted that these confessions where made in response to simple questions, and that she was never ordered to answer questions or cooperate in any way. CP 146. The defendant testified that she broke down and started to cry when walking to the auditor's office with Ms. Stallard. CP. 135. At this point Ms. Stallard wanted to know what was going on and the defendant explained to her that she had stolen money from the county. CP 84, 135, 148.

Similarly, the defendant's statements to Ms. Scott were not the result of coercion. The defendant entered Ms. Scott's office visibly shaken and sobbing and she confessed that she had stolen money from the county. CP 106, 119, 148. This confession was either spontaneous as the defendant entered the room or in response to Ms. Scott's question of either "What's wrong?" or "What happened?" in response to the defendant entering her office crying. CP 106-107, 148.

Testimony revealed that the defendant's statements were generally spontaneous or in response to expressions of concern as to why she had suddenly started crying. At no point did Ms. Stallard or Ms. Scott have to "pry answers out of Ms. Betts or force her to answer". CP 84.

The lower court found that these circumstances simply were not coercive, and certainly not to the extent that it had overcome the voluntary nature of the defendant's statements. CP 170. The lower court went on to note that the overwhelming concern of Ms. Stallard and Ms. Scott was for the defendant's safety, not the collection of evidence to be later used in trial. CP 172.

Substantial evidence exists in the record to support the lower court's unchallenged ruling that the defendant's statements were not subject to suppression under *Garrity*. The trial court did not abuse its discretion in admitting those statements.

C. Sufficient evidence was produced to support the defendant's conviction for complicity to filing a false or fraudulent tax return when it was demonstrated that defendant falsified data in a spreadsheet knowing that that false information would be used by another to compile and file a required tax return

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the non-moving party, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a can be drawn from that evidence. *Id.* Further, a reviewing court will defer to the trier of fact to resolve issues of conflicting testimony, credibility of witnesses, and the persuasive force of the evidence. *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011).

The defendant was charged with nineteen counts of complicity in the filing of a false or fraudulent tax return. CP 214-227. The relevant portion of the complicity statute reads as follows:

> (1) A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable.
> (2) A person is legally accountable for the conduct of another person when:

> (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct.

RCW 9A.08.020. The crime of filing a false or fraudulent tax return is found in RCW 82.32.290(2)(a)(iii). It provides that it shall be unlawful for any person to make any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or part thereof.

Thus, as charged, the State needed to present evidence that the defendant caused an innocent individual to file a false or fraudulent return or make a false statement in any return, with the intent to defraud the state or evade the payment of any tax or part thereof. The returns filed in this case that make up the nineteen counts for which the defendant was found guilty were largely filed by Ms. Stallard with some also being submitted by either Ms. Scott or Ms. Marchi. CP 687, 751, 794-95. These individuals did not know that the defendant was stealing money from the county and utilizing the REET income to help her mask those thefts.

The tax returns that were filed were required to be filed on a monthly basis by RCW 82.45.180 and contained a summary of the REET collections made by the county. CP 728. The information utilized to complete the returns was drawn from a summary prepared by the

defendant. CP 751-52. The defendant testified that she was aware that the figures that she put on the summary would be utilized by Ms. Stallard or in her absence by Ms. Scott or Ms. Marchi to complete the tax return filed with the state. CP 1180. Thus, the defendant passed false information along to innocent individuals (Ms. Stallard, Ms. Scott, and Ms. Marchi) knowing that it would be included in a tax return filed with the Department of Revenue.[2] The defendant's intent in doing so was to hide the fact that she had stolen a portion of the REET payments made to the county thereby defrauding the state of a portion of the collected REET tax it was due.

The defendant also claims that proof was not provided that the documents had been filed with the Department of Revenue, however, testimony revealed that the documents were required to be filed each month and that if they were not filed the Department of Revenue would follow-up with the county. CP 698, 734-36. Further, the county was entitled to a portion of that money and it would be returned to the county

[2] The defendant argues for the first time on appeal that the required monthly filings are not "tax returns" and cites to a Black's Law Dictionary definition of the term that defines the term as "the form on which an individual, corporation or other entity reports income, deductions, and exemptions and calculates their tax liability." The monthly return filed by the counties reporting their REET income meets this definition squarely. Just as a consumer pays his or her sales tax to a merchant who in turn files a return with the state to report the income and turn over the tax paid to it so to is the case with the sale of real estate. The tax is paid over to the auditor when the sale takes place and the auditor then files the monthly REET tax return to report the income and pay the tax collected.

once the Department of Revenue processed the return. Testimony established that those monies were also consistently received. CP 736. Sufficient evidence was submitted to establish that the returns were in fact filed with the Department of Revenue.

Sufficient evidence was presented to support the defendant's conviction for complicity to file false or fraudulent tax returns.

D. The to convict instruction for the charge of Filing a False or Fraudulent Tax Return was a proper statement of the law as the charge was brought against the defendant and the defendant did not object to its use

CrR 6.15(c) specifically requires the parties to make any objections or exceptions to the jury instructions prior to the trial court utilizing those instructions to advise the jury. The defendant failed to object to jury instruction number 20 before the trial court, thus depriving the trial court of an opportunity to fix the perceived error. CP 1245-46.

A defendant must preserve an issue for appeal by making a timely objection at trial. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The duty of a party to object and preserve possible error has specific applicability to the failure to challenge a jury instruction. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). This Court should decline review of this claim of error pursuant to RAP 2.5(a). It is worth noting that review of matters not objected to at trial can be obtained under

RAP 2.5(a)(3) upon a showing of a "manifest error affecting a constitutional right". However, the burden of making such a showing is upon the defendant and an appellant court will not assume such an error when it is not addressed and specifically explained in the briefing. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009); *McFarland*, 127 Wn.2d at 333; *Scott*, 110 Wn.2d at 688.

Beyond the failure of the defendant to preserve the error is the question of whether the instruction even constituted error. A jury instruction is proper if it permits the parties to argue their theories of the case, does not mislead the jury and properly informs the jury of the applicable law. *State v.* Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005), *citing Blaney v.Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160,* 151 Wn.2d 203, 210, 87 P.3d 757 (2004). The instruction in question included the language "or cause to be made" to reflect the fact that the defendant was charged as being complicit in the filing of the false returns. CP 96, 214-227. "Jury instructions are sufficient if they are readily understood and are not misleading to the ordinary mind." *State v. Dana,* 73 Wn.2d 533, 537, 439 P.2d 403 (1968). Even if a jury instruction is found to be possibly misleading, the complaining party must show prejudice resulted from inclusion of that instruction. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010).

This issue was the subject of extensive discussion before the trial court with the trial court ultimately ruling that the charges could go forward on the theory that the defendant had caused an innocent to engage in the criminal activity and was thereby guilty of being complicit in that offense under RCW 9A.08.020. CP 431-32, 643. The trial court's ruling comports with the language of RCW 9A.08.020. Instruction number 20 was a proper statement of the law combining the complicity portion of RCW 9A.08.020 with the offense elements of RCW 82.32.290.

E. The Trial Court did not improperly comment on the evidence when it gave an instruction that properly states the law and which was not objected to by the defense

The defendant next asserts that the inclusion of the complicity language from RCW 9A.08.020 into instruction number 20 constituted a comment on the evidence by the trial court. As noted above this issue is not ripe for review as it was not objected to below. Thus, this Court should decline review of the claim under RAP 2.5(a). Further as noted above, a jury instruction is proper if it permits the parties to argue their theories of the case, does not mislead the jury, properly informs the jury of the applicable law and is readily understood and not misleading. *Willis,* 153 Wn.2d at 370; *Dana,* 73 Wn.2d at 537.

The trial court's instruction of the law was not misleading in any way and allowed the parties to argue their theories of the case. Further the instruction was a proper and readily understood summary of the RCW 9A.08.020 provision of how a person can be found guilty of an offense even if that offense is committed by an innocent third party. This manner of establishing complicity requires the State to show that the defendant acted with the kind of culpability that would be sufficient for the commission of the crime and caused an innocent person to commit the crime. RCW 9A.08.020(2)(a). This is how the matter was argued throughout the trial and is amply supported by the evidence presented. Jury instruction number 20 was not objected to and is not an impermissible comment on the evidence.

F. The aggregation of multiple incidents of theft into a single count of theft in the first degree was a proper exercise of prosecutorial discretion

A prosecutor has broad discretion in charging a suspect with violations of the law, and choosing what charges to bring to adequately address the defendant's conduct. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). An example of this broad discretion is found in the charging of theft offenses. The common law in Washington has long allowed the aggregation of theft offenses under certain circumstances. If the thefts are from the same owner, occur at the same place and result

from a single criminal impulse or scheme, they may be aggregated. *State v. Vining*, 2 Wn. App. 802, 808, 472 P.2d 564 (1970). Similarly if the thefts are part of a common scheme or plan they may be aggregated if they are all part of that scheme or plan and are either from the same victim and occur over a period of time or from different victims but take place at the same time and place. *State v. Meyer*, 26 Wn. App. 119, 124, 613 P.2d 132 (1980).

The defendant contends that the enactment of RCW 9A.56.010(21)(c) abrogates the common law, and allows only third degree theft offenses to be aggregated. Such a notion makes little sense when reviewed. Consider a series of thefts that occurred at the same time and place and against the same owner. If these thefts were minor in nature and each constituted theft in the third degree then the defense theory would allow them to be aggregated. If the thefts were major offenses and each constituted theft in the first or second degree then the defense theory would not allow them to be aggregated – as the common law requirement that such offense must be aggregated was eliminated. Thus, the unit of prosecution consideration of *State v. Carsoa*, 83 Wn. App. 380, 382-83, 921 P.2d 593 (1996) is eliminated. The defense notion all but eliminates considerations of unit of prosecution and the common law theory of common scheme or plan in all instances except theft in the third degree.

The enactment of RCW 9A.56.010(21)(c) does not abrogate the long standing common law of Washington. Nor does it eliminate the protections afforded under unit of prosecution and common scheme or plan analysis. And lastly, it does not eliminate the broad charging discretion vested in the prosecutorial authority.

G. Sufficient evidence was presented to sustain the jury verdict finding the defendant guilty of theft in the first degree

The defendant contends that insufficient evidence was presented to sustain the jury's verdict of guilty of theft in the first degree and further that insufficient evidence was presented to 'link' the defendant to the crime. The response to these claims are combined here for sake of brevity and clarity. The legal standard for review of such a claim is set forth above. In summary the reviewing court views the evidence in a light most favorable to the State, resolving any credibility questions or analysis of the weight or persuasive force of the evidence in the State's favor. If after such a review sufficient evidence is present to convince any rational trier of fact of the essential elements beyond a reasonable doubt then the challenge to the jury verdict must fail. *Kintz* 169 Wn.2d at 551; *Raleigh* 157 Wn. App. At 736-37.

To convict a defendant of theft in the first degree the State need prove beyond a reasonable doubt the theft of property or services which

exceeds $5,000 dollars. RCW 9A.56.030. Ample evidence was presented to establish this crime.

The defendant was the Cashier for the Clallam County Treasurer's Office during the timeframe of the theft offense. RP 1113. One of the duties of the Cashier was to reconcile and balance all incomes and disbursements for the Clallam County Treasure's Office on a daily basis. *Id.* The defendant was also responsible for maintaining and balancing the cash drawer. RP 1120. While other employees also maintained cash boxes, those cash boxes contained far less money and were generally only utilized in the last week of April and the last week of October when tax volume was the highest. RP 1120. The money flowing into and out of the Clallam County Treasure's Office could vary from a few hundred dollars to more than one hundred thousand dollars on any given day. RP 756.

As part of her responsibility of assuring that the accounts balanced on a daily basis the defendant would add up all the cash-outs (transaction records) and cash and checks taken in to assure that they balanced. RP 1130-1135. The defendant testified that she counted the cash and checks individually to assure that the cash drawer balanced on a daily basis. *Id.*

The defendant further testified that on May 18, 2009 while she was processing her paperwork she came across a check for approximately

$877.60. The check did not have associated cash-out paperwork attached. RP 1138. The defendant decided to steal the equivalent amount of money from the cash drawer. RP 1138-39. At the same time the defendant was having problems balancing her accounts and a number of other staff had become involved to render assistance. When the associated cash-out paperwork turned up the defendant realized that she would be discovered and she told Ms. Stallard "You don't need to look anymore." RP 1140. The defendant then confessed to stealing the money from the county. RP 1140-44; 711; 761-67.

Following this confession Ms. Stallard went back and began reviewing the defendant's work for other discrepancies. She found approximately $80,000 in hidden rows on an Excel spreadsheet the defendant was responsible for preparing. RP 772. These hidden rows represented hidden reductions to the cash-out paperwork – an intentional effort to reduce the amount of money reported as being brought into the treasurer's office over a period of time. The testimony revealed that these reductions would have meant that the defendant would have been unable to balance on a daily basis, unless an identical amount of cash had also been removed from the cash drawer. The defendant, however, had always balanced. RP 699.

The matter was referred to both the Port Angeles Police Department and the Washington State Auditor's Office. RP 714. The Port Angeles Police Department assigned Detective Jason Viada to review the matter, and his investigation focused mostly upon the bank records and finances of the defendant. RP 1017. The Washington State Auditor's Office investigation was led by Mr. Jim Brittain. RP 831.

Mr. Brittain reviewed each of the daily reconciliations or balance sheets that the defendant prepared from June 30, 2003 to May 19, 2009. RP 838. He then compared the information entered into those daily reconciliations with supporting documentation that revealed what figures should have been on those daily reconciliations. In doing so Mr. Brittain identified five separate methods utilized by the defendant to steal money from the Clallam County Treasurer's Office. RP 847. Each of these schemes reduced the amount of money reported as being received by the county on a given transaction or series of transactions. RP 847-48. The defendant prepared each of the daily reconciliations on which these false reductions were found. RP 914. Further, the defendant continued to balance the accounts on a daily basis meaning that for each false reduction in the amount of money taken in by the county a corresponding amount of cash had to be removed from the cash drawer. RP 699.

The defendant testified that she specifically counted the cash and individual checks on a daily basis and compared them to the cash-out transactions in order to balance the county cash drawer. RP 1130-33. This simply is not possible unless the defendant was the person manipulating the data and taking the money. RP 914, 1013. A minimum of $617,000 was stolen from the county via the various schemes described by Mr. Brittain. RP 905. Mr. Brittain testified that no one but the person serving in the role of Cashier – Ms. Catherine Anne Betts – could have committed these thefts. RP 914.

The police investigation in this matter focused largely on the bank accounts of the defendant. RP 1017-18. Detective Viada found that the defendant had deposited nearly $150,000 in cash into her bank accounts during the time period charged in the Information. RP 1033. This amount excludes all payroll and other explainable or expected income. *Id.* In addition to these cash deposits the defendant made credit card payments of more that $66,000 from June of 2007 to September of 2009. RP 1035. The defendant was unable to explain where this money came from to the jury. RP 1185.

The testimony clearly established that a minimum of $617,000 had been stolen from the Clallam County Treasurer's Office. RP 905. These thefts were accomplished via five main schemes that all served to

manipulate the reported amount of money flowing into the county on a given day. RP 847-48. Each of these schemes relied upon manipulating data in spreadsheets and reports generated by the defendant. RP 913-14. Mr. Brittain testified that no one but the defendant could have stolen these funds. RP 914. Further, the bank account and credit card evidence revealed nearly $150,000 in cash deposits and over $66,000 in credit card payments into the defendant's accounts. RP 1033, 1035. The defendant was unable to explain any of these deposits or transactions. RP 1185.

More than ample evidence was presented to sustain the jury's verdict that the defendant was guilty of theft in the first degree.

H. The Trial Court properly allowed summary evidence under ER 1006 when the underlying documents were stipulated to by the defense and were voluminous and the witness testified that the summary information was fair and accurate summaries of that data

The defendant claims that the trial court improperly admitted summary testimony under ER 1006 as the summary constituted hearsay. This analysis is flawed as an ER 1006 summary overrides the hearsay rule when properly admitted. Admission of summary evidence under ER 1006 is proper if the materials are voluminous in nature, are not easily reviewed in court, the materials are authentic and would be admissible into evidence if offered and have been made available to the other parties for review and

finally if the summary itself is accurate. ER 1006. Each of these requirements was met in this case.

Initially, the State provided the defense with notice of its intent to rely upon business records pursuant to RCW 10.96.030. CP 212. The defense did not object to such reliance. The defense in fact stipulated to the accuracy and admissibility of the records that formed the basis for the summary.

RP 646.. Further Detective Viada testified that the summary exhibit he testified to was a "fair and accurate" summary of the data he reviewed. RP 1020, 1025. Finally, the defense was provided copies of the data as well as the summary of that data in discovery. RP 646. Thus the appropriate foundation was laid for the admission of the summary document. Once such a foundation is laid an objection to hearsay can not be made against the use of the summary. *See* Karl B. Tegland, Washington Practice: Evidence Law and Practice Sec. 1006.6 at 408 (5th ed. 2007); *U.S. v. Evans*, 572 F.2d 455 (5th Cir. 1978).

The summary evidence was properly admitted under ER 1006 given the defense stipulation to the underlying material and the testimony that the summary was accurate. The trial court did not abuse its discretion in admitting exhibit 45.

I. The conviction of the defendant of both theft and money laundering does not violate double jeopardy when the offenses are factually distinct and the legislature has expressed clear intent to allow for punishment of both offenses

The defendant contends that the convictions for both theft and money laundering violate the provision against double jeopardy. This is not the case.

Questions regarding potential violation of double jeopardy are reviewed *de novo*. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). A multipart test is utilized to determine if multiple convictions violate double jeopardy protections. *State v. Freeman*, 153 Wn.2d 765, 771-73, 108 P.3d 753 (2005). Application of the *Freeman* analysis to this case clearly establishes that double jeopardy was not violated by the defendant's punishment for both theft in the first degree and money laundering.

The initial aspect of the *Freeman* analysis is to review the statutory language to determine if the legislature specifically authorized multiple punishments. *Freeman* at 773. In this case the legislature did specifically authorize multiple punishments. The money laundering statute provides that "Proceedings under this chapter shall be in addition to any other criminal penalties, civil penalties, or forfeitures authorized under state law." RCW 9A.83.020(6). Thus, separate punishments are specifically

authorized, double jeopardy is not violated and this Court's review may conclude.

Should the Court wish to continue with the analysis, appellant's claim also fails the second part of the *Freeman* test. Under the "same evidence test" the court must review the elements of the offenses to determine whether one offense includes an element not included in the other offense. *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). The elements of money laundering include as charged in this case contain a requirement that the defendant "conducts or attempts to conduct a financial transaction . . .". RCW 9A.83.020(1)(a). Such a requirement is not present in the theft statute, thus proof of theft in the first degree could be made relating to a taking of greater than $5,000 with an intent to deprive, yet the offense of money laundering need not be simultaneously established. The trial court specifically found the specific criminal intent from the theft was a "very different and separate criminal intent" from the money laundering offense. RP 1387.

The Legislature clearly and unequivocally expressed intent that theft and money laundering can both be punished separately. Further, a review of the elements of each offense establishes that the 'same evidence' that would support conviction of one offense does not necessarily require conviction on the other offense. Give this analysis;

double jeopardy was not violated by the defendant's punishment following conviction for theft in the first degree and money laundering. *Freeman, supra.*

J. The prosecutor's admittedly improper question does not warrant reversal.

The State concedes that the prosecutor's comment while questioning the defendant was improper. RP 1189. The comment was immediately objected to and a curative instruction was given. RP 1189. Further the comment was the subject of a motion for a mistrial that was subsequently denied. CP 1248. The impropriety of the prosecutor's comments is not the end of the inquiry, however. The defendant must also show that there is a substantial likelihood that those improper comments affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Here the trial court immediately struck the comment and instructed the jury to disregard it. CP 1189. It is presumed that a jury will follow the trial court's direction and instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991); *State v. Anderson*, 153 Wn. App 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010). Further the comment was the subject of a motion for mistrial that was denied. CP 1248. A reviewing court gives

great deference to a trial court's determination that allegations of prosecutorial misconduct do not warrant mistrial because the trial court is in the best position to determine prejudice. *State v. Stenson*, 132 Wn.2d , 668, 719, 940 P.2d 1239 (1997). Finally, the trial court noted on several occasions at sentencing that the evidence of guilt in this matter was "overwhelming". RP 1389, 1392.

The defendant cannot establish a substantial likelihood that the improper comments affected the jury's verdict when the facts and circumstances provide overwhelming evidence of the defendant's guilt, the jury was immediately instructed to disregard the comment, and the trial court denied a motion for mistrial. *State v. Coleman*, 152 Wn. App. 552, 570-71, 216 P.3d 479 (2009).

K. The Trial Court did not improperly base its upward departure from the standard range upon impermissible grounds, but rather clearly articulated numerous appropriate grounds for the exceptional sentence imposed following the jury's findings on the charged aggravating factors

The imposition of a given sentence is reviewed for an abuse of discretion. A trial court abuses its discretion when its decision is manifestly unreasonable or is based on untenable grounds. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). Generally a trial court is presumed to understand the law, considering only admissible evidence and only for proper purposes. *State v. Foster*, 81 Wn. App. 508, 520, 915

P.2d 567, *review denied*, 130 Wn.2d 1009 (1996). The defendant focuses on a couple of comments that the trial court made when sentencing the defendant as evidence that the court considered improper material when deciding upon a sentence. The record, however, reveals that the trial court stated numerous appropriate and compelling reasons for the sentence imposed prior to making the now challenged comments.

The trial court began its sentencing of the defendant as follows:

> Now there are several factors which enter into the sentencing decision in this case this morning, and I did want to hear from counsel and Ms. Betts this morning before I decided which factors were important and which were not.
>
> I think the first factor which has to be considered is the jury found on Counts 1 and 2 that the theft of over $600,000, the laundering of that money by the Defendant were – constituted what the statute calls a major economic offense.
>
> In Instruction 45 that was given to the jury, the jury was told they could find that if they found one of the following four factors: That the crime involved attempted or actual monetary losses substantially greater than typical for the crime; theft in the first degree has a threshold of $5,000; (2) that crime involved a high degree of sophistication or planning; or (3) the crime occurred over a lengthy period of time; or (4) the Defendant used her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime. The jury was told they did not have to unanimous on one or the other, but they all had to agree that at least one of these factors was in fact true.
>
> Having heard the same testimony that the jury did, as the sentencing judge, I find that all four of those factors exist in this case. This was an enormous theft of public funds. It

involved a high degree of sophistication, and I think the fact that it went on undetected of almost a daily basis for over six years is testament to the fact that it was a very sophisticated scheme. Three, it did go of over a lengthy period of time, at lest six years; and, fourth, Ms. Betts did use a position of trust to facilitate these thefts. Without that position of trust, you would not have been able to do this. I do find all four of those factors exist, and the jury's determination in that regard is very well supported by the evidence.

I think the - - of those four, the one that is the most concerning is the breach of trust. And, Ms. Betts, you may feel this morning that you're being severely punished for your offense. I think you need to recall that it was your boss, Judy Scott, who put you in a position of trust and confidence that allowed you to steal the funds that were stolen, and she has been severely punished. She has lost her job and lost her career as the county treasurer as a result of your actions. She is indeed a victim of your breach of trust.

Another factor which concerns me and which I must factor into the sentencing decision is there has never as any time, including this morning, been any expression of remorse, and explanation as to what happened and why it happened, any apology. There is nothing in this category that would mitigate in your favor. As nearly as I can tell from the testimony, at the time this was going on you and your husband both enjoyed good jobs with good benefits. There was no evidence of any financial crisis or unusual need that would motivate stealing from the treasurer's office. The only conclusion that I can reach is that the motivation in this matter was a case of what can only be described as world-class greed on your part.

And finally, a factor whish I find most disturbing is this. The charging period was June the 1st of 2003 to May 30 of 2009. That means that this was an ongoing activity for a period of six years. And it started out small and it escalated. The more you took, the more you wanted,

> apparently. It ended up in the last two or three years of this time period that you were stealing $10,000 to $12,000 a month in cash from the county treasurer's office. That works out to an average of about $500 for each working day of the month.
> That means that each day you came to work in your position of trust and made a conscious decision to use that position to steal money from the treasurer's office. You could have stopped at any time during that six-year period, early middle, late. At any time you could have decided this is not right, I'm not comfortable with what I'm doing. You never stopped. You only stopped when you got caught. It would still be going on if you had not been caught on that fateful day in 2009.

RP 1388-91. The trial court concluded its discussion of the sentencing of the defendant by considering mitigating factors and weighing those factors against the aggravators found by the jury.

> So just to summarize, we do have aggravating factors found by the jury unanimously on Counts 1 and 2. The mitigating factors that have been presented, there is one that I have taken into account, and that is the fact that you are in poor health. Some of that is genetic, its no fault of you own; some of that is apparently self-induced. But you do have serious medical issues, and I have tried to take that into account. However, they do not overcome the other factors that I have just referred to.
>
> So it is going to be the decision of the Court, I am not going to follow the recommendation of the State in its entirety. I do not think it is justified. But on Count 1, which is the core of this case, that's the theft of over $600,000 in tax money that belongs to the citizens of this state, I am going to exercise the discretion allowed by the jury's finding of aggravating factors and sentence you to the maximum term of ten years in a state penal institution.

RP 1392-93. The Court went on to set the sentence on the remaining counts, address restitution and advise the defendant of the post conviction rights. Between these two discussions the trial court did make reference to the defendant having elected to exercise her right to a trial and her right to remain silent and not cooperate with the investigation. These references are unfortunate, and if relied upon by the trial court would form an improper basis for the sentence. The trial court, however, stressed that it understood that these factors could not be considered. "I understand you have an absolute right to remain silent. You have an absolute right to have a jury trial. You exercised those rights. You cannot be punished for exercising those rights." RP 1391-92. The trial court clearly understood what could and what could not be considered in fashioning the defendant's sentence. A court is presumed to understand the bounds of the law and consider only admissible evidence and for only proper purposes. *Foster* 81 Wn. App at 520.

The trial court clearly expressed multiple legitimate grounds for the sentence it imposed. Granted the trial court did briefly mention the fact that the defendant did not cooperate with the investigation and instead took the matter to trial, but it also specifically acknowledge that it could not take those facts into consideration at sentencing. The trial court did not abuse its discretion in sentencing the defendant to an exceptional

sentence when the jury found that aggravating factors existed and the trial court itself also believed that those factors had been proven.

IV. CONCLUSION

For the forgoing reasons the defendant's convictions should be affirmed and her sentence upheld.

RESPECTFULLY SUBMITTED this 8TH day of June, 2012.

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NO. 42519-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CATHERINE ANN BETTS,

Appellant.

DECLARATION OF SERVICE

DAISY LOGO declares as follows:

On Friday, June 8, 2012, I deposited into the United States Mail postage prepaid and addressed as follows:

Jordan McCabe
P.O. Box 46668
Seattle, WA 98146

Copies of the following documents:

- Brief of Respondent
- Declaration of Service.

I declare under penalty of perjury under the laws of the state of Washington that the forgoing is true and correct.

EXECUTED this 8th day of June, 2012, at Seattle, Washington.

DAISY JACOBSON