FILED
January 13, 2016
Court of Appeals
Division I
State of Washington

No. 73046-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

SANDRA ALLEN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The evidence was insufficient to prove that Ms. Allen committed theft through exertion of unauthorized control over "partnership" funds.

The State's first theory of the case on the charge of theft was that Ms. Allen committed theft by exerting unauthorized control over property of another. Specifically, the State theorized that Ms. Allen and Ms. Hughes entered into a "partnership agreement" to create a "ministry" and that Ms. Allen improperly used "partnership" funds supplied by Ms. Hughes. The evidence was insufficient to support the State's theory. There was no "partnership." And even assuming there was one, the evidence did not establish that the funds were spent in violation of any "partnership agreement."

a. There was no "partnership."

"Exerts unauthorized control" means "[h]aving any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement." RCW 9A.56.010(22)(c) (emphasis added). The jury was so instructed. CP 36.

What this provision means is an issue of statutory interpretation. The goal is to ascertain and carry out the legislature's intent. State v.

Garcia, 179 Wn.2d 828, 836, 318 P.3d 266 (2014). The court examines the context of the statute, related provisions, and the statutory scheme. Id. at 837. The common law may be consulted to determine meaning. Id. "In criminal cases, fairness dictates that statutes should be literally and strictly construed and that courts should refrain from using possible but strained interpretations." Id.

The State is correct that the terms "partner" and "partnership" are undefined in the theft statutes. Br. of Resp't at 19. These terms, however, are defined in a related provision, Washington's Uniform Partnership Act, chapter 25.05 RCW. "'Partnership' means an association of two or more persons to carry on as co-owners a business for profit formed under RCW 25.05.055, predecessor law, or comparable law of another jurisdiction." RCW 25.05.005(6). "'Partnership agreement' means the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement." RCW 25.05.005(7).

These statutory definitions are consistent not only with the "legal" definition of "partnership" cited in the Opening Brief, but also with the ordinary definitions found in the dictionary. "Partner" means "one of two or more persons associated as joint principles in carrying on any business with a view to joint profit." Wester's Third New International Dictionary,

1648 (1993). “Partnership” means “a legal relation existing between two or more competent persons who have contracted to place some or all of their money, effects, labor, and skill in lawful commerce or business with the understanding that there shall be a communion of profit between them.” Id.

Contrary to the State’s suggestion, there is no indication that the legislature intended the terms “partner” or “partnership agreement” to mean something else. In fact, the history of the provision indicates that legislature had these meanings in mind when it expanded what constitutes theft by embezzlement in 1986. Laws of 1986, ch. 257, § 2. This statute was passed in a reaction to State v. Brich, 36 Wn. App. 405, 675 P.2d 246 (1984), which held it was not a crime for a partner to steal partnership property because it was not the “property of another.” State v. Coria, 146 Wn.2d 631, 648, 48 P.3d 980 (2002). Thus, the dismissal of the charge of theft against the defendant in Birch, who had opened a construction business with another person and used partnership funds for his own personal use, was affirmed. Birch, 36 Wn. App. at 406. In so holding, this Court discussed the Washington Uniform Partnership Act and noted that the matter of expanding the theft statute was “better left to the legislature.” Id. at 406, 408-10.

Accordingly, this Court should reject the State's argument, Br. of Resp't at 22-23, that it did not actually have to prove that there was a partnership, meaning, an "association of two or more persons to carry on as co-owners a business for profit." Mere proof that Ms. Allen and Ms. Hughes associated together in an action is inadequate. Br. of Resp't at 21.

The State did not prove that Ms. Allen and Ms. Hughes formed a partnership. "A contract of partnership, either express or implied, is essential to the creation of the partnership relationship." Eder v. Reddick, 46 Wn.2d 41, 49, 278 P.2d 361 (1955). "Such a contract must contemplate a common venture uniting labor, skill, or property of the parties, for the purpose of engaging in lawful commerce or business for the benefit of all of them; a sharing of profits and losses; and joint right of control of its affairs." Id.

The record is devoid of evidence establishing a partnership between Ms. Allen and Ms. Hughes. There was no investment in a business for profit. What the evidence proved is that Ms. Hughes donated money to Ms. Allen for religious reasons, not that the two went into business together.

Acceptance of the State's interpretation of the term "partnership" would constitute a judicial expansion of the criminal law of theft not contemplated by the legislature. It would mean that churches, charitable

organizations, crowdfunders,[1] and panhandlers become "partners" exposed to possible criminal liability if they receive a donation for a specific purpose and do not use the donation for that purpose. This is not what the legislature intended.

b. Even assuming a partnership, there was no exertion of unauthorized control over the funds.

Assuming that the evidence proved a "partnership," the State still did not prove that Ms. Allen's use of the funds violated any "partnership agreement."

The State argues that the funds given by Ms. Hughes were "earmarked" and "to be used exclusively" for the purpose of the "ministry." Br. of Resp't at 21, 24. The evidence does not support the State's theory. The receipt, which the State made the centerpiece of its case at trial, does not restrict the use of the funds. Ex. 27. Moreover, it recounted that the donation was for multiple purposes, including "outreach work," "ministry building," "church ministries," "music publication," and "helps." Ex. 27. It did not earmark anything. Thus, there can be no theft by embezzlement. State v. Joy, 121 Wn.2d 333, 341, 851 P.2d 654 (1993)

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[1] See https://en.wikipedia.org/wiki/Crowdfunding (last accessed January 11, 2016). Many websites allow people to solicit donations for projects or for personal needs. See, e.g., http://www.kickstarter.com and http://www.gofundme.com.

(for there to be embezzlement of funds, funds must be earmarked or restricted for a specific purpose).

The State contends Joy does not apply because this case involves "partnership funds" and RCW 9A.56.010(22)(c) rather than payments for a commercial transaction and RCW 9A.56.010(22)(b). Br. of Resp't at 24-25. But both are theft by embezzlement theories. State v. Linehan, 147 Wn.2d 638, 651, 56 P.3d 542 (2002). Further, subsection (c) represents an expansion of subsection (b), as recounted earlier. Coria, 146 Wn.2d at 648. The State has to prove more than that a person used partnership property. The State has to prove that the use of partnership property was unauthorized, *i.e.*, that they stole the property. The State did not prove this.

The State contends the funds were designated exclusively for the "ministry," but does spell out what it means. Br. of Resp't at 21-22, 27. The State presumes that Ms. Allen's purchases were not for the "ministry." But since it was Ms. Allen's "ministry," this was up to her to define. The government generally does not involve itself in intrachurch disputes. See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., __ U.S. __, 132 S. Ct. 694, 705-06, 181 L. Ed. 2d 650 (2012) ("ministerial exception" precludes government from requiring a church to accept or retain an unwanted minister); Erdman v. Chapel Hill

Presbyterian Church, 175 Wn.2d 659, 667, 286 P.3d 357 (2012) ("The First Amendment protection of religious freedom requires that courts remain neutral in matters concerning religious doctrine, beliefs, organization, and administration."); Rentz v. Werner, 156 Wn. App. 423, 433, 232 P.3d 1169 (2010) (under "ecclesiastical abstention doctrine," "courts abstain from resolving disputes concerning a religious organization's ecclesiastical affairs."). Moreover, the government does not decide which beliefs are worthy of being deemed "religious" and which are not. Backlund v. Bd. of Comm'rs of King Cty. Hosp. Dist. 2, 106 Wn.2d 632, 640, 724 P.2d 981 (1986) ("Religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection. Courts have nothing to do with determining the reasonableness of the belief.") (internal quotation and citations omitted). Adhering to the state and federal constitutions, this Court should reject the State's invitation to rule on what activities are consistent with a "ministry" and which are not.

Because there was no partnership and no violation of any partnership agreement, this Court should hold that the evidence was insufficient to prove that Ms. Allen stole partnership property.

2. The evidence was insufficient to prove that Ms. Allen committed theft through deception.

a. The State bore the burden of proving that Ms. Allen deceived Ms. Hughes and that her deception induced Ms. Hughes to turn over her property.

The State's second theory was that Ms. Allen committed theft by obtaining Ms. Hughes' property through color or aid of deception. The State agrees that it bore the burden to prove that there was deception which induced Ms. Hughes to turn over the property. Br. of Resp't at 28-29; 9A.56.010(4). If Ms. Hughes would have given her money to Ms. Allen regardless of deception, there was no theft. State v. Renhard, 71 Wn.2d 670, 672, 430 P.2d 557 (1967). Here, the record establishes that Ms. Hughes gave the money to Ms. Allen not because of any deception, but because Ms. Hughes believed she was fulfilling God's will. Br. of Resp't at 22-26. Thus, the State failed to prove theft by deception.

b. Our government does not adjudicate matters of religion, including whether a person is a "false prophet."

At trial, the State did not identify as a deception Ms. Allen's purported claims to Ms. Hughes about being a prophet or prophetess of God. Rather, the State identified the deceptions as being of a more mundane nature, such as how the money would be spent and Ms. Allen's level of success as a musician. 1/18/15RP 41-43.

On appeal, the State now identifies the deceptive conduct as consisting of religious statements and representations made by Ms. Allen. For example, the State contends its "evidence showed . . . that [Ms.] Allen portrayed herself falsely as a prophet of God . . ." Br. of Resp't at 1. The State argues Ms. Allen made a "phony" claim of being connected with God. Br. of Resp't at 15-16. The State goes as far as arguing that a rational jury "could easily conclude that [Ms.] Allen was a false prophet, so the tithing order from God was itself a relied-upon deception." Br. of Resp't at 31.

The State forgets that the Washington Constitution and the First Amendment to the United States Constitution protect freedom of expression and religion. U.S. Const. amend. I; Const. art. I, § 5, 11. Article one, section eleven "absolutely protects the free exercise of religion" and its protections are broader than that of the First Amendment. City of Woodinville v. Northshore United Church of Christ, 166 Wn.2d 633, 642, 211 P.3d 406 (2009) (internal quotation omitted).[2] Citizens may peacefully seek to spread their religious beliefs in public and solicit donations without fear of criminal prosecution. Cantwell v. State of

[2] To comply with article one, section eleven, when government action burdens the sincere exercise of religion, the government must prove that its action is narrowly tailored to achieve a compelling goal. Woodinville, 166 Wn.2d at 642.

Connecticut, 310 U.S. 296, 301, 60 S. Ct. 900, 84 L. Ed. 1213 (1940) (prosecution of Jehovah's Witnesses for peacefully discussing their religion in public and soliciting donations violated First Amendment). They also mandate that the government not become excessively entangled with religion. Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) (to not violate establishment clause, law must have a secular purpose, not have the primary effect of advancing or inhibiting religion, and not excessively entangle the government with religion); Witters v. State Comm'n for the Blind, 112 Wn.2d 363, 366, 771 P.2d 1119 (1989); see State v. Frazier, 102 Wash. 369, 385, 173 P. 35 (1918) ("judges are made of the same stuff as other men, and what would appear to be heretical or doctrinal to one may stand out as a literary gem or as inoffensive narrative to another").

The State's "false prophet" theory of theft is contrary to these principles. A United States Supreme Court case involving a prosecution for mail fraud is illustrative. United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148 (1944). There, Justice Douglas eloquently explained that the First Amendment precludes inquiry into the truth of a person's religious beliefs and whether they are sincerely held:

> we do not agree that the truth or verity of respondents' religious doctrines or beliefs should have been submitted to the jury. Whatever this particular indictment might require,

the First Amendment precludes such a course, as the United States seems to concede. 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' The First Amendment has a dual aspect. It not only 'forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship' but also 'safeguards the free exercise of the chosen form of religion.' 'Thus the Amendment embraces two concepts,- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.' Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those

> doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.

Ballard, 322 U.S. at 86-87 (internal citations omitted) (emphasis added). In other words, "the government may not . . . punish the expression of religious doctrines it believes to be false." Employment Div., Dep't of Human Res. of Oregon v. Smith, 494 U.S. 872, 877, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990) (citing id. at 86-88).

Thus, in reviewing the record for evidence of deception that induced Ms. Hughes to transfer money to Ms. Allen, this Court cannot rely on the State's "false prophet" theory. To do so would violate our state and federal constitutions. In any case, the State did not prove the impossible, *i.e.*, that Ms. Allen was a "false prophet."

c. The State did not prove deception which induced Ms. Hughes to give Ms. Allen the funds.

The theories of deception advanced by the State below related to (1) how the funds would be spent; (2) the degree of Ms. Allen's financial success as a musician; and (3) how well Ms. Allen knew another pastor's family. 1/8/15RP 41-43. As argued, the problem for the State is that the evidence establishes that Ms. Hughes gave her money to Ms. Allen because she believed God commanded it. She believed she owed God past amounts in tithing and that she could make amends by giving it to

Ms. Allen. 1/5/15RP 50, 53-54, 62-64, 103, 112, 122, 133. Contrary to the State's contentions, Br. of Resp't at 29-32, she did not testify that the purported deceptions (such as a purported statement about paying money back to Ms. Hughes) induced her to give the funds to Ms. Allen. Regardless, the record establishes that even if Ms. Allen had not made the representations cited by the State, Ms. Hughes would still have parted with the funds. The State all but concedes this by arguing that Ms. Hughes "never would have given Ms. Allen the money had she not believed [Ms.] Allen's claim to be a prophet of an angry God." Br. of Resp't 32.

The State argues that all that is needed to affirm on this issue is evidence that Ms. Allen obtained $5,001 from Ms. Hughes through deception. Br. of Resp't at 30-31. This was not how the case was charged and tried by the State. CP 20 (information alleges that "thefts were a series of transactions"); 1/8/15RP 21, 25, 38, 43 (closing argument by State repeatedly cites figure of $77,000). Moreover, the judgement and sentence imposed restitution in the amount of $77,030, not $5,001. CP 54.

In any event, the State's theory that one of the transfers was based on Ms. Allen saying she would pay back the money after being paid on an upcoming record deal is not substantiated by the testimony. Ms. Hughes testified about this representation, but does not testify that it induced her turn over any funds. 1/5/15RP 80, 99, 123, 129-30. The State is asking

this Court to speculate, which is improper. State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013) (""[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.").

The evidence establishes that Ms. Hughes gave the funds to Ms. Allen for religious reasons and that she would have done so for these reasons regardless of the secular deceptions identified by the State. Accordingly, the evidence was insufficient to prove theft by deception. Renhard, 71 Wn.2d at 674.

3. Insufficient evidence as to both means requires reversal and dismissal. Reversal of only one of the two means requires reversal and remand for a new trial.

If the evidence is insufficient to support both alternative means of theft, the conviction should be reversed and dismissed with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978). If only one means is reversed for insufficient evidence, the Court should still reverse but remand for a new trial on that theory alone. Joy, 121 Wn.2d at 345-46. The State does not argue otherwise.

B. CONCLUSION

The evidence was insufficient to prove either theft by embezzlement or theft by deception. The conviction should be reversed.

DATED this 13th day of January, 2016.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73046-1-I
v.	)	
	)	
SANDRA ALLEN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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