COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

CATHERINE ANNE BETTS
Appellant

42519-0-II

On Appeal from the Superior Court of Clallam County
Superior Court Cause number 10-1-00121-1

The Honorable S. Brooke Taylor

REPLY BRIEF

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II. SUMMARY OF THE CASE

Appellant, Catherine Anne Betts, asks the Court to reverse her convictions for one count of first degree theft, one count of money laundering, and 19 counts of filing a fraudulent tax return. Ms. Betts challenges the sufficiency of the State's evidence to prove the offenses charged, and claims other due process violations denied her a fair trial.

III. STATEMENT OF THE CASE

The facts are set out in full in the Appellant's Opening Brief. Catherine Anne Betts was a cashier in the Clallam County Treasurer's Office, responsible for collecting Real Estate Excise Taxes (REET). RP 1112-13.

"Any number" of employees would accept REET payments and number the tax payer's affidavit consecutively using a highly unreliable machine that frequently skipped numbers or stamped two numbers. They deposited checks in a basket at the counter with an attached copy of the affidavit. RP 682, 692, 698, 739, 747, 750, 1114-15.

The Treasurer's Office handled up to several million dollars in cash and checks every day. RP 677. Anyone receiving cash placed it in Betts's cash drawer. RP 1119-20. The entire office used Betts's computer password for REET transactions. RP 726, 783, 784, 806. Each day, Betts reconciled the REET cash and checks with the affidavits and recorded

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each transaction and the daily total on an EXCEL© spreadsheet.[1] RP 1130. All her spreadsheets, including a master sheet used to prepare the allegedly false monthly reports charged in Counts III-XXI, were accessible to everyone in the office without any password. RP 786, 1190.

It was the duty of the Treasurer's Accountant, Anne Stallard, to submit a monthly REET report to the Department of Revenue with the tax proceeds. Using Betts's master spreadsheet, without exercising any oversight, Stallard simply transferred Betts's totals into the Dept. of Revenue report. RP 751; 796. Moreover, the row-number column from the daily spreadsheet did not appear on the monthly master, so Stallard could not even check for skipped row numbers.[2] RP 789.

All the employees, including Betts, were handling millions of dollars effectively without supervision. RP 777-78. Stallard had received no training for overseeing large amounts of cash and was unaware she had any duty to oversee the monthly REET report. RP 86, 774, 783.

On May 19, 2009, Stallard discovered a $300 error in the check book and also a REET affidavit for $877 without a matching check. RP 76-77, 130, 1140. Betts started crying when Stallard asked her about the

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[1] A widely used copyrighted spreadsheet program.
[2] In EXCEL, it is easy to hide a row containing a negative amount. An automatic adding feature subtracts the hidden entry so that the total balances. The hidden row is detectable, however, as a skipped row number. RP 773.

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missing $877 check. RP 130, 1141. Stallard immediately suspected criminal behavior and assumed Betts had stolen money. RP 93, 157. She asked, "What have you done?" RP 78, 763. Betts admitted taking the check when it appeared in her cash drawer with no paperwork. RP 79, 81, 669.

Betts wished to leave immediately, but Stallard refused and insisted that she explain the matter to Treasurer Judy Scott, as required by county policy. RP 81, 94-95, 136-37. County Policy 235 mandates that employees immediately "candidly volunteer" all information known to them that is relevant to an ongoing investigation, including any information tending to corroborate the complaint. § 10.7, Ex. 1 at 6.

Stallard took Betts to Scott's office where the two supervisors questioned her. RP 82, 95. She answered their questions because she knew she could be fired if she did not. RP 138, 140, 146-48.

Scott testified that Betts was not free to leave. RP 119-21, 153. She and Stallard prevented Betts from leaving because they intended to notify the authorities and thought she might try to flee. RP 83, 95.

Scott took Betts by the arm to the Human Resources office where she was questioned by Scott, Marge Upham and Iva Burks. RP 124-25, 141-42. Scott finally took her to a lawyer's office. RP 110, 126, 144.

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Meanwhile, Stallard discovered a series of hidden rows in some of the daily REET spreadsheets. RP 770.

James E. Brittain, Director of Special Investigations for the State Auditor's Office, did a forensic audit of REET records from 2004 to 2009. RP 828. He claimed to have found shortfalls totaling $617,000. RP 658.

Port Angeles Police Detective Jason Viada also prepared summaries from Betts's personal accounts with two banks. RP 1020, 1025. An anonymous staffer at the Attorney General's office prepared summaries of Viada's summaries. RP 1024. The trial court admitted the A.G.'s summaries over a hearsay objection. RP 1026.

Betts's bank deposits exceeded her county earnings. RP 1027-28. Evidence showed that Mr. and Ms. Betts used her earnings for household expenses and deposited his earnings of $40.000.00 per year into savings. RP 1148. Betts received around $1,000 per month from Mr. Betts, which she also deposited. RP 1153. She deposited a $9,000 cash-out from an IRA. RP 1146. The couple had also refinanced their house. RP 1154-55. For some years, Ms. Betts had income from a second job. RP 1029. And she frequently deposited cash advances from a credit card. RP 1150.

The State aggregated the shortages alleged by Brittain and charged Betts with first degree theft. They also charged money laundering by means of depositing stolen funds into her personal bank account. And

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they charged 19 counts of filing a false tax return, based on the monthly Department of Revenue reports allegedly filed by Stallard. RP 1190.

Venue: The defense told the court pretrial that Betts would be seeking a change of venue. The court stated this would be denied because the court believed it could seat an impartial jury. RP 63, 65. Betts was tried by a Clallam County jury and convicted on all counts. CP 19-20.

Garrity Issue: Betts moved to suppress her statements to Stallard and Scott under the inherent coercion doctrine of *Garrity v. State of N.J.*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967). RP 69-71. She cited the county policy requiring employees, on penalty of termination, to fully answer all questions from supervisors regarding suspected wrong-doing. *Id.*; Ex. 1. The trial court denied the motion. RP 167.

Aggregation: Betts unsuccessfully challenged the first-degree theft count based on aggregated amounts exceeding those constituting third degree theft, contrary to the aggregation statute which permits only amounts less than $250 to be aggregated.[3] RP 924-25; RP 961.

Betts was convicted on all counts. Although she had no criminal history, the current offenses put her offender score at 9. She received a total of 144 months, including an exceptional sentence of 120 months on

[3] RCW 9A.56.010(21)(c). The State thought this only applied to organized retail thefts. RP 962.

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the theft to run consecutively to 12 months for money laundering, and 19 concurrent 12-month sentences on the false filing counts. CP 21-22.

IV. ARGUMENTS IN REPLY

1. DUE PROCESS REQUIRED A CHANGE OF VENUE.

The State claims defense counsel made a strategic decision not to pursue a change of venue. Brief of Respondent (BR) 6. The record does not support this.

No objection is required when a trial judge renders any objection futile. *See, e.g., State v. Warren*, 165 Wn.2d 17, 43, 195 P.3d 940 (2008). To do so would be frivolous. *State v. Briggins*, 11 Wn. App. 687, 692, 524 P.2d 496 (1974). Here, it would have been pointless to file a written motion after the court told counsel it had no inclination to change venue.

The venue error denied Betts any possibility of an impartial jury.

It is the duty of the court to ensure that the defendant receives an impartial jury. *State v. Hillman*, 42 Wash. 615, 619, 85 P. 63 (1906). This right is guaranteed by the Sixth Amendment and Const. art.1, § 22, as well as the due process clauses of the Amendments V and XIV and Const. art. 1, § 3. *State v. Crudup*, 11 Wn. App. 583, 586-587, 524 P.2d 479 (1974).

Where, as here, prejudice in the community jeopardizes the prospect of a fair trial, the court must take corrective action. *State v.*

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Wixon, 30 Wn. App. 63, 67, 631 P.2d 1033, *review denied*, 96 Wn.2d 1012 (1981). It is reversible error to deny a change of venue where the probability of prejudice threatens the right to an impartial jury. *State v. Gilcrist*, 91 Wn.2d 603, 609, 590 P.2d 809 (1979). Actual prejudice need not be shown. *State v. Stiltner*, 80 Wn.2d 47, 491 P.2d 1043 (1971).

Here, a public employee was accused of stealing over half a million dollars from tax payers. Trial by a jury of county tax payers must be deemed inherently prejudicial because the jurors were all victims of the alleged crimes. It was not possible to assure a fair trial by an unbiased jury, and due process mandated a change venue.

2. BETTS'S STATEMENTS WERE INADMISSIBLE UNDER *GARRITY*.

The State claims Betts's statements were voluntary and admissible because no overt coercion was manifest when the statements were obtained. BR 8. This misses the point of *Garrity*, which holds that threatening a suspect with loss of livelihood is a form of compulsion that violates both the Fourth and Fifth Amendments. *Garrity v. State of N.J.*, 385 U.S. 493, 497, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

In *Garrity*, several police officers confessed to misconduct after being informed that refusing to answer their supervisors' questions would cost them their jobs and benefits. This forfeiture policy was inherent

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coercion such that the statements were barred from subsequent criminal prosecutions. *Garrity*, 385 U.S. at 496, citing *Chambers v. Florida*, 309 U.S. 227, 236, 60 S. Ct. 472, 84 L. Ed. 716 (1940). Such coercion is as offensive as the practices prohibited in *Miranda*,[4] because it is exerts equal "pressure upon an individual as to disable him from making a free and rational choice.' *Garrity*, 385 U.S. at 497. Statements infected by such inherently coercive schemes are not voluntary. *Garrity* at 385 U.S. at 498.

Here, Clallam County Policy 235 made it a condition of employment that a suspected employee immediately "candidly volunteer" everything she knows that is relevant to an ongoing investigation, including any information tending to corroborate the complaint. § 10.7, Ex. 1 at 6. In other words, Betts was required to incriminate herself.

Accordingly, the *Garrity* doctrine required Stallard, Scott, Upham and Ivy to postpone any questions likely to elicit an incriminating response until a hearing under the principles of due process. Moreover, Policy 235 itself prohibits questioning outside of a hearing. At minimum, the policy required them to tell Betts she could have a labor representative present before any questioning, which they did not do. Ex. 1, at 6.

It was Scott's duty to ensure that procedures were observed. § 10.4, Ex. 1 at 6. But Scott was ignorant of the policy and thought she was

[4] *Miranda v. Arizona*, 384 U.S. 436, 464-65, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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supposed to forcibly detain the target employee and report the matter to the personnel department and to the police. RP 712-13.

As soon as either Stallard or Scott formed a reasonable belief that the inquiry might lead to discipline, Betts should have been so notified and all questioning should have ceased. § 10.9.

The State contends that *Garrity* applies only if an employee is affirmatively ordered to answer. BR 10. This is wrong. The mere existence of an official policy that penalizes the refusal to answer incriminating questions constitutes inherent coercion and renders the answers inadmissible. *Garrity*, 385 U.S. at 496. By its plain language, Clallam's policy threatens to terminate employees who do not "candidly volunteer" all information known to them, not merely those who refuse a direct order to speak.

Betts's statements were inherently coerced by the existence of a policy subjecting her to termination for declining to answer questions and not volunteering all information known to her. *Garrity* requires reversal.

3. THE EVIDENCE WAS INSUFFICIENT TO PROVE BETTS FILED FALSE RETURNS.

The State claims the evidence is sufficient to convict Betts as an accomplice in the filing of false returns by Stallard. BR 12. These convictions cannot stand for the following reasons.

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1. The State failed to prove that Betts, among the many anonymous persons who had access to her cash drawer, computer and password, falsified any REET spreadsheets.

2. Stallard made no attempt to check the accuracy of the REET reports she filed, despite occasionally affixing her signature to certify that she had done so. Instead of doing her job, Stallard assigned this supervisory function to Betts, the supervisee. Betts cannot be held criminally liable for Stallard's derogation of duty. She merely complied with a supervisor's instructions to prepare a master spreadsheet.

3. The State does not accuse Betts of the essential elements of RCW 82.32.290(2)(a)(iii), the fraudulent tax return statute. Rather, Betts was charged solely with accomplice liability under RCW 9A.08.020(2)(a). She was held legally accountable for Stallard's conduct by causing an innocent or irresponsible person to file false tax returns.

Therefore, the State was required to prove:

- that Stallard violated RCW 82.32.290(a)(iii) by filing false tax returns; and —
- that Stallard was innocent or irresponsible, and —
- that Betts caused Stallard to file false reports.

The State failed to establish any of these essential elements.

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Stallard Did Not Violate RCW 82.32.290(2)(a)(iii). The State does not address the fact that the documents Stallard filed were not tax returns. They were administrative reports. Under the REET statutes, the sole entity with a tax liability is the seller of real estate. RCW 82.45.080(1); 82.46.050; WAC 458.61A.100(2)(a). Neither Betts nor Stallard was a seller. Funds paid over by the County Treasurer to the State are not taxes but "proceeds" of the taxes paid by the tax-payers. RCW 82.45.180(1)(a)(iii).

Moreover, if a penal statute can be deemed ambiguous, the Rule of Lenity imposes a construction that favors the criminal defendant. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

Thus, by the statutes' plain language, the County Treasurer and other agents of the County do not pay taxes or file tax returns. And even if this were ambiguous, the Rule of Lenity requires this interpretation. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

Betts Was Not Legally Accountable for Stallard's Conduct.

As Treasurer's Accountant and Betts's supervisor, Stallard was legally accountable for Betts's conduct, not vice versa. Moreover, Stallard was neither innocent nor irresponsible. She was responsible for checking the accuracy of the daily totals from Betts. Her signature was required on

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the reports precisely because, as supervising accountant, she was legally accountable for their accuracy.

Betts Did Not Command Stallard. Betts could not solicit, encourage, request or command her supervisor to do anything. It was Stallard who instructed Betts to transfer the daily totals to a monthly spreadsheet. If Stallard had actually supervised Betts, she could not have failed to detect five years' worth of skipped rows. Betts is not legally accountable for the inevitable consequences of Stallard's misfeasance and the general lack of oversight that pervaded the Treasurer's Office.

Because the evidence is insufficient to prove the essential elements of the crime, the Court should reverse and dismiss with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

4. THE TO-CONVICT INSTRUCTION RELIEVED THE STATE OF ITS BURDEN OF PROOF.

The Court gave Instruction No.20:

> A person commits the crime of filing a false or fraudulent tax return when they make **or cause to be made** a false statement on a return with intent to defraud the State and evade the payment of a tax or a part thereof.

But the statute does not criminalize "causing to be made." RCW 82.32.290(2)(a)(iii). And the prosecutor conceded that Betts did not file any forms. Opening Statements, RP 655.

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Also, during jury selection, the court defined the offense charged in Counts III-XXI as: making "a false or fraudulent return **or report, in this case monthly real estate excise tax reports**." RP 44. Again, the statute is not concerned with reports, but with tax returns. The statute does not target dishonest agency officials but tax payers who file false returns. The extraneous language added by trial court created an alternative means of committing the crime and obscured the distinction between a tax return and an administrative report filed by the Treasurer.

Besides being erroneous, this constituted a comment on the evidence. Const. art. 4, § 16 prohibits the court from conveying a personal attitude toward the merits of the case. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). This issue can be raised for the first time on appeal and is presumed prejudicial. *Levy*, 156 Wn.2d at 721. The jury was the sole arbiter of whether an administrative report constitutes a tax return.

The State asks the Court to treat the to-convict instruction like any other instruction. BR 15. But an erroneous to-convict can be challenged for the first time on appeal. *State v. Aumick*, 126 Wn.2d 422, 429-30, 894 P.2d 1330 (1995). This error requires a new trial.

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5. THE ALLEGED THEFT AMOUNTS WERE ERRONEOUSLY AGGREGATED.

Theft in the first degree involves amounts greater than $5,000. RCW 9A.56.030(1)(a). The aggregation statute, former RCW 9A.56.010(18)(c) permits a series of third degree thefts to be aggregated and charged as a single transaction. Again, the court modified this to omit any reference to third degree theft:

> Whenever any series of transactions that constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be the value considered in determining the degree of theft involved.

Instruction No. 8, CP 84. The State claims prosecutors can ignore this and aggregate as they see fit. BR 18. But the statute's plain language permits aggregation solely of amounts less than $250. RP 924-25; RP 961-62.

The remedy is to reverse and dismiss.

6. THE STATE DID NOT PROVE THAT ANY THEFT OCCURRED.

The State defends the sufficiency of the evidence of theft. BR 20. For the sake of argument, Betts admits the truth of the State's evidence and all reasonable inferences. *See, State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). It still is insufficient.

First, the record shows that forensic accountant James Brittain had reached a foregone conclusion that Betts was guilty. RP 839-40. Second,

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his accounting conclusions were based on false premises.

Brittain first made a list of each day' cash-tendered transaction amounts then looked for an underreported amount in the affidavits and spreadsheet. If he found one, he would manipulated the transaction data for up to 20 minutes until he found some combination that matched. RP 863, 866, 868-69, 951. A dozen or more numbers might be broken down to several constituent amounts. RP 952. By this means, Brittain usually came up with a winning combination. RP 950.

There is no evidence that Brittain ran any experimental controls to determine whether manipulating a comparably-sized list of random numbers could yield a combination totaling a randomly selected number. RP 951. Moreover, Brittain included all unmatched shortages as alleged thefts. RP 951. The State did not explain how the Treasurer's office could have been audited every year with no irregularity ever being found to support Brittain's novel theory. RP 953-55.

Nevertheless, Brittain concluded that "the cashier" i.e., Betts, must be guilty of crimes against the County. RP 913-14. Despite the practice of shared passwords, Brittain opined that Betts necessarily would have caught any irregularity created by someone else. RP 914-15, 941.

Brittain examined a single week's cancelled checks looking for checks corresponding to cash-tendered entries for that week. RP 875, 889,

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896, 946. He did not find them. RP 875. Yet he acknowledged that most real estate tax assessments were for several thousand dollars, which would ordinarily be paid by check. RP 946. Brittain extrapolated from that one week to the entire six and a half year span of his investigation. *Id.*

The State does not respond to Betts's challenge to the facial implausibility of Brittain's hypothesis. Yet the State failed to show beyond reasonable doubt that Brittain's method would not produce enough possible combinations to virtually assure a match. And Brittain's failure always to match a known discrepancy by juggling cash transactions is consistent with a fallacious theory. RP 950.

Leaving aside Brittain's hypotheses, the only evidence of theft was Betts's coerced admission that she took $877, which established no more than third degree theft, with which Betts was not charged.

For the same reasons, the evidence was insufficient to prove any of the aggravating factors constituting a major economic crime. RP 1388-89.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). The Court should reverse and dismiss.

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7. THE EVIDENCE WAS NOT SUFFICIENT TO LINK THE ALLEGED THEFTS TO BETTS.

Assuming for the sake of argument the truth of the State's evidence, the record shows that internal controls and security measures were so lax that anyone could have helped themselves to REET proceeds.

A bookkeeper cannot be held criminally liable for embezzling funds merely by showing that funds have been misappropriated "where there is an obvious lack of internal control and where persons other than the accused received funds and made some entries in the accounts in the absence of a showing that he converted the funds to his own use." *State v. Randecker*, 1 Wn. App. 834, 836, 464 P.2d 447 (1970), quoting *Webb v. Commonwealth*, 204 Va. 24, 129 S.E.2d 22 (1963), *reversed on other grounds by State v. Randecker*, 79 Wn.2d 512, 516-517, 487 P.2d 1295 (1971). Please see Appellant's Brief at 39.

In *Randecker*, as here, the evidence showed an absence of internal controls over funds received and direct access by others to the accused's cash drawer. *Randecker*, 1 Wn. App. at 836-37.

On this evidence, no reasonable jury could find that Betts was responsible for any shortages. The total lack of oversight was known to everyone in the office. RP 784-85. The only safeguard was the automated sequential numbering system which had been broken for years. RP 132,

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704, 752, 1115. The computers were supposed to be password-protected, but this purported safeguard also was illusory. RP 726, 783, 784, 806. Betts's spreadsheets were accessible to everyone in the office even without her password, including the master spreadsheet used to prepare the monthly reports that form the basis for Counts III-XXI. RP 786, 1190.

Anyone could remove a fistful of cash and conceal the transaction with a hidden row on the spreadsheet. RP 659; 787. Treasurer Scott conceded that the safeguards were inadequate. RP 715. Scott thought it was not possible for Stallard to prepare the monthly REET report without personally reviewing the affidavits. RP 719. She was wrong. Stallard was relying solely on Betts's self-reporting. RP 704-05; 719-20.

The lack of oversight and the common access both to the funds and to the spreadsheets injects reasonable doubt sufficient to support these convictions. The Court should reverse and dismiss the prosecution.

8. THE BANK DEPOSIT EVIDENCE WAS TRIPLE HEARSAY ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE.

At BR 25, the State defends incarcerating Ms. Betts for 13 years for money laundering based on an anonymous A.G. staffer's summary of non-accountant Detective Viada's summaries of his conclusions regarding Betts's bank deposits. RP 1024-25.

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Accepting for the sake of argument that this evidence was admissible, evidence disclosed in the course of a police investigation is testimonial. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). As such, the confrontation clause applies. *State v. Neal*, 144 Wn.2d 600, 608, 30 P.3d 1255, (2001). The Court should reverse the money laundering conviction.

9. CONVICTING BETTS OF BOTH THEFT AND MONEY LAUNDERING VIOLATED DOUBLE JEOPARDY.

The State's double jeopardy analysis is flawed. BR 27-28. On these facts, Betts cannot be punished for both theft and money laundering.

Same Evidence Test. The State is correct that if the theft and money laundering statutes are compared without reference to the alleged facts, the elements are different. BR 27. But a proper Blockburger analysis compares the statutory elements in light of what actually happened, which in some cases establishes conduct constituting a single offense. *State v. Potter*, 31 Wn. App. 883, 887-888, 645 P.2d 60 (1982). The crimes of embezzlement and money laundering are such a case.

Double jeopardy is violated where the evidence required to support a conviction on one crime would be sufficient to convict on the other. *In re Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004). On the facts

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alleged here, the evidence required to prove money laundering necessarily includes proof of specified unlawful activity. Proving the specified unlawful activity would necessarily constitute proof of theft.[5]

Money laundering means to conduct a financial transaction with the proceeds of "specified unlawful activity." RCW 9A.83.020(1)(a). "Specified unlawful activity" means a class A or B felony. RCW 9A.83.010(7). But the felony of theft by embezzlement is not completed until the funds are misallocated, which is to say, deposited. *State v. Joy*, 121 Wn.2d 333, 341, 851 P.2d 654 (1993).[6] Accordingly, where the specified unlawful activity is embezzlement, the predicate felony is incomplete until after the financial transaction involving the proceeds.[7]

Comparing the elements in light of the conduct alleged here, it is apparent that theft-embezzlement could not have occurred without the money laundering. *See Potter*, 31 Wn. App. at 888; *In re Orange*, 152 Wn.2d 795, 818-19, 100 P.3d 291 (2004). Accordingly, the evidence proving one crime completely proves a second crime which means the

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[5] Federal decisions are in accord. *See United States v. Christo*, 129 F.3d 578, 580-81 (11th Cir.1997) (insufficient evidence of money laundering where predicate crime required misapplication of funds).

[6] Betts inadvertently cited to the unpublished portion of *State v. Dingman*, 149 Wn. App. 648 (2009). AB 44-45. That case, however, cites to the published authorities discussed here. *See, Dingman* at ¶ 83.

[7] This reflects the legislative intent that money laundering constitutes "separate conduct occurring after completion of the underlying criminal offense." *United States v. Savage*, 67 F.3d 1435, 1441 (9th Cir.1995).

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crimes are the same in law and fact. *State v. Walker*, 143 Wn. App. 880, 886, 181 P.3d 31 (2008).

Legislative Intent. It can thus be seen that RCW 9A.83.020(6), stating the legislative intent that money laundering penalties be in addition to other criminal penalties, does not apply on these facts, because the element of "specific unlawful activity" requires proof of the completed crime of money laundering. This is a logical impossibility, because the elements must prove the crime, not vice versa..

Accordingly, the jury should have been instructed that it could convict Betts either of theft or of money laundering, but not both for the single offense of depositing county funds into her personal account.

The error requires vacation of both convictions, because it cannot be discerned which, if any, crime a properly instructed jury would have selected. *Milanovich v. United States*, 365 U.S. 551, 558, 81 S. Ct. 728, 732, 5 L. Ed. 2d 773 (1961) (taking and receiving the same property constitute a single transaction as a matter of law.)

10. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT.

A defendant claiming misconduct must show an improper comment and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). If the comment is not harmless and compromises a

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fair trial, "then the defendant should get a new one." *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009).

Here, dissatisfied with Betts's explanations regarding the bank deposits, her daily ability to balance, and her failure to notice hidden rows in her spreadsheets, the prosecutor demanded: "[L]ast chance. Is there something you want to tell us? ... It might make a difference in sentencing." RP 1188.

The court's instruction to disregard could not overcome the prejudicial impact. RP 1189. An instruction to disregard may not be sufficient to erase an improper comment from the jurors' minds. *State v. Case*, 49 Wn.2d 66, 70, 298 P.2d 500 (1956). Reversal is required.

11. THE SENTENCING COURT PENALIZED BETTS FOR EXERCISING HER RIGHT TO A JURY TRIAL.

The sentencing court stated unambiguously that confessing "would have made your situation this morning considerably better as far as the court is concerned[.]" And, we ended up with "an enormously complicated and expensive trial that the jury costs were almost $9,000 alone, tens of thousands of dollars in investigative expenses on both sides[.]" RP 1391-92. The court also perceived Judy Scott, who arguably bears ultimate responsibility for the entire fiasco, as a victim because she was forced to resign. RP 1390.

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The State recites appropriate grounds articulated by the court to support the exceptional sentence. BR 31-33. This cannot restore confidence in the fairness of the sentence, however. The principle is analogous to pretextual traffic stops in which the officer always cites a legitimate infraction but an improper motive contaminates the entire situation and invalidates the stop. Likewise, the judge here revealed disqualifying bias.

It cannot be discerned from this record what sentence an unbiased judge would have imposed. The error cannot be deemed harmless.

At minimum, the Court should remand for resentencing by a different judge.

V. CONCLUSION

For the foregoing reasons, the Court should reverse Ms Betts's convictions and dismiss the prosecution with prejudice.

Respectfully submitted this 18th June, 2012.

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