RECEIVED
OCT 14 2016
Washington State
Supreme Court

NO. 93688-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

State of Washington,

Respondent/PETITIONER

v.

Michael C. McKinnon,

Appellant/RESPONDENT.

COURT OF APPEALS NO. 74008-3-I

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY
The Honorable George Bowden, Judge
The Honorable Marybeth Dingledy, Judge

ANSWER TO STATE'S PETITION FOR REVIEW AND CONTINGENT CROSS-PETITION FOR REVIEW

DEREK T. CONOM
TOM P. CONOM

THE CONOM LAW FIRM
Attorneys for Respondent
7500 212th Street SW #215
Edmonds, WA 98026
(425) 774-6747

ORIGINAL

TABLE OF CONTENTS

SUMMARY OF WHY REVIEW SHOULD BE DENIED 1

REASONS WHY REVIEW SHOULD BE DENIED 2-12

I. THE STATE WOULD HAVE THIS COURT OBLITERATE THE LEGAL DISTINCTIONS BETWEEN THEFT BY DECEPTION AND BY EMBEZZLEMENT 2-4

II. WHEN THE LEGISLATURE EXTENDED THE STATUTE OF LIMITATIONS FOR THEFT BY DECEPTION IN 2009, IT DID NOT AMEND THE SUBSTANTIVE LAW OF DECEPTION AND EMBEZZLEMENT 4-10

III. THE STATE MISREPRESENTS THE RECORD – THE HOA BOARD WAS COMPOSED OF SOPHISTICATED MEMBERS OF VARIOUS AGES WHOSE JOB IT WAS TO OVERSEE THE FINANCIAL CONDITION OF THE HOA 10-12

CONTINGENT CROSS-PETITION FOR REVIEW 12-17

ISSUES PRESENTED ON CROSS-PETITION

A. Did the trial court commit reversible error by failing to arrest judgment where the undisputed record showed the 3-year statute of limitations for embezzlement was violated? 12-14

B. Whether, consistent with the fundamental fairness of due process and the equal treatment of similarly situated persons required by the equal protection clause, a prosecutor has the unfettered discretion to elect to charge a means of a crime to take advantage of a lengthier statute of limitations where, under the very same facts, the charge is barred by the applicable statute of limitations? 14-15

C. Where the facts are undisputed and only a legal question is presented, is the erroneous denial of a *Knapstad* motion reviewable? 15-16

CONCLUSION 16

TABLE OF AUTHORITIES

Table of Cases

Washington Supreme Court

In re Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000) 14

Olsen v. Delmore, 48 Wn.2d 545, 295 P.2d 324 (1956) 15

State v. Ager, 128 Wn.2d 85, 904 P.2d 715 (1995) 3, 9

State v. Bauer, 180 Wn.2d 929, 329 P.3d 67 (2014) 15-16

State v. Blanchey, 75 Wn.2d 926, 454 P.2d 841 (1969) 15

State v. Danforth, 97 Wn.2d 255, 643 P.2d 882 (1982) 15

State v. Emerson, 43 Wn.2d 5, 259 P.2d 406 (1953) 2-3

State v. Johnson, 56 Wn.2d 700, 355 P.2d 13 (1960) 8-9

State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993) 3

State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986) 12,15-16

State v. Larson, 123 Wash. 21, 211 Pac. 885 (1923) 10

State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002) 3

State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951) 3,5,16

State v. Peltier, 181 Wn.2d 290, 332 P.3d 457 (2014) 14

State v. Renhard, 71 Wn.2d 670, 430 P.2d 557 (1967) 4, 5

State v. Smith, 2 Wn.2d 118, 98 P.2d 647 (1939) 3-9

Washington Court of Appeals

State v. McKinnon, No. 74008-3-I, *slip opinion* (Div.1 8/29/16) ... 1-12,16 (attached as Appendix)

Constitutions

Washington Article 1, section 3 14-15

Washington Article I, section 12 14-15

United States 14th Amendment 14-15

Washington Statutes

R.C.W. 9A.04.080 .... 1, 12-14

R.C.W. 9A.56.010 1-16

R.C.W. 9A.56.020 1-16

R.C.W. 9A.56.030 1-16

Rem.Rev.Stat. Sec. 2601 .... 3, 6

Washington Court Rules

CrR 8.3 15-16

Treatises

3 LaFave *Substantive Criminal Law,* sec. 19.8 (2d ed. 2003) 5-6

Fine and Ende, 13B Washington Practice, *Criminal Law,* sec.2606; 2607; 2609 (2d ed. 1998 main volume; 2015-16 supp.) 3-6

Verbatim Reports of Proceedings

1 VRP (April 24, 2015) 1-26

2 VRP (July 8, 2015) 1-8

Appendix A (Bates nos. 1-359), CP I 30-389 (Discovery File)

SUMMARY OF WHY REVIEW SHOULD BE DENIED

This is a classic embezzlement case. Without permission, a bookkeeper employed by the board of directors of a homeowners' association borrowed the employer's money in his rightful possession as fiduciary for personal use (which he repaid in full with interest). Years later, a reconstituted homeowners' board instructed its attorney to make a criminal referral for embezzlement to the Snohomish County Prosecutor, six months before the statute of limitations expired.

Due to its unexplained negligence, the state did not file an embezzlement charge before expiration of the limitations period. Instead, many months after the embezzlement charge was barred by the statute of limitations, the prosecutor filed a charge of theft by deception – based only on the embezzlement evidence – in an attempt to circumvent the applicable time bar by invoking a longer statute of limitations for deception.

The Court of Appeals, relying on long-standing precedent from this Court, unanimously held that the evidence produced at trial by the state proved only embezzlement. Accordingly, there was insufficient evidence as a matter of law to establish theft by deception and the court reversed the wrongful conviction.

There is nothing novel or controversial in the unpublished Court of Appeals' decision. It is simply a straightforward application of well-settled precedent to undisputed facts and hardly calls for re-review of those facts by this Court.

I. THE STATE WOULD HAVE THIS COURT OBLITERATE THE LEGAL DISTINCTIONS BETWEEN THEFT BY DECEPTION AND BY EMBEZZLEMENT

Although the state does not explicitly say so, what it wants this Court to do is to overrule a century of settled law and obliterate the long-standing distinctions between theft by deception and by embezzlement. The Court should decline this implicit, and baseless, invitation to subvert the statutory scheme for theft.

From the time of statehood when theft by deception (formerly false pretenses) and embezzlement were separate crimes until today when under the 1975 criminal code deception and embezzlement are alternative means of the single crime of theft, there have been clear analytical and elemental distinctions between the two.

The Court commented on this history more than 60 years ago in *State v. Emerson,* 43 Wn.2d 5, 17, 259 P.2d 406 (1953):

> "At common law and by statutes prior to the enactment of the criminal code in 1909, *the two were separate and distinct offenses.*" (emph.ad.)

When the Legislature enacted the predecessor statute to the 1975 code for theft, the alternative methods of deception (false pretenses) and embezzlement continued to be separate and distinct:

> "They are *necessarily so treated* under our present statute upon the trial of a case, for the reason that in the former money is wrongfully *obtained* by the defendant from the complainant by some false pretense; while in the latter case (embezzlement) he *acquires the money rightfully* in the capacity of an agent, bailee, trustee, etc. and then appropriates the same to his own use."

State v. Emerson, 43 Wn.2d at 17 (*dis.op.;* emph.ad.).

Since the adoption of the 1975 criminal code, this Court has consistently declared that deception and embezzlement are analytically distinct alternative means of committing the crime of theft. *State v. Linehan,* 147 Wn.2d 638, 647, 56 P.3d 542 (2002)("theft is an alternative means crime"); *State v. Ager,* 128 Wn.2d 85, 91, 904 P.2d 715 (1995) ("embezzlement occurs where property that is lawfully in the taker's possession is fraudulently or unlawfully appropriated by the taker [and] involves a violation of trust"); *State v. Joy,* 121 Wn.2d 333, 851 P.2d 654 (1993)(same).

Commentary has followed the holdings of this Court in acknowledging the alternative means of theft remain "analytically distinct." *See* Fine and Ende, 13B Washington Practice, *Criminal Law 2d* sec. 2606 at 129 (1998 main volume),[1] citing the leading cases of *State v. Smith,* 2 Wn. 2d 118, 98 P.2d 647 (1939) and *State v. Olds,* 39 Wn.2d 258, 235 P.2d 165 (1951).[2]

As the Court of Appeals stated below, quoting from this treatise, "The difference between theft by deception and embezzlement lies in whether the defendant had lawful possession of the property prior to the

---

1 The lead author of the Washington Practice commentary, Mr. Seth A. Fine, was formerly counsel of record for Petitioner in the appellate court.

2 The Court stated in *Olds*: "We held in *State v. Smith,* 2 Wn.2d 118, 98 P.2d 647, that the subdivisions of Rem. Rev. Stat. Sec. 2601, defined separate and distinct offenses, rather than providing various ways in which the same offense could be committed, notwithstanding that the several offenses were all designated as larceny." 39 Wn.2d at 260.

theft." Sec. 2609 at 137, quoted in *slip op.* at 7. From this well-settled proposition in Washington law, the Court of Appeals concluded: "If the defendant had lawful possession before the theft, then he cannot be guilty of theft by deception." *Id. See* Sec. 2609 at 137 ("the defendant could only be guilty of embezzlement"), relying on *State v. Smith, supra* and *State v. Renhard,* 71 Wn.2d 670, 430 P.2d 557 (1967).

The Court of Appeals below correctly held that *Smith* and *Renhard* continue to be the controlling law under the 1975 code and command the result reached by the court. *Slip op.* at 7-11 ("McKinnon's case is analogous to *Smith* and *Renhard.*").

The state utterly fails in its Petition to cite, discuss or acknowledge this history or any of the controlling authorities. Nor does the state make any showing that this Court's decisions relied on by the Court of Appeals were wrongly decided or harmful.

II. WHEN THE LEGISLATURE EXTENDED THE STATUTE OF LIMITATIONS FOR THEFT BY DECEPTION IN 2009, IT DID NOT AMEND THE SUBSTANTIVE LAW OF DECEPTION AND EMBEZZLEMENT

The state makes much ado about the Legislature's extension of the statute of limitations for theft by deception suggesting that the Legislature intended a drastic substantive change in theft law to permit for the first time proof of embezzlement to also constitute proof of deception. Pet. at 5-6, 13-15. This is a red herring which would result in the means of embezzlement being read out of the law. Proof of embezzlement is *not* proof of theft by deception. The Legislature made no relevant *substantive*

changes to the law of theft relating to the alternative means of deception and embezzlement which retain distinct elements which must be charged and proved. The state's failure in this case to do so is neither excused by its negligence in not timely filing the correct charge nor justified by a non-existent legislative change in substantive theft law.

The state misrepresents the relevant facts and the relevant law.

It is unquestionably "mandatory that defendants in criminal cases must be convicted of the offenses charged, and guilt of other offenses will not suffice." *State v. Olds, supra,* 39 Wn.2d at 261 (reversing theft conviction based on possibility jury convicted on proof of uncharged means of theft):

> "Since the appellants *may* have been convicted of an offense with which they were not charged, the judgment must be reversed."

Id. (emph.ad.)

It is black-letter law that a person charged with one means of committing the crime of theft cannot be convicted on the basis of evidence establishing the commission of a different and uncharged means of theft. This legal maxim clearly applies to the crimes of theft by embezzlement and theft by deception. *State v. Smith; State v. Olds; State v. Renhard.*

Professor LaFave explains the general rule applicable to theft by deception and theft by embezzlement:

> "Thus, the evidence may show that the defendant, who fraudulently converted another's property, obtained possession of (but not title to) the victim's property by lies, intending from

> the beginning to misappropriate it (larceny by trick), or it may show that he obtained the possession honestly and only later decided to misappropriate it (embezzlement). *Evidence of one crime will **not** support a conviction of the other."*

LaFave, 3 *Substantive Criminal Law,* section 19.8(a) at 143 (2d ed. 2003)(emph. ad.).

The cited Washington decisions follow this rule as recognized by the commentators:

> "A person who is charged with a theft committed by one of these means cannot be convicted on evidence showing another kind of theft."

Fine and Ende, 13B Washington Practice, *Criminal Law 2d,* sec. 2606 at 129; sec. 2607 at 132 (1998).

The leading case on point is this Court's decision in *State v. Smith, supra* as correctly held by the Court of Appeals below. *Slip op. 7-9, 11.* Although *State v. Smith* was decided under a predecessor to the current theft statute, there is no material difference between the substantive law then and now[3] and the sufficiency of evidence analysis remains good law.

The relevant facts in *Smith* are as follows. The defendant, Smith, had control of the business of a warehouse company, "including the bank deposits." Smith was "authorized to draw checks against the bank account." Smith was contacted by co-defendant Ruark who sold him oil leases and mining stock. The leases and stock "were paid for by checks

---

3 *Compare* the definition of embezzlement in Rem.Rev.Stat., sec. 2601, quoted at 2 Wn.2d at 121, *with* R.C.W. 9A.56.010(22)(b). Except for some grammatical changes, there is virtually no difference in the two statutes.

drawn against the company's bank account." Smith made the checks payable to Ruark and "then to cover up the transaction, Ruark issued his personal checks" which Smith kept in the office cash box. An audit revealed that Smith had converted to his own use approximately $26,000 of the company's funds. The scheme transpired over three years. "He admitted the facts just related." 2 Wn.2d at 119-120.

As in Mr. McKinnon's case, the state in *Smith* charged a means of theft other than embezzlement. As in Mr. McKinnon's case, Smith raised the following issue:

> "Appellant contends he is guilty, if at all, of the crime of embezzlement and not of larceny. This contention is founded upon the admitted fact that the funds of the company were appropriated after they were given into his lawful custody and exclusive control, appellant reasoning that the violation of the possession of those funds, as charged in the information could not have occurred."

2 Wn.2d at 120.

After discussing the "obvious distinction[s]" between various methods of committing theft, the Supreme Court unanimously held:

> "It is plain that the *evidence* presented to the jury was, if believed, sufficient to prove the crime of *embezzlement*. [cits. omit.] The *evidence*, however, did not prove the crime of larceny as defined by [different] subdivision" of statute.

State v. Smith, 2 Wn.2d at 122 (emph. ad.).

> "We agree that the information was sufficient to sustain a conviction of larceny, but we cannot hold that the *evidence* supported that charge. Appellant used for himself money rightfully in his possession, and over which he alone had control. Ruark aided and abetted him. In so far as the *evidence* in this case is concerned, appellant was the principal and Ruark the accessory in committing the crime of *embezzlement.*" *Id.*

> "Careful examination of the *evidence*, construed in the light of the authorities to which our attention has been directed, leads us to the conclusion that the first essential of the crime of larceny was *not proven* ... ." The *record* discloses that appellant was given the lawful custody and control of all the money and property of the Warehouse Company. It wholly fails to reveal *any evidence* from which the jury could infer that appellant harbored an intention to steal the particular $ 2,000 at the time he took it into his possession. The intent to appropriate the money to his own use came to appellant after it had been given into his lawful custody."

State v. Smith, 2 Wn.2d at 123 (emph. ad.).

The Court concluded, at 123, 125 (emph.ad.; second quote cit. omit)

> "Appellant was charged with larceny and convicted of embezzlement. *Such conviction cannot stand.*" ... "The difficulty is that the act stated was not proven, and that the act proven was not stated."

The state claims that the decision of the Court of Appeals conflicts with this Court's decision in *State v. Johnson,* 56 Wn.2d 700, 355 P.2d 13 (1960). Pet. at 9. On the contrary, the Court of Appeals' analysis perfectly harmonizes *Smith* and *Johnson. Slip op.* at 11-12. Johnson schemed with his uncharged (deceased) co-conspirator, Haber, to defraud Haber's insurance company by filing false insurance claims. 56 Wn.2d at 702-05. As a defense to charges of larceny by false representations, Johnson argued his conduct fell only within the parameters of the uncharged crime of embezzlement pursuant to *Smith.* 56 Wn.2d at 704. The *Johnson* Court held the critical difference between Smith's status and Johnson's status was that, unlike Smith, the accomplice Haber "was not in possession of the funds at the time he appropriated them to his own use." 56 Wn.2d at 705.

"He did not *obtain* possession thereof until other agents of the company, who had possession of the funds, caused the drafts authorized by Haber to be honored. ... The funds which were to pay the drafts were in the possession of other agents of the company. ... Haber's acquisition of possession of the company's funds being wrongful, *he did not embezzle the funds and the rule of the Smith case is not apposite. Id.* (emph.ad.)

The *Johnson* Court at 704-05 explained the key distinction between theft by embezzlement and by deception and between the different outcomes in *Smith* and *Johnson*:

"We held that the facts established the crime of embezzlement and not larceny, because the funds were in Smith's lawful posession at the time he unlawfully appropriated them to his own use."

The teaching of *Smith* and *Johnson* is straightforward: Where the actor has rightful possession of the property and then fraudulently converts it to personal use, the only crime committed is *embezzlement*, but where the actor does not have rightful possession of the property and then uses deception to obtain such property, the only crime committed is *theft by deception.* Because the exertion of unauthorized control over the homeowners' funds occurred while they were in the rightful possession of Mr. McKinnon, the Court of Appeals correctly held his conduct falls squarely within the parameters of *Smith* and not *Johnson. Slip op.* at 11. *Accord: State v. Ager, supra,* 128 Wn.2d at 91.

In opposition to this conclusion, the state makes the frivolous argument, without authority, that because third-party bank personnel – strangers to the parties – may have engaged in ministerial acts involving

the funds after conversion, this means that Mr. McKinnon never had rightful possession to them. Pet. at 11. A century ago, this Court held that a bank officer who did not have exclusive or actual possession of bank funds could still be guilty of embezzlement regardless of the necessary involvement of the bank's personnel (who were *not* strangers to the parties) in assisting him to accomplish that crime. *State v. Larson,* 123 Wash. 121, 128, 211 P. 885 (1923).

III. THE STATE MISREPRESENTS THE RECORD – THE HOA BOARD WAS COMPOSED OF SOPHISTICATED MEMBERS OF VARIOUS AGES WHOSE JOB IT WAS TO OVERSEE THE FINANCIAL CONDITION OF THE HOA

Mr. McKinnon accepts the facts as stated by the Court of Appeals. *Slip op.* at 1-3. The state claims it too accepts those facts, Pet. at 1, but then asserts "facts" never found by either the trial or appellate court.

For the first time in this case, the state makes the spurious claim that theft by deception was appropriately charged in this embezzlement case because the entire board of directors of the homeowners' association was composed of elderly, vulnerable, unsophisticated members who were in special need of protection of their assets and apparently unable for years to do the job for which they had *volunteered* – to oversee the financial affairs of the homeowners' association. Even if any of this were true, it would still not justify a charge not permitted by law. But it is not true.

The board was composed of relatively sophisticated homeowners and investors of various ages and professional backgrounds. A number of

board members gave statements to the police which included their personal backgrounds. App. A Consider for example Ms. Janet Robinson, the President of the HOA Board of Directors during the relevant period and primary contact with Mr. McKinnon. Ms. Robinson was employed as a realtor. She had been an officer of the board since the mid-1990's and was President at the time Mr. McKinnon was hired in 2006. She was 57 years young at that time. She had previously known Mr. McKinnon as an accountant who had personally prepared her tax returns. Ms. Robinson maintained voluminous financial records of the HOA in "large, three-ring binders." She stated that as many as 15 or more of the homeowners, including board members, might attend a board meeting. Bates nos. 15-20 (Ms. Robinson's replacement on the board in 2012, Barbara Lenac, was 58 years young when she assumed her position. Bates no. 52.).

Not a single board member (or homeowner for that matter) claimed that he or she was ever deceived by Mr. McKinnon into making any payments above and beyond what was required by the HOA. From the initial disclosure by Mr. McKinnon to Ms. Robinson, the board members consistently took the position that Mr. McKinnon's misconduct was unauthorized borrowing, Bates no. 38, and this was unchanged through sentencing ("Mr. McKinnon violated our trust by borrowing from the Association's bank accounts and reserve fund without permission.")CP4-7

Contrary to the state's fanciful mischaracterization of the record, the Court of Appeals correctly held:

> "Here, McKinnon initially had lawful possession of the association's funds. Although he misappropriated the funds, and attempted to hide his misappropriation, *the deception did not convert his embezzlement into theft by deception.*"

State v. McKinnon, slip op. at 7 (emph.ad.).

CONTINGENT CROSS-PETITION FOR REVIEW

Mr. McKinnon properly preserved in the trial court, assigned error to and briefed in the Court of Appeals three additional dispositive issues:

1. Violation of the 3-year statute of limitations on an undisputed record;

2. Violation of due process and equal protection in allowing the state to elect which statute of limitations for theft applies to identical facts;

3. Denial of *Knapstad* motion to dismiss prior to trial.

The Court of Appeals acknowledged these issues were properly before it but stated they need not be addressed because the sufficiency of evidence issue resolved the case. *Slip op.* at 4.

If, but only if, this Court grants the state's Petition for Review, Mr. McKinnon asks the Court to also grant review of the unresolved issues he raised below. In this contingent cross-petition, he incorporates by reference as though fully set forth his opening and reply appellate briefs.

A. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO ARREST JUDGMENT WHERE THE UNDISPUTED RECORD SHOWED THE 3-YEAR STATUTE OF LIMITATIONS FOR EMBEZZLEMENT WAS VIOLATED

At all relevant times, it was undisputed that Mr. McKinnon acted in the capacity of fiduciary for the HOA board. *E.g.*, Pet. at 4, 9, 14. The state further stipulated that at all relevant times, *all* funds received by Mr.

McKinnon from the homeowners were in his rightful possession as fiduciary ("Mr. McKinnon had access to the funds as MCHOA accountant during the course of each of the withdrawals during the charging period in this case."). Stipulation for Bench Trial on Agreed Documentary Evidence 2.6 (c). CP 459-64 The crime of embezzlement is complete upon conversion and the statute of limitations is three years. R.C.W. 9A.04.080(1)(h).

The State conceded it received the police referral with adequate time to file a theft charge within the three-year statute of limitations for embezzlement. Resp. Brf. at 7; VRP 4/24/15 at 20.

The State further conceded it had probable cause to charge theft by embezzlement. Resp. Brf. at 3; Aff. of Prob. Cause based solely on attached police report dated August 21, 2014, CP 451-53.

The State further conceded the statute of limitations for embezzlement began to run on September 9, 2011 (the final conversion) and expired on September 9, 2014 thus barring the charge after that date. Resp. Brf. at 29; VRP 4/24/15 at 19.

Finally, the State conceded it delayed filing the charge until January 23, 2015, more than four months *after* the expiration of the three-year statute of limitations for embezzlement (but provided no excuse for the delay). Resp. Brf. at 7; VRP 4/24/15 at 20. *See* Pet. at 2 ("By the time the Snohomish County Prosecutor's Office made a charging decision in January 2015, the standard three year statute of limitations for embezzlement had expired.").

Given this undisputed record, the trial judge was "without authority to enter judgment," *State v. Peltier,* 181 Wn.2d 290, 297, 332 P.3d 457 (2014), and, accordingly, Mr. McKinnon timely moved to arrest entry of judgment for theft. CP 22. Inexplicably, the trial judge denied the motion without explanation resulting in "a complete miscarriage of justice." *In re Stoudmire,* 141 Wn.2d 342, 355, 5 P.3d 1240 (2000).

B. IT IS A VIOLATION OF DUE PROCESS AND EQUAL PROTECTION TO PERMIT A PROSECUTOR UNFETTERED DISCRETION TO EVADE THE APPLICABLE STATUTE OF LIMITATIONS BY ELECTING AN ALTERNATIVE MEANS WITH A LONGER STATUTE OF LIMITATIONS THAN THE BARRED MEANS ON IDENTICAL FACTS

The state begrudgingly admits it failed to charge the correct means (embezzlement) within the applicable statute of limitations and sought to charge a different means (deception) for the very purpose of circumventing the time bar which it had negligently overlooked. Pet. at 2; Resp. Brf. at 29; VRP 4/24/15 at 18-20.

> Prosecutor: "Now, I realize on the one hand that might make either, A, the victims of this offense, or B, the State look bad in the sense that we did not file charges within the statute of limitations for theft by embezzlement. And so it looks like we're trying to basically shoe horn something into theft by deception when that's not – that's not what it is."

On Petition to this Court, the state seeks to make a virtue out of its disingenuousness. Pet. at 5. The state is oblivious to the actual issue implicated by the prosecutor's conduct in this case:

Whether, consistent with the fundamental fairness of due process and the equal treatment of similarly situated persons required by the equal

protection clause, a prosecutor has the unfettered discretion to elect to charge a means of a crime to take advantage of a lengthier statute of limitations where, under the very same facts, the charge is barred by the applicable statute of limitations?

This actually *is* a novel undecided issue in this Court which in an appropriate case should be reviewed. In analogous circumstances, this Court has not hesitated in circumscribing on constitutional grounds the unfettered authority of prosecutors to unfairly seek to punish defendants by arbitrary election between conflicting statutes. *See, e.g., State v. Blanchey,* 75 Wn.2d 926, 939, 454 P.2d 841 (1969); *Olsen v. Delmore,* 48 Wn.2d 545, 295 P.2d 324 (1956); *State v. Danforth,* 97 Wn.2d 255, 259, 643 P.2d 882 (1982).

C. WHERE THE FACTS ARE UNDISPUTED AND ONLY A LEGAL QUESTION IS PRESENTED, AN ERRONEOUS DENIAL OF A *KNAPSTAD* MOTION IS REVIEWABLE

In *State v. Bauer,* 180 Wn.2d 929, 329 P.2d 67 (2014), this Court granted review of a trial court's denial of a *Knapstad* motion in order to determine if a statute could be applied to the conduct of a defendant. The case presented a purely legal question on agreed facts (Supreme Court granted review to decide "a controlling question of law"). 180 Wn.2d at 834.

Mr. McKinnon here is effectively in the same procedural posture as in the *Bauer* case: on undisputed facts he argues as a matter of law that because embezzlement and deception are distinct alternative means of

committing theft, the same evidence which proves the one cannot be used to prove the other and that sufficient evidence of deception to *obtain* property not already rightfully possessed must be presented. This is "a pure question of law." *State v. Olds, supra,* 39 Wn.2d at 259. Thus, denial of his *Knapstad* motion was manifest legal error requiring dismissal of the charge. *See State v. Bauer, supra,* granting such relief.

CONCLUSION

The unpublished unanimous decision of the Court of Appeals applied long-standing precedent from this Court on the law of theft to undisputed facts and correctly held that the facts presented by the state proved only the uncharged means of embezzlement but were insufficient to prove the charged means of deception. Consequently, the Court of Appeals properly concluded that Mr. McKinnon's wrongful conviction must be reversed. Nothing in the state's Petition for Review casts doubt on the validity of the appellate court's analysis of the controlling authorities or to the propriety of the application of those authorities to the facts. While the state may disagree with the result, that is not a basis to ask this Court to reconsider the applicable law or re-review the undisputed facts.

Alternatively, only in the event the Court decides to review the case, Mr. McKinnon asks the Court to also grant review of the additional dispositive issues in his Cross-Petition for Review properly raised and briefed but not reviewed by the Court of Appeals.

DATED THIS 11th DAY OF OCTOBER, 2016.

DEREK T. CONOM
WSBA # 36781

TOM P. CONOM
WSBA #5581

CONOM LAW FIRM
Of Attorneys for
Respondent/Coss-Petitioner
Michael McKinnon

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 74008-3-I
Respondent,	)	DIVISION ONE
v.	)	
MICHAEL C. McKINNON,	)	UNPUBLISHED
Appellant.	)	FILED: August 29, 2016

2016 AUG 29 AM 9: 15

Cox, J. — Michael McKinnon appeals his judgment and sentence for theft by deception, arguing that insufficient evidence supports his conviction. We hold that the State failed to prove that he obtained control of property through aid or color of deception, one of the necessary elements of theft by deception. Accordingly, we reverse his conviction.

In 2006, the Maplevine Condominium Homeowners Association hired McKinnon to provide accounting and bookkeeping services. As part of these services, McKinnon would receive the association's dues and other income and pay the association's bills. McKinnon was authorized to pay himself for his services.

APPENDIX

In 2007, McKinnon began taking funds from the association's accounts without its authorization. He characterized this as "borrowing," and periodically repaid some or all of the funds with interest.

McKinnon provided the association with yearly spreadsheets listing the association's funds. In these spreadsheets, McKinnon would list the funds he misappropriated as being in non-existent accounts. For example, in 2007 McKinnon provided a spreadsheet to the association that showed $10,616.98 in a "Cascade Savings" account. McKinnon had actually misappropriated these funds.

Between 2007 and 2011, McKinnon took approximately $134,000 from the association's accounts without authorization. During this same period, he repaid approximately $142,000 to the association, including $8,000 of interest.

In 2011, the association hired a management company and no longer required McKinnon's services. McKinnon then disclosed that he had been taking money from the association's accounts for his personal use. He stated that he periodically withdrew money from the accounts, which he later repaid with interest. In September 2011, McKinnon paid the association $23,000 to repay the last of the funds he took. The association did not report McKinnon's actions to authorities at that time.

The association later audited its financial records and confirmed that McKinnon took funds without authorization and repaid them with interest.

In March 2014, the association reported McKinnon's unauthorized use of funds to the Lynnwood Police Department and the Snohomish County

Prosecutor. In a voluntary interview with a police officer, McKinnon admitted to the facts described earlier. In August 2014, the police department referred the case to the Snohomish County Prosecutor for charging review.

In January 2015, the State charged McKinnon with first-degree theft, alleging that he obtained control of the association's funds "by color or aid of deception." At this time, the statute of limitations to charge McKinnon with embezzlement had expired.

McKinnon moved to dismiss the case under State v. Knapstad[1] for failure to establish every element of the offense. The trial court denied the motion.

The parties agreed to a bench trial on stipulated documentary evidence. The court determined that McKinnon was guilty of theft by deception.

McKinnon moved to arrest judgment, arguing that while the evidence established embezzlement, it did not establish theft by deception. The trial court denied the motion.

McKinnon appeals.

THEFT

McKinnon argues that there is insufficient evidence of theft by deception in this case. We agree.

RCW 9A.56.020 sets out different means by which a person may commit the crime of theft. One means is to wrongfully "exert unauthorized control over the property or services of another."[2] This means is commonly known as

---

[1] 107 Wn.2d 346, 729 P.2d 48 (1986).

[2] RCW 9A.56.020(1)(a).

embezzlement.[3] A different means, known as theft by deception, is "[b]y color or aid of deception to obtain control over the property or services of another."[4]

Although these are alternate means of committing the same crime, a three-year statute of limitations applies to embezzlement, while a six-year statute applies to theft by deception.[5]

These crimes are not "mutually repugnant"—under some circumstances, a defendant may commit both theft by deception and embezzlement.[6] Proving one means does not necessarily disprove the other.[7]

McKinnon raises a variety of challenges on appeal. He challenges the court's denial of his Knapstad motion, its determination that sufficient evidence supported finding him guilty of theft by deception, and its ruling that the statute of limitations for embezzlement did not bar prosecuting McKinnon.

But a single question resolves all of McKinnon's claims: do the facts of this case provide sufficient evidence that McKinnon committed theft by deception?

---

[3] State v. Joy, 121 Wn.2d 333, 339, 851 P.2d 654 (1993).

[4] RCW 9A.56.020(1)(b).

[5] RCW 9A.04.080(1)(d)(iv), (1)(h).

[6] State v. Pettit, 74 Wash. 510, 519, 133 P. 1014 (1913) (analyzing former larceny statute). RCW 9A.56.020 is a recodification of the former larceny statute—the elements of theft by deception and embezzlement have not materially changed. State v. Southard, 49 Wn. App. 59, 62 n.2, 741 P.2d 78 (1987).

[7] Id.

Sufficiency of the Evidence

McKinnon argues that insufficient evidence supports his conviction for theft by deception. We agree.

Evidence is sufficient when any rational trier of fact could find beyond a reasonable doubt the essential elements of the crime.[8] When considering a sufficiency challenge, we defer to the fact finder's determination as to the evidence's weight and credibility.[9] "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it."[10] Whether evidence is sufficient is a question of constitutional law that we review de novo.[11]

Here, the crucial inquiry is whether there is sufficient evidence that McKinnon obtained control of the association's funds by color or aid of deception, as the theft by deception statute requires.[12] "Obtain control over" has its "common meaning," as well as other definitions that do not apply in this case.[13]

---

[8] State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

[9] State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

[10] State v. Homan, 181 Wn.2d 102, 106, 330 P.3d 182 (2014).

[11] State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

[12] RCW 9A.56.020(1)(b).

[13] RCW 9A.56.010(10).

We focus on the word "obtain." According to the American Heritage Dictionary, "obtain" means "[t]o succeed in gaining possession of as the result of planning or endeavor; acquire."[14]

Here, McKinnon's deception involved misrepresenting the location of the funds he removed from the association's accounts. In its oral ruling, the court found:

> the deception that I saw in this case had to do with essentially the hiding of the assets. The assets were not couched as a loan to Mr. McKinnon in this case. They were described as being securely invested; that is the deception that I see in this case.[15]

But there is no evidence that McKinnon used this deception to obtain control over the association's funds.

The association hired McKinnon in 2006. He first deceived the association in a report sent in December 2007. Thus, McKinnon had control over the association's funds before he deceived them. Accordingly, he did not use deception to ***obtain*** control over the funds.

McKinnon used deception to hide the fact that he was misappropriating the association's funds. But this is insufficient to establish theft by deception. The statute's plain language requires that the defendant use deception to "obtain control over" the property.[16] Here, McKinnon did not use deception to obtain

---

[14] THE AMERICAN HERITAGE DICTIONARY (5th ed. 2016) https://ahdictionary.com/word/search.html?q=obtain.

[15] Report of Proceedings (July 8, 2015) at 4.

[16] RCW 9A.56.020(1)(b).

control of the funds. Rather, he already had control of the funds and used deception to retain control.

A leading treatise supports this interpretation: "The difference between theft by deception and embezzlement lies in whether the defendant had lawful possession of the property prior to the theft."[17] If the defendant had lawful possession before the theft, then he cannot be guilty of theft by deception.[18]

Here, McKinnon initially had lawful possession of the association's funds. Although he misappropriated the funds, and attempted to hide his misappropriation, this deception did not convert his embezzlement into theft by deception.

Case law also supports this conclusion. In State v. Smith, the supreme court interpreted a previous version of the theft statute, then known as larceny.[19] That statute, like the present theft statute, had embezzlement and theft by deception as alternate means of committing the same offense.[20] The elements of the different means have not materially changed—RCW 9A.56.020 merely rephrases and reorganizes the previous statute.[21]

---

[17] 13B SETH A. FINE AND DOUGLAS J. ENDE WASHINGTON PRACTICE: CRIMINAL LAW § 2608 at 137 (2015-2016 ed.).

[18] Id.

[19] 2 Wn.2d 118, 98 P.2d 647 (1939).

[20] Southard, 49 Wn. App. at 62 n.2; Rem. Rev. Stat. § 2601.

[21] Id.

In Smith, Bian Smith managed a business.[22] In this role, "he had complete control of all the business of the company, including the bank deposits" and was the only person authorized to write checks from the company's accounts.[23] He used funds in the company's account to purchase various personal investments.[24] To do this, Smith wrote checks that his codefendant cashed.[25] To hide these transactions, Smith would place personal checks in his codefendant's name payable to the company in the company's cash box.[26]

The State charged Smith with larceny, but not under the means of embezzlement.[27]

The supreme court distinguished embezzlement from other means of committing theft:

> "In embezzlement, the property comes lawfully into the possession of the taker and is fraudulently or unlawfully appropriated by him; in [other means of theft], there is a trespass in the unlawful taking of the property. Embezzlement contains no ingredients of trespass, which is essential to constitute the [other means of theft]. Moreover, embezzlement does not imply a criminal intent at the time of the original receipt of the property, whereas in [other means] the criminal intent must exist at the time of the taking."[28]

---

[22] Smith, 2 Wn.2d at 119.

[23] Id. at 119-20.

[24] Id. at 120.

[25] Id.

[26] Id.

[27] Id. at 121.

[28] Id. (quoting 18 AM. JUR., Embezzlement, § 3, p. 572).

The court determined that Smith had the funds lawfully in his possession before he wrongfully appropriated them.[29] Thus, he was guilty only of embezzlement and not of another means of theft.[30] Accordingly, the court reversed his conviction.[31]

Similarly, in State v. Renhard, the supreme court reversed Marcus Renhard's conviction for larceny by deception.[32] Renhard was the president of a corporation.[33] He used two corporate checks for his personal use.[34] Both Renhard and a secretary had to sign the corporation's checks.[35] But the secretary's signature was only a precaution against forgery—the secretary had no authority to refuse to sign a check.[36]

The State's evidence showed that Renhard informed the secretary that the checks were to purchase equipment for the corporation.[37] But he instead used them to purchase personal property.[38]

---

[29] Id. at 122.

[30] Id.

[31] Id. at 127.

[32] 71 Wn.2d 670, 674, 430 P.2d 557 (1967).

[33] Id. at 670-71.

[34] Id. at 671.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

The court held that insufficient evidence supported Renhard's conviction for larceny by deception. The court held that the State failed to prove that Renhard's deception was necessary to obtain the funds. The court also held that Renhard "had lawful control of the funds of the corporation, and these checks were, in effect, drawn by him."[39] Thus, larceny by embezzlement was "the only section [of the larceny statute] applicable to the facts of this case."[40]

In contrast, in State v. Johnson, the supreme court upheld Francis Johnson's conviction for larceny by deception.[41] In that case, Johnson's codefendant was an insurance adjuster.[42] The adjuster would create false claim files and authorize payment for the claims.[43] Then Johnson would cash the insurance checks and share the proceeds with his codefendant.[44]

On appeal, Johnson argued that he had committed only embezzlement, not theft by deception, because his codefendant lawfully possessed the funds.[45] The supreme court disagreed, distinguishing Smith.[46]

---

[39] Id. at 672.

[40] Id. at 673.

[41] 56 Wn.2d 700, 355 P.2d 13 (1960).

[42] Id. at 703.

[43] Id.

[44] Id. at 704.

[45] Id. at 705.

[46] Id. at 704-05.

The supreme court held that the insurance adjuster had the authority "only to order the payment of the company's funds."[47] This authority was not the equivalent to possessing the funds. Other employees possessed the funds, and the adjuster did not possess them until the other employees executed the payments he ordered.[48] Thus, Smith was distinguishable, and Johnson was properly convicted of larceny by deception.[49]

Here, McKinnon's case is analogous to Smith and Renhard. As the association's accountant, McKinnon had lawful possession of the association's funds. McKinnon would use the funds to pay the association's bills and had the authority to pay himself. Although McKinnon misappropriated the funds to his personal use, he had lawful possession when he did so. Thus, just as in Smith and Renhard, McKinnon committed only the crime of embezzlement. The evidence does not support a conviction for theft by deception.

McKinnon's case is also distinguishable from Johnson. In Johnson, the insurance agent did not have possession of the funds. He obtained the funds by falsifying insurance files to get his coworkers to execute payments. Thus, it was clear that the insurance agent used deception to obtain the funds.

Here, the State failed to prove such a link between McKinnon's deception and the association's funds. If McKinnon had requested and obtained additional funds from the association after falsely claiming that an unexpected cost arose,

---

[47] Id. at 705.

[48] Id.

[49] Id.

he would have been guilty of theft by deception. Similarly, if McKinnon had falsely informed the association's members that their dues had increased and obtained additional funds, he would have been guilty of theft by deception. But here, the State failed to establish that McKinnon used deception to obtain control over additional funds. Instead, the evidence shows only that McKinnon used deception to hide his misuse of the funds that he already controlled.

The State relies on State v. Mehrabian[50] to argue that sufficient evidence supports McKinnon's conviction. But that case is distinguishable.

In Mehrabian, Sassan Mehrabian worked for the City of Woodinville as its information technology manager.[51] His responsibilities included purchasing the city's computer equipment.[52] When purchasing equipment, Mehrabian was required to obtain three bids for the equipment and present the lowest bid to his supervisors for approval.[53]

Mehrabian also owned a computer equipment business.[54] The city prohibited its employees from engaging in business with the city.[55] Despite this prohibition, Mehrabian sold equipment to the city, using a third party vendor to

---

[50] 175 Wn. App. 678, 308 P.3d 660 (2013).

[51] Id. at 683.

[52] Id. at 701.

[53] Id. at 684.

[54] Id.

[55] Id.

invoice his sales.[56] Mehrabian sold the equipment to the city at substantial markups and often delivered equipment that was inferior to the invoice his supervisors approved.[57] Mehrabian also forged price quotations to obtain his supervisors' approval.[58] And on some occasions, Mehrabian forged invoices from the third party vendor, charging the city without delivering any equipment.[59]

The State charged Mehrabian with theft by deception after the city discovered the discrepancies in its computer equipment inventory.[60]

On appeal, Mehrabian argued that insufficient evidence supported his convictions.[61] Specifically, he argued that the State had not proven that the city relied on his misrepresentations when it purchased the equipment.[62] This court disagreed, noting:

> Neither [of Mehrabian's supervisors] knew they were approving business deals with Mehrabian, and both said they probably would not have approved the deals had they known the true facts. Neither [supervisor] knew Mehrabian was enriching himself through these transactions, and both supervisors testified he did not have permission to do so . . . .
>
> Mehrabian induced the City to pay out money by color or aid of deception: He purchased property himself, invoiced the City

---

[56] Id.

[57] Id.

[58] Id.

[59] Id.

[60] Id.

[61] Id. at 699.

[62] Id.

> through [the third party vendor] at a substantial markup, invented price quotes, forged invoices, delivered an inferior product or failed altogether to deliver the purchased property, and enriched himself through the transactions. He created the impression that he was legitimately engaging in business with another company for the purchase and delivery of computer products. That false impression caused the City to engage in business it would not otherwise have undertaken.[63]

Mehrabian is not analogous to McKinnon's case. In Mehrabian, it was clear that Mehrabian was "obtaining control" over the funds through deception. He would provide forged price quotations to his supervisors and then the equipment would be purchased with his supervisor's credit card.[64] Prior to the deception, he did not have control over the city's funds. Thus, he used deception to obtain the funds.

The only question on appeal was whether Mehrabian obtained these funds because the city relied on his deception or whether the city would have purchased these items regardless of his deception.[65] The court determined that there was sufficient evidence that the city relied on his deception.[66]

Thus, McKinnon's case is distinguishable. As explained earlier, the State failed to show that McKinnon used deception to obtain control over the association's funds. Accordingly, Mehrabian is not helpful.

---

[63] Id. at 707-08.

[64] Id. at 703-04.

[65] Id. at 699, 707-08.

[66] Id. at 707.

The State also argues that McKinnon obtained control over the association's funds under the definition found in RCW 9A.56.010(10). That statute provides: "'Obtain control over' in addition to its common meaning, means: (a) In relation to property, to bring about a transfer or purported transfer to the obtainer or another of a legally recognized interest in the property."[67]

The State argues that McKinnon's "unauthorized transfer of [the association's] reserve funds into his own personal account created a legally recognized interest that he alone exclusively controlled."[68] This argument is untenable.

Black's Law Dictionary defines a legal interest as "[a] legal share in something; all or part of a legal or equitable claim to or right in property <right, title, and interest>."[69] When McKinnon transferred the funds to his personal account, he did not create any legal or equitable right in the funds. Rather, he used the funds without any legal claim to them. The State also fails to cite any authority for its argument that McKinnon created a legally recognized interest in the funds by transferring them to his personal account. Thus, this argument is unpersuasive.

---

[67] RCW 9A.56.010(10).

[68] Brief of Respondent at 19.

[69] BLACK'S LAW DICTIONARY 934 (10th ed. 2014).

The State also argues that McKinnon failed to assign error to the court's findings. Because his argument is clear, the failure to assign error does not hinder our review.[70]

We reverse McKinnon's conviction for theft by deception.

Cox, J.

WE CONCUR:

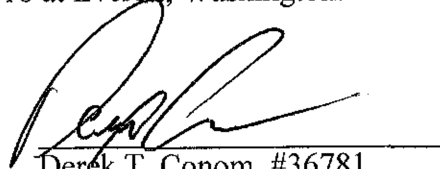
Trickey, ACJ

[illegible]

[70] See State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995).

1
2
3
4 IN THE SUPREME COURT OF THE STATE OF WASHINGTON
5
6
7
8
9
10
11

STATE OF WASHINGTON, Respondent, PETITIONER, v. MICHAEL C. McKINNON, Appellant, RESPONDENT	No. 93688-9 AFFIDAVIT OF SERVICE OF ANSWER TO STATE'S PETITION FOR REVIEW AND CONTINGENT CROSS-PETITION FOR REVIEW

12 STATE OF WASHINGTON)
ss.
13 COUNTY OF SNOHOMISH)
14
15 The undersigned states that on the below-stated date he personally served on: Mark Roe,
16 Snohomish County Prosecutor and Andrew E. Alsdorf, Snohomish County Deputy Prosecutor, at Mission Building, Snohomish County Courthouse, 3000 Rockefeller Avenue, Everett,
17 Washington 98201, by leaving with an appropriate person a copy of: **ANSWER TO STATE'S PETITION FOR REVIEW AND CONTINGENT CROSS-PETITION FO REVIEW**
18 I certify under penalty of perjury under the laws of the State of Washington that the
19 above is true and correct.
20 DATED THIS 11TH day of October, 2016 at Everett, Washington.
21

22 Derek T. Conom #36781
23 Attorney for Respondent
24
25
26
27 THE CONOM LAW FIRM
7500 212th St. SW, Suite 215
28 Edmonds, Washington 98026 Phone: (425) 774-6747