74008-3

74008-3

NO. 74008-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

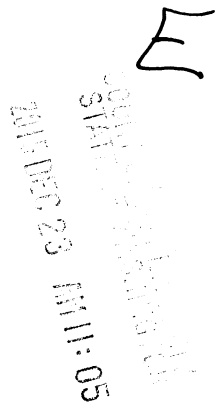
State of Washington,

Respondent,

v.

Michael C. McKinnon,

Appellant.



APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

The Honorable George Bowden, Judge
The Honorable Marybeth Dingledy, Judge

BRIEF OF APPELLANT

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INTRODUCTION

There is a critical distinction between theft by embezzlement and theft by deception: to commit embezzlement the actor must already have rightful possession of the property of the wronged party, as in a trust relationship, and then fraudulently convert it to personal use whereas in theft by deception the actor must employ color or aid of deception, which is relied on by the wronged party, to obtain property in possession of such party.

There is also a critical difference in the statutes of limitations governing these two alternative means of committing theft. Embezzlement is governed by a three-year limitations period while theft by deception is subject to the discovery rule and a six-year statute of limitations.

Appellant Michael McKinnon acknowledged to the wronged party, a homeowners association he served as accountant, that he had made a series of unauthorized withdrawals for personal use of funds entrusted to him for payment of the HOA bills and had provided the HOA with false accounting records. Officers of the HOA considered Mr. McKinnon's misconduct to be embezzlement. Prior to his termination, Mr. McKinnon had repaid with interest the full amount of his unauthorized withdrawals.

Years later the HOA had their attorney make a criminal referral directly to the Snohomish County Prosecutor. Mr. McKinnon freely admitted his misconduct to the police who also considered the conduct to be embezzlement and referred it as such to the Prosecutor.

The criminal referral from the attorney for the HOA and from the

police afforded sufficient time for the Prosecutor to file a charge of theft by embezzlement within the applicable three-year statute of limitations. But the Prosecutor did not do so. The Prosecutor delayed until the three-year limitations period expired. Instead, the Prosecutor filed a charge solely based on theft by deception, thereby invoking the six-year statute.

Both on a *Knapstad* motion and at stipulated trial, the superior court conflated the evidence required to prove the alternative means of theft and speculated that the deception means was broad enough to encompass the embezzlement means. In so doing, the superior court erroneously obliterated the distinction between embezzlement and theft by deception so that in the trial court's view, the identical facts which establish the crime of embezzlement simultaneously establish theft by deception.

This reasoning directly conflicts with, and is contrary to, the theft statutes and the precedents of this Court and the Supreme Court.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in denying the *Knapstad* motion. (CP 418-20)
2. The trial court erred as a matter of law in denying the *Knapstad* reconsideration motion. (CP 403-05)
3. The trial court erred as a matter of law in entering a verdict of guilty. (VRP 7/8/15 at 4)
4. The trial court erred as a matter of law in entering judgment and sentence. (CP 8-18)
5. The trial court erred as a matter of law denying the motion to arrest

judgment. (CP 22)

6. The trial court erred as a matter of law in denying the motion to dismiss for violation of the statute of limitations. (CP 22)

STANDARDS OF REVIEW

Review of statutes, including statutory interpretation in a *Knapstad* motion, is de novo. Sufficiency of evidence for a verdict is tested by asking, could a rational trier of fact, taking the evidence in a light most favorable to the state, have found guilt beyond a reasonable doubt. The applicability of a statute of limitations is reviewed de novo if facts are undisputed.

ISSUES

1. **Did the trial court commit reversible error in denying the *Knapstad* motion by erroneously conflating the evidence required to prove theft by embezzlement with the evidence required to prove theft by deception?**

2. **Did the trial court commit reversible error in making a finding of guilty by erroneously conflating the evidence required to prove theft by embezzlement with the evidence required to prove theft by deception and thus find guilt based on insufficient evidence?**

3. **May a person charged with theft alleged to have been committed by one alternative means be convicted on evidence establishing another uncharged means?**

4. **May evidence of after-the-fact concealment of embezzlement be used to convict on theft by deception or is the crime of embezzlement complete upon conversion and concealment a mere incident of that offense?**

5. **Did the trial court commit reversible error in failing to dismiss the charge of theft by deception with prejudice?**

6. **May the state circumvent the three-year statute of limitations applicable to theft by embezzlement by charging theft by deception based on evidence establishing embezzlement in order to invoke the inapplicable six-year statute of limitations?**

STATEMENT OF THE CASE

1. Nature of Action – Statement of Procedure

A. Delay in Criminal Referral. The alleged victim, Maplevine Condominium Home Owners Association (hereafter MCHOA), was informed by its accountant, Appellant Michael C. McKinnon, in September of 2011 that he had made a series of unauthorized withdrawals from its collected dues. From the time of Mr. McKinnon's self-reporting until the time of their Victim Impact Statement, the representatives of the MCHOA considered his misconduct to be embezzlement. *E.g.,* CP 4-7 ("Mr. McKinnon violated our trust by borrowing from the Association's bank accounts and reserve fund without permission.").

Nevertheless, the MCHOA delayed two and a half years before asking for a criminal prosecution review. According to the Affidavit of Probable Cause (hereafter Aff. P.C.), the "[r]eason for lag time in reporting has to due [sic] in large part with a change in leadership within the MCHOA ... ."

On March 28, 2014, nearly six months before the expiration of the statute of limitations for embezzlement, the MCHOA, through counsel, referred the matter directly to Mark Roe, Snohomish County Prosecutor. Aff. P.C.; Appendix A (Bates nos. 268-69)(hereafter Letter). Thereafter, a police investigation was conducted by the Lynnwood Police culminating with an interview of Appellant on July 22, 2014 in which he admitted to police, as he had to the MCHOA, that he had made a series of unauthorized loans to himself from MCHOA funds. Aff. P.C.; (Bates nos. 59-65).

The Lynnwood Police made a second criminal referral to the Snohomish County Prosecutor sometime in August, 2014 approximately one month before the expiration of the charging period. VRP 7/8/15 at 20.

B. Delay in Filing Charge. Despite having been put on notice of the nature of the potential charge in March and again in August of 2014, the Prosecutor did not file a charge until January 23, 2015, more than four months after the expiration of the statute of limitations. CP 454-55. When asked by the court why there was delay and why embezzlement was not charged, VRP at 18, 20, the Prosecutor responded:

> "The problem with that is that the statute of limitations is different for theft by deception. It's six years. For theft by embezzlement, it's three years. And given the timing of when this was reported and when this was referred to the State and when this ultimately led to a charging decision, we were outside of the statute of limitations.
>
> "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."

C. Information. The State filed a one-count Information charging first degree theft on the sole means of color or aid of deception during the period December 31, 2006 through September 9, 2011. CP 454-55.

D. *Knapstad* Motion. Appellant timely filed a *Knapstad* motion to dismiss pursuant to CrR 8.3(c) on the grounds the State had filed the wrong charge and that the undisputed evidence did not, as a matter of law, prove the means of deception but only established probable cause for the uncharged means of embezzlement. CP 436-450. Judge George Bowden

denied the motion by assuming that by the time of trial the State could produce a witness supporting the State's deception theory. CP 418-20. On the same basis, the judge denied the motion for reconsideration. CP 403.

E. Stipulated Trial. A stipulated trial occurred before Judge Marybeth Dingledy. The judge stated from the bench, "I think that it may very well should have been charged as an embezzlement." VRP 7/8/15 at 4. However, the judge opined that evidence of embezzlement could be used to prove deception because the two means are not mutually exclusive. "I think there is some overlap." *Id.*

F. Post-Trial Motions. Appellant moved to arrest judgment on several grounds including that the trial court erred as a matter of law in using evidence of embezzlement to establish theft by deception and that the charge should be independently dismissed as time-barred by the applicable statute of limitations. CP 23-29. The court denied the motion. CP 405.

G. "Windfall" to MCHOA. In addition to receiving a substantial profit from his payment of above-market interest on Mr. McKinnon's unauthorized loans, the MCHOA received an additional $ 3,000 from him more than two years after his employment ended. By letter dated October 9, 2013 from the attorney for the MCHOA to Mr. McKinnon, the homeowners falsely represented to him that they were going to belatedly pursue an independent accounting and needed a substantial amount of money to do so. Bates nos. 270-71. Relying on this misrepresentation, Mr. McKinnon paid MCHOA the sum of $3,000. Bates no. 006.

Later, the attorney admitted to Mr. Roe that the MCHOA had never conducted such an independent examination but falsely claimed the MCH OA kept Mr. McKinnon's money to cover "potential losses it might have incurred from the borrowing." Letter. Other representatives of the MCH OA not only acknowledged to the police that the homeowners had realized "a positive net gain" in excess of $8,000 from interest Mr. McKinnon paid but also "MCHOA acknowledges repayment in full ... ." Aff. P.C.

2. Statement of Facts – *Knapstad*

The following are the undisputed material facts before the *Knapstad* judge drawn from the Declarations of counsel for the parties. CP 425-39.

Michael McKinnon was hired in June, 2006 by the Maplevine Condominium Home Owners "as their sole bookkeeper." Aff. P.C. He was hired as "a professional [accountant to] help paying the bills, receiving homeowner's dues, monthly, et cetera. And so we hired Mike to work in that capacity." Interview with Janet Robinson, MCHOA representative, May 30, 2014 at 2, Bates nos. 015-038 (hereafter Interview). "McKinnon performed accounting and bookkeeping services to the Association from 2006 through 2011." Letter.

In his accounting/bookkeeping/dues receiving/bill paying capacities, Mr. McKinnon was authorized to receive and deposit monthly homeowner dues and was a signatory on the Association checking account authorized to issue checks to "pay the bills." Interview at 8. He was expressly

authorized to issue checks to himself as payment for services rendered ("he did pay himself for his fees and those were of record"). Interview at 6.

During his employment, McKinnon "had been borrowing the Association's funds, for his own use, without the Association's knowledge or permission." Letter. According to the Information, the period of this unauthorized borrowing from the MCHOA bank account was from December 31, 2006 through September 9, 2011.

"Over the course of his employment he withdrew money from MCHOA accounts into his own bank accounts and doctored financial records indicating MCHOA money was invested in Cascade Savings when in actuality he had taken it and placed it into his own personal account." Aff. P.C. On July 22, 2014, when asked by Lynnwood detectives whether money was "taken as a loan without permission," McKinnon responded "yes." Bates nos. 60-61. There is no evidence that at any time McKinnon 1) failed to timely deposit in the MCHOA bank account all dues received from its members, or 2) failed to timely pay any MCHOA bills in full, or 3) caused any financial harm to MCHOA or its members, or 4) used deception to obtain any funds above and beyond amounts owed by members to the MCHOA or in their accounts, or 5) used deception to obtain funds from MCHOA individual members.

When MCHOA complained to the Lynnwood Police Department it "allege[d] embezzlement" against McKinnon. Bates no. 006. In the police interview with Janet Robinson, she was twice asked if she consid-

ered this to be "unauthorized taking of money" and she twice responded "[i]t was unauthorized." Interview, Bates no. 38. The Affidavit of Probable Cause characterizes the offense as "a pattern of theft (embezzlement)."

McKinnon periodically paid back to the MCHOA bank account the money he had borrowed. By September of 2011, he had paid back all of the borrowed funds plus above-market interest (at a time when bank interest rates were at or near "0"%) resulting in a net profit to MCHOA in excess of $ 8,000. Aff. P.C. ("MCHOA acknowledges repayment in full ... and a final repayment to MCHOA with a positive net gain amount of $ 8[,000] plus (a 6-8% interest rate per year per McKinnon))."

3. Statement of Agreed Trial Facts – *Knapstad* and Stipulation

At trial, the evidentiary record consisted of all of the evidence submitted and considered at the *Knapstad* hearing including the Affidavit of Probable Cause and the Declarations of counsel, *see* Stipulation for Bench Trial on Agreed Documentary Evidence (2.2(a); (c); (d); 2.6(a)) as supplemented by three additional matters: 2.2(b), (the discovery in the case), Appendix A (CP 30-389; Bates numbers [partial] 1-359); 2.2(e)/2.6(c) (characterization of funds at issue); 2.2(e)/2.6(b) (Roy Teeters).

Stipulation 2.6(c) provides in its entirety:

> "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, and had legal permission to pay himself his own accountant's fees directly from the MCHOA funding."

Stipulation 2.6(b) provides in its entirety:

> "Roy Teeters was president of MCHOA during much of the charging

period at all times was a Board member. According to Teeters, the Board kept tabs on their funds via meetings during which they would go over financial summaries provided to them by the defendant. He does not recall looking directly at bank statements during these meetings. At no time was the Board presented with documents that contained the term 'Loan McKinnon' or indicated that a loan existed. The Board relied on records provided to them by McKinnon in knowing what funds they had available. The summaries provided led the Board to believe that their funds were securely invested. Had the Board learned of the loan while these transactions were being made, Mr. Teeters would have called a board meeting and he believes that the Board would have taken adverse action toward Mr. McKinnon's status as accountant."

ARGUMENT

I. INTRODUCTION

A. Historical Distinctions Among Means of Committing Theft.

Historically, there have been "obvious distinction[s]" among the various means and methods of committing the crime of theft. *State v. Smith,* 2 Wn.2d 118, 121, 98 P.2d 647 (1939). As to the two means of theft at issue on this appeal, embezzlement and deception, the obvious distinctions between theft by embezzlement and theft by false pretenses (the prior label of theft by deception) go back to the time of statehood. As our Supreme Court noted more than half a century ago, "[a]t common law and by statutes prior to the enactment of the criminal code in 1909, the two were separate and distinct offenses." *State v. Emerson,* 43 Wn.2d 5, 17, 259 P.2d 406 (1953)(*dis.op.).*

The essential distinction between the two kinds of theft was described in *State v. Emerson, supra*:

> " ... in the former [theft by deception] 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."

Paradigm examples in the case law highlight the distinction.

Embezzlement. When a banker who has rightful access to bank funds in an official capacity wrongly appropriates customers' money to personal use, the crime occurring is *embezzlement* not some other form of theft. *E.g., State v. Larson,* 123 Wash. 21, 211 Pac. 885 (1923).

When a lawyer who has rightful access to client funds in a trust account and wrongly appropriates the clients' money to personal use, the crime occurring is *embezzlement* not some other form of theft. *E.g., State v. Kinneman*, 120 Wn.App. 327, 84 P.3d 882 (Div.1 2003).

When an administrator of an estate who has rightful access to estate funds and wrongly appropriates the estate money to personal use, the crime occurring is *embezzlement* not some other form of theft. *E.g., State v. Liliopoulos,* 167 Wash. 686, 10 P.2d 564 (1932).

When an accountant or bookkeeper who has rightful access to company funds and wrongly appropriates the company money to personal use, the crime occurring is *embezzlement* not some other form of theft. *E.g., State v. Moreau,* 35 Wn.App. 688, 669 P.2d 483 (Div.3 1983); *State v. Stock,* 44 Wn.App. 467, 722 P.2d 1330 (Div.1 1986); *State v. Smith, supra.*

Deception. When a loan applicant obtains a loan from a bank under false pretenses, the crime occurring is *theft by deception* not some other

form of theft. *E.g., State v. Gillespie*, 41 Wn.App. 640, 705 P.2d 808 (Div.1 1985).

When an auto dealer turns back the odometer of a vehicle or misrepresents the condition or history of a vehicle in order to defraud the customer who is induced to pay a higher price than the actual value of the car, the crime occurring is *theft by deception* not some other form of theft. *E.g., State v. Pestrin*, 43 Wn.App. 705, 719 P.2d 137 (Div. 3 1986); *State v. George*, 161 Wn.2d 203, 164 P.3d 506 (2007).

When a government employee deceptively transfers an account receivable not in the rightful possession of the employee for the benefit of the employee, the crime occurring is *theft by deception* not some other form of theft. *E.g., State v. Monk,* 42 Wn.App. 320, 711 P.2d 365 (Div.3 1985).

When a company employee uses false representations to obtain funds not in the employee's rightful possession at the time of acquisition for personal use, the crime occurring is *theft by deception* not some other form of theft. *E.g., State v. Johnson,* 56 Wn.2d 700, 355 P.2d 13 (1960).

B. Current Statutory Distinctions Between Theft by Embezzlement and Theft by Deception

Since adoption of the 1975 criminal code, there are essentially four distinct kinds of theft in Washington. *State v. Ager,* 128 Wn.2d 85, 91, 904 P.2d 715 (1995), citing *State v. Vargas,* 37 Wn.App. 780, 782, 683 P.2d 234 (Div. 1 1984). The two at issue on this appeal are embezzle-

ment, R.C.W. 9A.56.020(1)(a), and deception, R.C.W. 9A.56.020(1)(b).[1]

The historical distinctions between embezzlement and theft by deception have been maintained by the 1975 code and the different types of theft remain "analytically distinct." Fine and Ende, 13B Washington Practice, *Criminal Law 2d,* sec. 2606 at 129 (1998). *See e.g., State v. Ager, supra,* 128 Wn.2d at 91 ("Embezzlement is included within this state's general theft statute. RCW 9A.56" as is "theft by deception"). These two forms of theft – embezzlement and deception – constitute alternative means of committing the offense. *State v. Linehan,* 147 Wn.2d at 649.

1. Elements of Embezzlement. The Washington Supreme Court states that "embezzlement occurs where property that is lawfully in the taker's possession is fraudulently or unlawfully appropriated by the taker." *State v. Ager, supra,* 128 Wn.2d at 91.[2] The inherent aspect of fraud in the crime of embezzlement is emphasized by our Supreme Court in *Ager* when it declares that the "mental state required for embezzlement is an intent to *fraudulently* convert."[3] Further, the Court underscored that unlike other forms of theft, "embezzlement involves a violation of trust." *State v. Ager*, 128 Wn.2d at 91. These principles are fully consistent with the

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1 The other two forms of theft are theft by misappropriation, R.C.W. 9A.56.020(1)(c), and theft by taking, R.C.W. 9A.56.020(1)(a). Technically, theft by taking and theft by embezzlement *together* constitute one alternative means of theft according to *State v. Linehan,* 147 Wn.2d 638, 649, 56 P.3d 542 (2002). It is nevertheless correct to refer to embezzlement as an alternative means vis a vis theft by deception under the facts here.

2 Citing 2 LaFave and Scott, *Substantive Criminal Law,* sec. 8.6(a) at 368-69(1986) and *State v. Gillespie,* 41 Wn. App. 640, 643, 705 P.2d 808 (Div.1 1985).

3 Citing 2 LaFave and Scott, *Substantive Criminal Law,* sec. 8.6(f)(1) at 379.

historical understanding of embezzlement in Washington. *See State v. Larson, supra,* 123 Wash. at 28, and *State v. Joy,* 121 Wn.2d 333, 339, 851 P.2d 654 (1993)("The 'exerts unauthorized control' alternative [in R.C.W. 9A.56.020(1)(a)] includes what was embezzlement under prior law," citing *State v. Dorman,* 30 Wn.App. 351, 354, 633 P.2d 1340 (Div. 1 1981)).[4]

The current statutory elements track the Supreme Court's analysis. *See* R.C.W. 9A.56.030(1)(a); 9A56.020(1)(a); 9A.56.010(22)(b); WPIC 70.02(1)(a), (2), (3), (4); 79.01 [first para.]; 79.02 [second para.].

2. Elements of Deception. This Court has determined that the elements of theft by deception under the 1975 criminal code are not materially different from earlier incarnations of the offense under the label larceny by false pretenses. *State v. Casey,* 81 Wn.App. 524, 528, 915 P.2d 587 (Div.1 1996). The Court stated in *Casey*:

> "The evolution of the crime of larceny by false pretenses into theft by deception *did not change its essential elements.* First, the terms 'theft' and 'larceny' are legally equivalent. Second, the Legislature chose to preserve the operative language 'by color or aid of.' Finally, substitution of the term 'deception' for 'false pretenses' merely indicates an intent to broaden the scope of the statute to include more kinds of devious behavior."

81 Wn.App. at 528 (notes omitted; emphasis added).

Thus the statutory elements of the offense of theft by deception remain

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4 Quoting what is now R.C.W. 9A.56.010(22) [the definition of embezzlement] as well as 9A.56.020(1)(a).

consistent with prior law: 1) criminal intent to deprive another of property[5] 2) by color or aid of deception[6] 3) obtain control over property of another[7] 4) partially or fully by an action relied on by the owner of property independent of any other form of theft[8] 5) of a certain value.[9]

The issue in *Casey* was whether the element of *reliance* which was required to be proved in larceny by false pretenses was also necessary to prove in order to establish theft by deception. The *Casey* Court noted that under the new code "the statutory definition of theft by deception does not explicitly require reliance." 81 Wn.App. at 527-28. The state argued that "the Legislature removed the element of reliance when it enacted the new theft statute." *Id.* This Court in *Casey* disagreed and held that reliance is an essential element under the 1975 iteration of the offense.

Thus, whenever the property (or service) at issue was previously obtained and in the rightful possession of the actor, the owner of the property could not, as a matter of law, have relied on any subsequent false representations to part with such property. *E.g., State v. Sloan,* 79 Wn. App. 553, 557, 903 P.2d 522 (Div.3 1995)("There could be no theft by deception ... because the services had already been procured."). Similarly,

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5 R.C.W. 9A.56.020(1)(b); WPIC 70.02(3); WPIC 79.01 (2d para.).

6 R.C.W. 9A.56.020(1)(b); R.C.W. 9A.56.010(4) and (5); WPIC 70.02(1)(B); WPIC 79.01 (2d para.).

7 R.C.W. 9A.56.020(1)(b); WPIC 70.02(1)(b); WPIC 79.01 (2d para.).

8 R.C.W. 9A.56.010(4); WPIC 79.03; *State v. Casey, supra,* 81 Wn.App. at 527-29.

9 For first degree theft, the value must exceed $5,000. R.C.W. 9A.56.030(1)(a); WPIC 70.02(2).

when a property owner is legally incapable of relying on a false representation, as when incompetent, theft by deception does not lie. *E.g., State v. Dash,* 163 Wn.App. 63, 71 n. 2, 259 P.3d 319 (Div.1 2011).

II. A PERSON CHARGED WITH THEFT ALLEGED TO HAVE BEEN COMMITTED BY ONE ALTERNATIVE MEANS CANNOT BE CONVICTED ON EVIDENCE ESTABLISHING A DIFFERENT UNCHARGED MEANS

It has long been settled 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 means of theft. This legal maxim applies explicitly to the crimes of theft by embezzlement and theft by deception and is particularly true where the charge pertains only to the means for which there is no sufficient independent evidence.

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)(emphasis added).

The Washington decisions follow this rule as recognized by 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).[10]

A. Charging Both Embezzlement and Deception Together

Because of the tendencies of prosecutors to want to cast as wide a net as possible by charging multiple means of committing theft, the Washington Pattern Jury Committee has cautioned trial judges to insist on sufficient evidence on *each means alleged* before allowing a jury to consider a particular means merely because a prosecutor has charged it.

> "The instruction [WPIC 70.02 – elements of theft] is drafted for cases in which the jury needs to be instructed using two or more of the alternatives for element (1). *Care must be taken to limit the alternatives* to those that were included in the charging document *and are supported by sufficient evidence."*

WPIC 70.02, Note on Use at 4, 11A Washington Supreme Court Committee on Jury Instructions (2011 pocket part, 2008 main volume)(emph.ad.).

A decision by this Court proves the rule. In *State v. Southard,* 49 Wn. App. 59, 741 P.2d 89 (Div.1 1987), a case in which the state charged both the embezzlement and deception means of theft, this Court was careful to point out there was a separate, independent basis to charge the deception prong and a separate, independent basis to charge the embezzlement prong.[11]

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10 Citing *State v. Smith,* 2 Wn.2d 118, 98 P.2d 647 (1939); *State v. Olds,* 39 Wn.2d 258, 235 P.2d 165 (1951).

11 Judge Bowden correctly analyzed *Southard* – he erred simply in failing to take the analysis to its logical conclusion: "I think that's where the *Southard* case is significant because the deception there is *incidental to the initial acquisition of the money from the bank* in Europe. And here I don't see, unless you can point to some indication that there was some deception or act committed by the defendant *in the initial acquisition of the of the funds.* And/or if there's some case law that says that it's sufficient that the act of deception, contrary to the statutory language, can occur sometime later in terms of a coverup or things like that ... [w[hich we often see in embezzlement cases. ...

"But it's separate acts, it seems to me, in *Southard* where there's conduct that shows acts or deception in the

First, the defendant in *Southard* obtained the face amount of traveler's checks under false pretenses by representing to the issuing bank that the checks had been lost when in fact they had not and remained in the defendant's possession. 49 Wn.App. at 60. This said the Court of Appeals satisfied the theft by deception prong. 49 Wn.App. at 64.

Second, when the defendant later negotiated the non-stolen checks – which contractually he was obligated to hold in trust for the issuing bank – he wrongly converted to his own use the bank's money. 49 Wn.App. at 60, 63. This said the Court of Appeals satisfied the theft by embezzlement prong. *Id.*

The Court of Appeals clearly held in *Southard* that the state could proceed to trial on two different theories of theft (deception and embezzlement) *only* because independent evidence supported each prong. Had there not been such independent evidence, the result would have been reversible error. *See State v. Joy; State v. Gillespie; State v. Dash; State v. Smith, supra.*

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acquisition of the funds or replacement traveler checks by the bank in Europe, then there is a separate conversion of property to which the defendant had no right to use those funds here in Washington. ... I read *Southard* as to say those facts support either or both charges, but not ... *they're not overlapping one[s],* and it's your choice as to which you file. You can charge theft by deception for the conduct in Europe or theft through embezzlement of funds that he ... had no right to possess when he converted the check here. And that's the part where I'm hung up.

"*It looks to me as though the defendant here acquired funds in the normal course of his authority.* Even if it was beyond what the homeowners association would have authorized or had authorized. He makes use of those funds, *and all of the deception that occurs later is an effort to cover up what he's been doing with those funds.* But ... the acquisition and *conversion* of those funds, it seems to me, *occurs independent of the deception.* So it's kind of like where's the deception come in?

"It comes in in an *attempt to cover up what he's done* but it *doesn't* seem to come in at a point that *helps him to acquire the funds* which is – and that's significantly different than *Southard.*"

VRP 4/24/15 at 12-14 (emphasis added).

In *State v. Joy* the defendant was charged with "six counts of theft, alternatively charged as theft by color or aid of deception and theft by exertion of unauthorized control over (embezzlement of) funds paid him by homeowners for contracting work." 121 Wn.2d at 335. The Supreme Court analyzed the sufficiency of evidence claims for a number of counts of theft by embezzlement. The Court observed that "Under the present theft statutes, the State must prove that defendant's activity falls within the definition of 'exerts unauthorized control' in R.C.W.9A.56.010(7) [now (22)]." 121 Wn.2d at 340. The Court of Appeals had determined "the evidence was insufficient to establish that defendant appropriated the property of another and therefore his convictions on an embezzlement theory could not be upheld." 121 Wn.2d at 335. On two of the counts, the Supreme Court agreed the evidence was insufficient. 121 Wn.2d at 342-43. The Court cited and quoted with approval this Court's opinion in *State v. Gillespie. Joy* stands for the proposition that when the State fails to prove that the evidence is sufficient to establish a particular type of theft, the trial judge must decline to instruct the jury on that type – in effect dismissing the charge. *Compare* Note on Use, WPIC 70.02, *supra.*

State v. Gillespie makes the trial court's duty explicit in this regard: where the evidence on a theft prong submitted by the State is insufficient to establish a prima facie case, the judge *must* dismiss that prong. "The issue on appeal" in *Gillespie* was "whether the trial court erred in submitting to the jury the alternative theory of theft by embezzlement." 41

Wn.App. at 643. In other words, *Gillespie* presented the obverse of Mr. McKinnon's case – he did not challenge the sufficiency of the theft by deception charge but "[a]t the close of the evidence Gillespie moved to have the alternative embezzlement theory stricken." 41 Wn.App. at 642. The trial judge declined and this Court reversed. "The trial court erred in giving instruction 5 and in submitting the alternative theft-by-embezzlement theory to the jury." 41 Wn.App. at 645.

In *State v. Dash* the State sought to sustain a verdict where theft was charged on both embezzlement and deception means. The State asserted that sufficient evidence had been presented on both means even though the evidence showed the property owner was incompetent at the relevant time. This Court refused to accept the State's assertion because given the "alleged incompetence at that time, the property taken at that time *would not have been taken by deception but, rather, by exerting unauthorized control"* – that is, the dispositive proof showed only *embezzlement* and not deception. 163 Wn.App. at 71, n. 2 (emph.ad.).

State v. Smith is the seminal Washington case barring the State from charging one means of theft and then relying on evidence of another means to sustain a conviction. *Smith* is discussed next.

B. Charging Only Deception When Evidence Shows Only Embezzlement

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[12] 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 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. "He admitted the facts just related." 2 Wn.2d at 119-120.

As in Mr. McKinnon's case, the state 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:

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12 *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. *See generally* Part I, *supra.*

"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 Supreme Court concluded:

"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."

State v. Smith, 2 Wn.2d at 123, 125 (emph. ad.; second quote, cit. omit.).

Two decades later, the Washington Supreme Court had an opportunity to revisit *Smith* this time in the specific context of a charge of theft by deception vis a vis an uncharged offense of embezzlement. *State v. Johnson*, 56 Wn.2d 700, 355 P.2d 13 (1960). 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 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.*

Applying this teaching to the case before the Court, it is clear that Mr. McKinnon's conduct falls squarely within the parameters of *Smith* and not *Johnson.* Every single exertion of unauthorized control over the homeowners' funds occurred while the funds were in the rightful possession of Mr. McKinnon.[13] At no time did Mr. McKinnon obtain homeowners'

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13 "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 at 2.6(c), CP 399-400.

funds by deception which were not already in his rightful possession as their accountant. *State v. Smith, supra* at 120 (Court agrees "the violation of the possession of those funds, as charged in the information could not have occurred.").

The rule of *State v. Sloan* also applies. Where the actor has previously and rightfully obtained possession of the property at issue, it cannot, as a matter law, thereafter be wrongly *reacquired* by deception.

> "Because the repossession services had been procured before the deception and could not, therefore, have been the result of deception, we hold that the information did not charge the elements of the crime of theft by deception."

State v. Sloan, 79 Wn.App. at 555.

Analogous federal authority is in agreement. *United States v. Beard,* 713 F.Supp. 285 (S.D.Ind.1989). In *Beard*, the government attempted to charge under two separate sections of the federal embezzlement statute, 18 U.S.C. sec. 641. The first paragraph of the statute prohibits embezzlement and is analogous to Washington's theft by embezzlement statute. The second paragraph criminalizes the knowing retention of embezzled property with the intention to convert it to personal use. Beard objected to the indictment on the ground that it was logically impossible for him to embezzle property (para. 1) and then retain the embezzled property with the intent to convert it to personal use (para. 2). The court agreed.

> "Thus, it is logically impossible for the indictment to charge that Mr. Beard retained that same property with the requisite intent to convert it *again.* ... once a conversion occurs it is complete ...
>
> The two crimes are mutually exclusive: under paragraph one the

> defendant has already performed the conversion; under paragraph two, the conversion is to occur in the future."

United States v. Beard, 713 F.Supp. at 289 (court's emphasis).

The State's theory in Mr. McKinnon's case is just as misguided as that in *Beard.* The State made the logically impossible argument that even though the evidence was undisputed that *all* unauthorized withdrawals were made from funds rightfully in Mr. McKinnon's possession, he nevertheless somehow *re-obtained* the identical funds by after-the-fact deception. *Compare* this Court's rejection of the State's logically impossible argument in *State v. Dash* that an incompetent person could nevertheless rely on a defendant's misrepresentations so as to support a charge of theft by deception when the only proved crime was embezzlement.

The State's position below is directly refuted by the teaching of *Smith* and *Johnson* as a matter of law. The logically impossible argument that a person may obtain by a different form of theft what has already been wrongly converted from rightful possession is directly refuted by *Sloan, Dash* and *Beard.* Under the facts here embezzlement and deception are mutually exclusive.[14] The State could have charged embezzlement but didn't and did charge deception but shouldn't have. The conviction cannot stand. *Smith.*

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14 Washington courts have long recognized the doctrine of mutual repugnance in the theft context. *See, e.g., State v. Smith, supra; State v. Harrison,* 6 Wn.2d 625, 627-28, 108 P.2d 327 (1940); *State v. Moreau,* 35 Wn. App. 688, 693, 669 P.2d 483 (Div.3 1983).

III. AFTER-THE-FACT CONCEALMENT OF EMBEZZLEMENT MAY NOT BE USED TO CONVICT ON THEFT BY DECEPTION; THE CRIME OF EMBEZZLEMENT IS COMPLETE UPON CONVERSION AND CONCEALMENT IS A MERE INCIDENT OF THAT OFFENSE

The State argued below that since there was a series of embezzlements over a period time, had the homeowners known of Mr. McKinnon's unauthorized conduct, they "might" have taken action earlier to prevent such conduct. *E.g.,* VRP 4/24/15 at 16 (Homeowners "might have been more likely to discover the taking earlier had they been provided an accurate spreadsheet ... .").

First, this argument is based on speculation. The most that can be said on this point is the self-serving "belief" of one homeowner four years after the fact that the MCHOA "would have taken adverse action toward Mr. McKinnon's status as accountant."[15] CP 399-400; Stipulation 2.6(b).

Second, and more important, whether or not the homeowners would have taken adverse action is irrelevant to the legal question of the nature of the offense – each unauthorized exertion of control over the homeowners' property entrusted to Mr. McKinnon constituted the crime of embezzlement at the moment of conversion. Nothing that he did, or did not do, after the conversion could alter the fixed character of the offense. *See* Judge Bowden's analysis at note 11 *supra.*

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15 The homeowner, Roy Teeters, did not provide a sworn statement to the trial court. His ex parte oral statement to the prosecutor was summarized by the prosecutor in the best light to the State and presented to the trial court following the *Knapstad* judge's "suggestion" in the Stipulation for Bench Trial on Agreed Documentary Evidence (2.6(b)). The prosecutor declined to sign the Stipulation. *See* CR2A. The trial judge misspoke in stating that both counsel had signed the Stipulation. VRP 7/8/15 at 3.

Third, the argument could be made in *any* case of embezzlement involving more than one fraudulent conversion. If this argument were law, *any* such case of embezzlement where concealment could be shown would automatically morph into a theft by deception thereby obliterating the distinction between theft by embezzlement and theft by deception.

A. Upon Conversion, the Crime of Embezzlement is Complete.

It is black-letter law that once a conversion occurs, the crime of embezzlement is complete. *See e.g., State v. Dorman, supra,* 30 Wn.App. at 355 ("the offense is completed at the time of the conversion"), citing *State v. Larson, supra,* 123 Wash. at 34; *United States v. Beard, supra,* 713 F. Supp. at 289 ("once a conversion occurs [the crime of embezzlement] is complete"); 1 *Wharton's Criminal Law*, sec. 94 at 642 (15th ed.1993) ("the statutory period of limitation for embezzlement begins to run from the time of appropriation.").

The federal court in *Beard* explained that what happens *after* the conversion occurs is legally "irrelevant" to the definition of the crime:

> "What the converter intends to do (or in fact does) with the converted property is irrelevant: the act of 'conversion' is completed upon the initial interference with the owner's interest."

United States v. Beard, 713 F.Supp. at 291.

This Court took a similar position in *Dorman* when it cited *Larson* for the proposition that "the fact that an embezzler offers to return, or does return, what he has fraudulently converted, does not bar prosecution because the offense is completed at the time of the conversion." 30 Wn.

App. at 355. But this is a two-way street. Just as Mr. McKinnon would be denied a defense to embezzlement even though he had repaid in full and with interest the amount of his unauthorized withdrawals because the offense, if committed, was complete at the time of conversion, so too is the State barred the use of after-the-fact conduct to transmute the completed crime of embezzlement into some other form of theft.

B. After-the-Fact Concealment of Embezzlement is a Mere Incident.

The Washington decisions are replete with examples that after-the-fact concealment of fraudulent conversions is inherent in the crime of embezzlement beginning with the seminal case on point, *State v. Smith, supra.* The Supreme Court in *Smith* explicitly referred to the post-conversion conduct as a "cover up" designed to prevent discovery of each conversion as it occurred over time. 2 Wn.2d at 120. Each time Smith made unauthorized use of company funds to purchase stock from his accomplice, Ruark, in order "to cover up the transaction, Ruark issued his personal checks payable" to the company in the amount of each embezzlement. Smith then kept the phony checks "in the office cash box." The series of embezzlements transpired over a period of at least three years. *Id.*

In *State v. Moreau* the Court of Appeals considered a case of embezzlement against a company bookkeeper whose duties included "keep the books, make out the payroll, write checks, receive and deposit incoming payments from customers in the bank, also pay accounts ... ." She was also "a signatory to both of the company's bank accounts and wrote her own

paychecks as well as the rest of the payroll." 36 Wn.App. at 690.

Ms. Moreau was charged and convicted of embezzling company funds in the form of unauthorized loans to herself. In an effort to conceal her misconduct, she falsely recorded company checks she had issued to herself without authorization "as either voided or blank." *Id.* She also falsely endorsed customer checks and concealed her failure to deposit the checks in the company bank. 35 Wn.App. at 690-91.

This Court considered a similar scenario in *State v. Stock,* 44 Wn.App. 467, 722 P.2d 1330 (Div.1 1986). Ms. Stock was employed as a company bookkeeper who was charged and convicted of embezzling company funds over a four-year-period. 44 Wn.App. at 469. This Court stated "Stock altered the company books to conceal this unauthorized activity." *Id.* Quoting from the record, the *Stock* Court described the concealment:

> "Stock allegedly has written large amounts of checks to herself and *when the cancelled checks came back to the company she would destroy the checks to keep them from being noticed by* [her employer]."

State v. Stock, 44 Wn.App. at 470 (emph.ad.). Two forged checks, however, were returned to the company. *Id.*

Moreover, this Court in *Stock* presumed, as a matter of law, that since a company officer had full access to the company's own bank records and canceled checks and could easily retrieve and review such records and checks, any attempted concealment by an employee of the company during the course of embezzlement would not necessarily deny the company actual knowledge. *See State v. Stock*, 44 Wn.App. at 470 (the company

president "presumably would have the basis of knowledge to determine his name had been forged on the checks and had been deposited in Stock's account without authorization.").

There is no suggestion in these cases that after-the-fact concealment is anything other than a mere incident of the crime of embezzlement. There is no speculation that if only the company had knowledge of the true state of affairs, it would have terminated the employee and thus prevented any further embezzlements or that such speculation could form the basis of a completely different form of theft. There certainly is no suggestion that would justify transposing an inherent incident (concealment) of one form of theft, embezzlement, into the foundation for a different form of theft based on deception. There is no statutory "overlap."

Furthermore, the very definition of embezzlement includes the alternative of "secrete" as well as "appropriate" connoting affirmative conduct to conceal the misappropriation.[16] As noted by our Supreme Court, "Clearly, this makes **secretion** at least a *very important evidentiary fact tending to show* larceny by *embezzlement.*" *State v. Sterett,* 160 Wash. 439, 445, 295 Pac. 182 (1931)(emph.ad.). The *Sterett* Court made clear that post-conversion false representations to the wronged party are inherent in the crime of embezzlement as statutorily defined.

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16 R.C.W. 9A.56.010(22)(b) provides: "'Wrongfully ... exerts unauthorized control' means

Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, *to secrete*, withhold, *or appropriate* the same to his or her own use or to the use of any person other than the true owner or person entitled thereto ... ." (emph.ad.)

> "We are of the opinion that Sterett's false representations to the children [of the deceased property owner], lulling them into the belief that he did not hold any money coming into his hands ... was sufficient to warrant the jury in believing Sterett guilty of having feloniously appropriated the [wronged party's money] to his own use ... . it clearly was Sterett's legal as well as moral duty to refrain from making false statements to them, in effect secreting from them the fact that he had received the [wronged party's money]."

State v. Sterett, supra, 160 Wash. at 445-46.

In any event, such concealment does not constitute independent evidence of theft by deception which requires the use of deception to initially "obtain control" over property not already in the actor's custody or control. R.C.W. 9A.56.020(1)(b); R.C.W. 9A.56.010(5); *State v. Southard, supra.* While evidence of concealment after appropriation may be probative evidence of fraudulent intent to *convert*, it is not evidence of intent to wrongfully *obtain. Smith; Stock; Moreau; Sterett, supra.*

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE *KNAPSTAD* MOTION BY ERRONEOUSLY CONFLATING THE EVIDENCE REQUIRED TO PROVE THEFT BY EMBEZZLEMENT WITH THEFT BY DECEPTION

When, on agreed facts, the trial court erroneously denies a *Knapstad* motion on the ground the state may prosecute on a legally inapplicable subsection of a statute it commits an error of law which may be reviewed on appeal. *State v. Bauer,* 180 Wn.2d 929, 934, 329 P.3d 67 (2014); *State v. Knapstad,* 107 Wn.2d 346, 729 P.2d 48 (1986).[17] Alternatively,

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17 While CrR 8.3(c)(3) purports to bar appeals from adverse trial court *Knapstad* rulings, that rule must be considered in light of the recent Supreme Court decision in *Bauer.* In the narrow circumstances involved in that case and this – the purely legal question of the applicability of a specific subsection of a criminal statute where the facts are undisputed – *Bauer* trumps the literal application of the rule.

review is proper where the erroneous *Knapstad* decision substantially informs the reasoning of the trial judge in reaching a verdict. RAP 1.2(a).[18] *Filo Foods, LLC v. City of SeaTac,* 183 Wn.2d 770, 792 (2015)(appellate court has inherent authority to consider issues necessary to reach a proper decision). The remedy on appeal is dismissal with prejudice. *State v. Bauer, supra.*[19]

The State used the *Knapstad* hearing to present an untenable misreading of the theft statutes to the superior court unsupported by the relevant statutes, case law or commentary. VRP 4/24/15 at 13-17. In essence, the State argued that the crime of theft is a shape-shifting offense capable of transmuting from embezzlement into theft by deception based on the identical evidence. The State went so far as to argue that the "fact that some of the defendant's conduct in this case may very well fall under the definition of embezzlement is *irrelevant.*" CP 425-35 (emph.ad.). Accordingly, the State asked the superior court to obliterate the historical, legislative and decisional distinctions between the alternative means of theft by embezzlement and theft by deception:

> "You can have an act or series of acts or an entire transaction *constitute both theft by deception and theft by embezzlement.*"

VRP 4/24/15 at 13 (emph.ad.)

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18 *See, e.g., State v. Blazina,* 182 Wn.2d 827, 841, 344 P.3d 680 (2015)("I would hold that this error can be reached by applying RAP 1.2(a), which states that the 'rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits.'" (Fairhurst, J., concurring).

19 While CrR 8.3(c)(4) purports to limit the *superior court* to dismiss only "without prejudice," there is no such limitation on an *appellate court. See State v. Bauer, supra,* 180 Wn.2d at 932, 946 (granting dismissal with prejudice as a matter of law under *Knapstad* reversing contrary superior and appellate court decisions).

The superior court obliged the State, first by the *Knapstad* judge and later by the trial judge.

The State conceded that under the facts presented, that at all times and on all misappropriations, Mr. McKinnon had rightful possession of the homeowners dues and further conceded under those same facts "that if we were talking about one transaction, *one embezzlement* followed by a bunch of efforts to cover it up after the fact with no other funds being taken, *that that would not be theft by deception.*" VRP at 14-15 (emph.ad.) However, the State then leaped to the illogical conclusion that if there were additional embezzlements accompanied by after-the-fact concealment, these embezzlements would *presto chango* be "transformed" into thefts by deception – despite the critical fact that all funds in those thefts had already been embezzled at *the moment* of conversion.

> "*At the moment* that those false ledgers are being provided, that is then *transforming* the takings that are occurring after the very first taking to *thefts by deception* because, at that point, they [MCHOA] are relying on false information in a way that renders them more vulnerable to the continued takings ... ." VRP at 16-17 (emph.ad.).
>
> ... "by continuing to take the funds and providing those false ledgers, that is then *transforming* those later acts into thefts by deception."

VRP at 15 (emph.ad.).

Putting to one side the fatal concession that the State convicted Mr. McKinnon on a crime neither charged nor within the applicable statute of limitations (the first ["one embezzlement"] occurring on December 31,

2006),[20] it is patently clear that the State misunderstood and mischaracterized the nature of the two means of theft at issue. It is *embezzlement* that occurs **at the moment** of conversion – theft by deception does *not* occur at "the moment that those false ledgers are being provided;" it can only occur if, and at the time, the owner of the property *relies* on the false ledgers to part with money which has not already been placed in the hands of, and converted by, the embezzler.

Fundamentally, however, it is reversible error for the superior court to accept the misbegotten notion that once a means of theft is established by the evidence as embezzlement it can be "transformed" at the whim of a prosecutor (who has neglected to charge the correct offense) into another form of theft based on the very same evidence.

A. Knapstad Procedural Error. The agreed evidence presented at the *Knapstad* hearing did not contain any facts supporting the idea that any of the officers of the homeowners association at any time relied on false accounting records in order to continue to allow Mr. McKinnon to collect their dues and pay their bills. Thus there were no facts presented that the association would have taken adverse action against Mr. McKinnon had there been accurate accounting.

Accordingly, the elements of theft by deception could not in any event

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20 Judge Bowden recognized that under no circumstances could the State proceed on a theft by deception theory on the first conversion "since those funds were misappropriated prior to any deceptive acts by defendant. ... This case can *only* proceed to trial upon the state's theory that he acquired his employer's funds, other than the initial misappropriation(s), by color or aid of deception." Letter opinion on motion for reconsideration dated May 5, 2015 at 1, CP 403 (Court's emphasis).

be established and the proper course for the *Knapstad* judge would be to dismiss the charge without prejudice and allow the prosecutor an opportunity to obtain the necessary evidence, and, if available, to refile the charge. CrR 8.3(c)(4). Instead, the *Knapstad* judge engaged in sheer speculation as to what *additional, new evidence* the State might be able to gather before trial. *See* Letter Opinion, April 30, 2015, CP 418-20 ("That would seem to include an *assumption* that appropriate agents from the homeowners association will testify that Mr. McKinnon would not have been given continuing access to their funds had he not presented them with falsified records," emph.ad.); Letter Opinion, May 5, 2015, CP 403-04 ("the evidence at trial *may establish* that the homeowner's [sic] association ... relied upon the misrepresentations by Mr. McKinnon as to the disposition of the association's funds, books and accounts of the organization, and without such deception it would not have permitted him to have access to such funds," Court's emphasis).

This kind of judicial speculation defeats the purpose of the *Knapstad* procedure. It is not the function of the trial court to fill in the gaps of the state's case by assumption and speculation where there is a lack of evidence. Rather, it is the court's duty to dismiss the charge without prejudice and allow the state to attempt to do its own job by obtaining sufficient evidence to prosecute under its theory if possible. On this basis, the trial court committed prejudicial error.

B. *Knapstad Substantive Error.* Ironically, Judge Bowden accurately

identified the appropriate legal standard to be applied in the specific theft context of the *Knapstad* motion before him. Unfortunately, the judge erred in failing to apply the standard to the facts as required by *Knapstad*.[21]

> "In the context of this case, it would be a defense if the jury finds that Mr. McKinnon was given by the homeowner's [sic] association the lawful custody and control over all of the funds that were misappropriated and that such acquisition was not obtained as a result of falsification of the association's records of accounts."

Letter Opinion, May 5, 2015 at 2, CP 404.

This is precisely the standard Mr. McKinnon urged be applied at the *Knapstad* hearing. He argued that the agreed evidence demonstrated unequivocally that the MCHOA provided Mr. McKinnon "the lawful custody and control over all of the funds that were misappropriated" and that none of the funds were "obtained as a result of falsification of the association's records of accounts." The court committed reversible error.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN MAKING A FINDING OF GUILTY BY ERRONEOUSLY CONFLATING THE EVIDENCE REQUIRED TO PROVE EMBEZZLEMENT AND DECEPTION, AND THUS ENTERING A VERDICT BASED ON INSUFFICIENT EVIDENCE

Appellant incorporates by reference as though fully set forth herein the arguments and authorities in Parts I - III, *supra.* Because both parties asked the trial judge to "look at the *Knapstad* and the briefing on that," and because Judge Dingledy "did look at the *Knapstad* motion and the

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21 It is important to note that even if a *Knapstad* court were permitted to make the kinds of speculations and assumptions the court made here, the court still was obligated to apply the law as it is, not as the State imagined it to be. In other words, the unchallenged evidence that Mr. McKinnon had rightful possession of of the homeowners' funds at all relevant times, thus establishing only theft by embezzlement, would trump any theory of theft by deception even if the court's assumptions were facts.

decision by Judge Bowden," VRP 7/8/15 at 3, in reaching her decision, Appellant also incorporates by reference as though fully set forth herein the arguments and authorities in Part IV, *supra.*

In *State v. Green,* 94 Wn.2d 216, 221, 616 P.2d 628 (1980), our Supreme Court adopted the federal standard for reviewing the sufficiency of evidence to sustain a verdict, "whether the record evidence could reasonably support *a finding of guilt beyond a reasonable doubt,*" quoting with approval, *Jackson v. Virginia,* 443 U.S. 307, 318 (1979)(Court's emph.). The test asks, "whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.*" *State v. Green* at 221, quoting *Jackson v. Virginia* at 319 (Court's emph.).

Under the state constitution, Art. I, sec. 3, our Court has subsequently gone further than the federal constitution in the strictness of the sufficiency review:

> "The Washington Constitution provides greater protection of the jury trial right, [[22]] requiring reversal if it is impossible *to rule out the possibility* the jury relied on a charge unsupported by sufficient evidence."

State v. Wright, 165 Wn.2d 783, 803, n.12, 203 P.2d 1027 (2009)(Court's emph.), citing *State v. Joy, supra,* with approval.

Thus, when the reviewing court cannot rule out the "possibility" that the trier of fact relied on evidence that *could not as a matter of law* estab-

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22 *Compare Griffin v. United States,* 502 U.S. 46 (1991)(Due process under the Fifth Amendment does *not* require sufficient evidence on each theory of offense to sustain verdict on alternative means).

lish proof beyond a reasonable doubt of the charged offense by the means alleged, such trier of fact is no longer acting in the rational manner required by *Green* and *Jackson v. Virginia. See, e.g., State v. Joy, supra,* 121 Wn.2d at 346 (reversing and dismissing where the evidence did not establish proof beyond a reasonable doubt of the theft means charged); *State v. Gillespie, supra,* 41 Wn.App. at 645-46 (same); *State v. Hundley,* 126 Wn.2d 418, 422, 895 P.2d 403 (1995)(reversing and dismissing; "No reasonable trier of fact could reach subjective certitude on the fact at issue here.").

Here, the trial judge erred in conflating the essential elements of theft by embezzlement with those of theft by deception in at least three respects.

First, the judge wholly ignored the stipulated facts, including 2.6(c), that showed Mr. McKinnon had rightful possession of all of the funds during all of the unauthorized withdrawals establishing that if a crime occurred, the crime was embezzlement not theft *by* deception.

Second, the judge failed to identify any funds initially obtained by deception. The judge found that deception was used in "hiding of the assets." VRP 7/8/15 at 4-5. But after-the-fact concealment does not establish that deception was used to *obtain* funds not already in rightful possession. It is this latter element – wholly lacking in the proof and the court's finding – that is essential for a conviction of theft by deception.

Third, and most critically, the trial judge erroneously thought, despite the dispositive facts just recited, that the means of embezzlement and

deception were not "mutually exclusive" in this case:[23]

"I think there is some overlap." VRP at 4.

To say that there is "overlap" between the essential elements of embezzlement and deception is to obliterate the distinctions drawn in the statutes and confirmed in the case law. *Compare* this Court's analysis in *Southard* (and *see* note 11 *supra* emphatically rejecting "overlap" theory) and the Supreme Court's analysis in *Smith* and *Johnson.* This Court cannot rule out the "possibility" that the trial judge erroneously convicted on evidence that could not as a matter of law establish proof beyond a reasonable doubt of the charged offense by the means alleged. Where – as in this case – the state relies, and the trier of fact convicts, on the *identical evidence* which proves a different means, such "possibility" has been conclusively established. Reversal and dismissal is mandated.[24]

VI. THE STATE MAY NOT CIRCUMVENT THE THREE-YEAR STATUTE OF LIMITATIONS APPLICABLE TO EMBEZZLEMENT BY CHARGING THEFT BY DECEPTION IN ORDER TO INVOKE THE SIX-YEAR STATUTE OF LIMITATIONS

Where the facts before the trial court indisputably show "expiration" of the applicable statute of limitations, the court is bound to dismiss the

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23 The trial judge's erroneous understanding of the significance of concealment in this case is revealed by the court's reasoning: "They [the homeowners] had been led to believe that those funds were securely invested; in fact, they were not. They were not available had some sort of situation come up and the board needed those funds; *so I do think that that is the deception."* VRP at 4-5. Contrary to the trial judge's conclusion, the conduct highlighted had *nothing* to do with wrongfully *obtaining* the funds in the first place since they were already in Mr. McKinnon's rightful possession. The conduct had only to do with after-the-fact concealment – relevant to embezzlement, not relevant to theft by deception. *See Part II B., supra.*

24 When the trier of fact relies only on "a legally invalid alternative," a defendant is "entitled to an outright acquittal." *State v. Wright, supra.* As previously noted, the State argued to the contrary that it was "irrelevant" if the evidence established the legally invalid alternative (embezzlement). CP 425-35.

charge with prejudice and is "without authority to enter judgment." *State v. Peltier,* 181 Wn.2d 290, 297, 332 P.3d 457 (2014). When the trial court nevertheless enters judgment and sentence it has "exceeded its authority" and the result constitutes "a complete miscarriage of justice." *In re Stoudmire,* 141 Wn.2d 342, 355, 5 P.3d 1240 (2000).

According to the Information in this case, the last prosecutable event of embezzlement – the final unauthorized exertion of control over the homeowners funds – was alleged to have occurred on September 9, 2011. *See Wharton's Criminal Law, supra* ("the statutory period of limitation for embezzlement begins to run from the time of appropriation."). The statute of limitations for embezzlement under R.C.W. 9A.04.080(1)(h) is *three years.* Hence, the limitations period "expired" on September 9, 2014.

Despite having a direct referral of the case as early as March 28, 2014, CP 451-53, the Snohomish County Prosecutor allowed the applicable three year time bar to expire and did not file a charge until January 23, 2015, CP 454-55, more than four months after the expiration. When the Information was finally filed, the Prosecutor charged only theft by deception thereby invoking a different statute of limitations, the six-year time bar in R.C.W. 9A.04.080(1)(d)(iv).

Because all of the alleged unlawful acts, if properly and timely charged, were embezzlements as a matter of fact and law, *see State v. Smith, supra,* Appellant moved in the trial court to bar entry of judgment on the ground that the charge was time-barred under R.C.W. 9A.04.080(1)(h), citing

State v. Peltier and *In re Stoudmire, supra.* CP 23-29. The court denied the motion without giving any reason. CP 22.

The State protested that it did not belatedly file the charge of theft by deception so as to evade the three-year statute of limitations, VRP 4/24/15 at 19 ("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."). Actually, it is what it is. And what it is is a transparent attempt at manipulating the theft statutes to take advantage of a defendant in an effort to escape its own mismanagement of the case.

The trial judge erred in failing to arrest judgment and to dismiss with prejudice where the applicable statute of limitations had expired according to the face of the Information and Affidavit of Probable Cause. *In re Stoudmire; State v. Peltier; State v. Novotny,* 76 Wn.App. 343, 884 P.2d 1336 (Div.1 1994). The Court reviews this issue de novo where, as here, the facts are undisputed. *State v. Dash, supra,* 163 Wn.App. at 69.

CONCLUSION

A theft by deception occurred in this case but it was not committed by Appellant Michael C. McKinnon. It was committed by his former employer, a homeowners association, who falsely represented to Mr. McKinnon through its attorney that a large sum of money was required to pay for an independent audit of his accounting services more than two years after those services ended. In reliance on this misrepresentation, Mr. McKinnon paid his former employer the sum of $ 3,000. The employer, how-

ever, neither contracted for, nor performed, an independent audit. Nor did it return the $ 3,000 to Mr. McKinnon.

Appellant, on the other hand, has freely admitted his misconduct in making unauthorized withdrawals of the homeowners' funds entrusted to him. He admitted his misconduct directly to the homeowners before any discovery was made of his actions. He admitted his misconduct to the police. He admitted his misconduct to the trial court. And he now admits his misconduct to this Court.

Mr. McKinnon also tried to make amends by paying back in full the amounts of his unauthorized withdrawals with above-market interest to his employer before his employment terminated.

The Snohomish County Prosecutor was timely apprised by the homeowners and the police of Mr. McKinnon's misconduct who requested that he be charged with the applicable crime, embezzlement. But the Snohomish County Prosecutor delayed and elected to file a charge for a different form of theft (by deception), a crime that Mr. McKinnon did not commit, in order to evade the applicable statute of limitations. At the time the Prosecutor filed the wrong charge, the statute of limitations had long since expired and the charge of embezzlement was time-barred.

Mr. McKinnon timely moved to dismiss the unfounded charge of theft by deception by a *Knapstad* motion and at trial. The superior court judges erroneously conflated the elements of embezzlement with the elements of deception and erred as a matter of law in denying the *Knapstad* motion and

denying the motions for acquittal and for arrest of judgment. In so doing, they effectively obliterated the distinctions between theft by embezzlement and theft by deception.

No rational trier of fact can convict for the wrong crime as a matter of law. No rational trier of fact can convict based on insufficient proof for the crime charged as a matter of law. It is the epitome of an irrational trier of fact to convict on evidence showing only the commission of an un-charged crime and to decline to acquit where the evidence is insufficient to convict on the charged crime.

The Snohomish County Superior Court committed reversible error in failing to dismiss with prejudice the charge of, and/or acquit on, first degree theft by deception.

DATED THIS DAY 23rd OF December, 2015.

TOM P. CONOM WSBA# 5581
Attorney for Appellant
Michael C. McKinnon

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON, Respondent, v. MICHAEL C. McKINNON, Appellant.	No. 74008-3-I AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
ss.
COUNTY OF SNOHOMISH)

The undersigned states that on the 23rd day of December, 2015 he deposited in the mails of the United States of America a properly stamped envelope directed to: Seth A. Fine, Snohomish County Deputy Prosecutor, Mission Building, M/S 504, 3000 Rockefeller Avenue, Everett, Washington 98201, containing a copy of: 1. Brief of Appellant, 2. Verbatim Report of Proceedings (April 24, 2015), 3. Verbatim Report of Proceedings (July 8, 2015).

I certify under penalty of perjury under the laws of the State of Washington that the above is true and correct.

DATED THIS 23rd day of December, 2015 at Edmonds, Washington.

Tom P. Conom #5581

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