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NO. 74008-3-I

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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

MICHAEL C. MCKINNON,

Appellant

BRIEF OF RESPONDENT

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2. Did sufficient evidence support the defendant's conviction for First Degree Theft by Color or Aid of Deception?

3. Was the charge of First Degree Theft by Color or Aid of Deception filed within the six year statute of limitations?

II. STATEMENT OF THE CASE

A. THE CRIME.

The defendant, Michael McKinnon, was a certified public accountant until 1975 when the Washington State Board of Accountancy ("WSBA") revoked his license. CP 37-38. In 2006 and again in 2008, the defendant applied for a business license with the City of Lynnwood. The license allowed him to do business as "Mr. Taxman," and described his business as "bookkeeping" or "accounting and taxes." CP 38.

According to the defendant, his accounting business income decreased significantly over a period of years while he served as Mayor of the City of Lynnwood. CP 92-93. The sharp decrease in his income had become so dire in 2006 that by 2007 he began "borrowing some money just for cash flow." CP 93.

The Maplevine Condominiums Home Owners Association ("MCHOA") hired the defendant as their accountant in 2006, and he served in that capacity continuously through late 2011. CP 36. As bookkeeper he was allowed to receive monthly homeowners' dues and to pay MCHOA's bills, which included his ability to pay himself for his own fees. However, he did not have permission or authority to use the MCHOA funds for his own personal use, to write himself checks for any purpose other than his own fees, or to invest MCHOA funds anywhere he wanted. CP 51-52.

In May or June, 2011, MCHOA decided to replace the defendant's accounting services by hiring a property management company. The MCHOA president, Janet Robinson, called the defendant to inform him that they were terminating their business relationship effective August 1, 2011. CP 53. As the August date approached the management company told MCHOA that the defendant was not turning over the accounting books as requested, so Janet Robinson emailed him about the issue. The defendant insisted that he needed to meet with her in person before turning over the books. CP 54.

Janet Robinson met the defendant in person at his office, whereupon the defendant said, "It will not take a rocket scientist to

figure out that there's been money moving around from your account. I actually took a loan . . . I've replaced all the money at a really high interest rate." The defendant demonstrated with financial records that his periodic unauthorized loans, and subsequent repayments, were an ongoing feature of his handling of MCHOA funds. He said, "I know it was wrong. . . I did it none the less." CP 54-55. The money was stolen[1] from the MCHOA reserve account, which the MCHOA contributed to on a monthly basis in order to build up a reserve of funds for unanticipated expenses. RP 57-58. The trust relationship between the defendant and MCHOA never included permission for him to borrow any MCHOA funds for his personal use, or to transfer MCHOA funds into his own personal account (except for his agreed bookkeeping fees). He was not allowed to write checks to himself from the MCHOA account. CP 49-50.

After the defendant disclosed his thefts to Janet Robinson in late 2011 she immediately informed the MCHOA board members about the situation. CP 55. However, the board was comprised of

[1] Although the defendant and some of the State's witnesses routinely referred to the unauthorized transfer of funds as "borrowing," the defendant concedes that his actions constituted a crime of theft (embezzlement). Br. App 26. For clarity, the State will accept the defendant's concession and refer to the unauthorized transfer of funds as theft.

elderly volunteers who did not pay sufficient attention to the financial statements the defendant had provided to them, and the members of the board were periodically changed. CP 39. In short, MCHOA took no action immediately after the defendant confessed what he had done, other than following through with their previous decision to hire another accountant.

It wasn't until about two years later on October 9, 2013, that MCHOA sent the defendant an official letter summarizing his crimes and demanding a payment of $5000 to cover the cost of an independent audit of their records. CP 300-301. The defendant responded in writing on October 21, 2013. CP 302-303. In the letter the defendant described his ongoing thefts from MCHOA from 2006 to 2011. He confessed that the "gross amount" of "Maplevine cash to McKinnon" during this six year period was $155,543,53, of which $21,300.00 was properly converted to his personal use as payment for his accounting fees. This left a gross theft amount, which he termed "borrowings," of $134,243.53. He said that he was "constantly re-paying the loans" such that the net theft balance never exceeded $52,545.14, and averaged $24,443.95 during the six year period. He acknowledged that he finally paid back the stolen funds, plus an amount of interest he calculated at "6%-8%"

ending with a series of lump sum payments totaling $23,780.15 in September, 2011. He refused to pay the requested $5000 for the audit of MCHOA records, but he did contribute $3000 toward the audit because he felt that amount was fair. Id.

B. THE INVESTIGATION.

On March 28, 2014, MCHOA's attorney sent a letter to Snohomish County Prosecutor Mark Roe describing the defendant's crimes and suggesting a review of the case for potential criminal charges. CP 298-299. The Snohomish County Prosecutor's Office is not an investigative agency. It appears that the Edmonds Police Department was the first agency to investigate the matter, but on May 23, 2014, Edmonds Police referred to the case to Lynnwood Police after determining that the illegal accounting activities and misappropriations of funds originated from the defendant's office located in the City of Lynnwood. CP 36. Lynnwood's Detective Teachworth took the lead of the investigation. He collected available records and interviews from MCHOA board members, both past and present, and investigated the status of the defendant's accounting license in consultation with the executive director of the WSBA. Detective Teachworth also interviewed the defendant, who voluntarily came to the Lynnwood

Police Department on July 22, 2014, for a non-custodial recorded interview. CP 89. The defendant described his role as the MCHOA bookkeeper, which involved keeping track of the monthly dues and special assessments paid by each of the owners. He was also responsible for paying vendors who performed services for MCHOA (for example, landscaping). An important part of his duties was to prepare an income statement for the MCHOA board showing an accounting of both the income (dues and assessments) and expenses (vendor payments). CP 89-90. This was separate from a balance sheet statement which also included a summary of MCHOA's accumulated assets and liabilities.

The defendant said that the thefts started in 2007, possibly as early as December, 2006. He acknowledged that the amount of his periodic thefts "over a period of time...grew to a little bit larger amount." CP 90. He never asked for, or received, permission to convert MCHOA funds to his own personal use. He admitted that he fraudulently misrepresented his ongoing conversion of MCHOA funds by describing his "loan account" with the innocuous title of "savings" on the balance sheet. CP 91; See, e.g. CP 389 ($10,628.98 fraudulently identified as "Cascade Savings" while it was actually in the defendant's possession). Although he agreed it

was unethical, he didn't consider it stealing because he always intended to pay the money back plus interest. CP 92.

Detective Teachworth referred his completed investigation to the Snohomish County Prosecutor's Office on August 21, 2014. He described the defendant's crimes as "Theft 1st Degree (by deception)" in violation of RCW 9A.56.030. Detective Teachworth asserted that the ongoing crime began on December 31, 2006, and ended on September 30, 2011. CP 32-33. Thus, the Snohomish County Prosecutor's office had approximately 41 days between receiving Detective Teachworth's referral and the expiration of the standard three year statute of limitations applicable to most felonies. See RCW 9A.04.080(1)(h).

C. THE PROSECUTION AND TRIAL.

On January 23, 2015, the Snohomish County Prosecutor charged the defendant with one count of First Degree Theft by deception in violation of RCW 9A.56.030(1)(a). The Information alleged that the defendant obtained U.S. Currency valued at more than $5,000 by color or aid of deception, with intent to deprive the owner of the currency, during the charging period of December 31, 2006 through September 9, 2011. CP 454-455.

On April 7, 2015, the defendant filed a motion to dismiss pursuant to State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). CP 436-450. He claimed that it was an "undisputed material fact[]..." that the defendant "did not use deception to obtain the money borrowed from the homeowner's association account...". CP 449. The State responded in writing on April 13, 2015, and laid out its theory of how the defendant deceived MCHOA by supplying them with fraudulent balance sheets "to create or confirm a false impression in the victims' minds about the disposition of their property." CP 425-435. The State conceded that the defendant's initial misappropriation of funds was properly characterized as embezzlement, but argued that thereafter "each act of deception on the part of the defendant in doctoring the financial records and the [balance] sheets relied on by the victim operated to aid in each subsequent withdrawal." CP 430.

The Court heard oral argument on April 24, 2015. 4/24/15 RP 1-26. On Aril 30, 2015, the court issued a memorandum decision denying the Knapstad motion to dismiss. CP 418-420. The decision contains thorough legal reasoning and concludes that "theft by embezzlement and theft by color or aid of deception are not mutually repugnant." CP 420. The Court agreed with the

prosecutor's reading of State v. Mehrabian as standing for the proposition that "it is not necessary that deception be the sole means of obtaining the property or services and that it may include conduct amounting to an inducement achieved by creating a false impression..." CP 420, citing State v. Mehrabian, 175 Wn. App. 678, 700, 308 P.3d 660 (Div. 1, 2013).

Defendant filed a motion for reconsideration, which the court denied on May 5, 2015, with another thorough letter to both parties' counsel. CP 403-404, 405, 406-417.

On June 29, 2015, the court accepted the parties' Stipulation for Bench Trial on Agreed Documentary Evidence and set a hearing for July 8, 2015, for entry of a verdict, findings of fact, and conclusions of law. See CP 399-400; 7/8/15 RP 2; 2 CP ____ (Sub #39 Stipulation for Bench Trial on Agreed Documentary Evidence). The stipulation established the agreed set of documents containing the facts the court was allowed to consider, but also included the additional facts set forth in paragraph 2.6 of the Stipulation for Bench Trial on Agreed Documentary Evidence. 2 CP ___.

At the July 8, 2015, hearing Judge Marybeth Dingledy announced her decision as the trier of fact. Her written findings of

fact establish that the State proved the following beyond a reasonable doubt:

> That on or about December 31, 2006 through September 9, 2011, in the State of Washington, the defendant obtained control over US currency in an amount exceeding $5000, this currency belonging to another, by color or aid of deception, and with the intent to deprive such other of this property.

2 CP __ (Stipulation for Bench Trial on Agreed Documentary Evidence at 5.). The court also made oral findings explaining in more detail the nature of the deception employed by the defendant and how that deception helped facilitate the ongoing thefts. The Court said:

> [T]he 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.
>
> I did look at one of the agreed stipulated facts, specifically under Section 2.6(b), and that was what Mr. Teeters had indicated. He indicated that at no time was the board presented with documents that contained the term "loan" to McKinnon, or any indication that the loan existed.
>
> The board did rely on the records provided to them by Mr. McKinnon in knowing what funds they had available. They 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. I do find that that's deception, and I will find Mr. McKinnon guilty of the charge.

7/8/15 RP 4-5. The defendant has not assigned error to any of the trial court's findings of fact on appeal. Br. App. 2-3.

The court did not impose sentence right away, but rather rescheduled it for August 25, 2015. 2 CP ___ (Sub # 40, Order Setting Sentencing Date). Meanwhile, the defendant filed a Motion for New Trial and to Arrest Judgment. CP 23-29. The court denied the motion. CP 22.

The court imposed a standard range sentence of 30 days in jail, but on the agreed recommendation of the parties converted that time to 240 hours of community service. CP 11. The trial court stayed execution of the judgment pending this appeal. 2 CP __ (Sub #52, Conditions of Release Pending Appeal).

III. ARGUMENT

The Brief of Appellant assigns error to six of the trial court's legal rulings but does not challenge the sufficiency of the evidence supporting any of the court's findings of fact. Br. App. 2-3. Although the defendant has presented his appeal as six discreet issues, the State's response will respond to all of defendant's arguments within the framework of the three issues identified above: the appealability of the Knapstad ruling, the factual and legal support for the trial

court's guilty verdict, and the determination of whether the charge was filed within the applicable statute of limitations.

A. THE DENIAL OF A KNAPSTAD MOTION TO DISMISS IS NOT SUBJECT TO APPELLATE REVIEW.

The defendant has cited State v. Knapstad for the proposition that the trial court's denial of his Knapstad motion to dismiss is "an error of law which may be reviewed on appeal." Br. App. 31, citing State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986) and State v. Bauer, 180 Wn.2d 929, 934, 329 P.3d 67 (2014). The citation to Knapstad is inappropriate because that case holds the direct opposite: "A defendant has no right to appeal a denial of the motion to dismiss." State v. Knapstad, 107 Wn.2d at 357, citing RAP 2.2(a). Instead the defendant argues in a footnote that "Bauer trumps literal application of the rule." Br. App. 31, fn. 17.

However, the defendant fails to mention that the procedural posture of the Bauer case was substantially different than this case. The Bauer trial court stayed the pending trial in order to allow the defendant to petition the Court of Appeals for discretionary review. State v. Bauer, 174 Wn. App. 59, 66, 295 P.3d 1227 (2013) rev'd, 180 Wn.2d 929, 329 P.3d 67 (2014). This unique procedural posture was warranted because the case involved "a controlling

question of law as to which there is substantial ground for a difference of opinion." State v. Bauer, 180 Wn.2d at 934. In contrast, the trial judge in this case never imposed a stay until after final judgment was entered, and long after the Knapstad motion had been denied. 2 CP __ (Sub #52, Conditions of Release Pending Appeal).

> Regardless of when a court is asked to examine the sufficiency of the evidence, it will do so using the best factual basis then available. For this reason, a defendant who presents a defense case in chief "waives" (*i.e.*, may not appeal) the denial of a motion to dismiss made at the end of the State's case in chief, and a defendant who goes to trial may not appeal the denial of a Knapstad motion. This does not mean that a defendant is barred from claiming insufficiency at a late stage of the proceedings, merely because he or she failed to do so earlier; it does mean, however, that the claim will be analyzed using the most complete factual basis available at the time the claim is made.

State v. Jackson, 82 Wn. App. 594, 608-09, 918 P.2d 945 (1996).

The defendant has supplied no binding, or even compelling, legal authority casting doubt on the longstanding legal principal that denial of a defendant's Knapstad motion to dismiss is not a final judgment subject to appellate review. This Court should decline to address the Knapstad ruling.

B. SUFFICIENT EVIDENCE SUPPORTED THE TRIAL COURT'S VERDICT OF GUILT ON THE CHARGED OFFENSE OF FIRST DEGREE THEFT BY COLOR OR AID OF DECEPTION.

The defendant asserts that the trial court did not have a legal basis to enter a finding of guilt on the charged offense, casting the issue as four discreet questions. Br. App. 3 (issues 2-5). However, each issue is simply a variation on the theme that insufficient evidence supported the charged offense. Resolution of that single issue will be dispositive of the others.

1. Standard Of Review.

Evidence is sufficient to sustain a conviction if after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom" State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the verdict, and most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105, cert. denied, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634,

638, 618 P.2d 99 (1980). Reviewing courts defer to the trier of fact on issues of witness credibility. State v. Clark, 190 Wn. App. 736, 755, 361 P.3d 168 (Div. 1, 2015).

When the verdict follows a bench trial, appellate review is limited to determining whether substantial evidence supports the trial court's findings of fact and, if so, whether the findings support the conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). " Substantial evidence" is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. Id. Unchallenged findings of fact and findings of fact supported by substantial evidence are treated as verities on appeal. State v. Homan, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). Challenges to a trial court's conclusions of law are reviewed de novo. Id.

In order to convict the defendant of the charged offense in this case, the State was required to prove beyond a reasonable doubt that the defendant obtained U.S. Currency valued at more than $5,000 by color or aid of deception, with intent to deprive the owner of the currency, during the charging period of December 31, 2006 through September 9, 2011. CP 454-455. The trial court's findings of fact precisely track and establish each element of the

charged offense. 2 CP ___ (Sub #39, Stipulation For Bench Trial On Agreed Documentary Evidence at 5).

2. The Defendant Assigns No Error To The Trial Court's Findings Of Fact.

The defendant has not assigned error to any of the trial court's findings of fact. Br. App. 2-3. Where no error is assigned to findings of fact, they become established facts of the case, and the sole question is whether they support the conclusions of law and judgment. Richert v. Handly, 50 Wn.2d 356, 357, 311 P.2d 417 (1957). Conversely, assignments of error directed only to conclusions of law do not bring up for review supporting findings of fact. J.D. English Steel Co. v. Tacoma School Dist., 57 Wn.2d 502, 504, 358 P.2d 319 (1961).

In this case the unchallenged findings of fact consist of a nearly verbatim recitation of the elements of the charged offense as set forth in the Information. Compare 2 CP ___ (Sub #39, Stipulation For Bench Trial On Agreed Documentary Evidence at 5) with CP 454. The unchallenged findings of fact necessarily support the subsequent conclusion of law that the defendant committed theft by deception in violation of RCW 9A.56.030(1)(a). This Court's analysis of the sufficiency of the evidence should end here.

3. The Evidence Established Each Element Of Theft By Deception.

Even though the appellant has not challenged any of the trial court's factual findings, had he done so the analysis would still support affirming the conviction. It is undisputed that the defendant obtained approximately $134,000 of MCHOA's funds to which he was not entitled. CP 302-303. It is also undisputed that he did so intentionally, without permission, and that his fraudulent balance sheets aided his effort to deceive MCHOA by keeping them unaware of the ongoing thefts. Br. App. 8; CP 68, 90-91; 2 CP ___ (Sub #39, Stipulation For Bench Trial On Agreed Documentary Evidence at 3-4).

The essential element of "deception" has been defined by statute since 1975:

> (5) "Deception" occurs when an actor knowingly:
> (a) Creates or confirms another's false impression which the actor knows to be false; or
> (b) Fails to correct another's impression which the actor previously has created or confirmed; or
> (c) Prevents another from acquiring information material to the disposition of the property involved; or
> (d) Transfers or encumbers property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or
> (e) Promises performance which the actor does not intend to perform or knows will not be performed;

RCW 9.56.010(5); 1975 Wash. Sess. Laws, 1st Ex. Sess. 841; see also WPIC 79.04.

The evidence established that the defendant's ongoing misrepresentations about MCHOA's funds, in the form of balance sheets falsely assuring MCHOA that their reserve funds were held by "Cascade Savings" when they were actually in the defendant's personal account, satisfied the first three alternative definitions of the term "deception" as defined under Washington State law. This reality directly contradicts defendant's authority-free assertion that post-conversion cover-up activities are a "mere incident" to the uncharged crime of embezzlement.

RCW 9A.56.010(4) expressly states:

> "'By color or aid of deception' means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services."

Even though the defendant had a fiduciary relationship which provided him *access* to MCHOA funds, his status as accountant did not give him permission to *possess* MCHOA funds in his own personal account. Such possession exceeded his authority, and the moment he transferred stolen funds into his exclusive custody in his personal account, he *obtained* the funds in

violation of the theft by deception statute. The statutory definition of "obtain control over" supports this reading:

> "'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."

RCW 9A.56.010(10).The evidence abundantly supports this application of facts to the elements of the charged crime. In other words, the defendant's unauthorized transfer of MCHOA reserve funds into his own personal account created a legally recognized interest that he alone exclusively controlled the funds, whereas before the transfers he was merely a fiduciary agent with authority to collect and disburse funds only according to MCHOA's wishes.

Nevertheless, case law still requires the State to prove that a victim relied on a defendant's deception in order to satisfy the statute. State v. Casey, 81 Wn. App. 524, 528, 915 P.2d 587 (1996). "Reliance is established where the deception in some measure operated as inducement[, but] the deception need not be the sole means of inducing the victim to part with his or her property." Id., citing State v. Zorich, 72 Wn.2d 31, 34, 431 P.2d 584 (1967).

In this case the State proved the victim's necessary reliance with statements from MCHOA Board President Roy Teeters, who said:

> 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.

2 CP ___ (Sub #39, Stipulation For Bench Trial On Agreed Documentary Evidence at 3-4). Although the defendant calls it "speculation" to assume that MCHOA would have terminated their fiduciary relationship with the defendant if they had known about his unauthorized loans, facts in the record show that this conclusion is among the reasonable inferences which this Court must accept in the State's favor when reviewing sufficiency of the evidence.

Specifically, the defendant had previously attempted to borrow approximately $3000 from the MCHOA reserve fund in approximately 2006 because he wanted to purchase a new sign for his office. He made this request openly and without deception, and his request was unequivocally denied. CP 65-69. Janet Robinson told the defendant that his request would not only require approval

from MCHOA and the building's ownership group, but that the request was bound to be denied because it was not only poor business practice to extend a personal loan to a vendor, but also too risky to constitute an appropriate investment of MCHOA's reserve fund. Id.

Thus, the defendant (and more importantly, the trier of fact in this case) had notice that MCHOA disapproved of their reserve fund being used as a lending source for vendors like the defendant. It is an eminently reasonable inference for this Court to conclude that MCHOA would have terminated the defendant's employment had they discovered his thefts from the very fund they had previously denied his access to. Further, it is reasonable to conclude that the defendant's deceptive balance sheets provided a means of continued access to the victim's funds that he otherwise would not have had, and in that way contributed to the series of thefts continuing over time. Because this inference is based on reason and not speculation, this Court must adopt it in the State's favor. State v. Salinas, 119 Wn.2d at 201; see United States v. Navarette-Aguilar, 14-30056, 2015 WL 9463075 at 7 (9th Cir. Dec. 28, 2015) ("a reasonable inference is one that is supported by a chain of logic...").

The trial court's conclusion of law that the defendant was guilty as charged was supported not only by unchallenged findings of fact, but those unchallenged findings of fact were also supported by substantial evidence. All of the defendant's various arguments attacking the sufficiency of the evidence for the charged offense of theft by deception must fail.

4. This Court Has Recently Rejected A Sufficiency Challenge On Similar Facts.

When the trial court in this case denied the defendant's Knapstad motion to dismiss, it cited with approval this Court's opinion in the analogous case of State v. Mehrabian:

> The more recent case of State v. Mehrabian also supports the prosecutor's position. There the State's witnesses testified that had the defendant disclosed his private business interest and/or complied with the City's purchasing policies, he would not have been permitted to purchase the computer equipment in the manner and at the prices he quoted to the City, which both facilitated and constituted the thefts alleged. The opinion notes that it is not necessary that deception be the sole means of obtaining the property or services and that it may include conduct amounting to an inducement achieved by creating a false impression even though particular statements or acts may not be false.

CP 420, citing State v. Mehrabian, 175 Wn. App. 678, 707-708, 308 P.3d 660 (2013) (finding "overwhelming" evidence of theft by deception and sufficient evidence of victim's reliance, based on

evidence that the victims "*probably* would not have approved the deals had they known the true facts"). The defendant neither cites nor addresses Mehrabian in his brief, but the binding precedential value of the case cannot be ignored. As applied to this case, it represents precedential approval of the State's theory that the defendant's deceptive balance sheets created the conditions by which his ongoing series of thefts was allowed to continue. This evidence meets the statutory definition of theft by deception, so the conviction must be affirmed.

5. Embezzlement And Theft By Deception Are Not Mutually Exclusive Alternative Means Of Committing Theft.

The defendant has not presented any authority, either to the trial court or here, that the alternative means of theft by deception and theft by embezzlement are mutually exclusive. Instead he asserts, again in a footnote, that "Washington courts have long recognized the doctrine of mutual repugnance in the theft context." Br. App. 25, fn. 14. But the three cases cited in support of that statement actually prove that a person can commit theft by embezzlement and theft by deception based on the same facts.

For example, in State v. Smith, the court started by recognizing that "in other jurisdictions...it has been held that the

two crimes overlap and, under certain circumstances, are identical." State v. Smith, 2 Wn.2d 118, 121, 98 P.2d 647 (1939). It then proceeded to analyze whether the evidence supported *both* alternative forms of theft (embezzlement and larceny). The conviction was reversed because the particular facts in evidence supported the uncharged crime of embezzlement, not larceny, but not because such a showing is logically impossible as a matter of law. See Id. at 122-123. If that were the case, the Court's detailed factual analysis would have been unnecessary.

Likewise, the defendant's citation to State v. Harrison is technically correct in that the court "recognized the doctrine of mutual repugnance," but critically, held that it did not apply when comparing embezzlement and larceny:

> The varying ways by which a crime may be committed are not repugnant to each other unless the proof of one will disprove the other. The defendant here was charged with having committed the crime of larceny by color and aid of false pretenses, and also as bailee or trustee. The proof that the crime was committed by color and aid would not necessarily be inconsistent with proof that under an agreement with the parties subsequently made the defendant became a bailee or trustee. Neither would proof that tended to establish that the alleged crime had been committed by a bailee or trustee necessarily disprove a charge that the possession of the property had been originally obtained by color and aid of false or fraudulent pretenses.

State v. Harrison, 6 Wn.2d 625, 628, 108 P.2d 327, 328 (1940). Similarly, the defendant's citation to State v. Moreau in this context does not mention the fact that the Moreau court *rejected* the defendant's argument that she had been charged with repugnant crimes. State v. Moreau, 35 Wn. App. 688, 693, 669 P.2d 483 (1983).

The defendant claims that embezzlement and theft by deception can be distinguished by determining whether the defendant had "rightful possession of the property" prior to either "converting" (embezzlement) or "obtaining" (theft by deception) the property in question. Br. App. 22-23, citing State v. Johnson, 56 Wn.2d 700, 355 P.2d 13 (1960). The facts of the Johnson case, however, support the opposite conclusion that these two forms of theft overlap.

The co-defendants in Johnson organized a fraud whereby Johnson's construction companies would document and submit false insurance claims to Haber, Johnson's accomplice. Haber was the insurance adjuster who reviewed and approved payment of the false claims. "He had authority to issue drafts for the payment of individual claims..." Id. at 703. Johnson was charged with 36

counts of forgery and 28 counts of theft by deception. Id. at 702, 704. The court affirmed the convictions, finding sufficient evidence supported the theft by deception charges because:

> Haber was not in possession of the funds at the time he appropriated them to his own use. 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 fact that Haber had authority to write drafts against the company does not establish that he had possession of the company's funds against which the drafts were written.*

Id. at 705 (*emphasis* added).

The defendant then incorrectly applies Johnson to this case by asserting that McKinnon's "access to the funds as MCHOA accountant" established his "rightful possession." Br. App. 23, fn. 13. Contrary to this argument, Johnson supports the conclusion that wrongful possession occurs at the moment funds are transferred from the victim's account to the defendant's account. This reading is supported by the statute defining "obtain" in the theft context, which was passed 15 years after Johnson. See RCW 9A.56.010(10)(a) ("Obtain control over"...means..."to bring about a transfer or purported transfer to the obtainer or another of a legally recognized interest in the property...").

The defendant also seeks to rely on State v. Sloan, 79 Wn. App 533, 903 P.2d 522 (1995). Br. App. 15, 24. The defendant in that case contracted with a repossession company to repossess a boat co-owned by his girlfriend, resulting in the boat being moved to an auto recovery lot. Almost a month after the repossession, the defendant showed up at the auto recovery lot and lied to the employees in order to remove the boat from the lot. The State charged the defendant with theft of "boat repossession services" for the incident at the recovery lot. The court held that the defendant's deception on that day did not result in him obtaining the boat recovery services on that date. In essence, the State had alleged the wrong date of violation. Id. at 554-555. The facts in Sloan do not support the defendant's extrapolated "rule" that "[w]here the actor has previously and rightfully obtained possession of the property at issue, it cannot, as a matter of law, thereafter be wrongly *reacquired* by deception." Br. App. 24.

Overall, the cases cited by the defendant demonstrate that the concepts of "obtaining," and "possessing" property often co-exist with the concepts of "converting" or "exerting unauthorized control" over property. The trial court was correct that the crimes of

embezzlement and theft by deception can "overlap" in some cases, including this one.

C. THE CHARGED OFFENSE WAS FILED WELL WITHIN THE SIX YEAR STATUTE OF LIMITATIONS.

Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges. State v. Korum, 157 Wn.2d 614, 625, 141 P.3d 13 (2006). However, the legislature maintains the power to limit the time period within which a prosecutor can file criminal charges. RCW 9A.04.080. The statute of limitations for first degree theft by deception was three years until 2009, when the legislature extended the limitations period to six years. State v. Reeder, 181 Wn. App. 897, 923, 330 P.3d 786 (2014), comparing former RCW 9A.04.080(1)(h) (2009) with RCW 9A.04.080(1)(d)(iv).

> "When successive takings are the result of a single and continuing criminal impulse and the defendant commits the takings as part of a single criminal plan, the takings may constitute a single theft. In such a case, the defendant does not complete the crime until the criminal impulse terminates. When a continuing criminal impulse exists, the statute of limitations does not begin to run until the crime is completed."

State v. Reeder, 181 Wn. App. at 924 (internal citations omitted).

In this case, the defendant committed a series of thefts resulting from his single criminal impulse to steal from the MCHOA

reserve fund after they had already declined his request for a loan of those funds. The series of thefts occurred over a five year period between December 31, 2006 and September 9, 2011, as alleged in the information. Thus, the criminal impulse ended in September, 2011, when the defendant confessed and paid back the balance in lieu of MCHOA's new accountant independently discovering the crimes. See CP 54-55 ("It will not take a rocket scientist to figure out...").

While it is true that a court must dismiss charges filed outside *the applicable* statute of limitations (see Br. App. 40-41), the defendant has provided no authority establishing that *the applicable* statute of limitations is anything other than that specifically naming the precise offense charged. Only one such statute exists, RCW 9A.04.080(1)(d)(iv), and the applicable limitations period is six years for the crime charged in this case.

By law the six year statute of limitations began to run on September 9, 2011. The State could have filed the charged offense any time prior to September 10, 2017. RCW 9A.04.080(1)(d)(iv). The charge was filed within the statute of limitations.

IV. CONCLUSION

For the reasons stated above, the State asks this Court to affirm the defendant's conviction.

Respectfully submitted on March 4, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. MICHAEL C. McKINNON, Appellant.	No. 74008-3-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 7th day of March, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Tom P. Conom, attorneytomconom@gmail.com.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 7th day of March, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office