SUPREME COURT NO. 93088-9
COA NO. 74008-3-I

IN THE SUPREME COURT
OFTHE STATE OF WASHINGTON

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STATE OF WASHINGTON

Petitioner

v.

MICHAEL C. McKINNON,

Respondent



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# PETITION FOR REVIEW

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MARK K. ROE
Prosecuting Attorney

ANDREW E. ALSDORF
Deputy Prosecuting Attorney
Attorney for Petitioner

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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## I. IDENTITY OF THE PETITIONER

The State of Washington, petitioner, petitions the Court for review of a decision of the Court of Appeals in State v. Michael C. McKinnon, no. 74008-3-I, filed August 29, 2016.

## II. COURT OF APPEALS DECISION

The Court of Appeals filed an unpublished opinion on August 29, 2016, reversing the defendant's conviction for Theft by Deception under RCW 9A.56.020(1)(b). A copy of the Court of Appeals' decision is attached to this petition as appendix A.

## III. ISSUE

Did the State present sufficient evidence that the defendant obtained control of property through color or aid of deception based on evidence that the ongoing pattern of thefts over a five year period was hidden by fraudulent bookkeeping practices, thereby allowing the ongoing thefts to not only continue, but also preventing the victim from discovering and halting the series of thefts?

## IV. STATEMENT OF THE CASE

The facts of this case are not in dispute and were properly summarized by the Court of Appeals. Briefly, the defendant was hired to conduct accounting and bookkeeping services for a Homeowners' Association (HOA) from 2006 to 2011. Starting in

2007 he incrementally stole approximately $134,000 from the associations' accounts, but he was also partially repaying the stolen funds over time. He covered up the ongoing thefts by submitting false annual spreadsheets to the HOA in which he claimed that the stolen funds were held in "savings" accounts which did not exist. When the HOA decided to change accountants in 2011 the defendant confessed his crime and also completed his effort to repay the stolen funds. He ultimately paid back the entire $134,000 loss plus approximately $8,000 in interest. The HOA did not report the thefts to law enforcement until March of 2014, and the police investigation was completed in August 2014. Slip Op. 2-3.

By the time the Snohomish County Prosecutor's Office made a charging decision in January 2015, the standard three year statute of limitations for embezzlement had expired. The State charged the defendant with First Degree Theft by color or aid of deception, a crime for which the legislature in 2009 extended the statute of limitations from three years to six years.

The trial court considered stipulated documentary evidence and convicted the defendant of Theft in the First Degree by deception. The defendant appealed and the Court of Appeals reversed, finding insufficient evidence of theft by deception.

Specifically, the Court of Appeals ruled that the State presented no evidence that the misappropriated funds were ***obtained*** by deception, because according to the Court the defendant obtained the funds when he was first hired in 2006, before he began generating deceptive accounting spreadsheets in 2007. Slip. Op. at 6.

## V. ARGUMENT

Theft by deception requires the State to prove that a defendant "obtained control over the property" by color or aid of deception. RCW 9A.56.020(1)(b). The Court of Appeals' decision focused exclusively on the word ***obtain*** in determining that the State presented insufficient evidence of Theft by Deception. Id. By focusing on this word the court ignored the more complex concept of ***control***, a term which can have very different meanings depending on the context. An infant has a certain degree of control over his parents, and authoritarian dictators have a certain degree of control over their populace, but the term's meaning varies widely depending on the context in which it is used. Washington courts have considered the definition of control in many contexts. See, e.g., State v. Smelter, 36 Wn. App. 439, 674 P.2d 690 (1984) (physical control of a motor vehicle); New Castle Investments v.

City of LaCenter, 98 Wn. App. 224, 989 P.2d 569 (1999) (in land use context); Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wn.2d 678, 871 P.2d 146 (1994) (in corporate mergers and acquisitions context).

In this case, the Court of Appeals did not adequately consider that the defendant's deceptive accounting practices allowed him to obtain a greater degree of control over the HOA's funds than he otherwise would have had. When he was acting strictly within the course of his duties, the defendant's authorized level of control over the HOA's funds allowed him only to pay vendors for services rendered, or to pay himself an agreed rate for his own services. Slip. Op. at 1. His deceptive spreadsheets to the HOA were the vehicle by which the defendant was able to maintain his position as a trusted bookkeeper, thereby granting him further access to the HOA's revenue (so the series of thefts could continue) and granting him a degree of control over the stolen funds he otherwise would have lacked – the ability to use the HOA's money for any purpose whatsoever as if it was his own. CP 461-62. The defendant's deception of the HOA Board was more effective, in part, because it was comprised mostly of elderly volunteers. This fact contributed significant delay to the HOA's

discovery of the thefts, but also to the additional delay in referring the matter to law enforcement. CP 39.

The defendant's deception of a group of elderly, volunteer, HOA board members was exactly the type of crime the legislature was addressing in 2009 when it unanimously passed a law extending the statute of limitations for theft by deception cases to six years instead of three, and allowed the period to run from the *discovery* of the crime rather than the *commission* of the crime. See Laws of 2009, Ch. 53, §1. The legislature's reason for changing the law applies directly to this case:

> The most important piece of the bill is the section that adjusts the statute of limitations to be calculated based on the point of discovery of the crime, rather than when the crime was actually committed. This comes up often in the context of elder abuse cases. There may be circumstances in which the individual is dealing with other issues and doesn't realize within three years that they have had their assets stolen. In the context of theft, this bill affects only those crimes accomplished by color or aid of deception, which is a small subset of theft cases.

House Bill Report SSB 5380 at 4 (2009). It was this change in the law which allowed the State to file the theft by deception charge in 2015, after the standard three year limitations period for embezzlement cases had expired. Slip. Op. at 3.

Even though the Court of Appeals acknowledged that theft by embezzlement and theft by deception are "not mutually repugnant," it failed to appreciate how the defendant's deceptive accounting practices fostered his ability to stay employed as the HOA's bookkeeper and continue the series of thefts for more than five years. In contrast, the trial court saw clearly that deception played a large role in the crime:

> 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 Court of Appeals' decision should be reviewed because it is inconsistent with other decisions of the Court of Appeals and of this Court. Most importantly, the decision raises an issue of substantial public interest because the legislature deserves a definitive answer to whether it actually addressed the problem identified in 2009 when it extended the statute of limitations for theft by deception cases. Review is warranted under RAP 13.4(b)(1), (2), and (4).

**1. The Decision Conflicts With Other Decisions Of The Court Of Appeals Finding Sufficient Evidence of Deception .**

At the trial court level and as argued to the Court of Appeals, the State relied on Division One's analysis of theft by deception found in State v. Mehrabian, 175 Wn. App. 678, 699–700, 308 P.3d 660 (2013). In Mehrabian, a city employee used multiple deceptive techniques in order to induce his supervisors to approve business transactions involving Mehrabian himself, in violation of city policy. The transactions involved computer equipment which Mehrabian deceptively described both as to origin and value. Id. at 707. The court found sufficient evidence of theft by deception because Mehrabian's supervisors said "they probably would not have approved the deals had they known the true facts." Id. The court described the role deception must play in a crime, and did so in a way that matches the defendant's actions in this case:

> "Deception" includes a broad range of conduct, including not only representations about past or existing facts, but also representations about future facts, inducement achieved by means other than conduct or words, and inducement achieved by creating a false impression even though particular statements or acts might not be false. The State must also prove that it relied on the defendant's deception, which is established where the deception in some measure operated as inducement. The plain language of the theft by color or aid of deception statute does not require an express misrepresentation. The statute

> focuses on the false impression created rather than the falsity of any particular statement.

Id. at 700 (citations omitted).

The State had equivalent evidence in this case, because the president of the HOA Board 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, [the Board's president] would have called a Board meeting and he believes that the Board would have taken adverse action toward Mr. McKinnon's status as accountant.

CP 461-62. In other words, the defendant's deceptive balance sheets deceived the HOA Board into a false sense of security and prevented them from firing the defendant. By hiding his thefts and preventing his own firing, the defendant induced the Board into keeping the defendant in a position of trust where he could continue to steal from them. This meets the definition of theft by deception.

The Court of Appeals said the facts of the Mehrabian case were not analogous to this case because in Mehrabian the misrepresentations induced specific purchases, which in turn constituted the alleged thefts. Slip. Op. at 14. In contrast, according to the Court of Appeals, the defendant "did not use deception to obtain control over the association's funds." Id. The court thought

that the defendant "obtained control over" all of the funds he would eventually steal back in 2006, before the defendant started deceiving the HOA Board from 2007 through 2011. Slip. Op. at 6.

This view of the State's evidence did not place it in the most favorable light as required under the law. A more favorable reading would have recognized that an ongoing series of thefts by a fiduciary such as an accountant depends on the fiduciary relationship continuing undisturbed. The defendant's deceptive balance sheets induced the Board to retain him as accountant, and thereby facilitated him "obtaining control over" additional funds as the months and years passed by. The Board's reliance on the defendant's deceptive accounting practices was very similar to the deception and reliance found in Mehrabian. This Court should review the Court of Appeals' decision to resolve the conflict with Mehrabian. RAP 13.4(b)(2).

**2. The Decision Of The Court Of Appeals Conflicts With Decisions Of This Court.**

The Court of Appeals' decision is inconsistent with this Court's decision in State v. Johnson, 56 Wn.2d 700, 355 P.2d 13 (1960). In Johnson, this court held that sufficient evidence supported the defendant's 28 convictions for theft by deception.

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. 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 same can be said of the defendant in this case. Just because he possessed a checkbook from which he was allowed to pay vendors and even his own previously-agreed fees, does not mean that he possessed the HOA's funds. It only means he had access, and very limited access at that, to the HOA's funds for limited purposes. In fact, when viewed in the light most favorable to the State, the record indicates that the defendant did not obtain his

desired degree of control over the HOA's funds until they had been transferred out of the HOA account and into his personal account. This was accomplished by a check, which still requires the involvement and approval of bank personnel along the same lines as the employee intermediary described in Johnson.

The Court of Appeals' decision also conflicts with this Court's previous descriptions of how embezzlement and theft by deception are not mutually repugnant to one another.

> 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 (1940). Although the Court of Appeals gave two examples of how an accountant like this defendant could still commit theft by deception, the examples have no material differences from the facts presented in this case. The two examples provided by the Court of Appeals were (1) if the defendant obtained additional funds from the HOA after falsely claiming that an unexpected cost arose, or (2) if he

falsely informed the association's members that their dues had increased and obtained additional funds. Slip. Op. at 11-12. But neither one of these scenarios would have enriched the defendant unless he took the further action of transferring funds into his personal account, which the HOA only allowed as payment for his accountant fees at the rate of $250 per month or $3,000 per year. CP 234. In both of the court's examples and in the record of this case, each theft was completed only when the defendant transferred money into his own account without permission to do so.

This Court confronted an analogous problem in a welfare fraud case, in State v. Wallace, 97 Wn.2d 846, 651 P.2d 201 (1982). The defendant there was convicted of welfare fraud based on her possession of funds originally sent to her husband, who then transferred the funds to her as his "limited power of attorney." This court reversed the conviction because the limitations on her power of attorney "prohibited [her] from using the funds for her own benefit. Any use of the funds in a manner inconsistent with [her husband's] instructions would have constituted a breach of petitioner's fiduciary duty." Id. at 851.

Similarly, the defendant in this case did not have permission to use the HOA's funds for his own purposes. Such permission could only be granted by the full HOA board, which never occurred. CP 39-40. The description by the Court of Appeals that the defendant "obtained control" over the disputed funds in 2006, simply because he was hired as the HOA's accountant, is inconsistent with the facts in the record and with the holding in Wallace. Just like the defendant in Wallace, the defendant in this case only had limited control over the HOA's funds by virtue of his limited authority as their accountant. Each transfer of funds into his own account exceeded his limited authority, meaning he obtained a level of control over those funds he didn't have before the transfers, and which his limited authority did not allow.

**3. The Decision Of The Court Of Appeals Involves An Issue Of Public Interest That Should Be Decided By The Supreme Court.**

The Court of Appeals' decision renders the 2009 extension of the statute of limitations in theft by deception cases ineffectual, even though the legislative history makes it clear that this is exactly the type of prosecution it was designed to save. See supra, p. 4-5. The HOA president acknowledged that the thefts went unreported in part due to the fact that the HOA Board was comprised of elderly

volunteers. CP 39. This concern (delayed discovery of theft in cases involving elderly victims) was cited in the legislative materials which resulted in the legislature's unanimous vote to allow prosecutions within six years from the discovery of the crime. The opinion is contrary to the clearly expressed intent of the legislature because many thefts by deception will go undiscovered within the shorter three year timeframe – often the deception is designed to hide the true nature of the theft, making discovery but also the investigation and prosecution of the thefts a much slower process. There is no reason to provide thieves who also happen to be accountants with a three year head start on similarly deceptive thieves who don't have a fiduciary relationship with their victims. The Court of Appeals' opinion in this case appears to encourage rather than resolve this incongruity. This Court should resolve the confusion by recognizing that a theft by deception theory can proceed whenever an accountant exceeds his limited authority by obtaining a greater level of control over his fiduciary's funds than he had permission to obtain. Deception in the cover-up of those activities contributes to the ongoing thefts continuing undetected, and should trigger the longer statute of limitations. Even if the State's theory is incorrect, Supreme Court guidance may be

necessary to highlight the inapplicability of the 2009 amendment to cases like this one.

## VI. CONCLUSION

Review should be granted under RAP 13.4(b)(1), (2), and (4). For the reasons stated above, this court should grant review, reverse the decision of the Court of Appeals, and reinstate the conviction.

Respectfully submitted on September 27, 2016.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

ANDREW E. ALSDORF, #35574
Deputy Prosecuting Attorney
Attorney for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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



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

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

# APPENDIX A

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

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

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

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

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

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

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

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

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

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

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

McKinnon appeals.

**THEFT**

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

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

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

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

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

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

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

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

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

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

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

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

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

[7] Id.

*Sufficiency of the Evidence*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[18] Id.

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

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

[21] Id.

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

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

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

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

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

[23] Id. at 119-20.

[24] Id. at 120.

[25] Id.

[26] Id.

[27] Id. at 121.

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

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

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

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

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[29] Id. at 122.

[30] Id.

[31] Id. at 127.

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

[33] Id. at 670-71.

[34] Id. at 671.

[35] Id.

[36] Id.

[37] Id.

[38] Id.

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

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

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

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[39] Id. at 672.

[40] Id. at 673.

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

[42] Id. at 703.

[43] Id.

[44] Id. at 704.

[45] Id. at 705.

[46] Id. at 704-05.

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

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

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

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

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[47] Id. at 705.

[48] Id.

[49] Id.

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

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

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

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

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

[51] Id. at 683.

[52] Id. at 701.

[53] Id. at 684.

[54] Id.

[55] Id.

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

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

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

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

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[56] Id.

[57] Id.

[58] Id.

[59] Id.

[60] Id.

[61] Id. at 699.

[62] Id.

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

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

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

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

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[63] Id. at 707-08.

[64] Id. at 703-04.

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

[66] Id. at 707.

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

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

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

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

[68] Brief of Respondent at 19.

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

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

We reverse McKinnon's conviction for theft by deception.

Cox, J.

WE CONCUR:

Trickey, ACJ

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

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

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|---|---|
| THE STATE OF WASHINGTON,<br><br>Petitioner,<br><br>v.<br><br>MICHAEL C. McKINNON,<br><br>Respondent. | SUPREME COURT NO. _____<br>COURT OF APPEALS NO. 74008-3-I<br><br>DECLARATION OF DOCUMENT FILING AND E-SERVICE |

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of September, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and 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 27th day of September, 2016, at the Snohomish County Office.

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