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COA No. 66078-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JACOB LIN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Michael J. Fox

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 3

 1. Original information. 3

 2. Amended information. 4

 3. Trial and Sentencing. 5

E. ARGUMENT 7

 1. MR. LIN'S TWO COURSES OF CONDUCT OF THEFT, SPURRED BY SEPARATE CRIMINAL IMPULSES OCCURRING BEFORE AND AFTER HIS ARREST, CONSTITUTED TWO UNITS OF PROSECUTION..... 7

 a. Double jeopardy precludes multiple punishments for the same constitutional offense..... 7

 (i). *Double Jeopardy*. 7

 (ii). *The unit of prosecution guides double jeopardy analysis*. 8

 b. The multiple convictions must be vacated. 16

 2. THE MULTIPLE CONVICTIONS ARISING FROM COUNTS 24 AND 25, AND COUNTS 27 AND 28, VIOLATE DOUBLE JEOPARDY WHERE THE "TO-CONVICT" INSTRUCTIONS WERE IDENTICAL AND THE JURY INSTRUCTIONS FAILED TO REQUIRE THE JURY TO FIND "SEPARATE AND DISTINCT ACTS" UPON WHICH TO BASE THE MULTIPLE CONVICTIONS 16

| | |
|---|----|
| a. <u>Double Jeopardy requires clear verdicts.</u> | 17 |
| b. <u>Lin's convictions in the specified counts were not established to be separate and distinct.</u> | 18 |
| c. <u>Duplicative convictions must be vacated.</u> | 20 |
| 3. THE CONVICTIONS WERE TWO COURSES OF THE "SAME CRIMINAL CONDUCT" FOR OFFENDER SCORE PURPOSES AND COUNSEL WAS INEFFECTIVE IF THAT ISSUE WAS WAIVED. | 21 |
| <i>Same criminal conduct generally.</i> | 23 |
| <i>Same victim.</i> | 23 |
| <i>Same place.</i> | 24 |
| <i>Same intent.</i> | 24 |
| 4. THE SPECIAL VERDICT WAS OBTAINED IN VIOLATION OF <u>GOLDBERG AND BASHAW</u> , AND MUST BE VACATED ALONG WITH REVERSAL OF THE CONVICTIONS | 27 |
| a. <u>The instructions misinformed the jury that agreement was required to reject the special allegation.</u> | 27 |
| b. <u>The error can be raised for the first time on appeal.</u> | 29 |
| c. <u>Under <i>Bashaw</i>, the error can never be harmless.</u> | 31 |
| F. CONCLUSION | 33 |

TABLE OF AUTHORITIES

WASHINGTON CASES

| | |
|--|----------|
| <u>State v. Adel</u> , 136 Wn.2d 629, 965 P.2d 1072 (1998). | 8,9,10 |
| <u>State v. Allen</u> , 101 Wn.2d 355, 678 P.2d 798 (1984) | 33 |
| <u>State v. Aumick</u> , 126 Wn.2d 422, 894 P.2d 1325 (1995) | 20 |
| <u>State v. Bashaw</u> , 169 Wn.2d 133, 234 P.3d 195 (2010). .. | 29,30,31 |
| <u>State v. Berg</u> , 147 Wn. App. 923, 198 P.3d 529 (2008). | 17,18 |
| <u>State v. Berrier</u> , 143 Wn. App. 547, 178 P.3d 1064 (2008) | 33 |
| <u>State v. Bobic</u> , 140 Wn.2d 250, 996 P.2d 610 (2000). | 7,8 |
| <u>State v. Borsheim</u> , 140 Wn. App. 357, 165 P.3d 417 (2007) | 17 |
| <u>State v. Burns</u> , 114 Wn.2d 314, 788 P.2d 531 (1990). | 26 |
| <u>State v. Calvert</u> , 79 Wn. App. 569, 903 P.2d 1003 (1995). | 23 |
| <u>State v. Carter</u> , 156 Wn. App. 561, 234 P.3d 275 (2010). | 19 |
| <u>State v. Clausing</u> , 147 Wn.2d 620, 56 P.3d 550 (2002) | 20 |
| <u>State v. Dolen</u> , 83 Wn. App. 361, 921 P.2d 590 (1996). | 24 |
| <u>State v. Dunaway</u> , 109 Wn.2d 207, 749 P.2d 160 (1987). | 23 |
| <u>State v. Elliott</u> , 114 Wn.2d 6, 785 P.2d 440 (1990). | 22 |
| <u>State v. Freeman</u> , 153 Wn.2d 765, 108 P.3d 753 (2005) | 8 |
| <u>State v. Gocken</u> , 127 Wn.2d 95, 896 P.2d 1267 (1995). | 7 |
| <u>State v. Goldberg</u> , 149 Wn.2d 888, 72 P.3d 1083 (2003) | 28 |

| | |
|--|-------|
| <u>State v. Grantham</u> , 84 Wn. App. 854, 932 P.2d 657 (1997) | 24 |
| <u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)..... | 22 |
| <u>State v. Jackman</u> , 156 Wn.2d 736, 132 P.3d 136 (2006). | 8 |
| <u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008) | 20 |
| <u>State v. Kinneman</u> , 120 Wn. App. 327, 84 P.3d 882 (2003) | 14,15 |
| <u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <u>aff'd</u> , 111 Wn.2d 66, 758 P.2d 982 (1988)..... | 26 |
| <u>State v. Maxfield</u> , 125 Wn.2d 378, 886 P.2d 123 (1994) | 23 |
| <u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995)..... | 22 |
| <u>State v. McReynolds</u> , 117 Wn. App. 309, 71 P.3d 663 (2003)..... | 9 |
| <u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1997). | 8 |
| <u>State v. Milam</u> , 155 Wn. App. 365, 228 P.3d 788, <u>review denied</u> , 169 Wn.2d 1023 (2010). | 25 |
| <u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984). | 31 |
| <u>State v. Pillatos</u> , 159 Wn.2d 459, 150 P.3d 1130 (2007) | 33 |
| <u>State v. Price</u> , 103 Wn. App. 845, 14 P.3d 841 (2000). | 24 |
| <u>State v. Porter</u> , 133 Wn.2d 177, 942 P.2d 974 (1997)..... | 24 |
| <u>State v. Ryan</u> , No. 64726-1-I (2011 WL 1239796 (2011))..... | 29 |
| <u>State v. Siers</u> , 158 Wn. App. 686, 244 P.3d 15 (2010) | 33 |
| <u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999) | 9 |
| <u>State v. Turner</u> , 102 Wn. App. 202, 6 P.3d 1226 (2000). | 9,10 |

| | |
|--|----|
| <u>State v. Vander Houwen</u> , 163 Wn.2d 25, 177 P.3d 93 (2008) | 31 |
| <u>State v. Vike</u> , 125 Wn.2d 407, 885 P.2d 824 (1994) | 24 |
| <u>State v. Vining</u> , 2 Wn. App. 802, 472 P.2d 564 (1970). | 13 |
| <u>State v. Walker</u> , 143 Wn. App. 880, 181 P.3d 31 (2008). | 23 |
| <u>State v. Wilson</u> , 136 Wn. App. 596, 150 P.3d 144 (2007) | 26 |

STATUTES AND COURT RULES

| | |
|----------------------------|----------|
| RCW 9.94A.589(1)(a). | 21,22,24 |
| RCW 9A.56.140(1). | 10,11,12 |

UNITED STATES SUPREME COURT CASES

| | |
|---|----|
| <u>Benton v. Maryland</u> , 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) | 7 |
| <u>Johnson v. Louisiana</u> , 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972) | 31 |
| <u>Williams v. Florida</u> , 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). | 31 |
| <u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) | 22 |

CONSTITUTIONAL PROVISIONS

| | |
|--------------------------------|------|
| U.S. Const. Amend. 5..... | 7,17 |
| Wash. Const. Art. 1, § 9. | 7,17 |
| U.S. Const. Amend. 14. | 7 |
| U.S. Const. amend. 6. | 22 |

A. ASSIGNMENTS OF ERROR

1. Mr. Jacob Lin's right to be free of double jeopardy was violated by his 29 convictions for theft where he committed only two units of prosecution as defined by the legislature.

2. Mr. Lin's right to be free of double jeopardy was violated where several of the theft convictions were not proved to be based on separate and distinct acts because of a defect in several of the "to-convict" jury instructions.

3. The trial court erred in not concluding the defendant's crimes should be scored as only two courses of the same conduct.

4. Alternatively, defense counsel provided ineffective assistance in failing to argue the offenses were two courses of the same criminal conduct at sentencing.

5. The special verdict must be vacated as improperly obtained and the theft offenses to which it was attached must be reversed.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The defendant committed two separate ongoing courses of conduct of theft pursuant to two separate criminal intents and impulses, by cashing two series of checks over a period of months, one before and one after the original thefts were discovered and

warned against by police. Were Mr. Lin's Double Jeopardy rights violated pursuant to the "unit of prosecution" analysis of State v. Turner¹ where he was convicted of 29 counts of theft based on each individual check?

2. Were Mr. Lin's Double Jeopardy rights violated pursuant to State v. Berg² where the "to-convict" instructions for Counts 24 and 25, and for Counts 27 and 28, were identical to each other, and the instructions failed to inform the jury that each count was required to be based on an act separate and distinct from the other counts?

3. Did the court err in failing to conclude that the defendant's crimes should be scored as two courses of the same criminal conduct?

4. Did defense counsel provide ineffective assistance in failing to argue same criminal conduct with respect to the defendant's two courses of conduct?

5. Must the special verdict be vacated where the jury was erroneously told that it had to be unanimous to reject the special allegation, and the theft convictions reversed?

¹ State v. Turner, 102 Wn. App. 202, 6 P.3d 1226 (2000).

² State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008).

C. STATEMENT OF THE CASE

1. Original information. Mr. Jacob Lin was charged by an original information filed in King County Superior Court with 13 counts of theft, based on checks that he cashed on the accounts of the owner of Chunshu Zhang International Incorporated, the business that employed him. CP 1-9. Chunshu Zhang is a sole proprietorship owned by Ms. Guang Feng, who hired Mr. Lin as an office worker. CP 6.

The affidavit of probable cause alleged a large number of checks that were allegedly improperly on various bank and credit card accounts owned by Ms. Feng. This occurred in part while she was traveling out of the country. CP 6-8.

The affidavit separated some of the checks by date, and in other parts of the attestation, simply described individual and totaled amounts of funds, taken over a range of dates. CP 6-8.

The 13 counts charged in the original information were thefts in the first or second degree, according to the amounts involved. The dates of commission were alleged to be single dates between March 14 through June 6, 2008. CP 1-9.

2. Amended information. The State filed an amended information charging 29 counts of theft in the third, second, and first degrees, along with aggravating factors of multiple offenses, and an allegation, attached to the counts occurring after the defendant had been discovered, that Mr. Lin had committed displayed an egregious lack of remorse. CP 10-29.

According to the prosecutor, the addition of charges and aggravators was based on the belief that Mr. Lin continued to cash a series of checks improperly even after some of the original takings were discovered by Ms. Feng, following which Bellevue Police Officer John Nourse, on June 30, 2008, arrested and booked Mr. Lin and warned him against further activity. CP 10-29; 1RP 47-49, see also 2RP 242-49.

In the amended information, the individual counts were each based on particular single *numbered* checks, allegedly cashed on dates from March 12 through July 7, 2008. CP 10-29; see CP 6-9. The 29 theft counts charged single dates, and also date ranges of several days or weeks; a large number of the date ranges overlapped each other. CP 10-29.

3. Trial and Sentencing. Ms. Feng discovered discrepancies in her business accounts when she was contacted by various banks and credit card companies, following which she called the Bellevue Police, and claimed the defendant had wrongly been obtaining funds. 1RP 133, 144-46.

Mr. Lin was contacted, then arrested and booked by Officer Nourse on June 30, 2008. 2RP 251. Mr. Lin told the officer that Ms. Feng had said “no,” but smiled, when he asked her if he could use the accounts while Ms. Feng was traveling, and he believed he had permission to disperse funds. 2RP 251-52. Mr. Lin testified similarly at trial, stating that Ms. Feng had given him permission to cash checks to pay various unanticipated amounts owed by the company, and that other checks represented items such as rent which needed to be paid during Ms. Feng’s time out of the country. 2RP 291-94.

Mr. Lin was found guilty as charged based on jury instructions that tracked the counts of first, second and third degree theft as alleged in the amended information, except that count 29 in the jury instructions extended the end date of the several-week charging period from July 7, 2008 to July 10, 2008. CP 76-104.

The “to-convict” instructions for two sets of the counts charged the same degree of theft and contained identical charging periods, and did not include language informing the jury that each count was required to be based on an act “separate and distinct” from the other counts charged. See Counts 24 and 25 (second degree theft), CP 99, 100; and Counts 27 and 28 (second degree theft), CP 102, 103.

The trial court rejected the State’s request for an exceptional sentence, denied the defendant’s request that the convictions be deemed one single course of conduct, and imposed a total period of incarceration of 43 months. CP 152-160; 3RP 444-46. The court stated at sentencing, however, that it had never seen embezzlement, theft or forgery cases that had been charged in the manner as the instant case, which involved a comparatively low amount of money but a large number of counts charged. 3RP 443-46.

Mr. Lin appeals. CP 164.

E. ARGUMENT

1. MR. LIN'S TWO COURSES OF CONDUCT OF THEFT, SPURRED BY SEPARATE CRIMINAL IMPULSES OCCURRING BEFORE AND AFTER HIS ARREST, CONSTITUTED TWO UNITS OF PROSECUTION.

a. Double jeopardy precludes multiple punishments for the same constitutional offense.³

(i). Double Jeopardy. The double jeopardy clause of the federal constitution provides that no individual shall “be twice put in jeopardy of life or limb” for the same offense, and the Washington Constitution provides that no individual shall “be twice put in jeopardy for the same offense.” U.S. Const. Amend. 5; Wash. Const. Art. 1, § 9. The Fifth Amendment's double jeopardy protection is applicable to the States via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 787, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969); U.S. Const. Amend. 14. Washington courts interpret Article 1, § 9's provision coextensively with the United States Supreme Court's reading of the Fifth Amendment's provision. State v. Gocken, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

³ Double jeopardy violations are, in general, manifest constitutional errors that may be raised for the first time on appeal under RAP 2.5. State v. Bobic, 140 Wn.2d 250, 257, 996 P.2d 610 (2000).

The State may bring multiple charges arising from the same criminal conduct, in a single proceeding. State v. Michielli, 132 Wn.2d 229, 238-39, 937 P.2d 587 (1997). Courts may not, however, enter multiple convictions or impose punishment for conduct that amounts to a constitutional same offense; doing so *violates* the defendant's double jeopardy protections. See generally, State v. Freeman, 153 Wn.2d 765, 770-72, 108 P.3d 753 (2005).⁴

(ii). The unit of prosecution guides double jeopardy analysis. In the context of Mr. Lin's multiple convictions for theft, when a defendant's double jeopardy challenge relates to multiple convictions under the same statute, the proper inquiry is what "unit of prosecution" the Legislature intended as the punishable act when enacting the criminal statute in question. State v. Bobic, 140 Wn.2d 250, 261, 996 P.2d 610 (2000). The unit of prosecution refers to the scope of the criminal act. State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). "When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy protects a defendant from being convicted twice under the same statute for

⁴ An alleged violation of the protection against double jeopardy is a question of law that this Court reviews *de novo*. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

committing just one unit of the crime.” Adel, 136 Wn.2d at 634.

Importantly, if the Legislature's intent regarding the unit of prosecution is unclear, the rule of lenity requires the court to construe the ambiguity in the defendant's favor. Bobic, 140 Wn.2d at 261-62. For example, in State v. McReynolds, 117 Wn. App. 309, 316, 71 P.3d 663 (2003), the defendants were convicted of multiple counts of first and second degree possession of stolen property, based on their possession of several different items. Possession of stolen property is defined as: "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). As with theft, the value of the property determines the degree of the crime. RCW 9A.56.150-.170.

The McReynolds Court reviewed these statutes and found that "the definition [of possession of stolen property] applies to all degrees of the crime, so the unit of prosecution remains the same." McReynolds, 117 Wn. App. at 335 (citing State v. Tili, 139 Wn.2d 107, 113, 985 P.2d 365 (1999)) ("The parallel construction of [rape] statutes dictates that the 'unit of prosecution' for rape remains the

same from one degree to the next.")). The Court determined that the unit of prosecution is a single act of possessing stolen property, regardless of the number of items possessed or their individual values. McReynolds, 117 Wn. App. at 335, 340.

In this case, the State charged and convicted Mr. Lin of a total of 29 counts of first, second and third degree theft in violation of RCW 9A.56.020(1)(a). CP 10-29. That statute defines theft as "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive[.]" RCW 9A.56.020(1)(a).

The degree of theft is determined by the value of the property or services taken -- property valued under \$250 dollars is third degree theft, property valued between \$250 and \$1,500 is second degree theft, and property valued over \$1,500 is first degree theft. RCW 9A.56.030(1), RCW 9A.56.040(1), RCW 9A.56.050(1). "The only distinction between the varying degrees of theft is the value of property stolen." State v. Turner, 102 Wn. App. 202, 208, 6 P.3d 1226 (2000).

The question in this case is whether the theft statutes allow for 29 multiple prosecutions based on the total number of checks

cached by Mr. Lin, rather than a prosecution on two counts based on the total value of the property taken during each of the two separate criminal impulses and courses of conduct under which the defendant committed the taking, one before, and one after, the warning by Bellevue Police. Mr. Lin argues that the double jeopardy case law and the State's manner of proving the instant case warranted only two "units of prosecution."

In Turner, the dispute on appeal centered on whether the Legislature intended multiple punishments where the defendant committed 72 acts of taking by different schemes or plans over the same period of time from the same victim. The State had charged 4 counts of theft by grouping the takings into four different factual schemes used to commit the thefts; i.e., where the defendant arranged for the payment of unauthorized bonuses to himself, or at other times by making unauthorized credit card purchases, etc. Turner, 102 Wn. App. at 208-09.

The Court of Appeals reviewed the theft statutes, and determined that they were ambiguous on the question whether such factual schemes constituted separate units of prosecution; therefore the Court held that "the rule of lenity dictates that the multiple

convictions in this case cannot stand because they violate double jeopardy." Turner, 102 Wn. App. at 209.

Similarly, the theft statutes do not clearly and unambiguously show that the Legislature intended multiple punishments for each single check cashed by Mr. Lin. The rule of lenity dictates that multiple convictions under such circumstances cannot stand because they would also violate double jeopardy. See Turner, 102 Wn. App. at 204, 208-09.

Even where there are multiple acts, Washington courts have found that multiple theft prosecutions are not necessarily allowed under Double Jeopardy strictures. Instead, when there are a series of acts, the facts of each case will determine whether the State can charge one count of theft or multiple counts of theft.

Where property is stolen from the same owner and from the same place by a series of acts there may be a series of crimes or there may be a single crime, depending upon the facts and circumstances of each case. If each taking is the result of a separate, independent criminal impulse or intent, then each is a separate crime, but, where the successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.

(Emphasis added.) State v. Vining, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970). Where the facts show a single, distinct plan or scheme, the State may only charge one count of theft. Vining, 2 Wn. App. at 808-09.

Here, Mr. Lin's successive takings from the accounts of Ms. Feng, before and after his arrest, interview and warning by Bellevue Police Officer Nourse, each constituted a single, criminal impulse or intent, pursuant to his purpose in obtaining, and then continuing to obtain, funds. Counts 1 to 25 constituted one unit of prosecution, followed by a second criminal impulse motivating the takings represented by counts 26 to 29, and a second unit of prosecution. This is how the State ultimately charged, and pursued its case against Mr. Lin. As the deputy prosecutor argued in its brief seeking an exceptional sentence,

Had Mr. Lin stopped depositing checks once he was terminated, or stopped depositing checks when he was arrested, it could be argued that this was one long course of conduct, and he should not face additional penalty simply because the State charged this as 29 individual counts. However, Mr. Lin's course of conduct was interrupted. Still, he resumed his activity after release from police custody.

CP 129 (State's sentencing memorandum).

Mr. Lin committed only two units of prosecution for first degree theft – total amounts exceeding \$1,500 -- under the theft statute.

The case of State v. Kinneman, 120 Wn. App. 327, 84 P.3d 882 (2003), is not to the contrary. In Kinneman, the defendant, an attorney, was convicted of 28 counts of first degree theft and 39 counts of second degree theft, after he made 67 unauthorized withdrawals by various means from his IOLTA account over a period of 16 months. Kinneman, 120 Wn. App. at 331-32. On appeal, Kinneman argued that the multiple convictions violated double jeopardy. Kinneman, 120 Wn. App. at 333.

The Court of Appeals disagreed, finding that each of Kinneman's withdrawals constituted a separate and discrete theft because they did not occur at the same time. The Court noted:

The State had the discretionary authority to charge Kinneman with a separate count of theft for each discrete, unauthorized withdrawal he made from his IOLTA account. He was not subject to double jeopardy for the 67 theft convictions where each was based on a discrete, unauthorized withdrawal.

(Emphasis added.) Kinneman, 120 Wn. App. at 338. In Kinneman, the defendant/attorney withdrew certain amounts on separate

occasions based on separate motivations, such as cash withdrawals for himself, but also checks payable to distinct and different clients, and checks payable to certain assorted lienholders. Kinneman, 120 Wn. App. at 328. The Court of Appeals decision was based not on the mere fact of multiple withdrawals, but on the fact that Kinneman engaged in multiple separate and "discrete" withdrawals over a lengthy period of time, which plainly constituted separate criminal impulses with different, circumstance-based intents.

Here, there were only two such separate impulses – one before, and one after, the thefts were discovered and warned against. In each instance the checks were a practical method of pursuing a single course of taking of money. Prosecutors do have considerable latitude to either aggregate charges or to bring multiple charges. See Kinneman, 120 Wn. App. at 337. But "a court should guard against the State's attempting to segment a singular criminal act to form the basis for multiple convictions." State v. Adel, 136 Wn.2d at 640. In this case, there were only two "discrete" acts and units of prosecution. Certainly, Kinneman does not support a proposition that 29 counts of theft were constitutionally permitted under Double Jeopardy, and Turner strongly indicates to the

contrary.

b. The multiple convictions must be vacated. The appropriate remedy in Mr. Lin's case is an order of remand for resentencing and vacation of all but two theft convictions. See Adel, 136 Wn.2d at 631, 637 (reversing one of two convictions where two convictions would violate double jeopardy); Turner, 102 Wn. App. at 212 (reversing two of three counts and remanding for resentencing).

2. THE MULTIPLE CONVICTIONS ARISING FROM COUNTS 24 AND 25, AND COUNTS 27 AND 28, VIOLATE DOUBLE JEOPARDY WHERE THE "TO-CONVICT" INSTRUCTIONS WERE IDENTICAL AND THE JURY INSTRUCTIONS FAILED TO REQUIRE THE JURY TO FIND "SEPARATE AND DISTINCT ACTS" UPON WHICH TO BASE THE MULTIPLE CONVICTIONS.

Under well-established Double Jeopardy case law, the "to-convict" instructions for Counts 24 and 25 (second degree theft), and also for Counts 27 and 28 (second degree theft), violated Double Jeopardy, where the two pairs of counts charged the same degree of theft and contained identical charging periods, and the jury instructions did not include language informing the jury that each count was required to be based on an act separate and distinct from the other counts charged. CP 99, 100, 102, 103.

a. Double Jeopardy requires clear verdicts. "The right to be free from double jeopardy . . . is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); Wash. Const. art. I, sec. 9; U.S. Const. amend. 5. A defendant's right to be free from double jeopardy is violated if the instructions do not make clear to the jury the State is not seeking to impose multiple punishments for the same offense. State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

This standard demands more than simply requiring that jury instructions be "accurate" and convey the law -- they must make the relevant legal standard "manifestly apparent to the average juror." State v. Berg, 147 Wn. App. at 931; see also Borsheim, 140 Wn. App. at 366. Thus identical jury instructions with the same charging periods charging the same crime must inform the jury that each count must be based on "separate and distinct acts." Id.

Notably, the jury also received an instruction stating, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 75 (Instruction No. 9). This

standard instruction, addressing all the counts in the case, did not prevent a Double Jeopardy violation -- the juries in Borsheim and Berg, both discussed infra, received-similar instructions. See Borsheim, 140 Wn. App. at 364; Berg, 147 Wn. App. at 935.

b. Lin's convictions in the specified counts were not established to be separate and distinct. In the absence of the required "separate and distinct" language, Mr. Lin was exposed to multiple punishments for the same offense as to the two pairs of counts indicated. Borsheim, at 364, 366-67. For example, the Borsheim Court vacated three of the defendant's four child rape convictions because of this instructional omission, relying in part on the fact that, as here, a single "to-convict" instruction comprised all the counts; the same result must follow here. Borsheim, at 371.

In Berg, the Court of Appeals followed Borsheim by vacating a child molestation conviction based on the same omission of "separate and distinct" language in the jury instructions, despite the fact that in that case, separate "to-convict" instructions -- as here in Mr. Lin's case -- were provided to the jury. Berg, 147 Wn. App. at 937, 944.

And recently, Division Two of the Court of Appeals followed

both Borsheim and Berg, vacating three of the defendant's four child rape convictions based on a similar error in the absence of the required explanatory language. State v. Carter, 156 Wn. App. 561, 234 P.3d 275 (2010).

Mr. Lin's case presents jury instructions that, in total, were at least as erroneous as those in Borsheim and Berg, in dispositive respects. As in those cases, here, multiple separate charges of the same crime were alleged to have occurred within the same stated charging period. Borsheim, 140 Wn. App. at 367; Berg, 147 Wn. App. at 934.

Importantly, although the charges were based on different checks introduced into evidence, it has been decided that neither the nature of the evidence at trial nor anything the State contends in closing argument can erase Double Jeopardy error induced by the jury instructions, or render such error constitutionally harmless:

The State offers no authority for the proposition that evidence or argument presented at trial may remedy a double jeopardy violation caused by deficient instructions.

(Emphasis added.) Berg, at 935; see also State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (stating that the jury must apply the

law in the instructions, and not base its understanding of the law on the attorneys' closing argument).

Indeed, the jury in Mr. Lin's case was specifically instructed by the court to not discern the facts or the law in any respect from the lawyers' arguments: "The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions." CP 64 (Instruction no. 1); see also State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995) ("it is the judge's province alone to instruct the jury on relevant legal standards") (quoting State v. Clausung, 147 Wn.2d 620, 628, 56 P.3d 550 (2002)) .

c. Duplicative convictions must be vacated. In the alternative to Mr. Lin's argument of Double Jeopardy under unit of prosecution analysis, this Court should vacate two of the indicated four convictions for theft based on the "separate and distinct acts" Double Jeopardy error in the jury instructions. Berg, 147 Wn. App. at 937 (proper remedy for double jeopardy violations is to vacate the additional convictions).

3. THE CONVICTIONS WERE TWO COURSES OF THE "SAME CRIMINAL CONDUCT" FOR

**OFFENDER SCORE PURPOSES AND COUNSEL
WAS INEFFECTIVE IF THAT ISSUE WAS WAIVED.**

Mr. Lin's counsel for sentencing argued in written briefing for sentencing that the 29 convictions all constituted one course of conduct. CP 134. At the sentencing hearing, counsel, who had been newly appointed, primarily found himself arguing against the State's effort to seek an exceptional sentence, but also noted that the convictions were simply an extended course of conduct aimed at the defendant obtaining money because of the needs of his family in Taiwan. 3RP 433-39. The trial court denied the exceptional sentence and imposed sentence within the standard range, although noting it believed the case had been overcharged. 3RP 443-46.

Mr. Lin contends that had the issue been analyzed properly by the trial court, the court would have determined that the two series of offenses before and after the defendant's arrest were each the "same criminal conduct," where each course involved the same victim, were committed at the same time and place in an ongoing scheme, and shared the same intent. RCW 9.94A.589(1)(a).

Alternatively, Mr. Lin's counsel was ineffective for failing to properly analyze the convictions and have the series of theft

convictions before and after the defendant's arrest scored as two courses of conduct. Ordinarily, the Court of Appeals will defer to the sentencing court's determination of the same criminal conduct, and disturb it only for "clear abuse of discretion or misapplication of the law." State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440 (1990)).

Mr. Lin believes the issue of proper scoring under the "same criminal conduct" standard was placed before the court, RAP 2.5, however, in the alternative, because trial counsel did not raise the precise issue at sentencing, the trial court has not yet had the opportunity to exercise its discretion. To sustain an ineffective assistance claim under the Sixth Amendment, a defendant must establish that his counsel's performance was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the unprofessional errors. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. amend. 6.

Same criminal conduct generally. Under the governing sentencing law, crimes constitute the same criminal conduct for

sentencing purposes only if they involve each of three elements: “(1) the same criminal intent, (2) the same time and place, and (3) the same victim.” State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994); RCW 9.94A.589(1)(a) (“same criminal conduct” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim).”

In determining whether separate crimes constitute the same criminal conduct, the court is directed to “focus on the extent to which the criminal intent, objectively viewed, changed from one crime to the next.” State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987). This analysis may include whether the crimes were part of the same scheme or plan and whether the criminal objectives changed. State v. Calvert, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995).

Same victim. The ultimate victims of a check forgery are the owner of the account and the payee or bank. Calvert, 79 Wn. App. at 580. The victim of theft is the owning party from whom the property is taken. State v. Walker, 143 Wn. App. 880, 891, 181 P.3d 31 (2008). In either event the victim is the same.

Same place. Theft is committed upon the taking of

unauthorized control over property of another, RCW 9A.56.020, therefore the defendant's crimes took place at Chunshu Zhang International. CP 1-9; see State v. Price, 103 Wn. App. 845, 856, 14 P.3d 841 (2000).

Same time. The "same time" element does not require that the two crimes occur simultaneously. State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996). Separate incidents may satisfy the same time element of the test when they occur as part of a continuous transaction or in a single, uninterrupted criminal episode over a short period of time. State v. Porter, 133 Wn.2d at 183; Dolen, 83 Wn. App. at 365. Here, the two courses of theft occurred over the same, uninterrupted periods of time.

Same intent. The "same criminal intent" element is determined by looking at whether the defendant's objective intent changed from one crime to the next. Dolen, 83 Wn. App. at 364-65; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997); see State v. Vike, 125 Wn.2d 407, 411, 885 P.2d 824 (1994) (standard for determining the same intent prong is the extent to which the criminal intent, viewed objectively, changed from one crime to the

next). The intent for each series of thefts, pursuant to the statute, is that the defendant intended to deprive another of property. RCW 9A.56.020. Cf. State v. Milam, 155 Wn. App. 365, 375, 228 P.3d 788 (identity theft and theft each contain an element that the other does not), review denied, 169 Wn.2d 1023 (2010).

Whether the defendant had an opportunity to reflect on his commission of the crime before committing another offense is an aspect of the determination of intent for same criminal conduct purposes. Here, Mr. Lin's intent was interrupted when he was arrested and warned by the Bellevue police officer, and concededly, the thefts before and after that event constituted a different criminal intent. However, the two series of takings of small amounts are each a single course of the same conduct under RCW 9.94A.589(1)(a).

Here, the State's theory of the case was that the defendant cashed checks in amounts that appeared appropriate to cover various expenses such as freight and rent that were usual to Ms. Feng's company. Plainly the defendant's intent was to obtain large amounts of cash in the amounts of tens of thousands of dollars, but that taking was purposely accomplished by multiple takings of

smaller amounts. Cf. State v. Wilson, 136 Wn. App. 596, 615, 150 P.3d 144 (2007) (where defendant had time to complete assault and then form new intent to threaten victim, crimes of assault and harassment had different objective intents and were not same criminal conduct).

The fact that one crime furthered commission of the other may, and in this case does, indicate the presence of the same intent. Vike, 125 Wn.2d at 411; State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990). The two series of crimes constituted the “same criminal conduct.” Had the same criminal conduct argument been made, Mr. Lin's offender scores, even considering his several prior convictions, would have been significantly lower and below “9”, which would have affected his standard range and, therefore, likely his sentence. Therefore, the materiality of the error in failing to raise the contention, and in failing to find same criminal conduct, indicates that there is “reasonable probability that but for counsel's error, the result [of the sentencing proceeding] would have been different.” State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988); Strickland v. Washington, 466 U.S. at 694. Mr. Lin asks that this Court remand the case for

resentencing and re-scoring of the multiple convictions for purposes of his offender score.

4. THE SPECIAL VERDICT WAS OBTAINED IN VIOLATION OF BASHAW AND MUST BE VACATED ON APPEAL, ALONG WITH REVERSAL OF THE THEFT CONVICTIONS.

Mr. Lin's jury found an aggravating factor based on a lack of remorse in committing the thefts after he was arrested. CP 56-62. These verdicts must be vacated because the jury was told it had to be unanimous as to a "no" answer. CP 117-18 (jury instruction 50). Reversal of the theft convictions is also required as the jury was misinstructed as to an element of the aggravated offense.

a. The instructions misinformed the jury that agreement was required to reject the special allegation. By telling the jurors generally that "each of you must agree to return a verdict" and failing to correct that instruction with regard to the special allegation, Mr. Lin's jury was instructed that whether it answered "yes" or "no" on the special verdict, it had to be unanimous. CP 117-18 (jury instruction no. 50). Thus the verdict was improperly obtained under State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), and State v. Bashaw, 169 Wn.2d 133, 146, 234 P.3d 195 (2010).

Although unanimity is required to find the presence of a special finding increasing the maximum penalty, it is not required to find the absence of such a finding. Furthermore, in Bashaw and Goldberg the Court makes clear that a non-unanimous negative jury decision on a special finding is a final determination the State has not proved that finding beyond a reasonable doubt, and re-trial is barred. See, e.g., Goldberg, 149 Wn.2d at 891.

Notably, this is no radical rule. Certainly the Supreme Court has inherent power both to fashion remedies, and to enforce its supervisory authority. The remedy the Court is imposing for violation of the Goldberg rule promotes the very conservative doctrine of judicial economy. Re-trial on an aggravator or enhancement requires the entire case be re-tried because aggravating factors are inextricably linked factually with the crime charged. Substantive offenses upon which there is already a guilty verdict, should not be re-tried all over again, simply to support a second prosecution on facts that merely enhance sentence.

b. The error can be raised for the first time on appeal. Mr. Lin did not object to the trial court's instructions with regard to the

aggravated fact in this respect, but neither did the defendant in Bashaw. Nevertheless, the Supreme Court addressed the issue and vacated the special finding and the enhanced sentence based upon the improper instruction. Bashaw, 169 Wn.2d at 146-47. Mr. Lin may raise this issue for the first time on appeal. As the Court of Appeals in Ryan correctly stated:

The Bashaw court strongly suggests its decision is grounded in due process. The court identified the error as “the procedure by which unanimity would be inappropriately achieved,” and referred to “the flawed deliberative process” resulting from the erroneous instruction. The court then concluded the error could not be deemed harmless beyond a reasonable doubt, which is the constitutional harmless error standard. The court refused to find the error harmless even where the jury expressed no confusion and returned a unanimous verdict in the affirmative. We are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless.

(Footnotes omitted.) State v. Ryan, No. 64726-1-I (2011 WL 1239796 (2011)) (at * 2). In Ryan, the State of Washington pointed, out of context, to a portion of the Bashaw opinion in which the Supreme Court stated that its holding was “not compelled by constitutional protections against double jeopardy.” See Bashaw, 169 Wn.2d at 145-47; see Ryan, at * 2.

But of all the contentions offered in support of the argument that the Bashaw holding did not have a constitutional basis, this is perhaps the least tenable. Review of the language of the Bashaw opinion makes clear that the Court was referring to the *remedy* for the identified instructional error, and was pointing out that the *source of the re-trial bar* was grounded in concerns for judicial economy, as opposed being based on double jeopardy principles. See Bashaw, 169 Wn.2d at 145-47. This language does not contradict, much less override the Bashaw Supreme Court's application of the "constitutional harmless error" analysis as indicative of the nature of the instructional error.

Finally, it seems beyond cavil that the issue should be treated as constitutional. The gravamen of Bashaw error is that the jury instructions erroneously overstate the degree of jury agreement necessary for acquittal. For a special finding, each individual juror has the ability (by voting no) to unilaterally exercise the power of acquittal. Bashaw error is just as plainly constitutional, as would be the opposite mistake -- erroneously *understating* the requirements for conviction. If the jury was instructed that only a *majority* of jurors needed to vote guilty in order to convict the defendant of the crime,

such error would squarely violate due process and the right to a jury trial. Where unanimity is required for conviction, understating that requirement is clearly an error that is constitutional in nature.

Johnson v. Louisiana, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972); Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Bashaw error is error of an analogous nature, but indeed a far greater extent of misstatement. Telling the jury that unanimity is required to answer “no” overstates by twelvefold the requirements of jury vote that is necessary.

Such error could certainly be raised for the first time on appeal. For further example, Petrich unanimity error may also be so raised. State v. Vander Houwen, 163 Wn.2d 25, 38, 177 P.3d 93 (2008); see State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The issue is properly before this Court.

c. Under *Bashaw*, the error can never be harmless. In Bashaw, the jury instructions suffered from the same error as those used in the present case. The Supreme Court refused to apply harmless error analysis, stating of the Respondent’s contentions:

This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. . . . The result of the flawed

deliberative process tells us little about what result the jury would have reached had it been given a correct instruction. . . . We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Bashaw, 169 Wn.2d at 147-48. The same analysis applies here.

This error is not subject to harmless error analysis. It is simply impossible to speculate what a jury in an aggravating factor case might have done or not done if each juror knew that he or she had it in his or her power to require the special allegation be answered in the negative. State v. Bashaw, at 148.

Finally, the Bashaw rule clearly applies to special verdicts regarding statutory aggravating factors. Goldberg was a case involving a special verdict issued on the aggravating factors enhancing first degree murder. Goldberg, 149 Wn.2d at 891; see RCW 10.95.020 ("A person is guilty of aggravated first degree murder [if] one or more of the following aggravating circumstances exist . . ."). The occurrence of re-trials in exceptional sentence cases affected by Blakely v. Washington under Legislative authority is not a demonstration that Bashaw's rule barring re-trial does not apply in Mr. Lin's case. See State v. Berrier, 143 Wn. App. 547,

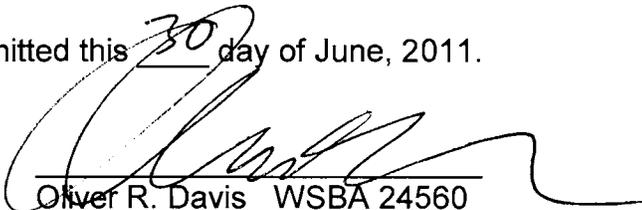
551, 178 P.3d 1064 (2008) (“the statute [RCW 9.94A.535] was amended to respond to . . . State v. Pillatos, 159 Wn.2d 459, 480, 150 P.3d 1130 (2007)”). The special verdict must be vacated.

d. The theft convictions containing the aggravator must be reversed. Additionally, failure to correctly instruct the jury on every element requires reversal of the conviction. See State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) (“trial court must instruct the jury on every element of the crime”). Here, the aggravator is such an element. State v. Siers, 158 Wn. App. 686, 702, 244 P.3d 15 (2010). The theft convictions that included the lack of remorse aggravator must be reversed.

F. CONCLUSION

Based on the foregoing, Mr. Lin respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 30 day of June, 2011.



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

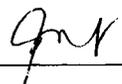
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| STATE OF WASHINGTON, |) | |
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| Respondent, |) | |
| |) | NO. 66078-1-I |
| v. |) | |
| |) | |
| JACOB LIN, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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