

NO. 34719-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

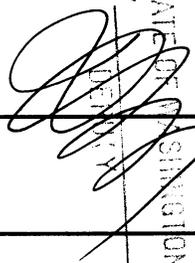
ROBERT C. DINGMAN,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda C. J. Lee

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DIVISION II

BRIEF OF APPELLANT

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A. SUMMARY OF APPEAL

Appellant Robert C. Dingman operated a construction company which specialized in adding sunrooms to existing structures. Dingman was a poor businessman and his company failed, leaving a large number of unhappy customers who had paid in whole or in part for sunrooms they did not receive.

Based on a series of contracts and associated transactions, commencing in 2001 and ending in 2002, when his company ceased to operate, the State charged Dingman with 20 counts of first-degree theft by unauthorized control and 36 counts of money laundering. Each theft count represented a contract. With respect to the money laundering counts, the State alleged that when Dingman expended monies received under a contract toward items other than what was specified in the contract, even when the moneys went toward such items as overhead or payroll, Dingman was using the funds unlawfully.

Dingman contends the State did not prove the essential elements of theft in the first degree. Specifically, Dingman contends under the “law of the case” doctrine that the State assumed the burden of proving he exerted unauthorized control and possessed the intent to deprive when he entered the contracts with the complainants. If the State did not assume this

burden, then the trial court erred in failing to give a unanimity instruction because any one of multiple acts could have established the charged thefts.

With respect to the money laundering counts, Dingman contends that as charged and proved here, the money laundering convictions and the thefts to which they allegedly pertain violate double jeopardy prohibitions. No “theft” was completed until the transaction occurred which the State chose to characterize as money laundering. The crimes are interlocked and entirely dependent on the same set of facts. The double jeopardy violation requires the money laundering convictions be vacated and dismissed.

Dingman also challenges the exceptional sentence imposed following his conviction. He contends first that the instructions on the special verdicts created alternative means and because all the means were not supported by substantial evidence, the trial court was obligated to give a unanimity instruction. He alternately argues that where the theft in question was from a marital community and involved property in which both husband and wife had an equal and indivisible interest, the “major economic offense” aggravator as defined by “multiple victims” was not established.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Dingman's pretrial motion for mirror images of computer files where the denial of the motion was contrary to CrR 4.7 and due process, prevented Dingman from accessing the files at trial, and deprived him his Sixth Amendment right to present a defense.

2. The State failed to sufficiently prove the essential elements of theft in the first degree as charged in counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49.

3. The trial court prejudicially denied Dingman his right to a unanimous jury verdict by failing to issue a unanimity instruction for purposes of the allegations of theft in the first degree in counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49.

4. The multiple convictions for theft in the first degree and money laundering violated constitutional prohibitions against double jeopardy.

5. The trial court erred in failing to issue a unanimity instruction with respect to the special verdict on "major economic offense" where the instruction on the special verdict allowed the jury to answer "yes" based on alternative means and the evidence was not sufficient to support both means.

6. The imposition of an exceptional sentence based on a major economic offense as defined by multiple victims was improper for counts 1, 7, 10, 12, 15, 18, 26, 34, 37, 39, 42, 44, and 46 where in each instance the theft in question was from a single victim, the marital community.

7. The trial court erred in entering finding of fact II in support of an exceptional sentence.¹

8. The trial court erred in entering finding of fact III in support of an exceptional sentence.

9. The trial court erred in entering conclusion of law II in support of an exceptional sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under CrR 4.7(a), a prosecutor must disclose to the defense “books, papers, documents ... or tangible objects” which the prosecutor “intends to use in the hearing or trial or which were obtained from or belonged to the defendant.” In the recent case of State v. Boyd, *infra*, the Washington Supreme Court analyzed this rule as it pertained to a defendant’s right to access computer hard drives seized from the defendant, and held that consistent with the Sixth Amendment right to present a defense and to effective representation of counsel, the rule

¹ The trial court’s findings of fact and conclusions of law for exceptional sentence have been supplementally designated as clerk’s papers. A copy of the court’s findings of fact and conclusions of law is attached as Appendix C.

mandates the State provide “meaningful access” by giving copies of the materials to the defense. Where the State refused to provide copies of computer hard drives and data seized pursuant to a search of Dingman’s home except in a format which all parties agreed the defense expert could not read, did the State fail to comply with its obligations under CrR 4.7(a)? Did the trial court’s ruling approving the State’s incomplete disclosure violate Dingman’s right to present a defense and to the effective representation of counsel? (Assignment of Error 1)

2. Where the materials allegedly contained potentially exculpatory evidence, did the State’s refusal to provide the materials violate Dingman’s Fifth and Fourteenth Amendment rights to due process of law? (Assignment of Error 1)

3. Under the common law “law of the case” doctrine, the State assumes the burden of proving additional “elements” of a charged offense when such “elements” are included without objection in the “to convict” instruction. For each of 20 counts of theft, the State employed novel wording regarding the charging period that required the jury to find that on or about a certain date “through” another date, Dingman exerted unauthorized control over the property of another, that the property exceeded \$1500 in value, and that he had the intent to deprive. No language limited the jury’s consideration to dates intervening within this

period. Under the law of the case doctrine, did the State assume the burden of proving Dingman had the intent to deprive from the initiation of the charging periods through their conclusions? Should this Court find the State did not meet its burden of proving intent with respect to counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49? (Assignment of Error 2)

4. Even if this Court does not agree that under the law of the case doctrine the State assumed the burden of proving unlawful intent at the initiation of the charging period, counts 1, 7, 10, 12, 15, 20, 26, 34, 39, 46, and 49 each involved multiple incidents which could have supported the charged thefts. The court did not instruct the jurors that they must be unanimous as to which incident the State proved beyond a reasonable doubt. Where the evidence of Dingman's intent was disputed, was the failure to require a unanimous verdict prejudicial error? (Assignment of Error 3)

5. The constitutional prohibition against double jeopardy protects against multiple prosecutions for the same conduct and multiple punishments for the same offense. Multiple convictions will violate double jeopardy if the offenses are the same in law and fact. Where the State prosecuted Dingman for money laundering based on acts which were

a key component for its related prosecution for theft, did the multiple convictions violate double jeopardy prohibitions? (Assignment of Error 4)

6. An accused person's constitutional right to a unanimous verdict may be violated where an elements instruction describes separate means of committing a crime and substantial evidence does not support one of the means. The United States Supreme Court and the Washington Supreme Court have held that because they increase the maximum punishment for a crime, aggravating circumstances are "elements" of a greater offense. Where the special verdict created alternative means of committing a "major economic offense" and substantial evidence did not support one of the means, did the trial court err in failing to issue a unanimity instruction? Must the sentence be reversed and remanded for imposition of a sentence within the standard range? (Assignments of Error 5, 7-9)

7. The trial court imposed an exceptional sentence based on the jury's finding that the thefts were a "major economic offense" because each count involved "multiple victims." In counts 1, 7, 10, 12, 15, 18, 26, 34, 37, 39, 42, 44, and 46, the thefts were from a marital community. Where under Washington law the interests of the marital community are unitary and indivisible, was the "multiple victims" finding improper for these counts? (Assignments of Error 6-9)

D. STATEMENT OF THE CASE²

In 1999, appellant Robert C. Dingman left his position as a salesman at Lifetime Exteriors and started a construction company in Gig Harbor with a partner, Tiffany Doty, called D & D Contractors, Inc. 29RP 2812-14, 2821.³ In early 2000, Dingman and Doty established a subsidiary company called Quality Home Enclosures (“QHE”), which focused on building sunrooms for local clients in partnership with local and national sunroom manufacturers. 29RP 2813. Dingman invested \$30,000 of his own money to start QHE and marketed the company’s product at local malls and home shows. 29RP 2818-21, 2858-59. Eventually the company, which initially was operated out of Dingman’s home in Gig Harbor, expanded enough for Dingman to rent office space in Fife. 28RP 2818.

² The Statement of the Case includes a brief summary of the general facts as necessary to provide the Court with a fair understanding of the chronology of events. In the interests of efficiency, additional facts are recited in conjunction with the arguments to which they pertain.

³ There are 42 volumes of transcripts of proceedings, the majority of which were transcribed by Court Reporter Dianne Wilson and which she consecutively paginated and numbered. On certain dates, other court reporters transcribed proceedings but these transcripts were not counted in Wilson’s numbered transcripts. For reading ease, Wilson’s numeration is maintained, but where multiple court reporters transcribed on a single day, those transcripts are numbered (a), (b), (c), etc. e.g. 20(a)RP 1851. A table of transcript citations is attached as Appendix A.

Due to a dispute over contracts assumed from Lifetime Exteriors, Dingman's business started at a deficit; however it grew so rapidly, Dingman did not realize for the first two years that his business was still operating at a loss. 28RP 2828-30, 2843. QHE wrote 50-60 jobs in 2000, \$1.6 million in business in 2001 – an increase of approximately 25% over the previous year – and completed \$2.2 million in jobs in 2002, so it appeared at least until the end of December 2001 that the company was generating sizeable profits. 28RP 2836, 2840, 2843, 2859-61, 2870. Dingman had calculated a financing system wherein if jobs were sold at “par,” approximately half of the money in each contract would cover the overhead, advertising, sales commission, and still leave a profit. 28RP 2824. However Dingman had so many employees – he used his own permanent construction crews instead of subcontracting out his jobs, and employed salespersons, marketers, office staff, and managers – much of his income was absorbed in overhead. 28RP 2843-44, 2857-59.

In March 2001, Dingman entered into a dealership agreement with Four Seasons Sunrooms (“Four Seasons”), a New York-based manufacturer of sunrooms. 27RP 2576-80, 29RP 2865-68. Pursuant to the agreement, Dingman was required to purchase a minimum of \$37,500 worth of business quarterly, which was equivalent to approximately six sunrooms. 27RP 2579. Dingman anticipated the dealership agreement

with Four Seasons would be a highly profitable venture, but this did not turn out to be so.

Four Seasons implied they would provide QHE with leads in Washington, but these turned out to be worthless. 29RP 2865; 31RP 3296-97. In turn, Dingman expended substantial funds in the dealership with Four Seasons. He generated signs, displays, mailers and presentation books. 29RP 2891. Additional costs not included in the dealership agreement involved marketing the Four Seasons product, engineering the Four Seasons sunrooms for each job, delivery and pick-up of the rooms, and purchasing brochures. 29RP 2868.

In October 2001, Dingman was contacted by Darryl Roosendahl, an investigator with the Washington Department of Revenue, regarding substantial amounts of sales tax that had been collected from clients but not remitted to the state. 25RP 2324-27. Roosendahl informed Dingman that the state was investigating him and that the investigation might be a criminal matter. 29RP 2874, 2877. Dingman told Roosendahl he was aware QHE owed sales tax, but said he had hired different bookkeepers and relied on them to ensure he was compliant with his tax obligation.⁴

⁴ Starting in November of 2000, Dingman had utilized the services of one accountant, Richard Haislip, to manage the QHE payroll, but Haislip erroneously included canceled contracts and change orders in its calculation of taxes owed and thus under Haislip's projected tax calculation, QHE would have made an

25RP 2330. QHE hired a new bookkeeper, Brad Goodwin, in September 2001, and in January 2002 made a payment of \$5,102.11 toward back taxes. 24RP 2217, 25RP 2341, 29RP 2882.

In March 2002, the dealership agreement between Four Seasons and QHE came up for review and Four Seasons decided to terminate it. 27RP 2584. Four Seasons allegedly had received complaints from several QHE customers that their rooms were not being built on time, and also had received a complaint from Alaska Traffic Company (“Alaska Traffic”), the transportation and holding facility to which orders were shipped, that sunrooms were sitting for a long time without being picked up or paid for. 27RP 2584-85. Four Seasons requested a credit check from QHE to which Dingman assented. At that time, there was only about \$6,200 - \$6,400 in QHE’s general account, a figure which Four Seasons found alarmingly low. 27RP 2587. Dingman acknowledged that some jobs were backed up and the financial situation with his company was not as stable as he would have liked, but felt that as the manufacturer of the sunrooms, Four Seasons had no place dictating how to run his business. 27RP 2589, 31RP 3230-33.

overpayment, which the company could not afford. 33RP 3613, 3615-16, 3619, 3629, 3660, 3662-63.

Following termination of the dealership contract, through counsel John O'Connor, QHE negotiated an agreement with Four Seasons to complete the remaining jobs involving Four Seasons sunrooms. 28RP 2737-38. Under the agreement, QHE would notify Four Seasons when a job was ready to be completed at which point Four Seasons would ship the sunrooms. At this time, QHE would pick up and pay cash on delivery for the rooms. 28RP 2739. Four Seasons' termination of its dealership agreement created problems for QHE, however. Four Seasons relayed negative information about QHE to customers, many of whom canceled their contracts with QHE outright after having contact with Four Seasons. 28RP 2739; 29RP 2899.

By this point, Dingman realized QHE was in serious financial trouble. In March 2002, he hired Mike Howard, a recent graduate from business school and the son of a customer, to try to identify how to streamline his business and increase efficiency. 26RP 2413-15; 29RP 2884-85. When Howard came on board, there were 67 jobs that had not been completed. 26RP 2442, 29RP 2889. Howard felt it was inevitable QHE would fail as a business and that Dingman needed to close QHE's doors as soon as possible. 26RP 2427-30, 2438.

Dingman found Howard's recommendations difficult to swallow given Howard's lack of experience. 29RP 2889. With regard to his

backlog, Dingman was in a quandary: he could not reduce his employees' pay but also could not cut the number of construction crews because both options would adversely affect the completion of existing jobs. 29RP 2910. Dingman terminated the employment of a number of his managers, including his long-time construction manager, Mark Pray, and persisted in trying to complete as many of his existing jobs as possible. 23RP 2081; 29RP 2884, 2913. By summer 2002 it was obvious to Dingman and his top managers that his company was hemorrhaging money. 29RP 2914; 30RP 3023.

In late August 2002, Four Seasons demanded a complete list of QHE's unfinished contracts, all information pertaining to the contract amounts, and contact information for all customers awaiting Four Seasons sunrooms. They also demanded that Dingman meet with their representatives. 28RP 2741. Dingman feared that Four Seasons would use this information to steal his contracts and his clients. 29RP 2925. He reasoned that if he provided the information and Four Seasons took his clients, QHE would still be bound by the contracts, but would lose any monies owed them under the agreement. Id. Acting on the advice of counsel, Dingman refused to attend the meeting, at which point Four Seasons said they would no longer ship orders. Id. Dingman still tried to keep the company going switching suppliers to Western Awning

Company (“Western Awning”), a local sunroom manufacturer. 29RP 2903-05, 2915.

In September 2002 so many of QHE’s managers and staff had resigned and funds were so tight that Dingman realized the company’s demise was certain. 29RP 2915; 31RP 3212. Dingman stopped taking in new contracts at this time. 29RP 2915. He still hoped to complete his existing jobs and expected he would sell his own property, if necessary, to do so. 29RP 2925-26. Dingman consulted with counsel and provided his attorney with a list of the projects that still had outstanding work obligations. 28RP 2742. QHE’s attorney sent these customers letters proposing that additional funds owed under the contract be placed in escrow so the jobs could be completed. 28RP 2742. Dingman planned to hire subcontractors to finish the jobs and sold his own car and ski boat to effect this. 29RP 2920-21. He in fact finished two jobs using these funds. 29RP 2922.

In October 2002, a QHE employee telephoned a number of customers and warned them not to give Dingman any more money. At the same time, unhappy customers had arranged a meeting to discuss QHE’s failure to perform under their contracts and local news stations began covering the story. 29RP 2916-17; 31RP 3212. Dingman closed his

business and in a civil lawsuit agreed to pay Four Seasons approximately \$225,000 for rooms they completed under QHE contracts.

Based on a series of uncompleted contracts and financial transactions beginning in June 2001 and ending in October 2002, the Pierce County Prosecuting Attorney charged Dingman with 20 counts of first-degree theft, contrary to RCW 9A.56.030, and 35 counts of money laundering, contrary to RCW 9A.83.020. CP 186-215. The case was tried before the honorable Linda C. J. Lee. On Dingman's motion, mid-trial, the court dismissed counts 5, 8, 13, 16, 21, 23, 24, 25, 27, 29, 31, 32, 40, 47, 50, and 56 for insufficient evidence. 30RP 2960-82; CP 935-36. A jury acquitted Dingman of counts 3, 4, 6, 9, 22, 28, 30, 33, 35, 36 and convicted him of the remaining counts. 37RP 3790-95; CP 820-51.⁵ By special verdict, and over defense objection, the jury found Dingman committed a major economic offense as defined by multiple victims or multiple incidents per victim with respect to counts 1, 7, 10, 12, 15, 18, 20, 24, 26, 34, 37, 39, 42, 44, 46, and 49. CP 855, 860-88. The trial court found substantial and compelling reasons existed to impose an exceptional sentence and imposed consecutive sentences of 12 months on each of the theft counts excluding count 52, for a total of 180 months confinement, a

⁵⁵ A table detailing the charges and their dispositions is attached as Appendix B.

57-month sentence on count 52 concurrent with the sentences on counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49, and 12 month sentences on each of the money laundering counts, also to be served concurrently with the 180-month term on counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49. 38RP 3851-55; Supp. CP __ (Judgment and Sentence). This appeal follows.

E. ARGUMENT

1. THE TRIAL COURT ERRONEOUSLY DENIED DINGMAN'S DISCOVERY REQUEST FOR EITHER A MIRROR IMAGE OF COMPUTER HARD DRIVES IN A FORMAT READABLE BY THE DEFENSE EXPERT OR FOR THE OPPORTUNITY TO VIEW AND DUPLICATE THE DRIVES, THEREBY DENYING DINGMAN HIS SIXTH AMENDMENT RIGHT TO PRESENT A DEFENSE.

a. The defense motion for useable copies of Dingman's computer hard drives. Dingman moved pretrial for a readable copy of his computer hard drives, which had been seized pursuant to a search warrant. 1RP 6, 14, 16-17. Dingman had retained L. Randall Karstetter as a computer expert. The State had provided copies of the hard drives to the defense in EnCase, a forensic examining tool developed and used primarily by law enforcement, but Karstetter did not have EnCase or a program that could read EnCase. 2RP 20-25. Karstetter testified at a pretrial hearing on August 30, 2005, that in every case in which he had

appeared as an expert before, he had been provided a mirror image clone of computer hard drives. 2RP 20.

The EnCase software was expensive – costing \$3,607 – so simply acquiring the software as a response to the State’s position was not an option for Karstetter. 2RP 221. Moreover, according to Karstetter, he had been informed by EnCase Software Help that most users of the program are law enforcement and hostile to the criminal defense. 2RP 38.

Karstetter feared an inherent bias might exist in the program that would preclude recovery of exculpatory evidence using the EnCase examining tool. 2RP 39.

Pierce County Sheriff’s Deputy Gregory Dawson acknowledged EnCase was used primarily by law enforcement. 2RP 57. He stated he had used EnCase to image nine computers and floppy disks seized from Dingman’s home. 2RP 60. He estimated that cloning the hard drives would require 30 hours of work. 2RP 67. He stated he would provide the computers themselves to the defense if directed to do so by the court. 2RP 81.

A computer forensic specialist with the prosecutor’s office voiced concerns with surrendering the computers to the defense for copying or allowing Karstetter to use his preferred program, Ghost, to create a mirror image of the files. 3RP 106-09. Although Ghost was widely used in

computer forensics the State's witness indicated Ghost occasionally has imaging problems. 3RP 112. The witness also speculated the hard drives might not work properly due to "stiction" – that after sitting in the evidence room, the computer read/write heads might not spin properly, causing damage to the media. 3RP 122.

The court denied the defense discovery request. 3RP 139-40.

At a hearing on September 12, 2005, Dingman's defense attorney, a public defender with the Pierce County Office of Assigned Counsel, indicated that he had looked into purchasing EnCase but that his office was unable to expend the funds to purchase the program. 4RP 151-52. The court ordered counsel to "move on." 4RP 152.

At a subsequent hearing on December 9, 2005, Dingman's counsel moved for a continuance. He noted his office did not get EnCase or authorize funding for personnel to be trained in the use of the program. 5RP 182-83. He stated that there were more than 60 gigabytes of data on the computer which he had not yet been able to access. 5RP 185. The State objected, and the court ruled that the materials the defense sought were available to Dingman through his own hard records and documents. 5RP 188, 200.

At trial, the State called a forensic accountant who, relying on an analysis of Dingman's receipts, paper records, and bank transactions,

estimated Dingman's expenditures toward each job. 27(a)RP 5-10. None of this witness's estimated calculation of expenditures included labor costs. 27(a)RP 55.

In his defense, Dingman repeatedly testified that he maintained complete customer databases on his computers. 32RP 3396, 3493, 3505-09. Dingman explained he tried to make QHE's records paperless, thus much of the information regarding each contract, including the work performed and the money expended toward satisfaction of the contract, was only available on his computers. 32RP 3508-09. He testified he had been precluded from reviewing his notes in the computers.

It's my ongoing bitter debate with the courts that they have offered me the right to see the computers. And to this day I have not seen one iota out of those computers.

32RP 3494.

b. The trial court erred in denying the defense discovery motion where the evidence was subject to mandatory disclosure under CrR 4.7(a), and Dingman required meaningful access to the evidence in order to prepare for trial and receive the adequate representation guaranteed by the Sixth Amendment. Dingman contends the State's failure to either make the computer hard drives available to him or provide copies in a format that was readable by the defense expert – i.e., make them accessible in order for Dingman to prepare his defense – violated the

mandatory disclosure rules of CrR 4.7, precluded him from preparing his defense, and inhibited his counsel's ability to prepare for trial. Because he was prejudiced by the constitutional error, he requests reversal and remand for a new trial at which he will be afforded access to the evidence.

In the recent case of State v. Boyd, the Washington Supreme Court considered nearly the identical issue presented on appeal here. ___ Wn.2d ___, 158 P.3d 54 (2007). Boyd and the two consolidated cases were prosecutions for possession of child pornography in which the State sought to avoid providing discovery of computer files and documents, maintain the materials in the State's custody and restrict the defendant's access to times convenient to the State. 158 P.3d at 57.

Similar to here, in Boyd, the trial court reasoned the defendant had "no right to unlimited access to evidence," only "reasonable access." Id. For this reason the court entered an order allowing defense counsel to access a mirror image of Boyd's hard drive, but only in a State facility, during two sessions, and only through the State's operating system and software. Id.

On review, the Supreme Court first analyzed which provision of CrR 4.7 applied. The Court held the applicable section was CrR 4.7(a),

setting forth mandatory disclosures by the prosecution.⁶ In so holding, the

Court reasoned:

This rule could not be any clearer in establishing what the State must disclose, and this is precisely the type of evidence involved in these cases. The evident purpose of the disclosure requirement is to protect the defendant's interests in getting meaningful access to evidence supporting the criminal charges in order to effectively prepare for trial and provide adequate representation. The evidence is offered to substantiate the criminal charges. We hold that CrR 4.7(a) controls the issue raised in these cases.

Boyd, 158 P.3d at 59.

The Court next addressed what “disclose” means for purposes of the rule, and concluded that “disclose” includes making actual copies of certain kinds of evidence. The Court analyzed the rule in light of the Sixth Amendment right to the effective assistance of counsel as enunciated in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 1052, 80 L. Ed. 2d 674 (1984), and reasoned:

⁶ That section of the rule reads:

(a) Prosecutor's Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

... .

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant.

The principles underlying CrR 4.7 require *meaningful access* to copies based on fairness and the right to adequate representation. The discovery rules “are designed to enhance the search for truth” and their application by the trial court should “insure a fair trial to all concerned, neither according to one party an unfair advantage nor placing the other at a disadvantage.”

Id. (quoting State v. Boehme, 71 Wn.2d 621, 632-33, 430 P.2d 427 (1967) (emphasis added)). The Court reiterated that “the revelation of facts must be meaningful” in order to ensure a defendant receives the effective assistance of counsel to which he is entitled under the Sixth Amendment. Id. at 60. The Court thus held, “Where the nature of the case is such that copies are necessary in order that defense counsel can fulfill this critical role, CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial.” Id. The Boyd Court ordered that, “given the nature of the evidence, adequate representation requires providing a ‘mirror image’ of that hard drive; enabling the defense attorney to consult with computer experts who can tell how the evidence made its way onto the computer.” Id.

In all salient respects, Boyd is on point and dispositive here. First, the evidence was subject to the mandatory disclosure rule of CrR 4.7 as “books, papers, documents ... or tangible objects” which the prosecutor intended to use at trial “or which were obtained from or belonged to the defendant.” Second, Dingman was entitled to copies of the computer hard

drives – and specifically, to a mirror image of the hard drives – so as to enable him to consult with his defense expert. Finally, the revelation of facts had to be meaningful so as to ensure that Dingman received the effective assistance of counsel to which he was constitutionally entitled.

The EnCase bit stream imaged files provided by the prosecutor failed to meet the stringent requirements of the court rule and the Sixth Amendment as expressed in Boyd. Most critically, the State did not disclose the evidence in such a manner as to make the disclosure meaningful. As defense counsel persuasively argued below, by providing the materials only in EnCase, the State had translated them into a language counsel could not understand.⁷ Because of the State’s insistent opposition to making the computers available in another format, the State made it impossible for the defense expert to access the files – and therefore, for defense counsel to assist Dingman in preparing and presenting his defense. As was amply demonstrated during trial, the limitation on discovery effectively impeded Dingman’s ability to defend against the State’s

⁷ Defense counsel argued, The State has translated the computers into Farsi, a foreign language that we don’t speak, and asked us to take Farsi because that’s what they decided to do and it was convenient and maybe very wise on their part. Well, we don’t want it in their language, your Honor. We want the discovery as it existed in Mr. Dingman’s computer and as it still exists in Mr. Dingman’s computer.

3RP 131.

allegations. Dingman is entitled to reversal of his convictions and remand for a new trial at which he will be properly afforded access to the copies of the evidence.

c. Dingman was also entitled to the evidence under the Due Process Clauses of the Fifth and Fourteenth Amendments and *Brady v. Maryland*. As the Court in Boyd also recognized, principles of due process require the State to give an accused person evidence “favorable to an accused ... where the evidence is material either to guilt or to punishment.” Boyd, 158 P.3d at 60 (quoting Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963)). “The suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87.

The evidence was both favorable to Dingman and material to guilt, as it would have enabled him to counter the State’s claim that he was doing only a few hundred dollars worth of work on each project. This Court should hold the denial of Dingman’s discovery request violated due process.

2. THE STATE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF THEFT IN THE FIRST DEGREE AS CHARGED IN COUNTS 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, AND 49.

According to statute, and as charged here, a person commits theft when he or she wrongfully obtains or exerts unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services. RCW 9A.56.020(1)(a); see also CP 761-63 (defining the offense for the jury).⁸ A person is guilty of first degree theft when the property or services exceeds \$1500 in value. RCW 9A.56.030(1)(a).

The State prosecuted Robert Dingman for 20 counts of first-degree theft. In each count the State alleged Dingman committed theft when his company, QHE, did not perform its obligations under a construction contract with a homeowner. The “to convict” instruction for each count listed as an element of each charge the allegation that Dingman committed theft “through” a period of time commencing at or near the formation of

⁸ RCW 9A.56.020 also defines “theft” as “By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services” or “To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(b); (1)(c).

the contract and terminating at or near the homeowner's renunciation of the contract.⁹

Dingman contends that under the law of the case doctrine, because of the language used in the "to convict" instruction, the State assumed the burden of proving he exerted unauthorized control over another person's property and that he possessed the intent to deprive from the outset of the charging period until its conclusion. He argues that even viewed in the light most favorable to the State, the State did not meet its burden of proving these added elements beyond a reasonable doubt. Dingman contends in the alternative that if the State did not assume this burden, then the trial court was obligated to give the jury a Petrich¹⁰ instruction because there were multiple acts which could have formed the basis for each of the theft allegations. He argues that the failure to give a Petrich instruction denied him his constitutional right to a unanimous verdict, requiring reversal of his convictions.

a. Under the law of the case doctrine, the State assumed the burden of proving Dingman exerted unauthorized control over the property of another and had the intent to deprive throughout the charging period.

⁹ Each of the pertinent "to convict" instructions is reproduced in section 2(a)ii(a)-(o), infra.

¹⁰ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

i. The law of the case doctrine. The law of the case doctrine is an established doctrine dating to the earliest days of statehood which holds that jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998) (citing Pepperall v. City Park Transit Co., 15 Wash. 176, 180, 45 P. 743, 46 P. 407 (1896) and Peters v. Union Gap Irr. District, 98 Wash. 412, 413, 167 P. 1085 (1917)). In the criminal context, the doctrine holds the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the “to convict” instruction. Hickman, 135 Wn.2d at 102 (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)); see also State v. Barringer, 32 Wn. App. 882, 887-88, 650 P.2d 1129 (1982) (where “to convict” instruction required jury to find valium was a “controlled substance,” this became the law of the case and an added element the State had to prove), overruled in part on other grounds by State v. Monson, 113 Wn.2d 833, 849-50, 784 P.2d 485 (1989).

Where the State has assumed the burden of proving surplusage by including “elements” in the “to convict” instruction, a defendant may assign error to such added “elements” and the court may consider whether the State has met its burden of proving them. Hickman, 135 Wn.2d at 102. “There is but one question ... that is, [i]s there sufficient evidence to

sustain the verdict *under the instructions of the court?*” Schatz v. Heimbigner, 82 Wash. 589, 590, 144 P. 901 (1914) (emphasis added). In determining whether there is sufficient evidence to prove the added element, the reviewing court assesses “whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt.*” Hickman, 135 Wn.2d at 103; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979) (emphasis in Green)). If the reviewing court finds insufficient evidence to support the added element, reversal and dismissal is required, and retrial is forbidden. Burks v. United States, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); Hickman, 135 Wn.2d at 103; State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (“The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.”).

In Hickman, the State included venue as an element of the “to convict” instruction in an insurance fraud prosecution by indicating the crime had occurred in Snohomish County, although venue was not an element of the charged offense. Reversing, the Court found the State had

failed to prove the crime occurred in Snohomish County and, consistent with double jeopardy prohibitions, barred the State from seeking a retrial. 135 Wn.2d at 105-06. Courts have reached a similar result where the State's burden was increased by an apparent scrivener's error. See State v. Nam, 136 Wn. App. 698, 150 P.3d 617 (2007) (although robbery is defined as the taking of personal property from the person of another or in her presence against her will by the use or threatened use of immediate force, the State assumed the burden of proving property was taken from victim's person when it omitted "presence" language from "to convict" instruction).

ii. The "to convict" instructions required the State to prove Dingman's criminal intent "through" the charging period. For each of the "to convict" instructions used for the theft counts, the State proposed essentially the identical jury instruction. See Supp. CP ___ (Plaintiff's Proposed Instructions to the Jury). In pertinent part, each "to convict" instruction for theft in the first degree informed the jury that to convict Dingman of the crime, they had to find that on or about the date the contract was entered *through* the date the contract was terminated, Dingman exerted unauthorized control over the property of another, that the property exceeded \$1500 in value, and that Dingman intended to deprive the other person of the property. No language limited the jury's

consideration to specific times or incidents intervening during the charging period. Dingman contends that by proposing this language, the State assumed the burden of proving Dingman exerted unauthorized control over property with the intent to deprive *throughout* the whole charging period, i.e., from its initiation to its conclusion.

This Court has held that the State’s inclusion of a particular charging period in the “to convict” instruction makes that charging period the law of the case. State v. Jensen, 125 Wn. App. 319, 104 P.3d 717 (2005), rev. denied, 154 Wn.2d 1011 (2005). In Jensen, a child molestation case, the defendant argued the State assumed the burden of proving the alleged molestation occurred during the charging period contained in the “to convict instruction.”¹¹ 125 Wn. App. at 325-26. This Court agreed, but found sufficient evidence had been presented for the jury to find the acts occurred during this charging period. Id. at 326. Here, however, this Court should find the State has not met its burden.

(a) Count I (The Sharpes). The “to convict” instruction for count 1 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count I, each of the following

¹¹ The language in the “to convict” instruction was substantially identical to the language used here, however the defendant’s argument regarding this language appeared to focus on whether the State had established any of the alleged acts occurred during this charging period. This Court therefore was not confronted with the same question presented here.

elements of the crime must be proved beyond a reasonable doubt:

(1) That **on or about the 6th day of June, 2001, through the 29th day of October, 2002**, the defendant wrongfully obtained or exerted unauthorized control over property of Kent and Joyce Sharpe;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 773 (emphasis added).

Dingman entered into a contract with Joyce and Kent Sharpe on June 6, 2001, to construct a Four Seasons sunroom. 10RP 457. The initial contract amount was for \$40,596; following a change order the contract price was \$45,335. 10RP 464-67. Under the contract the Sharpes were required to make an initial payment of \$15,000 as a “deposit.” 10RP 461. In July 2001, shortly after entering into the contract, the Sharpes contacted Dingman to negotiate a reduction in the contract price. 10RP 463. The Sharpes wanted to know whether it would be possible to rescind the contract and in the alternative to find out how much of their money would be returned if they canceled. 10RP 464. Dingman said they could not recover any of it; he said materials had been ordered and the money spent. Id. Accordingly they met with him to revise the contract and decided to

do their own electrical wiring, install the floors, and construct the interior walls to save costs. 10RP 464, 466.

In September 2001 a QHE construction crew began removing exterior walls and an awning. After 9/11, citing potential delays, Dingman attempted to persuade the Sharpes to accept a room from Western Awning. 10RP 470. The Sharpes declined. 10RP 470-71, 504. On November 30, 2001, QHE applied for a permit with the City of Puyallup. 10RP 527. The permit was issued December 4, 2001, and Kent Sharpe picked it up from the permit office. 10RP 506.

By January, no additional work had been done and the Sharpes were growing concerned. 10RP 507. Joyce Sharpe placed a number of telephone calls to QHE and finally on February 27, 2002, Mark Pray came to the house. Id. He requested a check for “delivering materials” in the amount of \$7,652.75 which Kent Sharpe provided. 10RP 508. On March 19, 2002, the Sharpes received a limited product warranty registration certificate from Four Seasons and by April 18, 2002, QHE workers came out, set forms and poured a concrete slab. 10RP 510, 514. No further

work was done by QHE. The sunroom was ultimately installed by a contractor hired by Four Seasons.¹² 10RP 525.

(b) Count 7 (The Murphys). The “to convict” instruction for count 7 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count VII, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That **on or about the 21st day of September, 2001, through the 29th day of October, 2002**, the defendant wrongfully obtained or exerted unauthorized control over property of Georgia and Louis Murphy;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 778 (emphasis added).

Georgia and Louis Murphy wanted a Four Seasons sunroom added onto their home in Allyn, Washington. 11RP 641-42. Georgia Murphy saw a QHE cart at the Kitsap mall and left her name and number for an appointment. 11RP 643. Dingman met with the Murphys on September 21, 2001. 11RP 644.

¹² Although the terms of the settlement were not made part of the record, Four Seasons’ satisfaction of the terms of the QHE – Sharpe contract presumably was addressed by its subsequent lawsuit against and settlement with Dingman.

He inspected the property and told them they would have to tear out their patio, move the septic system, and advised them that Mason County would only approve a permit for a room with a foundation. 11RP 647. He reassured them that QHE were professionals and could handle everything. 11RP 648. The Murphys entered a contract with QHE for a sunroom for \$30,104 and gave Dingman a \$10,000 deposit. 11RP 649-52, 708; Supp. CP __ (Ex. 3A). The Murphys asserted Dingman told them it would take 30 days for the permit to clear Mason County and then after the permit cleared it would take three weeks for the sunroom to be built, but Dingman disputed that he would have made such an unrealistic promise. 11RP 653-54; 32RP 3383.

On October 13, 2001, Dingman came out and collected another check from the Murphys. 11RP 654; Supp. CP __ (Ex. 3C). On November 27th, the Murphys contacted QHE for an update and were referred to Sam Day. 11RP 656. Day told them the permits had been submitted to Mason County on October 30th and that he would call Mason County for a status report. Day did not call the Murphys back. 11RP 657.

According to Day, it was typical for Mason County to be slow to issue building permits. 30RP 2998. On December 10th, Georgia Murphy spoke to Day again, who told her that the footing plans QHE had submitted to Mason County had been rejected and they were waiting for

revised plans from the engineer. 11RP 657. On December 20th, the Murphys received a letter from Mason County requesting footing specifications. 11RP 711. When they spoke with Day, he reassured them that they were dealing with the issue. 11RP 658.

Ultimately, on April 26, 2002, Murphy spoke to a county planning examiner who said the permit had been approved less than a week earlier but had not yet been picked up. 11RP 660. Georgia Murphy continued to call QHE and was told that Mark Pray would contact them to discuss a construction schedule. 11RP 661. Pray contacted them in May. 11RP 662. On May 14th, Pray came out to the property, surveyed it, and said the construction would be easy and would commence June 3rd. 11RP 663.

On May 30th, Murphy called Pray to remind him about his commitment and spoke with Dingman. Dingman told Murphy he had fired Pray and said Chuck Dailey would supervise the construction. 11RP 664. On May 31st, Murphy called Dailey and he came out and surveyed the site. 11RP 664. Murphy telephoned Dailey five times and ultimately on June 13th he said someone would come out the following day to dig holes for the footings. 11RP 665. A crew did come out as promised but the soil was hard-packed and they said they would return June 17th with a backhoe. 11RP 667. No one showed up and on June 19th Murphy was

told Dailey had quit and “Allen” would be supervising their project. 11RP 667.

Angry, the Murphys left a voicemail that same day for Dingman requesting a return telephone call or they would cancel the project. 11RP 668. Dingman did call back and committed to having “Mike” come out with a backhoe June 21st and completing the project to the Murphys’ satisfaction within 90 days. 11RP 670. On June 21st, Mike and another worker dug the foundation and four days later two other workers completed the dig. 11RP 671.

On July 2nd, the Murphys sent Dingman a letter reminding him of the 90-day commitment and giving him the option of canceling the project and refunding their money with interest. They requested a valid construction schedule by July 8th, all work to be completed by September 21st, and a \$150 penalty for every day after that the project was delayed. 11RP 673-74. They did not receive a response to the letter, but on July 9th, Dailey came out and started framing forms for the foundation. 11RP 675. The forms were inspected July 15th and did not pass inspection. 11RP 676. On July 25th, QHE workers corrected the form defects and the foundation was poured the same day. 11RP 677. On August 9th, 10th, and 12th, the subflooring was installed. On August 20th, workers moved an

external gas connection pursuant to the contract and removed all items belonging to QHE. 11RP 677.

In September Georgia Murphy questioned Dingman regarding the status of the sunroom. He said it would be delivered the following week. 11RP 680. On September 17th, Murphy spoke with Dingman again. He said he would meet with them on the 19th to discuss the project, and did so. He said Four Seasons was unreliable and their material shipments were short, causing construction delays. 11RP 682-83. He proposed the Murphys order the sunroom from Western Awning and pay for it with a cashier's check. 11RP 682. The Murphys declined to pay and Dingman said he would have Western Awning provide an estimate. 11RP 683. Murphy called Dingman four times between September 19th and October 2nd but he said he had not received the estimate. 11RP 683. Ultimately the Murphys received a letter from Dingman's attorney stating that QHE was ceasing operations and requesting they place additional funds in escrow for the project to be completed. 11RP 684; Supp. CP __ (Ex. 3E). The Murphys refused and requested a refund of \$9,564, which they figured to be their estimated loss. 11RP 686; Supp. CP __ (Ex. 3F).

(c) Count 10 (The Klemanns). The "to convict" instruction for count 10 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count X, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 2nd day of January, 2002, through the 11th day of November, 2002, the defendant wrongfully obtained or exerted unauthorized control over the property of Scott and Virginia Klemann;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 780 (emphasis added).

The Klemanns also contacted QHE after seeing the QHE kiosk at the South Hill Mall in Puyallup, and ultimately entered a contract for a Four Seasons sunroom on October 2, 2001, with salesman Andy Kline. 12RP 738. The contract amount was \$40,793 and included a kitchen remodel. 12RP 740; Supp. CP __ (Ex. 4A). The Klemanns wanted the sunroom completed by June of 2002; Dingman said this would be a “piece of cake.” 12RP 747-48.

The Klemanns followed Kline’s recommendations for financing but were surprised when a check for the full loan amount was issued directly to QHE. 12RP 744. They contacted Dingman, who told them not to worry about it. 10RP 745.

On January 29, 2002, QHE's permit manager Sam Day came out and discussed the construction job and some changes the Klemanns wanted. He said they were close to getting the building permit. 12RP 750. Virginia Klemann soon started calling QHE regularly to find out the status of the permit. 12RP 856. On March 14, 2002, Day telephoned Scott Klemann to say they had received their permit and the Klemanns dismantled their deck in anticipation of the work commencing. 12RP 752, 858.

On March 28, 2002, Mark Pray telephoned, and he came out to the property a couple of days later but did not subsequently return. 12RP 753. In early May, the Klemanns called QHE and were told Mark was no longer with the company and that they had a new project manager named Allen. 12RP 755. Allen met with the Klemanns and explained that Four Seasons had not yet sent the materials for the sunroom because of financial issues at QHE but that the problem was being addressed. 12RP 756-57. By this time, both Scott and Virginia Klemann were calling QHE frequently but rarely received return calls. Virginia Klemann did speak with Dingman in June at which point he explained he was having financial problems. 12RP 859. She accused Dingman of taking their money to pay for someone else's job and trying to get other people's money to pay for

their job; Dingman said “Well, that’s how business works.” He admitted he did not have the Klemanns’ money because he had spent it. Id.

In June the Klemanns were told they had a new project manager, Chuck. 12RP 761. Chuck met with the Klemanns in late June and explained QHE had had financial difficulties, that the materials for the sunroom had not yet arrived, that Dingman was out from under his financial problems and the Klemanns would receive a letter of explanation. 12RP 762. The Klemanns received the letter on July 15, 2002. 12RP 763; Supp. CP __ (Ex. 4C). Scott Klemann kept calling and eventually demanded, and received, a check for a 10% refund on the original contract amount. 12RP 766. However he had difficulties cashing the check because the QHE account lacked sufficient funds.

In August QHE laborers poured concrete and installed flooring for the Klemanns’ sunroom. 12RP 770, 772. In late August, Chuck called Scott Klemann; he informed him he no longer worked for QHE. 12RP 773. He told Klemann he was very upset and other employees were too. Id. At this point Virginia Klemann had a series of exchanges with Dingman in which both were emotional. 12RP 861-62. Scott Klemann subsequently contacted Dingman, who said the sunroom materials had been purchased, but it turned out that they had been ordered but not paid for. 12RP 774-75, 860.

The materials arrived in Seattle on September 19, 2002, and Dingman told Klemann he would have a crew ready to pick them up on September 26, 2002. 12RP 775. This did not occur and on September 28th, Klemann spoke to Dingman again, who assured him he would pick up the material for delivery on September 30th. Klemann telephoned Alaska Traffic who informed him they had not received any calls from Dingman. 12RP 776. Alaska Traffic said that Klemann could pick up the materials if he provided a signed release from Dingman and a check for \$6,531. 12RP 777-79.

On October 10, 2002, Scott Klemann called Dingman and scheduled a meeting. 12RP 780. Dingman admitted he needed \$7,000 more to get the materials and Klemann provided a check which Dingman agreed to repay at 6% interest. The room was delivered October 18th. 12RP 781-84. Klemann was unhappy with the room Dingman had ordered; it was an unheated space, rather than a livable room. 12RP 786, 867. Ultimately, the Klemanns' room was installed by a company called Sun Spaces, under a contract with Four Seasons. 12RP 820, 875.

(d) Count 12 (The Browns). The “to convict” instruction for count 12 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XII, each of the following

elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of October, 2001, through the 31st day of October, 2002, the defendant wrongfully obtained or exerted unauthorized control over the property of Vicki Platts-Brown and Ron Brown;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 782 (emphasis added).

The Browns¹³ entered into a contract with QHE for a sunroom in Fall 2001 for \$55,652.29. 12RP 879-80; 15RP 1288-89. They checked references provided by QHE – both references were satisfied with QHE’s work – and paid a deposit of \$22,260. 12RP 884, 15RP 1289. The Browns were concerned the project was underbid but QHE permit specialist Sam Day, who did the site check, assured them there was “fat” built into the bid. 15RP 1293.

The Browns’ home in North Seattle presented some unusual challenges for an addition. The QHE site check revealed the house was on a severe slope and the project required a lot of additional engineering.

¹³ For reading ease here, Vicki Platts-Brown and her husband Ron Brown are referred to together as “the Browns.”

23RP 2044-45; 30RP 3001. Because of these issues, the project was referred to Nicole Stremlow, an engineer who worked for QHE as an independent contractor. 15RP 1295, 1297.

In early March, Day telephoned the Browns and said the permit had been approved. He said based on the contract the Browns needed to write another check. 15RP 1298. He explained the first check had been used to pay Stremlow and related expenses. 15RP 1299. The Browns gave Day a check for \$16,695. 15RP 1298; Supp. CP __ (Ex. 5D).

When no QHE workers subsequently came out to the house, Vicki Platts-Brown telephoned Day. 11RP 1302. During this call, he said there had been “problems” and she should speak with Stremlow, who was in charge of the project. Stremlow informed Platts-Brown the permit still had not been approved. Id.

Platts-Brown telephoned Dingman to express her concern that QHE was being dishonest. 15RP 1305. Dingman instructed her to work with Stremlow. Stremlow told Brown the project could not go forward until the permit was approved. 11RP 1306. According to Stremlow, because of the critical slope on the property and the building design, obtaining the permit required a great deal of coordination with Seattle structural and geotech engineers. 23RP 2066.

The permit ultimately was approved on October 15, 2002, and Stremlow notified Platts-Brown that she should call QHE to schedule the job. 15RP 1307; 20RP 2048. Platts-Brown spoke with Dingman, who said he had financial problems and was restructuring his business. He said he planned to finish the jobs QHE had started. 15RP 1309. A few days later, he came out to the Browns' home with Stremlow and another employee. Id. Stremlow and Dingman informed the Browns that Day had underbid the job and there was not enough residual money owed for the job to be completed. 15RP 1310; 30RP 3085. Dingman admitted the money the Browns had advanced had been spent on operating expenses or taken by the IRS. 12RP 895, 909; 15RP 1311-12; 30RP 3089.

Platts-Brown asked for their money back. Dingman responded, "I do not have your money." 15RP 1312. He offered a kitchen remodel to help recoup some of the Browns' loss, but they declined, stating, "Your track record has been set." 11RP 895-96, 905, 908-10; 15RP 13-14; 30RP 3088. They subsequently received a letter from QHE's attorney offering to finish the job. 15RP 1319.

(e) Count 15 (The Ressler's). The "to convict" instruction for count 15 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XV, each of the following

elements of the crime must be proved beyond a reasonable doubt:

(1) **That on or about the 17th day of October, 2001, through the 17th day of September, 2002, the defendant wrongfully obtained or exerted unauthorized control over property of Ron and Marie Ressler;**

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 784 (emphasis added).

The Resslerers met with Sam Day on October 17, 2001, after seeing a QHE display at the Seattle Home Show. 12RP 914-15. Day wrote a contract for a Four Seasons sunroom for \$47,550 and referred the Resslerers to First Horizon Bank for financing. 12RP 920-21. The Resslerers made a \$500 good faith deposit on the day they entered the contract. 12RP 922; 14RP 1013.

The financing was approved on November 30, 2001. 12RP 925. First Horizon informed the Resslerers QHE would need to receive all of the money up front rather than in three payments. *Id.* The Resslerers felt this was unfair but were fearful of losing their low interest rate and any money for services already performed under the contract. Accordingly, a check for \$46,333 was issued directly to QHE. 12RP 926-27; 14RP 1016.

On December 1, 2001, QHE notified the Resslerers that the sunroom had been ordered and would be delivered from New York in four to six weeks. 12RP 927. The sunroom did not arrive and the Resslerers started telephoning QHE. 12RP 927. On February 21, 2002, the Resslerers received a warranty for the sunroom. 12RP 928; 14RP 1019. In March, QHE laborers dug nine holes to support the sunroom and in the last week of May, Chuck Dailey came out to pour cement. 12RP 928; 14RP 956, 1021. By this point the Resslerers were becoming agitated by delays and were dissatisfied with responses from QHE. On June 20th, they spoke with someone who told them Dailey had quit. 14RP 957, 1022, 1026. On June 21st, Marie Ressler spoke with Dingman. He agreed to come out and meet with her. 14RP 1027.

At that meeting, Dingman recommended that the Resslerers switch to a Western Awning sunroom. He admitted the Four Seasons sunroom had not been paid for. 14RP 961, 1028, 1031. He said they could get a Western Awning sunroom by August 15th. 14RP 962. The Resslerers decided to switch to a Western Awning room. Id.

On July 15th, the Resslerers received a letter from QHE stating their product was being shipped. 14RP 970. Between July 15th and July 19th, the subfloor for the sunroom was installed. 14RP 969. On July 25th, the Resslerers learned the room they had ordered had arrived. 14RP 972, 1045.

Ron Ressler called Dingman, who said he did not have the money or workers to pick up the room. Dingman said he would call every other day with a status update but he did not call. 14RP 973.

On August 29th, Ron Ressler had a confrontation with Dingman, during which he learned Dingman had not made payments on the room as he had said he would. 14RP 975. On August 30th, the Ressler's attorney sent QHE a letter reminding QHE of its duty to perform and stating QHE would be in default if the work was not completed within seven days. 14RP 976, 1001. On September 17th, through counsel, Dingman entered a settlement with the Ressler's wherein he agreed to finish the sunroom within 30 days and pay a \$100 penalty for every day after October 31st that the work was not completed. 14RP 985, 987, 1003. Dingman did not finish the room, and the Ressler's subsequently sued him and obtained a judgment against him. 12RP 976, 985. The Ressler's sunroom was later completed by Four Seasons. 14RP 992-93.

(f) Count 18 (Sean Tam and Amy Lam).

The "to convict" instruction for count 18 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XVIII, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 5th day of March, 2002, through the 27th day of August, 2002, the defendant

wrongfully obtained or exerted unauthorized control over property of Sean K. Tam and Amy B. Lam;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 786 (emphasis added).

Sean Tam and Amy Lam¹⁴ entered into a contract with QHE for a Four Seasons sunroom on November 23, 2001, after seeing a QHE kiosk at the Supermall in Auburn. 15RP 1145-49. For financing, the Tams used First Horizon, which was recommended by the QHE salesperson, and on March 4, 2002, when their financing was approved, they paid a deposit of \$15,500. 15RP 1153-54, 1185-86. At the recommendation of Sam Day, on March 21, 2002, the Tams entered a change order agreement to have one side of the room covered with aluminum siding instead of glass. 15RP 1156, 1185.

On May 7, 2002, Day told the Tams the permit application had been approved. 15RP 1160. No work was done, however, and “Jesse,” another QHE employee, told the Tams this was because QHE was waiting for approval from the Tams’ homeowners’ association. 15RP 1161.

¹⁴ Here referred to for reading ease as “the Tams.”

Angered by the delay, Amy Lam asked to speak with the QHE owner and was connected to Dingman. 15RP 1162. He said he did not know what had happened to her project but would find out and call her back. He said someone would come out and pour concrete and “check the electricity.” 15RP 1162, 1190.

Lam checked with her homeowner’s association and they had not received a request for the project to be approved. 15RP 1162. Lam next called the City of Kent and they had not received a permit application. 15RP 1164. At this point, she called an attorney for advice who, on July 22, 2007, wrote QHE a letter requesting the contract be terminated and any monies paid refunded. 15RP 1164-65. QHE did not respond to this letter, so the attorney wrote a second letter threatening a lawsuit. 15RP 1165. The Tams ultimately received a letter from attorney O’Connor stating QHE would finish the project if outstanding funds were placed in escrow. 15RP 1166. Through counsel, the Tams responded they did not wish to continue with QHE and wanted their money back. Id. The Tams did not receive their sunroom or a refund from QHE.

(g) Count 20 (Darlene Miller and Carol Kuhns). The “to convict” instruction for count 20 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XX, each of the following

elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 23rd day of January, 2002, through the 19th day of October, 2002, the defendant wrongfully obtained or exerted unauthorized control over property of Darlene Miller and/or Carol Kuhns;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 788 (emphasis added).

Darlene Miller and Carol Kuhns co-owned a home on Vashon Island. 15RP 1197-98, 1236. Miller scheduled an appointment with QHE to discuss adding a greenhouse to their home after seeing an advertisement on the roadway. 15RP 1237. On January 8, 2002, they entered a contract for a Four Seasons greenhouse with salesman Andrew Kline for \$27,594. 15RP 1239. They received a second mortgage on February 1, 2002, and on February 9, 2002, Sam Day came to do the site check and collect a check for \$11,976 per the contract. 15RP 1249. He said this money would be used to pay for the site plans, the permit from King County, and materials. 15RP 1243. In mid-March Miller spoke with Jesse at QHE, who said he was working on the drawings for their project. These were

submitted May 1, 2002. 15RP 1245. On May 30, 2002, QHE received conditional approval and on July 30, 2002, the permit was approved. 15RP 1245-46.

On September 1, 2002, QHE subcontractors poured the footings. Kuhns, who had been in the construction industry herself for 15-20 years, noticed the footings had no post anchors. 15RP 1212, 1247. She contacted Dingman about this, who told her not to worry. 15RP 1213. On September 5, 2002, after the footings were approved, Dingman came out to the house with Del Walker.¹⁵ At that meeting, Dingman told Kuhns he had a great crew who could install a new roof while the other construction was completed. 15RP 1214, 1248. Kuhns and Miller agreed and entered a new contract for \$8,000 on which they paid a \$4,000 deposit. 15RP 1216, 1248. Dingman said he would have roofing samples out the next day but this never happened. 15RP 1250.

Kuhns tried, unsuccessfully, to contact Dingman. 15RP 1217. On October 13th, Miller received a call from Walker informing her QHE had gone out of business. 15RP 1250. On October 19th, Kuhns and Miller sent a certified letter canceling their contracts to two different addresses for QHE; both were returned unclaimed. 15RP 1218, 1251. On

¹⁵ Kuhns and Miller referred to this individual's last name as "Miller," however it appears this was an error and the person to whom they actually were referring was Delmer Walker, a master carpenter and QHE construction foreman. See 23RP 2119.

November 8, 2002, they received a letter from John O'Connor indicating Dingman wanted to complete their project and stating any funds received would be placed in a controlled account. 15RP 1219, 1251. By this point, Miller and Kuhns had been in touch with Four Seasons and on the advice of counsel wrote a letter declining Dingman's offer and requesting termination of the contract and a full refund. 15PR 1220, 1252; Supp. CP __ (Ex. 8G).

(h) Count 26 (James Mathers and Cindy

Taylor). The "to convict" instruction for count 26 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XXVI, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) **That on or about the 26th day of February, 2002, through the 1st day of November, 2002,** the defendant wrongfully obtained or exerted unauthorized control over property of James Mathers and/or Cindy Taylor;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 790 (emphasis added).

Cindy Taylor saw a QHE display at the Seattle Home Show and made an appointment with Dingman for February 26, 2002. 17RP 1346, 1401. She and her husband James Mathers entered into a contract with QHE for a Four Seasons sunroom for \$29,460 and paid an initial deposit of \$7,365. 17RP 1349-50, 1406-07; Supp. CP __ (Ex. 10A). On March 5, 2002, Sam Day came to their house. He said he had to verify measurements and collected another check for \$7,365. 17RP 1354-55, 1409.

When no work was done by July 2002, Taylor started telephoning QHE. 17RP 1356. Dingman told her the permits were taking a long time but that they should be approved soon. 13RP 1357. At one point Taylor went to the QHE office in person. Dingman told her he thought things had just gone through and that he would send another person out to the site to make arrangements for the next step. Id. Del Walker came out to the site in August and inspected it. He recommended a concrete slab because of water drainage issues. 17RP 1358. This meant the permit had to be revised. 17RP 1360.

In September 2002 Dingman came out to the Mathers/Taylor home with two workers to break up the patio. 17RP 1361. He suggested that while they were breaking up the patio for the foundation of the sunroom they could break up the whole thing and put in a new patio and retaining

wall. 17RP 1362. Mathers and Taylor agreed and Dingman prepared a change order, at an additional cost of \$3,680. 17RP 1363-64. Later that week, workers came and broke up the patio, laid down a layer of gravel, and put in wood forms for the concrete. 17RP 1365-67. They worked two days. 17RP 1421-22.

On September 27th, Taylor telephoned Dingman's office to find out why nothing else had been done, but the number was disconnected. 17RP 1369. She managed to reach Dingman on his cell phone and he promised someone would be out the following Monday, but no one came. Id. On October 14th, Dingman said he would get a schedule to them by October 16th, but again did not follow through. 17RP 1370. On October 17th, Taylor contacted Dingman on his cell phone. He said he was closing his office and would be finishing his jobs with subcontractors. He said he would bring a written work schedule on October 22nd. 17RP 1370, 1423-24. Soon thereafter, Mathers and Taylor received a letter from O'Connor reiterating Dingman wished to finish the job, but Mathers and Taylor decided the contract was null and they did not want any more business with Dingman. 17RP 1425. The sunroom was eventually built by Four Seasons. 17RP 1440.

(i) Count 34 (The Dunivans). The "to convict" instruction for count 34 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XXXIV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) **That on or about the 30th day of May, 2002, through the 29th day of October, 2002**, the defendant wrongfully obtained or exerted unauthorized control over property of David and Vanessa Dunivan;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 794 (emphasis added).

The Dunivans hired QHE to build an addition onto their home and remodel their kitchen after seeing a QHE kiosk at the South Hill Mall in Puyallup. 17RP 1445-47. On April 13, 2002, Dingman and Sam Day met with the Dunivans at their home. Dingman drew up a contract for \$56,000 and the Dunivans set about obtaining financing. 17RP 1451; 23RP 1976. A change in the project elevated the cost to \$59,000. The total loan amount was \$62,000. 17RP 1452-53; 23RP 1977-78. Dingman said the project could be completed within 90 days, but the Dunivans did not wish him to start until after June 3rd. Nonetheless, Dingman requested an initial payment of \$36,000 so he could commence the approval process for the

building permits, do the site check, preparation, and order materials.

17RP 1453-54; 23RP 1979; 30RP 3115.

From the start, Vanessa Dunivan was very involved in the project, which necessitated numerous trips by Dingman to her home. 30RP 3116. From Dingman's perspective, Dunivan did not have a realistic notion of cost or finality; she frequently made changes to the project and spent in excess of what the contract allowed. 30RP 3118-20.

In the third week of June, when work had not yet commenced on the project, Vanessa Dunivan telephoned QHE. Dingman said Jess, who took care of permits, was out of the office and would return a week later. 17RP 1458. Dunivan called again in July and Dingman assured her the permits were done. Id. She then called the permit office and learned they had not yet been submitted. She called Dingman and this time he said they would be submitted the next morning. 17RP 1459.

On July 2nd, Dingman told Dunivan he needed \$12,000 to order cabinets from Home Depot. 17RP 1460. Dingman collected the check and Dunivan telephoned Home Depot and confirmed the cabinets had been ordered. 17RP 1461. By this time, the back patio had been chopped up, the concrete removed, and pilings for the addition installed. 17RP 1462. Other workers came and removed the old cabinets and appliances from the kitchen. 17RP 1463.

On August 23rd, 10 days before the cabinets were scheduled to be delivered, Dunivan received a telephone call from Home Depot. They said the cabinets were not coming and had been returned; there had been “a mix-up in the checks.” 17RP 1465-66. Dunivan called Dingman and asked what had happened. He told her the “wrong check had been canceled” and they would use another cabinet maker. 17RP 1467. “Jim,” the other cabinet maker Dingman found, measured the available space, said there were a lot of cabinets, and he would see if he could do it for Dingman’s requested price of \$6,000. 17RP 1467-68. Dunivan did not receive an estimate from “Jim.”

Dunivan found another cabinet maker in the yellow pages but Dingman told her the cabinets she had chosen were too expensive, and she would either have to give up her granite countertops or change the cabinet style. 17RP 1469, 78. She agreed and the cabinet price was reduced to \$10,000. 17RP 1480. Dingman still thought this was too expensive, but Dunivan stood her ground.

Dingman was supposed to provide Dunivan with a \$5,000 check for the cabinets but did not immediately do so. Dunivan ultimately obtained it from Dingman’s son and took it straight to the cabinet maker. 17RP 1483. Three weeks later the cabinet maker telephoned and told her the check had been returned for insufficient funds. 17RP 1484.

Dunivan telephoned Dingman. He said the IRS had taken his money but he thought the check had cleared. Id. Dunivan told him he had until that Friday to make the check good and demanded to see his IRS paperwork. Id.

They set up an appointment for October 8th. Dingman brought a stack of papers with him. 23RP 1989. He said the IRS had taken his money and if Dunivan worked with him he would finish her project but if she did not he would file for bankruptcy and she would get nothing. 17RP 1485. Dunivan gave him until that Friday to get the money for the initial payment on the cabinets but he could not pay the total amount. 17RP 1488. Dunivan went to her Credit Union and borrowed another \$3,000. Id.

On October 11, she telephoned Dingman and asked him if he had paid the remaining \$5,000 and Dingman said he had not. 17RP 1490. Dunivan hung up on him and the next day she moved all of the materials for the remodel into her home and hung a No Trespassing sign. 17RP 1491. The next day Dingman telephoned. He said he had sent out workers and they saw the “No Trespassing” sign on the fence and their materials were nowhere to be seen. 23RP 1992, 2012. David Dunivan told Dingman to call their attorney. 23RP 1992, 2013. The Dunivans did

not respond to a letter from Dingman's attorney indicating he wished to finish the project. 17RP 1496.

As of September 7, 2002, Dingman had put in the subfloor, removed the dining room wall, and started framing the outside room addition. 17RP 1469-74.

(j) Count 37 (The Smiths). The "to convict" instruction for count 37 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XXXVII, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 8th day of July, 2002, through the 21st day of October, 2002, the defendant wrongfully obtained or exerted unauthorized control over property of Eddie and Vevely Smith;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 797 (emphasis added).

Eddie and Vevely Smith entered a contract with Sam Day for a sunroom on June 3, 2002. 19RP 1638, 1670. The cost of the sunroom was \$47,482. 19RP 1641; Supp. CP __ (Ex. 13A). Dingman told the

Smiths two trees would need to be removed for the project and the Smiths had the trees taken out right away. 19RP 1656, 1674.

The Smiths initially tried to get financing through a Credit Union and when they were turned down, they contacted Dingman and were referred to U.S. Bank. 19RP 1664, 1669. After their loan was approved, on July 8th, Vevely Smith got a call from the bank that Ms. Dingman was there and wanted to pick up the full amount. 19RP 1651. Smith asked why and the bank officer said that she did not know; that was what Ms. Dingman was told she needed to do. Id. Smith refused and told the bank officer to only issue the amount necessary to cover the permit. Id. The bank officer said the young lady was getting very upset because her boss told her to pick up the full amount. Id. The bank then contacted Eddie Smith, who approved the disbursement. 19RP 1652, 1679. He later said he did not understand he was approving disbursement of the full contract amount. 19RP 1679.

The Smiths were told their sunroom would be completed within 40 days of July 9th or July 10th. 19RP 1699. When the start time came and nothing happened, Eddie Smith went to QHE's place of business in Fife. 19RP 1683. Dingman told Smith other projects were ahead of their project and he would come out to the house to give Smith an exact start date. 19RP 1684-85. He did not show up. 19RP 1685. The Smiths

telephoned Dingman and Eddie Smith drove by the business. 19RP 1653. Vevely Smith subsequently was telephoned by a QHE employee, who told her their job would not be completed; Dingman had taken the money and left. 19RP 1653. He said Dingman had not paid any of his employees and was having problems finishing the projects that were already in progress. 19RP 1685, 1702. The Smiths later received a letter from QHE's attorney, who said QHE had gone out of business. 19RP 1688.

(k) Count 39 (The Regans). The "to convict" instruction for count 39 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XXXIX, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) **That on or about the 14th day of June, 2002, through the 25th day of October, 2002**, the defendant wrongfully obtained or exerted unauthorized control over property of John and Tok Sun Regan;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 799 (emphasis added).

John Regan and his wife Tok Sun Regan entered a contract with QHE for a sunroom on June 14, 2002, for a total cost of \$31,455. 19RP

1720, 1723, Supp. CP __ (Ex.14A). The Regans paid an initial deposit of \$10,000. 19RP 1725-27. For the remainder of the contract amount, the Regans followed Dingman's recommendation for financing, which was approved in July. 19RP 1726. The contract was broken down into payments of \$5,000 for a site check, \$5,000 for ordering materials, \$4,000 for delivery, \$4,000 for installation of the walls, and the final payment of \$3,455 due upon completion. 19RP 1727.

The Regans expected to hear from Dingman right after entering the contract. 19RP 1789. After three or four days passed, Tok Sun Regan telephoned Dingman. He told her he was working on putting the order through and that it would take three to six months for the shipment to arrive. Id. The relationship between Dingman and the Regans quickly soured. Frustrated by the lack of movement on his project, John Regan telephoned Dingman in early July. 19RP 1728. During this call, Dingman had a hard time remembering who Regan was. 19RP 1729.

The Regans went to Alaska for a weeklong vacation on July 3, 2002. 19RP 1733. When they returned there was no message from Dingman. 19RP 1734. They called several times and received conflicting reports about the status of their project then, in mid-July, drove to Dingman's office with the hope of discussing the project's status with

him. 19RP 1734-35. No one was there except one of Dingman's sons, so Regan left Dingman a message to call him immediately. 19RP 1736.

Regan finally spoke to Dingman the following Tuesday and told him he wanted his money back. 19RP 1736. Dingman demurred, saying he had already run up a lot of expenses. Id. Regan asked what Dingman had spent the money on, and Dingman said he would like to come over to Regan's house to discuss it in person. 19RP 1737. Dingman showed up with a construction worker and begged to keep the job. 19RP 1738. He promised to handle everything personally. 19RP 1740. Regan refused several times, then relented, reasoning he already had sunk \$10,000 into the job, he wanted the sunroom, and Dingman seemed sincere. 19RP 1738.

On August 3rd, Dingman's son Jonathan met with the Regans and said the permit process was coming along nicely and they were ready to order materials, however under the contract another \$10,000 was due and had to be paid to cover the cost of materials. 19RP 1741. Regan wrote a second check for \$10,000 which he post-dated until August 9th. 19RP 1742. At the end of August, Dingman telephoned and said the permit was ready, noting he had never seen paperwork done so fast. 19RP 1745. Soon after, Pierce County delivered the permit. 19RP 1746.

After August 28th, the Regans started calling Dingman daily. 19RP 1744. On September 12th, QHE workers came out, took measurements, removed sod, dug out the foundation, dug holes for concrete, and later poured the concrete and inserted beams. 19RP 1747-48. After this, the work stopped. 19RP 1750.

In early October, Regan reminded Dingman he had promised to complete the project 30 days after breaking ground. 19RP 1751. He told Regan he had a lot of problems but would complete the jobs of those people “who will work with me.” Id. He said if Regan continued to work with him, he would only be out time, not money. Id. At first Regan agreed but then said that if Dingman had ordered the sunroom he should deliver the materials and Regan would have someone else do the work. 19RP 1752. Regan instructed Dingman to send him the materials and figure out the final bill, but this did not occur. 19RP 1753. Regan then called another contractor, who telephoned Western Awning and learned the sunroom had not been ordered. 19RP 1754.

Regan telephoned Dingman and asked if he had worked up the final bill. Dingman said he had been too busy. Id. Regan then asked if he had ordered the sunroom and Dingman said he had. Id. Regan said he had checked and no sunroom had been ordered in his name. Dingman said he could not understand why. Id. Regan pressed him, and Dingman said,

“Look, what do you want from me?” Id. Regan called Dingman “a little bullshit artist” and asked for his money back. Id. Dingman hung up and did not accept any further calls or give Regan any money back. 19RP 1755.

(1) Count 42 (The Fergusons). The “to convict” instruction for count 42 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XLII, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 17th day of July, 2002, through the 29th day of October, 2002, the defendant wrongfully obtained or exerted unauthorized control over property of Fred and Lorraine Ferguson;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 801 (emphasis added).

Lorraine and Fred Ferguson contacted QHE to build a sunroom on an existing patio behind their house after seeing a kiosk at the South Hill Mall in Puyallup. 18RP 1579. The Fergusons entered into a contract with QHE for \$23,436, and paid a deposit for materials and a site check on July 17, 2002. 18RP 1585, 1598, 1614. According to the young man and

young woman from QHE who picked up the deposit check from the Fergusons, the materials were to be delivered August 5th. 18RP 1616. When the materials were not delivered as promised, the Fergusons contacted QHE but received unsatisfactory excuses. 18RP 1590-91, 1618.

On August 19th, Fred Ferguson was told Dingman had requested permits. 18RP 1619. On August 26th, Dingman said the Department of Labor and Industries was going to review the contract for HUD compliance. 18RP 1620. On September 3rd, he said the plans had been submitted and construction would start soon after. Id. Ferguson subsequently went to the Pierce County permit office and was told no request for permits had been submitted. 19RP 1621. Ferguson continued to try to contact Dingman, unsuccessfully, and at some point got a message that his telephone had been disconnected. Id.

The Fergusons later received a letter from attorney O'Connor indicating Dingman wished to finish their job. Fred Ferguson left a message with O'Connor's paralegal that they were not interested in doing business with Dingman. 18RP 1623. He asked for their money to be refunded. Id. The paralegal said they would "make a note" of his request but Ferguson did not receive any money back. 18RP 1623-24.

(m) Count 44 (The DeSarts). The "to convict" instruction for count 44 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XLIV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) **That on or about the 20th day of August, 2002, through the 25th day of October, 2002,** the defendant wrongfully obtained or exerted unauthorized control over property of Alice and Allen DeSarat;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 803 (emphasis added).

Allen DeSart saw the QHE kiosk at the South Hill Mall and hired QHE to replace all their windows and sliding door. 18RP 1552-54. Sam Day met with the DeSarts and wrote up a contract for \$9,643.04. 18RP 1555. Day said QHE needed \$4,000 down before they would start the project. 18RP 1558. DeSart received an equity loan on August 20th and went to the QHE office in Fife to deliver the check. 18RP 1557. The DeSarts were told someone would come over to make final measurements “very soon.” 18RP 1558. No one showed up.

DeSart telephoned QHE and was referred by “Wes” to Dingman. 18RP 1559. Dingman came out in September and said QHE would order the windows and that workers would return in 10 days to two weeks to

install them. 18RP 1560-61. The DeSarts waited two weeks and then started calling. 18RP 1561. Eventually their telephone calls were not answered and finally the telephone was disconnected. 18RP 1652. DeSart's son went by the QHE office and saw an angry crowd and a television crew outside the business. 18RP 1563.

DeSart sent Dingman a notice of cancellation of the contract and request for refund on October 25, 2002, but did not receive a response. 18RP 1564. The DeSarts did receive a letter from Dingman's attorney stating he wished to finish their job, but the DeSarts declined. 18RP 1566.

(n) Count 46 (The Gosnells). The "to convict" instruction for count 46 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XLVI, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 13th day of July, 2002, through the 21st day of October, 2002, the defendant wrongfully obtained or exerted unauthorized control over property of Evelyn and Wilfred Gosnell;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 805 (emphasis added).

After receiving an advertisement for Four Seasons sunrooms in the mail that said QHE installed Four Seasons product, the Gosnells entered into a contract with Dingman on July 13, 2002, to add a sunroom to their Fircrest home for \$35,448. 19RP 1812-13, 1817, 1823; 20(a)RP 20. Dingman told them it would be ready for Thanksgiving. 19RP 1821. Dingman said they would start work while the Gosnells were on vacation and would “get right on” the permit. 19RP 1822-23. The Gosnells gave Dingman an initial deposit of \$6,500 and on Dingman’s advice, obtained a loan to pay for the remainder of the contract amount. 19RP 1823; 20(a)RP 21.

The Gosnells took a vacation in early August and while they were gone Dingman said he would have someone remove their patio and take the bricks off the back of the house. 20RP 1840. When the Gosnells returned, the patio had been broken up but there was rubble in the backyard. They telephoned Dingman and a man came and removed the rubble. 20RP 1840-41. Soon after laborers removed the sash and wood from around the window. 20RP 1843.

On August 19th, Evelyn Gosnell called Dingman because nothing more was happening. 20RP 1845. Dingman told her, “Well the engineering department is slow. It’s in engineering.” *Id.* On August 26th Gosnell telephoned again because Dingman had told her he would meet

with her that week but did not. Soon after that telephone call, Sam Day came out and took measurements and made photographs. 20RP 1846-47.

Dingman told Gosnell Fircrest was slow to issue permits, but when Gosnell checked with City Hall, no one from QHE had applied. 20RP 1847. Dingman again said the delay was the fault of the engineer. 20RP 1848. Gosnell eventually heard from Sam Day on September 12th who telephoned to say he was submitting the plans. 20RP 1850. On September 13th Fircrest Planning telephoned Gosnell and confirmed the contractor had just applied for a permit. On the 24th City Hall said the permit had been approved and would be picked up by Dingman that afternoon. 20RP 1850-51. By September 26th, the permit still had not been picked up, and the Gosnells ultimately learned this was because Dingman's check to the city had bounced. 20RP 1852-53.

On October 1st, Wilfred Gosnell contacted the police, who advised him the issue was a civil matter. 20RP 1853. He telephoned Dingman who said the materials for the sunroom would be paid for when they were delivered and that he would need more money. Id. Gosnell told Dingman he was not getting any more money until something was done. 20RP 1854. The next day Dingman telephoned. He said he had stopped by to pick up a check, but the Gosnells were not at home. Id.

The Gosnells were growing increasingly anxious. They telephoned several times and finally on October 7th Evelyn Gosnell spoke with Dingman. 20RP 1855. He told her he was behind because other customers were not paying him on time and he had hired too many people. 20RP 1856-57. She agreed to give him another chance.

On October 21st, Evelyn Gosnell spoke with Dingman again. 20RP 1858. This time he was defensive, saying his problems had increased and he was going bankrupt. 20RP 1858, 1870. On October 22nd, the Gosnells received a letter from Dingman's attorney. 20RP 1859. They sent a letter by registered mail to Dingman expressing their dissatisfaction as well as a letter from Tony Russo of Four Seasons who said Dingman was not authorized to contract for or build Four Seasons sunrooms. 20RP 1860. On October 30th, Dingman had a bitter exchange with Evelyn Gosnell and she terminated their contractual relationship.

(o) Count 49 (Dree Snider and Liesl Bohn).

The "to convict" instruction for count 49 instructed the jury:

To convict the defendant of the crime of theft in the first degree as charged in Count XLVI, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 12th day of August, 2002, through the 28th day of October, 2002, the defendant wrongfully obtained or exerted unauthorized

control over property of Dree M. Snider and/or Liesl H. Bohn;

(2) That the property exceeded \$1500 in value;

(3) That the defendant intended to deprive the other person of the property and

(4) That the acts occurred in the State of Washington.

CP 807 (emphasis added).

Dree Snider and Liesl Bohn saw the QHE kiosk at the Seattle Home Show, and entered a contract with QHE for a sunroom on July 31, 2002. 20(a)RP 79-80. Snider and Bohn had wanted a Four Seasons sunroom but Dingman told them he had a contractual dispute with Four Seasons and might not be able to get a product from them. 20(a)RP 82-83, 101. Dingman told Snider and Bohn a Western Awning room would be completed in three months. 20(a)RP 84.

The total cost of the room was \$31,573, and Snider and Bohn gave Dingman a down payment of \$5,714.60. 20(a)RP 86. Dingman said he would get the permit as quickly as he could. Id. Snider entered a change order on August 12, 2002, and that same day wrote a second check for \$4,500. 20(a)RP 87, 104. Bohn then telephoned him at least once a week to track the status of their project. 20(a)RP 91.

On October 8th, Dingman collected a third check for \$10,829.20.

20(a)RP 92. Bohn understood this check would be used to pay for the sun room, construction materials, permit, and to pay Dingman's workers.

20(a)RP 94. She asked Dingman to hold the check until she could transfer funds into the account and those funds cleared, and said she would notify him when this happened. 20(a)RP 92.

Bohn telephoned Dingman and asked when the permit would be started. Dingman said he was working on it. 20(a)RP 94. The conversation soon degenerated to an uncomfortable level. Dingman said he did not think Bohn even had the funds to cover the check and, taken aback, she rejoined, "Well, I don't think that you are going to do the work." 20(a)RP 94-95. Bohn hung up, then called back and said they should work on the project together and be cordial with one another. 20(a)RP 95.

Soon after, Bohn received a telephone call warning her about Dingman and tried to stop payment on the check, but was not successful. 20(a)RP 95-96. She subsequently telephoned the City of Auburn and learned no permit had been issued and no application submitted. 20(a)RP 96. She telephoned Dingman on October 29th to find out when the room would be started. He said he had 11 projects to complete before theirs and

would get to their project as soon as he could, then hung up. 20(a)RP 96-97. This was Snider and Bohn's last contact with Dingman.

b. The State did not prove Dingman exerted unauthorized control or had the intent to deprive "through" the charging periods.

Dingman contends that under the law of the case doctrine, the specific language pertaining to the charging period in each count imposed on the State the burden of proving Dingman intended to commit theft for the duration of the charging period. Where the State aggregates thefts or alleges multiple thefts constitute a continuing course of conduct, the State must prove "successive takings are the result of a single, continuing criminal impulse or intent executed as part of a general larcenous scheme." State v. Garman, 100 Wn. App. 307, 315, 984 P.2d 453 (1999) rev. denied, 141 Wn.2d 1030 (2000). Dingman submits that in each of the charged counts discussed above, the State did not prove that Dingman exerted unauthorized control or had the intent to deprive at the initiation of the charging period "through" its conclusion.

With respect to Count 1, involving the Sharpes, QHE entered a legitimate construction contract at a time when the business was running smoothly. QHE initially complied with the terms of the contract. QHE started demolition, applied for and obtained a permit, set forms, and poured concrete before at the last abandoning the project. In light of

QHE's efforts to initially fulfill its contractual obligations, it cannot be said the State proved beyond a reasonable doubt that QHE entered the contract with the intent to defraud. The conviction for theft in the first degree in Count 1 should be reversed and dismissed.

In Count 7, involving the Murphys, from the start the Murphys were frustrated by poor communication and delays in the commencement of their project. However, even assuming the disputed facts were resolved in the Murphys' favor – for example, assuming Dingman did promise the Murphys the permit would be approved in 30 days and the sunroom built three weeks after – the record does not establish beyond a reasonable doubt that Dingman had the intent to deprive when the contract was formed. QHE applied for and obtained a permit to construct the Murphys' sunroom. 11RP 660. A construction crew dug the foundation for the sunroom, framed forms, corrected defects per the county inspection, installed the subfloor, and moved the external gas connection according to the contract's terms. 11RP 671, 675-77. Although QHE did not complete the project, in light of QHE's partial completion of the contract, it cannot be said the State proved Dingman exerted unauthorized control over the Murphys' money and had the intent to deprive "through" the contract period. The conviction for theft in the first degree in Count 7 must be reversed and dismissed.

In Count 10, Dingman contracted to build the Klemanns a sunroom and remodel their kitchen. The project coincided with the onset of Dingman's serious financial difficulties and the work suffered as a result. Nonetheless, QHE commenced the project by applying for and obtaining a permit, pouring concrete and installing flooring. 12RP 770-73.

Dingman arguably was dishonest with the Klemanns. He repeatedly told them that the sunroom had been ordered when this was not so, and when it arrived he promised them a crew would pick it up but did not follow through. The Klemanns waited approximately eight months for their sunroom before Virginia Klemann finally confronted Dingman and he admitted he spent the money they had advanced on other projects. These facts, however, do not establish that when he entered the contract with the Klemanns he intended to commit theft. Even viewed in the light most favorable to the State, the evidence establishes the Klemanns were unfortunate casualties of the breakdown of Dingman's business, rather than victims of a deliberate plan to obtain their money. Count 10 should be dismissed for insufficient evidence.

The Browns' project, count 12, took a long time to get started because of the unusual engineering challenges posed by their property. The engineering was subcontracted to Nicole StremLOW, who testified candidly regarding the valid reasons why it took eleven months for the

building permit to be approved after she was retained on the project.

23RP 2044-48, 2065-66. Although Stremlow said communication with Dingman was a challenge, there was no indication from her testimony that his unavailability correlated to an intent to exert unauthorized control over the Browns' money. 23RP 2050.

When the permit was approved, almost one year after the Browns' contract was signed, all of the Browns' money had been spent on operating expenses or taken by the IRS. 15RP 1311. This also does not establish Dingman had the intent to steal when he entered the contract or "through" the contract period as required by the "to convict" instruction. In fact, Dingman demonstrated his good faith by offering to complete a project – a kitchen remodel – equal to the value of Sam Day's original bid. That the Browns refused Dingman's offer does not establish he intended to deprive them of their money when they signed the contract with Sam Day. Count 12 should be reversed and dismissed.

With respect to Count 15, QHE did a substantial amount of work for the Resslerers before they unilaterally terminated their contract. QHE construction workers dug holes for support beams, poured cement and installed the subfloor, and ordered the sunroom. 12RP 928-29; 14RP 955-56, 970, 972. QHE did not have the money to pay for the sunroom when it was shipped and the Resslerers ultimately sued Dingman. Given QHE's

considerable effort to discharge its contractual obligations, it cannot be said beyond a reasonable doubt that Dingman intended to deprive the Ressler of property on October 17, 2001, when the contract was formed. Count 15 should be dismissed for insufficient evidence.

With respect to Count 18, the Tams entered a contract with a QHE salesperson whom the State apparently chose not to call as a witness. The Tams dealt only with Sam Day for the first six months after the contract was entered, and Day handled the permit application. 15RP 1153-60. It was not until May or June that the Tams had their first contact with Dingman. 15RP 1162.

It is clear that the Tams were misinformed about whether QHE had sought approval from the homeowners' association and whether Day had applied for a building permit, but there is no evidence that Dingman himself had anything to do with, or even was aware of, the information that was being communicated to the Tams by other QHE employees. Dingman indicated the Tams canceled their project before permits were issued so it was impossible for QHE to fulfill its contractual obligations. 32RP 3409. That the Tams' money was not subsequently refunded does not establish Dingman had the intent to commit theft when the contract was formed. Nor should Dingman be held accountable for the State's failure to call a witness that could have established his intent at the outset

of the contractual period. Count 18 should be reversed and dismissed for insufficient evidence.

Count 20, involving Darlene Miller and Carol Kuhns, embraces two different contracts: the January 2002 contract for a greenhouse and the September 2002 contract for a new roof. CP 788. With respect to the greenhouse, QHE did a site check, obtained approval for a building permit and poured the footings. 15RP 1212-13, 1246-47. Although it may be argued Dingman should have known when he entered the contract for the new roof in September 2002 that his financial troubles made it unlikely he could complete the project, this does not establish he intended to deprive Miller and Kuhns of their money either then or when the contract for the greenhouse was formed. Cf., Garman, 100 Wn. App. at 315. Count 20 should be reversed and dismissed.

With respect to Count 26, the work done on the Mathers/Taylor project included obtaining, then revising, the permit, breaking up the patio for the foundation of the sunroom, laying down gravel, and installing wooden forms for the concrete. 17RP 1365-67, 1416. Although Dingman certainly did not fulfill all of his obligations under the contract, the evidence of significant compliance precludes the inference that he had the intent to deprive when he entered the contract. Count 26 should be reversed and dismissed as well.

With respect to Count 34, the Dunivans' experience with QHE was undeniably upsetting and even traumatic for them. However again, viewing the evidence in the light most favorable to the State, Dingman did not have the intent to deprive the Dunivans of property when he entered the construction contract. To the contrary, when the Dunivans barred Dingman from their property, QHE workers had installed the subfloor, knocked down the dining room wall, and commenced framing the room addition. 17RP 1469-74. QHE workers returned to the property to do more work but were prevented from doing so. 23RP 1992. Given Dingman's continued efforts to work on the project, the State simply did not prove he had the intent to deprive from when the contract was formed "through" its termination. Count 34 should be reversed and dismissed.

Count 37, involving the Smiths, is a closer call. In this count, the charging period began on July 8th, when Dingman's daughter collected the full contract amount. No work was ever performed or money returned. Dingman contends the evidence is still insufficient to prove his intent to deprive, as State did not prove that Rebecca Dingman acted specifically at Dingman's direction when she collected the money. Ms. Dingman only told the bank officer that "her boss" had told her to pick up the full contract amount. 19RP 1651. The record did not establish Ms. Dingman's "boss" was Dingman and not, for example, Sam Day.

Dingman submits that Count 37 should also be reversed for failure to prove he had the intent to deprive at the outset of the charging period.

With respect to Count 39, the Regans had an acrimonious relationship with Dingman almost from the start. John Regan was angered when the project did not start as expected and frequently lost his temper with Dingman. 19RP 1729, 30RP 3136, 3139. When Regan threatened to back out of the contract, Dingman begged to keep the job and promised to oversee it personally. 19RP 1738-40. QHE obtained a permit, made measurements, removed sod, dug the foundation for the sunroom, dug holes for concrete, poured concrete, and inserted beams. 19RP 1741, 1748. Dingman later failed to order the sunroom and, as construed in the light most favorable to the State, lied to Regan about this. However his apparent dishonesty at the end of QHE's financial collapse does not establish he had the intent to deprive when he entered the contract with the Regans. This Court should hold the evidence was insufficient to sustain count 39 as instructed in the "to convict" instruction and reverse and dismiss this conviction.

Much like the Smiths, in Counts 42, 44, and 49, the Fergusons, the DeSarts, and Dree Snider and Liesl Bohn, provided payment under the terms of their contracts but did not receive any work. Viewed in the light most favorable to the State, Dingman apparently gave these individuals a

series of excuses for QHE's failure to perform its obligations and did not disclose QHE's financial difficulties that were at the heart of its delinquency. However Dingman testified that in July 2002 he was still hopeful he could save his business and complete his existing jobs. 29RP 2884, 2913. He was not trying to cash in and get out; he was trying to salvage his company and reputation. Thus, notwithstanding QHE's failure to perform under these contracts, this Court should hold the State did not prove Dingman possessed the intent to commit theft when he formed the contracts. Counts 42, 44 and 49 should be reversed and dismissed.

In Count 46, involving the Gosnells, the State cannot show Dingman acted in bad faith. Although viewed in the light most favorable to the State, this Court can infer that Dingman held himself out to be a distributor of Four Seasons sunrooms even though Four Seasons had terminated the dealership agreement, this shows only that Dingman very much wanted the Gosnells' business. 20RP 1866. Dingman did have workers on the Gosnells' property for several days breaking up their patio, clearing rubble, and removing the sash and wood around a window that under the contract would be reframed. QHE also applied for a building permit but evidently lacked sufficient funds to pick up the permit when it was approved. The Gosnells' last interactions with Dingman coincided with the disintegration of his business, prospects, and personal finances

and some of his behavior evinced a lack of professionalism. 20RP 1861. Again, however, given Dingman's initial efforts to fulfill his contractual obligations, the State did not meet its burden of proving Dingman had the intent to deprive when the contract was first formed. Count 46 should be reversed and dismissed for insufficient evidence.

In sum, in most of the contracts underlying the State's theft allegations, Dingman partially fulfilled his obligations before his financial problems made it impossible for him to continue to remain in business. Dingman's partial satisfaction of the contracts suggests he entered the agreements in good faith. During Dingman's dealings with the alleged victims of the charged counts, Dingman successfully completed other jobs, undermining the conclusion that he embarked on the contracts with the intent to exert unauthorized control over the owners' money. 28RP 2657-64, 2766-76, 29RP 2794-2806. This Court should hold the State has not met its burden of proving intent to exert unauthorized control at the outset of the formation of the contracts "through" their completion, and reverse Dingman's theft convictions in counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49.

3. IF THE STATE DID NOT ASSUME THE BURDEN OF PROVING DINGMAN INTENDED TO COMMIT THEFT FOR THE DURATION OF THE CHARGING PERIOD UNDER THE LAW OF THE CASE DOCTRINE, THEN THE TRIAL COURT DEPRIVED DINGMAN HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT BY FAILING TO GIVE A *PETRICH* INSTRUCTION.

a. Jury unanimity is constitutionally required. The right to a unanimous jury verdict is protected under both the federal and state constitutions. U.S. Const. amend. 6;¹⁶ Const. Art. 1, § 21;¹⁷ Const. Art. 1, §22.¹⁸ In Washington, an accused may be convicted only when a unanimous jury concludes the criminal act charged in the information has been committed. Petrich, 101 Wnd at 569. When the prosecutor presents evidence of several acts which could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specified criminal act. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Petrich, 101 Wn.2d at 570). By requiring a unanimous verdict on one criminal act, the court protects a criminal defendant's right to a unanimous verdict based on an act proved beyond a reasonable doubt. State v. Coleman, 159 Wn.2d

¹⁶ The Sixth Amendment guarantees the right to a “speedy and public trial, by impartial jury. . .”

¹⁷ In relevant part, Const. art. 1, § 21 provides, “[t]he right of trial by jury shall remain inviolate. . .”

¹⁸ Const. Art. 1, § 22 provides, “[i]n criminal prosecutions the accused shall have the right. . . to have a speedy public trial by an impartial jury. . .”

509, 511-12, 150 P.3d 1126 (2007). Constitutional error from the failure to either elect the incident relied upon for conviction or properly instruct the jury is harmless only if the reviewing court is satisfied beyond a reasonable doubt that each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 405-06.

If this Court does not agree that by proposing the unusual language pertaining to the charging period that was utilized to instruct the jury, the State assumed the burden of proving Dingman intended to commit theft from the initiation of the charging period “through” its conclusion, then of necessity the State had to prove an individual act or acts occurring during that charging period constituted theft. Cf., Petrich, 101 Wn.2d at 571 (where each described act of incest occurred in a separate time frame and identifying place, State alleged “several distinct acts” as opposed to a continuing course of conduct, and a unanimity instruction was required), see also Garman, 100 Wn. App. at 315-16 (when State pursues aggregation theory, jury should be explicitly instructed to find the acts were part of a continuing course of conduct).

b. Where multiple acts could have supported the verdict, the court was obligated to give a *Petrich* instruction to ensure a unanimous verdict. In each of the counts referenced above save for counts 10, 19, 37, 42, and 44, involving the Klemanns, the Tams, the Smiths, the

Fergusons, and the DeSarts, respectively, multiple payments were made under the contracts. Each of these payments could have supported the charged thefts provided the jury found the State proved Dingman had the intent to deprive. Yet the court did not issue a unanimity instruction. Cf., Garman, 100 Wn. App. at 316 (finding danger that jury would have found acts to be separate and distinct but nonetheless convicted was averted where jury was explicitly instructed to return a verdict of “not guilty” if it found that the acts were *not* part of “a common scheme or plan, a continuing course of conduct, and a continuing criminal impulse.”).

As discussed supra, intent was a disputed issue. Dingman testified that he had intended to fulfill the contracts and believed he was acting lawfully when he utilized contract payments to pay his overhead, his employees’ salaries, and to offset other jobs. As Dingman told Virginia Klemann, “That’s how business works.” 12RP 859.

The Washington Supreme Court has repeatedly reaffirmed that where the State alleges multiple incidents to support a single charged count and the evidence as to one or some of the incidents is disputed, the failure to give a unanimity instruction is prejudicial error. See e.g. Coleman, 159 Wn.2d at 514-15 (reversing conviction for child molestation where multiple incidents were alleged and evidence was disputed, and rejecting State’s claim that error was harmless); Kitchen, 110 Wn.2d at

412 (in consolidated case, court reversed convictions of two out of three defendants where evidence regarding charged incidents was disputed).

The Court in Coleman identified the problem as follows:

The unanimity instruction requirement avoids the risk that jurors will aggregate evidence improperly. Without the election or instruction, each juror may arrive at a guilty verdict by responding to testimony about discrete incidents—incidents which, if an election were made, the jury may not all agree occurred.

Coleman, 159 Wn.2d at 512.

c. The danger described by the Court in *Coleman* is illustrated by this jury's conflicting verdicts. With respect to count 1, the jury convicted Dingman of committing theft from the Sharpes, but acquitted him of counts 2 and 3 – both of the money laundering charges pertaining to the Sharpes – each of which was predicated on a separate payment made by the Sharpes under the contracts. CP 817-19. The jury convicted Dingman of committing theft in count 7, pertaining to the Murphys, but acquitted him of the money laundering count relating to the Murphys. CP 822-23. While convicting Dingman of theft against Darlene Miller and Carol Kuhns, the jury acquitted him of money laundering with regard to the \$11,976 check he received from them. CP 832-33. The jury reached an identical anomalous result with regard to the charges concerning James Mathers and Cindy Taylor. CP 834-35. The jury

convicted Dingman of theft from the Dunivans, but acquitted him of both money laundering counts, pertaining to their first payment of \$36,000 and their second payment of \$12,000. CP 838-40.

In the charges involving the Browns, the Ressler, the Regans, the Gosnells, and Dree Snider and Liesl Bohn, counts 12, 15, 39, 46, and 49, the jury heard evidence of multiple acts that could have formed the basis for the theft counts, and found one of those acts also constituted money laundering. However these verdicts do not necessarily, or even probably, signify the jury was unanimous that the transaction underlying the money laundering count was a theft, given their disparate verdicts on the other theft and money laundering counts.

d. The remedy is remand for retrial on the constitutionally-defective charges. In short, Dingman was a unanimous jury verdict by the court's failure to issue a Petrich instruction where multiple acts could have supported the theft counts. The constitutional error is presumed prejudicial. Coleman, 159 Wn.2d at 512. Moreover, the sharply conflicting verdicts on the multiple acts evidence demonstrates the error cannot be considered harmless. Thus, if this Court disagrees that under the law of the case doctrine the State assumed the burden of proving Dingman had the intent to deprive at the start of the charging periods

“through” their conclusions, this Court must nonetheless afford Dingman a new trial on counts 1, 7, 10, 12, 15, 20, 26, 34, 39, 46, and 49.

4 THE MULTIPLE CONVICTIONS FOR THEFT AND MONEY LAUNDERING VIOLATED THE PROHIBITION AGAINST DOUBLE JEOPARDY CONTAINED IN THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9 OF THE WASHINGTON CONSTITUTION, REQUIRING REVERSAL, VACATION, AND DISMISSAL OF THE MONEY LAUNDERING CONVICTIONS.

a. The theft and money laundering convictions violated double jeopardy prohibitions. At trial, the State advanced a novel theory in support of the money laundering charges. The theory depended on the premise that the property owners had a possessory interest in monies advanced under the contracts, thus the “financial transaction” element of the crime was established by Dingman’s use of funds for purposes other than the purposes for which those funds were designated by Dingman’s staged payment system. See 28RP 2638-39, 2644-48. This was essentially the same theory the State relied upon to support the defendant’s *theft* convictions in State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993), also a prosecution for failure to perform construction contracts under a theft by embezzlement theory. See Joy, 121 Wn.2d at 339 (“The ‘exerts unauthorized control’ alternative [for proving theft] includes what was embezzlement under prior law.”). The Court in Joy held there was a

contractual limitation in the agreements between the property owners and the defendant that advance payments be used to pay for materials, and so when the defendant “used that money for other purposes, he appropriated the funds to his own use and committed theft by embezzlement.” Joy, 121 Wn.2d at 341.

On appeal, Dingman submits that in applying Joy to the facts of the present case, the trial court overlooked the central problem with the State’s charging decision. Specifically, *there was no theft* until the financial transaction occurred which the State chose to characterize as money laundering. The two crimes are inseparable and intertwined. Dingman contends that the multiple convictions for theft and money laundering, therefore, violate constitutional double jeopardy prohibitions. He requests reversal and dismissal of his convictions for money laundering in counts 11, 14, 17, 19, 22, 34, 38, 41, 43, 45, 48, 51, and 53.

b. Double jeopardy bars multiple punishments for the same offense. The double jeopardy clauses of the state and federal constitutions protect against multiple prosecutions for the same conduct and multiple punishments for the same offense. U.S. Const. amend 5;¹⁹ Const. art. I, §

¹⁹ The Fifth Amendment provides in relevant part, “No person shall... be subject for the same offence to be twice put in jeopardy of life or limb...”

9;²⁰ Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); United States v. Dixon, 509 U.S. 688, 696, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993). A conviction and sentence will violate the constitutional prohibition against double jeopardy if, under the “same evidence” test, the two crimes are the same in law and fact. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). If two convictions violate double jeopardy protections, under Washington law the remedy is to vacate the conviction for the crime that carries the lesser sentence. State v. Weber, 159 Wn.2d 252, 269, 149 P.3d 646 (2006), cert. den., 2007 U.S. LEXIS 7828 (2007).

Washington’s “same evidence” test mirrors the federal “same evidence” test adopted in Blockburger. Personal Restraint of Orange, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); Adel, 136 Wn.2d at 632.

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether *each provision requires proof of an additional fact which the other does not*.

Blockburger, 284 U.S. at 304 (emphasis added).

²⁰ Article 1, § 9 provides in relevant part, “No person shall be compelled in any criminal case to... be twice put in jeopardy for the same offense.”

In State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753 (2005), the Court endorsed a case-by-case approach to assess whether two crimes violate double jeopardy prohibitions as they are charged and prosecuted in a particular instance. 153 Wn.2d at 773-79. The court set forth the following analysis: (1) Do the statutes authorize separate punishments? (2) Are the two crimes, as charged and proved, the same in law and fact? (3) Do the crimes merge? (4) Did the commission of the “included” crime have an independent purpose or effect from the other crime? Id.

c. Theft and money laundering as alleged here were a single offense.

i. There is no legislative intent for separate punishment. Under the United States Supreme Court’s analysis of the Fifth Amendment’s double jeopardy clause, only where statutes expressly state the Legislature’s intent that crimes be punished separately will multiple convictions for the same offense not violate double jeopardy. Dixon, 509 U.S. at 696-97, Whalen v. United States, 445 U.S. 684, 692, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980). The money laundering statute was enacted by the Legislature in 1992 to give the State the ability to combat the ill of individuals manipulating the proceeds of unlawful activity in order to conceal their criminal origin and make them appear legitimate. S.B. Rep., 2SSB 5318, 52nd Leg., Reg. Sess. (Wash. 1992). According to

the legislative history of the statute, it was targeted at “criminals” who “accumulate considerable money through illegal activities.” H.B. Rep. 2SSB 5318, 52nd Leg., Reg. Sess. (Wash. 1992). The summary of the testimony for the bill attested

Criminals, particularly drug dealers, have gotten very sophisticated at hiding the nature of their wealth. This bill gives law enforcement a powerful new tool to combat serious offenders.

Id.

The bill was directed toward remedying a different societal evil than its use here. The Legislature viewed “money laundering” as a criminal enterprise separate from the underlying unlawful activity, rather than the simple act of cashing a check. Id. This factor supports a finding that the multiple convictions violate double jeopardy.

ii. The two crimes, as charged and proved, are the same in law and fact. To convict Dingman of theft in the first degree, the State had to prove he exerted unauthorized control over property of another, that the property exceeded \$1500 in value, and that he intended to deprive the other person of the property. RCW 9A.56.020(1); CP 761-63. As charged here, the crime of money laundering required the State to prove Dingman “conducted a financial transaction” with the proceeds of theft. In every instance, the State bolstered its proof that Dingman had

committed theft with evidence that Dingman used the money given him for a purpose other than that designated under the contract – i.e., that he committed “money laundering,” under the State’s theory. Thus, as charged and proved, the two crimes were the same in law and fact. C.f. e.g. Dixon, 509 U.S. at 698 (“the ‘crime’ of violating a condition of release cannot be abstracted from the ‘element’ of the violated condition. The Dixon court order incorporated the entire governing criminal code”). This factor supports the conclusion the multiple convictions violate double jeopardy.

iii. The crimes merge. “[T]he merger doctrine is a rule of statutory construction which only applies where the Legislature has clearly indicated that in order to prove a particular degree of crime. . . the State must prove not only that a defendant committed that crime. . . but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statutes[.]” Freeman, 153 Wn.2d at 777-78 (quoting State v. Vladovic, 99 Wn.2d 413, 420-21, 662 P.2d 853 (1983)). Depending on the facts, the merger doctrine will not always apply to the crimes of theft and money laundering. Again, for example, where there is evidence of a separate criminal enterprise that is designed and used to mask the proceeds of theft, the two crimes would not merge. Here, however, the State’s evidence of the “unauthorized control” aspect of theft

was the act the State chose to prosecute as money laundering – specifically, Dingman’s act of depositing or cashing the checks given him. See 35RP 3696-99. The crimes, therefore, merge.

iv. The commission of the “included crime” had no independent purpose or effect from the other crime. In Freeman, the Court noted that even where two crimes appear to violate double jeopardy prohibitions, two separate convictions may yet be permissible when there is a separate injury to the ‘the person or property of the victim or others, which is separate and distinct from and not merely incidental to the crime of which it forms an element.’” 153 Wn.2d at 778 (internal citation omitted). This is a factual inquiry. Id.

Here, the State did not argue or try to formulate a theory in which Dingman’s act of depositing the checks given him would have been a separate act from the theft. See 35RP 3699 (State’s closing argument). There was no evidence this act was gratuitous or had an independent purpose or effect from the alleged thefts themselves. Freeman, 153 Wn.2d at 779. Nor could there be, given that the written instruments given Dingman had no value to him until he deposited them. This component of the double jeopardy analysis under Washington law, therefore, also requires a finding that the convictions for theft and money laundering violate double jeopardy.

d. The remedy for the double jeopardy violation is to vacate Dingman's convictions for money laundering. The Washington Supreme Court has recently held that where multiple convictions violate double jeopardy, the remedy is to vacate the crime which carries the lesser sentence. Weber, 159 Wn.2d at 269. Money laundering is an unranked felony and thus carries a sentence of 0-365 days confinement. RCW 9.94A.505(1)(b). Theft in the first degree has a seriousness level of 2 and, based on Dingman's offender score, carried a standard sentence range of 43-57 months confinement. RCW 9.94A.510; .515. The remedy for the double jeopardy violation here, therefore, is vacation of the convictions for money laundering. Dingman's convictions in counts 11, 15, 17, 19, 38, 41, 43, 45, 48, 51, and 53 must therefore be vacated.

5. THE TRIAL COURT DENIED DINGMAN HIS CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT ON THE AGGRAVATING CIRCUMSTANCE WHERE THE SPECIAL VERDICT FORM PERMITTED THE JURORS TO FIND THE CRIME WAS A "MAJOR ECONOMIC OFFENSE" BY ALTERNATIVE MEANS.

a. The State's request for an exceptional sentence and the instructions to the jury. Prior to trial, the State gave notice that it would seek an exceptional sentence on the basis that the thefts were "major economic offenses." CP 71. The court rejected Dingman's challenges to its authority to impose an exceptional sentence, and accordingly the jury

was instructed by special verdict for purposes of counts 1, 7, 10, 12, 15, 18, 20, 24, 26, 34, 37, 39, 42, 44, 46, and 49 to answer “no” or “yes” the question whether the State proved the thefts were “a major economic offense” as defined by multiple victims or multiple incidents per victim. 34RP 36478; CP 855, 860-88. The court did not issue a unanimity instruction regarding the special verdict.

b. The statute defining “major economic offense” creates alternative means and therefore the court’s failure to give a unanimity instruction denied Dingman his constitutional right to a unanimous verdict. As amended, RCW 9.94A.535 sets forth an exclusive list of factors that may be submitted to a jury in support of a sentence above the standard range. According to RCW 9.94A.535(3)(d)(i), the jury may decide whether the current offense was a “major economic offense” as identified by whether the crime “involved multiple victims or multiple incidents per victim.” RCW 9.94A.535(3)(d)(i). Dingman contends that the statutory definition of “major economic offense” creates alternative means of proving the special verdict, and therefore that the failure to issue a unanimity instruction denied Dingman his constitutional right to a unanimous verdict.

i. The aggravating circumstances are elements. In Appendi and Blakely, the United States Supreme Court clarified the long-

standing requirement that *any* fact that increases the maximum punishment faced by a defendant must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 306-07, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). This is true even when the fact is labeled a “sentencing factor” or “sentence enhancement” by the Legislature. Blakely, 542 U.S. at 306-07; Apprendi, 530 U.S. at 482-83.

In Ring v Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the United States Supreme Court addressed aggravating factors that permitted the court, not a jury, to impose the death penalty rather than life imprisonment. The Court held “aggravating circumstances that make a defendant eligible for the death penalty or an exceptional sentence ‘operate as the functional equivalent of an element of a greater offense.’” Ring, 536 U.S. at 609, quoting Apprendi, 530 U.S. at 494 n.19.

In Sattazahn v. Pennsylvania, 537 U.S. 101, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003), the Court reiterated this principle:

Our decision in [Apprendi] clarified what constitutes an “element” of an offense for purposes of the Sixth Amendment’s jury-trial guarantee. Put simply, if the existence of any fact (other than a prior conviction) increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it

– constitutes an element, and must be found by a jury beyond a reasonable doubt.

Sattazahn, 537 U.S. at 111.

Likewise, in Harris v. United States, 536 U.S. 545, 557, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002), the Court explained, “Apprendi said that any fact extending the defendant's sentence beyond the maximum authorized by the jury’s verdict would have been considered an element of an aggravated crime -- and thus the domain of the jury -- by those who framed the Bill of Rights.”

The Legislature intended its 2005 amendments to the SRA’s exceptional sentencing procedure to conform the statute to Blakely. The Legislature specifically found:

The legislature intends to conform the sentencing reform act, chapter 9.94A RCW, to comply with the ruling in [Blakely]. In that case, the United States [S]upreme [C]ourt held that a criminal defendant has a Sixth Amendment right to have a jury determine beyond a reasonable doubt any aggravating fact, other than the fact of a prior conviction, that is used to impose greater punishment than the standard range or standard conditions. The legislature intends that aggravating facts, other than the fact of a prior conviction, will be placed before the jury. The legislature intends that the sentencing court will then decide whether or not the aggravating fact is a substantial and compelling reason to impose greater punishment. The legislature intends to create a new criminal procedure for imposing greater punishment than the standard range or conditions and to codify existing common law aggravating factors, without expanding or restricting existing statutory or common law aggravating circumstances.

Laws 2005, ch. 68, § 1.

Thus, the Legislature required the facts supporting aggravating circumstances be found by a unanimous jury beyond a reasonable doubt. Laws 2005, ch. 68, § 5. In State v. Pillatos, 159 Wn.2d 459, 150 P.3d 1130 (2007), our Supreme Court found the statutory amendments could be applied retrospectively without offending due process and *ex post facto* prohibitions. While the role of aggravators as elements of the offense was not integral to the Pillatos Court's decision and so was not addressed in depth, the Court has previously acknowledged this basic precept of Sixth Amendment jurisprudence. State v. Mills, 154 Wn.2d 1, 9, 109 P.2d 415 (2005) ("facts which are necessary to impose a greater sentence are 'the functional equivalent of an element of a greater offense,'" quoting Ring, 536 U.S. at 609). In keeping with this axiomatic principle, in Pillatos concurring justices Sanders and Chambers specifically found that because the aggravators are the basis for enhanced penalties, they are essential elements of the aggravated crime. Pillatos, 159 Wn.2d at 483 (citing Apprendi, 530 U.S. at 490 and State v. Goodman, 150 Wn.2d 774, 785-86, 83 P.3d 410 (2004) (Sanders, J., concurring)). Under any reasonable construction of Apprendi, Blakely, and their progeny, therefore, aggravating circumstances are elements of the crime.

ii. The special verdict forms created alternative means as to the “major economic offense” element. The Washington Constitution requires jury unanimity as to guilt. Petrich, 101 Wn.2d at 569; Wash. Const. art. 1, §§ 21, 22. The right to jury unanimity may be violated where an elements instruction describes separate crimes or where an elements instruction describes separate means of committing a single crime. State v. Stephenson, 89 Wn. App. 217, 222, 948 P.2d 1321 (1997). In certain situations, an accused person has the right to express unanimity on the means by which he is alleged to have committed a crime. State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed.

Id. at 707-08 (citations omitted, emphasis in original).

By way of example, Washington courts have found alternative means were created (1) where the defendant could have committed first-degree murder that was (a) premeditated or (b) done in the course of the

commission of robbery, i.e., felony murder; State v. Fortune, 128 Wn.2d 464, 471, 909 P.2d 930 (1996); (2) where the defendant was alleged to have committed rape in the first degree (a) by kidnapping or (b) with a deadly weapon; State v. Whitney, 108 Wn.2d 506, 510-11, 739 P.2d 1150 (1987); and (3) where the legislature defined theft as (a) by taking; (b) by embezzlement; (c) by color or aid of deception; (d) by appropriating lost or misdelivered property or services; Stephenson, 89 Wn. App. at 223.

The Legislature has also created alternative means for a crime to constitute a “major economic offense” by differentiating between (a) multiple victims and (b) multiple incidents per victim. RCW 9.94A.535(3)(d)(i).

iii. In counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49, the evidence was insufficient to support both alternative means of committing a “major economic offense,” requiring reversal and remand for a new trial. As discussed below, with respect to many of the charged incidents, the jury reached conflicting and inconsistent verdicts which undermine the conclusion that the State presented sufficient evidence of “multiple incidents per victim.” In other counts, the trial court called the sufficiency of the State’s evidence into question when it dismissed money laundering allegations the State alleged were connected to those thefts, leaving a single “incident” before the jury. Of necessity, the dismissal of these money laundering charges precludes a

finding that the “incidents” were supported by substantial evidence.

Finally, with respect to the remainder of the charged offenses, the State alleged a single “incident;” thus as a matter of law, there is insufficient evidence to support the “multiple incidents” means of committing a major economic offense.

In counts 1, 2, and 3, the jury convicted Dingman of theft from the Sharpes, but acquitted him of both counts of money laundering. CP 817-19. In counts 34, 35, and 36, the jury similarly convicted Dingman of theft from the Dunivans, but acquitted him of both counts of money laundering. CP 838-40. In counts 7 and 9, pertaining to the Murphys, counts 20 and 22, pertaining to Carol Kuhns and Darlene Miller, counts 26 and 28, pertaining to James Mathers and Cindy Taylor, the jury also convicted Dingman of theft, but acquitted him of money laundering. CP 822-23, 832-23, 834-35.

In counts 12 and 14, involving the Browns, the jury convicted Dingman of both theft and money laundering, however the jury considered only the check obtained from the Browns on March 4, 2002; count 13, involving the Browns’ initial deposit, was dismissed by the court for insufficient evidence. Given the court’s determination that the evidence was insufficient to establish money laundering as a matter of law, it can hardly be said that count 12 involved “multiple” incidents. Counts 15 and

17, involving the Resslerers; counts 39 and 41, involving the Regans; counts 46 and 48, involving the Gosnells; and 49 and 51, involving Dree Snider and Liesl Bohn; all suffer from a similar deficiency as the Brown counts.

Finally, counts 10, 18, 37, 42, and 44, pertaining to the Klemanns, the Tams, the Smiths, the Fergusons, and the DeSarts, each involve only a single “incident” because Dingman obtained a single payment from the respective victims.

Because the evidence is insufficient to support the “multiple incidents” means of committing a major economic offense with respect to each count of theft, Dingman was entitled to an express finding of jury unanimity. The special verdicts must be stricken and the case remanded for resentencing within the standard range or a new trial at which a unanimity instruction will be issued. Ortega-Martinez, 127 Wn.2d at 707-08.

6. THE IMPOSITION OF AN EXCEPTIONAL SENTENCE IN COUNTS 1, 7, 10, 12, 15, 18, 24, 26, 34, 37, 39, 42, 44, AND 46 BASED ON THE AGGRAVATING CIRCUMSTANCE THAT THE CRIMES WERE MAJOR ECONOMIC OFFENSES AS DEFINED BY MULTIPLE VICTIMS PER INCIDENT WAS IMPROPER WHERE THE THEFTS IN QUESTION WERE FROM A MARITAL COMMUNITY.

The SRA defines a “victim” as “any person who has sustained emotional, psychological, physical, or financial injury to person or

property as a direct result of the crime charged.” RCW 9.94A.030(49); State v. Branch, 129 Wn.2d 635, 647, 919 P.2d 1228 (1996). For purposes of imposing an exceptional sentence, and as defined here, a crime is a “major economic offense” if it involved “multiple victims” or “multiple incidents per victim.” RCW 9.94A.535(3)(d)(i).

The trial court found that Dingman committed a major economic offense as defined by multiple victims or multiple incidents per victim with respect to counts 1, 7, 10, 12, 15, 18, 20, 24, 26, 34, 37, 39, 42, 44, 46, and 49. CP 855, 860-88. With the exception of counts 52 and 56,²¹ however, each theft count charged by the State involved an allegation of theft from married or partnered homeowners.

Under Washington law, “The community of husband and wife is . . . a legal entity in which the individuality of both spouses is merged, in so far as ownership of property acquired by either, after marriage, is concerned[.]” Ostheller v. Spokane & Inland Empire R.R., 107 Wash 678, 182 P 630 (1919), overruled on other grounds by Brown v. Brown, 100 Wn.2d 729, 675 P.2d 1207 (1984). The counts involving married persons affected “multiple victims” only inasmuch as each count involved the appropriation of funds in which both married partners, as members of the marital community, jointly held an interest. Dingman contends the

²¹ Count 56 was dismissed during the trial by the court.

application of the “multiple victim” aggravator to these facts was improper because (1) both married partners had a community interest in the property at issue and (2) they could not encumber the property without the consent of the other spouse. Because the consent of both parties was *required* for the construction contracts, and their interest in the property was indivisible, Dingman submits the “multiple victim” aggravator should be stricken for these counts.

The community property rule in Washington predates statehood. See Wash. T. Code Ch. 183. The current Washington Legislature has codified the early common law and statutory rules without abridgement.

According to statute,

Property not acquired or owned, as prescribed in RCW 26.16.010 and 26.16.020, acquired after marriage by either husband or wife or both, is community property. Either spouse, acting alone, may manage and control community property, with a like power of disposition as the acting spouse has over his or her separate property, except:

...

(3) Neither spouse shall sell, convey, or encumber the community real property without the other spouse joining in the execution of the deed or other instrument by which the real estate is sold, conveyed, or encumbered, and such deed or other instrument must be acknowledged by both spouses[.]

RCW 26.13.030.

In Branch, *supra*, the defendant appealed his exceptional sentence imposed following his theft of funds from a limited partnership of which he was a general partner. The trial court found the offense was a “major economic offense,” *inter alia*, in that it involved multiple victims – specifically, 180 partnership investors – who had suffered loss as a result of Branch’s crime. 129 Wn.2d at 640-41. The Washington Supreme Court rejected Branch’s overbreadth and vagueness challenges to the “multiple victim” aggravator, and found the limited partners’ monetary loss was proximately caused by Branch’s crime. *Id.* at 648.

Here, however, Dingman contends that in light of the special rules governing community property, the application of the “multiple victims” means of committing a “major economic offense” to hold a marital community comprised “multiple victims” was manifestly improper. Rather, because obligations on the property are jointly held and the individual interests of each partner in the community disappear, the victims should be considered a single victim.

The Washington courts’ interpretation of the community property rule supports Dingman’s argument. Under Washington law, the community is liable for a community debt, even though one spouse is unaware of the obligation. Fies v. Storey, 37 Wn.2d 105, 112, 221 P.2d 1021 (1950). Division Three of this Court has held both spouses need not

be represented at trial before the court can impose obligations based on the management of community business. Lyzanchuk v. Yakima Ranches Owners Ass'n, 73 Wn. App. 1, 866 P.2d 695 (1994), superseded by statute on other grounds by, RCW 24.03.1031. The contributory negligence of one spouse is held to be the contributory negligence of the community, barring an action for recovery by the non-negligent spouse. Ostheller, 107 Wash. at 686. Money deposited by one spouse in her own name is presumed to be community property. See e.g. Plath v. Mullins, 87 Wash. 403, 409, 151 P. 811 (1915). Where property is purchased with both separate and community funds, an undivided fractional portion of the property is community in the ratio that the community funds bore to the total purchase price. In re the Estate of Dewey, 13 Wn.2d 220, 223, 124 P.2d 805 (1942).

As these decisions show, the determination that members of a marital community were separate victims where the property at issue was community property runs counter to the historic principle that the individual interests of both partners dissolve where community property is concerned. This Court should hold that for this reason, the imposition of an exceptional sentence on counts 1, 7, 10, 12, 15, 18, 26, 34, 37, 39, 42, 44, and 46, the counts involving married persons, was improper. The

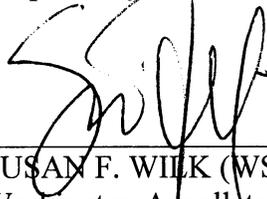
exceptional sentence should be reversed and the case remanded for the imposition of concurrent sentences.

F. CONCLUSION

As set forth above, Dingman requests reversal and dismissal of his convictions for theft in the first degree in counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, 46, and 49 for insufficient evidence. He alternatively requests a new trial based on State's discovery violation and the violation of his right to a unanimous jury verdict in counts 1, 7, 10, 12, 15, 18, 20, 26, 34, 37, 39, 42, 44, and 46. He further requests dismissal of his convictions for money laundering based on a violation of the constitutional prohibition against double jeopardy. He last requests that the exceptional sentence be stricken and this matter remanded for concurrent standard range sentences.

DATED this 12th day of July, 2007.

Respectfully submitted:



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State v. Robert Dingman, CoA No. 34719-9-II

Appendix A

TABLE OF TRANSCRIPT CITATIONS

August 5, 2005	-	1RP
August 30, 2005	-	2RP
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January 5, 2006	-	8RP
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February 7, 2006	-	25RP
February 8, 2006	-	26RP
February 9, 2006	-	27RP
February 9, 2006 (Wilson)	-	27(a)RP
February 13, 2006	-	28RP
February 14, 2006	-	29RP
February 15, 2006	-	30RP
February 16, 2006	-	31RP
February 27, 2006	-	32RP
February 28, 2006	-	33RP
March 1, 2006	-	34RP
March 2, 2006 (Wilson)	-	35RP
March 2, 2006 (Roetto)	-	35(a)RP
March 6, 2006 (Wilson)	-	36RP
March 6, 2006 (Frederick)	-	36(a)RP
March 10, 2006	-	37RP
April 21, 2006	-	38RP

State v. Robert Dingman, CoA No. 34719-9-II

Appendix B

State v. Robert Dingman – Table of Charges - 1

COUNT #	CHARGE	VICTIM	CHARGING PERIOD	DISPOSITION
1	Theft 1	Kent & Joyce Sharpe	6/6/01 – 10/29/02	G
2	Money Laundering		6/8/01 – 6/22/01	NG
3	Money Laundering		2/28/02 – 3/1/02	NG
4	Theft 1	Ruben & Janice Duran	9/18/01 – 4/17/02	NG
5	Money Laundering		9/19/01 – 9/20/01	D/M
6	Money Laundering		10/22/01 – 10/25/01	NG
7	Theft 1	Georgia & Louis Murphy	9/21/01 – 9/29/02	G
8	Money Laundering		9/24/01 – 9/27/01	D/M
9	Money Laundering		10/15/01 – 10/16/01	NG
10	Theft 1	Scott & Virginia Klemann	1/2/02 – 11/11/02	G
11	Money Laundering		1/3/02 – 1/9/02	G
12	Theft 1	Vicki L. Platts-Brown & Ron Brown	10/23/01 – 10/31/02	G
13	Money Laundering		10/23/01 – 10/26/01	D/M
14	Money Laundering		3/4/02 – 3/15/02	G
15	Theft 1	Ron & Marie Ressler	10/17/01 – 9/17/02	G
16	Money Laundering		10/24/01 – 10/26/01	D/M
17	Money Laundering		12/3/01 – 12/7/01	G
18	Theft 1	Sean K. Tam & Amy B. Lam	3/5/02 – 8/27/02	G
19	Money Laundering		3/6/02 – 3/8/02	G
20	Theft 1	Darlene Miller and/or Carol Kuhns	1/23/02 – 10/19/02	G
21	Money		1/23/02 –	D/M

State v. Robert Dingman – Table of Charges - 2

	Laundering		1/24/02	
22	Money Laundering		2/11/02 – 2/13/02	NG
23	Money Laundering		9/5/02 – 9/6/02	D/M
24	Theft 1	Edmond & Trudy Bonell	2/20/02 – 8/31/02	D/M
25	Money Laundering		2/21/02 – 2/22/02	D/M
26	Theft 1	James Mathers and/or Cindy Taylor	2/26/02 – 11/1/02	G
27	Money Laundering		3/1/02 – 3/4/02	D/M
28	Money Laundering		3/5/02 – 3/6/02	NG
29	Money Laundering		9/13/02 – 9/27/02	D/M
30	Theft 1	Jessie Randle	2/28/02 – 10/28/02	NG
31	Money Laundering		3/1/02	D/M
32	Money Laundering		3/8/02 – 3/11/02	D/M
33	Money Laundering		4/26/02 – 5/3/02	NG
34	Theft 1	David & Vanessa Dunivan	5/30/02 – 10/29/02	G
35	Money Laundering		5/30/02 – 6/2/02	NG
36	Money Laundering		7/3/02 – 7/8/02	NG
37	Theft 1	Eddy & Vevely Smith	7/8/02 – 10/21/02	G
38	Money Laundering		7/8/02 – 7/15/02	G
39	Theft 1	John & Tuk Sun Regan	6/14/02 – 10/25/02	G
40	Money Laundering		6/17/02 – 6/21/02	D/M
41	Money Laundering		8/9/02 – 8/12/02	G
42	Theft 1	Lorraine & Fred Ferguson	7/17/02 – 10/29/02	G
43	Money		7/18/02 –	G

State v. Robert Dingman – Table of Charges - 3

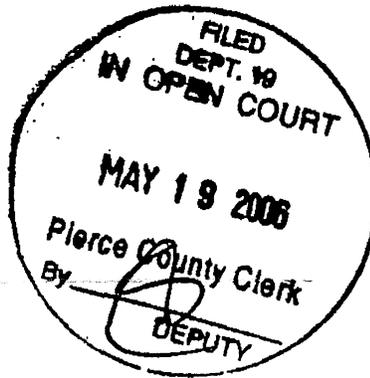
	Laundrying		7/19/02	
44	Theft 1	Alice & Allen DeSart	8/20/02 – 10/25/02	G
45	Money Laundrying		8/20/02 – 8/30/02	G
46	Theft 1	Evelyn & Wilfred Gosnell	7/13/02 – 10/21/02	G
47	Money Laundrying		7/15/02 – 7/16/02	D/M
48	Money Laundrying		7/26/02 – 7/29/02	G
49	Theft 1	Dree M. Sneider and/or Liesl H. Bohn	8/12/02 – 10/28/02	G
50	Money Laundrying		8/13/02	D/M
51	Money Laundrying		10/22/02 – 10/25/02	G
52	Theft 1	Regina Wade	8/1/02 – 10/6/02	G
53	Money Laundrying		8/2/02 – 8/9/02	G
56	Theft 1	Rebecca Kelly	8/27/02 – 10/29/02	D/M

State v. Robert Dingman, CoA No. 34719-9-II

Appendix C



04-1-02684-1 25504615 FNFCL 05-22-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 04-1-02684-1

vs.

ROBERT CORCORAN DINGMAN,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR
EXCEPTIONAL SENTENCE

Defendant.

THIS MATTER having come on before the Honorable Linda CJ Lee, Judge of the above entitled court, for sentencing on April 21, 2006, the defendant, ROBERT CORCORAN DINGMAN, having been present and represented by his attorney, Robert DePan, and the State being represented by Deputy Prosecuting Attorney APRIL D. MCCOMB, and the court having considered all argument from both parties and having considered all written reports presented, and deeming itself fully advised in the premises, does hereby make the following Findings of Fact and Conclusions of Law by a preponderance of the evidence.

FINDINGS OF FACT

I.

The defendant was found guilty at trial on March 10, 2006. That the standard range sentence is 43 to 57 months imprisonment for counts I, VII, X, ^{adm} XII, XV, XVIII, XX, XXVI, ^{RAD} XXXIV, XXXVII, XXXIX, XLII, XLIV, XLVI, and, XLIX; and 0 to 365 days in counts XI, XIV, XVII, XIX, XXXVIII, XLI, XLIII, XLV, XLVIII, LI, and LIII.

Office of Prosecuting Attorney
946 County-City Building
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

II.

The aggravating factors of the counts with which the defendant has been found guilty are that the convictions are major economic offenses or series of offenses involving multiple victims or multiple incidents per victim (RCW 9.94A.535(3)(d)(i)) and that the multiple current offenses of which the defendant has been found guilty would result in the defendant having a higher offender score resulting in some of the current offenses going unpunished (RCW 9.94A.535(2)(c)). Counts I, VII, X, XII, XV, XVIII, XX, XXVI, XXXIV, XXXVII, XXXIX, XLII, XLIV, XLVI, AND XLIX contain multiple victims and counts XI, XIV, XVII, XIX, ~~XXXVIII, XLI, XLIII, XLV, XLVIII, LI and LIII~~ each encompass multiple incidents. In addition the defendant has a prior criminal history, before these convictions, of 5 counts of Theft in the First Degree based upon convictions in Pierce County Cause Number 03-1-01301-5. The legislature did not consider these factors in determining the standard range.

III.

Because of the presence of the above aggravating factors, and considering the purposes of the Sentencing Reform Act, sentencing within the standard range is not an appropriate sentence. The following sentence to be served in the Department of Corrections is an appropriate sentence in this matter. For counts I, VII, X, XII, XV, XVIII, XX, XXVI, XXXIV, XXXVII, XXXIX, XLII, XLIV, XLVI, and XLIX a 12 month sentence is imposed which is to be served consecutively to each of these counts and consecutively to counts XI, XIV, XVII, XIX, XXXVIII, XLI, XLIII, XLV, XLVIII, LI, LII, and LIII. For counts XI, XIV, XVII, XIX, XXXVIII, XLI, XLIII, XLV, XLVIII, LI, and LIII a sentence of 365 days is imposed which is to be served concurrently to all other counts. For count LII the court imposes a sentence of 57 months which is to be served concurrently to the other counts. The sentence imposed in this

1
2 matter is an appropriate sentence based upon all of the facts testified to at trial and based upon
3 the Sentencing Reform Act.
4

5 CONCLUSIONS OF LAW

6 I.

7 That this court has jurisdiction over the parties to this matter and the subject matter of this
8 case.

9 II.

10 That there are substantial and compelling reasons justifying an exceptional sentence
11 outside the standard range.

12 III.

13 Defendant ROBERT CORCORAN DINGMAN, should be incarcerated in the
14 Department of Corrections for a determinate period of 180 months as described above.

15 DONE IN OPEN COURT this 17th day of May, 2006.
16
17

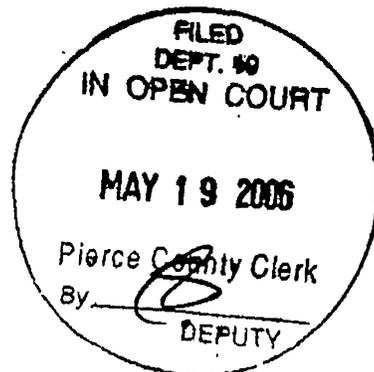
18 
19 JUDGE

20 Presented by:

21 
22 APRIL D. MCCOMB
23 Deputy Prosecuting Attorney
24 11570

25 Approved as to Form:

26 
27 Robert D. Pan
28 Attorney for Defendant
17902



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 34719-9-II
)	
ROBERT DINGMAN,)	
)	
APPELLANT.)	

DECLARATION OF SERVICE

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 12TH DAY OF JULY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

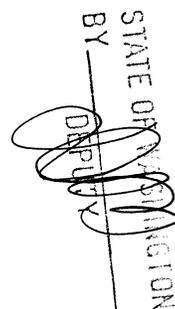
[X] APRIL MCCOMB, DPA
PIERCE COUNTY PROSECUTOR'S OFFICE
930 TACOMA AVE S RM 946
TACOMA WA 98402-2171

[X] ROBERT DINGMAN
DOC# 864765
AIRWAY HEIGHTS CORRECTIONS CENTER
PO BOX 1839
AIRWAY HEIGHTS, WA 99001-1839

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JUL 12 PM 1:51

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF JULY, 2007.

x _____ 

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COURT OF APPEALS
DIVISION II
07 JUL 16 AM 9:21
STATE OF WASHINGTON
BY  DPA