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NO. 95105-5

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent/Cross-Petitioner,

v.

GARY B. FARNWORTH II,

Appellant.

**SUPPLEMENTAL BRIEF OF RESPONDENT/
CROSS-PETITIONER**

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I. INTRODUCTION

The State charged Gary Farnworth II with three counts of theft in the first degree because Farnworth deceived the Department of Labor and Industries to obtain workers compensation benefits in excess of \$75,000. The State exercised its prosecutorial discretion to aggregate 45 chargeable second-degree felony thefts into two first-degree counts: one count for each separate period of Farnworth's thefts. These two counts were charged as first-degree theft based on the aggregated value of second-degree thefts that occurred during those two time periods against one victim. This exercise of prosecutorial discretion reduced the total number of felony theft counts charged from 46 to three and thereby reduced his standard range sentence from 43-57 months to 3-9 months.

A jury found Farnworth guilty of these two counts of theft in the first-degree. Farnworth appealed his convictions. The Court of Appeals was divided and each judge authored his or her own opinion. Two judges agreed on the result only: to affirm one conviction and vacate the second. Those opinions make unclear a prosecutor's discretion to charge and plea-bargain appropriately in cases involving series of second-degree felony thefts, such as Farnsworth's years of deceptively obtaining workers compensation benefits.

The Court of Appeals' ruling contradicts the well-established common law discretion to aggregate second-degree felony theft values to charge first-degree theft. By eliminating that discretion, the ruling encourages charging decisions that lead to disproportionately high offender

scores and lengthier prison sentences for defendants. It is, therefore, directly contrary to statutes that encourage more appropriate and just charging decisions.

The Legislature never altered the established discretionary power of Washington prosecutors at common law to aggregate second-degree felony thefts into first-degree counts to achieve justice in individual cases. This Court should hold that common law charging discretion remains intact for aggregating the value of a series of second-degree felony thefts to prove the value required for first-degree felony theft. The Court should reverse the Court of Appeals and affirm Farnworth's two convictions for theft in the first degree and the sentence imposed by the trial court.

II. ISSUES PRESENTED

Whether Washington prosecutors have discretion to aggregate the value of multiple second-degree felony thefts episodically committed against the same victim into more than one first-degree felony count?

III. STATEMENT OF THE CASE

Defendant Gary Farnworth was charged by second amended information with three counts of theft in the first degree for defrauding the Washington State Department of Labor and Industries (L&I) between 2010 and 2012. CP at 462-65. Counts II and III each alleged that several essentially identical thefts occurred by unlawfully obtaining workers compensation benefits during two separate and distinct periods of time. These two counts were separated by a period where Farnworth ceased obtaining benefits by deception from L&I. CP at 462-65; RP at 883, 886,

1073; Ex P80. At the jury trial in June of 2015, a jury convicted Farnworth on Counts II and III. CP at 527-35.

The charges and convictions resulted from Farnworth receiving and cashing 45 checks from L&I during the two charged periods of time. Ex P105B-P105CC, P106B-P106R; CP at 14-16. From November 2, 2010, to January 14, 2012 (Count II), Farnworth cashed 28 checks totaling \$48,117.58. Ex P105B-P105CC. From February 13, 2012, through October 5, 2012 (Count III), Farnworth cashed 17 checks totaling \$27,915.01. Ex P106B-P106R.¹ In between the periods in Count II and Count III, Farnworth had surgery and was not working. Thus, during that interval, no deception occurred and he was entitled to workers compensation benefits.

Each of the 45 checks that Farnworth deceitfully and wrongfully obtained from L&I was cashed on a separate day and each exceeded \$750 in value (the threshold value for felony theft in the second degree). *See* RCW 9A.56.040; Ex P105B-P105CC, P106B-P106R. Thus, the State had discretion to charge Farnworth with up to 46 felony theft counts: 45 counts of second-degree theft and one count of first-degree theft. *See* fn. 1. Instead, the State aggregated the value of the thefts during the two time periods in Counts II and III to charge three counts of first-degree theft. CP at 462-65.

Contrary to the Court of Appeals' lead opinion, the State never pled

¹ The evidence showed that Farnworth cashed 46 checks during the three charged periods. Count I, the acquittal, was based upon the cashing of a single check for over \$5,000 and that amount was not aggregated into the value of either of the other counts. Ex P104.

or even cited the aggregation statute that addresses when a felony may be charged for a series of *misdemeanor* thefts. *See* CP at 462-65. To the contrary, the State relied on the common law—this Court’s cases—which allow the prosecution to aggregate the value taken in multiple second-degree felony thefts within distinct time periods into single counts of first-degree felony theft. As a result, Farnworth faced a maximum offender score of “2” with a standard range sentence of 3-9 months. In contrast, he would have faced a maximum offender score of “9+” with a standard range sentence of 43-57 months for 46 counts of felony theft if the State had not judiciously exercised its charging discretion.

As noted above, the jury acquitted on Count I (the single check totaling over \$5,000), but returned verdicts of guilty for Counts II and III. CP at 527-35. On appeal, two judges agreed on the outcome only—to vacate one count, and remanded for resentencing on the remaining conviction. *State v. Farnworth*, 199 Wn. App. 185, 220, 398 P.3d 1172 (2017).

Judge Fearing’s lead opinion reasoned that the State improperly aggregated the charges. That opinion relies upon the mistaken belief that the State’s charges relied on RCW 9A.56.010(21)(c), the statute that allows aggregation of *misdemeanor* thefts (under \$750). *Id* at 216. However, the record contradicts Judge Fearing’s view. The value of each theft (each check cashed on a different day) was a *felony* value (over \$750). Nothing in the pleadings invoked the misdemeanor aggregation statute. Notably, the trial court refused to give Farnworth’s proposed lesser included jury instruction for third-degree misdemeanor theft because no evidence of

third-degree theft existed. RP at 1121.

Judge Pennell's concurrence agreed with the outcome, but she reasoned that under the common law the State has to elect between charging a single aggregated first-degree felony theft charge, or charging each individual second-degree theft. She created this highly polarized charging option based on the conclusion that the unit of prosecution for felony theft of aggregated values can only be one count. *Id.* at 220-24.

Judge Korsmo dissented. He pointed out that Judge Pennell's opinion misapprehends the common law and would encourage prosecutors to charge 46 counts of felony theft instead of the three charged in this case. *Id.* at 224-34. He would have affirmed both convictions on grounds that the common law allowed the State to aggregate felony thefts as it did:

“[t]his case was properly charged. In ruling otherwise, the lead opinion misinterprets a statute that it agrees does not apply, thereby confusing common law aggregation with statutory aggregation and running afoul of a longstanding Washington Supreme Court decision. It also makes a poor policy choice in limiting common law aggregation [because] aggregation of felony level offenses should only aid the defense, but this ruling effectively strips that practice away, to the probable consternation of other defendants.”

Id. at 224, (Korsmo, J., dissenting).

IV. ARGUMENT

A. Standard of Review

Cases that present only questions of law are reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). This case warrants de novo review because it contains questions of law including statutory interpretation, the common law, and the Constitution.

B. The State Should Continue to Have Discretion to Aggregate the Value of Individual Felony Thefts, Committed Within Distinct Episodic Periods, into Single Felony Counts for Justice

With the exception of the Court of Appeals' decision in this case, the common law is clear that identifying distinct periods of time and aggregating the value of felony thefts in those time periods, is within a prosecutor's discretion. *State v. Linden*, 171 Wash. 92, 102, 17 P.2d 635 (1932); *State v. Perkerewicz*, 4 Wn. App. 937, 938, 942, 486 P.2d 97 (1971) (following *Linden* and upholding multiple charges reflecting distinct periods in which the second-degree theft values were aggregated); *State v. Atterton*, 81 Wn. App. 470, 472, 915 P.2d 535, (1996) (aggregation of individual transactions to meet the threshold for a particular degree of theft is allowed by common law and by statute); *See also State v. Carosa*, 83 Wn. App. 380, 381, 921 P.2d 593 (1996) (recognizing authority to charge multiple counts rather than aggregate).

The rulings by the Court of Appeals makes unclear the well-established prosecutorial discretion to charge and plea-bargain appropriately in felony theft cases. The result, if not corrected, encourages charging decisions that could lead to disparate treatment of similarly situated defendants, disproportionately high offender scores, and lengthier prison sentences. Unless the Legislature says otherwise, prosecutors should retain discretion to aggregate numerous felony second-degree thefts into single counts of first-degree theft for ease of prosecution and to achieve justice in individual cases.

1. **Prosecutors' common law discretion to aggregate felony thefts into separate charges has not changed since this Court's opinion in *State v. Linden***

This case is indistinguishable from *Linden*. There, two defendants were convicted of three counts of grand larceny for taking money while working as officers of a bank. *Linden*, 171 Wash. at 92. The charges arose from three distinct periods of taking money and within each period, there were multiple acts of theft. *Id.* at 95. The defendants appealed and claimed “from the first date in the first count to the last date in the third count constituted a continuous offense, and that they could not be grouped in three separate periods and a count based upon each period.” *Id.* at 102. This Court rejected the argument. “[W]here the periods covered by the different counts are separate and distinct, as they are in this case, the wrongful appropriations during each period may be charged in a different count.” *Id.* “Where the periods covered by the two indictments are entirely separate and distinct, a prosecution under one will not bar a prosecution under the other.” *Id.* (quoting *State v. Owens*, 157 Wash. 54, 288 P. 233 (1930)).

Thus, the State properly relied on the common law in charging this case because the common law rule from *Linden* has never changed. “The Legislature has the power to supersede, abrogate, or modify the common law.” *Potter v. Washington State Patrol*, 165 Wn.2d 67, 76, 196 P.3d 691 (2008). The common law “shall supplement all penal statutes of this state and all persons offending against the same shall be tried in the courts of this state having jurisdiction of the offense.” RCW 9A.04.060. Courts will not deviate from the common law “unless the language of a statute be clear and

explicit for this purpose.” *Potter*, 165 Wn.2d at 77. As shown below, the Legislature adopted a statute governing aggregation of *misdemeanor* theft values, but it did not change the common law of aggregation of *felony* values for theft. Accordingly, there is no reason for this Court to change the common law rule it recognized in *Linden*.

Thus, pursuant to *Linden*, the State properly broke the charges against Farnworth into three distinct periods. These periods are separated by periods when Farnworth was not defrauding L&I. While the State had discretion to charge 45 second-degree thefts separately, which would have inflated Farnworth’s offender score, the State instead relied on the authority recognized in *Linden*, and acquiesced in by the Legislature, to charge three counts.

The Court of Appeals result and the opinions supporting it cannot be reconciled with *Linden*. Judge Pennell opines that Washington’s theft statute does not “permit [] prosecutors common law discretion to divide a continuing offense of first degree theft into multiple charges according to time periods.” *State v. Farnworth*, 199 Wn. App. 185, 220, 398 P.3d 1172 (2017) (Pennell, J., concurring). That conclusion is in opposition of the ruling in *Linden*. Moreover, as discussed below on page 17, the rule in *Linden* does not violate separation of powers or endanger defendants’ rights against double jeopardy as claimed by Judge Pennell’s opinion. Nor is there any evidence of legislative intent to limit the “unit of prosecution” to one first-degree felony count for the series of thefts in this case. *See* pages 17-19, below.

Judge Fearing’s opinion avoids *Linden* by arguing that the State proceeded under RCW 9A.56.010(21)(c), a statute concerning aggregating misdemeanor thefts. As shown next, that ruling misapprehended the record and the law. The law has not changed since *Linden* in regards to aggregating felony second-degree theft values and the State did not rely on the misdemeanor theft aggregation statute. Therefore, the two separate counts charged against Farnsworth were well within the authority of the prosecution.

The Court has not been asked to overrule *Linden* nor does Farnsworth provide any reason to do so. “The court will not overrule precedent unless it determines it to be incorrect and harmful . . .” *Fergen v. Sestero*, 182 Wn.2d 794, 812, 346 P.3d 708 (2015). *Linden* should remain good law under *stare decisis*, and because it allows prosecutors discretion to charge and plea-bargain judiciously.

2. The State properly charged this case under the wide discretion the Legislature gave prosecutors to seek appropriate justice under statute and common law in individual cases

It is long-recognized that prosecutors are vested with wide discretion in determining what, how, and when to file criminal charges. *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 98 S. Ct. 663, 669, 54 L. Ed. 2d 604 (1978); *State v. Pettitt*, 93 Wn.2d 288, 294, 609 P.2d 1364 (1980); *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The “[e]xercise of this discretion involves consideration of numerous factors, including the public interest as well as the strength of the state’s case.”

State v. Lewis, 115 Wn.2d 294, 797 P.2d 1141 (1990) (citing *United States v. Lovasco*, 431 U.S. 783, 794, 97 S. Ct. 2044, 2051, 52 L. Ed. 2d 752 (1977)). Whether multiple instances of criminal conduct are charged in separate counts or charged as one count is a decision within the prosecutor's discretion. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

A criminal statute limits the prosecutor's discretion only if it mandates that particular conduct be charged as one count. *State v. Knutson*, 64 Wn. App. 76, 80, 823 P.2d 513 (1992). Whether a criminal statute permits multiple counts is a matter of statutory interpretation. *Id.* Interpretation of a criminal statute is literal and strict. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Only if the statute is susceptible to more than one reasonable interpretation is it deemed ambiguous. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

The law is well-settled that the first-degree theft statute *permits* multiple counts and that “[p]rosecuting attorneys generally have discretion in deciding whether to aggregate the crimes or to charge them separately.” *State v. Reeder*, 184 Wn.2d 805, 828, 365 P.3d 1243 (2015). *Reeder* expressly held that the first-degree theft statute allows separate counts “based on a separate transaction that occurred at a separate time.” *Id.* at 829. This rebuts the concurring opinion's view that the unit of prosecution for first-degree theft precludes two charges. As in *Reeder*, the two counts here reflected separate transactions, albeit by aggregating the values of related second-degree thefts during separate and distinct periods.

The Legislature, however, has directed prosecutor's actions with

respect to filing multiple counts of the same crime. That statute supports the charges here. *See* RCW 9.94A.411(2)(A)(ii)(B). Prosecutors are

“to charge those crimes which demonstrate the nature and seriousness of a defendant's criminal conduct, but to decline to charge crimes which are not necessary to such an indication. Crimes which do not merge as a matter of law, but which arise from the same course of conduct, do not all have to be charged.”

RCW 9.94A.411(2)(A)(ii)(B). Following this direction and the natural flow of Farnworth's criminal actions, the State charged three counts of first-degree theft instead of 46 first and second-degree thefts.

The State's discretion to minimize the number of felony counts into two counts creates no separation of powers issue, as suggested by Judge Pennell's concurring opinion. *See State v. Lewis*, 115 Wn.2d 294, 305-06, 797 P.2d 1141 (1990) (Legislature may delegate functions to the prosecutor so long as there are standards for guiding decision-making). That is because the Legislature statutorily vested prosecutors with authority and discretion to determine how and when to file criminal charges. *See* RCW 9.94A.411; *State v. Rice*, 174 Wn.2d 884, 898, 279 P.3d 849 (2012) (separation of powers protects prosecutor's discretion to charge).

The Court should also reject the view that the enactment of the theft statute, to include the misdemeanor aggregation statute, divested the state of its common law discretion to charge multiple felony counts of theft. *See Farnworth*, 199 Wn. App. at 223-24 (Pennell, J., concurring). Principles of statutory construction direct otherwise. To determine if a statute supersedes, abrogates, or modifies the common law, courts look to the language of the

statute, whether that language contains an express statement of exclusivity, and other expressions of legislative intent. *Potter*, 165 Wn.2d at 80. Alternatively, legislative intent to repeal the common law may be found where “the provisions of a ... statute are so inconsistent with and repugnant to the prior common law that both cannot simultaneously be in force.” *Id.* (quoting *State ex rel. Madden v. Pub. Util. Dist. No. 1*, 83 Wn.2d 219, 222, 517 P.2d 585 (1973)). Nothing in the misdemeanor aggregation statute reveals any legislative intent to supersede common law principles of aggregation of value for felony theft set forth in *Linden*. See Appendix (containing RCW 9A.56.030, RCW 9A.56.040, and RCW 9A.56.010(21)).

The Court should give effect to the legislative decision not to enact a statute for aggregation of felony theft values and instead maintain the common law rule from *Linden*. “Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other.” *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). A court “cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. We assume the legislature ‘means exactly what it says.’” *State v. Delgado*, 148 Wn.2d 723, 728, 63 P.3d 792 (2003) (citing *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999)). Here, the Legislature did not include aggregation of felony thefts in the aggregation of misdemeanor statute. RCW 9A.56.010(21). This statute speaks only to the permissible aggregation of third-degree thefts, not aggregation of felony thefts. In the face of this clear statutory language, the Court should presume

the language was intentional and the common law rule in *Linden* remains unchanged. *Williams*, 147 Wn.2d at 491.

Moreover, broad prosecutorial discretion has long been allowed by the common law. *See Bordenkircher v. Hayes*, 434 U.S. 357, 365, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978). Prosecutors have ethical responsibilities that limit their charging discretion. *See* Comment to RPC 3.8 (“A prosecutor has a responsibility as a minister of justice and not simply that of an advocate”). The Legislature acknowledged by statute that prosecuting attorneys have broad charging discretion. *State v. Rice*, 174 Wn.2d 884, 898, 279 P.3d 849 (2012). It adopted RCW 9.94A.411 to guide that discretion.

Prosecutors cannot fulfill their roles under the note to RPC 3.8 as “ministers of justice” without discretion to make just charging decisions. For example, prosecutors cannot exercise their discretion “not to prosecute” under the legislative guidelines set forth in RCW 9.94A.411 without the discretion to aggregate value and thereby minimize counts while still seeking full restitution for the victim and appropriate criminal charges on behalf of the public. The lower court’s ruling, however, encourages prosecutors to choose between a 46-count information or one felony count. That ruling deprives prosecutors of established discretion to charge in a manner that considers justice in a particular case for a particular defendant. The Court of Appeals should be reversed and the jury verdicts and accompanying sentences affirmed.

C. The Court of Appeals' Lead Opinion Is Based on a Mistaken View of the Record and the Law

The lead opinion acknowledged that under the common law the State “enjoys the prerogative of aggregating the charges into more than one first degree theft charge[.]” *Farnworth*, 199 Wn. App. at 213 (quoting *State v. Linden*, 171 Wash. 92, 17 P.2d 635 (1932)). Specifically, Judge Fearing wrote that “[a]lthough the common law allows aggregation of counts, the State did not plead or argue the common law standard for aggregation, but rather pled and argued the aggregation standard found in Washington's aggregation statute, RCW 9A.56.010(21)(c).” *Id.* Thus, Judge Fearing started with the correct proposition that the law allows for aggregating values into two charges. His reasons for avoiding that result do not withstand scrutiny.

First, no authority supports Judge Fearing’s assumption that the State must “plead” the common law, such as by citing *Linden* in the criminal information. But more to the point, nothing in the record shows that the State “pled and argued” RCW 9A.56.010(21)(c), the statute for aggregation of misdemeanor thefts, as mistakenly assumed by Judge Fearing.

Second, Judge Fearing overstated the meaning of the misdemeanor aggregation statute, claiming it “addresses the number of theft counts to be charged when the accused engages in an ongoing scheme of theft.” *Farnworth*, 199 Wn. App. at 211. He failed to apply the explicit language in the statute, which limits its applicability to aggregation of third degree, misdemeanor theft values. That statute provides:

[W]henever any series of transactions which constitute theft, would, when considered separately, *constitute theft in the third degree because of value*, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

RCW 9A.56.010(21)(c) (emphasis added). The statute is unambiguously limited to “third degree” thefts and does not address aggregation of a series of transactions that would separately constitute second-degree felony theft because of value. Consequently, the Court of Appeals erred by misapplying this statute to determine the number of available theft counts because there were no third-degree values in this case.

Third, the lead opinion is contrary to the fact that each check cashed was of felony value. In this context where there were no misdemeanor thefts addressed by the statute, the State could only aggregate the values as allowed by common law. *State v. Barton*, 28 Wn. App. 690, 694-95, 626 P.2d 509 (1981) (citing *State v. Vining*, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970)). Thus, the State had no reason to cite the misdemeanor aggregation statute, or to charge by aggregating misdemeanor thefts, because there were no misdemeanors values to aggregate.

Fourth, Judge Fearing misapprehended the record when he stated that the “parties assumed that RCW 9A.56.010(21)(c) applies” and “the parties may assume that each DLI payment constituted third degree theft, but the undisputed evidence shows otherwise.” *Farnworth*, 199 Wn. App. at 211. Judge Fearing cited nothing in the record to support his statement that “the parties,” including the State, “assumed” that each

theft was a misdemeanor value. Nor does anything in the record support that view. Indeed, the record contradicts the lead opinion's description because the trial court rejected Farnworth's attempt to instruct the jury on the lesser crime of theft in the third degree. RP at 1120-23; CP at 389. The trial court found, and the State always concurred, that there was no evidence of a third-degree theft and refused to give the lesser included instruction for third-degree theft. RP at 1121, 1135. Simply put, all parties, the court, and the jury were aware that each theft value that was aggregated exceeded \$750. RP at 1120-21, 1135.

Fifth, Judge Fearing's opinion misuses the phrase "common scheme or plan" in the jury instruction defining "value" to support his opinion. This verbiage, taken directly from the Washington Pattern Jury Instructions, is simply the court's instructions to a jury that it may aggregate the value of thefts that are part of a common scheme or plan to determine the value of property stolen. *See* WPIC 79.20. The jury instruction does not incorporate the misdemeanor aggregation statute. It properly instructs on "value" for these charges, and there is no dispute over the instruction on "value" before this Court.

Finally, the State alleged two separate and distinct periods of time for each count in the Second Amended Information: Count II was November 2, 2010, to January 14, 2012, and Count III was February 13, 2012, to October 5, 2012. CP at 462-65. Thus, Judge Fearing's statement that the State did not "allege" distinct periods of time, *Farnworth*, 199 Wn. App. at 214, is simply wrong. The Information clearly pled the two

distinct periods for the two counts. CP at 462-65.

This Court should reject Judge Fearing's mistaken view that RCW 9A.56.010(21)(c) applies here, that the record assumed application of that statute, and his apparent adoption of a "pleading rule" that would change Washington charging standards for multiple thefts committed against the same victim within distinct time periods. Such a pleading rule would encourage prosecutors to charge numerous individual felony counts instead of aggregating those counts under similar circumstances for fear that a reviewing court will find that the "common law" was not properly "pled."

Instead, the Court should hold that the State's charging decision conformed with *Linden* and *Reeder*. That discretion and application of the common law undoubtedly benefited Farnworth, who would have faced a mandatory sentence of 22-29 months in prison if the jury convicted on just nine of the 45 available second-degree theft counts. RCW 9.94A.510-.515.

D. The Unit of Prosecution for Felony Theft Is Each Taking and Grouping Multiple Units of Prosecution into Singular Charges Does Not Offend Double Jeopardy Principles

The Court should also reject the concurring opinion's view that the unit of prosecution required by statute prevents the two aggregated charges, or creates a risk of double jeopardy. *State v. Farnworth*, 199 Wn. App. 185, 220, 398 P.3d 1172 (2017) (Pennell, J., concurring).

Double jeopardy prohibits multiple punishments for the same offense as well as a second prosecution for the same offense after acquittal or conviction. *State v. Gocken*, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995); *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072,

23 L. Ed. 2d 656 (1969). The Legislature defines the scope of a criminal act, the unit of prosecution, and “double jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime.” *State v. Adel*, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998).

The unit of prosecution is well-settled for theft. Each separate taking of property that occurred at a separate time may be prosecuted. *State v. Reeder*, 184 Wn.2d 805, 826, 365 P.3d 1243 (2015).

“A person is guilty of theft in the first degree if he or she commits theft of: (a) [p]roperty or services which exceed(s) five thousand dollars in value.” RCW 9A.56.030(1)(a). “Theft” as charged here means “[b]y 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.”

RCW 9A.56.020(1)(b). Hence, the unit of prosecution is each taking of over \$5,000. *Reeder*, 184 Wn.2d at 826.

This unit of prosecution can be one event or an aggregation of the value of a series of thefts under the statute for misdemeanor values, or at common law for felony values. *Linden*, 171 Wash. at 102; *State v. Atterton*, 81 Wn. App. 470, 472, 915 P.2d 535, 536 (1996); *State v. Barton*, 28 Wn. App. 690, 694, 626 P.2d 509 (1981) review denied, 95 Wn.2d 1027 (1981). Aggregation of the value of multiple thefts is permitted so long as the series of thefts are (1) from the same owner, (2) the same place, (3) and result from a single criminal impulse pursuant to a general larcenous scheme. *Atterton*, 81 Wn. App. at 472-73.

As shown above, the State had the discretion to charge either 46 counts of felony theft (one first-degree and 45 second-degree); or to charge

less counts based on aggregated values taken during separate and distinct periods of time because the thefts were against the same owner (L&I), from the same place (state treasury), were part of a general larcenous scheme against the owner, but occurred at different times. Because Farnworth ceased his thefts during his intervening surgeries and corresponding recovery periods during which he was not working, his actions divided his larcenous scheme into three separate and distinct periods. Thus, each charge was based on a separate and distinct time period when Farnworth collected time loss benefits while working.

Affirming the two convictions does not violate double jeopardy because there was a single prosecution and the two counts of theft cannot be the same offense. Further, as outlined above, the unit of prosecution for aggregated first-degree theft is each unlawful taking of property within a separate period of time that exceeds \$5,000. *See* RCW 9A.56.030; *State v. Reeder*, 184 Wn.2d 805, 826, 365 P.3d 1243 (2015). Farnworth's two convictions were based on multiple takings within separate periods, with an aggregate value of takings of over \$5,000 for each separate period, and thus satisfied the requirements for two units of prosecution. *See State v. Jensen*, 164 Wn.2d 943, 958-59, 195 P.3d 512 (2008); *State v. Adel*, 136 Wn.2d 629, 633-34, 965 P.2d 1072 (1998) (multiple convictions for separate units of prosecution do not violate double jeopardy).

Accordingly, this is not a case where the State "divid[ed] a single crime into a series of temporal or spatial units." *Farnworth*, 199 Wn. App. at 223-24, (Pennell, J., concurring) (citing *Brown v. Ohio*,

432 U.S. 161, 169, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977)). Rather, it simply groups multiple units of theft into fewer counts to thereby reduce the overall number of counts for ease of prosecution and to the benefit of the defendant.

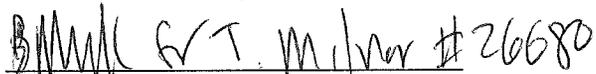
The two convictions in this case do not offend double jeopardy, do not violate the unit of prosecution allowed, and reflect the permissible aggregation of value under the common law. Prosecutors should retain discretion to lessen the number of felony counts by aggregating the value into single counts in appropriate cases. This practice benefits defendants and, more importantly, reflects the longstanding law in Washington as announced by this Court in *Linden* and *Reeder*.

V. CONCLUSION

The Court should reverse the Court of Appeals and find that the State properly aggregated multiple felony thefts into two counts of felony theft. The Court should affirm the jury's second guilty verdict and the trial court's sentence.

RESPECTFULLY SUBMITTED this 13th day of July, 2018.

ROBERT W. FERGUSON
Attorney General

Handwritten signature of Tienny Milnor in black ink, including the number #26680.

TIENNEY MILNOR, WSBA #32701

Assistant Attorney General

JAY D. GECK, WSBA#17916

Deputy Solicitor General

APPENDIX

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WESTLAW

West's Revised Code of Washington Annotated
 Title 9A. Washington Criminal Code (Refs & Annos)
 Chapter 9A.56. Theft and Robbery (Refs & Annos)

9A.56.030. Theft in the first degree

West's Revised Code of Washington Annotated | Title 9A. Washington Criminal Code | Effective: July 23, 2017 (Approx. 2 pages)
 Proposed Legislation

Effective: July 23, 2017

West's RCWA 9A.56.030

9A.56.030. Theft in the first degree

Currentness

(1) Except as provided in RCW 9A.56.400, a person is guilty of theft in the first degree if he or she commits theft of:

(a) Property or services which exceed(s) five thousand dollars in value other than a firearm as defined in RCW 9.41.010;

(b) Property of any value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, taken from the person of another;

(c) A search and rescue dog, as defined in RCW 9.91.175, while the search and rescue dog is on duty; or

(d) Commercial metal property, nonferrous metal property, or private metal property, as those terms are defined in RCW 19.290.010, and the costs of the damage to the owner's property exceed five thousand dollars in value.

(2) Theft in the first degree is a class B felony.

Credits

[2017 c 266 § 10, eff. July 23, 2017; 2013 c 322 § 2, eff. July 28, 2013; 2012 c 233 § 2, eff. June 7, 2012; 2009 c 431 § 7, eff. July 26, 2009; 2007 c 199 § 3, eff. July 22, 2007; 2005 c 212 § 2, eff. July 24, 2005; 1995 c 129 § 11 (Initiative Measure No. 159); 1975 1st ex.s. c 260 § 9A.56.030.]

Notes of Decisions (98)

West's RCWA 9A.56.030, WA ST 9A.56.030

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NOTES OF DECISIONS (98)

Accomplices, sufficiency of evidence
 Admissibility of evidence
 Collateral estoppel
 Concurrent offenses
 Construction with other laws
 Continuing conduct, nature and elements of offense
 Double jeopardy
 Embezzlement
 Evidence
 Included offenses
 Instructions
 Intent
 Nature and elements of offense
 Nonconsent of owner, nature and elements of offense
 Preemption
 Sentence and punishment
 Sufficiency of evidence
 Theft by deception
 Validity of prior law
 Value

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WESTLAW

West's Revised Code of Washington Annotated
 Title 9A, Washington Criminal Code (Refs & Annos)
 Chapter 9A.56, Theft and Robbery (Refs & Annos)

9A.56.040. Theft in the second degree

West's Revised Code of Washington Annotated | Title 9A, Washington Criminal Code | Effective: July 23, 2017 (Approx. 2 pages)
 Proposed Legislation

Effective: July 23, 2017

West's RCWA 9A.56.040

9A.56.040. Theft in the second degree

Currentness

(1) Except as provided in RCW 9A.56.400, a person is guilty of theft in the second degree if he or she commits theft of:

(a) Property or services which exceed(s) seven hundred fifty dollars in value but does not exceed five thousand dollars in value, other than a firearm as defined in RCW 9.41.010 or a motor vehicle;

(b) A public record, writing, or instrument kept, filed, or deposited according to law with or in the keeping of any public office or public servant;

(c) Commercial metal property, nonferrous metal property, or private metal property, as those terms are defined in RCW 19.290.010, and the costs of the damage to the owner's property exceed seven hundred fifty dollars but does not exceed five thousand dollars in value; or

(d) An access device.

(2) Theft in the second degree is a class C felony.

Credits

[2017 c 266 § 11, eff. July 23, 2017; 2013 c 322 § 3, eff. July 28, 2013; 2012 c 233 § 3, eff. June 7, 2012; 2009 c 431 § 8, eff. July 26, 2009; 2007 c 199 § 4, eff. July 22, 2007; 1995 c 129 § 12 (Initiative Measure No. 159); 1994 sp.s. c 7 § 433; 1987 c 140 § 2; 1982 1st ex.s. c 47 § 15; 1975 1st ex.s. c 260 § 9A.56.040.]

Notes of Decisions (66)

West's RCWA 9A.56.040, WA ST 9A.56.040

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NOTES OF DECISIONS (66)

Burden of proof
 Construction and application
 Construction with other laws
 Credit cards
 Double jeopardy
 Evidence
 Exculpatory evidence
 Instructions
 Intent
 Merger of offenses
 Multiple offenses
 Presumptions and burden of proof
 Property of another
 Sentence and punishment
 Sufficiency of evidence
 Validity
 Value

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WESTLAW

West's Revised Code of Washington Annotated
 Title 9A. Washington Criminal Code (Refs & Annos)
 Chapter 9A.56. Theft and Robbery (Refs & Annos)

9A.56.010. Definitions

West's Revised Code of Washington Annotated | Title 9A. Washington Criminal Code | Effective: July 23, 2017 (Approx. 4 pages)
 Proposed Legislation

Effective: July 23, 2017

West's RCWA 9A.56.010

9A.56.010. Definitions

Currentness

The following definitions are applicable in this chapter unless the context otherwise requires:

- (1) "Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument;
- (2) "Appropriate lost or misdelivered property or services" means obtaining or exerting control over the property or services of another which the actor knows to have been lost or mislaid, or to have been delivered under a mistake as to identity of the recipient or as to the nature or amount of the property;
- (3) "Beverage crate" means a plastic or metal box-like container used by a manufacturer or distributor in the transportation or distribution of individually packaged beverages to retail outlets, and affixed with language stating "property of", "owned by", or other markings or words identifying ownership;
- (4) "By color or aid of deception" means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services;
- (5) "Deception" occurs when an actor knowingly:
 - (a) Creates or confirms another's false impression which the actor knows to be false; or
 - (b) Fails to correct another's impression which the actor previously has created or confirmed; or
 - (c) Prevents another from acquiring information material to the disposition of the property involved; or
 - (d) Transfers or encumbers property without disclosing a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or
 - (e) Promises performance which the actor does not intend to perform or knows will not be performed;
- (6) "Deprive" in addition to its common meaning means to make unauthorized use or an unauthorized copy of records, information, data, trade secrets, or computer programs;
- (7) "Mail," in addition to its common meaning, means any letter, postal card, package, bag, or other item that is addressed to a specific address for delivery by the United States postal service or any commercial carrier performing the function of delivering similar items to residences or businesses, provided the mail:

NOTES OF DECISIONS (116)

In general
 Access device
 Aggregation, value
 Common scheme or plan, value
 Deception
 Deprive
 Double jeopardy
 Evidence
 Exculpatory evidence
 Exerting unauthorized control
 Fact questions
 Instructions
 Jury questions
 Market value
 Owner
 Property of another
 Sales price, value
 Sufficiency of evidence
 Value
 Wrongfully obtains

(a)(i) Is addressed with a specific person's name, family name, or company, business, or corporation name on the outside of the item of mail or on the contents inside; and

(ii) Is not addressed to a generic unnamed occupant or resident of the address without an identifiable person, family, or company, business, or corporation name on the outside of the item of mail or on the contents inside; and

(b) Has been left for collection or delivery in any letter box, mailbox, mail receptacle, or other authorized depository for mail, or given to a mail carrier, or left with any private business that provides mailboxes or mail addresses for customers or when left in a similar location for collection or delivery by any commercial carrier; or

(c) Is in transit with a postal service, mail carrier, letter carrier, commercial carrier, or that is at or in a postal vehicle, postal station, mailbox, postal airplane, transit station, or similar location of a commercial carrier; or

(d) Has been delivered to the intended address, but has not been received by the intended addressee.

Mail, for purposes of chapter 164, Laws of 2011, does not include magazines, catalogs, direct mail inserts, newsletters, advertising circulars, or any mail that is considered third-class mail by the United States postal service;

(8) "Mailbox," in addition to its common meaning, means any authorized depository or receptacle of mail for the United States postal service or authorized depository for a commercial carrier that provides services to the general public, including any address to which mail is or can be addressed, or a place where the United States postal service or equivalent commercial carrier delivers mail to its addressee;

(9) "Merchandise pallet" means a wood or plastic carrier designed and manufactured as an item on which products can be placed before or during transport to retail outlets, manufacturers, or contractors, and affixed with language stating "property of ...," "owned by ...," or other markings or words identifying ownership;

(10) "Obtain control over" in addition to its common meaning, means:

(a) In relation to property, to bring about a transfer or purported transfer to the obtainer or another of a legally recognized interest in the property; or

(b) In relation to labor or service, to secure performance thereof for the benefits of the obtainer or another;

(11) "Owner" means a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services;

(12) "Parking area" means a parking lot or other property provided by retailers for use by a customer for parking an automobile or other vehicle;

(13) "Receive" includes, but is not limited to, acquiring title, possession, control, or a security interest, or any other interest in the property;

(14) "Received by the intended addressee" means that the addressee, owner of the delivery mailbox, or authorized agent has removed the delivered mail from its delivery mailbox;

(15) "Services" includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water;

(16) "Shopping cart" means a basket mounted on wheels or similar container generally used in a retail establishment by a customer for the purpose of transporting goods of any kind;

(17) "Stolen" means obtained by theft, robbery, or extortion;

(18) "Subscription television service" means cable or encrypted video and related audio and data services intended for viewing on a home television by authorized members of the public only, who have agreed to pay a fee for the service. Subscription services include but are not limited to those video services presently delivered by coaxial cable, fiber optic cable, terrestrial microwave, television broadcast, and satellite transmission;

(19) "Telecommunication device" means (a) any type of instrument, device, machine, or equipment that is capable of transmitting or receiving telephonic or electronic communications; or (b) any part of such an instrument, device, machine, or equipment, or any computer circuit, computer chip, electronic mechanism, or other component, that is capable of facilitating the transmission or reception of telephonic or electronic communications;

(20) "Telecommunication service" includes any service other than subscription television service provided for a charge or compensation to facilitate the transmission, transfer, or reception of a telephonic communication or an electronic communication;

(21) Value. (a) "Value" means the market value of the property or services at the time and in the approximate area of the criminal act.

(b) Whether or not they have been issued or delivered, written instruments, except those having a readily ascertained market value, shall be evaluated as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied;

(ii) The value of a ticket or equivalent instrument which evidences a right to receive transportation, entertainment, or other service shall be deemed the price stated thereon, if any; and if no price is stated thereon, the value shall be deemed the price of such ticket or equivalent instrument which the issuer charged the general public;

(iii) The value of any other instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(c) Except as provided in RCW 9A.56.340(4) and 9A.56.350(4), whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

For purposes of this subsection, "criminal episode" means a series of thefts committed by the same person from one or more mercantile establishments on three or more occasions within a five-day period.

(d) Whenever any person is charged with possessing stolen property and such person has unlawfully in his possession at the same time the stolen property of more than one person, then the stolen property possessed may be aggregated in one count and the sum of the value of all said stolen property shall be the value considered in determining the degree of theft involved. Thefts committed by the same person in different counties that have been aggregated in one county may be prosecuted in any county in which one of the thefts occurred.

(e) Property or services having value that cannot be ascertained pursuant to the standards set forth above shall be deemed to be of a value not exceeding two hundred and fifty dollars;

(22) "Vulnerable adult" includes a person eighteen years of age or older who:

(a) Is functionally, mentally, or physically unable to care for himself or herself; or

(b) Is suffering from a cognitive impairment other than voluntary intoxication;

(23) "Wrongfully obtains" or "exerts unauthorized control" means:

(a) To take the property or services of another;

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

(c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement.

Credits

[2017 c 266 § 7, eff. July 23, 2017; 2011 c 164 § 2, eff. July 22, 2011; 2006 c 277 § 4, eff. June 7, 2006; 2002 c 97 § 1; 1999 c 143 § 36; 1998 c 236 § 1; 1997 c 346 § 2; 1995 c 92 § 1; 1987 c 140 § 1; 1986 c 257 § 2; 1985 c 382 § 1; 1984 c 273 § 6; 1975-'76 2nd ex.s. c 38 § 8; 1975 1st ex.s. c 260 § 9A.56.010.]

Notes of Decisions (116)

West's RCWA 9A.56.010, WA ST 9A.56.010

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NO. 95105-5

**SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

GARY BRUCE FARNWORTH,

Petitioner.

DECLARATION OF
SERVICE

I, Nicole Symes, declare as follows:

On July 13, 2018, I sent via the Washington State Appellate Courts' Secure Portal and deposited in the United States mail, postage prepaid, a true and correct copy of Supplemental Brief of Respondent/Cross-Petitioner and Declaration of Service, addressed as follows:

Douglas D. Phelps
Phelps & Associates, P.S.
2903 N. Stout Rd.
Spokane, WA 99206-4373

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

DATED this 13th day of July, 2018, at Seattle, Washington.



NICOLE SYMES

WASHINGTON STATE ATTORNEY GENERAL'S OFFICE - CRIMINAL JUSTICE DIVISION

July 13, 2018 - 3:40 PM

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Appellate Court Case Title: State of Washington v. Gary Bruce Farnworth II
Superior Court Case Number: 14-1-00357-0

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