

67523-1

67523-1

NO. 67523-1-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

*Respondent,*

v.

WILLIAM LAU,

*Respondent.*

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STATE OF WASHINGTON  
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BRIEF OF APPELLANT

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ORIGINAL

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**A. ASSIGNMENTS OF ERROR**

Appellant assigns error to:

1. The judgment and sentence imposed on July 21, 2011.
2. Defense counsel's failure to object to the prosecutor's misstatement of the law regarding the definition of "gross receipts"; his failure to propose a jury instruction defining the legal term "gross receipts"; and his failure to cite the decision in *TLR v. Town of La Center*, 68 Wn. App. 29, 841 P.2d 1276 (1992), to the trial judge.
3. The failure of the trial judge to instruct the jury on the legal definition of the term "gross receipts."
4. The trial judge's failure to prevent witnesses from testifying as to the legal definition of "gross receipts."
5. The trial judge's failure to grant the defendant's motion to dismiss for lack of a prima facie case.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Can an individual be found guilty of theft for not paying a gambling tax when the entity that owes the tax is a corporation and the individual manages the corporation's business?
2. For purposes of the crime of theft, if a taxpayer deliberately fails to pay some of the tax that he owes, is the unpaid tax "the property of another" for purposes of the crime of theft? Or is it just a debt, which does not constitute the "property of" the government to which it is owed?
3. Does prosecution for nonpayment of a tax constitute a violation of Wash. Const. art. 1, § 17 which prohibits imprisonment for debt?

Defense counsel argued to the jury, that since no revenue was ever collected for pull-tab games which were stolen, the cost of such stolen

games was not properly included within the defendant's "gross receipts," and that therefore no tax was due and owing for the amount of money which *would* have been collected for these games had they actually been sold to customers. The prosecutor argued the exact opposite to the jury. The jurors did not receive any jury instruction telling them who was correct. The case of *TLR v. Town of La Center*, 68 Wn. App. 29, 841 P.2d 1276 (1992) was decided nearly two decades before appellant Lau's trial. *TLR* held that for purpose of the gambling tax on pull-tabs, the term "gross receipts" does *not* include the cost of stolen games. Thus, *TLR* establishes that defense counsel was correct and the trial prosecutor was wrong.

4. Was the defendant denied his Sixth Amendment right to effective representation of counsel because his trial attorney (a) never cited the *TLR* case to the trial judge; (b) never requested a jury instruction stating that the cost of stolen games is *not* included within the taxable gross receipts; and (c) failed to object to that portion of the prosecutor's closing argument where the prosecutor erroneously told the jurors that the cost of stolen games *is* included within the taxable gross receipts?
5. Was the defendant's Article 4, § 16 right to have the trial judge "declare the law" violated by the trial judge's failure to instruct the jury on the legal definition of the term "gross receipts"?
6. Where the jury was instructed that it could find the defendant guilty of theft either by means of theft by deception, or by the exertion of unauthorized control theory, and that it need not be unanimous as to the means employed, must the defendant's conviction be set aside due to a violation of the art. 1, § 21 right to a unanimous jury verdict because there is insufficient evidence as a matter of law to support the "exerts unauthorized control" means

of committing theft?

## **C. STATEMENT OF THE CASE**

### **1. PROCEDURE**

William Lau was charged with one count of Theft 1° and one count of Theft 2°. CP 80-81. Count 1 alleged a theft of more than \$5,000 from the City of Federal Way. CP 80. Count 2 alleged a theft of more than \$750 from the City of Burien. CP 81. The case was tried to a jury before the Honorable Monica J. Benton. CP 53-67. After the State rested, the defense moved for a dismissal on the grounds that the State had failed to present a prima facie case. RP IV, 450-454.<sup>1</sup> The trial judge denied this motion. RP IV, 455. The defendant then rested without presenting any evidence. RP IV, 459.

The jury returned verdicts finding Lau guilty as charged. CP 82-84. Judgment and Sentence was entered on July 21, 2011. CP 131-136. Lau was sentenced to concurrent sentences of 2 months on each count, one month was converted to 240 hours of community service, and for the remaining month electronic home detention was authorized. CP 134, 137-139. The Court imposed a fine of \$5,000. CP 133. Lau filed timely

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<sup>1</sup> The verbatim report of proceedings is referred to throughout this brief as follows: RP I – trial proceedings of June 1; RP II – trial proceedings of June 2; RP III – trial proceedings of June 6; RP IV – trial proceedings of June 7; RP V – trial proceedings of June 8; RP VI – sentencing proceedings of July 18 and July 21.

notice of appeal on August 3, 2011. CP 142-149.

## **2. STATEMENT OF FACTS**

### **a. Defense Theory of the Case**

The defense theory of the case was simply that there was no wrongful intent on Lau's part. RP III, 110, 112. The defense maintained that Mr. Lau acted in good faith when he calculated his actual gross receipts by subtracting the costs associated with employee theft and customer fraud from the calculated projection of what his gross receipts would have been had he not incurred these costs. The defense accepted as true virtually all of the testimony given by the State's witnesses, except for Agent Lohse's testimony regarding the proper legal definition of the term "gross receipts" as that phrase is used in RCW 9.46.110. The defense contended that "gross receipts" did not include dollars that *should* have been received, but were not actually received because tickets were stolen. The prosecution contended that "gross receipts" *did* include dollars that should have been received but were never collected due to theft. The prosecution contended that the cost of tickets lost due to theft was a "cost" of doing business, and that an operator like Lau was not legally allowed to "take a deduction" for such expenses. RP IV, 453, RP V, 494. The defense contended that since no dollars were ever collected for stolen tickets, the sale value of such

stolen tickets was not a “deduction” at all, it was simply something that legally should never be included within “gross receipts” in the first place. RP V, 508-09.

In order to understand the dispute over the method by which gross receipts are calculated, one needs to know something about the way in which pull-tab games are played. Prosecution witnesses explained how the game works, and how operators keep track of the number of pull-tabs that are played in a game.

**b. How the Games Work.**

A pull tab flare is a rectangular piece of cardboard roughly 15 by 22 inches which has a number of symbols or numbers printed on it. RP III, 117. Each game may have hundreds or thousands of tickets. Each ticket for the game has a perforated window with a flap over it. RP III, 117. When the flap is torn off, the symbol underneath is visible. A player buys pull tab tickets, and if the symbol underneath the flap on a ticket matches the symbol on the flare, then the player wins and gets a prize. RP III, 117-18. If the prize is money, then the operator pays the winner the prize money amount. RP III, 119.

Defendant Lau managed three businesses. Two of them, the B Z’s Sports Bar and Good Time Ernie’s, were located in Burien, and one of

them, Tall Timbers, was in Federal Way. RP III, 123. All three of the businesses were owned by a limited liability corporation, and the corporations held the gambling licenses issued by the Washington State Gambling Commission. RP IV, 364. All three businesses were “commercial stimulant operators,” meaning that they sold pull-tabs as a way of stimulating customers to buy other products such as food and drink. *See* RCW 9.46.0217. At a business like one of the three sports bars, the business would be playing several pull tab games at once.<sup>2</sup>

Pull-tabs are kept in containers called fishbowls. RP III, 147. When a customer buys some pull-tabs, they are removed from the fish bowl. RP III, 127. When a pull tab matches one of the symbols under the flare, the customer shows his pull-tab to an employee – in this case a bartender – and the bartender verifies that it is a winning pull tab. RP III, 119.

**c. The Formula Which Agent Lohse Testified Was Used by the Gambling Commission to Calculate “Gross Receipts”.**

Agent Lohse testified that the formula for calculating gross receipts (G) is simply  $G = (C) \times (N)$ , where (C) is the cost per pull tab and N is the number of pull tabs that were played. RP III, 125. In a perfect world, the number of pull tabs that are played will be exactly equal to the number of

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<sup>2</sup> For example, Gambling Commission Agent Jess Lohse testified that there could be twelve pull tab games going on simultaneously. RP III, 120. Colleen Schroeder, a

pull tabs that were sold. (N played = N sold). But due to the twin problems of employee theft and customer fraud, the number of pull tabs that were played will be somewhat *higher* than the number of pull tabs that were actually sold.

In order to determine the number of pull-tabs that were *sold*, the operators count the number of pull-tabs that were *not* sold, and then they subtract that number – the number of remaining pull-tabs – from the total number of pull tabs in the game. RP III, 125. So for example, if a game has 6,000 pull-tabs, and there are 2,500 pull-tabs remaining after a game is pulled from play, then the number of pull tabs that were sold is estimated to have been 3,500 (6,000 minus 2,500).

**d. The Weighing Method of Calculating the Number of Pull Tabs That Were Played in the Game.**

There are two different ways of counting the number of pull-tabs remaining after a game closes: (1) actually physically counting them, or (2) weighing the remaining tabs, or weighing some representative sample of the remaining tabs. Agent Lohse explained:

Q. How are [sic] the number of tabs remaining typically calculated?

A. It depends on the licensee. They can – they can physically count all the remaining pull-tabs. Sometimes there's games

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former manager of one of the bars, testified that Tall Timbers had 34 games going simultaneously, B & Z's had 31, and Tall Timbers had 10 to 12. RP III, 219-20.

that have quite a few pull-tabs left, up to like 5-, 6,000. So in that case, operators, we allow them to use a scale to weigh the pull tabs, the remaining pull tabs. So what they do is they count out a sample, for instance, 300 pull tabs, and they place it in a scale. It weighs its weight and knows it – determines there's 300 pull-tabs. And then they dump the rest of the game in there, and it'll give you a final ticket count, and that will tell you the unsold tabs. And then you take the ticket count in the game minus what the scale told you was for the remaining pull-tabs, and that will give you the number of pull-tabs sold.

RP III, 125. *See also* RP III, 149.

Agent Lohse agreed that he *did not know of any* pull-tab operators who counted the number of remaining (unplayed) pull-tabs by hand, because that method was extremely time consuming; virtually all of them used the weigh and subtract method. RP III, 145-46.

Prosecution witness Schroeder agreed with Lohse. She did not know of anyone who used the counting by hand method. RP III, 244. As she put it, "Nobody has time for that." RP III, 244.

**e. Weighing Process Problems Which Cause the Number of Tickets Sold To Be Erroneously Overestimated.**

A number of possible errors can infect the weighing process. One witness testified, "I don't believe that the scales [used to weigh the tickets] to be accurate." RP III, 248. Moreover, because the tickets absorb water moisture, the weight of the tickets was affected by the extent to which the tickets had gained or lost weight due to humidity and exposure to heat.

RP III, 201. One of the business establishments, Tall Timbers, had a roof leak, and as a result the business “got rained on inside” and there was excessive moisture in the place. RP III, 203.

If tickets are first weighed in a full package of tickets when they are “wet” (having absorbed a lot of moisture in the air), and then are weighed many hours later after they have “dried out” due to exposure to the heat of light bulbs, the tickets will be lighter at the time of the second weighing than they were at the initial weighing. RP III, 201. This in turn will make it appear – falsely – that many more tickets have been sold than have really been sold. RP III, 202.<sup>3</sup>

**f. The Counting of Stolen Tickets, Which Causes the Amount of Gross Receipts to Be Erroneously Overestimated.**

The pull tab operators keep track of the number of pull-tab tickets played -- and the estimated amount of income they generate ( $N \times C$ ) -- on

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<sup>3</sup> Q. . . . What are some other things that might affect the weight?

A. Well, humidity will affect the weight. They're little paper tickets, and they tend to absorb water quite easily.

Q. So that makes it -- shows like there are a lot more tickets?

A. A lot over.

Q. And then if you have -- do some of the establishments have light bulbs over . . .

A. Yeah.

Q. And that would dry it out and then cause it to weigh less?

A. That's true. I didn't think of it, but, yeah, that's true.

Q. And so if you sold no tickets at all and you weighed the tickets in the morning when you first came in to a high humidity place, and then again sold no tickets at all and weighed at night, it would show that you sold a whole lot, or sold a bunch?

A. It could, yes. It could --

Q. Yeah.

a document called a monthly income summary. RP III, 128. Frequently the actual cash received does not match the calculated amount of cash that should have been received. RP III, 128. Nevertheless, on the monthly income summaries, N x C is recorded as the number for “gross receipts.” If there is more cash than there should be (more than N x C), then the discrepancy is listed as “cash over”; if there is less cash than there should be (less than N x C), then this is listed as a “short.” RP III, 128. Agent Lohse explained why it sometimes happens that the amount of *actual* cash received does not match up with the calculated “gross receipts” figure, which is the amount of cash that *should* have been received:

And reasons why that may occur is – ***it could be due to a miscount.*** When the licensee was counting the remaining pull-tabs, they counted it wrong. So their gross receipts are going to be typically off. It’s not going to match their actual cash count. ***It could also be related to theft.*** If one of their employees are taking pull tabs out of a bowl and not paying for it, ***then the cash is going to be lower than it should have been.*** So those are the typical things that would cause an overage or a shortage.

RP III, 128 (emphasis added).

All the witnesses testified that they were familiar with both employee and customer theft. One witness testified to observing an incident of customer theft, and said that even though the tickets were stolen from that game, in the count done after the game closed those stolen tickets were still counted “as if” they had been sold because their weight was missing

from the pull-tabs remaining in the fish bowl. RP III, 213.<sup>4</sup>

The number of tickets played in a game is “supposed to” match the number of tickets purchased; but because some pull-tab tickets are stolen and then played, these numbers do *not* match. RP III, 243. So at the end of a game, when the number of remaining (unplayed) tickets is counted and used to calculate the number of tickets that were supposedly sold, that number is too high, and consequently the “gross receipts” figure -- which was calculated by multiplying that number of tickets by the cost of a ticket -- is also too high.

**g. Evidence of Discrepancies Between The Numbers of Pull Tabs Recorded on Monthly Summaries and The Numbers Shown on Quarterly Reports and Tax Returns.**

While conducting a routine compliance inspection at B Z’s in January of 2010, Jess Lohse, a Special Agent for the Washington State Gambling Commission, discovered that one pull tab game had not been recorded on the monthly income summary sheet that pull tab operators are required to fill out and to submit to the State and to the taxing cities. RP III, 133-34.

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<sup>4</sup> “A. The bartender told me . . . She was tending bar that night and . . . one of the customers told her that he had just watched somebody walk behind the bar and take some tickets, so . . . I went back to the surveillance camera, . . . and, sure enough, somebody walked behind, reached his hand in, put some tickets in one pocket, reached the other hand in, put some tickets in the other pocket, and then left leaving pull-tabs all over the floor. And then I pulled the game, and it was over a couple of hundred tickets short.

“Q. And then you say you pulled it, you still weighed it and tried to come up and still had to enter the numbers, right?

“A. I had to enter what was left in the bowl, yes.”

During a follow-up inspection in March, Lohse discovered that the total numbers of pull-tabs played recorded on the business' monthly income summaries did not match the total numbers recorded on its quarterly revenue reports (which are used to calculate the 5% gambling tax). RP III, 134-35. The quarterly reports consistently showed fewer pull-tab tickets than the monthly income summaries showed. In Lohse's view, this constituted "underreporting." RP III, 135. Since the number of tickets sold was, in Lohse's view, underreported, this in turn produced an underreporting of gross receipts (N x C), and that led to an underpayment of the gambling tax. RP III, 136. Lohse expanded his investigation, and found that throughout the years from 2005 through 2010, the number of pull-tabs reported on the quarterly revenue reports was consistently lower than the number reported on the monthly income summaries. RP III, 137; RP IV, 332-333, 372-399, 402-441.

**h. Testimony From Huynh That "Gross Receipts" is "What They Take In" For Pull-Tabs, and Does Not Include The Value of Tickets Which Are Stolen or Purchased With Bounced Checks.**

Phung Huynh, a finance analyst for Federal Way, testified that as part of her job she reviewed gambling tax returns and went through them to make sure their calculations were correct. RP III, 254. She testified that when a person files a gambling tax return, "we don't allow any deductions

for punch board pull tabs or card rooms and then [sic] their taxable revenue. Then we take that and we times it by five percent to determine how much they're supposed to remit to the City." RP III, 256-57. The prosecutor had Huynh repeat the "no deductions allowed" portion of her testimony and she explained that while a deduction *was* allowed for the cost of the prize paid out to a winner of certain games, no such deductions were allowed for the winner of a pull-tab game. RP III, 257.

On cross-examination, defense counsel elicited further testimony to illustrate the fact that the ticket price of a *stolen* pull-tab ticket was *not* included within gross receipts, because that price was never received:

Q. Okay. What's gross receipts?

A. Gross receipts are basically *what they take in* for the pull-tabs.

Q. Okay. And if – *so you wouldn't count bounced checks or stolen things or anything like that?*

A. Uh-uh. [Clarified by the witness as a "no."]

RP III, 259 (emphasis added).

**i. Testimony from Coleman That "Gross Receipts" Includes Dollars Received for Pull Tab Tickets.**

Gary Coleman, the Burien accounting manager, was asked how Burien taxes gambling receipts, and he explained that games like bingo, run by charitable organizations, were taxed at 10% of *net* receipts, and that other

games like pull-tabs were taxed at a rate of 5% of *gross* receipts. RP III, 268-69. The prosecutor inquired, “Now when you say five percent of gross, what do you mean by that?” Mr. Coleman answered:

If it’s a \$1 pull-tab and an individual comes in and buys one, the tax on that would be five percent, which would become – be coming to the City. So five percent *of each dollar received* on the sale of pull tabs.

RP III, 269 (emphasis added).

**j. Defense Counsel’s Motion to Dismiss.**

When the State rested, defense counsel moved for a dismissal of the charges. RP IV, 450. During the legal argument on this motion the attorneys’ different understandings of the term “gross receipts” became apparent. Pointing to the testimony of Ms. Huynh and Mr. Coleman, defense counsel argued that Federal Way and Burien did not calculate “gross receipts” in the same way that Agent Lohse and the Gambling Commission did. Defense counsel explained that since no dollars were ever “taken in” or “received” for the stolen pull-tab tickets, the value of these stolen tickets was *not* included within the term “gross receipts”:

The City of Burien and the City of Federal Way have different standards, according to the testimony of each of their representatives, than does Agent Lohse. Agent Lohse says the only thing that counts is the number in and the number out times the dollar value or the value of the play, 25 cents primarily. And for State purposes, in your state return, that’s what counts. That’s how you figure it out. And he used that information, and for the

benefit of this motion quite accurately says that Mr. Lau and his people did not accurately report to the State based on the State's definition of what has to be reported. However, ***that's got nothing to do with this case.***

This case is about theft from Burien, theft from Federal Way. Ms. Huynh from Federal Way very clearly, very distinctly said that their standard is different. Their standard is your gross receipts, and then you can make adjustments for things like stolen tickets, accounting errors, things like that, and that does play into what their – what they want the licensee to take into account before they decide what the tax basis is.

The gentleman, Mr. Coleman, from the City of Burien when asked, said, "What do they owe you?" ***Five percent of every dollar taken in, quote/unquote.*** Not: Well, you figure out, go through this formula, and you look at how many tickets and you multiply by – no. ***It's the actual dollar taken in. Five percent of every dollar taken in.*** There's been no evidence before the Court that the numbers that have been submitted by Mr. Lau to the City are in any way inaccurate. We've had ample testimony saying that the quarterly – or the gross receipts are wrong. We've had Agent Lohse admit that they're probably not accurate, but that's how you have to do it. We have Colleen Schroeder and Kate O'Neill up one side, down the other say, "You can't rely on those. You can't rely on any part of those numbers as far as an accurate number." ***And the City of Burien and the City of Federal Way say you can take that into account when you send your numbers in to them.***

RP IV, 451-452 (emphasis added).

In reply, the prosecutor argued that the value of the stolen tickets was a business expense – the expense of losing property to theft. In his view, a business expense was a "deduction." Since Ms. Huynh had clearly testified that no deductions were allowed, the prosecutor argued that it would be wrong to subtract the value of the stolen tickets from the number

produced by Agent Lohse's simple formula of N x C:

The City of Burien and the City of Federal Way, *while the witnesses certainly simplified it* in their oral testimony in terms of *saying five percent of every dollar in*, the question ultimately becomes, well, how do you calculate the dollars that were taken in, *and that is established through the Washington State Gambling Commission standards.*

The paper trail here is – and *to the State's recollection, both the city of Burien and City of Federal Way representatives both testified that adjustments and deductions were not allowed. . . .*

RP IV, 452-53 (emphasis added).

In rebuttal, defense counsel reiterated his position that the value of stolen tickets was something that the three businesses never received, and thus, as Ms. Huynh clearly said, the value of those tickets was properly excluded from gross receipts:

MR. GEHRKE: Just briefly in response, your Honor. Although counsel might wish that to be the City of Federal Way's definition, *Ms. Huynh very clearly stated in cross-examination that they do not want to count NSF checks, stolen tickets.* They do make allowances before you consider the bottom line on gross receipts.

RP IV, 454 (emphasis added).<sup>5</sup>

**k. The Instructions Failed to Define the Term "Gross Receipts."**

Neither party asked the Court to give any instruction defining the term "gross receipts." Defense counsel did not take any exceptions to any of

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<sup>5</sup> The trial judge denied the motion to dismiss without directly addressing the issue of whether the value of stolen tickets was properly included within the term "gross receipts." RP IV, 454.

the jury instructions, and did not propose any instructions. RP IV, 465.

**I. Closing Arguments of Counsel.**

From their closing arguments, it is painfully clear that neither counsel was aware of this Court's decision in *TLR v. Town of La Center, supra*. The prosecutor continued to characterize the defense position as a contention that the defendant was entitled to a "deduction" for the value of stolen tickets, and he stressed the fact that no "deductions" were permitted. RP V, 484. He also argued that Mr. Lau committed theft by taking money that "belonged" to the cities:

For the period between July of 2005 and January of 2010, that Mr. Lau committed a theft of money from Federal Way. ***Money that didn't belong to him. Money that belonged to the City of Federal Way.*** He deprived the City of Federal Way of those funds. . . .

RP V, 485. He then argued that by underreporting his gross receipts, Mr. Lau had committed theft of "the property of another" in two separate ways: (1) by exerting unauthorized control, and (2) by color or aid of deception. He specifically told the jurors that "it's not necessary that you [all] agree" as to which type of theft was committed, so long as they all agreed that "it was one or the other." RP V, 487-88.

The prosecutor told the jury how to "do the math"; how to determine that the amount of money stolen from each city exceeded the threshold required for first degree theft (\$5,000) and second degree theft (\$750). RP

V, 498-499.<sup>6</sup> He told the jurors to calculate the difference between the number Lau listed on monthly reports as his gross receipts (calculated the way Agent Lohse said it should be calculated, simply as  $N \times C$ ) and the lower number listed on the defendant's quarterly reports and on his tax returns. According to the prosecutor, five percent of this difference, then, was what the defendant "stole" from the cities. RP V, 490.

The difference between those numbers. And five per cent of that is the money that should have gone to the City, should have gone to the people of the city of Burien, the people of the city of Federal Way, but didn't. Instead, *it stayed with the business, it stayed with Mr. Lau. Through color and aid of deception, he exerted unauthorized control over that property.*

RP V, 490 (emphasis added).

In reply to the defense argument that Mr. Lau properly reduced the N number in the  $N \times C$  formula, in order to account for stolen tickets and for weighing errors that erroneously inflated the number (N) of tickets supposedly sold, the prosecutor told the jurors that Mr. Lau was not allowed to do that because these were business costs that he had to bear:

Also, there was some testimony that, well, there's no way to make

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<sup>6</sup> "So Count 1, theft in the first degree, in the charging period and in the State of Washington, Mr. Lau intentionally deprived the city of Federal Way of over \$11,000. Theft in the first degree, the State only needs to prove \$5,000. It's over double that when you do the math.

"The City of Burien, Count 1. Over the charging period, January of 2006 through the end of 2009, he deprived the City of Burien, intentionally, flagrantly, of over \$4,000. And, again, what does the State have to do to prove theft in the second degree? \$750. It's well over four times that when you do the math."

up for shortages. *What if someone steals something? What if the weight is off? The fact is, those are costs of doing business. The business has to bear those costs. The cities shouldn't bear those costs.* If the business thinks that pull-tabs are too costly to operate given the taxes on them and given the possibility of theft, then the business shouldn't operate those pull-tabs. They are taxed on gross receipts, not net.

RP V, 494 (emphasis added).

Defense counsel flatly disagreed with the prosecutor's contention that it was illegal to take into account things like tickets lost to theft and inflated numbers of tickets played due to inaccurate weighing. He argued that the defense legal theory regarding what was properly included within the term "gross receipts" was fully supported by the testimony of Ms. Huynh, the Federal Way financial analyst. Defense counsel argued that reductions from the N x C formula to account for these things were not deductions, they were proper adjustments which corrected the mistakes made in the rough calculation of the number of tickets that were sold:

*Well, we had the lady from Federal Way, and she says you can't take deductions like for charity bingo, or if you give prizes out or a cash thing you can't deduct those. There's no evidence that Bill did. What did she say, though? I said, "Well, how about stuff like checks that bounce or if they steal stuff?" She said, "Oh, no. No. No. Don't count those." And if any of you think she didn't say that, please talk to your fellow jurors, because I wrote it down very clearly. I heard that and I said, "I know that ma'am. That's why I asked you the question." "No, we don't count that." That's not a deduction, folks. That's an adjustment. That's money that did not come in. That's money that you can't point to to [sic] the penny and say, well, somebody stole five 25*

cent ones, so that's \$1.25. No. That's something that you figure out at the end.

You think about it, the State can have their accounting standards. And if you look at the news, we have the Tea Party. We're getting back to the old days. Paul Revere made his ride, "No taxation without representation." *The cities, they're not going to tax you on money you don't get. The lady told us that: "No. We don't count that."*

RP V, 508-09 (emphasis added).

**D. STATUTES AND ORDINANCES GOVERNING GAMBLING TAX ON GROSS RECEIPTS FOR PULL-TAB GAMES.**

**1. THE LEGISLATURE AUTHORIZED CITIES TO TAX THE GROSS RECEIPTS RECEIVED FROM THE SALE OF PULL TABS.**

In 1973 the Legislature enacted RCW 9.46 pertaining to gambling activities. In the new act, the Legislature authorized cities to impose taxes on certain gambling activities including the sale of pull-tabs:

- (1) *The legislative authority of any county, city-county, city, or town, by local law and ordinance, and in accordance with the provisions of this chapter and rules adopted under this chapter, may provide for the taxing of any gambling activity authorized by this chapter within its jurisdiction, the tax receipts to go to the county, city-county, city, or town so taxing the activity. . . .*
- (2) (e) Taxation of punchboards and pull-tabs for bona fide charitable or nonprofit organizations is based on gross receipts from the operation of the games less the amount awarded as cash or merchandise prizes, and shall not exceed a rate of ten percent. At the option of the county, city-county, city, or town, *the taxation of punchboards and pull-tabs for commercial stimulant operators may be based on gross receipts from the operation of the games, and may not exceed a rate of five percent, or may be based on*

gross receipts from the operation of the games less the amount awarded as cash or merchandise prizes, and may not exceed a rate of ten percent.

RCW 9.46.110(1) & (3) (emphasis added).

The Legislature preempted any independent tax legislation by cities or towns in the clearest of terms, stating:

*This chapter shall constitute the exclusive legislative authority for the taxing by any city, town, city-county or county of any gambling activity and its application shall be strictly construed to those activities herein permitted and to those persons, associations or organizations herein permitted to engage therein.*

RCW 9.46.270 (emphasis added).<sup>7</sup>

Acting pursuant to this grant of legislative authority, Burien and Federal Way enacted laws which imposed a five percent tax on the sale of pull-tabs. For the time period that was the subject of Count I, Federal Way imposed a 5% tax on gross receipts from the sale of pull-tabs by “commercial stimulant”<sup>8</sup> operators. (See Appendix A).<sup>9</sup> Similarly, Burien

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<sup>7</sup> The Legislature also restricted the powers of cities to license and regulate gambling activity: “This chapter constitutes the exclusive legislative authority for the licensing and regulation of any gambling activity and the state preempts such licensing and regulatory functions, except as to the powers and duties of any city, town, city-county, or county which are specifically set forth in this chapter . . .” RCW 9.46.285.

<sup>8</sup> See RCW 9.46.0217 for a definition of the term “commercial stimulant”.

<sup>9</sup> Currently, Federal Way’s pull tab tax is only 3% of gross receipts: “In accordance with RCW 9.46.110, there is levied upon all persons a tax on every gambling activity permitted by this chapter at the following rates: . . . (c) Any punchboard or pull-tab activity for bona fide charitable or nonprofit organizations shall be at a rate of 10 percent on gross receipts from the operation of the games less the amount awarded as cash or merchandise prizes. *Taxation of punchboards or pull-tabs for commercial stimulant*

imposes a five percent tax on such gross receipts. (See Appendix B).<sup>10</sup>

**2. THE LEGISLATURE AUTHORIZED CITIES TO BRING CIVIL ACTIONS TO COLLECT DELINQUENT TAXES.**

The Legislature expressly authorized cities and towns to bring *civil* enforcement actions to collect unpaid gambling taxes:

*At any time within five years after any amount of fees, interest, penalties, or tax which is imposed pursuant to this chapter, or rules adopted pursuant thereto, shall become due and payable, the attorney general, on behalf of the commission, may bring a civil action in the courts of this state, or any other state, or of the United States, to collect the amount delinquent, together with penalties and interest: PROVIDED, That where the tax is one imposed by a county, city or town under RCW 9.46.110, any such action shall be brought by that county, city, or town on its own behalf. . . .*

RCW 9.46.350 (emphasis added). Pursuant to this grant of authority, the city of Burien has authorized the bringing of civil litigation to collect delinquent taxes. Burien City Code § 3.25.040 (See Appendix B).

**3. THE LEGISLATURE AUTHORIZED CITIES TO ENACT LAWS CREATING LOCAL GAMBLING OFFENSES, BUT THAT AUTHORITY WAS STRICTLY LIMITED AND EXTENDED ONLY TO THE ENACTMENT OF MISDEMEANORS AND GROSS MISDEMEANORS WHICH THE LEGISLATURE HAD ALREADY ENACTED AS STATE CRIMES.**

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*operators shall be at a rate of three percent on gross receipts from the operation of the game. . . .*" Federal Way City Code § 3.40.040(1)(c) (emphasis added).

<sup>10</sup> "There is imposed a tax at the rates set forth below, upon the following gambling activities, when authorized by Chapter 9.46 RCW, and when conducted in the city: (1) *Five percent of the gross receipts* from punchboards and pull-tabs, as those terms are defined by RCW 9.46.0273 and the Rules and Regulations of the Gambling Commission." City of Burien Code § 3.25.010(1) (emphasis added).

The Legislature's 1973 Gambling Act created a few criminal offenses, many of which are misdemeanors. For example, the following crimes are gross misdemeanors:

- making a false or misleading statement in any report submitted to the gambling commission, RCW 9.46.170;
- “employ[ing] any device, scheme or artifice to defraud,” or to making “any untrue statement of a material fact,” RCW 9.46.190;
- working in gambling activity without a license, RCW 9.46.198.

A few other statutes create felony offenses.<sup>11</sup>

In RCW 9.46.192 the Legislature strictly limited the power of cities to create gambling crimes. Cities may enact ordinances which duplicate the simple and gross misdemeanors offenses created by the State Legislature and specified in RCW 9.46, but they cannot create any new misdemeanor offenses and they cannot create any felony offenses:

***Every city or town is authorized to enact as an ordinance of that city or town any or all of the sections of this chapter the violation of which constitutes a misdemeanor or gross misdemeanor. The city or town may not modify the language of any section of this chapter in enacting such section except as necessary to put the section in the proper form of an ordinance or to provide for a sentence [to] be served in the appropriate detention facility. The ordinance must provide for the same maximum penalty as may be imposed under the section in this chapter.***

RCW 9.46.192 (emphasis added).

**E. ARGUMENT**

**1. THE STATE PROSECUTED THE WRONG “PERSON.”  
THE “PERSONS” WHO ALLEGEDLY UNDERREPORTED  
THEIR GROSS RECEIPTS WERE CORPORATIONS.**

The State’s own undisputed evidence was that the three sports bars were owned by two limited liability corporations. RP IV, 364. Stephanie Sherwood, a Special Agent for the Gambling Commission working in the Financial Investigations Unit, testified that when the Commission granted gambling licenses to the three businesses, they first did an investigation to determine who owned them. RP III, 363-64. Sherwood determined the ownership structure of the three bars and found that B Z’s Sports Bar was owned by TLF Holdings, LLC; and Good Time Ernie’s and Tall Timbers Bar & Grill were both owned and operated by Tall Timbers Enterprises LLC. RP III, 364. See Exhibit 57.

The legislature authorized “any person, association or organization operating an established business primarily engaged in the selling of food or drink for consumption on the premises to . . . utilize punchboards and pull-tabs as a commercial stimulant to such business when licensed and utilized or operated pursuant to the provisions of this chapter . . .” RCW 9.46.0325. The “organization[s]” that owned and operated these three

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<sup>11</sup> See, e.g., RCW 9.46.155 (bribing a public official with money received from gambling activities is a Class C felony); RCW 9.46.1961 (cheating in the first degree is a Class C

bars, and which held the gambling licenses issued by the Gambling Commission, were two corporations. Therefore, the corporations – not William Lau – were responsible for paying the municipal gambling taxes.

The State did not charge either of the corporations with theft. Instead, the State charged William Lau because he was managing the businesses. The State simply failed to appreciate the fact that William Lau was not the same “person” as either of the two corporations. But it is basic black letter law that “a corporation is always and necessarily a distinct and separate legal entity,” which cannot be equated with the individual human beings who may own it or run it. *Schroeder v. Meridian Improvement Club*, 36 Wn.2d 925, 930, 221 P.2d 544 (1950). A corporation is “separate and distinct from the persons who own its stock,” and a shareholder does not own any of the corporation’s property. *California v. Tax Commission*, 55 Wn.2d 155, 157, 346 P.2d 1006 (1959). The same is true of a limited liability corporation. “In general, members and managers of a limited liability company ***are not personally liable for the company’s debts, obligations and liabilities.***” *Chadwick Farms v. FHC LLC*, 166 Wn.2d 178, 207 P.3d 1251 (2009)(emphasis added), citing RCW 25.15.125(1).

William Lau did not own any of the three businesses; the corporations

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felony); RCW 9.46.215 (owning a gambling device).

did. Nor did William Lau hold the gambling licenses issued by the Gambling Commission; the corporations did. Accordingly, William Lau never owed any gambling taxes to either city; only the corporations had an obligation to pay the gambling taxes. Since Lau was not the “person” who owed the tax, the evidence was legally insufficient to find him guilty of any crime of theft for not paying some of the tax which the corporations (allegedly) owed but did not pay. The State should never have charged Lau with any crime, and his convictions should be reversed because there is no evidence to support them.

**2. AS A MATTER OF LAW UNPAID GAMBLING TAXES ARE NOT “THE PROPERTY OF ANOTHER,” AND THEREFORE IT IS IMPOSSIBLE TO COMMIT THE CRIME OF THEFT BY FAILING TO PAY SUCH TAXES.**

**a. A Person Cannot Steal His Own Property.**

The term “theft” as defined by RCW 9A.56.020(1) means:

- (a) To wrongfully obtain or exert unauthorized control over the property or services *of another* or the value thereof, with intent to deprive him of such property or services; or
- (b) 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 of such property or services; . . .

(Emphasis added).

“[A] person cannot steal his or her own property.” *State v. Pike*, 118 Wn.2d 585, 590, 826 P.2d 152 (1992). For example, in *Pike* the defendant

took his own car to an auto repair shop, had it repaired, and later picked it up and drove it away without paying the repair bill for the mechanic's services. Because the mechanic did not take the steps necessary to perfect a mechanics lien, the mechanic had no possessory interest in the car which was superior to Pike's ownership interest. Thus, Pike's theft conviction was reversed because he could not be convicted of stealing his own car.

As the owner of the car, Pike owed a personal debt to the mechanic. But as with all unsecured debts, Pike's mere failure to pay that debt, no matter how intentional, did not support a conviction for theft:

In essence, by completing the repairs in accordance with Pike's authorization, when Pike failed to pay, Scofield [the mechanic] gained a cause of action against him for the value of the repairs. This cause of action is contractual in nature: Pike contracted with Scofield to perform repair work on his 1980 Rabbit and then breached his contractual obligation to pay for the cost of the repairs. As with all nonsecured contractual debts, *the debt Pike owes Scofield for the cost of the repairs is a personal debt; it is not chargeable to any particular piece of property.* [Citation].

Such a general contractual debt cannot support a theft conviction. *First, it does not satisfy the "property of another" element because Scofield has no possessory interest in the car, only a right to recover damages from Pike in a civil lawsuit.* Second, mere breach of a contractual obligation to pay does not create criminal liability absent a specific statute, or contractual fraud. [Citations]. We are loath to turn the criminal justice system into a mechanism for the collection of private debts. Finally, a conviction based solely upon a breach of a contractual obligation to pay must fail because it violates the Washington State Constitution, which states that "[t]here shall be no imprisonment for debt, except in cases of absconding debtors." Const. art. 1, § 17. . . .

*Pike*, 118 Wn.2d at 595 (emphasis added).

Similarly, in *State v. Eberhart*, 106 Wash. 222, 179 P. 853 (1919) and *State v. Birch*, 36 Wn. App. 405, 675 P.2d 246 (1984), the appellate courts reversed and dismissed theft convictions which had been based upon facts showing that a partner took funds that belonged to the partnership of which he was a member. Since a partner owns an undivided share of all partnership property, a partner cannot be convicted of stealing partnership money because he already owns it.<sup>12</sup>

In the present case, it doesn't matter whether the sports bars were owned by the corporations or by Mr. Lau. Even if the business were owned by Mr. Lau as an individual, then the gross receipts would belong to him, and he could not be convicted of theft for "stealing" any part of the gross receipts, because if he owned the business then he owned all of the gross receipts. Because the businesses were corporately owned, the corporations actually owned all the gross receipts. Either way, the cities of Federal Way and Burien did not own *any* part of the gross receipts, and thus no one can be convicted for stealing property from the cities.

The businesses took in money from customers who purchased pull-tabs. Once a pull-tab ticket was sold, the money used to buy the pull-tab

ticket ceased to belong to the customer who bought the pull-tab and became the property of the owner of the business, that is to say, either (1)- the property of Mr. Lau under the State's mistaken view which ignored the fact that the business were owned by the corporations; or, in actuality, (2) the property of the corporations . In *neither case* did this money belong to the cities. Therefore, it was not possible for either Lau or the corporations to steal the money because it was not the "property of another."

Federal Way and Burien did not have any superior possessory interest in the funds which were collected when customers purchased pull-tabs. They had no security interest in these gross receipts. They had a claim to payment of a sum which was equal to five percent of the total amount of the gross receipts from pull-tab sales. But the cities' claims were simply claims to collect a debt owed to them (according to the State) by Lau, (and in fact, owed to them by the two corporations). Like the debt Pike owed to the mechanic, "this is a personal debt; it is not chargeable to any particular piece of property." *Pike*, 118 Wn.2d at 595. Neither Lau nor the corporations, had any obligation to pay the municipal gambling taxes with some of the very same dollars that were collected from the customers who purchased pull tabs. These taxes could be paid with funds from any

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<sup>12</sup> Eventually, the Legislature changed the common law by enacting a statute that made it possible for a partner to steal partnership property. *See* RCW 9A.56.010(22)(c).

source. They could be paid with money made from selling beer and pretzels. Even if Lau were the owner of the businesses, he could pay the gambling taxes out of wages he had earned while working for someone else; or out of rental income he received for renting a home he owned.

**b. An Unpaid Gambling Tax Is A Debt Owed to the City, But No Part of an Operator's Gross Receipts Constitutes "The Property of Another".**

The Burien City Code explicitly acknowledges the fact that an unpaid city gambling tax is a "debt" owed to the City:

All delinquent taxes and applicable penalties *shall constitute a public debt owing to the city* which shall be subject to collection or other enforcement by all means available, at law and in equity, including but not limited to injunctive relief against the offending party.

Burien City Code § 3.25.040(2). Because it is a debt, it can be collected like any other debt, but a pull-tab operator cannot be convicted of theft for not paying it, because the unpaid debt is not "the property of" the City.

**c. Courts In Other Jurisdictions Hold That When There Is No Duty to Segregate Funds In Order to Pay Taxes out of them, A Failure to Pay Taxes Does Not Constitute Theft.**

There do not appear to be any reported cases in Washington State where a person was prosecuted for theft for not paying taxes to a state or municipal government.<sup>13</sup> But legal research in other jurisdictions reveals

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<sup>13</sup> This fact alone strongly suggests that since statehood prosecutors have generally recognized that an unpaid tax debt is not "the property of another" and thus cannot

that there are analogous cases on theft and the failure to pay a sales tax. For example, in *State v. Marcotte*, 418 A.2d 1118 (Me. 1980), the Court ruled that failure to pay Maine's sale tax could not give rise to criminal liability for theft. In that case, Marcotte was indicted on seven counts of Theft by Misapplication of Property, for failure to remit sales tax incurred in the course of running his retail furniture business. "Reasoning that the sales tax is the personal debt of the retailer," and "that criminal liability could not arise from failure to pay a civil obligation," the trial court dismissed the theft charges. *Id.* at 1119. The State appealed and the Supreme Judicial Court of Maine affirmed the dismissals. The Court noted that there was nothing in the sales tax statutes that required retailers to sequester or reserve a portion of the funds received as sales receipts and to pay the sales tax out of that reserved portion. Since retailers were free to pay their sales taxes using money from any source, they were the owners of their sales receipts and they could not be prosecuted for theft for not paying their taxes out of these funds:

[W]e hold that under [the Theft by Misapplication of Property section] of the Maine Criminal Code, ***if there exists no agreement or legal obligation to make payment from the property obtained or its proceeds or from property to be reserved in equivalent amount, there can be no criminal liability.*** This requirement is similar in nature to a fiduciary or trust relationship.

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legally form the basis for a theft prosecution no matter how intentional the taxpayer's failure to pay may have been.

The question then becomes whether 36 M.R.S.A. § § 1751-2113, dealing with sales and use taxes, require a retailer to reserve funds for payment to the state, such that his intentional or reckless failure to pay sales tax which is due and owing constitutes theft within the meaning of [the theft statute]. ***We hold that there is no such duty and that consequently no criminal liability exists under [the Theft by Misapplication of Property Statute].***

*Marcotte*, 418 A.2d at 1121 (emphasis added).

The State argued that even if it couldn't prosecute under the "Theft by Misapplication of Property" statute, it should be allowed to prosecute under Maine's "Theft By Unauthorized Taking" statute, under 17-A M.R.S.A. § 353. The appellate court rejected this argument as well:

The conduct alleged in the indictment, however, involved no "unauthorized control over the property of another." Under title 36, the retailer is authorized to exercise control over and comingle sales tax receipts. Thus, we conclude as to the facts alleged in this case, that the result is no different under either section 353 [Theft By Unauthorized Taking] or section 358 [Theft by Misapplication of Property].

*Marcotte*, 418 A.2d at 1122.

The *Marcotte* Court's analysis is equally applicable to the failure to pay gambling taxes to Burien and Federal Way. Nothing in the cities' tax codes prohibits the comingling of pull tab sales receipts from other forms of income. Nothing requires a pull tab operator to pay his gambling tax out of the dollars received for the sale of pull-tabs. Those receipts belong to the pull-tab operator; no part of those receipts are the property of

another; and thus there can be no criminal liability for theft for failing to pay five percent of them to the cities.

Decisions from other jurisdictions also support Lau's contention that the intentional failure to pay taxes due does not support criminal liability for theft. In *People v. Nappo*, 94 N.Y.2d 564, 729 N.E.2d 698, 708 N.Y.S.2d 41 (2000), the defendants were charged with theft for failing to pay import motor fuel taxes. The New York Court of Appeals held that the defendants could not be charged with larceny because the unpaid taxes were not "the property of" the State of New York:

The People contend that defendants were required to pay taxes on the importation and distribution of motor fuel in New York state and that their failure to do so constituted a larceny of property owned by the State. Defendants counter that, as a matter of law, the State is not the "owner" of the uncollected taxes.

The State of New York is not an owner, as defined by the penal law, of taxes required to be paid for the importation and distribution of motor fuel. ***The taxes due were not the property of the State prior to their remittance. Accordingly, defendants did not steal money that belonged to New York State, but rather failed to make payments of taxes which were their personal obligations*** under the Tax Law.

*Nappo*, 94 N.Y.2d at 566 (citation omitted)(emphasis added).

Here, as in *Nappo* and *Marcotte*, the gross receipts belonged to the owner of the businesses – the corporations. By failing to pay a portion of the tax that was owed on those gross receipts, defendant Lau did not

“obtain control over,” or “exert unauthorized control over,” “the property of another” because the property did not belong to the cities. Here, as in *Nappo* and *Marcotte*, the defendant’s theft convictions should be reversed, and the charges dismissed with prejudice.

**d. Any Ambiguity in RCW 9.46.110, the Theft Statutes, or in the Municipal Ordinances, Must be Resolved in Favor of Appellant Lau.**

In *Marcotte*, one of the four justices concurred in the result (dismissal of the criminal prosecution for theft) on the ground that the proper construction of Maine’s theft statutes was difficult to discern. He noted that no other retailer had ever been charged with theft for not paying sales tax. *Id.* at 1123. Noting that penal statutes are strictly construed in favor of the accused, Chief Justice McKusick agreed that the theft charges were correctly dismissed. *Id.* He also noted that if the legislature did not like the result, it was free to amend the theft statutes so as to make it so that failure to pay sales tax could be prosecuted as theft. *Id.*

In the present case, if this Court believes that RCW 9.46.110 and the theft statutes are ambiguous as applied to the failure to pay gambling taxes on the gross receipts from the sale of pull-tabs, then here, as in *Marcotte*, the theft statutes should be strictly construed as inapplicable and Lau’s convictions should be reversed and dismissed with prejudice.

**3. THE THEFT STATUTES ARE UNCONSTITUTIONAL AS APPLIED TO THE INTENTIONAL FAILURE TO PAY A MUNICIPAL GAMBLING TAX BECAUSE ART. 1, § 17 PROHIBITS IMPRISONMENT FOR DEBT.**

“Failure to pay a debt, although intentional in the sense that a decision is made to use funds available for purposes other than payment of the debt, cannot be criminally punished because of the prohibition in Const. art. 1, § 17.” *State v. Enloe*, 47 Wn. App. 165, 169, 734 P.2d 520 (1987). While the theft statutes are obviously not facially unconstitutional, they are unconstitutional as applied in this case because as applied they authorize the criminal punishment of Mr. Lau for the nonpayment of “his” (but actually the corporations’) tax debts to Federal Way and Burien.

In *Pike* the Supreme Court reversed the defendant’s conviction not only because there was no proof that the defendant appropriated “property of another, but also because application of the theft statute to nonpayment of a debt violated article 1, § 17. The same is true here. Failure to pay a municipal gambling tax gives rise to a debt owed by the pull-tab operator to the city in question. The legislature specifically authorized cities to collect that debt in a *civil* action. RCW 9.46.350. See *American Legion Post #32 v. City of Walla Walla*, 116 Wn.2d 1, 12, 802 P.2d 784 (1991).

At the same time, the legislature carefully restricted the power of cities to enact criminal statutes to regulate gambling. The legislature enacted a

few specific crimes, but none of them punish the act of failing to pay the tax. *See, e.g.*, RCW 9.46.170. RCW 9.46.190, RCW 9.46.198. The Legislature said cities may reenact any state criminal misdemeanor or gross misdemeanor contained in RCW 9.46 as municipal criminal offense, but they “may not modify the language of any section of this chapter in enacting such section . . .” and had to “provide for the same maximum penalty for its violation” as the legislature had provided in the state law. RCW 9.46.192. Thus, the legislature made it impossible for cities to enact any criminal offense which would violate art. 1, § 17.

By using the theft statutes of RCW 9A.56, the county prosecutor subverted the Legislature’s careful design and crossed the forbidden border into the land of imprisonment for debt. Here, as in *Pike*, the prosecution of the defendant for nonpayment of a debt is unconstitutional.

#### 4. INEFFECTIVE ASSISTANCE OF COUNSEL.

a. **The Prosecutor and Defense Attorney Argued Diametrically Opposed Views of the Proper Legal Definition of The term “Gross Receipts”.**

The prosecutor and the defense attorney had sharply different understandings of what the term “gross receipts” meant. The prosecutor believed that “gross receipts” included the value of pull-tab tickets that had been stolen, or that had been paid for with bounced checks. In his

view, “gross receipts” was properly calculated simply by multiplying the number of tickets that were “gone” when the game was closed, by the cost of a ticket. As far as the prosecutor was concerned, it did not matter that some of the tickets that had been played had never been paid for, and that nothing had ever been received for the stolen tickets. According to the State, the payment that the businesses *should* have received if these tickets *had* been paid for, was properly included within the total number for “gross receipts,” even though nothing was received for them. Similarly, it did not matter to the prosecutor that weighing errors caused the number of tickets played in a game to be overestimated, thereby producing a “gross receipts” figure that was too high because it included the presumed receipt of payment for tickets that never actually existed at all.

But in the view of the defense, the value of stolen tickets was *not* properly included within gross receipts, because nothing was ever received for them. Similarly, since N was overestimated by weighing errors, the value of the tickets that had never really existed was also properly excluded from the calculation of gross receipts.

The two attorneys argued their opposing views of the law to the jury. Neither one asked the trial judge to rule on the legal issue. Neither one asked the trial judge to give the jury an instruction defining “gross

receipts.” And neither one was aware of the decision in *TLR v. Town of La Center*, 68 Wn. App. 29, 841 P.2d 1276 (1992). As it turns out, defense counsel was correct and the prosecutor was wrong.

**b. The Decision in *TLR v. Town of La Center* Shows That Defense Counsel was Right and the Prosecutor Was Wrong.**

In *TLR* some pull-tab operators sued the town of La Center seeking a declaratory judgment to resolve this very same dispute:

TLR and Runlee contend that the trial court erred in interpreting the term “gross receipts” to include, in addition to monies actually received from the sale of chances, amounts that would have been received from the sale of lost or stolen pull-tabs and punchboard tickets. They suggest that the term “gross receipts” means only the money, value, or other consideration *actually* received from the gambling activity. It does not, they urge, embrace money that was not received.

*TLR*, 68 Wn. App. at 32-33.

This Court ruled that the pull-tab operators were correct; that the plain ordinary meaning of gross receipts referred only to value that was actually received; that the value of pull-tabs that were stolen or lost was *not* properly included within “gross receipts”; and that the Court was free to reject the Gambling Commission’s contrary view of the law. *TLR*, 68 Wn. App. at 33-34 (citations omitted).<sup>14</sup>

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<sup>14</sup> “Our task is to determine the meaning of the term “gross receipts” contained in RCW 9.46.110 and La Center’s ordinance. In construing statutes, our primary objective is to carry out the intent of the Legislature. In so doing, legislative definitions provided in the statutes generally control. Where, as here, the statute does not define a material term, we

c. **Defense Counsel Failed (1) to Cite the TLR Case to the Trial Judge; (2) to Object to the Prosecutor's Misstatement of the Law; and (3) to Request a Jury Instruction Informing the Jury of the Correct Legal Definition of "Gross Receipts."**

A defendant making a claim of ineffective assistance of counsel must establish two things. "First, the defendant must show that his counsel's performance was deficient." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Second, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

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should give words their ordinary meaning. [¶] "In ascertaining common meaning, resort can be had to dictionaries. Black's Law Dictionary defines the term "gross receipts" as follows:

**"Gross Receipts.** Term refers to the total amount of money or the value of other consideration *received* from selling property or from performing services. (Emphasis added).

"The Town of La Center invites us to ignore the common meaning of the term and, instead, rely upon the Gambling Commission's definition of "gross gambling receipts." In WAC 230-02-110, the Commission defined that term as follows:

*'Gross gambling receipts' means the monetary value that would be due to any operator of a gambling activity for any chance taken, for any table fees for card playing, or other fees for participation, as evidenced by required records. . . .'* (Italics ours).

"As a general rule, courts need not resort to regulations issued by administrative agencies in determining the meaning of words in a statute. Such issues are matters of law, within the conventional competence of courts. [¶] "Courts are obliged to give substantial weight to an agency's interpretation of a statute which that agency is charged with administering, if the statutory language is ambiguous. Ambiguous means "[c]apable of being understood in either of two or more possible senses.

An attorney's conduct is deficient when it is shown "that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." *Thomas*, at 226; *Strickland*, at 688. Deficient performance is established when it is shown that one's trial attorney failed to do legal research and failed to discover existing case precedent which *supported* his legal position and the defense he was presenting at trial.<sup>15</sup> In this case, since the *TLR* case fully supported the defense theory of the case, it is impossible to imagine any "strategic" reason for *not* citing this case to the trial court.

Trial counsel's failure to be familiar with the case which legally defined "gross receipts" for purposes of the gambling tax was extremely prejudicial. Since he did not know the law, he made no objections during closing argument when the prosecutor repeatedly misstated the law by telling the jury that gross receipts included the value of stolen tickets.

The same type of circumstances were present in *Thomas*. There defense counsel failed to offer a jury instruction on the mental state which the State had to prove in order to obtain a conviction for the crime of

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***"The term "gross receipts," which appears in RCW 9.46.110 and La Center's ordinance, is unambiguous. We believe the plain meaning of that term is that ascribed to it by Black's Law Dictionary.***

<sup>15</sup> See, e.g., *State v. Kyllo*, 166 Wn.2d 856, 868-69, 215 P.3d 177 (2009) ("Failing to research or apply relevant law was deficient performance here because it fell 'below an objective standard of reasonableness based on consideration of all the circumstances.'").

“felony flight” from a police officer. The instruction was clearly warranted by the prior decision in *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982), which held that proof that the defendant acted both subjectively and objectively with wanton and willful disregard for the safety of others. Trial counsel was not familiar with *Sherman* and thus he failed to offer a *Sherman* instruction. Thomas argued that “an attorney of reasonable competence would not have failed to offer the instruction mandated by *Sherman*,” and the Court agreed. *Thomas*, at 227.

The absence of a proper instruction led to exactly the same kind of dueling closing argument scenario that occurred in Lau’s case:

The lack of a *Sherman* instruction allowed the prosecutor to argue that Thomas’ drunkenness caused her mental state. In contrast, defense counsel argued that Thomas’ drunkenness negated any guilty mental state. Therefore, ***in closing argument, opposing counsel argued conflicting rules of law to the jury. [Citation]. Accordingly, we conclude that in failing to offer a Sherman instruction, defense counsel’s performance was deficient.***

*Thomas*, 109 Wn.2d at 228 (emphasis added). Accord *State v. Aumick*, 126 Wn.2d 422, 431, 892 P.2d 1325 (1995); *State v. Flora*, 160 Wn. App. 549, 249 P.3d 188 (2011). Similarly, in *State v. Acosta*, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984), defense counsel was forced to argue to the jury that his view of the law of self-defense was correct:

***The defendant is entitled to a correct statement of the law, and should not be forced “to argue to the jury that the State [bears] the***

burden of proving absence of self-defense.” (Italics ours.) [Citation omitted]. Rather, the defense attorney is only required to argue to the jury that the facts fit the law; *the attorney should not have to convince the jury what the law is.*

(Emphasis added).<sup>16</sup>

In the present case, in exactly the same manner, by failing to offer a *TLR* instruction which properly defined the term “gross receipts,” the performance of Lau’s defense counsel was deficient,<sup>17</sup> and his deficient conduct was extremely prejudicial to Mr. Lau. In addition to not seeking a proper jury instruction, the prejudice defense counsel caused was compounded by his failure to object to the prosecutor’s misstatement of the law in closing argument. If the jury had known (1) that defense counsel was *correct* and the prosecutor was *wrong*; *and* (2) that “gross receipts” did *not* include the value of stolen tickets; *and* (3) that one *did* have to take into account the fact that weighing errors would produce an overestimate of the number of pull-tabs which had been sold; then there is a reasonable probability that the jury would have acquitted Lau.

As noted in both *Strickland* and *Thomas*, in order to establish prejudice the defendant “need *not* show that counsel’s deficient conduct more likely

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<sup>16</sup> *Accord, State v. LeFaber*, 128 Wn.2d 896, 903, 913 P.2d 369 (1996). Similarly, in *State v. Flora*, the judge failed to give the jury any definition of the word “willfully,” and thus the defendant was prejudiced because his attorney “did not have an instruction defining ‘willfully’ to support his argument. 160 Wn. App. at 555-56.

than not altered the outcome of the case.” 466 U.S. at 693; 109 Wn.2d at 226. He need only show that the probability of a different result is sufficient to undermine confidence in the outcome of the case. *Id.* As in *Thomas*, the defendant has done that, and his conviction must be reversed.

**5. BY ALLOWING WITNESSES TO USURP HER JUDICIAL ROLE OF DECLARING THE LAW, THE TRIAL JUDGE VIOLATED ARTICLE IV, § 16.**

Article 4, § 16 states: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, *but shall declare the law.*” (Italics added). But in the present case, rather than instruct the jury on the legal definition of “gross receipts,” the trial judge allowed two witnesses, Agent Lohse, and a financial analyst, Ms. Huynh, to testify to what they believed the law was regarding “gross receipts.” Thus, the trial judge permitted the witnesses to usurp her role, and violated Lau’s constitutional right under art. IV, § 16, to have the judge “declare the law.”

The same error was committed in *State v. Clausing*, 147 Wn.2d 620, 56 P.3d 550 (2002). There the Supreme Court ruled that “the trial judge should not have allowed the executive director of the Washington State Board of Pharmacy to answer the legal question of whether a prescription remains effective when the issuing physician loses his license.” *Id.* at 622-

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<sup>17</sup> In addition, defense counsel did not object when the prosecutor misstated the law, and that failure was also objectively unreasonable.

23. “For an expert to testify to the jury on the law usurps the role of the trial judge.” *Id.* at 628. The *Clausing* Court recognized that when a lay witness is allowed to testify about what the law is, it puts the lawyers in the untenable position of having to argue that the witness is wrong. *Clausing*, 147 Wn.2d at 629.<sup>18</sup>

In *Clausing*, the legal opinion given by the witness was *wrong*. *Id.* The same is true of Agent Lohse’s legal opinion in this case. “Gross receipts” is not simply the product of the formula  $N \times C$ . Here, as in *Clausing*, the erroneous legal opinion delivered by the witness “nonetheless supported the prosecutor’s argument.” *Id.* at 630. Here, as in *Clausing*, the defendant’s conviction must be reversed.

**6. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR THEFT BY DECEPTION. SINCE THE GENERAL JURY VERDICTS DO NOT REVEAL WHETHER THE JURORS UNANIMOUSLY FOUND THEFT BY EXERTION OF UNAUTHORIZED CONTROL, LAU’S THEFT CONVICTIONS MUST BE SET ASIDE.**

Lau was charged with both theft by deception and theft by exertion of unauthorized control. But the State failed to present even a scintilla of

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<sup>18</sup> “Washington Constitution, art. IV, § 16 provides that the court ‘shall declare the law.’ Legal questions are decided by the court, not the jury, for good reason. By arguing to the court, the lawyers have the opportunity to argue canons of construction; applicable law, including case precedent; and all the other traditional elements that make up legal argument. A judge trained in the law then decides whether or not the proposition is legally correct. And he or she can then craft an instruction for the jury. To allow a lay person to answer a legal question puts the lawyer in the impossible situation of making

evidence to show that Lau “obtained” the money paid for pull-tab tickets *by color of deception*. Since one of the two alternative means of committing theft has no evidentiary support, and since one or more jurors may have based their guilty verdicts solely upon this means, Lau’s theft convictions must be reversed.

The evidence was simply that the businesses sold customers pull-tab tickets. There was no contention, that Lau, or anyone else acting on behalf of the businesses, practiced any deception upon these customers. They got what they paid for – pull tab tickets. To be guilty of theft by deception, some deception must *cause* the defendant to gain control of the property. “‘By color or aid of deception’ means that the deception operated to bring about the obtaining of the property or services. . .” RCW 9A.56.010(4). While the deception practiced need not be the sole cause, it must play some role “in inducing the victim to part with his or her property.” *State v. Casey*, 81 Wn. App. 524, 529, 915 P.2d 587 (1996).<sup>19</sup> The deception practiced must in some way have “induced the victim to yield possession” of the property to the defendant. *State v. Bryant*, 73 Wn.2d 168, 171, 437 P.2d 398 (1968). Since there was no deception practiced upon the

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these legal arguments to a lay jury.” *See also Pepperall v. City Park Transit*, 15 Wash. 176, 182, 45 P. 743 (1896).

<sup>19</sup> *Accord State v. Zorich*, 72 Wn.2d 31, 34, 431 P.2d 584 (1967); *State v. George*, 161 Wn.2d 203, 209-10, 164 P.3d 506 (2007).

customers, *a fortiori* there was no causal relationship between obtaining the property from the customers and any act of deception.

The State's theory was that Lau practiced deception upon the cities, and that this deception allowed him to "retain" some of the proceeds which should have been paid over to the cities. RP V, 490 ("five percent . . . should have gone to the city . . . but didn't. Instead, it *stayed with* the business . . .") (Italics added). But under the jury instructions, "retaining" property by deception is *not* included within the definition of theft. The to-convict instructions referred *only* to "obtaining" control over the property of another. CP 102, 106 (Instruction Nos. 7 and 11) (Appendix C). Both of them informed the jury that the State had to prove that during the charged period of time Lau "by color or aid of deception, **obtained** control over property of another or the value thereof." CP 102, CP 106. Similarly, Instruction Nos. 8 & 12 informed the jury that "Theft means . . . by color or aid of deception, to **obtain** control over the property of another. . ." CP 103, 107. (Appendix D). These jury instructions correctly stated the law, since RCW 9A.56.020(1)(b), which defines "theft by deception," uses only the phrase "to obtain control" and does not cover "retaining" or "keeping" property by color or aid of deception.

Since the businesses had already obtained the money in question from

his customers, without any deception, any *later* act of deception practiced by Lau against the cities could not provide the basis for a conviction for theft by deception because the businesses -- *already possessed the money*.

*State v. Sloan*, 79 Wn. App. 553, 903 P.2d 522 (1995) is factually analogous. Sloan's friend Charles Rogers worked for a repossession company called Auto Recovery Service. *Id.* at 555. Sloan hired Auto Recovery to repossess a boat. Auto Recovery found and seized the boat and took it to its storage lot. *Id.* Sloan then asked Rogers for the boat, but Rogers demanded that Sloan pay the repossession and storage fees before he would release it. *Id.* Sloan refused to pay them. Instead, Sloan gained access to the Auto Recovery's storage lot by lying to an Auto Recovery employee, and once inside, Sloan took the boat. *Id.* The State then charged Sloan with theft by deception. He was *not* charged with stealing the boat (since neither Rogers nor Auto Recovery had any possessory interest in the boat). Instead, Sloan was charged with theft by deception for having stolen "boat repossession services" from Auto Recovery because he never paid Auto recovery for its services. *Id.*

The Court of Appeals held that the evidence was insufficient as a matter of law to prove theft by deception because the services obtained – repossession services – were obtained *before* any deception was used.

The deception used induced an employee to give Sloan access to the lot where the boat was stored, but it played no role in obtaining the repossession services because those services had already been obtained.

Because the repossession services had been procured before the deception and could not, therefore, have been the result of the deception, we hold that the information did not charge the elements of theft by deception.

*Sloan*, 79 Wn. App. at 555. The Court of Appeals went on to note that the facts argued at trial did not support the defendant's conviction. *Id.* at 558. The same is true in the present case. Since the dollars had been obtained from the customers before any deception was practiced upon the cities, Lau did not "obtain control" of these dollars "by color or aid of deception." Here, as in *Sloan*, the evidence is insufficient as a matter of law to support any conviction for theft by deception.

It is settled law in this State that criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). "In certain situations, the right to a unanimous jury trial includes the right to express jury unanimity on the *means* by which the defendant is found to have committed the crime." *Id.*

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.

[Citations]. 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*.

*Ortega-Martinez*, 124 Wn.2d at 707-08 (bold emphasis added).<sup>20</sup>

On numerous occasions, Washington appellate courts have applied this rule by reversing convictions where there was insufficient evidence of one of the charged alternative means of committing an offense.<sup>21</sup> This rule has been frequently applied when there is sufficient evidence to support a conviction for theft by one means, but insufficient evidence to support a conviction for theft committed by some other means. *See, e.g., State v. Joy*, 121 Wn.2d 333, 343-44, 851 P.2d 654 (1993) (theft convictions reversed because although evidence was sufficient for theft by deception it was not sufficient for theft by embezzlement); *State v. Gillespie*, 41 Wn. App. 640, 645-46, 705 P.2d 808 (1985) (same); *State v. Thorpe*, 51 Wn. App. 582, 754 P.2d 1050 (1988) (same).

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<sup>20</sup> *Accord, State v. Boiko*, 131 Wn. App. 595, 599 ¶ 11, 128 P.3d 143 (2006); *State v. Kintz*, 169 Wn.2d 537, 552 ¶ 33, 238 P.3d 470 (2010).

<sup>21</sup> *See, e.g., Boiko*, 131 Wn. App. at 601 ¶ 15 (“Because there was insufficient evidence to support a conviction on at least two of the alternative means set forth in the statute, Mr. Boiko’s conviction [for intimidating a witness] must be reversed.”); *State v. Lobe*, 140 Wn. App. 897, 167 P.3d 627 (2007) (reversing witness tampering convictions because the evidence was not sufficient to support some of the alternative means charged); *State v. Kinchen*, 92 Wn. App. 442, 963 P.2d 918 (1998) (reversing unlawful imprisonment convictions because evidence was insufficient on one of two charged alternative means); *State v. Maupin*, 63 Wn. App. 887, 893-94, 822 P.2d 355 (1992) (felony murder conviction committed either in the course of kidnapping or in the course of rape reversed because there was insufficient evidence to find murder in the course of rape).

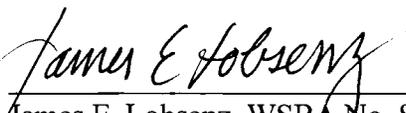
In the present case, there is insufficient evidence to support a conviction for theft by deception. Since the jury was instructed that it did not have to be unanimous as to the means by which theft was committed, there is no way of knowing whether all 12 jurors agreed that theft by exertion of unauthorized control was proved. Here, as in *Joy, Gillespie* and *Thorpe*, the defendant's theft convictions must be reversed.

**F. CONCLUSION**

For the reasons stated in sections 1 & 2 of the Argument portion of this brief, Lau asks this Court to reverse his convictions and to remand with directions that the charges be dismissed with prejudice. For the reasons stated in sections, 3, 4, and 5, Lau asks this Court to reverse his convictions and to remand for a new trial. For the reasons stated in section 6, Lau asks this Court to reverse his convictions, and to remand for a new trial with directions that the defendant may *only* be retried for theft by exertion of unauthorized control, and that the alternate charge of theft by means of deception must be dismissed with prejudice.

DATED this 23rd day of February, 2012.

CARNEY BADLEY SPELLMAN, P.S.

By   
James E. Lobsenz, WSBA No. 8787  
Of Attorneys for Appellant

# APPENDIX-A

**Chapter 3.40**  
**GAMBLING ACTIVITIES<sup>1</sup>**

FEDERAL WAY

Sections:

- 3.40.010 Activities authorized.
- 3.40.020 Punchboards and pull-tabs – Permitted.
- 3.40.030 Punchboards and pull-tabs – Tax imposed.
- 3.40.040 Tax on gambling activities.
- 3.40.050 Administration – Collection.
- 3.40.060 Declaration of intent to conduct activity.
- 3.40.070 When due – Delinquency.
- 3.40.080 Financial records.

**3.40.010 Activities authorized.**

The city authorizes bona fide charitable or nonprofit organizations to conduct bingo games, raffles, fund-raising events, amusement games and punchboards or pull-tabs, and to allow their premises and facilities to be used by only members, their guests, and members of a chapter or unit organized under the same state, regional, or national charter or constitution, to play social card games authorized by the commission, when licensed, conducted or operated pursuant to the provisions of Chapter 9.46 RCW. (Ord. No. 90-44, § 1, 3-6-90; Ord. No. 90-15, § 1, 1-30-90. Code 2001 § 14-141.)

State law references: Definition, RCW 9.46.0201; use of facilities, RCW 9.46.113.

**3.40.020 Punchboards and pull-tabs – Permitted.**

The city authorizes any person operating an established business primarily engaged in the selling of food or drink for consumption on the premises to conduct social card games and to utilize punchboards and pull-tabs as a commercial stimulant to such business when licensed and utilized or operated pursuant to the provisions of Chapter 9.46 RCW.

(Ord. No. 90-44, § 2, 3-6-90; Ord. No. 90-15, § 2, 1-30-90. Code 2001 § 14-142.)

**3.40.030 Punchboards and pull-tabs – Tax imposed.**

The city imposes a tax on punchboard and pull-tab activities as specified in FWRC 3.40.040 with the receipts therefrom going to the city; provided, that the operation of punchboard and pull-tabs are subject to the following conditions:

- (1) Chances may only be sold to adults;
- (2) The price of a single chance may not exceed \$1.00;
- (3) No punchboard or pull-tab license may award as a prize upon a winning number or symbol being drawn the opportunity of taking a chance upon any other punchboard or pull-tab;
- (4) All prizes available to be won must be described on an information flare. All merchandise prizes must be on display within the immediate area of the premises in which any such punchboard or pull-tab is located. Upon a winning number or symbol being drawn, a merchandise prize must be immediately removed, from the display and awarded to the winner. All references to cash or merchandise prizes, with a value over \$20.00, must be removed from the information flare when won, or such omission shall be deemed a fraud for the purposes of this chapter; and
- (5) When any person wins money or merchandise from any punchboard or pull-tab over an amount determined by the commission, every licensee under this section shall keep a public record of the award for at least 90 days containing such information as the State Gambling Commission deems necessary. (Ord. No. 97-301, § 1(A), 10-21-97; Ord. No. 90-15, § 3, 1-30-90. Code 2001 § 14-143.)

**3.40.040 Tax on gambling activities.**

(1) In accordance with RCW 9.46.110, there is levied upon all persons a tax on every gambling activity permitted by this chapter at the following rates:

- (a) Any bingo or raffle activity shall be taxed at a rate of five percent of the gross receipts from a bingo game or raffle less the amount awarded as cash or merchandise prizes;
- (b) An amusement game shall be taxed only at a rate sufficient to pay the actual costs of enforcement of the provisions of this chapter and Chapter 9.46 RCW and such taxation shall not exceed two percent of the sum of the gross receipts from the amusement game less the amount awarded as prizes;
- (c) Any punchboard or pull-tab activity for bona fide charitable or nonprofit organizations shall be at a rate of 10 percent on gross receipts from the operation of the games less the amount awarded as cash or merchandise prizes. Taxation of punchboards or pull-tabs for commercial stimulant operators shall be at a rate of three percent on gross receipts from the operation of the games;

Provided, no tax shall be imposed pursuant to this section on bingo, amusement games or fund-raising activities when such activities or any combination thereof are conducted by a "bona fide charitable or nonprofit organization" as defined in RCW 9.46.0209, which organization has not paid operating or management personnel and has gross receipts from bingo, amusement games, or fund-raising activities or any combination thereof not exceeding \$5,000 per year less the amount awarded as cash or merchandise prizes. No tax shall be imposed on the first \$10,000 of gross receipts less the amount awarded as cash or merchandise prizes from files conducted by any bona fide or charitable organization.

(2) The city clerk is instructed and authorized to adopt appropriate reporting requirements, to ensure the effective administration of license holders exempt from the payment of such tax.

(Ord. No. 10-663, § 1, 6-15-10; Ord. No. 10-662, § 1, 6-1-10; Ord. No. 02-422, § 1, 9-17-02; Ord. No. 98-329, § 1, 12-1-98; Ord. No. 97-301, § 1(B), 10-21-97; Ord. No. 96-279, § 1(A), 12-3-96; Ord. No. 90-44, § 3, 3-6-90; Ord. No. 90-15, § 4, 1-30-90. Code 2001 § 14-144.)

#### **3.40.050 Administration – Collection.**

The administration and collection of the tax imposed by this chapter shall be by the city clerk and pursuant to the rules and regulations of the State Gambling Commission.

(Ord. No. 90-15, § 5, 1-30-90. Code 2001 § 14-145.)

#### **3.40.060 Declaration of intent to conduct activity.**

For the purpose of identifying who shall be subject to the tax imposed by this chapter, any bona fide charitable or nonprofit corporation intending to conduct or operate any bingo game raffle or amusement game which requires licensing as provided in and authorized by Chapter 9.46 RCW shall, prior to commencement of any such activity, file with the city clerk a sworn declaration of intent to conduct or operate such activity, together with a copy of the license issued in accordance with Chapter 9.46 RCW. Thereafter, for any period covered by such state license or any renewal thereof, any such licensed bona fide charitable or nonprofit corporation shall, on or before the fifteenth day of the month following the end of the period in which the tax accrued, file with the city clerk a sworn statement, on a form to be provided and prescribed by the city clerk for the purpose of ascertaining the tax due for the preceding reporting period.

(Ord. No. 96-279, § 1(B), 12-3-96; Ord. No. 96-268, § 1(A), 6-18-96; Ord. No. 90-15, § 6, 1-30-90. Code 2001 § 14-146.)

#### **40.070 When due – Delinquency.**

(1) The tax imposed by this chapter shall be due and payable and remitted with such return, on a form prescribed by the city clerk, on or before the last day of the month succeeding the reporting period in which the tax accrued. The reporting period shall be as follows:

(a) For those gambling establishments whose total tax collection from gambling activities during the preceding year were \$10,000 or less, the reporting period shall be quarterly.

(b) For those gambling establishments whose total tax collection from gambling activities during the preceding year were in excess of \$10,000, the reporting period shall be monthly.

(2) For each reporting period, if the tax return or payment is not made by the due date thereof, interest and penalty shall be added as follows:

(a) If filed on or before the fifteenth day of the second month next succeeding the reporting period in which the tax accrued, a 10 percent penalty, with a minimum penalty of \$5.00.

(b) If filed prior to the last day of the second month next succeeding the reporting period in which the tax accrued, a 15 percent penalty with a minimum penalty of \$10.00.

(c) Interest shall accrue, from the date such tax is due until paid in full, at a rate of 12 percent per annum, compounded daily, on the principal interest and penalties imposed pursuant to this subsection.

(d) Failure to make payment by the last day of the second month succeeding the reporting period in which the tax accrued shall be both a criminal and civil violation of this section.

(Ord. No. 97-286, § 1, 1-7-97; Ord. No. 96-279, § 1(C), 12-3-96; Ord. No. 96-268, § (B), 6-18-96; Ord. No. 91-101, § 1, 6-4-91; Ord. No. 90-15, § 7, 1-30-90. Code 2001 § 14-147.)

#### **3.40.080 Financial records.**

It shall be the responsibility of all officers, directors and managers of any corporation conducting any gambling activities subject to taxation under this chapter to make available at all reasonable times such financial records as the city clerk may require in order to determine full compliance with this chapter.

(Ord. No. 90-15, § 8, 1-30-90. Code 2001 § 14-148.)

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<sup>1</sup>Cross reference: Licenses and business regulations, FWRC Title 12.

**Ordinance 11-710, passed December 6, 2011.**

Disclaimer: The City Clerk's Office has the official version of the Federal Way Revised Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

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# APPENDIX-B

**Chapter 3.25  
GAMBLING TAX**

CITY OF BURIEN

Sections:

- 3.25.010 Imposition.
- 3.25.020 Exemptions.
- 3.25.030 Activity report – Payment.
- 3.25.040 Delinquencies.
- 3.25.050 Additional rules.

**3.25.010 Imposition.**

There is hereby imposed a tax, at the rates set forth below, upon the following gambling activities, when authorized by Chapter 9.46 RCW, and when conducted in the city:

- (1) Five percent of the gross receipts from punchboards and pull-tabs, as those terms are defined by RCW 9.46.0273 and the Rules and Regulations of the Gambling Commission;
- (2) Five percent of the gross revenue, less the amount paid for or as prizes, received from bingo and raffles, as those terms are defined by RCW 9.46.0205 and 9.46.0277;
- (3) Two percent of the gross revenue, less the amount paid for or as prizes, from amusement games, as that term is defined by RCW 9.46.0201; and
- (4) Eleven percent of the gross revenue from social card games, as that term is defined by RCW 9.46.0281 and the Rules and Regulations of the Gambling Commission. [Ord. 285 § 1, 2000; Ord. 249 § 1, 1999; Ord. 206 § 1, 1997; Ord. 7 § 1, 1993]

**3.25.020 Exemptions.**

Bona fide charitable or nonprofit organizations, as defined by RCW 9.46.0209, conducting bingo, raffles or amusement games within the city shall be exempt from payment of the taxes imposed by BMC 3.25.010 on those activities, providing that such bona fide charitable or nonprofit organization shall employ no paid operating or management personnel and shall have gross income from bingo, raffles or amusement games, or any combination thereof, not exceeding \$5,000 per year, less the amount paid for or as prizes. [Ord. 7 § 2, 1993]

**3.25.030 Activity report – Payment.**

- (1) Activity Report. Every holder of a license issued by the Washington State Gambling Commission who conducts any taxable gambling activities within the city shall provide to the city a true copy of each activity report required by the Gambling Commission no later than the date of filing required by the State Gambling Commission.
- (2) Tax to Be Paid Quarterly. The tax levied under BMC 3.25.010 shall be paid quarterly for the preceding three-month period, or a portion thereof, on or before the thirty-first day of January, the thirtieth day of April, the thirty-first day of July, and the thirty-first day of October, at the office of the city clerk, Burien City Hall, or his or her designee; provided, however, that those persons conducting activities subject to taxation under this chapter less frequently than once every two months shall pay the tax for each taxable activity at the office of the city clerk, Burien City Hall, or his or her designee, within 30 days following the date upon which the activity was conducted. [Ord. 486 § 1, 2008]

**3.25.040 Delinquencies.**

- (1) All taxes on gambling activities shall be delinquent if not paid on or before the due date(s) as specified in BMC 3.25.030. Penalties shall accrue on all such delinquencies as follows:

due date;

(b) Fifteen percent of the delinquent amount (\$10.00 minimum) if paid in full between the eighteenth and fortieth days, inclusive, of the applicable due date; and

(c) All delinquent taxes and applicable penalties shall accrue interest at the rate of 12 percent, compounded daily, beginning on the forty-first day after any applicable due date.

(2) Delinquent taxes, penalties, and accrued interest shall constitute a public debt owing to the city which shall be subject to collection or other enforcement by all means available, at law and in equity, including but not limited to injunctive relief against the offending party. [Ord. 47 § 1, 1993; Ord. 7 § 4, 1993]

### **3.25.050 Additional rules.**

The city clerk shall have authority to adopt rules and regulations not inconsistent with the provisions of this chapter, for carrying out and enforcing payment, collection and remittance of the taxes levied in this chapter. Such rules and regulations may include the form of tax return required to be filed with the city at the time of payment of the tax on gambling activities, and procedures for auditing of the taxpayer's records. A copy of the rules and regulations so adopted shall be on file and available for public examination in the clerk's office. [Ord. 7 § 5, 1993]

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**This page of the Burien Municipal Code is current through Ordinance 551, passed December 13, 2010.**

Disclaimer: The City Clerk's Office has the official version of the Burien Municipal Code. Users should contact the City Clerk's Office for ordinances passed subsequent to the ordinance cited above.

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# APPENDIX-C

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

(1) That in the intervening period between July 1, 2005, and January 31, 2010, the defendant

(a) wrongfully obtained or exerted unauthorized control over property of another or the value thereof; or

(b) by color or aid of deception, obtained control over property of another or the value thereof;

and

(2) That the property exceeded \$5000 in value;

(3) That the defendant intended to deprive the City of Federal Way of property;

(4) That this act occurred in the State of Washington.

If you find from the evidence that elements (2), (3), and (4), and any of the alternative elements (1)(a) or (1)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3) or (4), then it will be your duty to return a verdict of not guilty as to Count I.

No. 11

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

(1) That in the intervening period between January 1, 2006, and January 31, 2010, the defendant

(a) wrongfully obtained or exerted unauthorized control over property of another or the value thereof; or

(b) by color or aid of deception, obtained control over property of another or the value thereof;

and

(2) That the property exceeded \$750 in value;

(3) That the defendant intended to deprive the City of Burien of property; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that elements (2), (3), and (4), and any of the alternative elements (1)(a) or (1)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count II. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (1)(a) or (1)(b) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of elements (1), (2), (3) or (4), then it will be your duty to return a verdict of not guilty as to Count II.

# APPENDIX-D

No. 8

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services, or, by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

No. 12

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services, or, by color or aid of deception, to obtain control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.