

68138-9

68138-9

NO. 68138-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,
Respondent and Cross-Appellant,

v.

SASSAN MEHRABIAN,
Appellant and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE SHARON ARMSTRONG

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BRIEF OF RESPONDENT AND CROSS-APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>CROSS ASSIGNMENT OF ERROR</u>	1
B. <u>ISSUES PRESENTED ON APPEAL</u>	1
C. <u>ISSUE PRESENTED ON CROSS-APPEAL</u>	4
D. <u>STATEMENT OF THE CASE</u>	4
1. PROCEDURAL FACTS	4
2. SUBSTANTIVE FACTS.....	6
E. <u>ARGUMENT ON APPEAL</u>	8
1. MEHRABIAN’S WAIVER OF HIS RIGHT TO COUNSEL WAS NOT EQUIVOCAL.....	8
2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT MEHRABIAN’S CONVICTIONS FOR THEFT IN THE FIRST DEGREE	20
3. THE JURY INSTRUCTIONS WITH RESPECT TO COUNT I DID NOT PERMIT THE JURY TO CONVICT MEHRABIAN SOLELY FOR CRIMES OCCURRING OUTSIDE THE STATUTORY LIMITATION PERIOD.....	31
4. COUNTS IV AND V ARE NOT SAME CRIMINAL CONDUCT	36
F. <u>ARGUMENT ON CROSS-APPEAL</u>	40
THE TRIAL COURT ERRED BY FAILING TO INCLUDE MEHRABIAN’S PRIOR CONVICTION FOR THEFT IN THE FIRST DEGREE IN HIS OFFENDER SCORE	40
G. <u>CONCLUSION</u>	45

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Faretta v. California, 422 U.S. 806,
95 S. Ct. 2525, 45 L. Ed. 2d 562 (1976)..... 9, 18

Jackson v. Virginia, 443 U.S. 307,
99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 20

Washington State:

In re Higgins, 120 Wn. App. 159,
83 P.3d 1054 (2004)..... 42, 43, 44

State v. Blair, 57 Wn. App. 512,
789 P.2d 104 (1990)..... 42

State v. Breedlove, 79 Wn. App. 101,
900 P.2d 586 (1995)..... 9

State v. Brisebois, 39 Wn. App. 156,
692 P.2d 842 (1984)..... 32, 34

State v. Carrier, 36 Wn. App. 755,
677 P.2d 768 (1984)..... 32, 34

State v. Casey, 81 Wn. App. 524,
915 P.2d 587 (1996)..... 21

State v. Dash, 163 Wn. App. 63,
259 P.3d 319 (2011)..... 31, 32, 33, 34

State v. DeWeese, 117 Wn.2d 369,
816 P.2d 1 (1991)..... 14, 18, 19

State v. Dunaway, 109 Wn.2d 207,
743 P.2d 1237 (1987)..... 39

<u>State v. Ervin</u> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	42
<u>State v. Glover</u> , 25 Wn. App. 58, 604 P.2d 1015 (1979).....	31
<u>State v. Grantham</u> , 84 Wn. App. 854, 932 P.2d 657 (1997).....	37, 39
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	20
<u>State v. Hyder</u> , 159 Wn. App. 234, 244 P.3d 454, <u>rev. denied</u> , 171 Wn.2d 1024 (2011)	37
<u>State v. J.P.</u> , 149 Wn.2d 444, 69 P.3d 318 (2003).....	43
<u>State v. Lee</u> , 159 Wn. App. 795, 247 P.3d 470 (2011).....	37
<u>State v. Luvene</u> , 127 Wn.2d 690, 903 P.2d 960 (1995).....	9
<u>State v. Madsen</u> , 168 Wn.2d 496, 229 P.3d 714 (2010).....	9
<u>State v. Mermis</u> , 105 Wn. App. 738, 20 P.3d 1044 (2001).....	34
<u>State v. Modica</u> , 136 Wn. App. 434, 149 P.3d 446 (2006), <u>aff'd</u> , 164 Wn.2d 83, 186 P.3d 1062 (2008).....	19
<u>State v. Mutch</u> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	37
<u>State v. Novotny</u> , 76 Wn. App. 343, 884 P.2d 1336 (1994).....	31
<u>State v. Price</u> , 103 Wn. App. 845, 14 P.3d 841 (2000).....	39

<u>State v. Reid</u> , 74 Wn. App. 281, 872 P.2d 1135 (1994).....	32, 33, 34
<u>State v. Rivers</u> , 130 Wn. App. 689, 128 P.3d 608 (2005).....	40, 41
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	20
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997).....	9
<u>State v. Woods</u> , 143 Wn.2d 561, 23 P.3d 1046 (2001).....	10

Constitutional Provisions

Federal:

U.S. Const. amend. VI	9
U.S. Const. amend. XIV	9

Washington State:

Const. art. I, § 22.....	9
--------------------------	---

Statutes

Washington State:

2009 Wash. Laws 61, § 1	32
2009 Wash. Laws 431, § 7.....	21
RCW 9.94A.525.....	41, 42, 44
RCW 9.94A.589.....	37, 39
RCW 9A.04.080.....	32

RCW 9A.56.010.....	21
RCW 9A.56.020.....	21
RCW 9A.56.030.....	21, 41

Other Authorities

Sentencing Reform Act.....	42
Uniform Commercial Code.....	34

A. CROSS ASSIGNMENT OF ERROR

The trial court erred by failing to include in Mehrabian's offender score his 1993 conviction for Theft in the First Degree.

B. ISSUES PRESENTED ON APPEAL

1. A defendant's choice to waive the right to counsel and represent himself must be expressed unequivocally. Mehrabian told the court that he did not want a public defender and wanted to proceed pro se with private standby counsel; he was permitted to do so. Later, private standby counsel was allowed to withdraw because he was not being paid and because Mehrabian was not happy with his services. In permitting private counsel's withdrawal, the court advised Mehrabian he could have a public defender reappointed and gave him a week to consider his options. After the week, Mehrabian told the court he did not want a public defender and would continue to proceed pro se. At subsequent hearings, Mehrabian continued to tell the court he did not want a public defender, and explained why he wanted to represent himself. Did the lower court act within its discretion by acceding to Mehrabian's repeated demands to represent himself?

2. Evidence is sufficient to sustain a verdict if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. As

charged in this case, the State had to prove that Mehrabian committed Theft in the First Degree by obtaining control over the property of another by color or aid of deception, with the intent to deprive him of that property. Here, the State presented evidence that Mehrabian, the City of Woodinville's information technology manager, failed to tell his supervisors that he was himself selling property to the City through a third-party vendor in violation of City policy and enriching himself in the process. He falsified price quotes from that third-party vendor, and twice forged invoices for the equipment the City bought. Mehrabian also provided the City with equipment of inferior quality to what it authorized purchasing, or never delivered the equipment at all. As Mehrabian alone was responsible for inventory, the City did not learn these facts until Mehrabian left the City's employ. Did the State offer sufficient evidence to justify a jury verdict that Mehrabian committed Theft in the First Degree by obtaining money from the City of Woodinville by color or aid of deception?

3. The statute of limitation for Theft in the First Degree committed by deception was three years. On March 6, 2009, the State charged Mehrabian with committing that offense on April 17, 2006. The evidence showed that, while Mehrabian purchased equipment for the City and arranged for the City to be invoiced a higher amount prior to March 6,

2006, the City did not rely on his deception – thereby completing the offense of Theft in the First Degree – until it issued a purchase order on March 7, 2006, and paid its bill on April 17, 2006. Moreover, the jury found beyond a reasonable doubt that Mehrabian committed count I on or about April 17, 2006. Was Mehrabian properly convicted of a crime occurring within the statute of limitation?

4. Two offenses are the same criminal conduct, and are counted as one crime in a defendant's offender score, if they require the same criminal intent, are committed at the same time and place, and involve the same victim. Here, Mehrabian committed count V by arranging a fraudulent purchase of equipment on behalf of the City of Woodinville in January of 2007. He committed count IV by forging invoices and arranging a fraudulent purchase of different equipment in March of 2007. The City relied on Mehrabian's deceit and paid for both sets of equipment – thus completing each crime of theft – on March 19, 2007. The trial court found that Mehrabian's acts occurred on different dates and involved sequential criminal intents. Did the trial court act within its discretion by concluding that counts IV and V were not the same criminal conduct?

C. ISSUE PRESENTED ON CROSS-APPEAL

A prior conviction for a Class B felony must be included in a defendant's offender score unless the defendant has spent ten crime-free years in the community since his last date of release from confinement pursuant to the conviction. Here, Mehrabian was convicted of Theft in the First Degree and sentenced to incarceration on January 15, 1993. He then committed a misdemeanor on September 17, 1993. He was later found to have violated the conditions of his Theft in the First Degree sentence, sanctioned with eight days of confinement, and last released from custody on May 30, 2003. Did the trial court err in finding that Mehrabian had spent ten crime-free years in the community since his last date of release from confinement, and thus in excluding his 1993 theft conviction from his offender score?

D. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 6, 2009, the State charged the defendant, Sassan Mehrabian, with four counts of Theft in the First Degree, one count of Theft in the Second Degree, and one count of Intimidating a Witness. CP 1-3. After a lengthy delay and a number of discovery conferences, Mehrabian sought to have new counsel appointed. CP 303-06. When that motion was denied, he hired private counsel. CP 307-15. The case

proceeded to trial before the Honorable Richard Eadie on May 26, 2011. CP 366. Shortly after trial began, private counsel became unavailable due to a death in his close family, and a mistrial was declared. CP 378, 380. Mehrabian then sought leave from the court to proceed pro se. CP 211-12. That motion was granted.¹ CP 209-10.

A new jury trial began on September 1, 2011, on an Amended Information. RP 1, 4.² That Information charged Mehrabian as follows: count I, Theft in the First Degree, on April 17, 2006; count III, Witness Tampering, on April 13, 2008; count IV, Theft in the First Degree, on March 19, 2007; count V, Theft in the First Degree, on March 19, 2007; count VI, Attempted Theft in the First Degree, between March 22, 2007, and April 16, 2007; count VII, Theft in the First Degree, on February 20, 2007; and count VIII, Theft in the First Degree, on December 18, 2006.³ CP 76-79. Mehrabian continued to represent himself. RP 4. On September 16, 2011, the jury found Mehrabian guilty as charged. CP 149-55.

¹ Because Mehrabian assigns error to the trial court's granting of his motion to proceed pro se, details of these proceedings are discussed further in section E.1, infra.

² The Verbatim Transcript of Proceedings consists of seven consecutively numbered volumes, and will be referred to in this brief as "RP."

³ Count II had previously been dismissed due to a violation of the statute of limitation. CP 381-84.

Post-trial, Mehrabian retained counsel and brought a motion for a new trial, arguing that his invocation of his right of self-representation was invalid. CP 200-57. That motion was denied. CP 300-01.

On December 20, 2011, the court held a sentencing hearing. RP 1006-54. The State alleged that Mehrabian's offender score was seven; Mehrabian disputed this calculation. CP 167, 294-99. The court calculated Mehrabian's offender score as six; that score was calculated by using every other current offense in – and excluding all prior offenses from – the offender score. CP 159; RP 1021-22. The court then sentenced Mehrabian to a standard range sentence of 29 months on the most serious offense, Tampering with a Witness, and concurrent sentences on the remaining counts. CP 161. This appeal timely followed. CP 197-99. The State timely cross-appealed. CP 432-45.

2. SUBSTANTIVE FACTS

In 2000, the City of Woodinville (“City”) hired Mehrabian as its information technology manager.⁴ His supervisors, Deborah Knight and Jim Katica, were unaware that Mehrabian had a side business running his own company, Information Technology Solutions and Services, Inc.

⁴ Because Mehrabian raises a sufficiency of the evidence claim with respect to all of the counts of theft and attempted theft, the evidence in support of those counts is detailed in section E.2, *infra*. A brief summary is provided here, without citation, for context. Citation is provided with respect to the single count of Witness Tampering, as Mehrabian does not challenge that conviction on appeal.

Mehrabian was solely responsible for buying new computer equipment for the City and inventorying that equipment. To purchase new equipment, Mehrabian was supposed to identify what he wanted, provide three competitive bids to Katica, the finance director, then obtain the equipment with a warranty after Katica approved the purchase. As an employee of the City, Mehrabian was prohibited from engaging in transactions with the City himself or through his company.

Despite this prohibition, Mehrabian began a scheme of buying used computer equipment on eBay and using a third-party vendor, GeekDeal.com, to invoice himself at the City for similar equipment at a significant markup. The City would then pay GeekDeal, and GeekDeal would pass the money on to Mehrabian. Over the course of several months, Mehrabian as a City employee purchased thousands of dollars of equipment via GeekDeal. GeekDeal never saw nor delivered that property. On several occasions, Mehrabian either falsified price quotes in support of his purchases or forged invoices from GeekDeal. He also delivered to the City equipment either inferior to what Katica approved purchasing, unwarranted equipment, or no equipment at all. Mehrabian's scheme was not uncovered until he left his job at the City in 2008, when the City inventoried the property in his department. When it discovered

substantial irregularities between the equipment it thought it should have and the equipment it did have, the City contacted the police.

During the course of his investigation, King County Sheriff's Detective Edward Ka met with Mehrabian, and told him not to talk to Ron Moisant, GeekDeal's owner. RP 244. Nonetheless, on April 13, 2008, Mehrabian drove to Moisant's home. RP 552, 639. Mehrabian told Moisant that he was in trouble with the City, that a detective was investigating, and that their stories needed to match. RP 554, 640. He offered Moisant \$40,000 to pass on to the City to make it all go away. RP 554, 640. When Moisant told Mehrabian that he wasn't changing his story and that he would tell the truth, Mehrabian told him he wasn't going down alone, but would take Moisant down with him. RP 555, 641.

E. ARGUMENT ON APPEAL

1. MEHRABIAN'S WAIVER OF HIS RIGHT TO COUNSEL WAS NOT EQUIVOCAL.

Before trial, Mehrabian sought to waive his right to counsel and proceed pro se. After several judicial inquiries, his request was granted, and he represented himself at trial. Mehrabian now complains that the trial court erred in granting his request because his request was equivocal. His claim lacks merit.

A defendant in a criminal case is entitled to the assistance of counsel. U.S. CONST. amend. VI, XIV; WASH. CONST. art. I, § 22; Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1976). However, a defendant also has a right to represent himself. U.S. CONST. amend. VI, XIV; WASH. CONST. art. I, § 22; Faretta, 422 U.S. at 818-19; State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). The right to self-representation is not self-executing; to exercise that right, a defendant must make an unequivocal and timely request, and his waiver of the right to counsel must be knowing, intelligent, and voluntary. Madsen, 168 Wn.2d at 504. In acting on a request to proceed pro se, the trial court should indulge in “every reasonable presumption against a defendant’s waiver of his right to an attorney.” State v. Stenson, 132 Wn.2d 668, 741-42, 940 P.2d 1239 (1997); State v. Luvene, 127 Wn.2d 690, 698-99, 903 P.2d 960 (1995).

A trial court’s ruling on a motion to proceed pro se is reviewed for abuse of discretion. Madsen, 168 Wn.2d at 504; State v. Breedlove, 79 Wn. App. 101, 106, 900 P.2d 586 (1995). “Discretion is abused if a decision is manifestly unreasonable or rests on facts unsupported in the record or was reached by applying the wrong legal standard.” Madsen, 168 Wn.2d at 504 (citation and internal quotation marks omitted). In evaluating whether a defendant’s request to proceed pro se is unequivocal,

the court looks at “the context of the record as a whole.” State v. Woods, 143 Wn.2d 561, 586, 23 P.3d 1046 (2001).

Here, in looking at the record as a whole, Mehrabian’s request to represent himself was unequivocal. He addressed his dissatisfaction with counsel on December 17, 2010, at a hearing before the Honorable Palmer Robinson. At the time, Mehrabian was represented by a public defender, Paul Vernon. CP 302-03.⁵ Mehrabian told the court that he wanted a new lawyer, or to hire private counsel, because he and counsel did not agree on trial strategy, and because the public defender failed to obtain documents necessary to his defense. CP 305. He also objected to his counsel’s repeated requests for continuances. CP 303. He said that he had lost “confidence” in his lawyer. CP 305-06. Judge Robinson denied Mehrabian’s request for appointment of new counsel. CP 306. She made no ruling as to whether he could hire private counsel. CP 304-05.

Two months later, on February 25, 2011, Mehrabian appeared before the Honorable Ronald Kessler with retained counsel Jon Zulauf, and requested that Zulauf be allowed to substitute in for appointed counsel Vernon. CP 307-08. In joining Mehrabian’s request for the substitution,

⁵ Whether the trial court erred in allowing Mehrabian to represent himself was litigated in a post-trial motion below. The parties had transcripts of the relevant hearings prepared, and filed them with the court. Accordingly, a number of the transcripts are not a part of the Verbatim Transcript of Proceedings, but instead are before this Court as Clerk’s Papers.

Vernon pointed out that his relationship with Mehrabian had been “problematic” and would only get worse at trial. CP 310. Judge Kessler granted the motion, and granted a continuance of the trial date to enable Zulauf to be prepared to proceed, but only after pointing out that he had previously dealt with Mehrabian’s claims of dissatisfaction with counsel.⁶ CP 310, 314. At the same time, the court warned Mehrabian that he would not grant another substitution of counsel. CP 315.

The case then proceeded to trial before the Honorable Richard Eadie. CP 366. Shortly after trial began, the court granted a mistrial because Zulauf’s sister-in-law died unexpectedly, and he was unable to proceed at that time. CP 378, 380. A few weeks later, Mehrabian sought to represent himself. At a hearing on June 28, 2011, before Judge Eadie, Zulauf alerted the court that Mehrabian wished to discharge counsel and proceed pro se. CP 211-12.

Judge Eadie engaged Mehrabian in an extensive colloquy regarding his wish to represent himself. CP 227-36. During that colloquy, the court asked Mehrabian whether he wished to represent himself; he said yes. CP 227. When asked why he wanted to proceed without counsel,

⁶ The State does not have a transcript of any other proceeding in which Mehrabian asked the court to appoint different counsel, and has not ordered one as it is not directly applicable to the issues on appeal. However, it appears from the transcript of the February 25, 2011, hearing, that Mehrabian had previously asked Judge Kessler for a substitution of counsel due to disagreements about strategy with the public defender, and that his request had been denied. CP 310, 312-15.

Mehrabian explained that no one knew the case as well as he did.

CP 232-33. Specifically, he said,

All the intricacies involved with this case is [sic] known to me and me only because I've studied those 900-something pages, page-by-page, and I know them by heart because I've had close to two years to study them. And as the Court is aware, I had every intention for Mr. Zulauf to represent me, but those few days I noticed that Mr. Zulauf is missing out on many of those little details that I wholeheartedly believe that are crucial during the question and answer procedures. And it was rather nerve-wracking for me to sit here and see Mr. Zulauf not asking those appropriate questions.

CP 233.

When asked if he knew he could have counsel appointed at public expense, Mehrabian responded that he had no faith in, and did not want, a public defender. CP 233-34. He said,

I started with that, unfortunately I didn't see the . . . the ethical and dedication on my attorney's behalf for putting a battle for my side of the story. He was far more interested in entering into some sort of plea bargain than anything else. And, you know, through my investigation I found that that's what the Public Defender does. They just do, you know, primarily do plea bargains. So I lost my faith in Mr. Vernon.

CP 233. He continued by saying that "the Public Defenders don't put up a fight, you know, that Defendants expect from their attorneys." CP 234.

After advising him further, Judge Eadie asked Mehrabian again, "Now in light of the penalties you might suffer if you were found guilty

and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and give up your right to be represented by a lawyer?” CP 235. Mehrabian responded, “Yes Your Honor, at this time.” CP 235. The court accepted this unequivocal waiver of the right to counsel, and granted Mehrabian’s request to proceed pro se. CP 209-10, 235-36.

A short time later, the court again asked Mehrabian whether he really wanted to represent himself in this case. CP 237. At that point, Mehrabian was less sure; he said, “Up to today I was determined to be . . . to go that pro se. But after listening to you I’m not quite sure to be honest with you.” CP 237. The State then expressed concern that the defendant was not unequivocal in his request to represent himself. CP 237-38. After further colloquy and discussion with counsel, Mehrabian asked to proceed pro se with Zulauf as standby counsel. CP 237-41. The court asked Mehrabian repeatedly what he wanted to do, and he consistently replied that he wanted to go pro se with Zulauf as standby counsel.⁷ The court

⁷ See CP 239 (“RE [Richard Eadie]: Okay. Mr. Mehrabian? If Mr. Zulauf does stay on as standby Counsel, do you want to represent yourself at this time? SM [Sassan Mehrabian]: Yes Your Honor.”); 240 (“RE: Well my understand[ing] is, Mr. Mehrabian, that you want to represent yourself and you’re firm in that, but . . . And are you firm in wanting to represent yourself? SM: Yes Your Honor. Yes. RE: As opposed to going back to the Office of Public Defense? SM: Yes Your Honor, Absolutely.”); 240 (“RE: . . . do you still want to represent yourself? SM: Yes Your Honor, I do. . . . RE: And your option is you want to represent yourself at this time, is that correct? SM: Yes. Yes please.”).

acceded to his request, and named Zulauf as retained standby counsel. CP 210, 238, 241. At that point, Mehrabian had expressed unequivocally and repeatedly that he wished to proceed pro se, with the assistance of Zulauf as standby counsel.

Two weeks later, on July 13, 2011, the parties appeared again before Judge Kessler to address scheduling. CP 247-48. At that hearing, Zulauf indicated that Mehrabian was not happy with his representation, and that he was not being paid for his services as standby counsel. CP 250. Mehrabian told the court that he preferred to have Zulauf as standby counsel, but if he could not be paid at public expense, then he wanted to continue to represent himself as long as he could have someone appear with him as standby counsel. CP 250. The court advised Mehrabian that he did not have a right to standby counsel.⁸ CP 250-51. He also allowed Zulauf to withdraw as standby counsel because he was not being paid. CP 251.

Judge Kessler told Mehrabian that, because he did not have a right to have standby counsel, the court would not order such appointment at public expense. CP 251. The judge then emphasized, “I’m telling you this right now because this may have some impact on whether or not you

⁸ This advisement was correct. See, e.g., State v. DeWeese, 117 Wn.2d 369, 379, 816 P.2d 1 (1991).

choose to continue representing yourself.” CP 251. Judge Kessler then gave Mehrabian a week to reconsider whether he would like to continue to represent himself, and directed him to discuss with the Office of Public Defense whether they would appoint him standby counsel in the absence of a court order.⁹ CP 251-52.

When the parties reconvened the next week, on July 20, 2011, the court inquired as to how Mehrabian wished to proceed. Mehrabian told the court that he had elected not to meet with the Office of Public Defense, and that he wanted to continue to proceed pro se. CP 255. Because Mehrabian had not screened for eligibility with OPD, Judge Kessler told him that, if he wanted to retain standby counsel on his own, he could do that. CP 256.

Two weeks later, at a discovery hearing before the Honorable Beth Andrus, Mehrabian again clarified that he was proceeding pro se and did not want a public defender appointed. CP 316-21. The prosecutor explained to the court the procedural history that led to Mehrabian representing himself without standby counsel. CP 318-20. When the court inquired as to whether Mehrabian was permitted to change his mind about his self-representation, he told the court, “[T]o add to the

⁹ Judge Kessler also told Mehrabian to be screened by OPD to determine whether he was eligible for a public defender in the event he decided not to continue his self-representation. CP 252.

[prosecutor's] comments is that um I was not interested to have a public defender to be representing me as an attorney and that's what I expressed to the Court and um Judge Kessler." CP 320. He also said that he could not afford standby counsel on his own, and that he was dissatisfied with Zulauf in any event. CP 319.

Finally, at the commencement of the second trial, the trial judge inquired whether everyone was satisfied that Mehrabian was properly permitted to represent himself. RP 4. The State indicated its satisfaction; Mehrabian expressed no concerns. RP 4. When Mehrabian was struggling pretrial with the rules of evidence, the court pointed out to him that that was because he chose to proceed pro se; Mehrabian did not dispute that, and later acknowledged he chose to represent himself. RP 69, 169. Moreover, Mehrabian repeatedly explained to the trial court why he had dismissed his attorney and was proceeding pro se. RP 8, 84, 97.

In examining the record as a whole, Mehrabian was clear that he did not want the services of the public defender. He tried to fire his appointed attorney and, when that proved unsuccessful, hired counsel on his own. When that relationship proved unsatisfactory, he chose to represent himself, initially with private counsel assisting as standby counsel. When the court allowed Zulauf to withdraw as standby counsel, it also allowed Mehrabian to retain different standby counsel, talk to the

Office of Public Defense about being appointed standby counsel without a court order, or relinquish his self-representation and have new counsel appointed at public expense. While Mehrabian preferred to have private standby counsel, he could not afford it, and he emphatically and repeatedly refused the services of the public defender. This constitutes an unequivocal invocation of the right to self-representation.

In arguing that his request to proceed pro se was equivocal, Mehrabian characterizes his waiver of the right to counsel as “conditioned” on the appointment of standby counsel. It is correct that Mehrabian told Judge Eadie that he wished to proceed pro se with Zulauf as standby counsel, a request that Judge Eadie granted. However, Mehrabian claims that Judge Kessler was “unaware that the waiver was conditional” when he permitted Zulauf to withdraw as standby counsel. Brief of Appellant at 4. This is disingenuous. Mehrabian entirely omits from his brief the fact that Judge Kessler advised him that he had no right to standby counsel and that that might affect whether he wished to continue to proceed pro se, directed Mehrabian to consult with OPD about appointment of standby counsel and his eligibility for appointment of a public defender, and gave him a week to consider his options. Mehrabian’s brief also ignores the fact that, after that week-long continuance, Mehrabian told the court he did not want a public defender

and was going to continue on his own, and that he reaffirmed that position to Judge Andrus two weeks later.

Further, the fact that Mehrabian would have preferred to proceed with standby counsel does not render his decision to proceed pro se equivocal. Caselaw is clear that, when an indigent defendant fails to provide a trial court with adequate reasons to appoint new counsel, the court may require the defendant either to continue with appointed counsel or to represent himself. State v. DeWeese, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). The situation facing Mehrabian was nearly identical to that in DeWeese. Here, the court properly denied Mehrabian's request for substitution of appointed counsel, but of course allowed him to proceed with the already-appointed counsel representing him; he refused. He was not happy with Zulauf's services, nor could he continue to afford private counsel in any capacity. Thus, he elected to proceed without a lawyer. Mehrabian had choices, and he repeatedly and clearly chose to represent himself over the other choices available to him. Compare DeWeese, 117 Wn.2d at 377-78 ("Mr. DeWeese's remarks that he had no choice but to represent himself rather than remain with appointed counsel, and his claims on the record that he was forced to represent himself at trial, do not amount to equivocation or taint the validity of his Faretta waiver. These disingenuous complaints in Mr. DeWeese's case mischaracterize the fact

that Mr. DeWeese did have a choice, and he chose to reject the assistance of an experienced defense attorney who had been appointed.”).

Moreover, the fact that Mehrabian chose to represent himself because he was dissatisfied with the assistance of counsel does not change the nature of his choice. “[W]hen a defendant makes a clear and knowing request to proceed pro se, such a request is not rendered equivocal by the fact that the defendant is motivated by something other than a singular desire to conduct his or her own defense.” State v. Modica, 136 Wn. App. 434, 442, 149 P.3d 446 (2006), aff’d, 164 Wn.2d 83, 186 P.3d 1062 (2008); see also DeWeese, 117 Wn.2d at 378-79 (defendant’s request to proceed pro se was unequivocal, despite being motivated by frustration with attorney’s performance).

Here, Mehrabian maintained his desire to proceed pro se through several hearings, even when given additional opportunities to have counsel appointed. He explained repeatedly to the courts that he was dissatisfied with counsel and thought that he himself was in the best position to understand all the evidence. In the context of the record as a whole, Mehrabian’s request to proceed pro se was unequivocal. The trial court did not abuse its discretion in granting Mehrabian’s motion to represent himself. His claim otherwise should be rejected.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT MEHRABIAN'S CONVICTIONS FOR THEFT IN THE FIRST DEGREE.

Mehrabian contends that the State's evidence was insufficient to support guilty verdicts on Theft in the First Degree. Specifically, he argues that the evidence was inadequate to show that the City of Woodinville relied on any deception by Mehrabian when it purchased computer equipment from him. This argument ignores both the evidence and common sense. Mehrabian's claim is without merit.

Evidence is sufficient if, taken in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). A claim of insufficiency of the evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Id. (citation omitted).

To convict Mehrabian of Theft in the First Degree as charged in this case, the State had to prove beyond a reasonable doubt that he committed theft of more than \$5,000 of property or services.¹⁰ RCW 9A.56.030(1)(a); CP 76-79. A person commits theft, as charged in the Information, when he “[b]y color or aid of deception” obtains control over property of another with the intent to deprive him of that property. RCW 9A.56.020(1)(b); CP 76-79, 132. “By color or aid of deception” means that the defendant used deception to “bring about” the obtaining of the property; to convict a defendant under this definition of theft, it is unnecessary that the deception be the sole means of obtaining the property. RCW 9A.56.010(4); CP 133; State v. Casey, 81 Wn. App. 524, 529, 915 P.2d 587 (1996) (holding that victim’s reliance on defendant’s deception is required to prove theft by color or aid of deception). “Deception,” for purposes of this case, means either that the defendant knowingly created or confirmed another’s false impression that the defendant knew to be false, or failed to correct such false impression that the defendant had previously created or confirmed. RCW 9A.56.010(5); CP 134.

¹⁰ For count I only, the State had to prove that Mehrabian committed theft of more than \$1,500 in value of property or services. CP 76. The law was subsequently modified to increase the threshold for Theft in the First Degree from \$1,500 to \$5,000. 2009 Wash. Laws 431, § 7.

At trial, the State presented evidence that Mehrabian was the sole owner of a corporation created in 1999 known as ITSSI, Information Technology Solutions and Services, Inc. RP 204-05; ex. 194. In early 2000, Mehrabian, as an individual, was hired by the City to be responsible for all aspects of information technology for the City. RP 203, 308. He left in 2008. RP 317. During his tenure at the City, Mehrabian was supervised first by Deborah Knight, the assistant to the city manager, and then by finance director Jim Katica. RP 305-07.

Mehrabian's responsibilities with the City included all aspects of information technology, including maintaining infrastructure, purchasing computer equipment and software, and keeping inventory control over the City's IT property. RP 203, 240, 308-09, 337. When he wanted to purchase new computer equipment, Mehrabian was supposed to tell the City what he wanted to purchase and provide three competitive bids for the equipment. RP 242-43; Ex. 193. He would then obtain approval from a supervisor and the finance director, Katica, to make the purchase. RP 242-43, 344; Ex. 193. During the period of 2006-08, Mehrabian alone was responsible both for purchasing computer-related equipment and inventorying that same equipment for his department. RP 534.

Katica and Knight, Mehrabian's supervisors, testified that they were unaware that Mehrabian had his own business, ITSSI, while he was

working for the City. RP 329, 405-06. Katica explained that such employment was required to be disclosed either to himself or to the city manager. RP 329. Katica also said that it would not have been acceptable for Mehrabian to sell items to the City, and that it was in fact illegal for an individual both to be an employee and do business with the City. RP 329. Katica further testified that Mehrabian did not have permission to buy items online and then bill them to the City via GeekDeal, nor to mark up the price of any such equipment. RP 330.

Knight testified similarly; she said that, had she known of Mehrabian's employment with ITSSI, she would not have approved any contract between ITSSI and the City. RP 405-06. She also explained that she would not have approved any invoice in which Mehrabian purchased an item, then invoiced it to the City through a third-party vendor at a markup. RP 405-06. Further, Katica and Knight both told the jury that it was expected that equipment purchased by Mehrabian for the City would be warrantied. RP 330, 404. The City as a rule did not purchase computer equipment through eBay, because there was no guarantee that the equipment would be new or that it would be warrantied. RP 442, 494.

Because Mehrabian was prohibited from buying equipment himself or as ITSSI and selling it directly to the City at a markup, he did so surreptitiously. He began purchasing equipment through eBay, an

online auction site, and selling it to the City through a third-party vendor, GeekDeal.com. RP 570-74. The owner of GeekDeal, Ron Moisant, testified that Mehrabian told him that, because he was an employee, he was not allowed to sell equipment directly to the City. RP 571. Instead, Mehrabian would purchase property on his own for the City, typically through eBay, and use GeekDeal to invoice the City for that property. RP 572. Mehrabian would tell Moisant to prepare an invoice for the City, instructing him both as to what he claimed to be delivering to the City and the claimed price. RP 573. Moisant would send an invoice to Mehrabian at the City, often without ever seeing the property GeekDeal was purportedly selling. RP 580. The City would pay GeekDeal's invoice, and Moisant would then pass that money along to Mehrabian, minus taxes, credit card fees, and \$100 for his time. RP 574-75.

As an example, the evidence relating to count I, Theft in the First Degree, showed that on February 16, 2006, Mehrabian sent Moisant an email telling him to invoice the City \$2900 for a "Quantum DLTS 160/320 GB SCSI Tape Backup Unit." Ex. 115. He also told Moisant to charge the City's credit card for the item that day, and that a purchase order would be forthcoming. Ex. 115. A few days later, Mehrabian purchased that item of equipment on the internet for \$920 using his ITSSI PayPal account. Ex. 118. He had the item shipped not to the City, but to a

mail box he maintained at a business called Mail Plus in Bellevue.

Ex. 118; RP 186-87. On February 28, 2006, GeekDeal then invoiced the City for the Quantum Tape Backup Unit. Ex. 114.

On March 3, 2006, Mehrabian again emailed Moisant, and directed him to charge the City's credit card \$2200 for an HP Compaq Mobile Workstation. Ex. 109. The same day, GeekDeal invoiced the City for that item, Ex. 108, and wrote a check to Mehrabian for \$4,667.55: \$2900 plus \$2200, less \$200 (\$100 for each transaction) and a little more to cover the credit card fees. Ex. 119. Three days later, Mehrabian purchased an HP Compaq computer online for \$1710 using his ITSSI PayPal account. Ex. 112. He again had the equipment shipped to his own mail box, not the City. Ex. 112. Mehrabian provided GeekDeal with a purchase order for the computer the next day, on March 7, 2006. Ex. 425. The purchase order was based on three price quotes Mehrabian provided to the City for the equipment, which claimed that GeekDeal's price quote was the lowest. Ex. 105. As GeekDeal never saw the equipment and invoiced for a price provided by Mehrabian, RP 587-88, Ex. 109, this price quote was plainly invented.

The City finally parted with its money on April 17, 2006, when it paid its credit card bill containing the charges for the Quantum Tape Backup Unit and the HP Compaq computer. Ex. 103, 107.

Counts IV, V, VI, VII, and VIII involved similar conduct, with some differences. For instance, for count IV, Theft in the First Degree, the City thought it was purchasing an HP DL 580 Dual Core server and a Cisco PIX 525 firewall. Ex. 426, 427; RP 225-26. No evidence was found that Mehrabian ever purchased either item. RP 225-26. Indeed, although the City received and paid GeekDeal invoices for these two items, GeekDeal did not actually invoice the City for them nor know of their existence until later. RP 595-99; Ex. 139, 144. The invoices were apparently forged by Mehrabian. RP 695-99, 609-10. When an inventory was conducted after Mehrabian's departure, only a much older firewall – that Mehrabian had told Katica was new – was ever located. RP 371. That firewall was out of warranty. RP 393. And, instead of an HP DL 580 server, only a DL 380 server could be found. RP 449-51. That server was also out of warranty. RP 503.

For count V, Theft in the First Degree, the City thought it was purchasing an Aironet controller and another HP DL 580 server. Ex. 153, 158. Again, no evidence was found that Mehrabian purchased either item. RP 227-28. During inventory, the City located an Aironet controller, but it was used, not new. RP 505. As with count IV, the City could not locate an HP DL 580 server, but did find an HP DL 380, a lower quality model. RP 505-07. And, as with count I, Mehrabian provided price quotes to the

City showing that GeekDeal had the lowest price. Ex. 150, 156. As Mehrabian provided the prices to GeekDeal, not the other way around, this price quote was a fiction.

For count VI, Attempted Theft in the First Degree, the City thought it was purchasing two HP DL580 Dual Core servers. Ex. 165, 430. As with count IV, however, there is no evidence Mehrabian ever purchased such items, RP 229, lower quality items were found upon inventory, RP 505-07, and Mehrabian forged a GeekDeal invoice to the City for the servers, Ex. 165-68; RP 608-10. Moisant testified that he confronted Mehrabian about the forged invoice, and Mehrabian told him that he was in a hurry and couldn't wait for GeekDeal to prepare the invoice. RP 608-10.

For count VII, Theft in the First Degree, the City thought it was purchasing two Aironet wireless access points; it paid \$6300 plus tax. Ex. 431. GeekDeal passed on \$5959.88 of that purchase price to Mehrabian. Ex. 178. It appears only one access point was ever located. RP 507.

Finally, for count VIII, Theft in the First Degree, the City thought it was purchasing a 24-port Cisco switch, a 48-port Cisco switch, and a Cisco Firewall Failover PIX 525. Ex. 186, 189, 189A, 432, 433. No evidence was found that Mehrabian ever purchased any of these items. RP 236-38. During inventory, the City located a 24-port switch, was

unable to locate a 48-port switch, and located a Cisco PIX 525, but it was a used item at the end of its life, rather than a new item. RP 507-08. As with counts I and V, Mehrabian provided the City with three price quotes for the Cisco PIX 525, showing GeekDeal as the low bidder. Ex. 183. However, Mehrabian had told GeekDeal what amount to quote the City, and then later told GeekDeal to lower that amount by \$100. Ex. 190.

When Mehrabian left his employment with the City in 2008, other City employees conducted an inventory of the IT Department to determine what property they had. RP 317. As the inventory turned up the irregularities described above, the City hired a firm to look at all the IT property and compare what they in fact had to what they thought they should have. RP 317. The City determined that some property was missing, and some property was of lower quality than it thought it had purchased. RP 317-18. The City called the police. RP 318.

King County Sheriff's Office Detective Edward Ka was assigned to investigate, and he interviewed Mehrabian. RP 198-201, 238-39. During their discussion, Ka told Mehrabian that it was inappropriate for him to be making money from his dealings with the City. RP 242. Mehrabian admitted that his conduct might have been unethical, but claimed it wasn't criminal. RP 242.

The above evidence, taken in the light most favorable to the State, shows overwhelmingly that Mehrabian obtained property – money – through deceiving the City of Woodinville. The deception occurred on multiple levels. First, in each instance, Mehrabian himself sold property to the City in violation of the City’s policies regarding doing business with employees. Neither Knight nor Katica, his supervisors, knew that they were doing business with Mehrabian; they thought they were doing business with GeekDeal.

Second, the City did not know that Mehrabian was enriching himself through these transactions. Both Katica and Knight testified that he did not have permission to do so, and they would not have approved such transactions. Indeed, and third, by requiring a competitive bidding process, the City thought that it was ensuring it received the best price for the equipment it was purchasing. Instead, it was purchasing equipment at a substantial markup over what Mehrabian had paid for it via eBay and PayPal. And fourth, the bids that Mehrabian provided to the City in support of his purchases were inventions, at least in part. Mehrabian did not receive a price quote from GeekDeal for equipment he wanted to purchase; to the contrary, Mehrabian told GeekDeal the amount to invoice the City. As such, they were invented and not competitive bids.

Fifth, the City either did not receive the equipment they paid for at all, or received lower quality equipment than specified in the purchase orders and invoices. Because Mehrabian was responsible for receiving the equipment and inventorying it after the purchase was approved by his supervisors, neither Knight nor Katica learned of Mehrabian's deception in this regard until after his employment ended. And sixth, as the equipment did not come from GeekDeal, the City had no one to turn to for warranty service if the equipment was not operating correctly. RP 634-35. Finally, in counts IV and VI, GeekDeal did not even provide an invoice; Mehrabian forged invoices from GeekDeal and presented them to the City for payment.

By purchasing property for the City himself, invoicing the City through GeekDeal, inventing price quotes, forging invoices, not delivering the property purchased or delivering an inferior product, and enriching himself, Mehrabian induced the City to part with its money by color or aid of deception. He created in Katica and Knight the impression that he was legitimately engaging in an arm's-length transaction with another business for the delivery of goods. That impression was false, and Mehrabian knew it. The evidence in support of the jury's verdicts was not just sufficient, it was overwhelming. Mehrabian's challenge to the sufficiency of the evidence should be rejected.

3. THE JURY INSTRUCTIONS WITH RESPECT TO COUNT I DID NOT PERMIT THE JURY TO CONVICT MEHRABIAN SOLELY FOR CRIMES OCCURRING OUTSIDE THE STATUTORY LIMITATION PERIOD.

Mehrabian alleges that his conviction on count I is barred by the statute of limitation. Specifically, he contends that “this Court cannot determine whether the jury convicted [him] based on a continuing criminal impulse that extended into the statutory limitation period,” Appellant’s Brief at 17, and thus reversal is required. Mehrabian is incorrect. The jury found beyond a reasonable doubt that Mehrabian committed the crime on or about April 17, 2006, a date well within the limitation period. His conviction on count I should be affirmed.

A criminal statute of limitation is jurisdictional; it limits the power of the State to act against the accused. State v. Dash, 163 Wn. App. 63, 67, 259 P.3d 319 (2011); State v. Glover, 25 Wn. App. 58, 61, 604 P.2d 1015 (1979). As such, a claim that an offense was not charged within the statute of limitation can be raised for the first time on appeal. Dash, 163 Wn. App. at 67; State v. Novotny, 76 Wn. App. 343, 345 n.1, 884 P.2d 1336 (1994). If the to-convict instruction permits the jury to convict based solely on acts beyond the statutory limitation period, reversal is required. Dash, 163 Wn. App. at 65.

Here, the statute of limitation for Theft in the First Degree was, at the relevant time, three years. Former RCW 9A.04.080(h) (2009).¹¹ On March 6, 2009, the State filed an Information charging Mehrabian with several counts of Theft and Intimidating a Witness. CP 1. Accordingly, the Information could only reach crimes that were committed on or after March 6, 2006. Count I alleged that Mehrabian committed Theft in the First Degree on or about March 7, 2006. CP 1. The Information was later amended to allege a crime date in count I of April 17, 2006. CP 76. This crime date is within the statute of limitation.

Although aware of this fact, Mehrabian stakes his argument on a line of cases regarding continuing criminal impulse. See, e.g., Dash, 163 Wn. App. 63; State v. Reid, 74 Wn. App. 281, 872 P.2d 1135 (1994); State v. Carrier, 36 Wn. App. 755, 677 P.2d 768 (1984); State v. Brisebois, 39 Wn. App. 156, 692 P.2d 842 (1984). That line of cases holds that, when successive takings are the result of a single and continuing criminal impulse and are committed pursuant to a single plan, the takings may constitute a single theft. Dash, 163 Wn. App. at 68; Reid, 74 Wn. App. at 290. In such a situation, the crime is continuing and is not completed until the criminal impulse is terminated. Dash, 163 Wn. App. at 68; Reid, 74

¹¹ The statute of limitation for felony theft committed by deception was extended to six years effective July 26, 2009. 2009 Wash. Laws 61, § 1, codified at RCW 9A.04.080(d)(iv).

Wn. App. at 290. Where there is such a continuing criminal impulse, which must be found by a jury, the statute of limitation does not begin to run until the crime is completed. Dash, 163 Wn. App. at 68; Reid, 74 Wn. App. at 290-91.

Mehrabian claims that, under these cases, there are facts to establish that “the entire crime of theft by deception was completed” prior to the statutory period. Brief of Appellant at 17. He is wrong. Although his acts, and even his criminal intent, may have ended before March 6, 2006, the crime of Theft in the First Degree was not committed until the City completed the crime by relying on Mehrabian’s deception. The evidence was unequivocal that this happened after March 6, 2006. Moreover, jury’s instructions did not permit it to convict Mehrabian for a crime committed outside the statutory period.

As detailed in section E.2, supra, the evidence unambiguously showed that, prior to March 6, 2006, Mehrabian told Moisant to invoice the City for two items of computer equipment, Ex. 109, 115, purchased the equipment via PayPal, Ex. 112, 118, and was paid by GeekDeal, Ex. 119. GeekDeal also invoiced the City prior to March 6, 2006. Ex. 108, 114. However, the City did not issue a purchase order until March 7, 2006. Ex. 425. Even more significant, the City did not pay for the items until April 17, 2006. Ex. 103.

First, unlike in Dash, Reid, Carrier, and Brisebois, the State charged Mehrabian with committing the offense of Theft in the First Degree on a single date, April 17, 2006, instead of a period of time that spanned the limitation period. CP 76. The jury was instructed, consistent with the Information, that it had to find beyond a reasonable doubt that Mehrabian committed count I on or about April 17, 2006 – a date within the statute of limitation. CP 137. Thus, the to-convict instruction never “permit[ted] the jury to convict the defendant based solely upon acts committed beyond the statutory limitation period.” Dash, 163 Wn. App. at 65.¹²

¹² Only one case cited by Mehrabian involves the concept of continuing criminal impulse yet the Information charged that the crime occurred on a single date. This case, State v. Mermis, 105 Wn. App. 738, 20 P.3d 1044 (2001), appears anomalous. First, it is inconsistent to argue that a criminal impulse was “continuing” yet to charge the defendant with committing a crime on a single date. Second, Mermis dealt with a case where the defendant was charged with committing the crime of theft both by deception and by exerting unauthorized control. Id. at 742. The acts supporting each theory of theft were different, yet the jury returned a general verdict of guilty. Id. at 743. Third, it appears that the State relied on the concept of continuing criminal impulse late in the game; the statute of limitation issue appears to have been raised only in a post-trial motion. Had the State relied on the doctrine of continuing criminal impulse at trial in order to address the statute of limitation issue presented, the jury should have been instructed consistent with that theory. Fourth, it is unclear that the State argued to the Court of Appeals in its briefing on Mermis the argument advanced here – that the jury instructions only permitted the jury to convict if it found beyond a reasonable doubt that the crime was committed on a specific date that was in fact within the statute of limitation. Finally, the thrust of the opinion in Mermis was the applicability of certain principles of the Uniform Commercial Code to the concept of theft. Given the focus of the argument, it is not surprising that no one made the common-sense argument that the jury in fact made a determination that the crime was committed on a date within the statute of limitation.

Second, the State charged Mehrabian with having committed the offense on April 17, 2006, because the crime itself was not complete until that date. The State did not and does not argue that Mehrabian had a continuing criminal impulse that did not terminate until April 17, 2006 (or earlier within the statute of limitation). Rather, irrespective of Mehrabian's criminal impulse, the crime of Theft in the First Degree – as opposed to Attempted Theft in the First Degree – was not committed until the City paid for the equipment covered in count I. As discussed in detail in section E.2, supra, theft by deception requires that a defendant obtain property, at least in part, by creating or confirming in another a false impression that induces him to part with his property. Until the City paid for the computer equipment, it was not induced to part with its property. Further, until that time, all acts done on behalf of the City were done by Mehrabian; there was no “other” to be deceived or to rely on Mehrabian's deception. Accordingly, prior to April 17, 2006, when the City paid its bill, Mehrabian had only committed Attempted Theft in the First Degree.

By analogy, consider the case of a person intending to commit a murder who began planning the homicide on January 1, 2011. Over the course of a year he purchases a firearm, recruits another person to help him, scopes out possible locations for the crime, and plans an escape route. He prearranges with his intended victim to meet on December 31,

2011, and on that date, his accomplice goes to the meeting place in his stead and shoots and kills the victim. Under those facts, the defendant would be charged with Murder in the First Degree committed on December 31, 2011. Everything that occurred before that date was an attempt or conspiracy, and it would make no sense to charge said defendant with murder committed during the time period of January 1, 2011, through December 31, 2011. And, even if it did, as the crime of murder was not committed – completed – until the victim died, and the statute of limitation could not begin to run until that event.

The same is true here. Although Mehrabian's acts and criminal impulse may have been completed prior to March 6, 2006, the crime was not. Theft in the First Degree was committed only when the City acted on Mehrabian's deceptions and parted with its money. The evidence unequivocally established that that occurred on April 17, 2006, within the statute of limitation. The jury found that fact beyond a reasonable doubt. count I should be affirmed.

4. COUNTS IV AND V ARE NOT SAME CRIMINAL CONDUCT.

Mehrabian alleges that the trial court erred by declining to find that counts IV and V were same criminal conduct. But, although the thefts charged in counts IV and V were completed on the same day, Mehrabian's

acts that led to the completion of those offenses occurred at different times, and his intent to commit the crimes was not continuous.

Accordingly, the trial court did not abuse its discretion in concluding that counts IV and V were not same criminal conduct.

Two offenses are the same criminal conduct, and are counted as one crime in a defendant's offender score, if they involve "the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a); State v. Lee, 159 Wn. App. 795, 819, 247 P.3d 470 (2011). "If any one of these elements is missing, the offenses must be individually counted toward the offender score." Id. (citation omitted). The Legislature intended that "same criminal conduct" be construed narrowly. State v. Grantham, 84 Wn. App. 854, 858, 932 P.2d 657 (1997).

A lower court's determination of whether multiple offenses constitute same criminal conduct is reviewed for abuse of discretion. State v. Mutch, 171 Wn.2d 646, 654, 254 P.3d 803 (2011). "A trial court abuses its discretion when the reason for its decision is manifestly unreasonable or based upon untenable grounds. Restated, a trial court abuses its discretion when it adopts a view no reasonable person would take." State v. Hyder, 159 Wn. App. 234, 246, 244 P.3d 454, rev. denied, 171 Wn.2d 1024 (2011).

Here, the trial court rejected Mehrabian's argument that counts IV and V were the same criminal conduct; it found that the acts committed by him involved different intents on different dates. RP 1021. This was not an abuse of discretion.

First, Mehrabian's acts occurred at different times. The evidence presented at trial was that, with respect to count V, Mehrabian's acts occurred in January of 2007. Specifically, Mehrabian emailed Moisant to have GeekDeal invoice the City for an Aironet controller and an HP DL 580 server on January 11, 2007. Ex. 154. GeekDeal invoiced the City on January 23, 2007, in response to purchase orders provided by Mehrabian dated January 11, 2007, and January 23, 2007. Ex. 149, 153, 155, 158. The City paid for the equipment on March 19, 2007. Ex. 148.

Count IV, by contrast, was supported by acts that occurred several weeks later. Mehrabian provided purchase orders for computer equipment to GeekDeal dated March 1, 2007. Ex. 426, 427. He also prepared forged invoices from GeekDeal to the City dated March 5, 2007. Ex. 139, 144. The City again paid for the equipment on March 19, 2007. Ex. 136.

In his argument here and below, Mehrabian focuses on the fact that the charged date of crime – the date the City parted with its money – was the same for both counts. But although the City acted in reliance on Mehrabian's deceptions – thereby completing both crimes – on the same

day, Mehrabian's acts which caused the City to so rely happened at different times. Despite the common check date, the City was in fact paying for separate fraudulent acts by Mehrabian. Indeed, it was serendipitous, and an artifact of Mehrabian's fraudulent scheme, that the checks happened to have been issued on the same day. If a finding of "same criminal conduct" looks at a defendant's conduct, then Mehrabian did not engage in the conduct supporting counts IV and V at the same time. The trial court's finding was correct.

Second, Mehrabian's criminal intent – the intent to steal – was not continuous. In determining whether crimes share the same criminal intent for purposes of RCW 9.94A.589, courts must evaluate whether a defendant's intent, viewed objectively, changed from one crime to the next, and whether one crime furthered another. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). In conducting this analysis, courts must examine whether crimes are sequential or continuous. Grantham, 84 Wn. App. at 859; State v. Price, 103 Wn. App. 845, 858-59, 14 P.3d 841 (2000). Where a defendant has the "time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," the acts are sequential, the defendant forms a new criminal intent, and the crimes are not the same criminal conduct. Grantham, 84 Wn. App. at 859.

That is exactly what occurred here. Mehrabian completed his acts supporting count V in January, even though the City did not rely on them and pay for the equipment until March. He had several weeks to consider whether to continue to steal from the City before committing the acts that supported count IV. He did not have continuous intent. As such, the trial court did not abuse its discretion in finding that his acts were sequential and did not constitute same criminal conduct.

F. ARGUMENT ON CROSS-APPEAL

THE TRIAL COURT ERRED BY FAILING TO INCLUDE MEHRABIAN'S PRIOR CONVICTION FOR THEFT IN THE FIRST DEGREE IN HIS OFFENDER SCORE.

At sentencing, the State alleged that Mehrabian's offender score was seven. CP 167. One of those seven points came from including a prior conviction for Theft in the First Degree in Mehrabian's offender score. CP 167, 398-402. Mehrabian argued that that conviction had washed out. CP 294-95. The court agreed with Mehrabian and did not include that offense in his offender score. CP 159; RP 1021-22. This was error. Mehrabian's prior Theft in the First Degree did not wash because he had not spent ten crime-free years in the community since his last date of release from confinement pursuant to that conviction.

A sentencing court's calculation of a defendant's offender score is reviewed de novo. State v. Rivers, 130 Wn. App. 689, 699, 128 P.3d 608

(2005). Theft in the First Degree is a Class B felony. RCW 9A.56.030(2). Class B felony convictions are included in a defendant's offender score unless the defendant has spent ten consecutive crime-free years in the community since his last date of confinement pursuant to any felony conviction. RCW 9.94A.525(2)(b).

Here, Mehrabian was convicted of Theft in the First Degree in 1992. CP 405-09. He was sentenced on January 15, 1993, to 60 days in custody, with credit for one day served. CP 407. Fifteen days were converted to community service hours; the remainder of the term was to be served in electronic home detention. CP 407. The court also imposed 12 months of community custody. CP 407.

However, on May 30, 2003, the court held a sentence modification hearing. CP 424-25. Mehrabian was in custody for that hearing due to a bench warrant that had been issued on January 30, 2003. CP 422-23. The court found that Mehrabian willfully failed to pay legal financial obligations, sanctioned him to eight days in custody with credit for eight days served, and released him from jail. CP 424-26.

Mehrabian's position below, erroneously adopted by the trial court, was that he spent ten crime-free years in the community after imposition of his sentence, so the conviction for Theft in the First Degree washed out

in early 2003.¹³ CP 294-95; RP 1021. This analysis is incorrect for two reasons.

First, the trial court's application of the washout provisions of the Sentencing Reform Act to Mehrabian's theft conviction ignored the plain language of the statute. That statute provides for washout only after ten crime-free years in the community counting from "the last date of release from confinement . . . pursuant to a felony conviction." RCW 9.94A.525(2)(b). In other words, the triggering event from which one measures ten crime-free years in the community is the last date of release from confinement pursuant to a conviction,¹⁴ not the first date of release. Compare State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010) (describing the washout statutes as having a "trigger" clause and a "continuity/interruption" clause). Here, Mehrabian's last date of release from confinement pursuant to his felony theft conviction was May 30, 2003, not some time in 1993. CP 424-26. Thus, the Theft in the First

¹³ The record is silent as to when Mehrabian was released from custody pursuant to the original sentence. Thus, for purposes of Mehrabian's argument, it is reasonable to count ten years from entry of the Judgment and Sentence on January 15, 1993. See RCW 9.94A.525(2)(b) ("Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction." (emphasis added)).

¹⁴ It is well settled that time spent in confinement pursuant to a violation of a condition of a felony sentence is confinement "pursuant to a felony conviction" for purposes of RCW 9.94A.525(2)(b). In re Higgins, 120 Wn. App. 159, 83 P.3d 1054 (2004); State v. Blair, 57 Wn. App. 512, 789 P.2d 104 (1990).

Degree conviction could not have washed by the time of his sentencing in 2011. In re Higgins, 120 Wn. App. 159, 164, 83 P.3d 1054 (2004) (“[T]he wash-out period . . . does not begin until release from any confinement ordered in the course of carrying out the sentence for the felony conviction.”).

The trial court reasoned that, had Mehrabian been sentenced for these crimes on May 1, 2003, the 1993 theft conviction would have washed, and there is no statutory provision that “revives” a washed offense. RP 1021. The court thus concluded that the legislature did not intend such a result. RP 1022. While the court was correct that the 1993 theft conviction would not have been included in Mehrabian’s offender score for these crimes had he been sentenced on May 1, 2003, that fact is irrelevant. The court erred in using this anomaly to conclude that the legislature could not have intended such a result. Although the court must discern the intent of the legislature in construing any statute, the starting point is the statute’s plain language. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). When that language is unambiguous, the court’s work is done. Id. Further, statutes must be interpreted so that all language is given effect. Id.

Here, the statute uses the phrase “last date of release from confinement” as the trigger for the washout period. RCW

9.94A.525(2)(b). This language is unambiguous. The trial court was required to give meaning to each word of the statute. By finding that Mehrabian's theft conviction washed out before his last date of release from confinement, the trial court erred. RP 1021-22 ("I am troubled because I think that doesn't give meaning to the word last."). This Court should give effect to each word in the statute and conclude that Mehrabian's confinement in 2003 for violation of the conditions of sentence is the correct trigger date for determining whether his conviction washed.

Second, even if Mehrabian's argument below was correct that a crime could wash out prior to an offender's last date of release from confinement, the trial court still erred in refusing to include the conviction in Mehrabian's offender score. This is because Mehrabian did not, in fact, spend ten crime-free years in the community between his 1993 theft conviction and his 2003 re-incarceration for that crime. To the contrary, Mehrabian was convicted of the crime of Driving Without a Valid Operator's License, committed on September 17, 1993. CP 402. This conviction is an independent re-trigger of the washout period. RCW 9.94A.525(2)(b); Higgins, 120 Wn. App. at 164. Mehrabian was then confined in May 2003 for the violation of his Theft in the First Degree sentence; less than ten years had elapsed since his misdemeanor

conviction, so the wash-out clock again started anew. The Theft in the First Degree conviction had not washed out by Mehrabian's 2011 sentencing.

This Court should conclude that the trial court erred in finding that Mehrabian's 1993 theft conviction had washed out. Accordingly, this Court should reverse the trial court's offender score calculation and remand for resentencing.

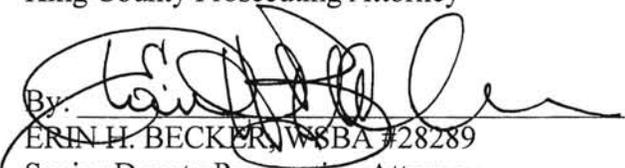
G. CONCLUSION

For the foregoing reasons, this Court should affirm Mehrabian's convictions for Theft in the First Degree and Attempted Theft in the First Degree. It should further affirm the trial court's finding that counts IV and V are not same criminal conduct. However, this Court should reverse the trial court's exclusion of Mehrabian's 1993 conviction for Theft in the First Degree from his offender score, and remand for resentencing.

DATED this 25th day of October, 2012.

Respectfully submitted,

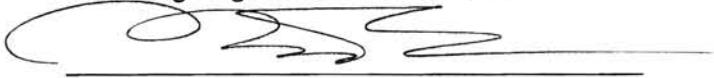
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott, the attorney for the appellant, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA 98104, containing a copy of the Brief of Respondent and Cross-Appellant, in STATE V. SASSAN MEHRABIAN, Cause No. 68138-9-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name

Done in Seattle, Washington



Date