

FILED
October 16, 2015
Court of Appeals
Division I
State of Washington

No. 73046-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SANDRA ALLEN,

Appellant.

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

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES..... 2

D. STATEMENT OF THE CASE..... 3

E. ARGUMENT 11

The evidence was insufficient to prove the crime of first degree theft. 11

1. The State bore the burden to prove all the elements of theft beyond a reasonable doubt. 11

2. The evidence was insufficient to prove that Ms. Allen exerted unauthorized control over the property of another..... 14

3. The evidence was insufficient to prove that Ms. Allen obtained control over property of another by color or aid of deception. 20

4. Insufficient evidence on both alternative means requires reversal and dismissal. 26

5. Insufficient evidence as to only one of the two means requires reversal and remand for a new trial..... 26

F. CONCLUSION..... 27

TABLE OF AUTHORITIES

United States Supreme Court Cases

Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)..... 26

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).... 11

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)..... 12

Washington Supreme Court Cases

State v. Coria, 146 Wn.2d 631, 48 P.3d 980 (2002)..... 15

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 12

State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993) 18, 27

State v. Linehan, 147 Wn.2d 638, 56 P.3d 542 (2002)..... 12, 14

State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994) 26

State v. Pike, 118 Wn.2d 585, 826 P.2d 152 (1992)..... 17

State v. Renhard, 71 Wn.2d 670, 430 P.2d 557 (1967) 21, 22, 26

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013) 12

Washington Court of Appeals Cases

State v. Birch, 36 Wn. App. 405, 675 P.2d 246 (1984) 14

Constitutional Provisions

Const. art. I, § 11..... 17

Const. art. I, § 21..... 26

Const. art. I, § 3..... 11

Const. art. I, § 5..... 17

U.S. Const. amend. I.....	17
U.S. Const. amend. XIV	11

Statutes

RCW 9A.56.010(22)(b)	18
RCW 9A.56.010(22)(c)	14
RCW 9A.56.010(4).....	20
RCW 9A.56.010(5)(a)	20
RCW 9A.56.010(5)(b)	20
RCW 9A.56.010(5)(e)	20
RCW 9A.56.020(1)(b)	12
RCW 9A.56.020(1)(a)	12
RCW 9A.56.030(1)(a)	12

Other Authorities

<u>Black’s Law Dictionary</u> (10th ed. 2014).....	16
--	----

A. INTRODUCTION

Elizabeth Hughes freely donated significant sums to Pastor Sandra Allen and her ministry. Nevertheless, the State prosecuted Ms. Allen for first degree theft, contending the funds given by Ms. Hughes were partnership funds and that Ms. Allen embezzled these funds by spending portions on herself rather than the ministry. Alternatively, the State contended that Ms. Allen deceived Ms. Hughes into turning over the funds and, therefore, was guilty of theft. Because the State failed to prove either alternative with sufficient evidence, this Court should reverse. If sufficient evidence supports one alternative but not the other, this Court should still reverse because it is impossible to tell if the jury was unanimous as to either alternative.

B. ASSIGNMENTS OF ERROR

1. In violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and article one, section three of the Washington Constitution, the conviction for first degree theft is not supported by sufficient evidence.

2. In violation of Ms. Allen's right to a unanimous verdict under article one, section twenty-one of the Washington Constitution, the jury was not instructed that it had to be unanimous on the alternative means of committing theft and sufficient evidence did not support each means.

C. ISSUES

1. When a person exerts unauthorized control over partnership funds and has intent to deprive, the person has committed theft by embezzlement. After Ms. Allen received two large donations from Ms. Hughes, she signed a receipt memorializing the donation. While recounting some of the purposes of the donation, the receipt did not limit the use of the funds. Was the evidence insufficient to convict Ms. Allen of theft by embezzlement when there was no partnership agreement and the receipt did not limit Ms. Allen's use of the funds?

2. When a person intends to deprive another of property and induces that person to part with the property through deception, the person has committed theft by color or aid of deception. This requires proof that the person who parted with the property would not have done so absent the deception. Ms. Hughes explained she gave her money to Ms. Allen because she believed Ms. Allen was God's prophet and that God commanded it. The State presented evidence that Ms. Allen made some deceptive statements, but did not prove that Ms. Hughes would not still have parted with the money absent the statements. Was the evidence insufficient to prove theft by color or aid of deception?

3. Defendants have the right to a unanimous jury verdict on the means by which they committed the offense. If insufficient evidence

supports one of the means submitted to the jury and it is impossible to determine whether the jury's verdict was unanimous as to the means which is supported by sufficient evidence, the conviction must be reversed. The jury was instructed that it did not have to be unanimous as to the means of committing theft and was given a general verdict form. If the evidence is insufficient as to one means but not the other, must the conviction be reversed?

D. STATEMENT OF THE CASE

In 2012, Sandra Allen, a middle aged woman in her 50s, was homeless. 1/7/15RP 12, 16. In addition to her economic plight, Ms. Allen was suffering from various medical conditions, including fibromyalgia and a heart condition. 12/10/14RP 24-25; 12/15/14RP 100; 1/7/15RP 12-13. Nevertheless, Ms. Allen, a minister, preached the word of God and conducted outreach in the local community in Federal Way. 1/7/15RP 12, 14-15. Ms. Allen, a musician, also sang and played the piano. 1/5/15RP 35; 1/7/15RP 14, 18.

In the summer of 2012, Ms. Allen was staying with Michelle Allen, a woman unrelated to Ms. Allen. 12/16/14RP 38; 1/7/15RP 65-66. After living there for about a month, Ms. Allen was asked to leave. 1/7/15RP 66. Around this time, Ms. Allen met Elizabeth Hughes, who was about 50 years old. 1/5/15RP 18, 31; 1/7/15RP 16.

Ms. Hughes does not care for the word “religion,” but has a spiritual belief in Jesus and God. 1/5/15RP 20. She attended various churches in 2012, but had not found the right one. 1/5/15RP 21-22. She watched religious programming on television and gave money to these organizations. 1/5/15RP 22-23, 27. She also participated in a “street ministry” with her friends, which she described as “walking out, like, downtown Seattle, and finding homeless people, and buying sandwiches, and loving people . . . talking to people.” 1/5/15RP 29-30. Ms. Hughes was not happy in her marriage because her husband was not “walking with the Lord.” 1/5/15RP 110.

Ms. Hughes knew Michelle and met Ms. Allen at Michelle’s home. 1/5/31RP 31. Shortly after Ms. Allen left Michelle’s, Ms. Hughes ran into Ms. Allen at a Walmart around June 2012. 1/5/15RP 32; 1/7/15RP 17. Ms. Hughes invited Ms. Allen, who was homeless and living in her car, to stay the night at her home with her family. 1/5/15RP 33. Ms. Allen accepted the invitation. 1/7/15RP 18. Before dinner, Ms. Allen played the piano. 1/7/15RP 35. Ms. Hughes showed Ms. Allen her “shofar,” a musical instrument mentioned in the Bible. 1/5/15 RP 108. Before bed, the two spoke about God. 1/7/15RP 35. Ms. Allen slept in a room that was used as an office, where the Hughes kept financial and personal records. 1/7/15RP 36. Ms. Allen left the next morning and went to the

Seatac Value Inn in Des Moines. 1/5/15RP 40-42. Ms. Hughes paid for Ms. Allen's motel bill. 1/5/15RP 41-42; Ex. 24. Ms. Hughes began to visit about a couple times a week and would sometimes stay late into the night or early morning. 1/5/15RP 111.

Ms. Hughes testified that Ms. Allen spoke like a Christian, knew the Bible and scriptures very well, presented herself well, and told stories about walking with the Lord and being a pastor. 1/5/15RP 37. While Ms. Allen denied it, Ms. Hughes recounted that Ms. Allen represented herself as a prophet or prophetess of God. 1/5/15RP 35, 37; 1/7/15 RP 109. Ms. Hughes testified that she had no reason to doubt Ms. Allen. 1/5/15RP 37. Ms. Allen took on a "pastoral . . . role towards" Ms. Hughes. 1/5/15RP 37. This meant that Ms. Allen would pray for Ms. Hughes, teach her about the Bible, and counsel her. 1/5/15RP 54. They also went to churches together, including Pastor Bernard Jack's. 1/5/15RP 83. Ms. Allen represented that she knew Pastor Robert Manaway and his family, who led a church that Ms. Hughes had been visiting. 1/5/15RP 22, 81-82, 105.

Ms. Hughes wrote out a personal check in the amount of \$11,335.84, obtained a cashier's check in the amount of \$44,194.87, and signed both to over to Ms. Allen. Ex. 8, 26. Ms. Allen deposited the checks into her Chase Bank account on June 20, 2012. Ex. 8. Ms. Hughes

and Ms. Allen signed a document written by Ms. Allen, also dated June 20, 2012, memorializing the donation to Ms. Allen's ministry. Ex. 27 (attached in the appendix).

While this receipt did not refer to tithing and Ms. Allen denied it, Ms. Hughes testified Ms. Allen told her that she owed God for tithes that had not been properly paid for the past 10 or 12 years. 1/5/15RP 50, 63; 1/7/15RP 24; Ex. 32. Ms. Hughes calculated the amount she owed using her tax returns and made a tithing worksheet. 1/5/15RP 96; Ex. 32. Ms. Allen told her that God wanted her to give the funds to Ms. Allen's ministry. 1/5/15RP 53-54, 60. Ms. Allen purportedly referred Ms. Hughes to different stories in the Bible, including one in the New Testament about Ananias and Sapphira, a couple that God struck dead after they lied about money they kept rather than donated. 1/5/15RP 69.¹ The worksheet Ms. Hughes made states that she gave \$58,000.00 to "Sandra Allen's ministry" on June 20, 2012. Ex. 32.

At some point, Ms. Allen discussed with Ms. Hughes about buying an inexpensive car to replace her old one. 1/5/14RP 121. Ms. Hughes was aware that Ms. Allen planned to buy a car with the money she donated and did not object. 1/5/14RP 122. Ms. Allen purchased a used

¹ Acts 5:1-11; see also Ex. 29 (e-mail from Ms. Hughes quoting this verse along with others) (this exhibit was not admitted into evidence).

car, a 2002 Jaguar, for \$7,500 in cash on June 22, 2012. Ex. 4. Ms.

Hughes claimed not to be aware of this transaction until a detective told her about it. 1/5/14RP 121.

Ms. Hughes wrote another personal check to Ms. Allen for \$21,500, which Ms. Allen deposited into her Chase Bank account on June 29, 2012. 1/5/15RP 62; Ex. 8. Ms. Hughes explained that she gave the money because she owed God and that she was paying God through Ms. Allen and her ministry:

So it was tithe money. And so I owed God the tithe money. And in order to pay God, God is not in a physical body walking on the earth, so we give to the church. And she established herself as a pastor, established herself as setting up a ministry, and established herself as having a particular ministry purpose that is near and dear to my heart. And so that's the reason the money went to her.

1/5/15RP 63.

Sometime after giving Ms. Allen this check, the two were at a restaurant. 1/5/15RP 71. Ms. Allen purportedly told Ms. Hughes about a scripture in the Bible where God cursed generations of families who disobeyed him and that God had similarly cursed her. 1/5/15RP 70-71. She needed to atone by giving \$12,000 otherwise God would kill her son. 1/5/15RP 72. After conducting her own research, Ms. Hughes concluded that Ms. Allen was not actually friends with a "famous" "prophet" that

Ms. Hughes knew of. 1/5/15RP 77. She stopped trusting Ms. Allen and called the police on July 10, 2012. 12/10/14RP 33-34; 1/5/15RP 77, 85.

Officers Adrienne Purcella and Billy Forester spoke with Ms. Hughes that day. 12/14/14RP 21, 34. Based on their conversation, Officer Forester suspected Ms. Allen of “swindling” and Officer Purcella suspected Ms. Allen of “[e]xtortion, theft.” 12/14/14RP 21, 35. They confirmed Ms. Allen was staying at the motel, but were unable to contact her that day. 12/14/14RP 21.

The next day, July 11, 2012, police went to the motel around 9:30 p.m. and arrested Ms. Allen, who was in her pajamas. 12/14/14 RP 40. Ms. Allen spoke with police at the station around 10:40 p.m. that night. 12/14/15RP 40; Ex. 1. Ms. Allen, who felt like she was being coerced, made some inaccurate statements, including that she made a lucrative salary as a musician. Ex. 1; 1/7/15RP 49. She told police she had deposited the money into her Chase Bank account. Ex. 1. After the interrogation, police released Ms. Allen and transported her back to the motel. 12/14/14RP 23.

Ms. Allen provided a written statement the next day. Ex. 22; 12/16/14RP 29-30. Ms. Allen also spoke with Detective Annette Scholl on the phone that day. 12/15/14RP 23. Ms. Allen called Detective Scholl at later dates and left voicemails. Ex. 17; 12/15/14RP 102-05. Ms. Allen

also provided a written statement to the police on July 23, 2012. Ex. 5; 12/15/14RP 29. Ms. Allen spoke with Detective Scholl in person on August 15, 2012. Ex. 16. In her statements, Ms. Allen denied that she stole from or extorted Ms. Hughes. Ex. 5, 22.

Detective Scholl contacted Richard Moothart, an investigator with the Washington Department of Social and Health Services, and asked him to investigate Ms. Allen. 12/15/14RP 76-78. The Department obtained a benefits application by Ms. Allen in late 2011. Ex. 12; 12/15/14RP 80-82. In this application and in employment verification letters, Ms. Allen incorrectly represented that she was employed by the “Federal Way Outreach Center” since 2008. Ex. 12, 15; 12/15/14RP 80-83 Ms. Allen, who was desperate for assistance due to her serious health condition, incorrectly believed she had to be employed to receive benefits. Ex. 15; 12/15/14RP 100-01. She admitted to misrepresenting her employment status to the Department from 2009 to 2012. Ex. 15.

Chase Bank records showed that Ms. Allen deposited the first two checks from Ms. Hughes, totaling about \$55,000, on June 20, 2012. Ex. 8. Ms. Allen withdrew \$20,000 on June 21, 2012. Ex. 8. She made various purchases using a debit card tied to the account on July 9 through July 18. Ex. 8. She made two separate withdrawals of \$10,000 on July 16 and 18, 2012. Ex. 8. Wells Fargo bank records showed that Ms. Allen opened

accounts there on July 18, 2012 and made deposits that day in the amounts of \$3,500, \$4,000, \$1,000, and \$500. Ex. 9. U.S. Bank records showed that Ms. Allen's account was closed for lack of funds on June 19, 2012. Ex. 10. Police did not retrieve any of the money. 12/15/14RP 60-61. Ms. Allen later explained that besides the purchases, the funds were used for donations, outreach, to pay for her living and medical expenses, and to pay Ms. Hughes for assisting her in her ministry. 1/7/15RP 104-10.

The State charged Ms. Allen with first degree theft, alleging she stole over \$5,000 from Ms. Hughes. CP 1, 10, 20. The State alleged the theft was a major economic offense. CP 10, 20. Based on Ms. Allen's false statement to the Department about her employment status, the State also charged her with perjury in the second degree. CP 10-11, 20-21.

Ms. Allen was tried before a jury in late December 2014 and January 2015. She testified in her defense. 1/7/15RP 12-144. On Ms. Allen's motion, the court dismissed the perjury charge for insufficient evidence, but allowed the theft charge to be decided by the jury. 1/5/15RP 151-22; CP 80. The jury found Ms. Allen guilty of first degree theft and found that it was a major economic offense. CP 45-46.

At sentencing, two of Ms. Allen's grown children spoke about Ms. Allen's work as a minister and outreach in the community. 2/13/15RP 14-15, 17-19. Prentis Johnson, a pastor of the Greater Christ Temple Church

in Tacoma spoke about Ms. Allen's good character and work in the community. 2/13/15RP 16-17. Ms. Allen's former son-in-law, Shawn Good, told the court that Ms. Allen had been a pastor to him and that he and Ms. Allen had evangelized in the community. 2/13/15RP 20-21. Ms. Allen maintained her innocence and spoke about her work in her ministry and the community. 2/13/15RP 22-26.

The court rejected the State's request for an exceptional sentence. 2/13/15RP 28. The court ordered Ms. Allen to serve 90 days in jail with 30 days converted to community service hours. 2/13/15RP 28; CP 61-63. While noting it was not the court's job to second guess the jury, the court stated that Ms. Hughes "did not appear to be particularly vulnerable" and that it was "curious to [the court] how this amount of money would have been given to the victim [sic] under the circumstances." 2/13/15RP 28. The court ordered restitution of \$77,030. CP 54; 2/13/15RP 35.

E. ARGUMENT

The evidence was insufficient to prove the crime of first degree theft.

1. The State bore the burden to prove all the elements of theft beyond a reasonable doubt.

The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art.

I, § 3. In reviewing whether the State has met this burden, the appellate court analyzes “whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

“A person commits the crime of theft in the first degree when he or she commits theft of property exceeding \$5000 in value.” CP 32; accord RCW 9A.56.030(1)(a). Theft is an alternative means crime. State v. Linehan, 147 Wn.2d 638, 647, 56 P.3d 542 (2002). One means requires exertion of unauthorized control over another’s property while a second requires that the property be obtained by color or aid of deception. RCW 9A.56.020(1)(a), (b). Theft by embezzlement is a form of theft through exertion of unauthorized control, but is not its own means. Linehan, 147 Wn.2d at 647-48. The jury was instructed on these two means: “Theft means to exert unauthorized control over the property of another, with intent to deprive that person of such or by color or aid of deception, to

obtain control over the property of another, or the value thereof, with intent to deprive that person of such property.” CP 35.

Under the “to-convict” instruction, to prove the first element of first degree theft, the jury had to find that Ms. Allen “exerted unauthorized control over property of another” or “by color or aid of deception, obtained control over property of another” during a time between June 3, 2012 and August 16, 2012:

To convict the defendant of the crime of theft in the first degree, as charged in Count 1, each of the following four elements of the crime must be proved beyond a reasonable doubt:

(1) That during a time between June 3, 2012 and August 16, 2012, the defendant

(a) exerted unauthorized control over property of another; or

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

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

(3) That the defendant intended to deprive the other person of the 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 1. 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.

CP 33-34. The State failed to prove either alternative means of theft, (1)(a) or (1)(b) beyond a reasonable doubt.

2. The evidence was insufficient to prove that Ms. Allen exerted unauthorized control over the property of another.

The State's primary theory of the case was that Ms. Allen "exerted unauthorized control" over the funds given by Ms. Hughes to her. See 12/10/14RP 5-12 (State's opening argument); 1/8/15RP 21-40 (State's closing argument). The jury was instructed that "to exert unauthorized controls" means "having any property in one's possession, custody or control as partner, to secrete, withhold or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto, where such use is unauthorized by the partnership agreement." CP 36; accord RCW 9A.56.010(22)(c). This is a theft by embezzlement theory. Linehan, 147 Wn.2d at 651.

This statutory definition was enacted in 1986. Laws of 1986, Reg. Sess., ch. 257, § 2. Prior to its enactment, it was not a crime for a partner to appropriate partnership property. State v. Birch, 36 Wn. App. 405, 675 P.2d 246 (1984) (holding that a partner cannot be charged with

embezzling partnership funds because the partner would not be exerting unauthorized control over the “property of another.”). The Legislature responded by making it a crime for a partner to steal partnership property. State v. Coria, 146 Wn.2d 631, 638, 48 P.3d 980 (2002).

The State theorized that the case was about a “broken promise,” contending that Ms. Allen had promised to use the money given by Ms. Hughes to start a ministry and that Ms. Allen had broken that promise by spending funds for her personal use rather than the ministry. 1/8/15RP 22, 27-29. In support of this theory, the State relied almost exclusively on exhibit 27, the signed receipt memorializing Ms. Hughes’ donation of \$55,330.71 to Ms. Allen and her ministry. 1/8/15RP 22 (“This case ultimately is about . . . Exhibit 27, this broken promise crafted by the Defendant herself, signed by the Defendant herself.”). The State contended this receipt constituted a “partnership agreement” that did not authorize funds to go towards Ms. Allen’s personal use. 1/8/15RP 24, 39-40. The receipt, dated June 20, 2012, states:

Receipt of checks donated for outreach work, ministry building, church ministries, music publication, and helps. This is to confirm that I, Pastor Sandra Allen, received a donation of funds from Elizabeth Hughes for the outreach work and for needy and Federal Way Outreach Ministries to help the indigent and any needy people. Elizabeth Hughes donated these funds freely to the ministry to help the poor and the homeless. Funds were received on June 20th, 2012, 1:30 p.m. Elizabeth willingly donated

these proceeds to help support this work and to help feed the needy, total amount, \$55,330.71.

Ex. 27.

The evidence was sufficient for the jury to conclude that Ms. Allen spent some of this money on herself. For example, she bought a used car on June 22 for \$7,500 and made other various purchases in July 2012. Ex. 4, 8. The problem, however, is that neither the receipt nor any other evidence established a partnership agreement restricting the use of the funds Ms. Allen received from Ms. Hughes. And even if it did, the evidence did not prove that Ms. Allen spent the money on an unauthorized purpose.

First, no “partnership” was created. Neither the theft statute nor the jury instructions in this case define “partnership” or “partnership agreement.” Black’s Law Dictionary defines “partnership” as a “voluntary association of two or more persons who jointly own and carry on a business for profit.” Black’s Law Dictionary (10th ed. 2014). During closing, the prosecutor offered a similar definition for the jury in explaining the definition for “exert unauthorized control” and argued that spending any money outside an agreement is “unauthorized control.”

The first is that the Defendant exerted unauthorized control and the definition of course is in your jury instructions, having any property in one’s possession, custody, or control, as partner and withholding or

appropriating the same to her own use. Now, that's a lot of words but essentially what it boils down to is a partnership agreement, when you decide to go into business with someone, when you decide to do something together, and you say we're going to pool this money together for X. And then one of the two individuals holds the money.

That person is not entitled to spend it however they please because you two have agreed for what the money will be spent on. And anything deviating from that, anything the money is spent on that's outside of that agreement, is unacceptable and unauthorized control.

1/8/15RP 39-40. Contrary to the prosecutor's contentions, Ms. Allen and Ms. Hughes did not go into business together. Ms. Hughes' money was a donation to God and Ms. Allen's ministry, not a business investment.

1/5/15RP 50, 53-54, 62-63, 72-75. Both Ms. Hughes and Ms. Allen were exercising their constitutional rights to freedom of expression and religion, as guaranteed by our state and federal constitutions. U.S. Const. amend. I; Const. art. I, § 5, 11. Under the prosecutor's theory, anyone who donates to the Red Cross or some other charitable organization is a partner in a business venture.

Because this was a donation, rather than a business investment, the money belonged to Ms. Allen. "[A] person cannot steal his or her own property." State v. Pike, 118 Wn.2d 585, 590, 826 P.2d 152 (1992). Thus, the State failed to prove that Ms. Allen exerted unauthorized control over the property of another.

Second, even assuming a “partnership,” the receipt does not restrict the use of the donated funds. It does not say that Ms. Allen could not use any of the money on herself. It does not say that money can only be spent on “outreach work,” “ministry building,” “church ministries,” “music publication,” or “helps.” Moreover, these terms are undefined. Absent some evidence showing a restriction on the use of the funds, Ms. Allen could spend the money as she saw fit.

Our Supreme Court’s opinion in State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993), while involving a commercial transaction (as opposed to a donation) and a different subsection defining “exerts unauthorized control,” is instructive on this point.² There, the defendant was convicted of five counts of theft on embezzlement theories. Joy, 121 Wn.2d at 335. On each count, the defendant had entered into written contracts to do jobs

² Joy involved the definition of “exerts unauthorized control” under former RCW 9A.56.010(7)(b). Joy, 121 Wn.2d at 339. This statute is now codified under subsection (22)(b) and defines unauthorized control as:

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

RCW 9A.56.010(22)(b). The jury was not instructed on this definition.

remodeling homes. Id. at 335-38. The defendant did not complete the contracted work. Id. Our Supreme Court held that a person can be guilty of theft by embezzlement in this context if “the particular agreement between the owner and defendant restricted the use of the funds to a specific purpose.” Id. at 341. Because there was sufficient evidence that the defendant entered into three different agreements which earmarked the money, the court affirmed three of the convictions. As for the other two convictions, the court reversed for insufficient evidence because “there was no testimony about what the parties agreed the money was to be used for, and the written contract does not restrict the use of the advance payments.” Id. at 343.

Similar to Joy, the receipt does not restrict the use of the donated funds. There was also no testimony that the funds were restricted for specific purposes. Thus, the State failed to prove that Ms. Allen exerted unauthorized control over the funds.

Third, even assuming a restriction, the evidence did not prove the funds were spent on an unauthorized purpose. Ms. Allen herself was indigent and needy. As Ms. Hughes recognized, Ms. Allen needed help. And to pursue the purposes listed in the receipt, such as “music publication,” Ms. Allen had to provide for herself first. Thus, that Ms. Allen may have made personal purchases for herself was not a violation of

any “partnership agreement.” Hence, the State failed to prove this means of theft.

3. The evidence was insufficient to prove that Ms. Allen obtained control over property of another by color or aid of deception.

The State’s secondary theory of the case was that Ms. Allen committed theft by obtaining Ms. Hughes’ property through color or aid of deception. 1/8/15RP 40-43 (State’s closing). “By color or aid of deception means that the deception operated to bring about the obtaining of the property. It is not necessary that deception be the sole means of obtaining the property.” CP 37; accord RCW 9A.56.010(4). “Deception occurs when an actor knowingly creates or confirms another’s false impression which the actor knows to be false or fails to correct another’s impression which the actor previously has created or confirmed or promises performance which the actor does not intend to perform or knows will not be performed.” CP 38; accord RCW 9A.56.010(5)(a), (b), (e).

During closing, the State alleged the deception was Ms. Allen’s statement that the money would be used for a deposit on a building and for outreach purposes. 1/8/15RP 41-42. The State alleged another deception was Ms. Allen’s representation that she was a successful recording artist. 1/8/15RP 42. Last, the State also theorized that Ms. Allen deceived Ms.

Hughes as to how well she knew Pastor Manaway and his family.

1/8/15RP 42-43.

The State was required to prove not only deception, but that Ms. Hughes would not have turned over her money to Ms. Allen absent the deception. See State v. Renhard, 71 Wn.2d 670, 672, 430 P.2d 557 (1967) (“[T]he state failed to prove a vital element of its case, namely that the checks would not have been issued had the false representations not been made.”). In Renhard, the defendant, who was a president of a corporation, obtained two checks from the corporation, telling the assistant secretary, who was required to sign issued checks, that the checks were to pay for equipment for the corporation. Id. at 670-71. The defendant, however, used the checks for his personal use. Id. at 71. Because there was no evidence that the assistant secretary would have refused to sign the checks, our Supreme Court held the evidence was insufficient to prove the defendant had obtained the funds by color or aid of deception. Id. at 672, 674. By itself, the misrepresentation was inadequate:

The fact that the appellant misrepresented the use to which he intended to put the funds, or changed his mind after he had obtained the checks and failed to advise the secretary of this fact, while it was not the most commendable behavior, still was not criminal in and of itself. Unless the representations were calculated to and did induce the corporation, acting through an agent authorized to act on its behalf, to part with its funds when it would not have done so had the true intent been exposed, there was no larceny.

And there was no evidence that this was the case. It may be conjectured that it was, but conjecture will not support a verdict.

Id. at 674.

While the circumstances are different, the same reasoning applies. Even assuming Ms. Allen made the representations recounted by the State during closing, the evidence did not prove that Ms. Hughes relied on these representations when she gave Ms. Allen her money. Ms. Hughes' testimony was that she gave the money to Ms. Allen because she believed Ms. Allen was God's prophet, that God's prophet was telling her she owed God money for past tithes, and that she could fulfill God's command by giving this money to Ms. Allen and her ministry. 1/5/15RP 50, 53-54, 62-63, 103, 112, 122, 133. Ms. Hughes made this evident in her testimony on why she gave Ms. Allen her money:

Q. . . . Those are very large checks. Why would you give those large checks to Ms. Allen?

A. Well, she told me that she was a prophet and that God told her that I wasn't paying my tithes properly, because you're supposed to pay 10 percent of your income. And so I did pay donations, but she said that God told her that they weren't enough, and that I wasn't trusting him properly, and that I needed to go back and review every single amount of money that I owed the Lord for the past 10 years.

And so she said, "Go home and write out, figure out exactly how much you owe God, 10 percent of your income, over a 10-year period, and then to report it to her,

and tell her exactly how much that I owe the Lord, like write it out for Sandra and give it to her. And then she was going to pray and see if I was telling the truth. And so then she prayed and she said that there was more money that I owed and that God told her it was such-and-such amount of money that I owed him in back tithing.

1/5/15RP 50.

Q. Why did you give her the money?

A. I gave her the money because she said she was a pastor. At this particular point, we had established a pastoral kind of follower-type person. She had presented herself as a pastor and a friend. And so she was like a confidante to me. And she told me that God said I needed to repay my tithe money for 10 years and that, when we were praying about it and asking where to give it, she said I should give it to her ministry because she was going to start an outreach center for homeless people in Federal Way and she needed a deposit on the building. And she was going to use the money to help people in the city of Federal Way.

1/5/15RP 53-54.

Q. What did you -- and we're just talking about this last check, this one for 21,500. So after you gave those two checks, this last check, why did you give that check to her that last time?

A. I need to explain.

Q. Sure.

A. Okay. She had told me that I owed God 10 years of tithe money over our --

Q. And was that the 55,000?

A. It was, like, I don't know, \$70,000 or \$80,000.

And then at one point, she said I owed 10 years of tithes. And then she said she made a mistake and God said I actually needed to pay her 12 years of tithing because -- I don't know. She would change her mind. And so when I tried to say, "Well, how come God is not pleased with every time I try to obey him? Then he changes the bar and seems to, like, you know, keep changing his plan," then she would just snap at me and say, "Obey the prophet," and get mad at me.

But first, the purpose of giving her the money was that she said I owed the Lord 10 years of tithing and then she said, no, it was 12 years of tithing. And then she said I owed now on the net, on whatever the more is, the gross or the net, whichever the one is before taxes. She said I owe the money before taxes, not after. So after I gave her all this money, she said, "That's not enough because you didn't do it on the net," whichever the one is where you take money out or there's no money taken out.

Does that make sense? I'm sorry. I'm getting nervous. So it was tithe money. And so I owed God the tithe money. And in order to pay God, God is not in a physical body walking on the earth, so we give to the church. And she established herself as a pastor, established herself as setting up a ministry, and established herself as having a particular ministry purpose that is near and dear to my heart. And so that's the reason the money went to her. And it was a large amount of money.

1/5/15RP 62-64.

Q. . . . And the reason that you gave \$55,000 on State's Exhibit 28 and the reason why you gave the \$21,000 in credit card advances -- why was that?

A. Because she said she was a pastor who was establishing a ministry in Federal Way and she was going to open a ministry center.

1/5/15RP 103.

Q. Okay. So in here, there's no mention of tithes being paid. Correct?

A. She can -- the money that I was giving her for her ministry was my tithe that she told me that I owed God. And she said give it to her ministry to start her ministry. And that's where God wanted me to put my money, in her ministry.

1/5/15RP 112.

Q. And did you tell her, "No. That money's not for a car. It's for the ministry"?

A. I don't remember what I told her about that particular money. I just wanted to pay my tithe to God and be done with how much I owed that particular situation. She told me I owed God.

1/5/15RP 122.

Q. . . . And I just want to make sure we're clear. Why did you give her that money?

A. Because I believed with all truth and honesty she was going to start a ministry.

1/5/15RP 133.

Hence, Ms. Hughes did not testify that the identified representations by the State induced her to give the money to Ms. Allen. Rather she gave the money because she believed God commanded it and that she had to follow God. In other words, the record does not show that Hughes would not have given the money to Ms. Allen absent the purported deceptions. No reasonable trier-of-fact could find otherwise.

Thus, following Renhard, this Court should conclude the evidence was insufficient. Renhard, 71 Wn.2d at 674.

4. Insufficient evidence on both alternative means requires reversal and dismissal.

Because there was insufficient evidence to prove that Ms. Allen exerted unauthorized control over the funds provided by Ms. Hughes or that Ms. Allen obtained the funds by color or aid of deception, the theft conviction should be reversed and dismissed with prejudice. Burks v. United States, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

5. Insufficient evidence as to only one of the two means requires reversal and remand for a new trial.

Criminal defendants in Washington have a right to a unanimous jury verdict. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). If the evidence is insufficient to prove whether the defendant committed the offense by any one of the means submitted to the jury, and it cannot be determined that the jury was unanimous as to the means for which there was sufficient evidence, the conviction must be reversed. Ortega-Martinez, 124 Wn.2d at 708; State v. Garcia, 179 Wn.2d 828, 843-44, 318 P.3d 266 (2014).

Here, the jury was only given a general verdict form. CP 45. Further, the jury was instructed that it did not need to be unanimous as to the alternative means. CP 34. Thus, if this Court concludes the evidence

was insufficient as to either alternative means, then the Court should reverse the conviction and remand for a new trial solely on the alternative for which there was sufficient evidence. Joy, 121 Wn.2d at 345-46 (remanding two theft convictions for retrial on theft by deception theory because sufficient evidence did not support alternative means of theft by embezzlement).

F. CONCLUSION

Because she believed God commanded it, Ms. Hughes donated money to Ms. Allen and her ministry. No deception induced Ms. Hughes to turn over her money. There was no partnership agreement between Ms. Allen and Ms. Hughes, and even assuming there was one, the agreement did not limit Ms. Allen's use of the funds. Accordingly, because the evidence was insufficient to prove theft, this Court should reverse the conviction and order it dismissed.

DATED this 16th day of October, 2015.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

Appendix

June 20th 2012

Receipt of Checks donated for outreach work, ministry building, church ministries, and music publications, and helps.

This is to confirm that I Pastor Sandra Allen, received a donation of funds from Elizabeth Hughes for the outreach work and for needy and Federal, 3way Outreach Ministries to help the indigent and cry needy people.

Elizabeth Hughes donated these funds freely to the ministry to help the poor and the homeless. Funds were received on June 20th 2012, 1:30 p.m.

Elizabeth willingly donated these proceeds to help support this work and to help feed the needy. Amount \$55,330.71
Pastor Sandra Allen

SANDRA ALLEN

Elizabeth Hughes 6/20/12

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 73046-1-I
v.)	
)	
SANDRA ALLEN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
<input checked="" type="checkbox"/> SANDRA ALLEN 2400 62 ND AVE E #C FIFE, WA 98424	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF OCTOBER, 2015.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710