42519-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

State of Washington
Respondent

v.

CATHERINE ANNE BETTS
Appellant

42519-0-II

On Appeal from the Superior Court of Clallam County
Superior Court Cause number 10-1-00121-1

The Honorable S. Brooke Taylor

BRIEF OF APPELLANT

Jordan B. McCabe, WSBA No. 27211
Attorney for Appellant, Catherine A. Betts

McCABE LAW OFFICE
PO Box 46668, Seattle, WA 98146
206-453-5604▪mccabejordanb@gmail.com

CONTENTS

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

I. AUTHORITIES CITED

Washington Cases

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Washington Statutes, Regulations & Court Rules

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Federal Cases

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Other States' Cases

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Constitutional Provisions

Treatises and Misc.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. By denying a change of venue, the court violated Appellant's rights under the Fifth, Sixth and Fourteenth Amendments and Wash. Const. art. 1, §§ 3 and 22 to a fair trial by jury that was not composed entirely of victims of the offenses with which she was charged.

2. The court violated the Fifth and Fourteenth Amendments by admitting statements by Appellant that were obtained in circumstances that were inherently coercive.

3. Appellant was convicted of filing fraudulent tax returns based on insufficient evidence in violation of the Sixth Amendment and Const. Art. 1, § 22.

4. The trial court's instruction on the elements of filing a fraudulent tax return relieved the State of its burden to prove every element beyond a reasonable doubt and violated the Sixth Amendment and Const. Art. 1, § 22.

5. The erroneous fraudulent tax return instruction constituted a judicial comment on the evidence in violation of the Sixth Amendment and Wash. Const. Art. 1, § 22.

6. The trial court erroneously allowed the State to aggregate multiple alleged thefts into a single first degree theft count without regard to the statute's plain language limiting aggregation to alleged third degree thefts, thus permitting Appellant to be convicted of first degree theft on insufficient evidence contrary to the Sixth Amendment and Const. Art. 1, § 22.

7. Appellant was convicted of first degree theft on evidence that was insufficient to prove that any theft occurred.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

8. The evidence was insufficient to link Appellant to the alleged offenses.

9. The State's only evidence of money laundering consisted of triple hearsay that was inadmissible and also violated the Confrontation Clauses of the Sixth Amendment and Wash. Const. Art. 1, § 22.

10. Appellant's convictions for both theft and money laundering violated the Double Jeopardy clauses of the Sixth Amendment and Const. Art. 1. § 22.

11. The prosecutor committed reversible misconduct.

12. The sentencing court penalized Appellant for exercising her trial rights under the Sixth and Fourteenth Amendments and Const. Art. 1, § 22.

B. **Issues Pertaining to Assignments of Error**

1. Was it possible for Appellant to receive an impartial jury in Clallam County?

2. Were Appellant's statements to supervisors inherently coerced under the *Garrity* doctrine?[1]

3. Under the plain language of RCW 82.32.290(2)(a)(iii) was the evidence insufficient to prove Appellant filed a fraudulent tax return?

4. Did the jury instruction on filing a false return relieve the State of its burden by substituting undisputed extraneous elements for an essential element the State could not prove?

5. Did the judge comment on the evidence by presenting alleged facts as law in the jury instructions?

---

[1] *Garrity v. New Jersey*, 385 U.S. 493, 496, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967).

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

6. Did the court erroneously permit the State to aggregate alleged offenses for first degree theft?

7. Was the admissible evidence insufficient to prove theft in any degree?

8. Was the evidence insufficient to link Appellant to any alleged thefts?

9. Was the money laundering evidence inadmissible both under the hearsay rules and the Confrontation Clauses of the Sixth Amendment and art 1, § 22?

10. Did the multiple convictions for both theft and money laundering violate Double Jeopardy?

11. Did the prosecutor commit reversible misconduct by inviting Appellant to admit guilt during trial so as to receive a more lenient sentence?

12. Did the sentencing court penalize Appellant for not admitting guilt but exercising her trial rights?

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

III. SUMMARY OF THE CASE

Appellant, Catherine Anne Betts, asks the Court to reverse her convictions for one count of first degree theft, one count of money laundering, and 19 counts of filing a fraudulent tax return.

Ms. Betts challenges the sufficiency of the State's evidence to prove the offenses charged, and claims other due process violations denied her a fair trial.

IV. STATEMENT OF THE CASE

Appellant, Catherine Anne Betts, worked in the Clallam County Treasurer's Office from 2001 to 2009. RP 1112. Beginning in 2003, she was the cashier. RP 1112-13. One of the functions of the Treasurer's Office was to collect Real Estate Excise Taxes, referred to as REET, payable by the seller whenever real estate was sold. RP 1113.

The tax payer would fill out an affidavit and bring it, with the deed and a check or cash in the amount of tax due, to the counter at the Treasurer's Office. There, one of six employees would stamp a number on the affidavit, using a machine that was supposed to dispense consecutive numbers. RP 1114-15. "Any number" of people in the office accepted payments and put them in the cashier's box. RP 692. Likewise,

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

anyone in the office could have received an affidavit and stamped a number on it. RP 739, 747.

The numbering machine was highly unreliable. It frequently jammed and either skipped numbers or stamped two numbers. RP 682, 698, 750, 1115. Management were unaware of the extent of this problem and were unconcerned about it. RP 796. 798.

The affidavit number was noted on the deed, which the tax payer then took to another county department to register. RP 682-83. Checks were deposited in a basket at the counter with an attached copy of the affidavit. Cash was placed in Betts's cash drawer. RP 1119-20. Betts rarely took payments herself; the other four staffers did. RP 1119.

Everyone in the office, including all five who worked the counter and received REET payments, used Betts's password when they handled a REET transaction or balanced the books in her absence. RP 726, 783, 784, 806. Moreover, Betts's spreadsheets were accessible to everyone in the office even without her password. RP 786. This included the master spreadsheet used to prepare the monthly reports that form the basis for Counts III-XXI. RP 1190.

At the end of each day, Ms. Betts balanced the cash and checks received with the total amounts on the affidavits and recorded each REET

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

transaction and the total for the day on an EXCEL[2] spreadsheet. RP 1130. She also noted the daily total on a different spreadsheet, along with the daily totals for all sources of revenue handled by the Treasurer's Office.

The Treasurer's Accountant, Anne Stallard, used this master spreadsheet to prepare monthly reports, including a monthly REET report that was supposed to be sent to the Department of Revenue, along with the tax collected. RP 778. The State offered no evidence that the reports underlying the 19 false reporting counts were ever filed. RP 778-79, 802. A signature on the report was supposed to indicate that the report was in its final form and was filed. RP 780. All but five of the reports were unsigned, however. Ex. 1-19; RP 721, 795-96. There was no other mark on the face of any monthly report from which it could be discerned that it was ever mailed. RP 778-79, 802.

The Treasurer's Office handled anywhere from a few hundred to hundreds of thousands to several million dollars in cash and checks every day. RP 677. It was not unusual to process up to $100,000.00 in cash in a single day. RP 756. Yet Ms. Stallard had never received any training as a supervisor, nor had anyone at the Treasurer's Office issued her guidelines for overseeing the handling of large amounts of cash. RP 783. Stallard was supposed to exercise some oversight in the course of preparing the

[2] A widely used copyrighted spreadsheet program.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

monthly REET report. RP 778. But Stallard never looked at Betts's daily spreadsheets. Instead, she had instructed Betts to transfer her daily REET totals to the master spreadsheet and total them up so that Stallard could simply transfer the totals into the Dept. of Revenue report. RP 751; 796. Stallard testified that she could not have noticed any skipped row numbers because the row-number column from the daily REET spreadsheet did not appear on the monthly master print-out that she was working with. RP 789. In other words, the cashiers, including Betts, were effectively unsupervised. RP 777-78.

Clallam County's elected Treasurer, Judy Scott, believed Ms. Stallard was overseeing the cashiers' work in general and Betts's in particular. RP 718, 774. Chief Deputy Treasurer Teresa Marchi also thought Stallard was Betts's supervisor. RP 809.[3] Stallard, however, was unaware that she had any oversight responsibility. RP 86, 774. Accordingly, the daily REET spreadsheet entries were never checked. RP 742, 776, 788.

At lunch time on May 19, 2009, Betts still had not obtained a daily balance from the previous day. RP 1137. This was highly unusual. RP 75, 104, 117. While Ms. Betts was away at lunch, Ms. Stallard reviewed Betts's work and discovered two things. First, a $300 error in an entry in

[3] The evidence at the suppression hearing was that Stallard was Betts's supervisor. RP 115.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

the check book explained the balancing problem. Second, Stallard found an affidavit for an excise tax payment of $877.[4] RP 76-77, 130, 1140. Another employee found two affidavits stamped with the same number. RP 104. When Betts returned from lunch, Stallard asked her about the $877 check that should have been attached to the affidavit. RP 130, 1141.

Betts told Stallard the check might be in the County Auditor's office and asked Stallard to accompany her down the hall to look for it. RP 78. Betts stopped outside the auditor's office and started crying. Stallard asked her, "What have you done?" RP 78, 136. At trial, Stallard said she merely inquired what was wrong when Betts started crying. RP 134, 640. But then she consulted her notes to be sure she got the quote right. She then repeated that her question to Betts was: "What have you done?" RP 763. Betts told Stallard about stealing the $877 that had appeared in her cash drawer with no paperwork. RP 79. 81, 669. Stallard suspected criminal behavior and assumed Betts had stolen money even before she asked her about it and elicited the confession. RP 93, 157.

Ashamed, Betts asked Stallard to let her leave immediately, and asked Stallard to retrieve her purse from the Treasurer's Office. RP 81. 94, 136. Stallard refused. RP 137. Stallard told Betts she could not leave, but must immediately speak with Treasurer Scott, the supervisor of both

[4] The exact amount was either $877.20 or $877.60. RP 130, 760.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Betts and Stallard. RP 81, 94, 136. Stallard spent 5-10 minutes insisting that Betts explain to the Treasurer, as required by county policy. RP 94-95. The policy was admitted as Exhibit 1. RP 101.

Finally, Stallard took Betts to Scott's office where she was questioned by the two supervisors. RP 82, 95. Judy Scott also asked Betts what had happened. Betts answered because Stallard and Scott were her supervisors and she knew she could be fired if she did not. RP 138, 140, 146-48.

Stallard said that Betts was not allowed to leave because it was necessary to notify the proper authorities. She later testified that she was also concerned because Betts had said she wanted to kill herself. RP 83.

Scott left Stallard to guard Betts and went in search of Personnel Director Marge Upham. CP 97, 109. Stallard again prevented Betts from leaving. RP 95. Scott also voiced concerns that Betts might bolt and try to flee. RP 109. Both Stallard and Scott maintained that their primary concern was for Betts's safety. RP 99, 109. Regardless, Ms. Scott was quite clear that Ms. Betts was not free to leave. RP 119-20, 153. And, Stallard admitted she was standing in front of the door but denied blocking it. RP 121.

Scott took Betts by the arm and walked her to Upham's office. RP 124,141. There, Betts was questioned by Scott, Ms. Upham, and another

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

personnel officer, Iva Burk. RP 125. All three questioned Betts. RP 142. Following the interview with Upham, Scott and Burk, Scott decided that Betts should talk to a lawyer. Betts did not have counsel, so Scott contacted a lawyer for her. RP 110. Scott accompanied Betts to the lawyer's office and remained there until the lawyer told her to leave. RP 126, 144.

Meanwhile, Ms. Stallard examined some daily REET spreadsheets and discovered a series of hidden rows. RP 770. It is a simple matter to hide a row in an EXCEL spreadsheet that contains a negative dollar amount. EXCEL's automatic adding feature will subtract the hidden entry and display a total that appears to balance with the receipts. The only indication of the hidden row is a skipped number in the row number column on the far left of the entry. RP 773.

The State produced no evidence that the monthly REET reports were ever mailed to the Department of Revenue. Dating and signing a report was supposed to indicate that it was in final form and had been mailed. RP 681. But, for the 29-month period ending in May, 2009, the State was able to produce only 19 monthly REET reports that were dated. RP 679. Of these, only five were signed. Ex. 1-19. RP 721. There was no mark on the face of any monthly report from which it could be

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

discerned that it was ever mailed. RP 778-79, 802. These 19 REET reports are the basis for the 19 counts of filing a false tax return. RP 1190.

James E. Brittain, Director of Special Investigations for the State Auditor's Office performed a forensic audit of the REET records from 2004 to 2009. RP 828. Mr. Brittain claimed to have discovered shortfalls totaling $617,000. RP 658.

Detective Jason Viada of the Port Angeles Police Department also did an investigation. RP 1017. He obtained warrants for Betts's accounts with two banks, Bank of America and Columbia Bank (American Marine). RP 1020. Det. Viada prepared summaries of the information he extracted from these bank accounts. RP 1025. He passed his summaries along to the Attorney General's office, where an anonymous functionary prepared summaries of Viada's summaries. RP 1024. The evidence offered in court was the A.G.'s summaries. The trial court admitted these over a defense hearsay objection. RP 1026.

Viada found what he considered excessive cash deposits over and above Betts's County earnings. RP 1027-28. Betts explained that she and her husband used her earnings for household expenses and deposited his earnings (around $40,000.00 per year) into savings. RP 1148. Mr. Betts then would give his wife cash as she needed it, usually around $1,000 per month, which she deposited. RP 1153. Ms. Betts had also deposited

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

almost $9,000 after cashing out an IRA. RP 1146. The couple had refinanced their house a couple of times. RP 1154-55. For some years, Ms. Betts had additional income from a second job. RP 1029. And she frequently deposited cash advances from credit card. RP 1150.

The State charged Betts with first degree theft for the aggregated shortages. Count I; money laundering by means of depositing stolen funds into her personal bank account. Count II; and 19 counts of filing a false tax return in violation of RCW 82. Counts III-XXI, based on monthly Department of Revenue reports that Stallard prepared between 2007 and 2009. RP 1190.

At the outset, the defense requested a change of venue. RP 63. The trial court said it would deny the motion, believing it would be able to seat an impartial jury. RP 65. The case remained in Clallam County.

Betts moved to suppress her statements to Stallard and Scott because her interviews with them were inherently coercive. RP 69-71. This was due to a County personnel policy that required employees to fully cooperate with inquiries into suspected wrong-doing and to answer all questions from supervisors on penalty of termination. *Id.*; Ex. 1. The court denied the motion, and admitted the statements. RP 167.

During the trial, defense counsel challenged basing the first-degree theft count on an aggregation of amounts exceeding those constituting

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

third degree theft. Counsel cited to the statutory definition of "value" whereby transactions that individually would constitute third degree theft may be aggregated in one count in determining degree. RCW 9A.56.010(21)(c).[5] Counsel argued that only amounts less than $250 could be aggregated into a single count of first degree theft. RP 924-25; RP 961. The State thought this applied solely to organized retail thefts. RP 962. The court declined to disturb the first-degree theft charge.

Betts was tried by a Clallam County jury and convicted on all counts. CP 19-20.

The number of counts boosted her offender score from 0 to 9. CP 21. Accordingly, the standard range was 43-57 months on count I and 0-12 months on counts II – XXI. CP 21. Betts received an exceptional sentence of 144 months: the statutory maximum 120 months on Count I; a top-of-the-range 12 months on Count II, consecutive to Count I and concurrent with 12-month sentences on Counts III–XXI. CP 21-22.

V. ARGUMENT

1. THE TRIAL COURT DENIED BETTS A FAIR TRIAL BY AN IMPARTIAL JURY BY DENYING A CHANGE OF VENUE.

Washington courts have reviewed the decision on a motion to change venue for abuse of discretion. *Id.* But the question presented is

[5] Former RCW 9A.56.010(18)(c). RP 925.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

whether the court honored the "time-honored principles" of Due Process enshrined in the Fourteenth Amendment. *Estes v. Texas*, 381 U.S. 532, 535, 85 S. Ct. 1628, 14 L. Ed.2d 543 (1965). The right to trial by an impartial jury is guaranteed by the Sixth Amendment and article 1, section 22 of the state constitution. The right to a fair trial also is guaranteed by the due process clause of the Fifth and Fourteenth Amendments and Wash. Const. art. 1, § 3. *State v. Crudup*, 11 Wn. App. 583, 586-587, 524 P.2d 479, *review denied*, 84 Wn.2d 1012 (1974). As such, the issue is properly before this court even if inartfully presented by defense counel below. RAP 2.5(a)(3).

In criminal proceedings, it is the duty of the court to ensure that the defendant can receive a fair and impartial trial. *State v. Hillman*, 42 Wash. 615, 619, 85 P. 63 (1906). Therefore, a motion to change venue must be granted where the probability of prejudice threatens the right to an impartial jury. *State v. Gilcrist*, 91 Wn.2d 603, 609, 590 P.2d 809 (1979).

Where the likely source of bias is accusatory pretrial publicity, it is non improper for the trial court to postpone its decision on a motion for change of venue until after the voir dire of prospective jurors, as the judge did here. *Crudup*, 11 Wn. App. at 589. In Betts's case, however, pretrial publicity was the least of the venue problems. Rather, a public employee was accused of pilfering over half a million dollars from the purse of the

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

county's tax paying public. Without further inquiry, it was glaringly obvious that a Clallam County jury pool would consist entirely of the direct victims of the alleged crimes. Accordingly, it was not possible for the court to guarantee Betts's due process right to a fair trial by an unbiased jury without granting Betts's motion to change venue.

Due process requires the granting of a motion for change of venue when a probability of prejudice is shown; actual prejudice need not be shown. *State v. Stiltner*, 80 Wn.2d 47, 491 P.2d 1043 (1971). Where the circumstances involve a probability of prejudice, denying a change of venue is deemed inherently lacking in due process. *Id.*

The decision in *Hillman* is illustrative. In that case, as in *Betts*, a large section of the public had been victimized by the alleged offenses. *Hillman*, 42 Wash. at 618-19. Also as in *Betts*, most of the jury venire had been exposed to accusatory pretrial publicity. As did the judge here, the *Hillman* court seated only jurors who believed they could rise above the publicity and render an unbiased decision. *Id.* Nevertheless, the reviewing court reversed the convictions, concluding that the defendants could not receive a fair trial in King county and it was reversible error to deny a change of venue. *Hillman*, 42 Wash. at 620.

The Selection of Betts's Jury Focused Solely on Pretrial Publicity to the Exclusion of the Impact of the Alleged Crimes on the Entire Community.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

The court failed to notice, and defense counsel did not clearly articulate the presence of the 500-pound gorilla in the courtroom in the form of a jury pool consisting entirely of Clallam County taxpayers, which is to say, victims of the alleged crime. Consequently, not a single juror was asked whether the fact he or she was footing the bill for the alleged losses would undermine the presumption of innocence and make it difficult for the juror to give Betts the benefit of the doubt regarding weak links in the State's chain of evidence.

In discussing the impending jury selection procedure, defense counsel recognized that a person whose tax payment was misappropriated could not sit on the jury. RP 202. But counsel failed to argue that all the citizens of Clallam County were equally victims of the alleged misappropriation, not just those who engaged in specific real estate transactions during the relevant time.

2. BETTS'S STATEMENTS TO SUPERVISORS WERE COERCED UNDER THE *GARRITY* DOCRRINE.

In *Garrity v. State of N.J.*, 385 U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967), several police officers were under investigation for alleged criminal conduct in the course of their employment. During questioning by their supervisors, they were advised that they had the right not to

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

answer. They were warned, however, that refusing to answer would result in losing their jobs and benefits under a New Jersey statute whereby employment and pension rights were forfeit for withholding information about suspected misconduct on the ground of self-incrimination.

The officers chose to confess. The Supreme Court held that the forfeiture policy constituted inherent coercion, and the confessions were involuntary. Accordingly, the Fourteenth Amendment prohibited the introduction of the statements in subsequent criminal prosecutions in state court. *Garrity*, 385 U.S. at 496.

> The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession ... can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn v. State of Alabama*, 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L. Ed. 2d 242. Subtle pressures (*Leyra v. Denno*, 347 U.S. 556, 74 S. Ct. 716, 98 L. Ed. 948; *Haynes v. State of Washington*, 373 U.S. 503, 83 S. Ct. 1336, 10 L. Ed. 2d 513) may be as telling as coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' *Lisenba v. People of State of California*, 314 U.S. 219, 241, 62 S. Ct. 280, 292, 86 L. Ed. 166.

Garrity, 385 U.S. at 496, citing *Chambers v. State of Florida*, 309 U.S. 227, 236, 60 S. Ct. 472, 84 L. Ed. 716 (1940). Due process as guaranteed by the Fourteenth Amendment and Fifth Amendments guarantees procedural standards that are adequate "to protect, at all times, people

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

charged with or suspected of crime by those holding positions of power and authority." *Chambers*, 309 U.S. at 237. "[A]s assurance against ancient evils, our country, in order to preserve 'the blessings of liberty', wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed." *Id.*

Forcing a person to choose between forfeiting her job and incriminating herself is a form of compulsion that violates both the Fifth Amendment and the Fourth Amendment. *Garrity*, at 497. "The option to lose [one's] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent." *Id.* Such coercion is just as likely as the interrogation practices prohibited in *Miranda*[6] 'to exert such pressure upon an individual as to disable him from making a free and rational choice.' *Garrity* at 497. Therefore, statements infected by the coercion inherent in such schemes "cannot be sustained as voluntary under our prior decisions." *Garrity* at 498. "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other." *Garrity* at 498.

"There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price." *Garrity*, at 500. "[T]he

[6] *Miranda v. Arizona*, 384 U.S. 436, 464-65, 86 S. Ct. 1602,16 L. Ed. 2d 694 (1966).

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office" is one of them. *Garrity*, at 500. This protection "extends to all, whether they are policemen or other members of our body politic." *Garrity*, at 500.

Here, Due Process under *Garrity* required Betts's supervisors to postpone any questions likely to elicit an incriminating response until a hearing. The County's Investigation and Discipline Policy 235 not only prohibited Stallard and Scott from questioning Betts outside of a hearing, but also required them to inform Betts of her right to have a labor representative present before any questioning. Ex. 1, at 6. Ms. Scott did not know this; she thought the County's investigation protocol was to forcibly detain the target employee and report the matter first to the personnel department, then to the police. RP 712-13.

According to the Countyt's Policy 235, a complaint of misconduct made by a fellow employee should be directed to the reporting employee's supervisor, the County Official, or the Director. § 10.2, Ex. 1, at 6. Here, the reporting employee was Anne Stallard. She correctly reported to the County Official, Treasurer Judy Scott. Finding 21, CP 189.

Upon receiving Stallard's complaint, Policy 235 required Ms. Scott to confine her inquiry to obtaining as much information as possible from

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

the reporting employee, Stallard, including a written statement. § 10.4, Ex. 1 at 6. Only then was Scott authorized to initiate an investigation. § 10.5, Ex. 1 at 6. It was Ms. Scott's responsibility to ensure that county, department, and labor agreement procedures were adhered to and to coordinate proper investigative procedures. § 10.4, Ex. 1 at 6.

Once it became apparent that the complaint might "reasonably result in disciplinary action," Policy 235 required Scott, as the County Official, to notify the Director, thus triggering the Director's obligation to become involved "in the coordination of the investigative and disciplinary process and ensure that procedures regarding investigation and discipline are followed." Policy § 10.5, Ex. 1 at 6.

Dispositive here, Policy 235 mandated that Betts immediately "candidly volunteer" all information known to her that was relevant to the ongoing investigation, including any information tending to corroborate the complaint. § 10.7, Ex. 1 at 6. In other words, she was required to incriminate herself.

Under § 10.9, as soon as either Stallard or Scott formed a reasonable belief that the inquiry might lead to discipline, the interview should have ceased until Betts was so notified. ("At any stage of an interview when an investigator believes that facts may lead to discipline of a particular employee, that employee shall be so advised prior to

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

continuing the interview." This would have triggered Betts's right to have a labor representative present. If a reasonable request to include a labor representative had been refused, Betts could not have been disciplined based on information she disclosed after the refusal. § 10.9.

The policy is ambiguous as to precisely what the "investigative and disciplinary process" is, because the discussion of the initial interview merges with that of the disciplinary hearing. Regardless, however, § 10.8 requires the target employee to answer fully all questions a supervisor may ask and to cooperate with the internal investigation process. The employee's rights come into play "during any question period." *Id.* Disciplinary action ranged from verbal counseling to discharge. Policy 235 § .30, Ex. 1 at 9.

The Policy mandates that that merely refusing to answer questions subjects a County employee to disciplinary action, and erroneously states that, under *Garrity*, statements will be suppressed only if the employee was affirmatively ordered to answer. § 10.8. This misses the point of *Garrity*. It is the mere existence of a policy that subjects an employee to discipline for refusing to answer that constitutes the inherent coercion that renders the answers inadmissible. *Garrity*, 385 U.S. at 496.

In *Garrity*, moreover, the officers were advised that they need not say anything and that anything they did say could be used against them in

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

a criminal prosecution. *Garrity* at 504, Harlan, J., dissenting. Betts received no such advisement.

The trial court erred in admitting Betts's statements. Under *Garrity*, her statements were inherently coerced by the existence of the County Policy subjecting her to termination not merely for declining to answer questions but also if she did not immediately and "candidly volunteer" all information known to her. Reversal is required.

3. THE EVIDENCE WAS INSUFFICIENT TO PROVE FILING A FRAUDULENT TAX RETURN BECAUSE THAT OFFENSE CAN BE COMMITTED SOLELY BY A TAX PAYER, NOT BY A STATE AGENT.

The principles of due process require the State to prove beyond a reasonable doubt every essential element of a crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). To determine whether there is sufficient evidence to support a conviction, The Court views the evidence in the light most favorable to the prosecution and determines whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

This issue turns on the interpretation of the fraudulent tax return statute return statute, RCW 82.32.290 (2)(a)(iii). This Court interprets

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

criminal statutes de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

A court's "fundamental objective in construing a statute" is not to ensure than no wrongdoer goes unpunished, but "to ascertain and carry out the legislature's intent." *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). If a statute's plain language is subject to only one interpretation, then the inquiry ends. *Id.*; *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Where statutory language is unambiguous, the Court accepts that the legislature means exactly what it says. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Courts discern a statute's plain meaning from the context of the statute containing the disputed provision, as well as related provisions, and the statutory scheme as a whole. In a criminal prosecution, moreover, if the State brings charges under a statute that is ambiguous, then the Rule of Lenity requires the Court to interpret the statute in a manner that gives the accused the benefit of the doubt. And a criminal statute must receive "a literal and strict interpretation." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The Court will not "add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *Delgado*, 148 Wn.2d at 727.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Here, the State failed to prove that Betts committed the essential elements of RCW 82.32.290(2)(a)(iii), the fraudulent return statute. The statute provides that it is unlawful to make "any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or part thereof." RCW 82.32.290(2)(a)(iii).

The State does not allege that Betts filed anything. Rather, the State alleges that RCW 82.32.290 was violated when Anne Stallard filed with the Department of Revenue monthly reports containing false information regarding the proceeds of the REET tax. Betts is charged solely under the accomplice liability statute, RCW 9A.08.020.

A person is legally accountable for the conduct of another person when: Acting with the kind of culpability that is sufficient for the commission of the crime, he or she causes an innocent or irresponsible person to engage in such conduct. RCW 9A.08.020(2)(a). Or she is made accountable for the conduct of such other person by this title or by the law defining the crime. RCW 9A.08.020(2)(b). Or she is an accomplice of such other person in the commission of the crime. RCW 9A.08.020(2)(c).

Therefore, the State was required to prove:

- that Anne Stallard violated RCW 82.32.290(a)(iii) by filing a false tax return; and —
- that Stallard did so with the intent to defraud the state or evade payment of tax. And —

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

- that Betts was legally accountable for Stallard's conduct, because:
    - Stallard was an innocent or irresponsible person, and —
        - Betts caused Stallard to file the erroneous reports; or
    - Betts acted as Stallard's accomplice.

The State failed to establish any of these essential elements.

Stallard Did Not Violate RCW 82.32.290(2)(a)(iii). First, the documents filed monthly by Stallard were not tax returns. They were reports by the County Treasurer of the proceeds of tax returns filed by tax payers.

The statute does not define the term "return." Therefore, we assign the term its standard dictionary meaning. *State v. Sullivan*, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). Accordingly, a "tax return" is "the form on which an individual, corporation, or other entity reports income, deductions, and exemptions and calculates their tax liability. Black's Law Dictionary 6th ed., page 1462. Under the REET statutes, the sole entity with a tax liability is the seller of real estate. RCW 82.45.060 creates a state tax on the sale of property: There is imposed an excise tax upon each sale of real property at the rate of one and twenty-eight one-hundredths percent of the selling price. The statute goes on to provide detailed instructions on how the proceeds of the tax is to be distributed. Likewise,

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

RCW 82.46.010 creates a County excise tax on real estate sales: The legislative authority of any county or any city may impose an excise tax on each sale of real property ... at a rate not exceeding one-quarter of one percent of the selling price. RCW 82.46.010(2)(a).

Thus, real estate excise taxes are the obligation of the seller. RCW 82.45.080(1); RCW 82.46.050. *See also* WAC 458.61A.100(2)(a) (the taxes imposed are due at the time the sale occurs, are the obligation of the seller, and, in most instances, are collected by the county upon presentation of the documents of sale for recording in the public records.)

Betts was not a seller. RCW 82.45.020. Once the seller pays the tax, the funds are no longer called taxes. They are called "proceeds" of the tax statute. RCW 82.45.180(1)(a)(iii) ("Proceeds" means moneys collected and receipted by the county from the taxes imposed by this chapter...". Likewise, funds paid over by the County Treasurer to the State Treasurer are not called taxes, but also are "proceeds" of the tax paid by the tax-payer. RCW 82.45.180(1)(a)(iii).

The taxes levied under these provisions of chapters 82.45 RCW and 82.46 RCW are the **obligation of the seller**. RCW 82.45.050 and RCW 82.46.060. Real estate excise taxes are **paid to and collected by the treasurer** of the county within which the real property sold is located.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

RCW 82.46.060. That is, taxes are **not paid by and collected from** the treasure.

Moreover, if the criminal statute could be deemed ambiguous, the Rule of Lenity requires the Court to construe the statute in favor of the defendant, absent legislative intent to the contrary. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

Thus, by the plain language of the statutes, the County Treasurer and other agents of the County do not pay excise taxes or file tax returns. This statutory language is not ambiguous. And even if it were, the Rule of Lenity would require an interpretation favorable to Betts. *Jacobs*, 154 Wn.2d at 601.

Stallard Did Not Intend to Defraud. An argument might be made that Stallard was negligent, but the State neither alleged nor proved that she deliberately falsified reports with the intention of deceiving the Department of Revenue or depriving the State or the County of tax proceeds.

Accordingly, because she neither filed a tax return nor did so with intent to defraud, Stallard did not commit the crime of filing a fraudulent

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

tax return as defined by RCW 82.32.290(2)(iii). Since no crime was committed, Ms. Betts cannot be found guilty of criminal complicity.[7]

Betts Was Not Legally Accountable for Stallard's Conduct.

Even if Stallard's conduct and intent had been criminal, the State did not prove the legal accountability element of complicity. Rather, the evidence established the opposite. As the Treasurer's Accountant and Betts's supervisor, Stallard was legally accountable for Betts's conduct. Stallard was by no means an "innocent or irresponsible person" as contemplated by the statute. Stallard was responsible for checking the accuracy of the daily totals she received from Betts before incorporating them into the monthly reports. Stallard was supposed to sign her name to the reports to provide assurance that she had done this. Stallard's signature was required precisely because, as the supervising accountant, she was legally accountable for the accuracy of the reported information.

Betts was simply a cashier. It was Stallard, not Betts, who had the prestigious title of Treasurer's Accountant and presumably was

---

[7] If a theft charge were deemed inadequate, larceny is a better fit: Every person who, with intent to deprive or defraud the owner thereof and having any property in h[er] possession, custody or control, as ...servant, agent, employee, or ... as a public officer, or a person authorized...to take or hold such possession, custody or control, or as a finder thereof, shall secrete, withhold or appropriate the same to his own use or to the use of any person other than the true owner or person entitled thereto, steals such property and is guilty of larceny. RCW 9.54.010(3).

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

compensated accordingly, reflecting the enhanced responsibility inherent in being legally accountable for information over her signature.

Betts Was Not Stallard's Accomplice. A person is another's accomplice if, knowing it will promote or facilitate the commission of the crime, she "solicits, commands, encourages, or requests such other person to commit it; or aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a)(i)&(ii).

As discussed above the State did not prove that Stallard committed a crime. Neither did the State prove that Betts "solicited, commanded, encouraged, or requested" Stallard to file false information.

First, once Betts had done her job by generating a spreadsheet, she had no further interest in the information or what Stallard did with it. Second, it was no part of Betts's job description to solicit, encourage, request or command Stallard to do anything. Third, Betts was entitled to presume that Stallard would do her own job and employ a supervisory protocol whereby it was at least possible to discover and eliminate false or inaccurate information. Moreover, it was at Stallard's instigation that Betts transferred the daily totals to a monthly spreadsheet in the first place to save Stallard the bother of reviewing the dailies. If Stallard had looked at a daily REET spreadsheet even occasionally, her expert accountant's eye might have detected skipped row numbers. Had she taken the trouble

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

to pull an occasional REET affidavit and compare the amount with that entered on the daily spreadsheet, she could not have avoided discovering anomolies. From Betts's subjective perspective, it was inconceivable that Stallard was not doing this. Accordingly, Betts cannot be held legally accountable for the inevitable consequences of Stallard's shoddy work habits and the general lack of oversight that pervaded the Treasurer's Office.

Where the State fails to produce sufficient evidence to prove the essential elements of the crime charged in the Information, the sole remedy is to dismiss with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) ("Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." Quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).)

The Court should reverse the convictions and dismiss the prosecution.

4. THE JURY INSTRUCTIONS ON FILING A FALSE TAX RETURN RELIEVED THE STATE OF ITS BURDEN OF PROVING THE ESSENTIAL ELEMENT OF FILING A RETURN.

Courts may not add extraneous language to a legislative enactment, even if it appears that language was inadvertently omitted. *State v. Taylor*, 162 Wn. App. 791, 799, 259 P.3d 289 (2011); *State v. S.M.H.*, 76 Wn.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

App. 550, 558-59, 887 P.2d 903 (1995). Moreover, the standard for clarity in jury instructions is higher than for statutes, because juries lack the skills to undertake statutory construction. *State v. LeFaber*, 128 Wn.2d 896, 902, 913 P.2d 369 (1996), *overruled on other grounds by State v. O'Hara*, 167 Wn.2d 91, 217 P.3d 756 (2009).

The statute, defines the fraudulent filing of a tax return as follows:

> It is unlawful for any person to make any false or fraudulent return or false statement in any return, with intent to defraud the state or evade the payment of any tax or part thereof.

RCW 82.32.290(2)(a)(iii). Instead, the Court gave Instruction No.20:

> A person commits the crime of filing a false or fraudulent tax return when they make **or cause to be made** a false statement on a return with intent to defraud the State and evade the payment of a tax or a part thereof.

This is wrong. To find a person guilty as a principal of filing a false return, the State must prove that the person actually filed a return. The statute contains no language that would suggest that the Legislature contemplated any sort of "causing to be made." But, with regard to the 19 false filing counts, the prosecutor conceded that Betts "did not really file those returns. They were filed by the office of the Clallam County Treasurer where she worked." Opening Statements, RP 655.

This issue was squarely before the trial court. RP 431-32.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Also, during jury selection, the court defined the offenses in Counts III-XXI as: making "a false or fraudulent return **or report, in this case monthly real estate excise tax reports**." RP 44. But the statute does not mention any sort of reports, let alone real estate tax reports. The statute targets the filing of false tax returns by tax payers, not theft by agents of the county.

The extraneous language added alternative means of committing the crime not found in the statute's unambiguous language. When statutory language is unambiguous, the Court may not look beyond that language to determine the legislative intent. "Plain language does not require construction." *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010).

Thus, before the trial even began, the court embedded in the minds of the jurors the belief that the Legislature did not distinguish between a tax return by a tax payer and an administrative report of monthly receipts by an accountant in the Treasurer's office. This denied Betts an unbiased jury and requires a new trial.

5. THE ERRONEOUS INSTRUCTIONS CONSTITUTED AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

By instructing the jurors that causing a false real estate excise tax report to be made is the same as filing a false tax return, the trial court

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

trespassed on the exclusive province of the jury and impermissibly commented on the evidence. This denied Betts's right to have the facts decided by her jury as guaranteed by the Sixth Amendment and Wash. Const. art. 1, §22.

"A judge is prohibited by article IV, section 16 of the state constitution from 'conveying to the jury his or her personal attitudes toward the merits of the case.'" *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006), quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The determination of whether a comment is prohibited depends upon the facts and circumstances of each case. *State v. Alger*, 31 Wn. App. 244, 249, 640 P.2d 44 (1982), quoting *State v. Painter*, 27 Wn. App. 708, 714, 620 P.2d 1001 (1980).

Here, the judge effectively intruded himself into the jury deliberations by instructing the jurors that the facts alleged by the State constituted the charged crime as a matter of law. But the jury was the sole arbiter of whether the facts alleged by the State constituted the elements of the offenses charged, a different offense, or no offense. By inserting the concept of causing to be made and expanding the definition of tax returns to include not merely reports, but REET reports, the judge violated Betts's right to a jury trial.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Judicial comments couched in jury instructions are presumed prejudicial. *Levy*, 156 Wn.2d at 726. The burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. *Id.* Here, the presumption of prejudice cannot be overcome.

The remedy is to reverse.

6. THE COURT ERRONEOUSLY INSTRUCTED THE JURY ON THE DEFINITION OF VALUE CONSTITUTING FIRST DEGREE THEFT.

A person is guilty of theft in the first degree if he or she commits theft of property or services that exceeds five thousand dollars in value. RCW 9A.56.030(1)(a). The legislature has defined value in this context:

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

RCW 9A.56.010(21)(c). Instead, the court gave Instruction No. 8:

> Whenever any series of transactions that constitutes theft is part of a common scheme or plan, then the sum of the value of all transactions shall be the value considered in determining the degree of theft involved. CP 84.

The defense correctly argued that the statute's plain language permits only amounts less than $250 to be aggregated into first degree

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

theft, because only amounts less than $250, when considered separately, would constitute theft in the third degree. RP 924-25; RP 961-62.[8]

Moreover, in construing a statute, this Court's inquiry ends with the plain languge, unless the language is ambiguous, because the legislature means exactly what it says. *Marohl*, 170 Wn.2d at 698. And the Court must give effect to all the statutory terms, so that none is rendered meaningless or superfluous. *Marohl*, 170 Wn.2d at 699.

Finally, if the statutory language is ambiguous, then the Court must interpret penal statutes strictly in favor of the defense. *Jacobs*, 154 Wn.2d at 601.

Here, the language of RCW 9A.56.010(21)(c) is plain. It says the State may aggregate thefts that singly would be third degree, whenever ***said*** thefts are part of a single criminal episode or common plan. "Said" means "aforementioned." Black's at 1336. The term must be given

---

[8] Division I opined in an unpublished opinion that this statute does not restrict aggregation to third degree thefts. *State v. Noble*, 54149-8-I (2005), Slip Op. at 2. But, even if the aggregation provisions of RCW 9A.56.010 were subject to interpretation, Division I got it wrong. *Noble* cites *State v. Barton*, 28 Wn. App. 690, 694, 626 P.2d 509 (1981), an earlier Division I decision permitting the State to aggretate second degree theft charges because the defendant was not charged under the aggregation statute, but under the first degree theft statute, RCW 9A.56.030. But RCW 9A.56.010 is a definition section. The State cannot convict a person of a definition. Regardless of the apparent degree, no theft suspect is charged under RCW 9A.56.010. *Barton*, morover, relies on dictum in an advisory opinion in *State v. Vining*, 2 Wn. App. 802, 808, 472 P.2d 564 (1974).

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

effect. Moreover, all mention of third degree is superfluous if the State can aggregate any series of thefts of whatever degree.

Despite having been put on notice of this flaw in the charges, the State never specified which alleged transactions it wished the jury to aggregate so as to find Betts guilty of first degree theft. Therefore, the evidence supporting the conviction was insufficient.

The remedy is to reverse and dismiss.

7. THE ADMISSIBLE EVIDENCE WAS NOT SUFFICIENT TO PROVE THEFT IN ANY DEGREE.

The evidence is not sufficient to support a conviction unless any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A sufficiency challenge admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas*, 150 Wn.2d at 874. Granting the truth of the State's evidence here, it was insufficient to support Betts's convictions.

First, the evidence of forensic accountant James Brittain was not sufficient to establish that $617,000 was misappropriated.

Brittain assumed from the outset that Ms. Betts was guilty of perpetrating various schemes to siphon off county funds. RP 839. He testified that he knew all along that Betts's 'cash tendered' transactions

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

were "being used for one of the schemes to misappropriate." The court ordered this stricken. RP 839. But Brittain set out to find evidence to prove his foregone conclusion of guilt. RP 840.[9]

Brittain identified four different "schemes": affidavits omitted from the daily REET report; affidavits with the amount altered and the lesser amount entered on the REET; altered affidavits with an even smaller amount entered on the REET; and hidden rows in the EXCEL spreadsheets. RP 847-48.

Brittain's strategy was to first make a list of the cash-tendered transaction amounts for each day. Then he would scrutinize the affidavits where available, and the daily spreadsheets for that day. If he identified an underreported amount, he would play with the dollar amounts from the list of cash-tendered transactions for up to 20 minutes, until he found a combination of two or three that added up to the underreported amount. RP 863, 866, 868-69, 951. The list could consist of a dozen or more numbers, each of which might be broken down to include several separate amounts. RP 952. Brittain was able to come up with a winning combination "a majority of the time." RP 950.

---

[9] Brittain based his testimony on several boxes of exhibits marked State's 34 to 39. RP 864. Pursuant to cumbersome exhibit provisions of RAP 9.8(b), Appellant will designate these if the Court so directs.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Brittain did not perceive any flaw in this protocol. But the State presented no evidence of the soundness of this method. Specifically, Brittain did not run any experimental controls to determine how often a comparably-sized list of random numbers could be manipulated to yield a combination totaling a particular predetermined number. RP 951. Brittain also included all unmatched shortages as alleged thefts. RP 951. Moreover, the Treasurer's office was audited at least yearly, and no irregularities were ever found. RP 953-54.[10] Specifically, "there wasn't anything that supported" Brittain's novel theory. RP 954, 955.

In addition to the source documents, the State offered Brittain's summary report of his findings. Ex. 40; RP 899. Brittain also prepared a list of dates for which no documents could be found. Ex. 41; RP 900, 956. This reflected the hit-or-miss nature of the Treasurer's record keeping system. Records entire months were unavailable, even though, had such records ever existed, they would have been available from the Department of Revenue, the County Auditor, and County Assessor. RP 947-48. Of the 25 monthly reports that were available for the 29 months between January 2007 and May 2009, 15 were unsigned, and some were not even dated. RP 948-49. The Department of Revenue never inquired about the

[10] The audits also failed to detect any accountability issues. RP 954.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

missing reports, contrary to Ms. Scott's belief that the Department invariably followed up on missing reports. RP 727, 950.

Brittain concluded that "the cashier" must have committed crimes against the County. RP 913-14. Further, Brittain thought that, if anyone other than Betts were guilty, Betts necessarily would have caught the irregularity when she did her daily reconciliation. RP 914. Brittain did not attempt to justify this conclusion, given the practice of shared passwords. RP 914-15, 941.

Brittain found it significant that misappropriation activity ceased on days when Betts did not work, as well as after she was terminated. RP 915-16, 941. This cemented his conclusion that Betts must be the perpetrator. RP 941. He conceded, however, that a different guilty party likely would cease criminal activity once it became known that a forensic audit was scheduled and that security and control measures would belatedly be implemented. RP 943. Likewise, a thief operating under cover of Betts's password would have refrained on days when Betts was not at work.

Mr. Brittain did not attempt to match dollar amounts from the affidavits with checks deposited in the county's bank account, although most REET assessments were for several thousand dollars and would ordinarily be paid by check. RP 946. Instead, he examined a single week

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

of cancelled checks deposited in the bank records, looking for checks corresponding to cash-tendered entries for that week. RP 875, 889, 896, 946. He did not find them. RP 875. He extrapolated from this one week of April 6-10, 2009, to the entire six and a half year span of his investigation. RP 946. He acknowledged that most real estate taxes assessments were for several thousand dollars, which would ordinarily be paid by check. RP 946.[11]

Moreover, Brittain's hypothesis is facially implausible. Without expert testimony on probability theory, the jury could not reasonably conclude that Brittain could detect an irregularity by matching the total from one of an indefinite number of REET affidavits to the sum of any number of items from a list of cash transactions with an unspecified number of elements. It cannot be assumed beyond reasonable doubt that Brittain's method did not produce a number of possible combinations large enough to assure a match in virtually every case. And, as would be predicted if his theory were fallacious, Brittain was not always able to match a known discrepancy by juggling cash transactions. RP 950.

---

[11] The State claimed the cost of obtaining County bank records was exorbitant. The bank charged $16,000 for just this one week. RP 889. The State did not explain why the County's bank records could not have been subpoenaed or obtained via a search warrant as were Ms. Betts's bank records. CP 212; RP 1017-18.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

In addition, contrary to Brittain's unsupported presumption that only Ms. Betts could be the perpetrator because he documented no losses after she was terminated, he conceded that a different guilty party likely would avoid criminal activity when it became known that a forensic audit was scheduled and that the Treasurer would belatedly implement some security and control measures. RP 943. Likewise, during the period covered by the Information, a person other than Betts who was misappropriating funds under cover of Betts's password, likely would confine her criminal activity to days and when Betts was at work.

Outside of Brittain's theoretical crimes, the only evidence of theft offered by the State was Betts's coerced and inadmissible admission of guilt. Even if her confession were admissible, the value was only $877. This is insufficient to establish no more than third degree theft, with which Betts was not charged.

For the same reasons, the evidence was insufficient to prove any of the aggravating factors constituting a major economic crime. RP 1388-89.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). The Court should reverse and dismiss.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

8. THE EVIDENCE WAS NOT SUFFICIENT TO LINK THE ALLEGED OFFENSES TO BETTS.

Accepting the truth of the State's evidence, the record shows that internal controls and security measures were so lax in the Clallam County Treasurer's office that anyone could have helped themselves to REET proceeds.

A bookkeeper cannot be held criminally liable for embezzling funds merely by showing that funds have been misappropriated "where there is an obvious lack of internal control and where persons other than the accused received funds and made some entries in the accounts in the absence of a showing that he converted the funds to his own use." *State v. Randecker*, 1 Wn. App. 834, 836, 464 P.2d 447 (1970), quoting *Webb v. Virginia*, 204 Va. 24, 129 S.E.2d 22 (1963), *reversed on other grounds by State v. Randecker*, 79 Wn.2d 512, 516-517, 487 P.2d 1295 (1971).

In *Randecker*, as here, the state could not show that the defendant had the sole access to the cash drawer. As here, the evidence showed an absence of internal control over funds received. And, as here, five court employees and officers had direct access to the cash drawer. *Randecker*, 1 Wn. App. at 836-37. In *Randecker*, the State needed only to produce substantial evidence sufficient to take the case to the jury, not, as here, proof beyond a reasonable doubt.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

The evidence here was insufficient to support a reasonable jury in finding beyond a reasonable doubt that Betts was responsible for any shortages. The lack of controls and total absence of oversight was common knowledge, possessed by everyone in the office who covered for Betts in her absence. RP 784-85.

The only safeguard against misappropriation of tax-payer funds was the automated numbering system for the REET affidavits that accompanied each tax return. RP 132, 752. The security feature was that the numbers were supposed to be sequential, guaranteeing a record for every dollar received. RP 704. But the numbering machine had been broken for years. RP 1115. Consequently, the staff of the Treasurer's Office generally ignored the numbers and did not do any sort of follow up to investigate breaks in the sequence. RP 663, 782.

The computers in the Treasurer's Office were supposed to be password-protected. RP 675. Like the sequential numbering system, this purported safeguard also was illusory. Everyone in the office used Betts's password and accessed her computer when they handled a REET transaction or balanced the books in her absence. RP 726, 783, 784, 806. Moreover, Betts's spreadsheets were accessible to everyone in the office even without her password. RP 786. This included the master spreadsheet used to prepare the monthly reports that form the basis for Counts III-XXI.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

RP 1190. Stallard testified that other employees should not have been doing that, and that she did not know they did so. RP 787.

As a result, it was a simple matter for anyone to simply remove a fistful of cash and conceal the transaction by inserting a hidden row with a negative dollar amount on the Excel spreadsheet. RP 659; 787. This involved either a direct command from a drop-down menu or a simple right-click of the mouse. RP 788. No-one ever totaled the displayed rows or checked for hidden rows (which would have shown up as a skipped row number (RP 773), either of which would have disclosed any missing transactions. RP 706, 776. The Treasurer conceded that the safeguards were inadequate. RP 715. But Stallard was supposed to be checking the affidavits and not relying solely on Betts's self-reporting. RP 704-05; 719-20. Scott testified that it would not be possible for Stallard to prepare the monthly report without personally reviewing the affidavits. RP 719.

Further complicating matters, the County employed two different computerized accounting systems in parallel, the Eden system and the Computech system. On any given day, some cash transactions from Betts's work station would show up in one system, others in the other. RP 952-53.

The lack of oversight and the common access both to the funds and to the spreadsheets at every stage of the process injects reasonable doubt

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

sufficient to preclude any reasonable person from forming an abiding belief that another person in the Treasurer's office was not clever enough to exploit the lack of internal controls without arousing Betts's suspicions.

The Court should reverse the theft conviction and dismiss the prosecution.

9. THE BANK DEPOSIT EVIDENCE WAS TRIPLE HEARSAY ADMITTED IN VIOLATION OF THE CONFRONTATION CLAUSE.

The State's evidence in support of the money laundering charge comprised solely Detective Viada's bank deposit evidence. This evidence originated with bank statements seized by Viada and summarized by him. The Attorney General's office then received Viada's summaries and an unidentified person prepared a summary of his or her understanding of Viada's summary of what Viada thought was established by the bank statements. RP 1024-25. The court overruled a timely defense objection to the admissibility of this evidence. RP 1026.

Out-of-court statements may not be admitted to prove the matter asserted. ER 801, 802. If an out-of-court statement is not permitted by an exception under the hearsay rule, the proponent must demonstrate particularized guarantees of trustworthiness. Particularized guarantees of trustworthiness are present only when cross-examination would add

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

nothing to the reliability of the statement. *State v. Martinez*, 105 Wn. App. 775, 781, 20 P.3d 1062 (2001).

Viada's evidence was triple hearsay and not admissible under any exception to the hearsay rule.

Moreover, the federal confrontation right applies to the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). Accordingly, even evidence that may be admitted as an exception to the hearsay rule must nevertheless adhere to the standards of the confrontation clause. *State v. Neal*, 144 Wn.2d 600, 608, 30 P.3d 1255. (2001). Minimal due process includes the right to confront adverse witnesses, unless good cause exists not to require the confrontation. *State v. Abd-Rahmaan*, 154 Wn.2d 286, 288, 111 P.3d 1157 (2005).

The bank records are testimonial hearsay. Information disclosed in the course of a police investigation is testimonial per se. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Here, when an unidentified bank employee turned over Betts's financial information to the police in compliance with a search warrant, that person would have expected it to be used in a criminal proceeding.

This evidence was highly prejudicial, because some jurors might have found Betts's history of cash deposits persuasive evidence of guilt.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

The Court should reverse the money laundering conviction.

10. CONVICTING BETTS OF BOTH THEFT AND MONEY LAUNDERING VIOLATED DOUBLE JEOPARDY.

A claim of double jeopardy is a question of law that is reviewed de novo. *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006); *State v. Jones*, 159 Wn.2d 231, 237, 149 P.3d 636 (2006).

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees that "[n]o person shall be ... subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Washington Constitution guarantees that "[n]o person shall ... be twice put in jeopardy for the same offense." Wash. Const. art. 1, § 9. Washington courts interpret both clauses identically. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995); *State v. Schoel*, 54 Wn.2d 388, 391, 341 P.2d 481 (1959); *State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006); *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005); *United States v. Scott*, 437 U.S. 82, 87-88, 98 S. Ct. 2187, 57 L. Ed. 2d 65 (1978).

The facts in Betts are essentially indistinguishable from those of *State v. Dingman*, 149 Wn. App. 648, 202 P.3d 388 (2009). In both cases, the State charged theft by means of obtaining payments in the course of

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

employment and also with exerting control over the same funds in a manner inconsistent with the interests of the employer. This constituted double jeopardy, because the two offenses merged. *Dingman*, 149 Wn. App. at 665.

Merely obtaining a check did not prove the crime of theft by an employee authorized to obtain checks. The crime of theft was not completed until the defendant actually misallocated the funds. *Dingman*, 149 Wn. App. at 665, citing *State v. Joy*, 121 Wn.2d 333, 341, 851 P.2d 654 (1993). Only when the defendant used the money for other purposes, did he appropriate the funds to his own use and thus commit theft by embezzlement. *Id.*

The same principle is explained in *Milanovich v. United States*, 365 U.S. 551, 558, 81 S. Ct. 728, 732, 5 L. Ed. 2d 773 (1961) (taking and receiving the same property constitute a single transaction as a matter of law.) Accordingly, the jury should have been instructed that it could convict Betts of one or the other, but not both for the single offense of depositing County funds into her personal account. Failure to so instruct the jury requires vacation of both convictions, because the reviewing court cannot discern which — if any — crime a properly instructed jury would have selected. This applies equally convictions as an accomplice. *Milanovich*, 365 U.S. at 558-559.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

Here, even if the State could have proved that Betts exerted control over the County's funds, the crime of theft was not completed until she deposited misappropriated funds into her own account. That is what would constitute misallocating the funds. Reversal is required.

11. THE PROSECUTOR COMMITTED MISCONDUCT BY EXPRESSING AN UNEQUIVOCAL OPINION OF GUILT.

The prosecutor found Betts's explanations unsatisfactory regarding the bank deposits, her daily ability to balance, and her failure to notice hidden rows in the spreadsheets. RP 1188. He therefore asked Betts: **"[L]ast chance. Is there something you want to tell us? ... It might make a difference in sentencing."** *Id.* This denied Betts a fair trial.

Prosecutorial misconduct may deprive a defendant of her right to a fair trial. *See State v. Jones*, 144 Wn. App. 284, 290, 183 P.3d 307 (2008). A 'fair trial' is one in which the prosecuting attorney does not "throw the prestige of his office... and the expression of his own belief of guilt into the scales against the accused." *State v. Case*, 49 Wn.2d 66, 71, 298 P.2d 500 (1956).

A defendant claiming misconduct must show both improper comments and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). If the conduct of the prosecutor is not harmless and

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

denies the defendant fair trial, "then the defendant should get a new one." *State v. Fisher*, 165 Wn.2d 727, 740 n.1, 202 P.3d 937 (2009).

The court here sustained a defense objection and instructed Betts's jury to disregard the prosecutor's comment. RP 1189. This was not sufficient, however, to overcome the prejudicial impact. As in *Case*, "an objection, an instruction to disregard, and an apology probably could not erase from the minds of the jurors the brand thus forcefully applied [.]" *Case*, 49 Wn.2d at 70.

The prosecutor's remark could not be ignored and cannot be characterized as harmless. The question constituted flagrant and ill-intentioned misconduct that would require reversal even without the defense objection.

12. THE SENTENCING COURT PENALIZED BETTS FOR EXERCISING HER RIGHT TO REMAIN SILENT AND TO A JURY TRIAL, VIOLATING THE FIFTH AND FOURTEENTH AMENDMENTS.

The Fifth Amendment states, no person "shall be compelled in any criminal case to be a witness against himself." The Fourteenth applies this to the states and provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." *Malloy v. Hogan*, 378 U.S. 1, 6, 85 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). In Washington, that means that criminal defendants have a due process right to have their

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

defenses heard. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007), citing *Taylor v. Illinois*, 484 U.S. 400, 408, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *accord Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Specifically, the State may take no action that chills or penalizes the assertion of a constitutional right, and the court may not draw adverse inferences from the exercise of a constitutional right. *Doyle v. Ohio*, 426 U.S. 610, 612-13, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); *State v. Gregory*, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006).

Here, the sentencing court impermissibly penalized Betts for exercising her rights under the Sixth and Fourteenth Amendment and Const. art. 1, § 22. The court first remarked that Ms. Betts could not be penalized for exercising her trial rights. RP 1391-92. The court then proceeded to make an unambiguous record that it regarded her failure to confess and cooperate with the investigation as an aggravating factor:

> Once you were caught, there was never any offer on your part to participate in the investigation or [as]sist in any way. Now, I understand you have an absolute right to remain silent. You have an absolute right to have a jury trial. You exercised those rights. You cannot be punished for exercising those rights.
>
> On the other hand, **there was another choice that you could have made that would have made your situation this morning considerably better as far as the court is concerned**; and you opted not to cooperate in any

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

> way, to not express any remorse and to defend the case[.]
> ...
> So what we ended up was, is having an enormously complicated and expensive trial that the jury costs were almost $9,000 alone, tens of thousands of dollars in investigative expenses on both sides[.]

RP 1391-92.

On similar facts, this Court has recognized the violation inherent in a sentencing court's commenting negatively upon the defendant's decision to go to trial, citing the Sixth Amendment and art 1, § 22. *State v. Radcliffe*, 139 Wn. App. 214, 224, 159 P.3d 486 (2007).

In *Radcliffe*, the Court concluded that the error was harmless because the record suggested that the court would have imposed the same sentence without the error. *Radcliffe*, 139 Wn. App. at 224. That is not the case here.

It cannot be discerned from this record what sentence an unbiased judge would have imposed. This is an error of constitutional magnitude that cannot be deemed harmless unless the State can persuade this Court beyond a reasonable doubt that any reasonable jury (in this case, judge) would have reached the same result absent the error. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

At minimum, the Court should remand for resentencing by a different judge.

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

VI. CONCLUSION

For the foregoing reasons, the Court should reverse Ms Betts's convictions and dismiss the prosecution with prejudice.

Respectfully submitted this 6th day of February, 2012.

Jordan B McCabe

Jordan B. McCabe, WSBA No. 27211
Counsel for Catherine Betts

CERTIFICATE OF SERVICE

Jordan McCabe served a copy of this Appellant's Brief upon opposing counsel, Scott A. Marlow, by the Division II upload portal: scottm4@atg.wa.gov

A copy was deposited in the U.S. Mail, first class postage prepaid, addressed to:

Catherine A. Betts, DOC # 351849
Washington Corrections Center for Women
9601 Bujacich Rd. NW, Gig Harbor, WA 98332-8300

Jordan B McCabe February 6th, 2012

McCabe Law Office
P. O. Box 46668, Seattle, WA 98146
206-453-5604•mccabejordanb@gmail.com

MCCABE LAW OFFICE

February 06, 2012 - 8:48 AM

Transmittal Letter

Document Uploaded: 425190-Appellant's Brief.pdf

Case Name: State v. Betts

Court of Appeals Case Number: 42519-0

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Jordan B Mccabe - Email: **mccabejordanb@gmail.com**

A copy of this document has been emailed to the following addresses:

scottm4@atg.wa.gov