

NO. 74008-3-I

---

---

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

State of Washington,

Respondent,

v.

Michael C. McKinnon,

Appellant.

APPEAL FROM THE SUPERIOR COURT  
FOR SNOHOMISH COUNTY

The Honorable George Bowden, Judge  
The Honorable Marybeth Dingledy, Judge

---

REPLY BRIEF OF APPELLANT

---

TOM P. CONOM

THE CONOM LAW FIRM  
Attorney for Appellant  
7500 212<sup>th</sup> Street SW #215  
Edmonds, WA 98026  
(425) 774-6747

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2016 APR -6 AM 11:30

**TABLE OF CONTENTS**

**REVISED ASSIGNMENT OF ERROR No. 3 ..... 1**

**ISSUES ..... 1-22**

- 1. Did the trial court commit reversible error in denying the *Knapstad* motion by erroneously conflating the evidence required to prove theft by embezzlement with the evidence required to prove theft by deception?**
- 2. Did the trial court commit reversible error in making a finding of guilty by erroneously conflating the evidence required to prove theft by embezzlement with the evidence required to prove theft by deception and thus find guilt based on insufficient evidence?**
- 3. May a person charged with theft alleged to have been committed by one alternative means be convicted on evidence establishing another uncharged means?**
- 4. May evidence of after-the-fact concealment of embezzlement be used to convict on theft by deception or is the crime of embezzlement complete upon conversion and concealment a mere incident of that offense?**
- 5. Did the trial court commit reversible error in failing to dismiss the charge of theft by deception with prejudice?**
- 6. May the state circumvent the three-year statute of limitations applicable to theft by embezzlement by charging theft by deception based on evidence establishing embezzlement in order to invoke the inapplicable six-year statute of limitations?**

**REPLIES TO STATE’S ARGUMENTS**

**Reply to State’s Argument that an Appellant Must Assign Error to a “Finding of Fact” which is Actually a Conclusion of Law Where Appellant has Adequately Assigned Error to the Verdict of Guilty as a Matter of Law ..... 1**

**Reply to State’s Argument that Denial of a *Knapstad* Motion, Where only a Statutory Interpretation Issue is Presented, Is Not Subject to Appellate Review ..... 4**

<b>Reply to State’s Argument that the Trial Judge Ruled Correctly that Theft by Deception and Theft by Embezzlement Legally and Factually Overlap .....</b>	<b>5</b>
<b>Reply to State’s Intimation that <i>Mehrabian</i> has <i>Sub silentio</i> Overruled <i>Smith</i> and <i>Olds</i> to Allow Theft by Deception to Encompass Theft by Embezzlement .....</b>	<b>14</b>
<b>Reply to State’s Argument that After-the-Fact Concealment Is Not Inherent in, and Incidental to, Theft by Embezzlement .....</b>	<b>16</b>
<b>Reply to State’s Argument on Statute of Limitations that State has Unfettered Discretion to Choose Which Statute of Limitations Applies .....</b>	<b>17</b>

**SUMMARY OF APPELLANT’S ARGUMENT**

<b>I. INTRODUCTION: Embezzlement and Deception .....</b>	
<b>II. A PERSON CHARGED WITH THEFT ALLEGED TO HAVE BEEN COMMITTED BY ONE ALTERNATIVE MEANS CANNOT BE CONVICTED ON EVIDENCE ESTABLISHING A DIFFERENT UNCHARGED MEANS .....</b>	<b>5-17</b>
<b>III. AFTER-THE-FACT CONCEALMENT OF EMBEZZLEMENT MAY NOT BE USED TO CONVICT ON THEFT BY DECEPTION; THE CRIME OF EMBEZZLEMENT IS COMPLETE UPON CONVERSION AND CONCEALMENT IS A MERE INCIDENT OF THAT OFFENSE .....</b>	<b>16-17</b>
<b>A. Upon Conversion, the Crime of Embezzlement is Complete</b>	<b>16</b>
<b>B. After-the-Fact Concealment of Embezzlement is a Mere Incident .....</b>	<b>16-17</b>
<b>IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING THE <i>KNAPSTAD</i> MOTION BY ERRONEOUSLY CONFLATING THE EVIDENCE REQUIRED TO PROVE THEFT BY EMBEZZLEMENT WITH THEFT BY DECEPTION .....</b>	<b>4-5</b>
<b>V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN MAKING A FINDING OF GUILTY BY ERRONEOUSLY CONFLATING THE EVIDENCE REQUIRED TO PROVE EMBEZZLEMENT AND DECEPTION, AND THUS ENTERING A VERDICT BASED ON INSUFFICIENT EVIDENCE .....</b>	<b>3, 5-17</b>

<b>VI. THE STATE MAY NOT CIRCUMVENT THE THREE-YEAR STATUTE OF LIMITATIONS APPLICABLE TO EMBEZZLE- MENT BY CHARGING THEFT BY DECEPTION IN ORDER TO INVOKE THE SIX-YEAR STATUTE OF LIMITATIONS</b>	17-22
<b>CONCLUSION</b>	22

**TABLE OF AUTHORITIES**

**Table of Cases**

**Washington Supreme Court**

<i>In re Stoudmire</i> , 141 Wn.2d 342, 5 P.3d 1240 (2000)	22
<i>Olsen v. Delmore</i> , 48 Wn.2d 545, 295 P.2d 324 (1956)	18, 20
<i>State v. Ager</i> , 128 Wn.2d 85, 904 P.2d 715 (1995)	10
<i>State v. Bauer</i> , 180 Wn.2d 929, 329 P.3d 67 (2014)	4-5, 22
<i>State v. Blanchey</i> , 75 Wn.2d 926, 454 P.2d 841 (1969)	18, 20
<i>State v. Dailey</i> , 93 Wn.2d 454, 610 P.2d 857 (1980)	19-20
<i>State v. Danforth</i> , 97 Wn.2d 255, 643 P.2d 882 (1982)	21-22
<i>State v. Emerson</i> , 43 Wn.2d 5, 259 P.2d 406 (1953)	9-10
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984)	15
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	2, 17
<i>State v. Johnson</i> , 56 Wn.2d 700, 355 P.2d 13 (1960)	10-11, 15
<i>State v. Johnson</i> , 92 Wn.2d 671, 600 P.2d 1249 (1979)	17
<i>State v. Joy</i> , 121 Wn.2d 333, 851 P.2d 654 (1993)	10
<i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986)	4, 5, 16
<i>State v. Linehan</i> , 147 Wn.2d 638, 56 P.3d 542 (2002)	8, 10
<i>State v. Olds</i> , 39 Wn.2d 258, 235 P.2d 165 (1951)	4, 7-10, 14-15, 22

<i>State v. Ortega-Martinez</i> , 124 Wn.2d 702, 881 P.2d 231 (1994) .....	1
<i>State v. Reeder</i> , 184 Wn.2d 805, __ P.3d __ (2015) .....	19
<i>State v. Sandholm</i> , 184 Wn.2d 726, __ P.3d __ (2015) .....	1, 9
<i>State v. Severns</i> , 13 Wn.2d 542, 125 P.2d 659 (1942) .....	13
<i>State v. Smith</i> , 2 Wn.2d 118, 98 P.2d 647 (1939) .....	6-11,13-16, 22
<i>State v. Sterett</i> , 160 Wash. 439, 295 Pac. 182 (1931) .....	16

**Washington Court of Appeals**

<i>Rhinehart v. Seattle Times</i> , 59 Wn.App. 332, 798 P.2d 115 (Div. 1 1986) .....	2-3
<i>State v. Bray</i> , 52 Wn.App. 30, 756 P.2d 1332 (Div.1 1988) .....	12-14, 22
<i>State v. Brown</i> , 45 Wn.App. 571, 726 P.2d 60 (Div.1 1986) .....	12-15
<i>State v. Gillespie</i> , 41 Wn.App. 640, 705 P.2d 808 (Div.1 1985) ...	12-14,22
<i>State v. Haley</i> , 39 Wn.App. 164, 692 P.2d 858 (Div.3 1984) .....	20-22
<i>State v. Jackson</i> , 82 Wn.App. 594, 918 P.2d 945 (Div.2 1996) .....	5
<i>State v. Mehrabian</i> , 175 Wn.App. 678, 308 P.3d 660 (Div.1 2013) 2,14-18	
<i>State v. Moreau</i> , 35 Wn.App. 688, 669 P.2d 483 (Div.3 1983) .....	17
<i>State v. Perez</i> , 130 Wn.App. 505, 123 P.3d 135 (Div.2 2005) .....	8
<i>State v. Regan</i> , 28 Wn.App. 680, 625 P.2d 741 (Div.2 1981) .....	17
<i>State v. Southard</i> , 49 Wn. App. 59, 741 P.2d 89 (Div.1 1987) .....	11-14
<i>State v. Stock</i> , 44 Wn.App. 467, 722 P.2d 1330 (Div.1 1986) .....	17
<i>State v. Sulgrove</i> , 19 Wn. App. 860, 578 P.2d 74 (Div.1 1978) .....	19-20
<i>State v. Wilder</i> , 4 Wn.App. 850, 625 P.2d 741 (Div.2 1971) .....	17
<i>Wolf v. Boeing Co.</i> , 61 Wn.App. 316, 810 P.2d 943 (Div.1 1991) .....	3-4

<b>United States Supreme Court</b>	
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) .....	2, 22

**Constitutions**

Washington Article 1, section 3 .....	2
Washington Article 1, section 12 .....	18, 22
United States 14th Amendment .....	2, 18, 22

**Washington Statutes**

R.C.W. 9A.04.080 .....	17-22
R.C.W. 9A.56.010 .....	8,13
R.C.W. 9A.56.020 .....	8, 13-14
R.C.W. 9A.56.030 .....	8, 13-14
R.C.W. 10.27.070 .....	19
R.C.W. 10.27.170 .....	19
R.C.W. 36.27.020 .....	19

**Washington Court Rules**

RAP 10.3(g) .....	3
CrR 2.3 .....	19
CrR 4.6 .....	19
CrR 4.8 .....	19
CrR 8.3 .....	19-20

**Treatises**

18 American Jurisprudence, <i>Embezzlement</i> (1 <sup>st</sup> ed.) sec. 3 .....	6
3 LaFave <i>Substantive Criminal Law</i> , sec. 19.8 (2d ed. 2003) .....	8-9
Fine and Ende, 13B Washington Practice, <i>Criminal Law</i> , sec. 2606 (2d ed. 1998) .....	8
<i>Random House Dictionary</i> (2d ed. 1987) .....	9

## REVISED ASSIGNMENT OF ERROR

3. The trial court erred as a matter of law in entering a verdict of guilty based on a lack of sufficient evidence including “finding of fact:”

“the defendant obtained control over US currency in an amount exceeding \$5,000, this currency belonging to another, by color or aid of deception, and with the intent to deprive such other of this property.”

(VRP 7/8/15 at 4-5; CP II 459-64 [4.2; 4.3])

### **Reply to State’s Argument that an Appellant Must Assign Error to a “Finding of Fact” which is Actually a Conclusion of Law Where Appellant has Adequately Assigned Error to the Verdict of Guilty as a Matter of Law (Brief of Respondent at 16)**

This case comes before the Court for review of a verdict based on stipulated evidence at a bench trial. The State concedes the stipulated evidence established the uncharged means of theft by embezzlement. Brief of Respondent at 3 (“the State will accept the defendant’s concession ... that his actions constituted a crime of theft (embezzlement)”); *see also*, comment of trial judge during delivery of verdict: “I think that it may very well should have been charged as an embezzlement.”) VRP 7/8/15 at 4.

The question presented is a legal one: May evidence of one distinct alternative means of theft be used to prove a different alternative means or must there be sufficient independent evidence to establish the latter? *State v. Sandholm*, 184 Wn.2d 726, 732 (2015)(reversible error “when insufficient evidence supports one or more of the alternative means”), *reaffirming State v. Ortega-Martinez*, 124 Wn.2d 702, 881 P.2d 231 (1994).

The State purports to challenge the alleged failure of Appellant to explicitly assign error to a boilerplate “finding of fact” on an element of the crime as charged but this “finding” is actually a mislabeled conclusion of law which is reviewed de novo. Appellant has properly assigned error to the ultimate “finding” of *guilty* which necessarily subsumes any “findings of fact” on the elements of the offense.

**A. Due Process Requires Review of Entire Record When Sufficiency of Evidence is Raised on Appeal**

In *Jackson v. Virginia*, the United States Supreme Court held as a matter of due process that “the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction ... [is] to determine whether the *record evidence* could reasonably support a finding of guilt beyond a reasonable doubt.” 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)(emph.ad.).<sup>1</sup> The Washington Supreme Court emphasized in *State v. Green*, 94 Wn.2d 216, 220-21, n.2, 616 P.2d 628 (1980), that this determination requires review “on the whole record.” *See State v. Mehrabian*, 175 Wn.App. 678, 699, n.4, 308 P.3d 660 (2013).

**B. Legal, not Factual, Issues are Presented in this Appeal**

It bears repeating that this is an appeal from a stipulated facts bench trial presenting only legal questions. Appellant is “directly challenging the legal principles” at issue. *Rhinehart v. Seattle Times*, 59 Wn.App.

---

<sup>1</sup> While the evidence must be considered in the light most favorable to the state, the review is of *all* of the evidence. *Jackson v. Virginia*, 443 U.S. at 319 (“upon judicial review, *all of the evidence* is to be considered in the light most favorable to the prosecution.” (emph.ad.)

332, 336, 798 P.2d 115 (1990). As in *Rhinehart*, the “claimed error [was] clearly disclosed in the associated issue included in the brief.” 59 Wn.App. 336, citing RAP 10.3(g). Issue V. in Appellant’s opening Brief reads:

**THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN MAKING A FINDING OF GUILTY BY ERRONEOUSLY CONFLATING THE EVIDENCE REQUIRED TO PROVE EMBEZZLEMENT AND DECEPTION, AND THUS ENTERING A VERDICT BASED ON INSUFFICIENT EVIDENCE**

As in *Rhinehart*, the “manner in which the claimed errors are set forth and described in the brief is adequate to understand what has been asserted as error.” As in *Rhinehart*, the State here “had no difficulty in responding to the issues raised.” And, as in *Rhinehart*, the State here has asserted no prejudice and if there was a failure to properly assign error it is “not prejudicial to appellate review.” 59 Wn.App. at 336.

**C. Even if there was Technical Error, It has been Cured**

Even if the boilerplate finding referenced by the State were a true finding of fact rather than a conclusion of law, any defect has now been cured by Appellant’s revision of Assignment of Error no. 3 to include verbatim the language of the so-called finding. If there truly was confusion regarding what Appellant was assigning error to when he objected to the “finding of guilty” (original Assignment of Error no. 3 and Issue No. V.), Appellant has remedied any defect. *See, e.g., Wolf v. Boeing Co.*, 61 Wn.App. 316, 322, n.5, 810 P.2d 943 (1991)(Where the “thrust” of appellant’s “overall position in his opening brief made clear his challenge to the finding ...” and where appellant “cured ... defect in his reply brief,”

review proper). “A technical violation of the rules will not ordinarily bar appellate review where justice is to be served by such review.” *Id.*

**Reply to State’s Argument that Denial of a *Knapstad* Motion, Where only a Statutory Interpretation Issue is Presented, Is Not Subject to Appellate Review** (Resp. Brf. 12-13)

In *State v. Bauer*, 180 Wn.2d 929, 329 P.2d 67 (2014), the Washington Supreme Court granted review of a trial court’s denial of a *Knapstad* motion in order to determine if a statute could be applied to the conduct of a defendant. The case presented a purely legal question on agreed facts (Supreme Court granted review to decide “a controlling question of law”). 180 Wn.2d at 834.

Appellant here is effectively in the same procedural posture as in the *Bauer* case: he argues as a matter of law that because embezzlement and deception are distinct alternative means of committing theft, the same evidence which proves the one cannot be used to prove the other and that independent evidence of deception must be presented. This is “a pure question of law.” *State v. Olds*, 39 Wn.2d 258, 259, 235 P.2d 165 (1951). Thus, denial of his *Knapstad* motion was manifest legal error requiring dismissal of the charge. *See State v. Bauer, supra*, granting such relief.

The State, however, asserts there are two procedural distinctions between *Bauer* and Appellant’s case that should bar *Knapstad* review. The State’s arguments are distinctions without a difference.

First, the State says that *Bauer* involved pretrial discretionary review. While true, it is also irrelevant to the legal question whether a

reviewing court has authority to decide whether a particular statute may be applied to a particular set of facts when the question arises in the context of a *Knapstad* motion. Clearly, the Washington appellate courts *have* such authority. *State v. Bauer*, 174 Wn.App. 59 (2013), *reversed*, 180 Wn.2d 929 (2014).

Second, citing *State v. Jackson*, 82 Wn.App. 594, 918 P.2d 945 (1996), the State argues that because after the *Knapstad* denial the case proceeded to trial, and an additional fact was elicited, review should be limited to sufficiency of evidence “using the most complete factual basis available.” Resp. Brf. at 13, quoting *Jackson*, 82 Wn.App. at 608-09. Whatever the merits of this position in general, it is irrelevant in this case because the additional fact (Roy Teeters statement, 2.6(b))<sup>2</sup> added nothing of legal relevance to the purely legal question presented in the *Knapstad* motion. For the additional reasons set forth in Appellant’s Brief, pp. 31-36, the Court is asked to grant review of the *Knapstad* issue.

**Reply to State’s Argument that the Trial Judge Ruled Correctly that Theft by Deception and Theft by Embezzlement Legally and Factually Overlap (Resp. Brf. 27-28)**

In reaching a verdict, the trial judge ruled that theft by embezzlement and theft by deception legally overlap and therefore evidence which proves the former may also be used to prove the latter. *See* VRP 7/8/15 at 4 (“I don’t see that the embezzlement and the obtaining property by

2

---

Because Teeters does not claim that he, or any of the other homeowner board members, were deceived into providing their ordinary dues in trust to Appellant, stipulated fact 2.6(b) does not materially change the *Knapstad* record reviewed by the trial court and now before this Court. CP II 459-64.

color or aid of deception are mutually exclusive. ... *I think there is some overlap.*”). Contrary to the governing law, the State urges this Court to approve the trial judge’s misstatement of Washington law and overrule a century of precedent. Resp. Brf. 23-28.

The State begins by mischaracterizing the analysis and holding of the seminal case on point, *State v. Smith*, 2 Wn.2d 118, 98 P.2d 647 (1939). In *Smith*, our Supreme Court began its analysis by quoting a legal encyclopedia for the general rule, followed in Washington, that “the crimes of embezzlement and larceny are recognized as distinct and separate crimes ... .” In contradistinction, the *Smith* Court quoted further to acknowledge a minority view: “[i]n other jurisdictions, however, it has been held that the two crimes overlap and, under certain circumstances, are identical.” 2 Wn.2d at 121 quoting 18 Am.Jur., Embezzlement, sec. 3, p. 572.

In the very next sentences after quoting Am.Jur., our Supreme Court unanimously rejected the minority view that there was “overlap” between Washington’s embezzlement and larceny statutes:

“It is plain that the evidence presented to the jury was, if believed, sufficient to prove the commission of the crime of embezzlement. [cits. omit.] The evidence, however, did not prove the crime of larceny as defined [by former theft law].”

*State v. Smith*, 2 Wn.2d at 122. On the basis that there was no “overlap,” the Supreme Court reversed a conviction for the crime of larceny *as charged* when the evidence only proved the *uncharged* crime of embezzlement. There is not even a hint in *Smith* that the evidence presented tend-

ing to prove embezzlement could also be used to prove larceny. The *Smith* Court's holding is directly to the contrary. This reading of *Smith* is powerfully reinforced by *State v. Olds*, 39 Wn.2d 258, 235 P.2d 165 (1951), a case not cited by the State.

“We held in *State v. Smith*, 2 Wn.2d 118, 98 P.2d 647 that the subdivisions of [former theft statute], defined separate and distinct offenses, rather than providing various ways in which the same offense could be committed, notwithstanding that the several offenses were all designated as larceny.”

*State v. Olds*, 39 Wn.2d at 260.

The Supreme Court in *Olds* reaffirmed the holding of *Smith* that proof of one means of theft does not overlap with, and cannot be used to prove, a different means of theft on an erroneous theory that alternative separate and distinct means of theft are committed in “various ways:”

“This makes it *mandatory* that defendants in criminal cases must be convicted of the offenses charged, and *guilt of other offenses will not suffice*. Since the appellants may have been convicted of an offense with which they were not charged, the judgment must be reversed.”

*State v. Olds*, 39 Wn.2d at 260-61 (emph.ad.)

*Olds* involved a theft charge based on one of the means set forth in the former larceny statute. However, the trial judge instructed the jury that it could convict on either the charged means *or* on an uncharged means. The Supreme Court held this was impermissible overlap of distinct alternative means and constituted reversible error:

“Evidence that could sustain a charge under [uncharged subdivision of statute] *would not suffice* for a crime charged under [different subdivision of statute].”

*State v. Olds*, 39 Wn.2d at 260 (emph.ad.).

The historical distinctions among the various types of theft in general and between the alternative means of theft by embezzlement and theft by deception specifically have been maintained in the current theft law and these means remain “analytically distinct.” Fine and Ende, 13B Washington Practice, *Criminal Law 2d*, sec. 2606 at 129 (1998). In *State v. Linehan*, 147 Wn.2d 638, 649, 56 P.3d 542 (2002), the Washington Supreme Court explicitly affirmed that embezzlement and deception continue to be distinct alternative means of committing theft.<sup>3</sup>

Thus, for more than 75 years it has been black-letter law that there is no such thing as “overlap” in the various means of committing theft:

“A person who is charged with a theft committed by one of these means *cannot be convicted on evidence showing another kind of theft.*”

Fine and Ende, *supra* at sec. 2606 at 129 (emph.ad.) Although one of the co-authors of Washington Practice quoted above has been counsel of record in this appeal and has filed the State’s cross-appeal, there is no mention of this settled legal principle in the State’s Brief.<sup>4</sup>

Notably, the law summarized in Washington Practice appears to

---

<sup>3</sup> If Division Two’s reading of *Linehan* is correct, an exception to the analysis arises in the context of the alternatives in R.C.W. 9A.56.020(1)(a) of *taking and embezzlement*. *State v. Perez*, 130 Wn.App. 505, 506-509, 123 P.3d 135 (2005). According to *Perez*, it is error to instruct on both such alternatives when only one is charged, but the error is harmless because both alternatives “share the same statutory definition.” See R.C.W. 9A.56.010(22). If this is truly an exception, it is the exception that proves the rule because embezzlement and deception are *defined separately*. Compare R.C.W. 9A.56.010(22)(b) with 9A.56.010(4),(5) and (10).

<sup>4</sup> Snohomish County Deputy Prosecutor Seth A. Fine has been sole counsel of record until recently. Although he filed a cross-appeal in this matter, he has not advised the Court or Appellant’s counsel what issues he seeks to have reviewed and he has provided no briefing to the Court. Accordingly, the State’s cross-appeal should be deemed abandoned.

accurately represent national law pertaining to embezzlement and deception according to a leading authority, Professor Wayne LaFave:

“Evidence of one crime will *not* support a conviction of the other.”  
LaFave, 3 *Substantive Criminal Law*, sec. 19.8(a) at 143 (2d ed. 2003).

The Washington Supreme Court has quite recently carefully explained what it means when we say a sub-category of an offense is a distinct alternative means as opposed to methods which “are merely facets of the same criminal conduct.” *State v. Sandholm*, 184 Wn.2d 726, 734-36 (2015). The Court characterized as “a true alternative” a means which describes “a separate category of conduct.” The Court emphasized that when an alternative means of committing a particular crime is judicially determined, the critical criterion is the “distinctiveness of the criminal conduct.”

It is a legal non sequitur to say there is “overlap” between embezzlement and deception when by definition<sup>5</sup> overlap signifies such means cannot be separate and “distinct.” A *distinct* alternative means is the antithesis of *overlapping* facets of a single means of criminal conduct.

The Washington Supreme Court historically has applied this kind of analysis to larceny/theft in repeatedly holding that embezzlement and deception are separate categories of conduct with a clear distinctiveness in each means:

---

<sup>5</sup> The term “distinct” is defined as: “1. distinguished as not being the same; not identical; separate ... 2. different in nature or quality; dissimilar: *Gold is distinct from iron.*” Random House Dictionary (2d ed, 1987) at 571.

“ ... in the former [theft by deception] money is wrongfully obtained by the defendant from the complainant by some false pretense; while in the latter case (embezzlement) he acquires the money rightfully in the capacity of an agent, bailee, trustee, etc. and then appropriates the same to his own use.”

*State v. Emerson*, 43 Wn.2d 5, 17, 259 P.2d 406 (1953); *State v. Smith*; *State v. Olds*, *supra*; *State v. Joy*, 121 Wn.2d 333, 851 P.2d 654 (1993); *State v. Ager*, 128 Wn.2d 85, 904 P.2d 715 (1995); *State v. Linehan*, *supra*.

Our Supreme Court highlighted the critical distinction between embezzlement and deception in *State v. Johnson*, 56 Wn.2d 700, 704-05, 355 P.2d 13 (1960). The Court explained the *Smith* holding:

“We held that the facts established the crime of embezzlement and not larceny, because the funds were in Smith’s lawful possession at the time he unlawfully appropriated them to his own use.”

In contrast, in *Johnson* the “funds which were to pay the drafts were in the possession of other agents of the company.” 56 Wn.2d at 705. The *Smith/Johnson* embezzlement/deception distinction can be distilled to:

Where the actor has rightful possession of the property and then fraudulently converts it to personal use, the only crime committed is *embezzlement* but where the actor does not have rightful possession of the property and then uses deception to obtain such property, the only crime committed is *theft by deception*.

The State, however, misapprehends the dispositive facts in *Johnson*. Resp. Brf. at 26. Johnson’s accomplice, unlike Smith, never had possession of the company’s funds because he himself could not access the funds without necessary actions of others in the company. 56 Wn.2d at 705. Even though he could write drafts on the company account, he could never take actual possession of the funds without the prior endorsement of

“other agents of the company, *who had possession of the funds.*” *Id.*

Thus, unlike Smith – and unlike Appellant – Johnson never had rightful possession of the company’s monies and so could not be guilty of embezzlement. Accordingly, Appellant clearly falls on the *Smith* side of the dividing line between embezzlement and deception.

This Court recognized the importance of the distinctions between the elements of the alternative means of embezzlement and deception and the need for sufficient independent proof of each in *State v. Southard*, 49 Wn.App. 59, 741 P.2d 89 (1987), a case neither cited nor discussed by the State. *Southard* was a case where the state charged both prongs of embezzlement and deception and the trial court allowed both to be considered by the jury. The issue on appeal was whether there was sufficient evidence presented on each alternative means. Judge Bowden below aptly analyzed the significance of *Southard* to the State’s argument on overlap:

“I think that’s where the *Southard* case is significant because the deception there is *incidental to the initial acquisition of the money from the bank* in Europe. And here I don’t see, unless you can point to some indication that there was some deception or act committed by the defendant *in the initial acquisition of the of the funds*. And/or if there’s some case law that says that it’s sufficient that the act of deception, contrary to the statutory language, can occur sometime later in terms of a coverup or things like that ... [w]hich we often see in embezzlement cases. ...

“But it’s separate acts, it seems to me, in *Southard* where there’s conduct that shows acts or deception in the acquisition of the funds or replacement traveler checks by the bank in Europe, then there is a separate conversion of property to which the defendant had no right to use those funds here in Washington. ... I read *Southard* as to say those facts support either or both charges, but not ... *they’re not overlapping one[s]*, and it’s your choice as to which you file. You can charge

theft by deception for the conduct in Europe or theft through embezzlement of funds that he ... had no right to possess when he converted the check here. ...

*“It looks to me as though the defendant here acquired funds in the normal course of his authority. Even if it was beyond what the homeowners association would have authorized or had authorized. He makes use of those funds, and all of the deception that occurs later is an effort to cover up what he’s been doing with those funds. But ... the acquisition and conversion of those funds, it seems to me, occurs independent of the deception. So it’s kind of like where’s the deception come in?”*

*“It comes in in an attempt to cover up what he’s done but it doesn’t seem to come in at a point that helps him to acquire the funds which is – and that’s significantly different than Southard.”*

VRP 4/24/15 at 12-14 (emphasis added).

Of course, when the trial court allows both alternative means of embezzlement and deception to be considered by the trier of fact but, unlike *Southard*, there is insufficient independent evidence on one of the means, this Court has not hesitated in reversing a wrongful conviction. *E.g., State v. Gillespie*, 41 Wn.App. 640, 646, 705 P.2d 808 (1985).

Moreover, in analogous contexts where the state charged only *one* alternative means but the jury was erroneously instructed to “consider” evidence pertaining to a different but uncharged alternative means, this Court also has not hesitated in reversing where the trier of fact could indeed have reached decision by considering the evidence on the uncharged means. *E.g., State v. Bray*, 52 Wn.App. 30, 34, 756 P.2d 1332 (1988); *State v. Brown*, 45 Wn.App. 571, 580, 726 P.2d 60 (1986).

*Bray* was a forgery case where, over objection, the trial judge defined the crime for the jury as including an alternative means not charged

in the information. 52 Wn.App. at 33. This Court stated:

“When the information charges only one of the alternatives, ... it is error to instruct the jury that they may *consider other ways or means by which the crime could have been committed, regardless of the range of evidence admitted at trial.* *State v. Severns*, [13 Wn.2d 542, 125 P.2d 659 (1942)]. The manner of committing the crimes is an *element* and the defendant must be informed of this *element* in the information in order to prepare a proper defense. [cit.omit.] *One cannot be tried for an uncharged offense.* *State v. Brown*, 45 Wn.App. 571, 576 (1986).”

*State v. Bray*, 52 Wn.App. at 30 (emph.ad.).

To summarize: 1. A trust relationship existed at all relevant times between the homeowners and Appellant who served as their trustee within the meaning of R.C.W. 9A.56.010(22)(b).

2. All monies received by Appellant during the charging period were received in his capacity as trustee and all such monies were rightfully in his possession prior to conversion. Stipulated fact 2.6( c)(“Mr. McKinnon had access to the funds as MCHOA accountant *during the course of each of the withdrawals during the charging period in this case...*”). CP 459-64

3. The State has conceded that the stipulated facts establish the uncharged alternative means of theft by embezzlement. Resp. Brf at 3.

4. The trial judge erroneously *considered* the evidence of embezzlement to convict on theft by deception based on a mistake of law that there is “overlap” in the alternative means elements allowing identical evidence of an uncharged means to be used to convict on the charged means. VRP 4

5. There is no independent evidence in the record showing deception was ever used to *obtain* monies not already rightfully in the possession of

Appellant as trustee. *Smith; Southard; Gillespie*. The trial court erred as a matter of law in concluding that “deception” was proven by evidence that the homeowners’ funds “were not available had some sort of situation come up and the board needed those funds; so I do think that that is the deception.”<sup>6</sup> VRP 7/8/15 at 4-5. That is *not* the deception required by law. 6. Appellant was convicted based on evidence of a theft means for which he was not charged and insufficient independent evidence was presented to prove the theft means for which he was charged. *Smith; Olds*.

**Reply to State’s Intimation that *Mehrabian* has *Sub silentio* Overruled *Smith* and *Olds* to Allow Theft by Deception to Encompass Theft by Embezzlement** (Resp. Brf. at 22-23)

The State places heavy reliance on this Court’s opinion in *State v. Mehrabian*, 175 Wn.App. 678, 308 P.2d 660 (2013). Resp. Brf. at 22-23. The reliance is misplaced. *Mehrabian* is a classic theft by deception case having nothing to do with the alternative means of embezzlement.<sup>7</sup>

Mehrabian was neither charged with embezzlement nor was any evidence of embezzlement presented at his trial. The *Smith/Johnson* dividing line between embezzlement and deception was not at issue. The state never claimed overlap between the two alternative means and the trial judge never permitted the jury, *compare Smith, Olds, Bray* and

---

<sup>6</sup> The additional stipulated fact of Teeters’ speculative statement on what the board might, or might not have done with respect to Appellant’s employment status, does not support any inference, reasonable or otherwise, that the board at any relevant time actually relied on deception to part with its money. 2.6(b).

<sup>7</sup> “Mehrabian induced the City to pay out money by color or aid of deception: He purchased property himself, invoiced the City through GeekDeal at a substantial markup, invented price quotes, forged invoices, delivered an inferior product or failed altogether to deliver the purchased property, and enriched himself through the transactions.” *State v. Mehrabian*, 175 Wn.App. at 708.

*Brown, supra*, to consider evidence of embezzlement to convict on theft by deception. The state did not concede that the facts adduced established the crime by the uncharged means of embezzlement and the trial judge did not erroneously rule that the alternative means of embezzlement and deception “overlapped.”

Factually, Mehrabian never had rightful possession of his employer’s monies. As in *Johnson*, the monies Mehrabian received were facilitated through third parties who had actual possession *before* he gained possession by use of deception. Thus, *Mehrabian* clearly falls on the *Johnson* side of the *Smith/Johnson* dividing line.

Nevertheless, the State discerns in *Mehrabian* that this Court intended to overrule a century of precedent including *Smith* and *Olds*, without ever mentioning these precedents, so as to hold that deception is now so broadly defined that it swallows up the means of embezzlement. See Brief of Respondent at 23 arguing that *Mehrabian* has “binding precedential value” while ignoring the controlling holdings of *Smith*, *Olds* and *Johnson* which in reality *are* the binding precedents. Contrary to the State’s expansive misreading of *Mehrabian*, there is nothing in the case calling into question the long-standing principle that evidence of one means of theft cannot be used to prove a different means. If the Washington Supreme Court’s decisions in *Smith* and *Olds* are to be overruled, that is the sole prerogative of the Washington Supreme Court. *E.g.*, *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

**Reply to State's Argument that After-the-Fact Concealment Is Not Inherent in, and Incidental to, Theft by Embezzlement**

The State quarrels, without the benefit of authority, with Appellant's position that after-the-fact concealment, the "cover up," is inherent in, and incidental to, embezzlement. The experienced *Knapstad* judge offered the State below an opportunity to produce "some case law that says that it's sufficient that the act of deception, contrary to the statutory language, can occur sometime later in terms of *a coverup or things like that. Which we often see in embezzlement cases.*" VRP 4/24/15 at 13 (emph.ad.)

The State provided no such authority to the trial court just as it has cited no such authority to this Court. And for good reason. Since at least the 1930's, the Washington Supreme Court has recognized that the after-the-fact "cover up" is part and parcel of the crime of embezzlement, not an independent alternative means of re-committing the already completed crime. *State v. Smith*, 2 Wn.2d at 120 ("cover up" acknowledged as inherent in embezzlement and not a basis to charge and convict on another means of theft); *State v. Sterett*, 160 Wash. 439, 295 P.182 (1931)(same).

In *Sterett*, a case not acknowledged by the State, the defendant, like Appellant here, made after-the-fact false statements to the wronged party. 160 Wash. at 440. While observing that a defendant in this situation has a "legal duty" to refrain from making such false statements, the *Sterett* Court's observation was made in the context of "secreting" from the wronged party the fact of *embezzlement*. *Id.* That is precisely the context in which Appellant made after-the-fact false statements.

The Court of Appeals, too, has recognized that after-the-fact concealment of embezzlement inheres in that offense with no indication that such post-completed act of embezzlement cover up would simultaneously constitute sufficient independent evidence of a separate distinct alternative means. *E.g.*, *State v. Stock*, 44 Wn.App. 467, 469-70, 722 P.2d 1330 (Div. 1 1986); *State v. Moreau*, 36 Wn.App. 688, 690-91, 669 P.2d 483 (1983).

Moreover, in other contexts, Washington courts have held that when a wrongful act is only *incidental* to the essential crime, it may not be charged separately. *E.g.*, *State v. Green, supra*, 94 Wn.2d at 227 (“mere *incidental* restraint and movement of a victim ... are not, standing alone indicia of a true kidnapping” [Court’s *emph.*], citing *State v. Johnson*, 92 Wn.2d 671, 680, 600 P.2d 1249 (1979)(state may not obtain a conviction for a felony in addition to rape “unless it involves some injury to the person or property of the victim or others which is *separate and distinct from and not merely incidental to the crime*” (*emph.ad.*)); *State v. Regan*, 28 Wn.App. 680, 684-87, 625 P.2d 741 (1981)(following *Johnson* as to kidnapping and assault); *State v. Wilder*, 4 Wn.App. 850, 852-53, n. 1, 486 P.2d 319 (1971)(where kidnapping “is only incidental to the commission of another crime ... kidnapping would not be a proper charge.”).

**Reply to State’s Argument on Statute of Limitations that State has Unfettered Discretion to Choose Which Statute of Limitations Applies** (Resp. Brf. 28-29)

The State claims there is “no authority” prohibiting a prosecutor from choosing which statute of limitations will apply to any particular

alternative means of committing a crime. Resp. Brf. at 29. In other words, the State claims the unfettered power to elect which means by which to charge a defendant depending on the availability or expiration of the statutory charging period as to such means.

Since the statute of limitations for theft was split into different time periods for the first time only in 2009,<sup>8</sup> it is not surprising that there is no specific authority yet on point. But there *is* authority – which the State overlooks – that the State is not permitted to manipulate a criminal charge to the detriment of a defendant.

For example, the Washington Supreme Court has held that “statutes which give the prosecution discretion to charge either a felony or a misdemeanor upon the same facts violate the equal protection clause.” *State v. Blanchey*, 75 Wn.2d 926, 939, 454 P.2d 841 (1969), citing, *Olsen v. Delmore*, 48 Wn.2d 545, 295 P.2d 324 (1956). Here, the abuse of prosecutorial discretion is far more egregious: on the same facts, one means of the charge – the one for which there was probable cause – was absolutely time-barred, whereas the other means – the one for which there was no probable cause – was not, and the State charged only the latter.

First, the State concedes it received the police referral with adequate time to file a theft charge within the three-year statute of limitations

---

8

“The statute of limitations for felony theft committed by deception was extended to six years effective July 26, 2009. R.C.W. 9A.04.080(1)(d)(iv); Laws of 2009, ch. 53 sec. 1.” *State v. Mehrabian*, *supra*, 175 Wn.App. at 696, n.3. For all other means of felony theft, including embezzlement, the statute of limitations remains three years. R.C.W. 9A.04.080(1)(h).

for embezzlement.<sup>9</sup> Resp. Brf. at 7; VRP 4/24/15 at 20.

Second, the State further concedes it had probable cause to charge theft by embezzlement. Resp. Brf. at 3; Aff. of Prob. Cause based solely on attached police report dated August 21, 2014, CP 451-53.

Third, the State further concedes the statute of limitations for embezzlement began to run on September 9, 2011 and expired on September 9, 2014 thus barring the charge after that date. Resp. Brf. at 29; VRP 4/24/15 at 19.

Fourth, the State further concedes it delayed filing the charge until January 23, 2015, more than four months *after* the expiration of the three-year statute of limitations for embezzlement (but provides no excuse for the delay). Resp. Brf. at 7; VRP 4/24/15 at 20.

Finally, the State concedes it filed the charge as theft by deception in order to invoke the longer statute applicable to that means and so avoid the time-bar applicable to theft by embezzlement. Resp. Brf. at 29; VRP 4/24/15 at 19.

Even simple mismanagement of a case by a prosecutor's office has

9

---

The State would have this Court ignore the fact that the Snohomish County Prosecutor had six months notice of the potential charge and of the time available to file based on the highly misleading assertion that the "Snohomish County Prosecutor's Office is not an investigative agency." Resp. Brf. at 5. It hardly needs citation to authority to demonstrate that obviously a county prosecutor's office is by definition an investigative agency. R.C.W. 36.27.020(4), (5), (6); R.C.W. 10.27.070 (investigative powers before grand jury); R.C.W. 10.27.170 (investigative powers before special inquiry judge: "an additional investigatory tool for the prosecuting attorney", *State v. Reeder*, 184 Wn.2d 805, 815 (2015)); CrR 4.8 (subpoena powers); CrR 4.6 (deposition authority); CrR 2.3(a) (search warrant authority), etc.

More importantly here, any competent prosecutor's office has, or should have, procedures in place to prioritize cases to insure that when exercising discretion whether to file a charge, offenses at or near the expiration of the statute of limitations are given heightened consideration to insure that a valid charge is filed. Here, despite six months direct notice to the elected prosecutor, there is no showing that his office gave *any* consideration to the imminent expiration of the statute of limitations and, in fact, the charge was not filed until long after the expiration of the time limit.

been deemed sufficient to require dismissal. *State v. Sulgrove*, 19 Wn. App. 860, 862, 578 P.2d 74 (1978)(dismissal affirmed “due to the failure of the Prosecuting Attorney to charge the alleged offense properly”); *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 857 (1980)(dismissal affirmed for Snohomish County Prosecutor’s mismanagement of case stating: “we have made it clear that ‘governmental misconduct’ need not be of an evil or dishonest nature, simple mismanagement is sufficient. *State v. Sulgrove*, *supra*.”).

When the State neglects to file a charge within the applicable statute of limitations, that is simple mismanagement of the case requiring dismissal. Here, however, there is more than simple governmental mismanagement. Here, there is intentional manipulation of the theft statutes to charge an alternative means for the sole reason of allowing the prosecution to take advantage, to the detriment of Appellant, on the same facts of a more generous limitations period when the charge is barred by the applicable limitations period. This is akin to the prosecutorial statute-shopping condemned in *State v. Blanche* and *Olsen v. Delmore*, *supra*. Just as a prosecutor is not permitted to manipulate the charge to increase punishment, so too a prosecutor should not be permitted to manipulate the charge to evade the applicable statute of limitations.

This point is well-made in the analogous decision of the Court of Appeals in *State v. Haley*, 39 Wn.App. 164, 692 P.2d 858 (1984). *Haley* concerned a prosecutor’s choice to file a charge of manslaughter, which

had no time limit,<sup>10</sup> instead of under the former negligent homicide statute, which had a three-year limitations period. The *Haley* decision addressed this issue in the context of the doctrine requiring a prosecutor to charge only under a specific law when a general law also applies. The Court noted two factors specific to negligent homicide but absent in manslaughter: the limitations differences and the fact that negligent homicide necessarily required proof of use of an automobile:

“... because the negligent homicide statute requires the use of an automobile as the instrument of death, and a time limitation of 3 years within which the death must occur, it is the more specific statute, and preempts prosecutions under the general manslaughter statute [with no time limitation].”

*State v. Haley*, 39 Wn.App. at 168.

The analogy to Appellant’s case is clear: just as negligent homicide required proof of a specific fact not required in manslaughter (use of an automobile), so too theft by embezzlement requires proof of a specific fact (trust relationship) not required in theft by deception and just as there was a difference between the three-year statute of limitations for negligent homicide and no limitation for manslaughter, so too embezzlement is governed by a three-year statute whereas deception may be charged six years after discovered.

In such circumstances, the *Haley* Court firmly rejected the State’s argument that a prosecutor should have unfettered discretion in making

10

---

*See* R.C.W. 9A.04.080(1)(a)(i) (no time bar for manslaughter as judicially included with murder). Under current law, vehicular homicide also has no time bar. It is noteworthy that with the advent of the discovery rule for theft by deception in R.C.W. 9A.04.080(1)(d)(iv), the six-year limitations period can be transformed into no limitations period depending on the facts of the case.

the charging decision:

“To grant the prosecutor unbridled discretion of choosing which statute he is to charge is to emasculate the negligent homicide statute.”

*State v. Haley*, 39 Wn.App. at 169. The *Haley* Court further declared:

“This result is an impermissible potential usurpation of the legislative function by prosecutors.”

*Id.*, quoting, *State v. Danforth*, 97 Wn.2d 255, 259, 643 P.2d 882 (1982).

To accept the State’s baseless argument here, that on the same facts, a prosecutor has unbridled discretion to charge either theft by embezzlement or theft by deception would be to “emasculate” the alternative statutory means of embezzlement. It would constitute an impermissible usurpation of the legislative function by prosecutors. And it would constitute a denial of equal protection of the laws to similarly situated persons. 14<sup>th</sup> Amendment; Art. I, sec. 12.

### CONCLUSION

“Under our system of criminal justice, even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar.” *Jackson v. Virginia*, 443 U.S. at 323-24. Should such a miscarriage occur, as in this case, the remedies are reversal, *State v. Olds*; *State v. Gillespie*; *State v. Bray*, and dismissal, *State v. Smith*; *State v. Bauer*; *In re Stoudmire*.

DATED THIS 5th DAY OF APRIL, 2016.

  
TOM P. CONOM WSBA# 5581  
Attorney for Appellant  
Michael C. McKinnon

1  
2  
3  
4 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

5 DIVISION I

6 STATE OF WASHINGTON, )

7 Respondent, )

No. 74008-3-I

8 v. )

9 AFFIDAVIT OF MAILING  
OF REPLY BRIEF

10 MICHAEL C. McKINNON, )

Appellant. )

11 \_\_\_\_\_ )  
12 STATE OF WASHINGTON)

ss.

13 COUNTY OF SNOHOMISH)

14  
15 The undersigned states that on the 5th day of April, 2016 he deposited in the mails of  
16 the United States of America a properly stamped envelope directed to: Mark Roe, Snohomish  
17 County Prosecutor and Andrew E. Alsdorf and Seth A. Fine, Snohomish County Deputy Prosecutors,  
Mission Building, M/S 504, 3000 Rockefeller Avenue, Everett, Washington 98201, containing a copy  
of: 1. Reply Brief of Appellant; 2. Copy of this Affidavit.

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

20 DATED THIS 5TH day of April, 2016 at Edmonds, Washington.

21   
Tom P. Conom #5581

22  
23  
24  
25  
26  
27 ORIGINAL