

67523-1

67523-1

NO. 67523-1-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

*Respondent,*

v.

WILLIAM LAU,

*Respondent.*

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REPLY BRIEF OF APPELLANT

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ORIGINAL

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## A. INTRODUCTION

Appellant Lau was convicted of two counts of theft committed both by deception and by exertion of unauthorized control. CP 80-81. This required proof that the defendant (1) wrongfully obtained (2) property “of another,” i.e., property that belonged to someone else; either (3) by means of the exertion of unauthorized control or by color or aid of deception. RCW 9A.56.050. In the present case, the State failed to prove these elements, and this failure is due to the State’s failure to understand three critical concepts. As a result the State obtained theft convictions for conduct that simply does not constitute theft.

First, the State does not understand the nature of the property that was the subject of the prosecution because the State fails to appreciate the distinction between a debt – an obligation that can be discharged with money from any source -- and the taking of a specific collection of cash or currency that is owned by someone else. Currency can be stolen. If a person takes someone else’s money out of that other person’s wallet, or desk drawer, or cash register, that taking can be the basis for a theft charge. But nonpayment of a monetary debt cannot be theft. It cannot be theft because an unsecured debt “*is not chargeable to any particular piece of property.*” *State v. Pike*, 118 Wn.2d 585, 595, 826 P.2d 152 (1992) (emphasis added). A debt can be paid with any money; it need not be

paid with specific dollars collected from any specific place, or earned from any specific activity. Because the debt in this case arose from a failure to pay taxes, and because the tax is calculated as a percentage of gross receipts, the State erroneously believes that the tax debt must be paid out of the actual dollars that comprise the gross receipts.

Second, the State fails to understand that *no part* of the gross receipts that were obtained from pull tab gambling activity constituted “the property of another.” According to the State, the property that was stolen was money – U.S. currency – which the State claimed *belonged* to the cities of Federal Way and Burien. The State believes that because Federal Way and Burien were *owed* gambling taxes in the amount of five percent of the gross receipts collected within the cities, that therefore the cities *owned* five percent of the gross receipts. But to *owe* and to *own* are not equivalent terms. To *owe* is to have a contractual obligation to another; to *own* is to have a bundle of property rights that others must respect. The State never understood this, and mistakenly predicated a prosecution for theft crimes on a faulty premise of municipal ownership. The cities never *owned* any of the gross receipts taken in by the three corporations.

Third, the State fails to understand that William Lau and the two corporations that owned the sports bars are separate and distinct persons, and that therefore William Lau is not personally responsible for payment

of the corporations' taxes. Since he is not personally responsible for payment of their taxes, he cannot properly be prosecuted for nonpayment of them. Even assuming, *arguendo*, that nonpayment of a debt could be deemed acquiring the "property of another" (in this case, according to the State, the "property of" the creditor), Lau was not the "person" who acquired such "property." The corporations -- TLF Holdings, LLC and Tall Timbers Enterprises LLC -- acquired it. Lau did not acquire it, and thus he did commit any theft because *he* did not obtain such "property."

In sum, no one committed theft because no one acquired "property of another." Alternatively, even if unpaid taxes do constitute property of another, since the unpaid taxes were not paid by corporations, only the corporations could be guilty of a theft.

## **B. ARGUMENT IN REPLY**

- 1. THE STATE IGNORES THE RULE THAT A CREDITOR'S RIGHT TO COLLECT A DEBT IS NOT "THE PROPERTY OF ANOTHER" AND THUS CANNOT BE THE SUBJECT OF A THEFT PROSECUTION.**
- a. The State's Assertion That the Cities Had an "Ownership Right" to a Share of the Corporations' Gross Gambling Receipts Is Premised Upon a Tortured and Untenable Reading of RCW 9.46.110(4).**

The State asserts that "the cities had an *ownership right* in five percent of the bars' gross gambling receipts." *Brief of Respondent* ("BOR"), at 17 (emphasis added). But the State is mistaken. Ignoring the holding of *Pike* that an unsecured debt "is not chargeable to any particular piece of

property,” the State argues that the cities had a “superior possessory interest” in 5% of the gross receipts from gambling activities. *BOR*, at 19.

The State seems to ground “the cities’ possessory interest in that portion of the gross receipts” in RCW 9.46.110(4). *Id.* But the language of that statute cannot be tortured into giving the cities “a possessory interest” in a portion of the *currency* which the sports bars collected. The statute provides the cities with a “lien” on “personal and real property used in the gambling activity,” and states that “[t]he lien shall attach on the date the tax becomes due.”

While one can put a lien on real property, or on personal property that can be sold for money, the notion that one can attach a “lien” to U.S. currency makes no sense. By definition a “lien” provides security for an unpaid debt: “We have held that a lien is an encumbrance upon the property as security for the payment of a debt.” *Boeing Employees Credit Union v. Burns*, 167 Wn.2d 265, 278, 272 P.3d 908 (2012). *Accord Sullins v. Sullins*, 65 Wn.2d 283, 396 P.2d 886 (1964). If an unsecured debt is owed and unpaid, a creditor can take steps to impose a lien against some piece of property. By taking steps to foreclose on that lien the creditor can then force a sale of the liened property and take money from the proceeds of that sale to satisfy the debt. But if a debtor possesses U.S. currency, it makes no sense to talk about putting a “lien” on that currency in order to

secure payment of the debt. If the debtor has currency to pay the debt then it is simply a matter of executing a judgment for the debt by seizing that currency. Thus, the attempt to assert a lien-type of possessory interest over currency makes no sense at all. One does not sell “encumbered” U.S. currency in order to raise money with which to pay a debt.

Moreover, the lien statute does not apply to all forms of personal property. RCW 9.46.110(4) provides that when gambling taxes are not timely paid, the unpaid taxes “become *a lien* against personal and real property *used in the gambling activity* in the same manner as provided for in RCW 84.60.010.” (Italics added).<sup>1</sup> Therefore, Burien and Federal Way could have placed a lien on the real estate upon which the three sports bars were located, or upon any pull-tab games that the corporations possessed. In this way the cities could *assert* a possessory interest in the actual things “used” in the course of playing the pull-tab games.<sup>2</sup> The money paid to the bars as the price of playing the pull-tab game was not something “used in the gambling activity.” Thus, even if it were possible to acquire a lien on U.S. currency, RCW 9.46.110(4) does not give the cities “a possessory interest” in any portion of the dollars and coins paid in to the sports bars

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<sup>1</sup> RCW 84.64.010 was repealed in 1991 and replaced with RCW 84.64.040 through .080.

<sup>2</sup> Moreover, the mere assertion of such a possessory interest in the sports bar or in the gambling equipment would not give the taxing authority – in this case the cities -- any immediate possessory interest in the lien property. A city with a tax lien still has to go through the judicial process of foreclosing on the lien. Only then would the city gain an

by the patrons who paid to play the pull-tab games.

b. **The State's Assertion That The Cities Had an "Ownership Right" to a Share of the Corporations' Gross Gambling Receipts Is in Conflict With *State v. Pike*, And With Several Cases From Other Jurisdictions.**

The State has not cited a single case where a *theft* conviction was based on the nonpayment of a tax. This is not surprising because it is well settled that a creditor's contractual right to collect a debt is not a "property right," and thus it cannot be the subject of a theft prosecution.

It is so well settled that an unpaid debt is not a property right of the creditor, that there are relatively few cases that discuss it.<sup>3</sup> In addition to the *Pike* decision in Washington State, there are many decisions from all over the country which recognize that a failure to pay a debt does not amount to appropriation of the "property of another" upon which a theft conviction can be predicated. The opinion in *Commonwealth v. Mitchneck*, 130 Pa. Super. 433, 198 A. 463, 464 (1938) is instructive.

Mitchneck owed his employees wages, and they owed money to a store owner named Vagnoni. Mitchneck deducted the amounts his

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ownership right to some or all of the proceeds that are obtained in the ensuing foreclosure sale of the gambling establishment or the gambling equipment. See RCW 84.64.080.

<sup>3</sup> Before *Pike* was decided in 1992, this same principle was recognized in *State v. Polzin*, 197 Wash. 612, 620, 85 P.2d 1057 (1939): "We have uniformly held that the failure of the debtor to account to his creditor does not constitute embezzlement." *Polzin* cited to *State v. Mahaffay*, 192 Wash. 76, 72 P.2d 1028 (1937). Oddly, the State has also cited *Mahaffay* (BOR, at 16). And yet *Mahaffay* expressly states "It is *not* enough to sustain such a conviction that the relation of debtor and creditor existed between them, and that, on a balance being struck of the account the agent would be found indebted to his

employees owed to Vagnoni from their wages and assumed the obligation to pay those debts to Vagnoni for them, but he then failed to pay Vagnoni. On this basis he was charged and convicted of theft. But the appellate court threw out his theft conviction because whatever money Mitchneck had was *his* money, and the failure to pay debts to others did not convert his money into the property of another:

***The defendant in the present case had not received, nor did he have in his possession, any money belonging to his employees. True he owed them money, but that did not transfer to them the title to an ownership of the money.*** His deduction from their wages of the amounts of the store bills which they had assigned to Vagnoni did not change the title and ownership of the money thus withheld, nor did his agreement to pay to Vagnoni the amounts thus deducted constitute the latter the owner of the money. The money, if Mitchneck actually had it, of which there was no proof, was still his own, but after he accepted the assignments he owed the amount due his employees to Vagnoni instead of to them . . . But failure to pay the amount due the new creditor was not fraudulent conversion . . . ***Defendant's liability for the unpaid wages due his employees was, and remained, civil, not criminal. His liability for the amount due Vagnoni after his agreement to accept or honor the assignments of his employees' wages was likewise civil and not criminal.***

*Mitchneck*, 198 A.2d at 464.

The State argues that because the cities were entitled to be paid an amount equal to 5% of the gross receipts from pull tab gambling, that the sports bars had to fork over 1/20 of the very same dollars that it had collected from paying pull-tab customers. Based on this faulty premise,

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principal.” *Mahaffay*, 192 Wash. at 84, quoting *Hamilton v. State*, 46 Neb. 284, 64 N.W.

the State concludes that the cities “owned” 5% of those receipts, and that this 5% share was therefore “property of another.” The Colorado Supreme Court rejected an identical argument in *People v. Treat*, 193 Colo. 570, 568 P.2d 473 (1977). In that case Treat made a contractual agreement that he would rent out Powers’ motor home to rental customers, and that he and Powers would share the rental income received. Treat then rented the vehicle to many people and collected rental income, but he never paid Powers any part of Powers’ share of the rental income. The State charged Treat with theft, for stealing Powers’ rental income. But the trial court tossed out the charge and the Colorado Supreme Court affirmed:

The trial court correctly . . . dismiss[ed] the theft count. No evidence showed that the Center was an agent for the purpose of rental collections, or that specific rental funds were to be set aside for payment to Powers. Powers only concern was that he be paid his share of the rents collected; no money collected by Treat became Powers’ property until it was transferred by Treat in payment of the obligation. Given those facts, without more, no inference can be drawn that Treat unlawfully exercised control over property of another with intent to deprive him of it. This was simply a debtor-creditor controversy, properly to be resolved by civil proceedings.

*Treat*, 568 P.3d at 477.

Powers didn’t get his share of the rental income because Treat didn’t pay it to him. Similarly, in the present case the cities didn’t get their 5% share of the pull tab gambling income because the sports bars didn’t pay it

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965, 966 (1895) (emphasis added).

to them. In both cases there is no criminal liability for theft because the money received by the defendant was not “the property of” the other “person” who was supposed to receive a fractional share of the income.

**c. The Same Result – No Criminal Liability – Applies When the Creditor is a Government Entity To Whom Taxes Are Owed.**

Lau relies on the holding of *Pike* that a “general contractual debt cannot support a theft conviction.” 118 Wn.2d at 595. The State responds that the *Pike* holding does not apply because “the nature of the charges in *Pike* and its underlying facts are readily distinguishable.” *BOR*, at 19. The State says, “[t]he facts of this case are markedly different.” *Id.* Certainly the State is correct when it says that the sources of the unpaid debts are different. The debt in *Pike* was a contractual debt which Pike agreed to pay. The debt in this case is a public tax debt.

Does it make a difference whether a debt is “contractual” or “public”? Lau cited two cases from other States that demonstrate that it does *not*. *State v. Marcotte*, 418 A.2d 1118 (Me. 1980); *State v. Nappo*, 729 N.E.2d 698 (N.Y. 2000). The State attempts to distinguish *Marcotte*, and simply asks this Court not to follow *Nappo*.

The State’s discussion of *Marcotte* implies that the operative theft statute in Maine is significantly different from Washington’s theft statute:

In *Marcotte* . . . the defendant was charged with “Theft By Misapplication of Property,” *which* explicitly required “the existence of either a statutory obligation to make the specified

statutory payment from the property obtained” or “a statutory obligation to reserve an equivalent amount of the defendant’s own property.” *Marcotte*, 418 A.2d 1118, 1120 (1980). No similar requirement exists in Washington’s general theft statute.

*BOR*, at 20-21 (emphasis added).

But the State’s argument is highly misleading since there were *two* theft statutes at issue in *Marcotte*, the Supreme Judicial court of Maine said they were *both* inapplicable to the defendant’s conduct, and the Respondent entirely ignores the second Maine statute which is *identical* to Washington’s general theft statute.

The Respondent focuses its discussion of *Marcotte* entirely on the “Theft by Misapplication of Property,” statute, 17-A M.R.S.A. § 358. However, in *Marcotte* the prosecution relied upon *two* theft statutes. The prosecution contended that “even if § 358 does not apply,” the defendant’s convictions were still proper under Maine’s “Theft by Unauthorized Taking” [statute] under 17-A M.R.S.A. § 353.” That statute provides: “A person is guilty of theft if he obtains or exercises unauthorized control over the property of another with the intent to deprive him thereof.” 17-A M.R.S.A. § 353(1), quoted in *Marcotte*, 418 A.2d at 1122, n.2.<sup>4</sup>

Both Maine’s statute and Washington’s statute require proof that the

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<sup>4</sup> This language of Maine’s “Theft by Unauthorized Taking” statute is virtually identical to Washington’s general theft statute, RCW 9A.56.020(1)(a), which states: “‘Theft’ means: (a) To wrongfully obtain or exert unauthorized control over the property of another or the value thereof, with intent to deprive him or her of such property or

defendant obtain or exercise (or exert) “unauthorized control *over the property of another.*” (Italics added). The *Marcotte* court rejected the State’s attempt to rely on the Theft by Unauthorized Taking statute precisely because the conduct charged – not paying taxes that were due – did not constitute theft because there was no taking of any property that belonged to the State: “The conduct alleged in the indictment, however, involved no ‘unauthorized control over the property of another.’” *Marcotte*, 418 A.2d at 1122. Accordingly, the Court held it made no difference which statutory definition of theft the prosecution sought to rely upon: “we conclude as to the facts alleged in this case, that the result is no different under either section 353 or section 358.” *Id.* (footnote omitted). This portion of the *Marcotte* decision is fully applicable here; instead of attempting to distinguish it, the State has simply ignored it.

Similarly, in *People v. Nappo*, 94 N.Y.2d 564, 729 N.E.2d 698, 708 N.Y.S.2d 41 (2000) the Court dismissed larceny charges that were premised upon the defendant’s failure to remit motor fuel taxes to the State. The Court simply held that “***The State of New York is not an owner***, as defined by the Penal Law, of taxes required to be paid for the importation and distribution of motor fuel.” 94 N.Y.2d at 566 (emphasis added).

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services; . . . .” This definition of theft was charged in the second amended information

The same is true in the present case. The cities are not the “owners” of any portion of the gross receipts taken in for pull-tab gambling. In some places the State uses words that describe the cities’ right *to receive payment* of taxes owed: “[Lau] essentially took control of the cities’ right to payment of the tax bill . . .” *BOR*, at 17. In other places the State erroneously equates this right to receive payment with a right of “ownership” of a portion of the gambling receipts: “Here the cities had an ownership right in five percent of the bars’ gross gambling receipts.” *Id.* The *Nappo* Court faulted the State for making the exact same mistake: “The taxes due were not the property of the State prior to their remittance. Accordingly, the defendants did not steal money that belonged to New York State, but rather failed to make payments of taxes which were their personal obligations under the Tax Law.” *Nappo*, 94 N.Y.2d at 566.

The State claims that the *Nappo* Court distinguished between cases where *some* taxes were paid, and cases where *no* taxes were paid, arguing that *Nappo* holds that a theft prosecution is permissible in the former case (which it likens to this case) and impermissible in the latter case.<sup>5</sup> It is

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upon which Appellant Lau was tried and convicted. CP 80-81.

<sup>5</sup> “The [*Nappo*] court distinguished the facts (defendants never filed any tax returns or paid any taxes for the fuel they imported) from a situation where taxes are actually collected, yet unremitted to the State. *Id.* at 567. Regardless of New York’s interpretation of its own statutes, this Court should not follow New York’s reasoning in a case where a taxpayer collects gambling revenue in Washington, a portion of which is owed to the city, and then engages in a long term scheme to underreport that revenue, concealing an obligation to pay substantial gambling taxes and effectively exerting

difficult to figure out what passage in the *Nappo* opinion the State means to refer to here. In any event, it makes no sense to hold – as the State implies that the *Nappo* Court did – that (a) if you pay *some* of the taxes you owe government and conceal the rest of what you owe, you can be prosecuted for theft in New York; (b) but if you pay *no taxes at all* and conceal all of what you owe, you cannot be prosecuted for theft in New York.

Similarly, in support of its claim that “the cities had *an ownership right* in five per cent of the bars’ gross gambling receipts,” the State cites to pages 257 and 269 of the third volume of the trial transcript. But there is *nothing* on either of these pages that addresses the “ownership” of any portion of gross gambling receipts.<sup>6</sup> Here, as in both *Marcotte* and *Nappo*, the fact that a defendant may owe a tax debt does not mean that the State or municipality owns any part of the actual dollars from which the amount of the tax debt is computed.

In addition to *Marcotte* and *Nappo*, an Illinois Supreme Court decision also holds that defendants cannot be charged with theft for failing to remit taxes owed because there is no taking of the “property of another.” In one

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control over the cities’ cause of action for unpaid taxes.” *BOR*, at 21-22.

<sup>6</sup> On both of these pages (which are attached hereto as Appendix A) the witnesses testify that their city taxes gross gambling receipts at 5%. That has never been in dispute. But neither testifies that their city has “ownership” of 5% of the gross gambling receipts. Similarly, the State cites to provisions of the city tax codes which impose the tax and set

of the consolidated cases reported in *People v. Buffalo Confectionery Company*, 78 Ill.2d 447, 401 N.E.2d 546, 547-48, 36 Ill. Dec. 705 (1980), the Court noted that the appeal “raises the issue of the propriety of the offense of theft [citation] for a retailer’s failure to pay to the State of Illinois use tax monies as required under the Use Tax Act [citation].” The Court accepted as correct the defendants’ contention that Illinois’ “revenue acts give rise to a debtor-creditor relationship between the taxpayer and the State and that such relationship is inconsistent with the charge of theft.” *Id.* at 551. Much like Burien City Code § 3.25.040(2), the Illinois Use Tax Act provided:

The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer ***shall constitute a debt*** owed by the retailer to this State.

*Buffalo Confectionery*, 401 N.E.2d. at 552 (emphasis added). Under Illinois law the State had the authority to pursue either a retailer or a consumer for failure to pay the state taxes due. But because the obligation to pay the tax was a *debt*, the retailer’s failure to pay the debt could *not* be made the subject of a theft prosecution:

This court has held that evidence of the type of transaction which leads only to a debtor-creditor relationship will not support a charge of embezzlement or larceny by a bailee. . . .

The State contends that once the element of intent to permanently

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the tax rate, but there is no mention of any right of “ownership” in any of the cited city code provisions.

deprive an owner of the use or benefit of his property is added to the debtor-creditor relationship, it then ripens into the crime of theft. In support of this proposition the State cites to [two specific cases]. The language used in those cases refers to the receiving and holding of funds or property of another as not being enough in and of itself to establish embezzlement: . . . In our case *we do not have a situation where an agent is holding property belonging to another. We have the situation of a retailer who is a debtor under the statute and has failed to pay a debt owed to the State of Illinois. Under these facts it is improper for the State to institute prosecution for theft merely to collect a debt.*

*Buffalo Confectionery*, 401 N.E.2d at 553 (emphasis added).

Here, as in *Marcottei*, *Nappo*, and *Buffalo Confectionery*, the theft convictions should be vacated and the charges dismissed because the tax due to the cities was not the “property of another.”

**2. THE STATE IGNORES THE IDENTITY ELEMENT OF THEFT: THE STATE MUST PROVE THAT THE PERSON WHO WRONGFULLY OBTAINED PROPERTY OF ANOTHER WAS THE DEFENDANT.**

The State asserts that Lau is the proper defendant because he is the one who practiced deception with the intent to defraud the cities. The State says that it “properly charged and convicted Lau of theft for his acts of intentionally underreporting gross gambling receipts and falsifying tax returns.” *Id.* at 12.<sup>7</sup> But this description of “theft” entirely omits the element of “wrongfully obtaining” the property of another. The State

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<sup>7</sup> As noted in Appellant’s opening brief, any such act of intentional falsification could be prosecuted either under RCW 9.46.170, which defines the making of any false or misleading statement in any report submitted to the gambling commission as a misdemeanor offense; or under RCW 9.46.190, which makes it a misdemeanor to make “any untrue statement of a material fact.”

simply ignores the fact that it was required to prove that it was “the defendant” – William Lau – who wrongfully “obtained” the property.<sup>8</sup> Here it was *not* the defendant who obtained the property, it was the two corporations that owned the three sports bars that took in the gross receipts from pull tab gambling activity. The money was paid in to the coffers of the corporation, not into the pocket of William Lau.

In a strained attempt to justify prosecuting Lau, the State cites to *State v. Lee*, 128 Wn.2d 151, 904 P.2d 1143 (1995) as alleged support for the contention that it doesn’t matter whether it was Lau or the corporations that obtained control over the gross receipts. But in *Lee* the defendant personally obtained control over both a house and rental assistance money paid to him by the Red Cross.<sup>9</sup> The Supreme Court *reversed* Lee’s

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<sup>8</sup> The second amended information charged “[t]hat the defendant WILLIAM LAU . . . did obtain control over U.S. Currency . . .” which allegedly belonged to the cities of Federal Way and Burien. CP 80, 81. And similarly, the to-convict instructions stated that the prosecution had to prove that “*the defendant* (a) wrongfully obtained or exerted unauthorized control over property of another . . . ; or (b) by color or aid of deception, obtained control over property of another . . . .” CP 102, 106.

<sup>9</sup> Lee offered to buy a run-down vacant house from Guy Hanson and Hanson accepted. Lee then spent an unspecified amount of money (“well over \$700”) to repair the house to make it habitable. Before the closing date, and without Hanson’s permission, Lee rented the house to the two tenants to whom the Red Cross was providing housing assistance. Accepting Lee’s representation that he was renting the house to them, the Red Cross “sent Lee a check for \$700, which he deposited in his savings account.” *Id.* at 154. But Lee failed to appear for closing and forfeited his earnest money that he had paid Hanson for the house, so at all times Hanson actually owned the house. “In closing argument the prosecutor told the jury that the ‘gist of the case’ was that Lee rented a house he didn’t own and accepted \$700 from the Red Cross as rent.” Lee claimed he could not be convicted of theft because he did not steal anything from the tenants since they received the housing they had been promised. On appeal Lee claimed there was no victim and thus no theft. But the Supreme Court held that Hanson was the victim of the theft because Hanson owned the house, and the rental money for the tenants should have been

conviction because it could not tell whether Lee deprived Hanson of more than \$250 worth of rental value of the house, because it was unclear how much Lee spent on repairing the house before he received the \$700 rental assistance money. The bottom line was, Lee was guilty of theft because Lee *did* obtain something of value – rental income that belonged to Hanson – but there was insufficient evidence that the benefit Lee received was in excess of \$250 and thus insufficient evidence to prove commission of a felony. In sum, *Lee* simply cannot be said to support the State’s contention that to prove theft the State does not have to prove that the defendant personally obtained something of value.<sup>10</sup>

The State also purports to rely on *State v. Monk*, 42 Wn. App. 320, 711 P.2d 365 (1985), as support for the notion that a defendant can be found guilty of theft if he deprives a true owner of property, even if the defendant himself obtains nothing. The State argues that “it does not matter whether Lau or the bars ultimately profited.” *BOR*, at 15.

Even a cursory reading of *Monk* reveals that *Monk* does not support such a conclusion. In *Monk* the defendant stole electricity from the city utility by hiding the fact that she was tapping into the city’s power line. *Monk* clearly *did* “ultimately profit” from her act of deception; *Monk* got

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paid to Hanson, but was instead paid to Lee. Lee was charged and convicted of a felony theft for stealing property or services of more than \$250 in value.

electrical power that she did not pay for. Thus Monk herself “obtained control” of property or services of another.

In a final, and even more strained attempt to justify charging Lau instead of the corporations, the State argues that Lau stole from the corporations. Relying on a case where a corporate agent embezzled money from the corporation and put money in his own pockets, the State argues that it was proper to charge Lau with theft, *even though this is in direct conflict with the State’s assertion that Lau stole from the cities of Federal Way and Burien*. The State asserts:

A corporate employee/officer/agent/ commits theft when, with intent to deprive, he allows ***corporate assets*** to be appropriated to the use of any person other than the true owner – regardless of whether the corporate funds are converted to the agent’s own use, or to the use of anyone other than the true owner. State v. Mahaffay, 192 Wash. 76, 78, 72 P.2d 1028 (1937); . . . .

*BOR*, at 15-16 (bold italics added).

This is most strange. First the State admits that the gross receipts paid by the pull tab customers were “corporate assets” – that they “belonged to” the corporations. Then, the State cites to *Mahaffay* where a corporate agent embezzled money from the corporation that he worked for and put corporate money into his own pocket. *State v. Mahaffay*, 192 Wash. at

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<sup>10</sup> Lee did obtain control over something belonging to another and Lee did personally benefit from it. Lau did not obtain control over the gross receipts because he got none of it and the corporations got all of it.

77.<sup>11</sup> But the State's theory of the case, and the charges brought were premised on the notion that five percent of the gross receipts *belonged to the cities*. It is true that legally a corporate officer can steal from a corporation by embezzling corporate monies entrusted to him or under his control. But Lau was never convicted on this basis. There was never any contention that the victim of Lau's "theft" was one of his corporations.<sup>12</sup>

**3. BECAUSE THE STATE IMPROPERLY TREATED NONPAYMENT OF A DEBT AS IF IT WERE THE PROPERTY OF ANOTHER, THE THEFT CONVICTIONS VIOLATE ART. 1, § 17.**

The State argues that "one who acts fraudulently may be imprisoned,

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<sup>11</sup> The *Mahaffay* opinion states that the defendant was charged with "having in his possession, custody and control as officer and trustee of the Universal Investment Company, a corporation, personal property of the value of \$17,308.13, lawful money of the United States of America, and while having said property in his possession, custody and control as trustee and officer of said . . . corporation, . . . he . . . did . . . unlawfully and feloniously . . . appropriate the said property to his own use with the intent to *deprive and defraud the lawful owner thereof, to-wit: Universal Investment Company, a corporation . . .*"

Moreover, Mahaffay's conviction for theft was *reversed* and the charge of theft was dismissed precisely because there was no evidence that he converted the money to his own use: "there is no proof of conversion of any property of the Universal Investment Company to the use of the appellant . . ." *Id.* at 81. Thus the State misrepresents *Mahaffay* claiming that it shows that a corporate employee can be found guilty of theft of corporate assets "regardless of whether the corporate funds are converted to the agent's own use," *BOR*, at 16, when in fact Mahaffay's conviction was *reversed* because the State failed to show that Mahaffay converted the corporate funds to his own use.

<sup>12</sup> The state also purports to rely on *State v. Thomas*, 123 Wash. 299, 212 P. 253 (1923), but the issue decided in that case – when a corporate officer can be held criminally liable for a crime committed *by the corporation* -- is completely irrelevant to this case. In *Thomas* the corporation president was convicted of theft for stealing funds belonging to a man named Hunt by not paying Hunt funds that the corporation owed to Hunt. Thomas claimed he could not be convicted of theft because it was the corporation, not Thomas the individual, which appropriated Hunt's money to itself. Acknowledging the general rule that a corporate officer cannot be held liable for the criminal act of the corporation unless the evidence shows that he personally participated in the corporation's criminal act, the Court held that the evidence did show that, and upheld Thomas' conviction. Unlike the

as he is being punished for the fraud, not the failure to pay.” *BOR*, at 22. Appellant Lau is in complete agreement with this statement. A person who acts fraudulently *can* lawfully be punished for fraud, and a person who tells lies *can* be punished for telling lies, *without* violating art. I, § 17.

In recognition of this fact, RCW 9.46.170 and RCW 9.46.190 expressly make it a criminal offense for a pull-tab operator to make a false statement to the gambling commission, or to make any untrue statement of fact to anyone. These statutes specifically state any person who commits these offenses shall be “guilty of a gross misdemeanor subject to the penalty set forth in RCW 9A.20.021.” Such punishment is *not* punishment for failure to pay a debt. But punishment for “theft” of an unpaid debt, *is* punishment for debt and therefore *is* unconstitutional.

**4. IT IS DEFICIENT CONDUCT TO FAIL TO CITE THE CONTROLLING CASE THAT SUPPORTS THE DEFENDANT’S CONSTRUCTION OF THE OPERATIVE STATUTE, AND TO FAIL TO OBJECT WHEN THE PROSECUTOR ARGUES A CONTRARY CONSTRUCTION OF THE STATUTE TO THE JURY.**

**a. The Holding of TLR Applies to Both Civil and Criminal Cases.**

At trial Appellant’s counsel argued that the term “gross receipts” did *not* include the value of pull-tabs which were lost or stolen. RP IV, 454, 508-09. The prosecutor argued that it did. RP IV, 453-53, RP V, 494. In perfect agreement with the position argued by trial defense counsel, the

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defendant in *Thomas*, defendant Lau never tried to argue that the corporations were guilty

decision in *TLR v. Town of La Center*, 68 Wn. App. 29, 32-33, 841 P.2d 1276 (1992) holds that gross receipts do *not* include the value of stolen or lost pull-tabs which the pull tab operator should have received but did not.

The State does not dispute the fact that this is what *TLR* holds. Instead, the State argues that *TLR*'s definition of gross receipts does not have "any relevance to the criminal charges here" because *TLR* was a civil case. *BOR*, at 23. No explanation is given as to why this should matter.<sup>13</sup>

The State does not point to any other statute that uses the term "gross receipts" in reference to the operation of pull-tab games. Moreover, the State ignores the fact that the term is included in a statute located within the statutory Title that is labeled "*Crimes and Punishments*." Finally, it contradicts all applicable canons of statutory construction to find that criminal liability for unpaid taxes is *greater* than civil liability.

**b. The State Offers No Explanation As To Why a Competent Criminal Defense Attorney Defending a Person Accused of a Theft Based on Failure to Pay a Gambling Tax Would Fail to Cite the One Case That Supports the Defendant's Position.**

Appellant Lau's defense counsel never cited *TLR* to the trial court even though it endorsed the very argument he was making and flatly

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of committing thefts which he had nothing to do with.

<sup>13</sup> In *TLR* several pull-tab operators brought a declaratory judgment action challenging the same interpretation of the same phrase in the same statute that is at issue here. The pull-tab operators won. Without explanation, the State suggests that if the plaintiffs in *TLR* had not brought a civil suit, and had instead been criminally prosecuted for failing to pay a 5% tax on the value of the pull tabs which had been lost and stolen, that the outcome of the case would have been different because in that procedural setting the term "gross receipts" would have a different – and a more expansive -- meaning.

contradicted the argument the prosecutor was making. Sometimes a court can hypothesize a strategic reason why a defense attorney would have failed to take certain action. But sometimes, as in *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987), it is inconceivable that the defense counsel had any such strategic reason.<sup>14</sup> This is another such case.<sup>15</sup>

c. **If He Had Objected and Cited the TLR Case It is a Virtual Certainty That The Trial Judge Would Not Have Permitted the Prosecutor to Misstate the Law in Closing Argument.**

The State's secondary fall back argument regarding the prejudice prong of *Strickland* fares no better. The State claims that Lau "has not demonstrated that the outcome probably would be different had his counsel cited the case, objected, or asked for a jury instruction." BOR, at 23.<sup>16</sup> But this argument simply ignores reality. If he had objected to the

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<sup>14</sup> In *Thomas*, so far as the published opinion shows, there is nothing from which one can tell whether trial counsel was "aware of" the Supreme Court's decision in *State v. Sherman*, 98 Wn.2d 53, 653 P.2d 612 (1982); nevertheless, all the Supreme Court justices -- including the dissenters ("I do not quarrel with the observation of the majority that the performance of trial counsel was deficient . . ." *Thomas*, 109 Wn.2d at 234 (Opinion of Dolliver, J.)) -- agreed that trial counsel was deficient for not requesting a *Sherman* instruction simply because such an instruction would have helped and could not possibly have harmed the defense.

<sup>15</sup> The State says that "the record does not show that his trial counsel was unfamiliar with *TLR*." BOR, at 23. First, the record *does* show that trial counsel never cited to *TLR*, never objected to the prosecutor's closing argument which contained statements in total conflict with *TLR*, and never tried to make any use of *TLR*. The State's attempt to recast the issue as the question of whether trial counsel was "familiar with" *TLR* is disingenuous. For if one makes the assumption that trial counsel *was* aware of it, it merely makes his conduct even *more* grossly deficient. If he was aware of it, why didn't he cite it and why didn't he object? When no strategic reason can be conceived of, that, by definition, the failure to cite helpful, supportive case law is deficient conduct.

<sup>16</sup> Initially the State misstates the standard for the *Strickland* prejudice prong. He need *not* show that the trial outcome "would probably be different" (BOR, at 23) if his attorney had cited the case, and/or objected, and/or requested an instruction. The defendant "need *not* show that counsel's deficient conduct more likely than not altered the outcome of the

prosecutor's closing argument remarks regarding the scope of "gross receipts" and had cited the *TLR* case, it is a virtual certainty that the trial judge would have forbidden the prosecutor from making that argument. Had defense counsel cited the case earlier, and requested an instruction consistent with *TLR*, it is very likely that the trial judge would have given such an instruction. And even if he had not asked for such an instruction earlier, had he asked for a curative instruction after the trial prosecutor misstated the law, the trial judge almost certainly would have given one.

**5. THE TRIAL JUDGE'S FAILURE TO DECLARE THE LAW REGARDING THE CORRECT DEFINITION OF "GROSS RECEIPTS" IS MANIFEST CONSTITUTIONAL ERROR.**

The State's sole argument against an art. IV, § 16 violation<sup>17</sup> seems to be that this error was not manifest because it was not prejudicial. For purposes of RAP 2.5 in order to raise an error for the first time on appeal the error must be "manifest" and of constitutional dimension. *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). A "claimed error is manifest if [the appellant] can show it had practical and identifiable consequences at trial that actually prejudiced him." *Id.* at 99.

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case." *Strickland v. Washington*, 466 U.S. 668, 693 (1984); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Later in its brief the State gets it right, citing to *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). *BOR*, at 24.

<sup>17</sup> The State cannot and does not deny that (1) article IV, § 16 guarantees an accused the constitutional right to have the trial judge "declare the law"; (2) the trial judge allowed a prosecution witness to testify regarding the definition of the term "gross receipts," thereby usurping the trial judge's role to instruct the jury on the law; (3) the trial judge failed to give the jury any instruction which defined the term "gross receipts"; and (4)

Lau easily makes that showing. Here the jury ended up having to choose between the conflicting arguments of the prosecutor and defense counsel as to the proper meaning of the term “gross receipts.” The prosecutor’s argument turned out to be legally *wrong*. As this Court said recently, “A prosecutor’s misstatement of the law is a serious irregularity having the grave potential to mislead the jury.” *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011).<sup>18</sup>

**6. THERE WAS INSUFFICIENT EVIDENCE THAT ANY DECEPTION CAUSED THE DEFENDANT TO “OBTAIN” THE PROPERTY ALLEGED TO HAVE BEEN STOLEN.**

There was no evidence to show theft by deception because there was no evidence that the deception *caused* Lau to “obtain” the gross receipts generated by the pull-tab gambling conducted at the three sports bars. Any deception (allegedly by underreporting the amount of gross receipts) came *after* the sports bars “obtained” the gross receipts from its pull tab customers. Thus, there was a complete absence of any causal connection between the deception and the “obtainment” of control over the receipts.

In order to persuade this Court that there was sufficient evidence of

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she allowed the opposing attorneys to argue different positions to the jury regarding the correct legal meaning of that term.

<sup>18</sup> In his opening brief Lau cited to *State v. Aumick*, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995). There, as here, the defendant failed to object to the jury instructions in the trial court and the State argued that this meant Aumick could not raise the issue of lack of a jury instruction on an element of the offense on appeal. The State also argued that any error was harmless because defense counsel was able to argue to the jury what he believed the elements of the offense were. But the Supreme Court held that the error was

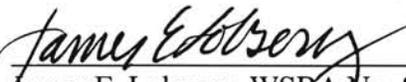
theft by deception, the State *changes* its legal theory and shifts from the contention that the defendant committed theft of the gross receipts – the dollars themselves that came in from the pull-tab customers – to the contention that Lau “essentially took control of the cities’ right to payment of the tax bill, and was thus properly convicted of theft.” *BOR*, at 38. In support of this new theft theory, the State cites to *State v. Monk*, 42 Wn. App. 320, 711 P.2d 365 (1985). But in *Monk* the defendant worked for the company that he stole from, and his theft charge was based on the defendant’s act of hiding the company’s accounting records so that it was deceived into thinking that the defendant had paid his bill. Here, Lau did not work for either of the cities and thus had no occasion to hide the cities’ own records from the cities.

**C. CONCLUSION**

For these reasons, this court should vacate Lau’s theft convictions and remand with directions to dismiss the charges with prejudice. In the alternative, this Court should reverse and remand for a new trial.

DATED this 7th day of August, 2012.

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of constitutional dimension, and that “a jury should not have to obtain its instruction on the law from arguments of counsel.” *Id.* at 431. Here, as in *Aumick*, reversal is required.

# APPENDIX A

1 the City.

2 Q. Okay. So the taxes -- the City taxes gross receipts at --

3 A. Yeah.

4 Q. -- five percent?

5 A. That is correct.

6 Q. Now, you mentioned that the City doesn't allow any  
7 deductions. What do you mean by that?

8 A. Deductions -- there's certain gambling activity that  
9 allows for a deduction, like bingo, raffles, and amusement  
10 games, and the deductions are for prize amount paid out.

11 Q. Okay. And so in those games, they would be allowed --

12 A. Yes.

3 Q. -- to deduct them?

14 A. That is correct.

15 Q. And so what deductions are allowed for pull-tabs?

16 A. There isn't any.

17 Q. And does it indicate that on this form?

18 A. That is correct. It does.

19 Q. So is their taxable income any different than their gross  
20 gambling receipts?

21 A. No.

22 Q. And does the City of Federal Way require these every  
23 month?

24 A. That is correct.

5 Q. And do Exhibits 30 through 34, are those true and accurate

1 five -- ten percent of net. But this is five percent of  
2 gross.

3 Q. Okay.

4 A. Excuse me.

5 Q. So it's like bingo and things like that that it's ten  
6 percent of net?

7 A. Bingo. And then also some charitable organizations can  
8 also sell pull-tabs.

9 Q. All right.

10 A. And which there's the -- the different rate comes into  
11 effect.

12 Q. Now, when you say five percent of gross, what do you mean  
13 by that?

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

18 Q. And that's as reported to you by the taxee?

19 A. Yes.

20 Q. And at the bottom of each of those quarterly tax returns,  
21 there's a signature and a printed name; is that correct?

22 A. All I have is -- oh, yes, there is. Okay. Yes.  
23 Signature and printed name.

24 Q. And what's the printed name?

5 A. William Lau.