

NO. 34719-9 II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT CORCORAN DINGMAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Linda CJ Lee

No. 04-1-02684-1

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DIVISION II  
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AMENDED BRIEF OF RESPONDENT AND BRIEF ON RESPONDENT'S CROSS-  
APPEAL

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the appellant entitled to an image of the defendant's computers in a format other than the format used by the State in imaging the computers?
2. Was the Appellant entitled to a sixth continuance?
3. Were all elements of the charges of which the appellant was found guilty proven by the state?
4. Based upon the facts of this case, was the court required to give a Petrich instruction?
5. Was the appellant's constitutional right against double jeopardy violated when he was convicted of, and subsequently sentenced for, multiple charges of theft and money laundering?
6. Did the special verdict form used for the establishing of the aggravating sentencing factor of a major economic offense violate the appellant's constitutional rights?
7. Did the state prove that there were multiple victims for the theft convictions for counts 1, 7, 10, 12, 15, 18, 24, 26, 34, 37, 39, 42, 44 and 46?

B. STATEMENT OF THE CASE.

1. Procedure

On June 3, 2004, the appellant was charged with 20 counts of theft in the first degree, and 35 counts of money laundering. On June 17, 2004, the appellant was arraigned and entered a plea of not guilty to all charges. On July 1, 2004, the appellant appeared at his pre-trial conference with his first attorney, Anthony Savage, who was provided with 2,146 pages of discovery. On September 1, 2004, Mr. Savage was allowed to withdraw as the defense attorney, and on September 23, 2004, the Department of Assigned Counsel (DAC) was appointed. (CP 74-76) On October 6, 2004, Robert DePan of DAC entered his notice of appearance in this matter. On May 25, 2005, the State amended the Information and added an additional count of theft in the first degree. (CP 111-142)

On August 30, 2005, a hearing began in front of the trial Judge, Linda CJ Lee. (2 VRP) This hearing was based upon the appellant's demand for a mirror image of the computer hard drives and floppy discs which were seized from the appellant pursuant to a search warrant. The appellant wanted the mirror image in a format other than the EnCase

format which was used by the Pierce County Sheriff's Department when they analyzed the appellant's computers hard drives and discs. (CP 157-158) After hearing the testimony from the State's witnesses and the defense witness, the court denied the defense motion in regards to the format, but ordered that the State provide the defense with the mirror image of the computers in the EnCase format. (3 VRP 138-141, CP 16-161) On September 12, 2005, at the appellant's request, the case was continued for the fourth time to enable the defense to review the EnCase format of the appellant's computer hard drives and discs. (4 VRP 152) On September 26, 2005, the defense provided the State with the required external hard drive so that the Sheriff's Department could make a copy of the EnCase format onto the defense's hard drive for the defense's unfettered review of the material which was contained in the appellant's hard drives and discs. The external hard drive was returned to the defense on September 29, 2005, with the EnCase format of the appellant's hard drives and discs. (CP 174-176)

The trial began on January 3, 2006, and ended on March 10, 2006, when the jury returned a verdict of guilty on 16 counts of theft in the first degree, and 11 counts of money laundering. (CP 820-842) The jury also returned a special verdict on 15 counts of theft in the first degree and 11 counts of money laundering. (CP 855-879) The special verdict form was for an exceptional sentence based upon RCW 9.94A.535(3)(d), which allows for an exceptional sentence if the crime is a major economic

offense. The jury answered “yes” to whether the specified count in each verdict form was a major economic offense which involved multiple victims or multiple incidents per victim. (37 VRP 3795-3800) The appellant was found not guilty of two counts of theft in the first degree (Counts 4 and 30), and 9 counts of money laundering (Counts 2, 3, 6, 9, 22, 28, 33, 35, and 36). (37 VRP 3789-3795)

On February 15, 2006, based upon the motion of the defense, the Court, over objections from the State, orally dismissed counts 5, 8, 13, 16, 21, 23, 25, 27, 29, 31, 32, 40, 47, and 50, which were all money laundering charges, and counts 24 and 56 which were theft in the first degree charges. (30 VRP 2955-2986) The Order of Dismissal for these counts was signed and filed by the court on April 21, 2006, at the time of the appellant’s sentencing. (CP 935-936)

The appellant was sentenced on April 21, 2006, to an exceptional sentence of 180 months, based upon RCW 9.94A.535(3)(d). (38 VRP 3851-3855, CP 915-930) At the time of the sentencing, the State had also argued that an exceptional sentence could be imposed based upon RCW 9.94A.535(2)(c), which the court did not do. (38 VRP 3818-3831, CP 894-900)

The restitution hearing was initially set for June 2, 2006, but was continued several times at the request of both parties. On November 3, 2006, a partial restitution order was agreed upon by both parties and signed by the court. (CP 1026-1027) On January 18, 2007, the restitution

hearing was held which dealt with the remaining victims. The parties agreed on the amount to be paid for Scott and Virginia Klemann, and for David and Vanessa Dunivan. There was argument concerning the amount of money to be paid to Four Seasons who provided the sunrooms for the Sharpes, Murphys, Ressler, Miller/Kuhns and the Gosnells. The parties agreed on the amount of money which was to be paid to Four Seasons, but the defense argued that Four Seasons should not be considered to be a victim because of a civil judgment which Four Seasons had obtained against the appellant. The Court refused to order any restitution for Four Seasons, or to the victims for whom the sunrooms were provided by Four Seasons. (1/18/07 VRP 2-18, Resp. CP 1-2) On February 16, 2007, the Court denied the State's Motion for Reconsideration for inclusion of Four Seasons as a victim on the restitution order. (2/16/07 VRP 2-5; CP 1031-1033; Resp. CP 3-4)

The defense filed their Notice of Appeal on April 21, 2006, and the State filed its cross appeal on May 18, 2006. The State filed an additional Notice of Appeal on the issue of restitution on February 16, 2007, which was consolidated with this case.

## 2. Facts

In late 1999 or early 2000, the appellant started his construction business which was called Quality Home Enclosures (hereafter referred to as QHE). (29 VRP 2813) This was a home construction business with a main emphasis of building sunrooms for residential customers. (29 VRP

2813, 2867-2868; 31 VRP 3261) At the beginning, the appellant had a business partner by the name of Tiffany Doty. The appellant was not able to obtain credit in order to run his business and relied upon Ms. Doty to provide the business with the needed credit to acquire the materials needed to run the business. (29 VRP 2821; 31 VRP 3245) As the testimony established at trial, the appellant was, for the time covered by the charges, in financial difficulty. (27 VRP 2235; 33 VRP 3592-3593) In many instances he could only pay for the business materials with either cash or a cashier's check. (23 VRP 2073-2074; 24 VRP 2226-2227) There were many occasions when his employees had to use their own money to obtain materials for the construction jobs. (23 VRP 2039-2043, 2074)

Testimony established that the appellant owed money to the Internal Revenue Service, his ex-wife, the State Department of Labor and Industries, the State of Washington for sales tax, which he had collected but did not forward to the State, and for the business and occupation tax. (33 VRP 3615) The appellant also owed money to Western Awning for sunrooms that he had ordered from them (26 VRP 2541-2542), and he owed money to Alaska Traffic for the shipping, delivery, and storage fees for the Four Seasons Sunrooms that the appellant had ordered from Four Seasons. (24 VRP 2147-2176) These sunrooms were the rooms that the appellant had sold to most of the victims in this case.

The appellant was always trying to sell new construction jobs so that he could get more money to pay for the older pending jobs and to

make payroll. (23 VRP 2079-2080; 24 VRP 2224-2226; 33 VRP 3593-3594) The appellant also used the money he collected for sales tax to pay for pending jobs instead of sending the money to the State of Washington. On March 14, 2001, the appellant met with his CPA about his failure to pay the sales tax to the State. (33 VRP 3614-3617) From the testimony of the witnesses, it was clear that the appellant was aware that he needed to forward the money he had collected for sales tax, and it was clear that he did not do so. (33 VRP 3614-3617) In October 2001, the appellant met with Daryl Roosendaal, an investigator with the Office of the Attorney General, to discuss the sales tax situation. Again, the appellant stated that he was aware that the sales tax needed to be paid to the State. (25 VRP 2325-2331) Ultimately, the appellant pled guilty on July 11, 2005, of five counts of theft in the first degree for keeping the sales tax. (31 VRP 3326)

The appellant was the only signer on the business bank accounts, and he was the sole decision maker for the business. (23 VRP 2077; 24 VRP 2220, 2223) The appellant set up the pricing schedule which was used to establish the prices for the various construction jobs. (30 VRP 3086-87) The contracts which were used by the appellant for the construction projects provided partial, or stage, payments. As the appellant and one of his former sales men, Andrew Kline, testified at trial, each of the payments included not only the charges for overhead and labor, but also the money to be used to acquire the material for each job. (1/30/06 VRP 43, 47; 29 VRP 2872-2873; 32 VRP 3434-3435) The

appellant did the hiring and firing of the management employees for the business, to include managers, salesmen and bookkeepers. (31 VRP 3289-3291)

The appellant became a distributor of Four Seasons sunrooms starting in March, 2001. In February 2002, the appellant was contacted by a Four Seasons representative because Four Seasons had concerns about the appellant's ability to deliver the Four Season sunrooms to his customers. The appellant provided Four Seasons with banking information, which Four Seasons had requested. After reviewing the banking information, Four Seasons refused to renew their contract with the appellant. The appellant was informed of this refusal by a letter dated April 1, 2002. The appellant was informed that Four Seasons believed that his operating capital was "grossly inadequate" to operate his business. (27 VRP 2584-2587, 2589-2590)

In March, 2002, the appellant hired Mike Howard as a business analyst. Mr. Howard, who had a Master's Degree in Business Administration, reviewed the financial records which were provided to him and concluded that QHE business liabilities exceeded its assets. From Mr. Howard's review of the business records, it was clear that the appellant was taking money which he received for future jobs and was using it to finish current jobs, leaving no money for the future jobs. Mr. Howard was aware that employees would take their checks and immediately go to the bank to cash the check. The employees who did not

get to the bank early enough did not get paid. Mr. Howard informed the appellant by letter of his conclusions, and then left the business. (26 VRP 2412-2423, 2428-2429, 2438-2439)

On June 6, 2001, Kent and Joyce Sharpe entered into a contract with the appellant to build a Four Seasons sunroom. They paid the appellant \$15,596 by check on that same date. The appellant told the Sharpes that the sunroom would be built by the holidays of 2001, which did not happen. On August 8, 2001, a change order was signed by the Sharpes and QHE which reduced the cost of the project. On February 27, 2002, the Sharpes made a second payment in the amount of \$7,653.75 which, the Sharpes understood, was to be for materials. On February 28, 2002, the money was deposited into the payroll account and was spent by the appellant as of March 1, 2002. In March 2002, the appellant started to work on the Sharpes' project by tearing out the existing patio walls and roof. By April 18, 2002, the concrete slab was poured for the sunroom. No further work was ever done on the project, even though the Sharpes called the appellant numerous times. The Sharpes were provided their sunroom by Four Seasons who had another contractor build the Sharpes' sunroom. (10 VRP 452-488, 497-522; Exhibits 1A, 1C, 1H)

On September 21, 2001, the appellant entered into a contract with Georgia and Louis Murphy to build a Four Seasons sunroom. On that date the Murphys paid the appellant \$10,000. The appellant told the Murphys that the room would be done by Christmas. On October 13, 2001, the

Murphys paid the defendant \$7,604, which the Murphys understood would be for materials. On April 26, 2002, the building permit was issued to build the sunroom. In June 2002, workers appeared at the site and dug some holes. By the end of July, 2002, the foundation was poured for the room, but the forms had to be corrected. In August, 2002, the subfloor was put in, and the gas connection and outside light were moved. Nothing else was done towards building the sunroom even after numerous phone calls were made by the Murphys to the appellant. The Murphys ultimately did obtain their sunroom because Four Seasons had another contractor build it for them. (11 VRP 641-687, 703-719; Exhibit 3A, 3C, 3E, 3F)

On October 2, 2001, Virginia and Scott Klemann entered into a contract with QHE, through the appellant's salesman Andrew Kline, to build a Four Seasons sunroom, and for work to be done on their kitchen. The Klemann's obtained a home loan to pay for the sunroom. At the time that they signed the paperwork, they noticed that all of the money was to go to the appellant. The Klemann's objected to that procedure but signed the paperwork anyway with the understanding that all of the money would not go to the appellant. The appellant, however, was paid the entire amount of the contract, which was \$45,793.00, on January 2, 2002. On January 8, 2002, the appellant met with the Klemann's and gave them \$13,000.00 for the kitchen cabinets which the Klemann's subsequently purchased. The appellant only installed the foundation, which was incorrectly installed, and the subfloor for the sunroom. In July, 2002, Mr.

Klemann was able to obtain \$3,789.00 from the appellant. However, in August, 2002, after many phone calls, Mrs. Klemann was informed by the appellant that he had spent their money on other projects and there was nothing for her project. Ultimately Mr. Klemann obtained money from his 401K to pay for the sunroom which had been ordered and was sitting in Alaska Traffic. Mr. Klemann paid Alaska Traffic and obtained the sunroom which was in pieces in several crates. (12 VRP 737-791, 840-865; Exhibit 4A, 4C, 4D)

On October 23, 2001, Vicki Platts-Brown and her husband Ron Brown, entered into a contract with QHE for a Four Seasons sunroom. The cost of the contract was \$55,562.29. On that date they paid \$22,260.00 towards the sunroom. On March 4, 2002, they made another payment of \$16,695, which the Browns believed was for materials. The Browns had also paid for a geological survey out of their own pockets which was required due to the location of their house and the requirements of the building department. The Browns did not get their sunroom, and no construction was done towards building the sunroom. In October 2002, Mrs. Brown asked the appellant for their money. The appellant said he did not have the money and he was broke. Instead, the appellant offered to do other work on their house which the Browns refused to do. Prior to meeting with the Browns, the appellant had informed Nicole Stremlow, an independent contractor who had done the work on the Brown's building permit for the appellant, that he did not have the money for the Browns.

While the building permit was granted, the appellant did not pay for the building permit, and did not pay Nicole Stremlow for the work she had done to obtain the building permit. (12 VRP 878-898; 15 VRP 1284-1315; Exhibit 5A)

On October 17, 2001, Ron and Marie Ressler entered into a contract with QHE to build a Four Seasons sunroom for \$46,833. On that date, the Ressler's paid \$500.00 as good faith, and paid the balance of \$46,333.00 to QHE on December 3, 2001. The money went into the QHE payroll bank account on December 3, 2001, and was spent on various matters, none of which had anything to do with the Ressler's project. The Ressler's had been told that the sunroom had been ordered, which was not true. Work began on their project in March, 2002, with the digging of nine holes as footings for the subfloor. In April, 2002, the sewer elbow was moved and the back porch was broken up; in May, 2002, the nine holes were filled; and in July, 2002, the subfloor was installed and the water bib was moved. Nothing else was done on the project. In June, 2002, the appellant told the Ressler's that if they would change their sunroom to Western Awning they could get their room installed by August 15, 2002. The Ressler's agreed to this, but they still did not get a sunroom. On August 16, 2002, Mr. Ressler spoke to the appellant who told him that he did not have the money or the people to pick up the sun room from Western Awning. Ultimately, the Ressler's got their sunroom from Four

Seasons, who hired a contractor to install the room for the Ressler. (12 VRP 913-931; 14 VRP 955-978, 1008-1050; Exhibit 6A)

On November 23, 2001, Sean Tam and Amy Lam, who are husband and wife, entered into a contract with QHE to install a Four Seasons sunroom at their house. They paid the appellant \$15,500 on March 5, 2002, for materials and the building permit. The money was deposited into the QHE general bank account on March 6, 2002, and was spent by March 8, 2002. The Tam/Lams never received the sunroom or any materials from the appellant. (15 VRP 1144-1167, 1179-1193; Exhibits 7A, 7E)

On January 8, 2002, Darlene Miller and Carole Kuhns entered into a contract with QHE to build a Four Seasons sunroom. They paid the appellant \$2,000.00 on January 22, 2002, and \$11,796.00 on February 11, 2002. Both sums were deposited into the general bank account for QHE and were spent within a couple of days of the deposit. The victims removed the decking, and the appellant only put in the footings for the project on September 1, 2002. On September 5, 2002, the appellant contacted the victims and obtained \$4,000 from them for a new roof, which was never installed. This money was deposited into the QHE general bank account and was spent by the following day. The victims ultimately did obtain a sunroom from Four Seasons, who provided the victims with another contractor to build the room. (15 VRP 1197-1221, 1236-1253; Exhibits 8A, 8C, 8G)

On February 20, 2002, Edmond and Trudy Bonnel entered into a contract with the appellant to build a sunroom. The Bonnells paid the appellant \$12,000.00, which the defendant deposited into the QHE payroll bank account. The money was spent by February 22, 2002. The Bonnells made numerous phone calls to the appellant and the appellant made them promises, but never built them the sunroom. It was the understanding of the Bonnells that the appellant would use the money to obtain the building permit. No building permit was obtained. The trial court, over the State's objection, dismissed the Bonnells from the case prior to presenting the case to the jury. (15 VRP 1264-1276; Exhibit 9A, 9B, 9C)

On February 26, 2002, James Mathers and Cindy Taylor, husband and wife, entered into a contract with the appellant to build a Four Seasons sunroom, even though the contract did not specify a Four Seasons sunroom. On that date, the victims paid the appellant \$7,365.00 and made another payment of \$7,365.00 on March 5, 2002. In September, 2002, the appellant leveled the backyard and put in some rock. No further work was done on the victims' project. On September 12, 2002, Ms. Taylor met with the appellant at her home and discussed the project with him. She ultimately paid the appellant an additional \$3,680.00, which was the full price, to build a patio and a retaining wall. The appellant put the money into his personal bank account. The victims never got the sunroom and never got the new patio. They did get a lot of promises from the appellant

which he never fulfilled. (17 VRP 1345-1375, 1398-1426; 32 VRP 3420-3421; Exhibit 10A, 10C)

On April 11, 2002, the appellant entered into a contract with Vanessa and David Dunivan to remodel their kitchen, and add a room onto the house. The cost of this project was \$59,000.00. The Dunivans obtained a loan, and on May 30, 2002, the appellant was paid \$36,000.00 towards the project. On July 3, 2002, the Dunivans paid the appellant \$12,000.00 to purchase cabinets. On July 13, 2002, the appellant started work on the Dunivans' construction project. The appellant put in the outside flooring, and put up some of the wall studs for the add on room. The roof was never put up and the trusses for the roof were left on the ground. The appellant did no further work on the add on room. In August, 2002, the appellant gutted the kitchen, moved two windows, and opened the wall into the living room. The appellant never finished the living room wall since plumbing was found in the wall area, and the appellant never moved the plumbing in order to finish the wall. The appellant did no further work on the kitchen remodel. The victims ordered the cabinets from Home Depot, but when the cabinets arrived, the appellant was unable to pay for them since he had used all of the Dunivans' money on items other than for the Dunivan project, and Home Depot returned the cabinets. The appellant had written a check for the cabinets to Home Depot, but it bounced because the appellant did not have money in the QHE bank account to pay for them. Ultimately, the

Dunivans had to obtain another loan to pay for the cabinets, which they obtained from Custom Design Cabinets. The appellant did write a \$2,000.00 check toward the payment on the second set of cabinets, but this check also bounced. Throughout the project, and after August, 2002, the Dunivans made multiple phone calls to the appellant about their project. On October 8, 2002, the Dunivans met with the appellant at their home. The appellant told them that he didn't have the money to do their project. The appellant said that if anyone sued him they would get nothing and he would file for bankruptcy. The appellant also told the Dunivans that he owed money to the IRS who had, allegedly, taken money out of the QHE bank account to pay for back taxes. Ultimately, the Dunivans hired another contractor to complete their project. (17 VRP 1445-1497; 23 VRP 1969-1994; Exhibit 12A)

On June 3, 2002, Eddie and Vevely Smith entered into a contract with QHE to build a sunroom. The Smiths thought that they were buying a Four Seasons sunroom, but the contract did not specify that the room was to be from Four Seasons. As part of the contract, the victims cut down trees and trimmed others in preparation for the room. On July 1, 2002, the Smiths met with the appellant at their home. The appellant went over the contract and the plans for the sunroom with them. By July 8, 2002, the Smiths had obtained the financing for their project, and the bank paid the appellant the entire amount of the contract which was \$47,482.00. All of the money went into the payroll bank account for QHE, and was all

spent by July 15, 2002. Some of the money was transferred from the payroll account into the general account. This money which was transferred into the general account was spent by the appellant in multiple transactions by July 10, 2002. The appellant never obtained their room and no work was ever done on their project. The victims did call the appellant and, at one point, he promised to come out the next day with the start date for the project, but he never appeared. (19 VRP 1637-1656, 1665-1689, 1711-1715; Exhibit 13A)

On June 14, 2002, the appellant entered into a contract with John and Tok Sun Regan for the construction of a sunroom. The victims paid the appellant \$10,000.00 towards the contract, and made the second payment of \$10,000.00 on August 9, 2002. It was the understanding of the victims that the second payment was to be for materials. The initial payment was deposited into the general account on June 17, 2002, and was spent in multiple transactions by June 21, 2002. The second payment went into the payroll account and was spent on the same day as the deposit. The only work that was done on the project was to remove the sod in the area where the sunroom was to be built, dig six holes and then fill the holes with concrete for the footings for the floor. This work was done on September 12, 2002, and September 14, 2002. Nothing else was done on the victims' project. The victim's made numerous phone calls to the appellant. The appellant made promises, but never did any further work. (19 VRP 1717-1757, 1783-1798; Exhibit 14A)

On June 15, 2002, the appellant entered into a contract with Lorraine and Fred Ferguson to build a sunroom. The victims paid \$13,077.00 towards the contract on July 17, 2002. The money was deposited into the QHE general bank account and was spent by July 19, 2002. The victims were told that they would get the materials for the sunroom on August 5, 2002. The victims never got the materials. The victims spoke to the appellant several times on the phone. On September 16, 2002, the appellant told the victims he had the building permits for the project, which was not true. On October 6, 2002, the appellant told the victims that he would start the project in two weeks, which never occurred. (18 VRP 1578-1595, 1607-1624; Exhibit 15A)

On July 9, 2002, Alice and Allen DeSart entered into a contract with QHE to install new windows at their home. Mr. DeSart made a partial payment of \$4,000.00 on August 20, 2002. The money was put into the QHE payroll bank account and the money was spent by August 30, 2002. The victims never got their windows and, in fact, the appellant never even ordered the windows. (18 VRP 1552-1568; Exhibit 16A)

On July 10, 2002, Evelyn and Wilford Gosnell entered into a contract with the appellant to build a Four Seasons sunroom. While the appellant denied making the contract for a Four Seasons sunroom, he used the Four Seasons sunroom plans to apply for the building permit and provided the victims with his business card which shows that he was selling Four Seasons sunrooms. The victims paid the appellant \$6,000.00

on July 15, 2002, and the money was deposited into the QHE general bank account. By July 15, 2002, the appellant had spent all of the money. On July 26, 2002, the victims paid the appellant \$13,600.00. The second payment was deposited into the general account by the appellant, and was spent by July 29, 2002. The appellant started work on the Gosnells' project in August, 2002, even though QHE did not have a building permit. The patio was torn up, and the bricks were taken off of the back of the house in the area where the sunroom was to be attached. No other work was done on the project. The building permit for which the appellant had applied was never obtained since the check that was written for the permit by the appellant bounced. The appellant never covered the back of the house, or replaced the brick. The Gosnells made numerous phone calls to the appellant about their project. On October 1, 2002, the appellant told the Gosnells that he had ordered the material, which he had not done. On October 2, 2002, the appellant left a message that he was coming over for another payment towards the contract, but he never appeared. On October 17, 2002, Mrs. Gosnell spoke to the appellant and he told her that she needed to be nice to him or she could get in line and sue him. The Gosnells finally obtained their sunroom only when Four Seasons provided them with the room and another contractor. (19 VRP 1810-1827; 20 VRP 1834-1863; 1/30/06 VRP 5-13, 15-28; Exhibit 17A)

On July 30, 2002, the appellant entered into a contract to build a sunroom for Dee Snider and Liesl Bohn. The victims paid the appellant

\$4,500.00 towards the contract. This payment was deposited into one of QHE bank accounts, which had a negative balance at the time of the deposit. The money was spent by the close of business on August 13, 2002. On October 8, 2002, prior to the appellant's meeting with the Dunivans on the same date, the appellant obtained \$10,829.00 from Snider/Bohn towards their contract. The appellant never did anything on this construction project. The appellant did hold the second check until the victims told him that the money was in their account to cover the check. The appellant then took the check and had it transferred into three cashier checks. The appellant used the money to open a new checking account. On October 29, 2002, the victims spoke to the appellant who told them that there were 11 projects ahead of them. By this time, the appellant's civil attorney had sent out letters to some of the appellant's customer's telling them about the appellant's poor financial situation. The Snider/Bohns did not receive the letter. (22 VRP 1933-1944; 1/31/06 VRP 79-98; Exhibit 18A, 18E)

On August 1, 2002, Regina Wade entered into a contract with QHE to build her a sunroom. Ms. Wade wrote a \$10,000.00 check on that date to QHE. Pursuant to the contract, Ms. Wade contacted the appellant on August 2, 2002, which was within the three day revocation period, and asked for her money back. The appellant was rude to her. Instead of returning the check, the appellant deposited the check into the QHE payroll bank account. The money was used in several transactions and

was all spent by August 9, 2002. Ms. Wade never received her money, and never received a sunroom. (22 VRP 1894-1909; Exhibit 19A)

On August 27, 2002, Rebecca Kelly entered into a contract with the appellant to build her a sunroom and a bathroom. Ms. Kelly paid the appellant \$15,000.00 towards the contract. She had asked the appellant to hold the check until August 30, 2002, when the money would be deposited into her account. The appellant did so, and the check was cashed on August 30, 2002. During the following month the appellant promised to meet with the victim to go over the blueprints, which never occurred. The appellant never did any work for Ms. Kelly. The trial court, over the State's objection, dismissed this count prior to presenting the case to the jury. (22 VRP 1910-1929, 1950-1951; Exhibits 20 A, 20B, 20C, 20D, 20E)

On March 19, 2003, the Pierce County Sheriff's Department served a search warrant on the appellant's house. (26 VRP 2480) Pursuant to the search warrant, the officers seized nine computers and multiple floppy discs. (CP 144-145) On May 14, 2003, the investigating detective obtained a search warrant to search the contents of the nine computers and the floppies. (2 VRP 59) Shortly after this date the computers and the discs were provided to Detective Greg Dawson of the Sheriff's Department, who is certified in data recovery/computer forensics to recover the data from the computers and the discs. (2 VRP 48, 59-60) Detective Dawson used EnCase to image the computers and the floppy

discs. He then returned the computers and the discs to the property room on July 17, 2003. (2 VRP 60) On December 15, 2003, Detective Dawson issued his final report. On pages one and two of the report the detective clearly states that he used EnCase to image the computers and the discs. (CP 1012-1014) On June 3, 2004, 2,146 pages of discovery were provided to the defense attorney. Detective Dawson's report was at pages 2052 through 2063. Included in these pages is the version of EnCase used by Detective Dawson when he imaged the computers. (CP 1012-1013)

After Robert DePan became the attorney of record for the appellant, the State had discussed with him on many occasions whether he wanted the computer images. On May 12, 2005, after talking to the defense attorney on this issue again, the State emailed Mr. DePan concerning the procedure to be followed for the defense to obtain a copy of the EnCase image of the computer hard drives and the discs. The defense was informed that they needed to provide the State with an 80 gigabyte hard drive so that Detective Dawson could download the forensic images of the appellant's computers in the EnCase format. (CP 1012-1013) This procedure would allow the defense to review the appellant's computer hard drives and discs at their leisure. When this did not occur, the State sent the defense a second email on July 27, 2005, in which the necessity of providing the hard drive was discussed, and the necessity of obtaining an expert who could use EnCase. Instead of providing the hard drive, the defense filed a motion to Demand Discovery. None of the

information imaged from the computers was used at trial by either the State or the defense. (CP 153- 156, 157-158, 1012-1013)

C. ARGUMENT.

1. THE APPELLANT IS NOT ENTITLED TO AN IMAGE OF THE DEFENDANT'S COMPUTERS IN A FORMAT OTHER THAN THE FORMAT USED BY THE STATE IN IMAGING THE COMPUTERS.

Computer Forensics is the field of specialty in which the information and electronic data contained in a computer hard drive, floppies, discs, and zip drives can be analyzed without altering, changing or deleting any of the information, data, files or any other electronic information contained in the original hard drive, floppies, discs, zip drives or other means of storing electronic information in or from a computer. (2 VRP 48-49, 54-55; 3 VRP 99-100) Computer Forensics ensures that the computer, as well as the other electronic storage devices, remain in the same state and condition in the custody of the police as they were at the time they were seized, and that nothing has been tampered with during the mirror imaging process. The imaging also enables the analyst to access data which would not be accessible by turning the computer on and doing a direct download of the files and folders contained on the drives associated with the computer. (2 VRP 51-52, 54)

Every time a computer is turned on, or some action is taken involving the computer, changes are made to the programs, files, documents, and/or drives contained in the computer. These changes can be minute or major depending on the programming contained in the computer, and the actions taken by the operator involving the computer. (3 VRP 103)

EnCase is a software program which allows the analyst to obtain all of the electronic information stored in a hard drive or disc by making a “bit-by-bit image” of the entire hard drive, including allocated space, unallocated space, deleted files, non-deleted files, and file fragments. (2 VRP 50-52, 82) Without EnCase, this information would not be available to either the prosecution or the defense without starting or actually operating the suspect computer which, as was discussed above, would alter the contents of the hard drive. EnCase accesses the electronic information contained on the drives of the computer by accessing the drives without using the computer to turn them on. The analyst’s computer, which contains the EnCase program, is connected to the drives of the computer by a cable, and EnCase will then make a mirror, bit-by-bit, image of the drives without activating or writing to the drives. (2 VRP 54-55)

Deleted files are files which the operator has allegedly deleted from the hard drive of a computer. In reality, the computer removes the ability of the operator to access the deleted file by changing the first letter, or byte, of the file name, which indicates to the operating system that the sectors using this file are now available to be reused, thus, as far as the user is concerned, removing the name of the file or the icon from the computer. The actual file, folder, document or other form of the electronic information is still in the hard drive, but it is now available for the computer to overwrite with new or additional information. This overwriting process occurs at the whim of the computer. A deleted item may be fully overwritten, partially overwritten, or never overwritten. Because it is making a mirror image of all of the electronic information available in a hard drive, EnCase reveals this deleted information to the analyst through the EnCase program. (2 VRP 52-54)

EnCase has the ability to mirror image computers which contain a RAID array configuration. RAID is an acronym for Redundant Array of Independent Disks. RAID is a method/program which enables a computer to contain multiple hard drives where, in the past, the computer would only have one or two hard drives. RAID vastly expands the capacity of a computer. RAID computers use various methods for “striping” data between multiple drives using special software and/or hardware. The

RAID drives must work together with software and/or hardware specific to the type of RAID system being utilized. EnCase can review all of the information stored on the RAID system regardless of the hardware and/or software used to create and manage RAID. Striping means that when the data on a specific topic, for example, is saved to the RAID system, it is shared or spread over the multiple drives, and is not stored in one location only. (2 VRP 61-63; 3 VRP 107-108)

One of the computers seized from the appellant used RAID. The software program which the defense wanted to use to make the mirror images of the appellant's computers (called Ghost), would not have been able to make a usable image of the RAID system. (3 VRP 110).

Not only does EnCase create a mirror image of the electronic information contained in a drive, but it has a search function. EnCase can search and examine the information contained on the bit by bit mirror image to locate certain files, documents, folders, and/or other electronic information in a short period of time based upon the criteria the analyst provides to the program. A prime example would be to locate documents which contain a certain name or fact. EnCase will automatically search the electronic data contained in the mirror image for all key words

provided by the analyst. It will then provide the analyst with a view of the item or items without the analyst having to do a manual search (2 VRP 48, 50, 73, 81; 3 VRP 109)

EnCase has a built in verification check called MD5 Hash. This system provides both an internal and external check to the operation of EnCase. The MD5 Hash ensures that no errors or changes are made in the mirroring process. EnCase will measure the MD5 Hash values which were recorded when the original mirror image was created with the MD5 Hash figures which are reordered each time the EnCase mirror image is analyzed. If these values are not the same, then changes and/or errors have occurred and the operator is so informed. (2 VRP 56-57)

Because the EnCase's bit-by-bit imaging function is a neutral program, there is no built in bias in the programming. It is merely a tool to obtain the entire mirror image of all electronic information contained in a hard drive, disc or other electronic storage device without altering the information. (3 VRP 100, 108-109)

EnCase is not a novel or seldom used program. It has been widely tested and accepted. (3 VRP 101, 104) EnCase is utilized by not only law enforcement, but also by corporations and private industry throughout the world. (3 VRP 101, 104) It is available to the public and is not a closely held and hidden asset which only a rare few can use. (3 VRP 99-101)

Courts throughout the United States have upheld the admissibility of EnCase. The Texas Court of Appeals in the case of Williford v. State, 127 SW 3d 309 (2004), upheld the admissibility of the EnCase mirror images in a case of possession of child pornography. The court relied upon the testimony of the detective who conducted the computer analysis. The detective testified that EnCase is used worldwide and by various agencies in the United States, including federal agencies. The case law shows that EnCase has been successfully used in both civil and criminal cases, and in both State and Federal Courts. U.S. v. Hill, 322 F.Supp. 2d 1081 (C.D. Ca. 2004), U.S. v. Greathouse, 297 F. Supp. 2d 1264 (D. Oreg. 2003), State v. Levie, 695 NW2d 619 (Minn. App. 2005), State v. Morris, 2005 Ohio 599 (2005), State v. Cook, 149 Ohio App. 3d 422, 777 NE 2d 882 (2002).

In criminal cases, it is not only the prosecution who has wanted access to EnCase information, but also the defense. In U.S. v. Frabizio, 341 F. Supp. 2d 47 (D. Mass. 2004), the FBI obtained a mirror image of the defendant's hard drive through the use of EnCase. When the defendant was unable to obtain a copy of the EnCase image, he brought a motion before the United States District Court for the District of Massachusetts. The Federal District Court Judge granted the defendant's motion to provide him with a copy of the EnCase mirror image.

The State, in this case, did not refuse to provide the defense with the electronic information contained on the nine computers, and the discs found in the appellant's residence, nor did the defense so argue before the trial court. Instead, the defense wanted the information to be provided to the defense in a format of its own choosing called Ghost. The defense, however, has never provided any legal basis to support its position.

There is no legal requirement that the State must conform its investigation or investigatory tools to the whims and desires of a defendant. In State v. Emerson, 10 Wn. App. 235, 238, 517 P.2d 245 (1973) the Court of Appeals stated "The kind of techniques law enforcement agencies use to detect crimes is basically a matter for the judgment of the persons charged with law enforcement responsibility." In State v. Johnson, 40 Wn. App. 371, 385, 699 P.2d 221 (1985), the Court of Appeals relied upon State v. Judge, 100 Wn. 2d 706, 675 P.2d 219 (1984) when it said "The police are not required to search for exculpatory evidence, conduct tests, or exhaustively pursue every angle on a case...Here, the State was not obligated to develop the defense theory that proof of Mr. Prather's blood type may have served to impeach Ms. Klassen." In State v. Bernson, 40 Wn. App. 729, 734, 700 P.2d 758 (1985), the Court Appeals, again relying upon Judge, supra., held

“additional investigation for the benefit of the defendant was not mandated.”

The due process right which the defendant has to discovery only “affords a criminal defendant a right of access to evidence...” which is both favorable to the defendant and material to the issues of guilt or punishment. State v. Knutson, 121 Wn. 2d 766, 772, 854 P.2d 617 (1993). But, as the Supreme Court further discussed in State v. Norby, 122 Wn. 2d 258, 266, 858 P.2d 210 (1993), the “discovery request must be reasonable.” In Norby, the defendant wanted the prosecutor to compile information from every felony investigation in Spokane County in a 3 year period. The court found that the request did not meet the requirement of reasonableness.

The State Supreme Court in State v. Boyd, 160 Wn. 2d 424, 158 P.3d 54 (2007), contrary to the appellant’s position, does not require that the State provide the mirror image of a computer in a format specified by the defense. As the Boyd Court at 432 provided

The evident purpose of the disclosure requirement is to protect the defendant’s interests in getting meaningful access to evidence supporting the criminal charges in order to effectively prepare for trial and provide adequate representation.

The State in this case did not restrict the defense’s access to the information contained on the computers and discs. The State provided the

defense not only with the information which the appellant would have been able to access through normal usage of the computer, but also provided the defense with information, such as the deleted files, which the appellant would not have been able to access.

The Boyd Court at 435 emphasized that the “Sixth Amendment right to effective assistance of counsel includes a “reasonable investigation” by defense counsel...It also guarantees expert assistance if necessary to an adequate defense.” In this case, the defense had more than adequate notice that the expert which they required would have to be versed in the use of EnCase, a common tool used to image computers, and not an individual who has a philosophical dislike of EnCase.

In this case, the defense’s demand was unreasonable. The State provided the appellant with access to the electronic data. The software program which the defense wanted the State to use has a myriad of problems which would not have ensured a mirror image of the computer hard drives. (3 VRP 110-111, 122) In addition, there was no guarantee that the hard drives would be operational after sitting, unused, in the property room for over two years. (3 VRP 111-114) The defense expected that the only detective assigned to computer forensics with the Sheriff’s Department was to spend many additional hours, not to mention days, to re-image the nine computers and multiple discs that he had already imaged

through EnCase. (2 VRP 66-67, 3 VRP 111) This simply is not a reasonable request

2. THE APPELLANT WAS NOT ENTITLED TO A SIXTH CONTINUANCE

The defense was provided with their copy of the EnCase bit by bit image of the appellant's computer hard drives on September 29, 2005. (CP 174-176) On December 9, 2005, the defense moved for another continuance, arguing that more time was needed to review the computer hard drives. During the argument the defense attorney stated that their expert would be able to produce the information from the hard drive within two to three weeks from December 9, 2006, (5 VRP 185). In addition, it was argued by the State that the original source material, the contents of the appellant's boxes and filing cabinets, had been returned to the appellant as of January 13, 2004, when the appellant picked the items from the property room at the County City Building. Additional documents were returned to the appellant on June 14, 2004. These documents were returned at the request of the appellant. (CP 174-176) The bank records for all of the bank accounts for QHE and the appellant were provided to defense on May 12, 2005, during the discovery process, and were admitted at trial without objection. (25 VRP 2348-2378)

Case law provides that the granting or denial of a motion for a continuance is within the sound discretion of the trial court. State v. Williams, 84 Wn. 2d 853, 855, 529 P. 2d 1088 (1975); State v. Kelly, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982); State v. Staten, 60 Wn. App 163, 172, 802 P.2d 1384 (1991). The appellant, however, is not entitled to a continuance as a matter of right. State v. Early, 70 Wn. App. 452, 458-59, 853 P.2d 964 (1993). The various factors which the trial court can consider are surprise, diligence of the moving party, materiality, redundancy, due process and the maintenance of orderly procedures which includes the number of continuances that have been previously granted. State v. Harper, 13 Wn. App 273, 275, 534 P.2d 846 (1975); State v. Edwards, 68 Wn. 2d 246, 412 P.2d 747 (1966); Williams, supra; Staten, supra; Early, supra. In considering the impact on the appellant's Sixth Amendment right to assistance of counsel at trial, which the granting and/or denial of a continuance motion could affect, the trial court is only required to provide the defense with a reasonable time for preparation and consultation prior to the trial. State v. Hartzog, 96 Wn. 2d 383, 635 P.2d 694 (1981).

The appellant was provided with a reasonable amount of time in which to prepare for trial. At the time of the December 9, 2005, hearing, the case was over a year and a half old, and the appellant had already been

granted five continuances. The affidavits submitted by the defense in support of the request for the sixth continuance did not provide any information on when his expert reviewed the computer information, nor did the affidavits state how much time the individual devoted to the review. At the time of the December 9, 2005, continuance hearing, the defense had been in possession of the hard drives for 70 days, and the trial did not start for another 25 days. There is no information available to the State, or this court, which would support any supposition that the defense did not get the report from their expert.

The forensic accountant, who testified at trial, based his testimony solely upon the bank records and hard copies of the receipts which were found in the appellant's filing cabinets and boxes. Copies of the receipts and bank records had previously been provided to the defense, along with the Excel spread sheets developed by the forensic accountant which were, in part, admitted at trial in support of the accountant's testimony. (26 VRP 2481-2535; 27A VRP 39-55)

3. ALL ELEMENTS OF THE CHARGES OF WHICH THE APPELLANT WAS FOUND GUILTY WERE PROVEN BY THE STATE.

When an appellant claims that the charges of which he was convicted were not supported by evidence, on appeal, as the Supreme

Court provided in State v. Salinas, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992), this “claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” The evidence to be considered includes circumstantial and direct evidence, since both are equally reliable. State v. Delmarter, 94 Wn. 2d 634, 638, 618 P.2d 99 (1980); State v. Jensen, 125 Wn. App. 319, 104 P.3d 717 (2005). The Jensen Court at 325, further provided that “[e]vidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.”

Time is only a material element of a crime when the incident occurred outside of the charging period or there is an alibi defense; otherwise the use of the phrase “on or about” “is sufficient to admit proof of the act at any time within the statute of limitations.” State v. Hayes, 81 Wn. App 425, 432, 914 P.2d 788 (1996); Jensen, supra.

In this case, the appellant was charged with theft from each of the victims for the time period covered by the payment of the money to the appellant and/or his business, to the time when it could be established that the project had not been completed. As the testimony established, no work was even commenced, when it was commenced, until the appellant received the money from the victims. The theft charges were based upon the contract which was entered into by the victims and the appellant’s business. The theft charges were not based upon the receipt of each

payment from the victims but upon whether the appellant wrongfully obtained or exerted unauthorized control over all of the property belonging to each of the victims (i.e. their money).

On June 6, 2001, the Sharpes entered into their contract with the appellant to build them a Four Seasons sunroom (10 VRP 454-455, Exhibit 1A), and paid him \$7,652.75 (10 VRP 460-461). On August 8, 2001, the Sharpes and the appellant signed a change order which reduced the cost of the sun room. (10 VRP 464-467; Exhibit 1C) The Sharpes made their second payment towards the contractual price on February 27, 2002. (10 VRP 473) The second, and last, payment was in the amount of \$7,600.00 (10 VRP 508) In October, 2001, QHE applied for the building permit which was issued in December, 2001. (10 VRP 506) Actual work started on the Sharpes project in March, 2001, (10 VRP 509) and ended on April 18, 2002, when a slab was poured for the sunroom. (10 VRP 514) No further work was done on the Sharpes project thereafter, even though the Sharpes made numerous phone calls to the appellant. (10 VRP 514-520)

On September 21, 2001, the Murphys signed the contract with the appellant to build a Four Seasons sunroom. (11 VRP 644, 649; Exhibit 3A) The contract does not describe the sunroom as a Four Seasons room, but, as the Murphys testified, the only room which they talked about was a Four Seasons Room. (11 VRP 652) On the same date, the Murphys wrote the appellant a \$10,000.00 check. (11 VRP 653) On October 13, 2001,

the Murphys paid the appellant \$7,604.00. (11 VRP 654-655) The Murphys made numerous phone calls to QHE and the appellant since no work was done on their property. (11 VRP 656-666) Finally on June 14, 2002, some men came to the house to dig holes for the footing, which they were unable to do. (11 VRP 667) On June 21, 2002, the foundation was finally dug for the sunroom. (11 VRP 671) On July 9, 2002, the forms were laid for the pouring of the foundation. This was done only after many phone calls and a letter from the victims to the appellant. (11 VRP 673-675) On July 25, 2002, the foundation was poured and the subfloor was installed in early August, 2002. On August 20, 2002, employees of QHE moved the gas connection and removed all of the material from the site. (11 VRP 675-677) Nothing further was done on the victims' project. (11 VRP 680-684)

On October 21, 2001, the Klemann's signed a contract for QHE to build them a Four Seasons sunroom and to update their kitchen. (12 VRP 738-740; Exhibit 4A) On, or about, January 2, 2002, the appellant was paid the entire amount of the contract which was \$45,793.00. (12 VRP 743-744) On January 8, 2002, the appellant returned \$13,000.00 of the money so that the victims could purchase cabinets for their new kitchen. (12 VRP 745-746) During the meeting on January 8, 2002, the deadline for finishing of the project was discussed with the appellant. He agreed to finish the project by June, 2002. (12 VRP 747) In reality, nothing was done on the project until mid August, 2002. (12 VRP 769-779) Prior to

mid August, the victims were able to obtain ten percent back on their contractual price in the amount of \$3,879.99 (12 VRP 767-769). The victims, during this eight month time period, made numerous phone calls trying to get their project started. (12 VRP 747-769) The subflooring was incorrectly installed, and nothing else was done on the project. (12 VRP 769-773) In May or June, 2002, Mrs. Klemann had a phone conversation with appellant during which he agreed that he had used their money for other's people's projects, and he did not have the money to do their project. (12 VRP 859-860) After the subfloor was installed, Mrs. Klemann spoke to the appellant for the last time. In this conversation, the appellant told the victim that he was going to be filing for bankruptcy and the victims could "go piss up a fucking rope." (12 VRP 862)

On October 23, 2001, the Browns entered into a contract with QHE for a Four Seasons sunroom. On October 23, 2001, the Browns paid QHE \$22,260.00 for their project. (Exhibit 5A, 15 VRP 1289) On March 4, 2002, the Browns paid \$16,695.00 towards the contract price. (15 VRP 1298) When the victims made, what turned out to be, the last payment, they were assured that the material had been ordered. (15 VRP 1299) The appellant did not pay Nichole Stremlow, who had worked on obtaining the building permit, and he did not pay for the building permit itself. (23 VRP 2049-2053, 2069) In October, 2002, the building permit was finally obtained. (15 VRP 1307) Shortly after that, Mrs. Platts-Brown drove to the business location of QHE in Fife, Washington, and discovered that it

was closed down. (15 VRP 1308) After the visit to the Fife location, Mrs. Platts-Brown spoke to the appellant and set up an appointment at her home. During this meeting, the appellant informed her that he no longer had her money, and offered to do another project which was not the project for which she had contracted. (15 VRP 1310-1312)

On October 17, 2001, the Resslerers entered into a contract with QHE to build them a Four Seasons sunroom. (12 VRP 915-918; Exhibit 6A). On that day, the victims wrote a \$500.00 check as good faith. (14 VRP 1013) On November 30, 2001, the victims obtained their financing and QHE was paid \$46,333.00, which was the remaining amount owed on the contract. (12 VRP 925-927) The first work was not done on the victims' property until March, 2002, when nine holes were dug for the foundation for the sunroom. (14 VRP 928) At the end of April, 2002, QHE moved the sewer pipe and broke up the back patio. (12 VRP 929) In July, 2002, the subfloors were installed and the water bib was relocated. (14 VRP 969-972) Nothing else was done on the Resslerers' project even though the victims made numerous phone calls to the appellant. (14 VRP 972-978)

On November 19, 2001, the Tam/Lams entered into a contract with QHE to build a sunroom with a kitchen. (15 VRP 1147-1149; Exhibit 7A) On March 5, 2002, after the victims had obtained financing, they paid QHE \$15,500.00. (15 VRP 1152-1154) At the time the victims made the payment, they were told that the money would be used to order materials,

obtain the building permit, do architectural work and obtain permission from the home owners association. (15 VRP 1155) On May 7, 2002, the victims were told that the building permit and the home owner's association permission had been obtained, which was not true. (15 VRP 1160-1164) No work was ever done on the victims' project, even though the victims made many phone calls to the appellant. (15 VRP 1165)

On January 8, 2002, the Miller/Kuhns entered into a contract with QHE to build a Four Seasons sunroom. (15 VRP 1199-1202; Exhibit 8A) On January 23, 2002, the victims paid \$2,000.00 towards the contract price. (15 VRP 1203; 27A VRP 24) On February 9, 2002, after the victims had obtained financing, they paid \$11,000.00 towards the contract. At the time of the second payment, the victims were told that the money would be used for ordering materials, obtaining the plans, and then submitting the plans to the building department. (15 VRP 1206-1207) No work was done on the house by the appellant until early September, 2002, when the footings were poured. (15 VRP 1212) On September 5, 2002, the appellant came to the victims' house and talked the victims into ordering a new roof. The victims paid the appellant \$4,000.00, and the appellant promised that someone would return to their house the next day with roof samples. Nothing further was done on the project. (15 VRP 1213-1217)

On February 26, 2002, the Mather/Taylors entered into a contract with the appellant to build a sunroom. The victims thought they were

purchasing a Four Seasons sunroom, however the contract does not specify the manufacturer of the room. At the time of the signing, the victims paid the appellant \$7,365.00. (17 VRP 1346-1349; exhibit 10A) On March 5, 2002, the victims made a second payment of \$7,365.00 (17 VRP 1354-1355) In August, 2002, after talking to an employee of the appellant, the victims agreed to make some changes to the foundation of the sunroom which resulted in the building permit being amended. (17 VRP 1359-1360) On September 12, 2002, the appellant came to the victims' house, and they agreed to pay additional money to install a patio. The appellant was given a check in the amount of \$3,680.00. (17 VRP 1361-1365) At this point, no work had been done on the victims' project. Some workers did show up a few days after September 12, 2002, and broke up the existing patio and laid some gravel. No further work was done on the victims' project. (17 VRP 1365)

On April 13, 2002, the Dunivans entered into a contract with the appellant to renovate their kitchen and build a family room on to their house for a total cost of \$59,000.00. (17 VRP 1447-1452; exhibit 12A) At the appellant's demand, the victims paid him \$36,000.00. (17 VRP 1455-1456) On July 3, 2002, the victims paid the appellant \$12,000.00 for the purchase of kitchen cabinets. During this time, the victims had been making numerous phone calls to the appellant to find out why their project had not started. (17 VRP 1456-1460) After the cabinet payment, the patio was torn up and the foundation was laid for the new room. The inside of

the kitchen was next gutted. (17 VRP 1462-1463) By September 7, 2002, the subfloor was put in for the new room, one of the kitchen walls had been partially removed, a new kitchen wall had been partially framed, one and half walls were framed on the new room, and a couple of windows in the kitchen were moved. Nothing else was done to the project. (17 VRP 1469-1477) The victims never received their cabinets from the appellant, and they had to take out another loan to pay for their cabinets. (17 VRP 148)

On June 3, 2002, the Smiths signed a contract with QHE to build a sunroom onto their house for the amount of \$47,482.00. (19 VRP 1638-1641; Exhibit 13 A) On July 1, 2002, the appellant went to the Smiths' house to talk about their project. After his visit, the Smiths obtained financing for their project. (19 VRP 1644-1646) On July 8, 2002, the appellant was paid the entire amount of the contract. (19 VRP 1652) No work was ever done on the victims' project. (19 VRP 1652)

On June 14, 2002, the Regans signed a contract with the appellant to build a sunroom and paid him \$10,000.00 towards the total cost of the contract which was \$31,455.00. (19 VRP 1720-1725; Exhibit 14A) On August 3, 2002, the victims paid QHE a second payment of \$10,000.00. This payment occurred after a meeting between the appellant and Mr. Regan during which the defendant promised to start work on the victims' project. (19 VRP 1737-1741) After many phone calls, some workers showed up at the victims' house on September 12, 2002. (19 VRP 1747-

1748) The workers removed the sod, dug six holes, and filed the holes with concrete. No further work was done on the project. (19 VRP 1748-1750)

On June 15, 2002, the Fergusons signed a contract with the appellant to build a sunroom. (18 VRP 1580-1585; Exhibit 15A) On July 17, 2002, the victims paid \$13,077.00 towards the price of the contract, which was \$23,436.00 (18 VRP 1585, 1614) No work was ever done on this project. (18 VRP 1593)

On July 9, 2002, the DeSarts signed a contract with QHE to install new windows in their home. (18 VRP 1553-1555; Exhibit 16A) On August 20, 2002, the victims paid \$4,000.00 towards the total contract price of \$9,643.04. (18 VRP 1555, 1557) No work was ever done on the DeSarts contract. (18 VRP 1567)

On July 10, 2002, the Gosnells signed a contract with the appellant to build a sunroom. While the contract does not specify a Four Seasons sunroom, the verbal agreement with the appellant was to build a Four Seasons sunroom. (19 VRP 1816-1824; Exhibit 17A) On July 10, 2002, the victims paid the appellant \$6,000.00 towards the purchase price of the contract. (20 VRP 1835) On July 26, 2002, the victims paid the appellant \$13,600.00, resulting in a balance owing on the contract of \$15,848.00. (19 VRP 1823; 20 VRP 1837-1838) It was only after the July 26, 2002, payment that any work was done on the victims' project. The total amount of work done by the appellant's workers was the removal of the

window sash in the area where the sunroom was to be attached to the house, removal of the bricks around the window, and removal of the patio. The victims' removed a brick planter. (20 VRP 1840-1845) No further work was done by the appellant on the victims' project. (20 VRP 1854)

On July 30, 2002, the Snider/Bohns signed a contract with the appellant to build a sunroom at a cost of \$31,573.00. (1/30/06 VRP 81-83; Exhibit 18A) On August 12, 2002, the victims made a \$4,500.00 payment to the appellant. On that same date, the victims signed a change order with the appellant to decrease the cost of the contract by deleting one door from the project. (1/30/06 VRP 87-89; Exhibit 18E) On October 8, 2002, the victims wrote the appellant a check in the amount of \$10,829.20 for materials. The appellant held on to the check until the victims were able to move money into their checking account. (1/30/06 VRP 91-94) No work was ever done on the victims' project. (1/30/06 VRP 96-97)

On August 1, 2002, Regina Wade entered into a contract with QHE to build a sunroom. At the time that the victim signed the contract, she also made a payment in the amount of \$10,000.00. (22 VRP 1895-1899; Exhibit 19A) On August 2, 2002, the victim called and spoke to the appellant. She requested the return of her money, pursuant to the terms of the contract. (22 VRP 1900-1901) The money was not returned and no work was done on her project. (22 VRP 1905)

The evidence presented by the State at trial clearly established that the appellant had the intent to deprive the victims of their money. Prior to

the entry into the contract with the Sharpes, the first set of victims, the appellant was already in financial difficulties. Nancy Jean Savage, who was the office manger for QHE, testified that as of January 2001, there was not enough money to pay the employees and the vendors who supplied the building materials. (33 VRP 3588, 3592) Ms. Savage further testified that the money which customers paid for their projects was actually used to pay for previous projects and when the new customer's project was to be done, there was no money to pay for that project. (33 VRP 3593) In fact, Ms. Savage testified that money was obtained from customers, whose jobs had not even been started, just to make payroll for QHE. Ms. Savage finally quit working at QHE in April, 2001. At the time she left, the financial situation at QHE was the same as in January 2001. (33 VRP 3594) Mark Pray, who worked for the appellant from the spring of 2001 to May, 2002, also testified that the appellant was always seeking new jobs to pay for old jobs. Mr. Pray testified that the appellant did not have the money to pay for the jobs, and also did not have the manpower to work on the jobs. (23 VRP 2073-2079)

Andrew Kline, who was hired as a salesman for QHE in May, 2001, testified that the appellant was always pressuring the sales staff to bring in new business. The purpose of the new sales was to just keep the business afloat. Mr. Kline testified that the appellant needed the new money to pay for the day-to-day activities and, thus, not to provide the new customers with their construction project. As Mr. Kline further

testified, the appellant would use the money to pay for a job which was sold maybe six months prior to the receipt of the new money. (1/30/06 VRP 41, 50)

In addition to not having money to pay employees, vendors and customers, the appellant had not paid his taxes. The testimony established that the appellant had a meeting with a certified public accountant on March 14, 2001. During the meeting, it was clear that the appellant knew that he owed sales tax to the State of Washington for 2000, and part of 2001. The appellant had collected the sales tax money from his customers, but had not forwarded the sales tax money to the State. The appellant also owed money to Labor and Industries, Employment Securities, and the Internal Revenue Service. The appellant met with a CPA firm to discuss this situation on March 14, 2001. (33 VRP 3613-3615)

In October, 2001, Daryl Roosendaal, the chief criminal investigator with the Attorney General's Office, interviewed the appellant at his place of employment in Fife, Washington, about the sales tax which he had not paid to the State. The appellant admitted to knowing that he owed the tax and had not paid the tax. The appellant also stated that he reviewed every contract entered into with his business, and that he oversaw the sales and construction sections of his business. Ultimately, the appellant pled guilty to five counts of theft in the first degree for the theft

of the sales tax monies for a time period which predated the Sharpes' contract. (25 VRP 2324-2331)

At the time the appellant entered into the contract with the Sharpes, he was well aware of the dire financial state of his business. The testimony of the witnesses clearly established that the appellant knew he would not be able to honor his obligations under the contracts he entered into with the victims. The appellant never ordered and/or obtained the sunrooms he sold to the victims, except for the Dunivans, whose project did not involve a sunroom. Promises were made to the victims by the appellant that their sunrooms had been ordered, when that was not the case. These promises were often made in response to the victims numerous phone calls asking, and in many cases demanding, status information on their construction projects. While the appellant did some work on some of the projects, it was months after the last work was done that some of the victims finally received letters from the appellant's civil attorney about the status of QHE, and the unlikelihood of the completion of the victims' projects.

The Smiths, DeSarts, Tam/Lams and Snider/Bohns never did receive any work on their projects. All they received were empty promises from the appellant.

4. BASED UPON THE FACTS OF THIS CASE, THE COURT WAS NOT REQUIRED TO GIVE A PETRICH INSTRUCTION.

The State Supreme Court in State v. Petrich, 101 Wn. 2d 566, 683 P. 2d 173 (1984), held that there is a constitutional requirement for jury unanimity when the evidence indicates that several distinct criminal acts have been committed, but the defendant has only been charged with one count of criminal conduct that encompasses all of the criminal acts. The Supreme Court stated that the State must either elect the one act upon which it will rely for a conviction or, in the event the State does not make such an election, the jury is to be instructed that it must unanimously agree upon the same criminal act beyond a reasonable doubt in order to support a conviction. However, when the case involves a continuous act, a Petrich instruction is not required since Petrich applies only to a multiple act case. Petrich, *supra*, at 571; State v. Crane, 116 Wn. 2d 315, 325, 804 P.2d (1991).

In determining whether there is one continuing offense, “the facts must be evaluated in a commonsense manner.” Petrich, *supra*, at 571; State v. Handran, 113 Wn. 2d 11, 12, 775 P.2d 453 (1989). As the Court of Appeals provided in State v. Fiallo-Lopez, 78 Wn. App 717, 724, 899 P.2d 1294 (1995)

...evidence that a defendant engages in a series of actions intended to secure the same objective supports the characterization of those actions as a continuing course of conduct rather than several distinct acts.

In State v. Campbell, 69 Wn. App. 302, 311-13, 848 P.2d 1292, *rev'd on other grounds*, 125 Wn. 2d 797, 888 P.2d 1185 (1995), the defendant had been convicted of welfare fraud. The Court of Appeals found that the crime of welfare fraud contemplated a continuing course of conduct; the sole goal of which was to obtain public assistance to which the defendant was not entitled. The Court of Appeals in Campbell found that the defendant was, thus, not entitled to a Petrich instruction.

In this case, the appellant was charged with one count of theft in the first degree for each set of victims. A common sense review of the facts shows that the thefts were based upon the construction contracts entered into by the separate sets of victims, and the payments which the victims made to the appellant and his business pursuant to these contracts. There is no evidence provided by either the State or the defense that the payments were for anything other than the contract which the victims had signed. Since the appellant's actions and promises were intended to obtain and then keep the victims' money without providing them with the project for which they had contracted, this continuing course of conduct does not require the giving of a Petrich instruction.

5. THE APPELLANT’S CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY WAS NOT VIOLATED WHEN HE WAS CONVICTED OF, AND SUBSEQUENTLY SENTENCED FOR, MULTIPLE CHARGES OF THEFT AND MONEY LAUNDERING.

The constitutional protection against double jeopardy, which is afforded by the Fifth Amendment of the U.S. Constitution, and Article I, Section 9 of the Washington State Constitution, is triggered when a defendant is punished multiple times for the same offense. State v. Adel, 136 Wn. 2d 629, 632, 965 P.2d 1072 (1998). In determining if the prohibition against double jeopardy has been violated, the courts in this State have traditionally applied the “same evidence’ test. Adel, supra, State v. Gocken, 127 Wn. 2d 95, 100, 896 P.2d 1267 (1995); State v. Calle, 125 Wn. 2d 769, 776, 888 P.2d 155 (1995). As the State Supreme Court provided in Gocken, supra, at 101

The “same elements” test, commonly referred to as the Blockburger test, examines whether each offense contains an element not contained in the other. “The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L.Ed.2d 306 (1932).

In this case, the same conduct does not support the charges of theft and money laundering. The theft began when the appellant obtained the checks from the victims. As the Court of Appeals provided in State v. Lampley, 136 Wn. App 836, 841, 151 P.3d 1001 (2006), the value of a check, based upon RCW 9A.56.010(18)(b)(i) is based upon the face value of the check, as long as the individual who wrote the check has the authority to assign the value to the check (State v. Skorpen, 57 Wn. App 144, 148-9, 787 P.2d 54 (1990)). As the US District Court stated in U.S. v. Parris, 88 F. Supp 2d 555, 562 (E.D. Va. 2000) “the act of endorsing and depositing the checks was a separate transaction from the actual embezzlement, and is properly the subject of a money laundering charge.” The Ninth Circuit followed this same rule in U.S. v. Lomow, 266 F. 3d 1013, 1018 (9<sup>th</sup> Cir. 2001) when the court found that the depositing of the check from the victim “constituted a separate transaction from the fraud that generated the funds.”

At trial, the money laundering evidence established how the proceeds were used once they were deposited into the bank account. While it is the State’s position that the theft occurred once the check was provided to the appellant, and not when the check was actually deposited, the evidence for the money laundering counts also clearly established an ongoing course of conduct which consisted of financial transactions

showing the actual use of the money after the check was deposited.

In addition, the crime of money laundering contains an element which the crime of theft does not contain. As the Supreme Court provided in State v. Freeman, 153 Wn. 2d 765, 772, 108 P.3d 753 (2005) “if each crime contains an element that the other does not, we presume that the crimes are not the same offense for double jeopardy purposes.” Theft does not require, as does money laundering, that there be “a financial transaction involving the proceeds of specified unlawful activity”, and that the appellant knows that the proceeds come from the unlawful activity. Contrary to the assertion of the appellant, the State does not need to establish that the appellant intended to conceal the criminal origins of the proceeds. All that needs to be proved is the appellant used the proceeds in a financial transaction. State v. McCarty, 90 Wn. App. 195, 204-204, 950 P.2d 992 (1998).

Legislative intent and the merger doctrine are only called into play for purposes of double jeopardy when the same act supports charges under two criminal statutes. State v. Freeman, 153 Wn. 2d 765, 771-74, 108 P.3d 753 (2005). Legislative intent can be established explicitly or implicitly. The merger doctrine is used as “another aid in determining legislative intent”. Freeman, supra. The merger doctrine, however, is only applied when “the degree of one offense is raised by conduct

separately criminalized by the legislature”. The merger doctrine does not apply when “there is an independent purpose or effect to each” crime.

Freeman, supra.

From the case law and the statutes, it is apparent that the theft statute is directed to the punishing of the wrongful obtaining or exerting of unauthorized control over property of another, while money laundering is directed at the use of the theft property, or proceeds, in a financial transaction. The legislature was obviously punishing a different intent with each crime, but was also punishing a different act with each crime.

The appellant’s argument that the theft occurred only when the check was deposited is inaccurate. The check, as provided in Lampley, has an intrinsic value as a negotiable instrument, which is not determined by its deposit into a bank. The United States District Court for the Northern District of Illinois in United States v. Li, 856 F. Supp. 411, 416, (1994), faced with this same argument, found that “a check, however, is a negotiable instrument with value of its own. A check does not need to be deposited in order to have value.”

The appellant argues that under State v. Joy, 121 Wn. 2d 333, 851 P.2d 654 (1993), a theft may not have occurred since the victims did not have a possessory interest in the money which they provided to the appellant pursuant to the constructions contracts. This case, however, is

quite different from the facts in Joy. In Joy, there was no evidence, as there is in this case, that the appellant's intent when he obtained the money from the victims was to pay for current jobs, and not the victims' projects. In addition, as the appellant testified, each stage payment covered not only overhead but also the materials needed for each job. As the testimony established, there was no clear payment which would only cover the materials, as required by Joy, but the testimony did establish that all payments covered materials. (31 VRP 3315) Thus, the appellant not only wrongfully obtained the victims' money, he also exerted unauthorized control over the victims' money.

6. THE SPECIAL VERDICT FORM USED FOR ESTABLISHING THE AGGRAVATING SENTENCING FACTOR OF A MAJOR ECONOMIC OFFENSE DID NOT VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHTS.

The special verdict forms used in this case provided

Is the offense as charged in Count (number specified) a major economic offense or series of offenses which involve multiple victims or multiple incidents per victim?"

(CP 855-879)

The special verdict for was based upon RCW 9.94A.535(3)(d)(i) which states

The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors: (i) the current offense involved multiple victims or multiple incidents per victim...

This factor, pursuant to Blakely v. Washington, 542 U.S. 296, 159, 124 S. Ct. 2531, L.Ed.2d 403 (2004), and RCW 9.94A.537 must be submitted to the jury and be proven beyond a reasonable doubt.

The defense has argued that since the special verdict form provides two alternative ways of committing a major economic offense, an unanimity instruction as to the special verdict forms should have been given. The defense bases its argument on the case law which provides that “in certain situations the right to a unanimous jury trial also includes the right to express jury unanimity on the *means* by which the defendant is found to have committed the crime.” (emphasis in the original decision). State v. Ortega-Martinez, 124 Wn. 2d 702, 707, 881 P.2d 231 (1994).

When more than one means is provided in the jury instructions, and there is sufficient evidence to “support each of the alternative means submitted to the jury”, a unanimity instruction as to each means is not required.

Ortega-Martinez, *supra*, at 707-708.

Later case law has provided that “unanimity is presumed so long as it is clear that the verdict was based on only one of the alternative means

(and substantial evidence supported that means). State v. Lobe, 140 Wn. App. 897, 167 P.3d 627 (Div. II, 2007); State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.3d 432 (1999) *overruled on other grounds* by State v. Smith, 159 Wn. 2d 778, 787, 154 P.3d 873 (2007); State v. Bland, 71 Wn. App. 345, 354, 860 P.2d 1046 (1993), *overruled on other grounds* by Smith, supra, at 787. The Court of Appeals in State v. Fleming, 140 Wn. App. 132, 136, 170 P.3d 50 (2007) stated that “if one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the verdict was based on only one of the alternative means and that substantial evidence supported that alternative means.”

In this case, the evidence which supported the special verdict forms for the theft convictions clearly and substantially establishes that there were multiple victims per theft counts. For the money laundering convictions, the evidence which supported the special verdict forms clearly and substantially established that there were multiple incidents, or financial transactions, per conviction. The testimony of William Omaitis showed the numerous financial transactions in which the money the appellant had stolen from the victims was used. (27A VRP 10-39) The defense presented no evidence which disputed the disposition of the stolen funds.

The unanimity requirement, however, is not required in this case. The unanimity requirement of the Oretega-Martinez case and its progeny, is not a blanket rule. If the instruction which is being appealed is merely a definitional instruction, a unanimity instruction is not required. State v. Smith, 159 Wn. 2d 778, 154 P.3d 873 (2005); State v. Linehan, 147 Wn. 2d 638, 56 P.3d 542 (2002). The Smith case, at 877-878, discussed the inapplicability of the unanimity instruction to a “means within a means” scenario. As the court stated

...these definitions [of assault] merely define an element of the crime charged and, thereby, give rise to a “means within a means” scenario. As stated above, a “means within a means” scenario does not trigger jury unanimity protections

The Smith Court relied upon the case of In re Jeffries, 110 Wn. 2d 326, 752 P.2d 1338 (1988), when the Supreme Court at 789 said

as this court noted in Jeffries, when presented with (and disavowing) a similar argument, this “means within [a] means” argument raises the [troublesome] spectre of a myriad of instructions and verdict forms whenever” a defendant is charged with such a crime. (stat)

The Smith Court went on to note at 789 that

We fail to see how the result Smith urges us to reach advances the two underlying purposes of the alternative means doctrine, which are to prevent jury confusion about what criminal conduct has to be proved beyond a reasonable doubt and to prevent the State from charging every available means authorized under a single criminal statute, lumping them together, then leaving it to the jury to

pick freely among the various means in order to obtain a unanimous verdict.

In Jeffries, supra, the court analyzed the requirement of unanimity for the special verdict forms for the aggravating factors for the crime of aggravated murder. The special verdict forms, as in this case, provided the alternatives for each aggravating circumstance. The Supreme Court found that this procedure was correct and did not require that the jury was required to unanimously agree as to which of the alternatives supported each special verdict. The Supreme Court in Jeffries, supra, at 340, stated that the

Petitioner cites no authority for his position and we perceive no necessity for it. Further, petitioner did not except to the instructions given on the grounds now argued, as required in order to preserve any claimed error, nor did he propose instructions on this theory. The trial court properly instructed on the alternative aggravating circumstances that could constitute aggravated murder in the first degree. The petitioner has shown no actual or substantial prejudice in this regard.”

The special verdict form used in this case not only contains the request that the jury decide if the State had established the aggravating factor of a “major economic offense”, but also contains the definition of “major economic offense”. Since the instruction is a definitional instruction, case law does not require that a unanimity instruction be given. As the State Supreme Court provided in Smith, supra, and Jeffries,

supra, the appellant's argument in this case raises the spectre of a "myriad of instructions and verdict forms" which the appellate courts have found to be unacceptable and not required by law.

7. THE STATE DID PROVE THAT THERE WERE MULTIPLE VICTIMS FOR THE THEFT CONVICTIONS FOR COUNTS 1, 7, 10, 12, 15, 18, 24, 26, 34, 37, 39, 42, 44 AND 46.

At trial, the defense did not raise this issue and is raising this issue for the first time on this appeal. As the Supreme Court provided in Jeffries, supra, the defense has not preserved this error and, thus, can not present this on appeal.

"Victim" has been defined in RCW 9.94A.030(49) as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." The State in Counts 1, 7, 10, 12, 15, 18, 24, 26, 34, 37, 39, 42, 44 and 46 of the Third Amended Information, as well as in the original Information and the Second Amended Information, listed the victims by name, even though they are married to each other. The State did not list the victims as members of a marital community.

The appellant in his argument has, in effect, tried to re-write the Third Amended Information to state that the victims were, for example, "the marital community of Kent and Joyce Sharpe". The State, however,

did not charge any of the counts of theft in this manner. The appellant has provided no authority which would allow it to re-write the Information. In fact, none of the cases which they discuss in their brief would allow them to argue, that for the purposes of the special verdict form used in this case, that the members of a marital community, who have been listed as separate individuals in the Information, are not separate victims but are only one victim since they are a member of a marital community.

The appellant in its argument actually admits that the spouses are separate individuals since they are described as members of a marital community. This presupposes that there are two persons who belong to a marital community. There is no case law, or statutory law, which holds that once someone marries, they are no longer a separate person and can not be considered as a victim.

Case law which discusses the concept of victim, describe the victim as “a victim”. State v. Kinneman, 122 Wn. App, 850, 860, 95 P. 3d 1277 (2004); State v. Kisor, 82 Wn. App. 177, 180, 916 P.2d 978 (1996); State v. Hicks, 77 Wn. App. 1, 888 P.2d 1235 (1995); State v. Davis, 53 Wn. App. 306, 766 P. 2d 1120 (1989). The statutory definition, as the Supreme Court held in State v. Davison, 116 Wn. 2d 917, 920, 809 P.2d 1374 (1991) “broadly defines “victim” as “any person who sustained physical or financial injury to person or property as a direct result of the

crime charged.” A victim can be either a real or an artificial person such as a corporation. State v. Sanchez, 73 Wn. App. 486, 488, 869 P.2d 1133 (1994). However, just because a victim is a member of an artificial “person”, does not preclude the person from being a victim. The State Supreme Court in State v. Branch, 129 Wn. 2d 635, 647, 919 P.2d 1228 (1996) found that the 180 partners in a partnership were separate victims, since they had lost the money they had invested in the partnership. Since this decision, the legislature has broadened the definition further to include emotional and psychological injury which presupposes that the “person” mentioned in the definition is a real person, as versus a legal entity which is not capable of suffering emotional or psychological injury. Only the members of the marital community can suffer such injuries.

The State Legislature considered whether a member of a marital community can be considered as a separate victim when they amended the definition of “property of another” as used in RCW 9A.48.010(c) in 2002. This was done in response to the decision of the Appellate Court in State v. Coria, 105 Wn. App. 51, 59-60, 17 P.3d 1278 (2001). In Coria, *supra*, the court held that the prior definition of “property of another” did not apply to property which is co-possessed and, thus, the defendant, who had damaged the property which he and his wife possessed, could not be convicted of malicious mischief. The Coria Court noted that the theft

statute was broad enough to allow prosecution of co-possessors, but the definitions which applied to malicious mischief were not that broadly written. The new definition of property of another now applies to “anything less than exclusive ownership.”

The courts have considered the application of the SRA definition of victim as defined in RCW 9.94A.030, to a case of domestic violence. In State v. Goodman, 108 Wn. App. 355, 30 P.3d 516 (2001), the defendant had burnt down the house in which his wife was living. The court found that the definition of victim was broad enough to include the defendant’s wife as a victim since she had suffered “emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged.” Goodman, supra, at 361.

The victims named in the theft counts are each separate victims pursuant to RCW 9.94A.030(49). They are each “any person” who suffered injury due to the defendant’s actions which resulted in his theft convictions. The imposition of an exceptional sentence based upon the appellant having committed a major economic offense which affected multiple victims per theft count was, thus, appropriate.

D. CROSS-APPEAL ASSIGNMENTS OF ERRORS

1. COUNTS 8, 13, 16, 21, 23, 24, 25, 27, 29, 31, 32, 40, 47, 50 AND 56 OF THE THIRD AMENDED INFORMATION SHOULD NOT HAVE BEEN DISMISSED BY THE COURT PRIOR TO JURY DELIBERATION
  
2. ASSIGNMENTS OF ERRORS PERTAINING TO THE DENIAL OF RESTITUTION TO FOUR SEASONS FOR THE SUNROOMS IT PROVIDED FOR THE SHARPES, MURPHYS, RESSLERS, MILLER/KUHNS, AND GOSNELLS.
  - a. The trial court erred in rejecting the stipulation made by the State and the Defense as to the restitution amount to be awarded to Four Seasons, who had provided sunrooms for certain victims of the defendant, after the trial court had previously stated that it would accept the stipulation.
  
  - b. The trial court erred in not granting the restitution to Four Seasons since the defense had not raised an issue as to the amount of restitution to be awarded to the Four Seasons and had in fact stipulated to the amount of restitution which was owed to Four Seasons.
  
  - c. The trial court erred in not providing the State with notice that it had changed its mind and would not be accepting the stipulation made by the State and the Defense as to the restitution amount to be awarded to Four Seasons.

- d. The trial court, after refusing to order restitution for Four Seasons, erred in denying the State's motion for reconsideration as to the amount of restitution to be awarded to Four Seasons.
- e. The trial court erred in not awarding restitution to Four Seasons based upon the stipulation as the amount of damages to be paid to Four Seasons.
- f. The trial erred in not awarding restitution to Four Seasons based upon the testimony presented at trial by the victims for whom Four Seasons provided sunrooms. These victims are the Sharpes, Murphys, Ressler, Miller/Kuhns and Gosnells.

E. ISSUES PERTAINING TO CROSS APPEAL AS TO THE DENIAL OF RESTITUTION TO FOUR SEASONS

- 1. COUNTS 8, 13, 16, 21, 23, 24, 25, 27, 29, 31, 32, 40, 47, 50 AND 56 OF THE THIRD AMENDED INFORMATION SHOULD NOT HAVE BEEN DISMISSED BY THE COURT PRIOR TO JURY DELIBERATION
- 2. ISSUES PERTAINING TO CROSS APPEAL AS TO THE DENIAL OF RESTITUTION TO FOUR SEASONS FOR THE SUNROOMS WHICH IT PROVIDED TO SOME OF THE VICTIMS
  - a. Did the trial court's refusal to award restitution to Four Seasons by claiming that the State had not established the basis for the amount of restitution a manifest abuse of discretion when the trial court initially accepted the stipulation made by the State

and the Defense as to the restitution amount to be awarded to Four Seasons, and then subsequently rejected the same stipulation without notice to the State?

- b. Was the trial court's refusal to award restitution to Four Seasons by claiming that the State had not established the basis for the amount of restitution to be awarded to Four Seasons a manifest abuse of discretion when the defense had stipulated to the amount of restitution and did not raise any issue concerning the computation of the restitution amount?
- c. Was the trial court's decision as to deny restitution to Four Seasons a manifest abuse of discretion when the trial court ignored the evidence provided at trial which established the amount of loss suffered by the Sharpes, Murphys, Ressler, Miller/Kuhns and Gosnells for whom Four Seasons provided sunrooms?
- d. Was the trial court's denial of the State's Motion for Reconsideration, which was based upon the information provided to the Defense in arriving at the stipulation for the restitution owed to Four Seasons, a manifest abuse of discretion?

F. LAW AND ARGUMENT FOR CROSS APPEAL BY THE RESPONDENT

1. COUNTS 8, 13, 16, 21, 23, 24, 25, 27, 29, 31, 32, 40, 47, 50 AND 56 OF THE THIRD AMENDED INFORMATION SHOULD NOT HAVE BEEN DISMISSED BY THE COURT PRIOR TO JURY DELIBERATION

Count 24 of the Third Amended Information (CP 186-215) was a charge of theft in the first degree based upon Edmond and Trudy Bonnel entering into a contract with the defendant to build a sunroom on February 20, 2002, for them. On that same date, the Bonnells wrote the appellant a \$12,000.00 check. (15 VRP 1264-1272) The appellant told the Bonnells that it would take six weeks from the date of the contract to have the sun room built. (15 VRP 1272-1273) It was the understanding of the Bonnells that the money which they gave to the appellant was to be spent on obtaining a building permit, which never occurred. (15 VRP 1273-1274)

Count 56 of the Third Amended Information was a charge of theft in the first degree based upon Rebecca A. Kelly entering into a contract with the appellant on August 27, 2002, to build a sunroom and a new bathroom for her. On that same date, Ms. Kelly wrote the appellant a check in the amount of \$15,000.00. (22 VRP 1910-1919) This amount was listed on the contract as a deposit. (22 VRP 1919) By the time that the appellant had entered into this contract with Ms. Kelly, Regina Wade's

money had been given to the QHE and had not been returned when she asked for its return within the allowable time period of the contract.

(Count 53) In addition, the appellant had not fulfilled his contractual obligations with the Sharpes, Murphys, Klemanns, Browns, Ressler, Tam/Lams, Miller/Kuhns, Bonnells, Mathers/Taylor, Dunivans, Smiths, Regans, Fergusons, DeSarts, Gosnells, and Snider/Bohns. Instead, he made promises which he never fulfilled, and he engaged in hostile contact with most of the victims when they, after many months, tried to get the appellant to do their projects.

The testimony of Andrew Kline, who was one of the appellant's salesmen, testified that the payment structure was developed by the defendant and was provided to Mr. Kline. Mr. Kline explained that the pricing structure was based upon the square footage of the project.

(1/30/06 VRP 41-47) He testified that the contractual price was divided into payments of which the first payment was a ten percent deposit, the last payment was ten percent and the remaining payments were each twenty percent of the total cost of the contract. (1/30/06 VRP 47)

The State also established the appellant's own position concerning the payment structure on his contracts in its case in chief. Testimony was presented from a deposition which the appellant gave on March 6, 2003, in which the appellant stated that by the time the loan is funded for a project,

the appellant has already ordered the materials for the project. (25 VRP 2263, 2266) The appellant went on to state in the deposition that his company would start work even before being paid, and he defined “start work” as “ordering materials, getting engineering done, getting permits done, getting site checks done, plans drawn.” (25 VRP 2266-2267)

Counts 8, 13, 16, 21, 23, 25, 27, 29, 40, 47 and 50 are all money laundering charges which are based upon the checks which the victims provided to the appellant as payments on their contracts. Count 8 was the initial payment of \$10,000 on the Murphy contract, which was made on September 21, 2001. (11 VRP 652-653) This amount was approximately a third of the total price of the contract, and was deposited into the general account for QHE. (Exhibit 3A) The money was all spent by the appellant as of September 27, 2001. (27A VRP 17)

Count 13 was for the initial payment made by the Browns on October 23, 2001, the day they entered into their contract with QHE. (15 VRP 1289) The payment of \$22,260, which was deposited into the general bank account of QHE, was spent by October 26, 2001. (27A VRP 19) This payment represented forty percent of the contractual price of \$55,000.00. (Exhibit 5A)

Count 16 was for the initial payment made by the Resslerers on their contract. This payment was in the amount of \$500.00 and was made on October 17, 2001, the date they entered into their contract with QHE. (12 VRP 915-918; 14 VRP 1013)

Count 21 was for the initial payment made by the Miller/Kuhns on their contract with QHE on January 23, 2001. This payment was in the amount of \$2,000.00, and the money was deposited into the general bank account for QHE and was gone by the next day. (27A VRP 24-25) Count 23 was a \$4,000 payment made by the victims on September 5, 2002, for the installation of a new roof. (15 VRP 1213-1217) This money was paid to the appellant who deposited it into the general account. The money was gone from the account by the next day. (27A VRP 26) The appellant was to have brought the victims roof samples on September 5, 2002. He never showed up, and the victims, in addition to not getting their sunroom, did not get the roof. (15 VRP 1213-1217)

Count 25 was for the \$12,000.00 payment made by the Bonnells to the appellant on their sun room contract. (15 VRP 1270) This amount represented forty nine percent of the contract price. (Exhibit 9A) The money was deposited into the payroll bank account for QHE and was

spent by February 22, 2002, which was two days after the victims had paid the appellant. (27A VRP 27)

Count 27 was for the initial payment of \$7,365 which the Mathers/Taylors made to the appellant on February 26, 2002, the day they entered into the contract with the appellant. (17 VRP 1346-1349) The payment represented twenty five percent of the total contract price. (Exhibit 10A) The money was deposited into the general bank account for QHE and was spent by March 4, 2002. (27A VRP 27-28) Count 29 was for the payment made by the same victims for the installation of a new patio and retaining wall. The payment was for \$3,680.00 and was the payment in full for the new patio and retaining wall. The victims did not obtain the patio or the wall. (17 VRP 1361-1365) The money was deposited into the personal bank account of the appellant. (27A VRP 28-29)

Count 40 was for the initial \$10,000.00 payment made by the Regans to the appellant on their contract. (19 VRP 1720-1725) This amount represented almost a third of the total cost of the project. (Exhibit 14A) The payment was made on June 14, 2002, the day they entered into the contract. (19 VRP 1720-1725) The money was deposited into the general bank account for QHE, and was spent by June 21, 2002. (27A VRP 32)

Count 47 was for the initial payment of \$6,000.00 made by the Gosnells to the appellant when they entered into the contract with him on July 13, 2002. (19 VRP 1816-1824; 20 VRP 1835) This sum represented seventeen percent of the total cost of the contract. (Exhibit 17A) During the contract negotiations with the Gosnells, the appellant informed them that he would build them a Four Seasons sunroom as they wanted, even though by this time he was no longer licensed to sell this product. (19 VRP 1815-1823; 27 VRP 2589-2592; Exhibit 31C) The money was deposited into a bank account for D & D Contractors doing business as QHE, and was all spent by July 16, 2002. (27A VRP 34)

Count 50 was for the initial payment made by the Snider/Bohns to the appellant after they entered into a contract with him. The payment of \$4,500.00 was made on August 12, 2002, (1/30/06 VRP 81-83, 87-89) and the money was deposited into the general bank account for QHE, and was all spent by August 13, 2002. (27A VRP 35) The payment represented fourteen percent of the contract price. (Exhibit 18A)

The dismissal of these counts was based solely on the case of Joy, supra. In Joy, the defendant was a building contractor who entered into construction contracts with several victims. The defendant did not fulfill the contracts, and was charged with and convicted of several counts of theft. On appeal, the defendant argued that the money he had received

from the victims was his property, and so he was not guilty of “obtaining the property of another”. The Supreme Court, at 341, held that

if the particular agreement between the owner and defendant restricted the use of the funds to a specific purpose, the owner would have an interest in the money, i.e., the application of the money to the purpose for which it was entrusted to defendant.

The agreement which existed between the defendant and his victims could either be in writing or verbally, as it was in Joy. As the Joy Court further stated

[t]he key is whether there was a restriction or limitation in the agreements giving the owners an interest in having the funds applied to the purchase of materials. Such restriction or limitation can clearly pertain to a construction contract payment within the contract price.

In deciding a motion for dismissal based upon whether the State has presented sufficient evidence to support the charge, case law requires that

evidence admits the truth of the evidence offered by the nonmoving party and all inferences that can reasonably be drawn therefrom. Said evidence will be interpreted most strongly against the moving party and in a light most favorable to the nonmoving party.

State v. Rhinehart, 21 Wn. App 708, 713, 586 P.2d 124 (1978); State v. Woody, 73 Wn. 2d 179, 181, 437 P.2d 167 (1968); State v. Etheridge, 74 Wn. 2d 102, 110, 443 P.2d 536 (1968). As the Supreme Court provided in

State v. Randecker, 79 Wn. 2d 512, 517, 487 P.2d 1295 (1971), the trial court is bound by this standard.

In this case, the evidence which was before the trial court at the time of the dismissal established sufficient information that the money paid to the appellant was restricted. The testimony of Mr. Kline and the deposition of the appellant would have enabled the State to argue that all of the payments made by the victims covered all aspects of the project to include the payment to the defendant for the materials which were required to build the sunrooms. The later testimony of the appellant clearly provided that each stage payment not only covered the overhead, but the purchase of the materials.

The payment made by the Bonnells to the appellant was clearly earmarked, from the testimony of Mrs. Bonnel, for the obtaining of the building permit. This permit was never obtained. The payment made by Ms. Kelly to the defendant was, as she discussed with the appellant, to include the construction plans for her project, which she did not obtain. In addition, the appellant exerted unauthorized control over the money of Ms. Kelly, since it was apparent from all of the available evidence that he would not be able to fulfill the terms of the contract with Ms. Kelly. Neither payment made by the Bonnells and Ms. Kelly qualify as a deposit

since, as Mr. Kline testified, a deposit was ten percent of the contract, and the payments of these two victims exceeded the deposit amount.

The money laundering counts which were dismissed, for the most part, also exceeded the ten percent deposit fee. Counts 23 and 29 were made specifically to obtain materials, and that evidence was presented to the trial court prior to the dismissals. The other money laundering counts pertained to money which, as the testimony of Mr. Kline established and would have allowed the State to argue, covered the cost of the building materials, as did all payments made by the victims.

2. THE TRIAL COURT ERRED IN DENYING RESTITUTION FOR FOUR SEASONS WHO HAD PROVIDED SUNROOMS FOR THE SHARPES, MURPHYS, RESSLERS, MILLER/KUHNS, AND GOSNELLS.

The Sharpes, Murphys, Ressler, Miller/Kuhns and Gosnells entered into contracts with the defendant to build a Four Seasons sunroom for each set of victims. As the testimony at trial established, the appellant took the victims' money and did not build the sunrooms. Instead, Four Seasons stepped in and had the sunrooms built for the victims. (10 VRP 494; 11 VRP 695; 14 VRP 982; 15 VRP 1259; 20 VRP 1876; 26 VRP 2588, 2602)

The amount of restitution which the State requested to be ordered for Four Seasons was \$87,719.15. The defense stipulated to this amount

and the court accepted this stipulation during the January 4, 2007, hearing. (1/4/07 VRP 3-4, 12-13, 15, 17 and 20) The sole issue which existed at the end of the hearing on January 4, 2007, was whether Four Seasons, in light of the civil judgment which they had obtained against the defendant, wanted restitution to be ordered in this criminal matter.

At the next hearing, which was held on January 18, 2007, the State provided the court with the affidavit from Four Seasons in which they requested that they be included in the order for restitution. (CP 1029-1030) The court, however, refused to order the restitution for Four Seasons, and stated that the State had not proven the amount owed to Four Seasons. (1/18/07 VRP 12) The court however, did order restitution to the Dunivans and the Klemanns based upon the same stipulation by the defense as to the amount owed to these two victims. While evidence was presented at trial which established the amount of restitution owed to the Klemanns, the amount of money owed to the Dunivans was not entirely established at trial. By stipulation of both parties, the appellant was given credit for the labor cost incurred on the work which was done on the Dunivan project. The court never questioned this amount. (1/18/07 VRP 6, 13; Resp. CP 1-2)

On January 26, 2007, the State brought a motion for reconsideration of the court's refusal to order restitution for Four Seasons.

The motion was based upon the affidavit of the State and the stipulation of the defense to the amount of loss attributable as being incurred by Four Seasons. (CP 1034-1036) The net loss attributable to each set of victims was the same amount that the defense had stipulated as being the loss to be assessed as restitution for Four Seasons. (1/4/07 VRP 12-13; Resp. CP 1-2; CP 1031-1036)

The restitution amount which was attributable to the Sharpes project was arrived at after consultation with the appellant's trial counsel. The restitution amount was agreed to by the State and the defense as being \$18,848.72. This amount was arrived at as follows: the amount of loss established at trial was \$23,248.75, from which was subtracted \$1,772.04 for materials, and \$2,267.99 for labor. The labor information was obtained from Mr. Sharpe, and agreed to by the defense prior to the January 8, 2007, hearing. (CP 1031)

The loss for the Murphys was \$7,604.00, which was the second payment which they made to the appellant. The Murphy's first payment of \$10,000.00 was found by the court to not be a loss pursuant to Joy, supra. From the testimony at trial from William Omaitis, the amount of materials and labor which the appellant expended on the Murphys' project was less than the \$10,000.00 payment, and the State assessed the materials

and labor against the \$10,000.00 payment, and not against the amount of money owed to the Murphys. (CP 1032)

The loss for the Ressler's project was computed as being \$35,870.43. The testimony at trial established that the amount of money which the victims could claim, pursuant to Joy, supra, as their property was \$44,495.43. From this amount was subtracted \$8,625.00, which was the cost of the flooring as established by the evidence at trial from a deposition which the appellant gave in the civil lawsuit involving the Ressler's. (CP 1032)

The loss which was computed for the Miller/Kuhns was \$11,796.00. This figure was based upon the payments made by the victims to the appellant. The amount did not include the initial payment made by the victims since the court ruled that pursuant to Joy, supra, the initial payment was not their property and, thus, not subject to the theft charge. The appellant had done no work on the victims' project and, thus, labor was never an issue. (CP 1032)

The loss which was computed for the Gosnells was \$13,600. This figure was based upon the testimony of the victims. This figure did not include the initial payment of \$6,000.00 since the court had ruled that, pursuant to Joy, supra, this payment was not their property and, thus, not subject to the theft charge. While some work was done on the victims

project, it did not exceed the initial payment, and so was not included in the as an expense against the amount of loss suffered by the victims. (CP 1032)

The court denied the motion for reconsideration even though the court acknowledged that Four Seasons had incurred a minimum cost for the rooms themselves, without the cost of construction, of \$8,982.04 for the Sharpes, \$8,090.56 for the Murphys, 9,987.47 for the Ressler, \$7,415.55 for the Miller/Kuhns, and \$3,127.00 for the Gosnells. (1/18/07 VRP 11, Exhibit 31 E)

Restitution has been defined in RCW 9.94A.030(38) as

a specific sum of money ordered by the sentencing court to be paid by the offender to the court over a specified period of time as payment of damages. The sum may include both public and private costs.

The basis for the restitution order is governed by RCW 9.94A.753.

As the statute provides, in part, at RCW 9.94A.753(3)

...restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury.

The authority for the sentencing court to order restitution is

“derived entirely from statute.” State v. Tobin, 161 Wn. 2d 517, 523, 166 P.3d 1167 (2007); State v. Smith, 119 Wn. 2d 385, 389, 831 P.2d 1082

(1992). The purpose of the restitution statute was to “require the defendant to face the consequences of his or her criminal conduct.” Tobin, supra, at 524; State v. Davison, 116 Wn. 2d 917, 922, 809 P.2d 1374 (1991). In determining the amount of restitution, the court is not to engage in “overly technical construction that would permit the defendant to escape from just punishment.” Tobin, supra, at 524. The amount itself should be based upon “easily ascertainable damages”, but the loss “need not be established with specific accuracy”. State v. Hughes, 154 Wn. 2d 118, 153-154, 110 P.3d 192 (2005), overruled on other grounds by Washington v. Recuenco, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2546, 165 L.Ed.2d 466 (2006); State v. Fleming, 75 Wn. App. 270, 274, 877 P.2d 243 (1994). The Supreme Court in Hughes, supra, at 154 provided that the evidence used in establishing the amount of restitution “is sufficient if it affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture.” The Hughes Court went on to provide that the trial court in determining the amount of restitution

...can either rely on a defendant’s acknowledgment or it can determine the amount by a preponderance of the evidence. State v. Hunsicker, 129 Wn. 2d 554, 558-59, 919 P.2d 79 (1996); State v. Ryan, 78 Wn. App. 758, 761, 899 P.2d 825 (1995). Where a defendant disputes facts relevant to the determination of restitution, the State must prove the amount by a preponderance of the evidence at an “evidentiary hearing.”

The Supreme Court reinforced the acceptability of the use of stipulations by the defense during the restitution phase of a criminal case in the later decision of Tobin, supra at 525, when the Court said, “[a]bsent agreement from the defendant as to the amount of restitution, the State must prove the amount by a preponderance of the evidence.”

Restitution is to be paid to the victim of a defendant’s criminal behavior. The Courts have authorized the payment of restitution to third party victims in such cases as State v. Barr, 99 Wn. 2d 75, 658 P.2d 1247 (1983) (restitution to widow and children of victim of negligent homicide); State v. Hahn, 100 Wn. App. 391, 996 P.2d 1125 (2000) (reimbursement allowed as restitution to be paid to DSHS who paid for the crime victim’s expenses); State v. Ewing, 102 Wn. App. 349, 7 P.3d 835 (2000) (insurance company that pays benefits to crime victim suffers a loss as a direct result of the crime); State v. Jeffries, 42 Wn. App. 142, 709 P.2d 819 (1985) (Department of Labor and Industries is a victim when they pay disability and medical expenses of assault victim); and State v. Forbes, 43 Wn. App. 793, 719 P.2d 941 (1986) (restitution allowed to state agency for gambling losses of undercover detective). The Supreme Court in Davison, supra at 921, found that the statutory definition of victim is very broad and stated “Washington courts have interpreted this [the definition of ‘victim’] and comparable statutes to carry out the wide

scope of restitution, and have determined that the recipient of restitution may be one other than the immediate victim of the crime.”

Four Seasons is a victim of the appellant’s actions since it provided the five sets of victims with a sunroom, even though Four Seasons was not under any legal obligation to do so. This action on the part of Four Seasons allowed the victims to get their sunroom and not wait for the appellant to make any effort to pay restitution. As the Supreme Court provided in Davison, supra, Four Seasons does not need to operate under a legal obligation to become a victim for purposes of the restitution statute.

In Davison, supra, the defendant assaulted an employee of the City of Seattle and was convicted of a charge of assault in the second degree. The City, during the time the victim was unable to work, paid to the victim his wages. When Davison was ordered to pay the City of Seattle for the wages it had paid the victim, he appealed the order. Davison argued that city was not damaged unless the City was legally obligated to pay the wages, or there was some other statute which specifically authorized the payment of wages. The State Supreme Court found that the State did not have to establish that the City was obligated to pay wages. Instead, the Court stated, at page 921-922:

it would not serve the purpose or policy underlying the [restitution] statute to permit the offender to escape responsibility for the consequences of his harmful assault

by denying restitution simply because the City chose, from legal obligation, *or otherwise*, to pay its employee rather than subject that victim to the hardship and uncertainty of awaiting possible restitution paid directly to the victim. [emphasis as it appears in the decision]

A challenge to an order for restitution is overturned only if an abuse of discretion is established. State v. We, 138 Wn. App. 716, 727, 158 P.3d 1238 (2007); Davison, *supra*. The courts have defined “an abuse of discretion” as occurring “only when the decision or order of the court is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons”. We, *supra*; State v. Enstone, 137 Wn. 2d 675, 679-80, 974 P.2d 828 (1999); State v. Cunningham, 96 Wn. 2d 31, 34, 633 p.2d 886 (1981).

In this case, the trial court’s refusal to order the restitution for Four Seasons, or even for the underlying victims, was “manifestly unreasonable”. The court had been told on numerous occasions that there was a stipulation reached between the State and the defense as to the amount of restitution attributable to Four Seasons. The defense also informed the trial court of the existence of the stipulation and, in fact, never disagreed as to the amount of restitution to be paid to Four Seasons. The trial court had even orally accepted the stipulation during the restitution hearing on January 4, 2006. It was not until January 18, 2006, when the court denied the amount of restitution for Four Seasons, that the

State and the defense were aware that the court, by implication, was not accepting the stipulation. At no point did the court ever inform the State that the stipulation was not acceptable.

On February 16, 2006, during the hearing on the State's motion for reconsideration, the State provided the trial court with an affidavit which explained, as described above, how the amount of restitution was determined for Four Seasons. This affidavit provided a "reasonable basis for estimating loss" and did not subject the trial court "to mere speculation or conjecture."

During the February 16, 2006, hearing, the court implied that the State had established the amount of restitution which was owed to the underlying victims. The State, however, had argued during the January 4, 2006, and January 18, 2006, hearings that Four Seasons was the victim based upon the case law because they had made the underlying victims whole. The State did not request that the court order the restitution amount to the victims, since they had been made whole by Four Seasons and, thus, the money was owed to Four Seasons.

G. APPELLANT'S ADDITIONAL GROUNDS FOR REVIEW

On October 23, 2007, the Appellant filed a Statement of Additional Grounds for Review. The appellant initially argues that the forensic

accountant who testified at trial did not include certain costs in arriving at the amount of money actually spent by the appellant on each construction project for labor. These issues and arguments were presented at trial to the jury through the testimony of the witnesses and the arguments of the defense attorney. The appellant continues to ignore the other facts that established his true intent of taking money from the twenty sets of victims to bank roll projects which were already in his office. There was sufficient evidence for the jury to conclude, as they did, that the appellant had no intention of performing the contracts. On several occasions the appellant promised victims a certain type of sunroom which he could no longer sell, on other occasions he took money from victims and provided them with nothing. The financial condition of his business was, to say the least, poor. He was not able to pay many of his employees on time, he did not pay his taxes to include the Internal Revenue Service and the sales tax to the State of Washington, he wrote insufficient funds checks, and had even been told by one employee that he should close his business because he did not have sufficient funds or employees to finish the pending jobs, much less the jobs he brought into the business for the money the new customers could give him.

The appellant has also argued ineffectual assistance of counsel based upon failure to call certain witnesses, failure to present physical

evidence, and an alleged claim by the defense attorney of not being prepared for trial. The standard of review for a claim of this nature was established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). The Strickland case provides a two part test to be used in “determining whether a defendant had constitutionally sufficient representation”. State v. Tilton, 149 Wn. 2d 775, 784-84, 72 P.3d 735 (2003); State v. Jensen, 125 Wn. App. 319, 104 P.3d 717 (2005). During the analysis of the defense attorney’s performance, the appellate court is to “give considerable deference to counsel’s performance and [the court’s] analysis begins with a strong presumption that counsel was effective. Strickland, supra, at 689-90; Jensen, supra. The appellant, thus, has the “heavy burden”, to “demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct”. Jensen, supra; State v. Hayes, III, 81 Wn. App. 425, 442, 914 P.2d 788 (1996); State v. Sherwood, 71 Wn. App. 481, 483, 860 P.2d 407 (1993); State v. McFarland, 127 Wn. 2d 322, 2335, 899 P.2d 1251 (1995).

To meet the first prong of the Strickland test, the appellant must show that his attorney’s performance was deficient. In the event that the appellant is able to meet this prong, the defendant must then show that the deficient performance by his attorney prejudiced the defendant. A

deficient performance is not based upon the ultimate outcome of the trial (State v. Garcia, 45 Wn. App. 132, 140-41, 724 P.2d 412 (1986); State v. Slemmer, 48 Wn. App. 48, 58, 738 P.2d 281 (1987)) but is based upon the attorney's "performance fall[ing] below an objective standard of reasonableness." State v. Stenson, 132 Wn. 2d 668, 705, 940 P.2d 1239 (1997); Jensen, *supra* at 328. The only evidence which the court can review is the evidence which is in the record and not based upon bare assertions of the appellant. Slemmer, *supra*, at 57; State v. Jackson, 36 Wn. App. 510, 516, 676 P.2d 517, *aff'd* 102 Wn. 2d 689, 689 P.2d 76 (1984); State v. King, 24 Wn. App. 495, 498, 601 P.2d 982 (1979).

The motion for continuance which the defense brought on January 3, 2006, was based upon a need to confer with the appellant. The defense asked for a continuance of 2 weeks (6 VRP 208-210) which was denied by the trial court.

Case law provides that the granting or denial of a motion for continuance is within the sound discretion of the trial court. State v. Williams, 84 Wn. 2d 853, 854, 529 P.2d 1088 (1975); State v. Cadena, 74 Wn. 2d 185, 188-89, 443 P.2d 826 (1968); State v. Kelly, 32 Wn. App. 112, 114, 645 P.2d 1146 (1982); State v. Staten, 60 Wn. App. 163, 172, 802 P.2d 1384 (1991). The appellant is not entitled to a continuance as a matter of right. State v. Early, 70 Wn. App. 452, 457-58, 853 P.2d 964

(1993). The various factors which the trial court can consider are surprise, diligence of the moving party, materiality, redundancy, due process and the maintenance of orderly procedures which includes the number of continuances that have been previously granted. State v. Harper, 13 Wn. App. 273, 275, 534 P.2d 846 (1975); State v. Edwards, 68 Wn. 2d 246, 412 P.2d 747 (1966); Williams, supra., Staten, supra., Early, supra. In considering the impact on the defendant's right to assistance of counsel at trial (Sixth Amendment of the U.S. Constitution, and Article 1 Section 22, Amendment 10 of the Washington State Constitution) which the granting and/or denial of a continuance motion could affect, the trial court is only required to provide the defense with a reasonable time for preparation and consultation prior to the trial. State v. Hartzog, 96 Wn. 2d 383, 635 P.2d 694 (1981).

The appellant had been provided with a reasonable amount of time in which to prepare for trial. He was granted five prior continuances over a year and a half time period. As the Court of Appeals provided in Staten, supra. and State v. Barnes, 58 Wn. App 465, 471, 794 P.2d 52 (1990) "in ruling on a motion for continuance, a trial judge may consider whether the motion was brought to delay trial and whether prior continuances have been granted." As the Courts further argued "to guard against abuse and to discourage motions made merely for delay, it is generally required that

a stronger showing be made in support of subsequent motions for continuance.” In Staten, the Court of Appeals upheld the denial of the continuance motion which was based “on the entirely tenable ground of avoiding further delay.” The Court emphasized that Staten had already been continued twice. In Barnes, supra., the Court of Appeals emphasized that the defendant had at least three prior continuances. The trial court in Barnes had also reviewed the additional discovery which the defense was using as its basis for the continuance request, and concluded that none of it was sufficiently important to require a further continuance.

In analyzing the actual conduct of the trial, the defense was provided with requested time period to interview the appellant and prepare for the defense due to length of the trial. Jury selection, which commenced on January 4, 2006, concluded on January 9, 2006. The defense started the presentation of their witnesses on February 13, 2006, which was five weeks from the January 3, 2006, request for a continuance. The defense did not testify until February 14, 2006.

A review of the testimony of the State’s witnesses shows that the defense attorney conducted a complete and more than competent cross-examination of each witness. It is important to note that the jury did not find the appellant guilty of all of the theft and money laundering counts

and, in fact, found the defendant not guilty of the charges of theft in counts 4 and 30.

The concerns of the appellant that information about the development of costs for a construction job and how a construction company operates were more than sufficiently explained to the jury by the defendant during his testimony. The defense also had Ray Guillot testify to information about the building industry based upon his many of years of experience in the building trades.

The appellant has failed to establish how the admission of relevant evidence at trial, such as the contracts, checks, and receipts, established a claim of ineffectual of counsel. The evidence was admitted in support of the charges pending against the appellant, and the appellant has failed to show that any of this evidence was inadmissible. While the appellant has concerns that his attorney did not present any documentary evidence at trial, he has failed to establish how that would impact on the effectiveness of his attorney. More importantly, he has failed to explain to the court what documentary evidence his attorney should have presented.

Finally, the appellant complains about the number of witnesses who testified for the State, and the fact that he was only able to present three customers of his business to testify for him. There was no objection at trial from the defense concerning the number of witnesses who testified

for the State. In order to establish that the thefts had occurred, the State is required to have the victims testify, otherwise, there is no evidence that a theft had even occurred. The three customers for the defense were allowed to testify by the court over the objections of the State. In addition, the defendant was able to testify, without contradiction by the State, that he had completed the 150 projects which he has discussed in his Statement on Additional Grounds. The appellant ignores the fact that his fulfilling some of the construction contracts does not negate his theft from the victims whose money he had used to bank roll other customers' jobs.

H. CONCLUSION.

From the evidence presented at trial, it is clear that the appellant had no intention of performing the construction contracts which he entered into with these victims. Instead the appellant used the victims as his own personal bankers to keep his business going. The theft and money laundering convictions are for separate and distinct offenses and, thus, do not merge. The special verdict form used at trial does not require a Petrich instruction since it is merely a definitional instruction and not an element instruction. The sentence imposed by the court is, therefore, appropriate and should be upheld.

The trial court should not have dismissed the two theft counts and the eleven money laundering counts since the evidence established that all monetary payments made by the victims included the cost of materials and other specific functions, which needed to be performed by the appellant in order for the projects to be built. The overhead and profit for each project was spread over the payments provided by the victims to the appellant and was not segregated to one payment.

The court had sufficient evidence before it, based not only on the stipulation by the parties, but also from the evidence presented at trial and by affidavit to order restitution for Four Seasons.

DATED: March 26, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



APRIL D. McCOMB  
Deputy Prosecuting Attorney  
WSB # 11570

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3-27-08   
Date Signature

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