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COURT OF APPEALS
STATE OF WASHINGTON
BY _____

28778-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

TOM O. MILLS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

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Attorney for Appellant

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A. ASSIGNMENT OF ERROR

1. The conviction violated due process because the evidence was insufficient.
2. The court exceeded its authority in imposing a sentence based on an incorrect offender score calculation.

B. ISSUE

1. Tri-City Fabricating provided its general manager, Tom Mills, with a credit card to be used for business purposes. Evidence shows the manager's job was broadly defined to include promoting the business to prospective customers, traveling to off-site construction job locations, and supervising the entire operation. Records showed that Mr. Mills used the credit card to pay for gasoline, restaurant and hotel bills, landscaping and remodeling materials, tools and vehicle maintenance. Was the evidence sufficient to support finding an essential element of the offense of first degree theft, namely that Mr. Mills exercised unlawful control over the credit card?

C. STATEMENT OF THE CASE

Tom Mills used to work for CanAm Steel Corporation, where he was the west coast regional manager for the “vertispace free standing mezzanine division.” (RP 276) His job at CanAm was primarily marketing and product promotion. (RP 291) This involved substantial entertaining such as buying dinner for potential customers and making a brief sales presentation, often using a laptop computer. (RP 290-91) These events took place at CanAm’s offices in Sunnyside, at the prospects’ offices, or in public ballrooms. (RP 291)

The purpose of such events was ultimately to establish his employer’s status as a recognized entity in the industry, among the top three choices for supplying its products. (RP 293) In Mr. Mills’s experience, this process of customer cultivation tended to bear fruit over a period of about one year to eighteen months. (RP 293)

In March 2008, Corey Reeves hired Mr. Mills as a project manager for Tri-City Fabricating. (RP 47, 120)

Tri-City had started out as a very small company, founded by Jo Molvik in 1972. (RP 116-17) By 1984, Tri-City had found its niche fabricating structural steel items for the construction industry. (RP 116-17) By 2008, Tri-City fabricated structural steel, stairs, ornamental iron and other miscellaneous items for the northwest market. (RP 45)

Over the years Mr. Molvik employed each of his five children in the family business for various lengths of time. (RP 118) By 2008, Mr. Molvik had begun cutting back his involvement in the business and left most of the day-to-day responsibilities to his children Lisa and Per, and his daughter-in-law Julie. (RP 46, 121)

In June 2008, after Mr. Mills had been with the company for less than three months, Mr. Molvik decided to promote him to the position of general manager, replacing Mr. Reeves. (RP 120, 132) Around this time, Mr. Molvik was in the process of buying out his former partner and needed to raise about \$400,000 to finish paying him off. (RP 137-38) But Tri-City was also experiencing financial problems. (RP 137-38) Mr. Molvik was hopeful that Mr. Mills would be able to pull the business out of its difficulties over time. (RP 137-38)

Mr. Mills asked Mr. Molvik to provide him with a company credit card so that he would not have to use his own funds to pay for gas and travel expenses. (RP 140) Mr. Molvik approved the card with the understanding it would be used for business purposes. (RP 140-41) Although Mr. Molvik was unaware of any specific occasions, he and Mr. Mills discussed using the card to take employees to lunch and to take prospective clients to lunch or dinner. (RP 147)

Mr. Mills's job was primarily seen as public relations and promoting the company. (RP 173) He was also expected to oversee the operation of the company and handle administrative matters, including hiring and firing. (RP 205) It was not unusual for management to travel to numerous job locations outside the immediate vicinity of the company offices. (RP 207)

When he left CanAm, Mr. Mills had not been asked to sign a non-compete agreement, and so he took with him his list of industry contacts. (RP 276-77) He gave the contact list to the office staff to enter in the Tri-City database. (RP 277) Joe Molvik also provided Mr. Mills with a list of prospects, mostly contractors, but he encouraged Mr. Mills to look towards building contacts with engineers. (RP 277)

Mr. Mills began contacting individuals on these lists, setting up meetings, golf dates and dinners with them, in order to introduce them to Tri-City's product line and capabilities. (RP 277-80) His marketing strategy was to build relationships with the engineers, contractors and manufacturers in the construction industry and establish a reputation for Tri-City as a top industry source for its products. (RP 288-89) This strategy was based on his prior experience working for CanAm. (RP 291-92)

One of his promotion projects was spectacularly unsuccessful. (RP 287-91, 296-97) Mr. Mills spoke with an old acquaintance, Mike Percechtel, who was in the construction industry in Seattle. (RP 287) Mr. Percechtel had several contacts, particularly in the shipping industry, that appeared to be excellent potential customers for Tri-City. (RP 287-88) Mr. Mills thought this would be an ideal opportunity for Tri-City to break into the Seattle market. (RP 288)

Mr. Mills and Mr. Percechtel agreed that Mr. Mills would put together a presentation and rent a hotel suite and Mr. Percechtel would bring his friends to Kennewick for the presentation and to play some golf and enjoy Tri-City's hospitality. (RP 243-44, 289-90) Mr. Mills reserved the best suite at the Clover Inn and prepared to receive his guests. (RP 290, 296)

As it happened, Mr. Percechtel had not confirmed the proposed outing with all of the intended guests and at the last minute most of them backed out because of a conflicting event in Seattle. (RP 245-46) On the morning of Mr. Mills's planned entertainment, Mr. Percechtel called and cancelled the event. (RP 290) Mr. Mills felt he was responsible for the failure of this project and agreed to pay the bill from Clover Island. (RP 297) He disputed the amount of the bill and the hotel records that suggested he kept the hotel room for four days. (RP 310-14)

Part of Mr. Mills's pitch to prospective customers was that Tri-City was in the process of remaking itself, becoming more modern and professional. (RP 279) He attempted to reinforce this image by initiating landscaping around the plant and redecorating some of the interior. (RP 279-81)

In addition to promoting Tri-City's business, Mr. Mills was also responsible for overseeing a number of off-site projects located in the Kennewick area, as well as Seattle, Walla Walla, and Spokane. (RP 119, 148, 282-83, 286) Mr. Mills purchased a Lincoln pickup truck in Tri-City's name to use for the travel to these sites. (RP 284) He personally paid for the insurance and authorized Tri-City to deduct \$250 from his paycheck each week to make the payments on the truck. (RP 285)

During this time Lisa Molvik was working as the bookkeeper and office manager. (RP 46) Mr. Mills had not provided her with receipts or documentation specifying the purpose of each of the charges he had made against the card, and when the statements came she had no explanation for them. (RP 52) Charges against Mr. Mills's credit card amounted to approximately \$8,000 for the three months he had the card. (CP 54-56)

On September 12, 2008, Tom Mills was fired. (RP 125, 171) Three months later, the State charged him with one count of first degree theft by wrongfully exerting unauthorized control over credit card

expenses charged to Tri-City. (CP 1) The matter was tried to a jury. (RP 1-389)

Lisa Molvik acknowledged that at least some of these expenses were business-related. (RP 55) She testified that some of the expenses were incurred on Sundays. (RP 56-59) She conceded that Tri-City employees, including Tom, sometimes worked on weekends. (RP 79) She agreed that a charge at a Touchet Chevron station could be related to a Tri-City project in Walla Walla. (RP 64) Ms. Molvik noted a Saturday August 2 charge at “Yakimart” in Toppenish for \$48; she was not aware of any business Tri-City was conducting in Toppenish. (RP 64) Ms. Molvik noted a charge at a UPS store on July 14 and commented that she usually handled mailing items to Tri-City customers. (RP 66-67) She also noted that there was a charge for \$101.27 to Schucks but that Mr. Mills had asked to be reimbursed for that expense, claiming he had paid in cash. (RP 68)

The credit card records reflected a charge of \$1,547.80 from the Clover Island for a stay from July 31 to August 1. (CP 55; RP 62) When Ms. Molvik saw this charge she called Mr. Mills and asked for an explanation. (RP 69) She testified that he told her that he had three or four engineers from out of town staying at the hotel and told her he would pay for it. (RP 69)

Mark Blotz, the general manager at the Clover Inn, testified that the registration card for Mr. Mills showed that two adults checked in and that he stayed at the hotel for four nights. (RP 107) Mr. Blotz thought he recalled seeing a lady with Mr. Mills. (RP 110) Kathryn Zwald, a Clover Island employee testified that Mr. Mills had changed his original checkout date from July 30 to August 1. (RP 113) She recalled seeing him come out of the elevator on one occasion accompanied by another person. (RP 114)

Mr. Molvik's daughter-in-law Julie was the manager designer for the ornamental iron division, and her husband Per was the project manager for that division. (RP 158) The ornamental iron division was separate from the rest of the company, and historically Per and Julia Morvik had operated it as an independent operation. (RP 178-79) She was not aware of any business that Mr. Mills brought in to the business during his three months as general manager. (RP 160) She thought it was unusual that he worked so many hours and produced so little results. (RP 173)

According to Julie Molvik, Joe Molvik asked her to find out the reason for Mr. Mills's credit card expenses. (RP 174) When she learned that Mr. Mills was using a company credit card she requested a detailed breakdown of expenses represented by a receipt from the West Richland Municipal Golf Course. (RP 161) She also questioned the Sunday

charges incurred at Shell Oil and Red Lobster. (RP 162) Mr. Mills provided brief explanations for some, but not all, of the charges on a list of receipts. (RP 162-63) He was unable to provide receipts for many of the items. (RP 166) His explanations were based on his best recollection, which, in a couple of cases, was not accurate. (RP 163-64) In Julie Molvik's opinion, the gasoline purchases were excessive. (RP 168)

Per Molvik told the jury that both the Yakimart and Legends Casino are located in Toppenish. (RP 208) He also testified that Mr. Mills was not responsible for supervising the ironworks division. (RP 216) According to Per Molvik, there were no policies in place respecting the use of company credit cards until shortly after Mr. Mills was terminated. (RP 220-225) At that point, the company adopted an express policy authorizing the use of credit cards for the purchase of gasoline, meals, boat trips, ball games, golf games and other expenditures to entertain prospective customers. (RP 225)

The jury found Mr. Mills guilty and the court imposed a sentence of nine months' incarceration. (CP 62, 65)

D. ARGUMENT

1. THE JURY CONVICTED MR. MILLS ON INSUFFICIENT EVIDENCE.

Evidence is sufficient if, viewed in the light most favorable to the State, it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Hendrickson*, 129 Wn.2d 61, 81, 917 P.2d 563 (1996) “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

The essential element of the charge against Mr. Mills was that he “wrongfully obtained or exerted unauthorized control over property of another.” (RP 348) The State did not present evidence that Mr. Mills’s use of the credit card was unauthorized.

The overwhelming evidence established that Tri-City obtained the credit card and gave it to Mr. Mills for his use. He was authorized to use it “for business purposes” and no definition limiting the ordinary meaning of the term “business expenses” was ever provided to him. There is no evidence that Tri-City Fabricating had any policies, procedures or forms relating to employees’ reporting of business expenses or mileage.

The Molvik family was aware that Mr. Mills drove a pickup truck that the company had provided to him and despite conflicting testimony regarding his authority to purchase the truck there is no allegation that he wrongfully exerted control over the truck. His job required him to travel

extensively, visiting sites both in the Kennewick area and in more remote locations including Seattle, Walla Walla and Spokane.

According to Mr. Mills, the truck got about eight miles per gallon of gas. (RP 284) The cost of gasoline in the summer of 2008 was approximately four dollars per gallon. (RP 322) The total of all charges identified as gasoline purchases was approximately \$2,200.¹ This reflects purchases of about 550 gallons of gas, equivalent to 4400 miles,² or about 1500 miles in each of the three months Mr. Mills used the truck.³

There is no evidence Mr. Mills did not, or need not, drive that many miles each month in view of his responsibility for supervising numerous off-site projects at various distances from the Tri-City offices.

The State made much ado about the fact that Mr. Mills did not purchase gas outside the general area of Kennewick, except for the purchase in Toppenish, near Yakima, and that he frequently purchased exactly \$99 worth of gas. It is undisputed that he made several trips to Seattle, at the very least two. The only possible inference is that either he was able to drive to and from Seattle on a single tank of gas or else he

¹ 71.75+63.83+65.86+73+40.14+99+99+99+99+99+100+69.04+77.90+100+99+24.52+60.83+99+122+48+99+99+100+9.29+99+74.63+58.67+9.14=2158.60
(CP 154-56)

² \$2200/4 * 8 mpg = 4400 miles.

³ 4400 mi / 3 months = 1467 miles per month.

personally paid for gasoline purchases outside the Kennewick area, or in excess of \$99, rather than using the business credit card.

The State presented no evidence that Mr. Mills used the card to purchase gasoline for his personal use.

It is undisputed that Mr. Mills was expected to engage in marketing activities on behalf of the company including entertaining prospective clients. The State presented no evidence that Mr. Mills used the credit card to purchase meals that he ate alone or with personal friends. No one testified that Mr. Mills did not, or could not, entertain business prospects on weekends. Mr. Mills charged approximately 16 meals, for a total of \$800, at businesses that appear to be restaurants.⁴ (CP 154-56)

There is no evidence Mr. Mills used the credit card to purchase food for personal, non-business-related consumption.

Mr. Mills incurred \$1,010 in expenses at the West Richland Municipal Golf Course.⁵ It was undisputed that Mr. Mills has a personal membership at this golf course and would not be required to pay to play golf there. Mr. Mills testified that he entertained prospective clients at the golf course, and that the amounts charged on the credit card were the costs incurred for entertaining those guests. ((RP 276-78) There is no evidence

⁴ $\$50+35+32+66+31+100+20+50+136.13+148+75+22+35.11=\800.24

⁵ $\$55+344.37+400+10.91+200=\1010.28

that playing golf with prospective business prospects was an unauthorized or inappropriate way to promote Tri-City and its products.

Mr. Mills charged purchases totaling \$1,576 at Lowe's and Schucks.⁶ (CP 154-56) Joe Molvik told the jury that the purchases from Lowe's were "probably legitimate, including one for toolboxes. (RP 124) Although Mr. Mills mistakenly requested cash reimbursement for one of the credit card purchases from Schucks, there is no evidence that the purchase was not made for a business purpose. (RP 57)

There is no evidence that the \$1,547.80 charge at Coral Island was not a legitimate business. Despite confusion about the dates, it is undisputed that Mr. Percechtel told Mr. Mills he intended to bring a number of business prospects for the proposed presentation and other entertainment, and that Mr. Mills made significant preparations for the event. Mr. Mills testified that he could not vacate the room immediately since he had already made preparations, including food, that had to be removed first. (RP 312) The only evidence the State presented to support the inference the room was rented for personal use was the manager's testimony that he saw Mr. Mills accompanied by a female person on one occasion. He provided no information about this person and acknowledged that he would not be able to identify her if he saw her

⁶ $\$371.58 + 101.27 + 767.11 + 336.42 = \1576.38

again. The brief sighting of a person in Mr. Mills's presence cannot be sufficient to support the inference that he rented the room for personal use.

Mr. Mills incurred additional charges on the credit card at various commercial establishments including the UPS store, Wal-Mart, Kohl's, Ross, Rite-Aid and various car washes. (CP 154-56) He did not specifically remember what each purchase involved, but he recalled purchasing items for landscaping, remodeling, interior decorating, golf shirts, and tools. No one testified that Mr. Mills was not authorized to undertake improvements to the Tri-City offices, or to mail items at the UPS store, or to maintain the company-owned truck he drove. Absent some policy to the contrary, there is no evidence that any of these purchases was not authorized as part of Mr. Mills's employment as the general manager of Tri-City Fabricating.

While the State is entitled to all inferences that can be reasonably drawn from the evidence, Mr. Mills was at all times entitled to a presumption of innocence and the State bore the burden of proving that Mr. Mills incurred more than \$1,500 in charges that were not authorized. The State presented absolutely no evidence that the company had not fully authorized him to use the card for any and all business expenses, or that any of the purchases Mr. Mills made with his business credit card was not a legitimate business expense.

3. THE COURT IMPOSED A GROSSLY INFLATED SENTENCE BASED ON AN INCORRECT OFFENDER SCORE

The court imposed a sentence more than three times the length of the presumptive sentence justified by a properly calculated offender score.

The court found that Mr. Mills had a prior conviction for third degree assault in 2000 and two prior convictions for unlawful issuance of a bank check in 2002. (CP 63) The court found Mr. Mills had an offender score of three. (CP 63) The resulting presumptive sentence for first degree theft with an offender score of three would be 45 days. RCW 9.94A.510-.515.

Third degree assault is a Class C felony. RCW 9A.36.031. In 2002, unlawful issuance of a bank check in an amount greater than \$250 was a Class C felony. RCW 9A.56.060; Laws of 2009, ch. 431, § 10.

None of these prior offenses was properly included in calculating Mr. Mills's offender score:

[C]lass C prior felony convictions other than sex offenses *shall not be included* in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c)(emphasis added). The State presented no evidence that Mr. Mills was incarcerated or charged with any offense committed at any time between 2002 and 2008 when the present offense was allegedly committed. Mr. Mills's correct offender score was zero.

The nine-month sentence was more than three times the 90-day maximum sentence that could have been imposed had the court properly calculated Mr. Mills's offender score. See RCW 9.94A.510 and .515.

E. CONCLUSION

The evidence did not support Mr. Mills's conviction; it should be reversed and dismissed. Even if the State had presented sufficient evidence, Mr. Mills's sentence represents a complete failure of the adversary process and the court's obligation to ensure due process.

Dated this 1st day of November, 2010.

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