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Court of Appeals  
Division III  
State of Washington

No. 30765-4-III  
IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

MELODY LYNN WRIGHT,

Defendant/Appellant.

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Appellant's Brief

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding the evidence was sufficient to support the conviction for first degree theft.

2. The trial court erred in finding the evidence was sufficient to support the convictions for Medicaid fraud.

3. Charging Ms. Wright under both the general theft statute and the specific Medicaid fraud statute constitutes a violation of her right to equal protection.

4. The trial court erred in ruling that the convictions for first degree theft and Medicaid fraud did not encompass the same criminal conduct.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was Ms. Wright's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the evidence was insufficient to support a conviction for first degree theft as charged in Count I?

2. Was Ms. Wright's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the evidence was insufficient to support a

conviction under the section of the Medicaid fraud statute charged in Counts II-XI?

3. Does charging Ms. Wright under both the general theft statute and the specific Medicaid fraud statute constitutes a violation of her right to equal protection requiring dismissal of the first degree theft charge?

4. Do the convictions for first degree theft and Medicaid fraud encompass the same criminal conduct?

### **C. STATEMENT OF THE CASE**

A local State agency called *Aging and Long-term Care of Eastern Washington* assesses the needs for in-home services for Medicaid-qualified recipients. Case managers go to a client's home and assess his or her needs for daily living. The specific program involved in this case is called COPES—Community Options Program Entry System. RP 138-39<sup>1</sup>.

In May, 2001, Ms. Wright signed a four-year contract to provide in-home care services for her mother, Donna Siegfried, authorizing payment by the State for 188 hours per month. RP 141-42, 155, 166. She signed a second similar four-year contract in April 2005. RP 144-45. In July 2005, the COPES case manager, Melisa Thomas, met with Ms. Wright and her mother for an annual assessment to determine if her

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<sup>1</sup> “RP” refers to the verbatim report of proceedings of the trial contained in five volumes, 725 pages long. Citations to any other hearing will be “RP” preceded by the hearing date.

mother's need for assistance had changed. As a result of that assessment, Ms. Wright's hours were decreased from 188 to 94 hours per month. RP 167-68. Ms. Wright and her mother appealed the reduction, a reassessment was done, and the hours were reinstated to 188 because there was no evidence that the mother's needs were exaggerated. The hours remained at 188 per month at the next annual assessment done in June 2006. RP 178-79, 200.

Both Thomas and her supervisor suspected the original 2005 assessment of 94 hours was accurate and the later ones were untruthful. RP 179, 284-85. The sole basis for Thomas' suspicion was her observation of Siegfried (Ms. Wright's mother) walking by herself in a grocery store several years after the 2005 assessment. RP 179, 198-99. On cross examination at trial, Thomas admitted that neither Ms. Wright nor her mother had ever represented that Siegfried could not walk by herself, was incapable of preparing food herself or could not get up and down by herself. RP 196. Thomas also admitted that the one time she saw Siegfried walking by herself at the grocery store, Ms. Wright was also present, Siegfried did not walk like a normal person, and she walked very slowly. RP 196. Several of Siegfried's neighbors testified they had seen

Siegfried walking with her grandchildren but she walked bent over and with difficulty. RP 306-18.

In March 2008, the assistant director at Aging and Long-term Care received an anonymous tip that Ms. Wright was working at a second job and not performing some of the hours she claimed as a care provider for her mother. This information was passed to Larry Carlier, an investigator for the Attorney General's Medicaid Fraud Control Unit. RP 255-57. Carlier found out Ms. Wright was working at Riverview Retirement Community (Riverview). He requested time-keeping records for Ms. Wright from Riverview and asked Thomas to have Ms. Wright provide time sheets for past time she spent as a caregiver for her mother. RP 183, 258.

Carlier told Thomas that Ms. Wright would be charged with a crime if she filled in the same times and dates on time sheets that she worked at Riverview. RP 206. In April 2008, Thomas asked Ms. Wright to provide time sheets from May 2007 to April 2008. Thomas had never asked Ms. Wright to fill out time sheets before that date. In fact time sheets did not exist between April 2007 and April 2008, and were routinely not provided to case managers. RP 156-57, 184, 204-05, 402. Thomas did not tell Ms. Wright about Carlier's investigation or that she

would be charged with a crime if the times she entered coincided with times she worked at Riverview. RP 206-07. It was not illegal or against any COPEs policy to be working at a second or even a third job while working as a caregiver. RP 427. Caregivers are free to deviate from their schedule so long as the total number of hours does not exceed the monthly amount authorized. RP 202, 354.

Ms. Wright did not know how to fill out the time sheets. RP 210-11. Ms. Wright filled out the time sheets for either 10 or 24-hours each day of the month and gave them to Thomas who in turn gave them to Carlier. Carlier said the time sheets were unacceptable and told Thomas to get proper time sheets. RP 185, 391, 434. Thomas told Ms. Wright to resubmit the time sheets to reflect only a total of 188 hours per month. RP 186, 210. Ms. Wright complied, filling in the time sheets for 188 hours per month. RP 212-13.

On May 30, 2008, Carlier told Thomas that based on the conflicting time sheets, he would be sending a letter to Donna Siegfried (Ms. Wright's mother) for an interview to confirm the hours, and then proceed with prosecutions of both Ms. Wright and Siegfried. RP 213. Ms. Wright and Siegfried showed up for the requested interview in June 2008. RP 392-93. Ms. Wright and Ms. Siegfried told Carlier that the first

set of time sheets was incorrect because Ms. Wright did not know how to fill them out, but that the second set of time sheets were accurate. Carlier confronted Ms. Wright with the Riverview time records that showed she was working at Riverview at times she claimed to be caring for her mother. Ms. Wright admitted the times she put down were inaccurate. RP 396-404, 439-42.

On cross examination, Carlier admitted he had no way of knowing whether Ms. Wright performed the conflicting caregiver hours at some other time than when she claimed on the time sheets. RP 428-30, 454-55. Donna Siegfried told Carlier at the first interview that Ms. Wright was not attempting to get any extra hours. RP 439-40

Ms. Wright submitted monthly telephonic invoices to receive payment for her caregiver services. RP 150-51, 204-05. Ms. Wright had already been paid for May 2007 to April 2008 before Thomas requested times sheets for that same period of time, since she had previously filed the monthly invoices,. RP 443-44. The time sheets had nothing to do with Ms. Wright getting paid. RP 204-05, 245

Ms. Wright moved to dismiss all charges at the close of the State's case in chief and again at the end of the trial for insufficient evidence. RP

457-60, 586. The Court denied the motion finding the evidence sufficient to support convictions for all charges. RP 469-70, 586.

Ms. Wright was convicted by a jury of one count of first degree theft and ten counts of Medicaid fraud between June 4, 2007 and April 2, 2008. CP 212-14. The Court ordered \$12,605 in restitution. RP 713. This appeal followed. CP 256-57.

#### **D. ARGUMENT**

1. Ms. Wright's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the evidence was insufficient to support a conviction for first degree theft as charged in Count I.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency

admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Count I of the information, herein, charges Ms. Wright with theft in the first degree as defined in RCW 9A.56.020(1)(a). Charging Ms. Wright as such warrants dismissal because it charges a means of committing the alleged theft that was unsupported by the evidence produced by the State.

Theft is an alternative means crime. *State v. Linehan*, 147 Wn.2d 638, 647, 56 P.3d 542 (2002). The manner in which it is alleged a crime has been committed is an element of the crime and the defendant must be informed of this element in order to prepare a proper defense. *State v.*

*Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). When a defendant is charged with only one means of committing an alternative means crime, a conviction cannot stand based on evidence of an uncharged means; there must be sufficient evidence to support a conviction on the charged means. *State v. Brown*, 162 Wn.2d 422, 430, 173 P.3d 245 (2007).

Ms. Wright was charged under RCW 9A.56.020(1)(a). A person commits theft under this section by "wrongfully obtain[ing] or exert[ing] unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." This section of the statute encompasses theft by common law trespassory taking, or larceny, and theft by embezzlement. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1991). An essential element of wrongfully obtaining or exerting unauthorized control over property, is trespass. *State v. Thorpe*, 51 Wn. App. 582, 585, 754 P.2d 1050 (1988), review denied, 111 Wn.2d 1012 (1988). Embezzlement occurs when one comes into lawful custody of another's property and then fraudulently appropriates the property to his own use. *State v. Monk*, 42 Wn. App. 320, 323, 711 P.2d 365 (1985).

The evidence submitted by the state, however, even when viewed in the light most favorable to the State, could not lead a rational jury to a

finding of guilt under RCW 9A.56.020(1)(a). That evidence suggested that Ms. Wright provided inaccurate information on the timesheets submitted to her case manager as to the specific times of day she rendered care to Donna Siegfried and misstated or exaggerated the level and degree of care or assistance Mrs. Siegfried actually required in the various assessments of Mrs. Siegfried's care needs.

This evidence could only support a finding of guilt under RCW 9A.56.020(1)(b), under which the defendant was not charged. RCW 9A.56.020(1)(b) provides an alternative means of committing theft when, "by color or aid of deception" a person "obtain[s] control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." The theft by deception statute criminalizes the act of creating or confirming another's false impressions, resulting in the actor obtaining control over the property of another. *State v. George*, 132 Wn. App. 654, 660, 133 P.3d 487 (2006). Theft by color or aid of deception means that the deception operated to bring about the obtaining of property or services. *Id.* In *Thorpe*, the court determined that the defendant's conduct of submitting knowingly inflated invoices to the state and receiving payment based on those invoices constituted theft of

money by deception, not by means of wrongfully obtaining or exerting unauthorized control. *Thorpe*, 51 Wn. App. at 586.

Similarly, the evidence herein suggests that Ms. Wright confirmed or created false impressions to obtain possession of the property of another by falsifying the timesheets submitted to her case managers or by exaggerating the amount of care Mrs. Siegfried actually needed. However, Ms. Wright was not charged with committing theft by color or aid of deception. Instead, she was charged under the section of the statute encompassing theft by common law trespassory taking, or larceny, and theft by embezzlement. Because the State did not provide sufficient evidence to sustain a conviction on the charged means of committing theft, the charge in Count I should be dismissed. *Brown*, 162 Wn.2d at 430.

Even assuming *arguendo* that the crime had been properly charged as theft by color or aid of deception, there would still be insufficient evidence to support the conviction. Theft by color or aid of deception requires that the deception operated to bring about the obtaining of property or services. *George*, 135 Wn. App. at 660. Although not explicitly stated in the statute, reliance on the deceptions of the actor is an element of theft by color or aid of deception. *State v. Casey*, 81 Wn. App.

524, 527-28, 915 P.2d 587, review denied, 130 Wn.2d 1009, 928 P.2d 412 (1996).

Here, the testimony revealed that the timesheets provided by Ms. Wright to her case managers were not used for purposes of paying her. The State had already paid Ms. Wright for the specific hours she allegedly billed fraudulently well before the timesheets were requested by State investigators. In other words, the timesheets submitted to her case managers were not relied upon in furnishing payment for the hours she spent providing care to her mother. Therefore, the falsified timesheets alone cannot serve as evidence of theft by color or aid of deception, since reliance upon the deception is an essential element of the crime. For this additional reason the charge of first degree theft should be dismissed for insufficient evidence.

2. Ms. Wright's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the evidence was insufficient to support a conviction under the section of the Medicaid fraud statute charged in Counts II-XII.

The general law on insufficient evidence is set forth in the previous issue.

When the Medicaid fraud statute at issue is given a plain meaning, the evidence is insufficient to support a conviction under the section under which Ms. Wright was charged. Even assuming the statute is somewhat ambiguous, the rule of lenity requires the court to interpret the statute in favor of the defendant absent legislative intent to the contrary. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005); *State v. Kazeck*, 90 Wn. App. 830, 953 P.2d 832 (1998); *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996); *State v. Gore*, 101 Wn.2d 481, 486, 681 P.2d 227 (1984).

Statutory construction begins by reading the text of the statute. *State v. Lilyblad*, 163 Wn.2d 1, 5, 177 P.3d 686 (2008). Under principles of statutory construction, a statute is not subject to judicial interpretation where its language is plain, unambiguous, and well understood according to its natural and ordinary sense and meaning. *State v. Lewis*, 86 Wn. App. 716, 717-18, 937 P.2d 1325 (1997). A statute is ambiguous only if it is susceptible to more than one reasonable interpretation. *State v. Bernard*, 78 Wn. App. 764, 768, 899 P.2d 21 (1995).

It is well settled that statutes must not be construed in a manner that renders any portion thereof meaningless or superfluous. *Cockle v. Dept. of Labor and Industries*, 142 Wn.2d 801, 16 P.3d 583 (2001); *Stone*

*v. Chelan County Sheriffs Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988). When a court reads a statute, it "must read it as a whole and give effect to all language used." *Lilyblad*, 163 Wn.2d at 6 (citing *In re Pers. Restraint of Skylstad*, 160 Wn.2d 944, 948, 162 P.3d 413 (2007)).

RCW 74.09.230(1) and (2), the Medicaid fraud statute, describe two distinct acts, either of which constitutes a Class C felony. Section (1), under which Ms. Wright was charged, criminalizes "knowingly mak[ing] or caus[ing] to be made any false statement or representation of a material fact in any application for any payment under any medical care program authorized under this chapter." Given a plain reading, an "application for payment," as used in section (1). would be an invoice or bill provided to the State for payment for medical care authorized under Chapter 74.09. An example of an act criminalized under this section might be a doctor who provides a specific type of treatment or care under a program authorized by Chapter 74.09 twice, yet claims in an invoice or bill submitted for payment to a medical care program to have provided that treatment on four separate occasions.

Section (2) of the statute, under which Ms. Wright was not charged, criminalizes "at any time knowingly mak[ing] or caus[ing] to be made any false statement or representation of a material fact for use in

determining rights to such payment, or knowingly falsif[ying], conceal[ing], or cover[ing] up by any trick, scheme, or device a material fact in connection with such application or payment." "Determining the right to such payment" is properly understood to mean determining eligibility for participation in a given state-funded medical care program. For instance, a patient who knowingly provides false information regarding his financial situation, and is subsequently found to be eligible for a medical care program authorized by Chapter 74.09 based on that false information, would be guilty under section (2).

The two sections should be read to criminalize making knowingly false statements during two distinct steps in the process of receiving payments authorized by Chapter 74.09. Section (1) criminalizes the falsification of the actual request for payment, i.e. a false statement, bill, or invoice for services, whereas section (2) criminalizes the falsification of information used in determining one's initial eligibility to participate in a given state-funded medical care program.

Reading RCW 74.09.230(1) in a way that criminalizes the making of false statements in determining eligibility for a medical care program authorized by the chapter is impermissible because it would render section (2) superfluous and meaningless. Conversely, reading section (2) in a way

that criminalizes a falsified invoice, bill or other "application for payment" is also impermissible because it would render that section meaningless and superfluous, as such activity is already criminalized by section (1).

The evidence herein only establishes that the timesheets submitted by Ms. Wright to her case manager were false as to the specific times of day which she claimed to have provided care to her mother. A plain reading of the statute, however, requires the State to prove under section (1) that Ms. Wright made knowingly false claims in her telephonic invoices submitted each month during the time period in question. The State provided no evidence that would lead a rational jury to reach such a conclusion. Therefore, the Medicaid fraud convictions (Counts II-XI) should be dismissed.

Even if this Court finds ambiguity in the statute, any ambiguity must be resolved in favor of Ms. Wright, the defendant. In this case, that requires a reading of the statute which finds that section (1) of the statute does not criminalize the alleged false statements regarding the level of care and assistance that Mrs. Siegfried required.

The evidence showed that the timesheets submitted to the case managers are not "applications for payment" as contemplated by the statute and were not relied upon in furnishing payment to Ms. Wright for

care provided to Mrs. Siegfried. In fact, the timesheets alleged to be knowingly falsified were submitted well after payment for the months in question was already received by Ms. Wright. Moreover, they were submitted only after State investigators asked the defendant's case manager to obtain those records from Ms. Wright, having informed the case manager that Ms. Wright was under investigation for the current charges.

The only applications for payment which the defendant made were the telephonic invoices submitted each month in which the defendant claimed to have provided one hundred eighty-eight hours of care to her mother. The State furnished no evidence that these invoices were falsified or that the hours claimed each month were not actually spent providing care to Mrs. Siegfried.<sup>2</sup> The time sheets were not applications for payment and were not relied upon by the State in paying Ms. Wright for the care she provided Mrs. Siegfried. Therefore, the evidence showing Ms. Wright submitted inaccurate timesheets cannot support a finding of guilt under section (1) of the statute.

The State may argue that other evidence showed that Ms. Wright and Mrs. Siegfried exaggerated or misstated the amount of care Mrs.

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<sup>2</sup> By the same token, since there was no evidence that the monthly invoices were falsified, there is no evidence that the State overpaid Ms. Wright, hence she should not owe any restitution.

Siegfried needed in order to increase her eligibility for state-funded care. However, even assuming the truth of that evidence, a finding of guilt for the crimes charged is still unfounded since that activity is not criminalized by the section of the statute under which the defendant was charged. Ms. Wright would be guilty of that allegation only under section (2), a knowingly false representation of a material fact used in determining the rights to payment under a state-funded medical care program. Since she is charged only under section (1) of the statute, this evidence cannot be used to support a finding of guilt.

In summary, under a plain reading of section (1) Ms. Wright would have had to knowingly falsify the monthly telephonic invoices to be guilty of Medicaid fraud. Since the evidence did not show the telephonic invoices were falsified, the Medicaid fraud convictions should be dismissed.

3. Charging Ms. Wright under both the general theft statute and the specific Medicaid fraud statute constitutes a violation of her right to equal protection requiring dismissal of the first degree theft charge.

Ms. Wright is charged under the general theft statute of RCW 9A.56.020 and a more specific Medicaid fraud statute, RCW 74.09.230(1). These statutes are concurrent in that a violation of the more specific

Medicaid statute constitutes a violation of the general theft statute in every instance. Because the statutes are concurrent, the specific crime must be charged to the exclusion of the more general crime. The State has failed to do so and Ms. Wright's right to due process has been violated, requiring the dismissal of the first degree theft conviction.

It is a denial of equal protection if a prosecutor charges a crime under a general statute where a more specific statute prohibits the same conduct, yet carries a different penalty. *State v. Alfonso*, 41 Wn. App. 121, 125-26, 702 P.2d 1218 (1985). The key in determining whether a prosecutor must charge under the specific statute is whether the two statutes are concurrent such that a violation of the specific statute constitutes a violation of the more general statute in every instance. *Id.* It is irrelevant that the specific statute contains elements additional to those of the more general statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d237 (1984). When a general and a specific statute are concurrent, the more specific law applies to the exclusion of the general. *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). Appellate courts review the question of whether two statutes are concurrent de novo. *State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630 (2006).

Ms. Wright was charged under both the general theft statutes, RCW 9A.56.020(1)(a) and 9A.56.030(1)(a), and a more specific Medicaid fraud statute, RCW 74.09.230(1). The general theft statute, RCW 9A.56.020(1)(a), defines theft as "wrongfully obtain[ing] or exert[ing] unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." If a person commits theft of property or services exceeding five thousand dollars in value, that person is guilty of theft in the first degree, which is a ranked, Class B felony. RCW 9A.56.030(1)(a). The more specific Medicaid fraud statute criminalizes "knowingly mak[ing] or caus[ing] to be made any false statement of representation of a material fact in any application for any payment under any medical care program authorized this chapter," which is an unranked, Class C felony. RCW 74.09.230(1).

The general theft statutes and the more specific Medicaid fraud statute are concurrent in that a violation of the more specific statute constitutes a violation of the general statute in every instance. One cannot make knowingly false statements in an application for payment under an authorized medical care program without also wrongfully obtaining or exerting unauthorized control over the money. If the State's evidence is to be believed, Ms. Wright also committed theft in every instance of making

false statements regarding the number of hours spent providing care to Mrs. Siegfried. Thus, a violation of the more specific fraud statute constituted in each instance a violation of the more general theft statute. Because the statutes are concurrent, the specific statute must be applied to the exclusion of the general. The State's failure to do so amounts to a violation of the defendant's right to equal protection, requiring dismissal of the charge in Count I.

4. The convictions for first degree theft and Medicaid fraud encompass the same criminal conduct.

A defendant's current offenses must be counted separately in determining the offender score unless the trial court finds that some or all of the current offenses "encompass the same criminal conduct." RCW 9.94A.589(1)(a); *State v. Anderson*, 92 Wn. App. 54, 61, 960 P.2d 975 (1998). "Same criminal conduct" is indicated when two or more crimes that require the same criminal intent are committed at the same time and place and involve the same victim. RCW 9.94A.589(1)(a). The absence of any of these elements precludes a finding of "same criminal conduct." *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994).

The Legislature intended that courts construe the phrase, "same criminal conduct," narrowly. *State v. Grantham*, 84 Wn. App. 854, 858,

932 P.2d 657 (1997). To determine if two crimes share a criminal intent, the focus is on whether the defendant's intent, viewed objectively, changed from one crime to the next. *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Courts should also consider whether one crime furthered the other. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Standard of Review. Appellate courts review a trial court's finding that the offenses did not constitute the same criminal conduct for abuse of discretion. *State v. Maxfield*, 125 Wn.2d 378, 402, 886 P.2d 123 (1994).

Here, it is undisputed that the crimes at issue involved the same criminal intent—theft by color or aid of deception, i.e. provide inaccurate information on timesheets and misstate or exaggerate the level and degree of care or assistance. It is also undisputed that the crimes involve the same victim—the State. It is obvious that the crimes all occurred in the same place.

The only remaining issue then is whether the crimes involved the same time. The ten counts of Medicaid fraud occurred on individual dates when entries on the time sheets conflicted with time records from Riverview, or the level of care was misstated between June 4, 2007 and April 2, 2008. The first degree theft was an aggregation of the monies

overpaid due to the individual counts of Medicaid fraud between June 4, 2007 and April 2, 2008. See RP 612-14, 703. Thus, the first degree theft and the Medicaid frauds occurred over the same time period. Therefore, the crimes constitute the same criminal conduct.

**E. CONCLUSION**

For the reasons stated, the convictions should be reversed.

Respectfully submitted, November 26, 2012,

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on November 26, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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