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Court of Appeals
Division I
State of Washington

NO. 69226-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL J. REEDER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD D. EADIE

BRIEF OF RESPONDENT

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A. ISSUES RAISED ON APPEAL

1. Whether the trial court erred in denying appellant's request to appoint new counsel for an alleged conflict of interest between appellant and his sister when there was no evidence that appellant's sister was represented by his lawyer's firm and when appellant cannot demonstrate that he and his sister had an adverse interest in the same or a substantially related matter?

2. Whether the trial court erred in denying appellant's motion to dismiss counts based on the statute of limitations when the charges were filed within the specific statute of limitations periods for theft and securities fraud described in RCW 9A.04.080(1)(d)(iv) and RCW 21.20.400(3) and when the jury found the statute of limitations proved beyond a reasonable doubt?

3. Whether the trial court erred in denying appellant's motion to suppress bank records when the records were obtained under authority of law by Special Inquiry Judge Subpoena authorized by RCW 10.27.170?

4. Whether the trial court's sentence violated the prohibition against double jeopardy when it sentenced appellant to an exceptional sentence above appellant's standard sentence range when the instructions, evidence, and argument made it manifestly clear to the jury that each count required proof of a separate and distinct criminal act?

B. STATEMENT OF FACTS

William McAllister met appellant through Private Mortgage Investors, Inc., which provides non-bank real estate financing. RP 7/10/12 p. 267-69. Between March 7, 2006, and July 20, 2007, appellant persuaded McAllister to invest over $1.7 million in two real estate investments, one in Snohomish and one in Bellevue. RP 7/10/12 p. 269-82; Exhibit 11. Instead of using Mr. McAllister's investment money to purchase or develop the real estate appellant withdrew McAllister's money in cash or used it to purchase cashier's checks payable to himself for his personal expenses or to gamble. RP 7/11/12 p. 453-58; RP 7/12/12 p. 490-94; Exhibits 19, 20, 21.

In the Snohomish transaction appellant told McAllister he had negotiated a deal to purchase two parcels of land near Lake Stevens. Appellant and McAllister formed an LLC and signed a contract in which McAllister agreed to loan appellant $350,000 for the down payments on the properties. The contract also stated that appellant had entered into purchase and sale agreements for the properties. RP 7/10/12 p. 280-83; Exhibit 10. Appellant later told McAllister that they had "lost the deal" because the sellers no longer wanted to sell. RP 7/10/12 p. 297.

In the Bellevue transaction appellant told McAllister that he had an opportunity to purchase a piece of property overlooking Meydenbauer

Bay. RP 7/10/12 p. 269-70. Appellant gave McAllister a copy of an appraisal that valued the property at $2 million. RP 7/10/12 p. 275-76. The owners of the property, George and Alice Buck, had known Appellant since he was a child. RP 7/10/12 p. 159. Although the Bucks had signed a purchase and sale agreement to sell their property to appellant for $1 million, RP 7/10/12 p. 176-86; Exhibits 4, 5, they had second thoughts and hired an attorney to void the transaction. RP 7/10/12 p. 187, 191-206. Appellant returned a copy of the purchase and sale agreement to the Bucks marked "void." RP 7/10/12 p. 205; Exhibit 4. He showed McAllister a copy of the same purchase and sale agreement that was not marked "void" and was altered in other respects to induce Mr. McAllister to invest in the property. RP 7/10/12 p. 269-72. After making various excuses for why the sale hadn't closed appellant eventually admitted to Mr. McAllister that he had spent all of his investment money. RP 7/10/12 p. 301.

The State obtained bank records for appellant under RCW 10.27.170 using subpoenas issued by the Special Inquiry Judge. Bank records show that appellant did not spend any of McAllister's money to purchase property. RP 7/12/12 p. 491. McAllister's money was co-mingled in a single bank account with money from investors Michael Jensen and Frank Braillard who testified at trial to falling victim to similar schemes by appellant. RP 7/10/12 p. 232-48; RP 7/11/12 p. 414-27. The

records show appellant withdrew nearly $3 million from the account in cash or cashier's checks including over $100,000 at casinos in Washington and Nevada and used over $232,000 to pay loans and credit card bills. RP 7/11/12 p. 453-58; RP 7/12/12 p. 484-94; Exhibits 19, 20, 21.

Appellant was charged in the first amended information with fourteen counts of securities fraud and fifteen counts of first-degree theft by deception for each of fifteen payments he obtained from Mr. McAllister:

COUNT	DATE	CRIME	LOSS
1	3/7/06 to 6/20/07	Securities Fraud	$80,000
2	3/7/06 to 6/20/07	Theft in the First Degree	
3	3/9/06 to 6/20/07	Securities Fraud	$160,000
4	3/9/06 to 6/20/07	Theft in the First Degree	
5	5/4/06	Securities Fraud	$240,000
6	5/4/06 to 6/20/07	Theft in the First Degree	
7	5/22/06	Securities Fraud	$160,000
8	5/22/06 to 6/20/07	Theft in the First Degree	
9	5/26/06	Securities Fraud	$200,000
10	5/26/06 to 6/20/07	Theft in the First Degree	
11	6/16/06	Securities Fraud	$150,000
12	6/16/06 to 6/20/07	Theft in the First Degree	
13	7/5/06	Securities Fraud	$100,000
14	7/5/06 to 6/20/07	Theft in the First Degree	
15	8/2/06	Securities Fraud	$50,000
16	8/2/06	Theft in the First Degree	
17	9/11/06	Securities Fraud	$154,000
18	9/11/06	Theft in the First Degree	
19	12/14/06	Securities Fraud	$57,500
20	12/14/06	Theft in the First Degree	

COUNT	DATE	CRIME	LOSS
21	12/21/06	Securities Fraud	
22	12/21/06	Theft in the First Degree	$181,000
23	1/31/07	Securities Fraud	
24	1/31/07	Theft in the First Degree	$11,500
25	6/13/07	Securities Fraud	
26	6/13/07	Theft in the First Degree	$71,200
27	6/20/07	Securities Fraud	
28	6/20/07	Theft in the First Degree	$106,000
29	7/20/07	Theft in the First Degree	$4,500
			$1,725,700

CP 301-17; Exhibit 11.

At a hearing on April 18, 2012, appellant moved for a new attorney on the ground that his present attorney, Matthew Pang, had a conflict of interest. The explanation for the conflict was that another attorney in Mr. Pang's office, David Roberson, had received a telephone call from appellant's sister, Billy Joe Cuzak, before criminal charges were filed asking Mr. Roberson for legal advice in a civil matter that Mr. Roberson thought "was either the same or very similar." RP 4/18/12 p. 8. Mr. Roberson gave her advice but did not open a file. RP 4/18/12 p. 8. Ms. Cuzak contacted the prosecutor's office after speaking to Mr. Roberson and told another prosecutor in the office that she wasn't represented by Mr. Roberson and only contacted him because her son knew him. RP 4/18/12 p. 5. Ms. Cuzak was not a witness in the case on appeal. Judge Ronald Kessler ruled that although appellant had

established an "arguable" conflict of interest he denied the motion and instead ordered Mr. Pang and Mr. Roberson and their investigators not to discuss the case with each other. RP 4/18/12 p. 8, 9.

The case was assigned to trial before the Honorable Richard Eadie. During pre-trial motions appellant moved to dismiss all of the securities fraud counts on the ground that they were barred by the statute of limitations. The trial court denied appellant's motion. CP 318-51; RP 7/2/12 p. 31-38; RP 7/3/12 p. 83-94. Appellant also moved before trial to suppress the bank records the State obtained by Special Inquiry Judge Subpoena, citing State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007). CP 318-51; RP 7/2/12 p. 42-52; RP 7/9/12 p. 140-41, 145-47. After reviewing Miles, the court invited appellant to provide additional authority for his claim that the records were obtained without authority of law. RP 7/9/12 p. 148. Appellant failed to produce additional authority or to make additional argument to support his claim.

The jury returned verdicts of guilty on counts 1 through 28 and found aggravating facts supporting an exceptional sentence above the standard sentence range.[1] CP 414-36. On august 17, 2012, Judge Eadie sentenced appellant to an exceptional sentence above the standard sentence range of 80 months on the securities fraud counts and 69 months

[1] Count 29 was severed on defendant's motion and dismissed after the jury returned verdicts of guilty. RP 7/2/12 p. 73-4; CP 352.

on the first-degree theft counts. CP 437-52. Appellant filed a notice of appeal on August 31, 2012. CP 453-69.

C. SUMMARY OF ARGUMENT

1. The trial court did not err when it denied appellant's motion for new counsel for a conflict of interest and instead instructed defense counsel not to speak to each other regarding their representation when counsel had not demonstrated that appellant's sister was a former client or that there was an actual conflict of interest or a significant risk that his lawyer's representation was materially limited by a conflict of interest.

2. The trial court did not err when it denied appellant's motion to dismiss counts for violation of the statute of limitations when the counts were charged within the time period permitted by the statute of limitations and when the State had asked the court to instruct the jury to find the statute of limitations proved beyond a reasonable doubt.

3. The trial court did not err when it denied appellant's motion to suppress bank records when those records were obtained under authority of law by Special Inquiry Judge Subpoena under RCW 10.27.170.

4. The trial court did not violate the prohibition against double jeopardy when it sentenced him to an exceptional sentence above the standard sentence range for fourteen counts of securities fraud and

fourteen counts of first-degree theft because the instructions, evidence, and argument made it manifestly clear to the jury that each count required proof of a separate and distinct criminal act.

D. ARGUMENT

1. THE TRIAL COURT DID NOT ERR WHEN IT DENIED APPELLANT'S MOTION FOR NEW COUNSEL FOR A CONFLICT OF INTEREST AND INSTEAD INSTRUCTED COUNSEL NOT TO SPEAK TO EACH OTHER REGARDING THEIR REPRESENTATION WHEN COUNSEL HAD NOT DEMONSTRATED THAT APPELLANT'S SISTER WAS A FORMER CLIENT, OR THAT THERE WAS AN ACTUAL CONFLICT OF INTEREST, OR THAT THERE WAS A SIGNIFICANT RISK THAT HIS LAWYER'S REPRESENTATION WAS MATERIALLY LIMITED BY A CONFLICT OF INTEREST.

The constitutional right to counsel includes the right to assistance of counsel free from conflicts of interest. State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000). However, "The mere possibility of a conflict of interest is not sufficient to 'impugn a criminal conviction.'" Davis, 141 Wn.2d at 861, 10 P.3d 977 (quoting Cuyler v. Sullivan, 446 U.S. 335, 348-49, 100 S. Ct. 1708, 1719, 64 L. Ed. 2d 333 (1980)).

Appellant claims that the trial court erred when it denied his motion for new counsel because his current lawyer had a conflict of interest. Appellant claims that this conflict of interest existed because another lawyer in his current lawyer's firm had advised appellant's sister

about a related civil case before the charges in this case were filed. Before a defendant is entitled to new counsel for a conflict of interest he or she must demonstrate either an actual conflict of interest between a current and former client or a significant risk that his lawyer's representation will be materially limited by a conflict with a former client:

> RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS
>
> **(a)** Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) the representation of one client will be directly adverse to another client; or
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

RPC 1.7.

First, appellant failed to demonstrate that Ms. Cuzak was a former client of his lawyer's firm:

> The existence of an attorney/client relationship is a question of fact, the essence of which may be inferred from the parties' conduct or based upon the client's reasonable subjective belief that such a relationship exists. Even a short consultation may suffice to create an attorney/client relationship, and an important factor in determining the existence of the relationship is the client's subjective belief.

Teja v. Saran, 68 Wn. App. 793, 795-96, 846 P.2d 1375, review denied, 122 Wn.2d 1008, 859 P.2d 604 (1993) (citation omitted).

The record below does not support appellant's claim that Ms. Cuzak was a former client of his lawyer's firm. Mr. Roberson did not create a file after his telephone consultation with Ms. Cuzak and Ms. Cuzak told a prosecutor in King County Prosecuting Attorney's Office that she was not represented by Mr. Roberson. An attorney-client relationship cannot be inferred from the parties' conduct or subjective belief that there was an attorney-client relationship.

Second, there is no evidence in the record that there was a conflict of interest. In determining whether an apparent conflict of interest on the part of trial counsel warrants reversal appellate courts employ a two prong test: first, a trial court commits reversible error if it knows or reasonably should know of a particular conflict into which it fails to inquire, and second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting counsel's performance. State v. Dhaliwal, 113 Wn. App. 226, 53 P.3d 65 (2002), affirmed, 150 Wn.2d 559, 79 P.3d 432 (2003).

Although the trial court inquired into appellant's claimed conflict of interest the record is devoid of any suggestion of an actual conflict or that there was a significant risk that his attorney's representation was

materially limited by Mr. Roberson's advice to Ms. Cuzak. An actual conflict of interest exists when a defense attorney owes duties to a party whose interests are adverse to those of the defendant. State v. Byrd, 30 Wn. App. 794, 798, 638 P.2d 601 (1981). Appellant has failed to identify any interest Ms. Cuzak had that was adverse to his own. The advice offered by Mr. Roberson to Ms. Cuzak involved a purportedly related civil case and was given before charges were filed in the case on appeal. Neither appellant nor his attorney explained the nature of the civil case or the advice given. Ms. Cuzak was not called or subpoenaed as a witness in the case on appeal. Under these circumstances the trial court did not err in denying appellant's motion for new counsel for a conflict of interest.

In his brief on appeal appellant claims that the prosecution alleged that Ms. Cuzak "is a witness, perhaps even an accomplice." This statement is completely unsupported by the record and appellant offers no citation to the record to support this claim. Appellant also claims that he was prejudiced by a conflict of interest because "counsel failed to understand the nature of the case, the relevant evidentiary standards, and ultimately presented no defense." This claim is also not supported by the record.

2. THE TRIAL COURT DID NOT ERR WHEN IT DENIED APPELLANT'S MOTION TO DISMISS COUNTS FOR VIOLATION OF THE STATUTE OF LIMITATIONS WHEN THE COUNTS WERE CHARGED WITHIN THE TIME PERIOD PERMITTED BY THE STATUTE OF LIMITATIONS AND WHEN THE STATE HAD ASKED THE COURT TO INSTRUCT THE JURY TO FIND THE STATUTE OF LIMITATIONS PROVED BEYOND A REASONABLE DOUBT.

a. Securities Fraud.

Appellant was charged by amended information with fourteen counts of securities fraud on April 8, 2011. CP 280-300. Counts 1 and 3 of the information charged appellant with securities fraud occurring during a time period intervening between March 7, 2006 and June 20, 2007, and March 9, 2006 and June 20, 2007, based on checks the victim wrote to appellant on March 7 and March 9, 2006, respectively. In the remaining counts of securities fraud the information charged appellant with each of twelve different investment transactions based on checks written from May 4, 2006, until June 20, 2007. CP 301-317. The jury instructions for all counts of securities fraud required the jury to find that the State had proved beyond a reasonable doubt "That the act or acts described in (1)(a), (b), or (c) were part of a continuing course of conduct and were committed under a continuing criminal impulse that did not terminate until after April 7, 2006." CP 353-413. The jury returned verdicts of guilty on all fourteen charged counts of securities fraud. CP 201-03.

Where a crime is part of a continuing criminal impulse the statute of limitations does not begin to run until the criminal impulse is terminated. State v. Reid, 74 Wn. App. 281, 290, 872 P.2d 1135 (1994) (citing State v. Brisebois, 39 Wn. App. 156, 163, 692 P.2d 842 and State v. Carrier, 36 Wn. App. 755, 758, 677 P.2d 768 (1984)). "Whether a criminal impulse continues into the statute of limitations period is a question of fact for the jury." State v. Dash, 163 Wn. App. 63, 259 P.3d 319 (2011), citing State v. Mermis, 105 Wn. App. 738, 746, 20 P.3d 1044 (2001). The statute of limitations for securities fraud is five years from the date of violation or three years after discovery of the violation, whichever is later. RCW 21.20.400(3).

Here, the information charged appellant with fourteen counts of securities fraud all occurring within five years of the date the information was filed. The jury's verdict that appellant's continuing course of conduct and continuing criminal impulse did not terminate until after April 7, 2006, was amply supported by the evidence at trial of appellant's continuing misrepresentations to Mr. McAllister regarding his efforts to acquire the properties coupled with appellant's bank records that showed he was spending Mr. McAllister's investment money at casinos, withdrawing it in cash, or using it for his personal expenses.

Appellant argues that because there is a conflict between RCW 9A.04.080 which provides that "No other felony may be prosecuted more than three years after its commission . . ." and the five-year statute of limitations in RCW 21.20.400(3) the rule of lenity requires the court to apply the three year statute of limitations. However, the rule of lenity is properly applied in construing an ambiguous criminal statute. State v. Welty, 44 Wn. App. 281, 726 P.2d 472 (1986), and operates in the absence of clear evidence of legislative intent. State v. Pentland, 43 Wn. App. 808, 719 P.2d 605 (1986); State v. Datin, 45 Wn. App. 844, 845, 729 P.2d 61, 62 (1986).

In Datin, appellant argued that the rule of lenity required the State to charge him with first-degree incest, a lesser offense of the crime he was charged with, first-degree rape, since his conduct violated both statutes. In holding the rule of lenity did not apply to this circumstance, the court noted:

> Where a special statute punishes the same conduct that is punished under a general statute, the special statute applies and the accused can be charged only under that statute. State v. Shriner, 101 Wn.2d 576, 681 P.2d 237 (1984). Courts will assume in such a case that the Legislature intended that the specific crime be charged where the defendant's conduct violates both the specific and the more general statutes. This rule of construction applies only where the statutes are concurrent, that is, where the general statute will be violated in each instance where the special

> statute has been violated. Shriner, 101 Wn.2d at 580, 681 P.2d 237.

Id. at 845-46.

Similarly, the special statute of limitations for securities fraud of five years in RCW 21.20 should be applied here instead of the general statute of limitations of three years in RCW 9A. The two statutes are not ambiguous and the legislature's intent to enact a longer statute of limitations for securities fraud is made clear by the amendment of RCW 21.20.400 in 2003 to add the provision that the statute does not begin to run until the later of five years or three years from discovery. Where there is a conflict between two statutory provisions the more specific controls over the more general. Spokane County Fire Prot. Dist. No. 9 v. Spokane County Boundary Review Board, 97 Wn.2d 922, 925-26, 652 P.2d 1356 (1982). Appellant's argument to the contrary is without merit.

b. Theft By Deception.

Appellant was also charged with fourteen counts of first-degree theft by deception on April 8, 2011. The information charged counts 2, 4, 6, 8, 10, 12, and 14 as a continuing course of conduct beginning on various dates from March 7, 2006 to July 5, 2006, and ending on June 20, 2007, based on the same transactions charged in the securities fraud

counts. The remaining seven counts of first-degree theft charged appellant with each of seven different theft transactions occurring from August 2, 2006, until June 20, 2007. CP 1-21. The statute of limitations for first-degree theft by deception was three years until July 26, 2009, when an amendment to RCW 9A.04.080 extending the statute of limitations to six years for first- and second-degree theft by deception took effect. 2009 Wash. Legis. Serv., Ch. 53 §1 (West); RCW 9A.04.080(1)(d)(iv).

Appellant makes the same argument for reversal of the theft counts as he does for the securities fraud counts: The rule of lenity requires the court to apply the three-year statute of limitations. However, the rule of lenity operates in the absence of clear evidence of legislative intent and applies only if the statute is ambiguous. See Welty, Pentland and Datin, supra. RCW 9A.04.080(1)(d)(iv) is not ambiguous and the legislative intent to extend the limitations period for theft by deception is clear. Rather than the rule of lenity, the following rule applies: When the legislature extends a criminal statute of limitation the new period of limitation applies to offenses not already time barred when the new enactment was adopted and became effective. State v. Hodgson, 108 Wn.2d 662, 666-67, 740 P.2d 848, 850-51 (1987). None of the theft counts charged were time barred by the three-year statute of limitations on July 26, 2009, so the statute of limitations for those counts is six years.

All of the theft counts were filed within six years of the criminal act. Appellant's argument that the theft counts should be reversed as barred by the statute of limitations is without merit.

3. THE TRIAL COURT DID NOT ERR WHEN IT DENIED APPELLANT'S MOTION TO SUPPRESS BANK RECORDS WHEN THOSE RECORDS WERE OBTAINED UNDER AUTHORITY OF LAW BY SPECIAL INQUIRY JUDGE SUBPOENA UNDER RCW 10.27.170.

The State obtained appellant's bank account records by subpoenas issued by Special Inquiry Judge under RCW 10.27.170. The trial court denied appellant's motion to suppress the records at trial under State v. Miles, 160 Wn.2d 236, 156 P.3d 864 (2007). In Miles, the court held that the Securities Division's use of administrative subpoenas to obtain a person's bank records violated article I, § 7 of the Washington Constitution:

> We find that banking records are private affairs protected by article I, section 7 of the Washington Constitution. A search of personal banking records without a **judicially issued warrant or subpoena** to the subject party violates article I, section 7. Chapter 21.20 RCW is invalid to the extent it authorizes the Division to issue administrative subpoenas to third parties for otherwise private information.

State v. Miles, 160 Wn. 2d 236, 252, 156 P.3d 864, 872 (2007) (emphasis added).

Appellant offered no additional authority to the trial court below that the records were obtained without authority of law. Nor did he raise any of the additional grounds for suppression he now raises on appeal. On appeal he cites cases that stand for the proposition that warrantless searches are generally unreasonable and that subpoenas that are not issued by a judge cannot be used to violate a person's private affairs. However, none of the cases he cites conflict with the holding in Miles or provide authority for his claim that subpoenas issued by the Special Inquiry Judge violate the state or federal constitutions. "Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." In re Request of Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353, 1359 (1986).

Appellant raises a number of procedural issues on appeal. He argues that the prosecuting attorney does not meet the definition of a public attorney under the statute, that the secrecy provisions of RCW 10.27 violate the open courts doctrine, and that there is no proof in the record that the Special Inquiry Judge was a neutral magistrate. A special inquiry judge is sufficiently severed and disengaged from law enforcement activities to qualify as a neutral and detached magistrate. State v. Neslund, 103 Wn.2d 79, 690 P.2d 1153 (1984). However, appellant abandoned his challenge to the records at trial on these new

grounds after the court invited him to produce additional authority to support his argument that his records were obtained without authority of law. The court should not consider these additional arguments for the first time on appeal.

Use of the Special Inquiry Judge to obtain appellant's bank records violated neither the state nor federal constitutions under Miles. The trial court properly denied appellant's motion to suppress the records on these grounds. This court should not reverse the trial court and suppress the evidence under Miles or any of the other grounds he now raises on appeal.

4. THE TRIAL COURT DID NOT VIOLATE THE PROHIBITION AGAINST DOUBLE JEOPARDY WHEN IT SENTENCED HIM TO AN EXCEPTIONAL SENTENCE ABOVE THE STANDARD SENTENCE RANGE FOR FOURTEEN COUNTS OF SECURITIES FRAUD AND FOURTEEN COUNTS OF FIRST-DEGREE THEFT BECAUSE THE INSTRUCTIONS, EVIDENCE, AND ARGUMENT MADE IT MANIFESTLY CLEAR TO THE JURY THAT EACH COUNT REQUIRED PROOF OF A SEPARATE AND DISTINCT CRIMINAL ACT.

Appellant was charged with fourteen counts of securities fraud for each of fourteen transactions with the victim. Securities fraud is defined as follows:

> It is unlawful for any person, in connection with the offer, sale or purchase of **any** security, directly or indirectly:
> (1) To employ any device, scheme, or artifice to defraud;
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the

> statements made, in the light of the circumstances under which they are made, not misleading; or
> (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

RCW 21.20.010 (emphasis added). "Sale" or "sell" includes every contract of sale, contract to sell, or disposition of a security or interest in a security for value. RCW 21.20.005(14).

Appellant argues that he received multiple punishments for a single crime in violation of the prohibition against double jeopardy because the unit of prosecution for securities fraud is the scheme, not each individual sale of a security. The unit of prosecution analysis and its effect on double jeopardy was discussed at length in State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998). In Adel, the defendant was convicted of two counts of possession of marijuana for storing two quantities of marijuana in two different places:

> The proper inquiry in this case is what "unit of prosecution" has the Legislature intended as the punishable act under the specific criminal statute. See Bell v. United States, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955); State v. Mason, 31 Wn. App. 680, 685-87, 644 P.2d 710 (1982). The Legislature has the power, limited by the Eighth Amendment, to define criminal conduct and set out the appropriate punishment for that conduct. Bell, 349 U.S. at 82, 75 S.Ct. 620. The proper question for this case is what act or course of conduct has the Legislature defined as the punishable act for simple possession of a controlled substance? When the Legislature defines the scope of a criminal act (the unit of prosecution), double jeopardy

> protects a defendant from being convicted twice under the same statute for committing just one unit of the crime. See Bell, 349 U.S. at 83-84, 75 S.Ct. 620 (double jeopardy violated when defendant convicted on two counts of transporting women across state lines when two women were transported at the same time); In re Snow, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887) (double jeopardy violated when defendant convicted on multiple counts of plural cohabitation when the cohabitation was continuous and ongoing). The unit of prosecution issue is unique in this aspect: While the issue is one of constitutional magnitude on double jeopardy grounds, the issue ultimately revolves around a question of statutory interpretation and legislative intent.

State v. Adel, 136 Wn. 2d 629, 634, 965 P.2d 1072, 1074 (1998).

Here, the legislature's intent is clear as evidenced by its definition of the crime of securities fraud. The legislature's decision to prohibit false or misleading acts in connection with the sale of "any" security in RCW 21.20.010 coupled with its definition of "sale" in RCW 21.20.005(14) to include "every" sale makes it clear that the legislature intended each separate sale of a security or interest in a security to be a separate crime. Each transaction between appellant and his victim constituted a separate crime under this definition because each was the sale of a security or a separate interest in a security. Appellant's crimes were unlike the simultaneous possession of two caches of marijuana in Adel or the continuous cohabitation of multiple wives in Snow. Because the legislature intended each sale of a security or interest in a security as

the unit of prosecution appellant's double jeopardy rights were not violated.

Appellant argues that State v. Mahmood, 45 Wn. App. 200, 206, 724 P.2d 1021 (1986) supports his claim that the legislature intended that the unit of prosecution for securities fraud was each overarching scheme rather than each sale of a security. However, the analysis in Mahmood addressed whether the legislature intended the separate alternatives described in RCW 21.20.010(2) to be separate crimes:

> Applying the factors to this case we find that for the purposes of RCW 21.20.010, making an untrue statement and omitting to make a material statement are not separate offenses: They are connected by the object of deceiving; they may inhere in the same transaction and they are consistent and not repugnant to each other. Such an analysis is consistent with the rule of lenity described above.

State v. Mahmood, 45 Wn. App. 200, 206, 724 P.2d 1021, 1025 (1986). Contrary to appellant's assertion, the language that the alternatives described in RCW 21.20.010(2) "may inhere in the same transaction" is further guidance that in a securities fraud prosecution each transaction can be a separate offense. Mahmood does not support appellant's claim that the legislature intended each scheme to be a single unit of prosecution regardless of how many securities are sold pursuant to that scheme.

Appellant also complains that multiple acts of securities fraud were charged in the same time period alleged in count 1. However, only one transaction or sale of a security was alleged for each of the fourteen counts of securities fraud including count 1. Exhibits 1, 11. The time period charged in counts 1 through 4 reflected the time period for which appellant's criminal impulse continued for those counts.

Appellant cites State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007) to support his argument that the jury instructions violated his double jeopardy rights by allowing the jury to convict him multiple times for the same act. In Borsheim, the defendant was charged with four separate counts of rape charged during the same time period. The single "to convict" instruction for all four counts did not inform the jury to find a separate act of rape for each count. In reversing the convictions, the court held

> We agree that the jury instructions given violated Borsheim's right to be free from double jeopardy by exposing him to multiple punishments for the same offense. As an initial proposition, jury instructions "must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." State v. Watkins, 136 Wn.App. 240, 241, 148 P.3d 1112 (2006) (internal quotation marks omitted) (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). Accordingly, if it is not manifestly apparent to a criminal trial jury that the State is not seeking to impose multiple punishments for the same offense, the defendant's right to

> be free from double jeopardy may be violated. See Noltie, 116 Wn.2d at 848-49, 809 P.2d 190.

State v. Borsheim, 140 Wn. App. 357, 366-67, 165 P.3d 417, 422 (2007). Unlike Borsheim, here there were separate "to convict' instructions for each of the securities fraud counts, each with different dates, and evidence of a separate transaction supporting each count. Moreover, the State explained during closing argument that each check from the victim to appellant was a separate count of securities fraud and theft:

> This is Exhibit 1. That is just an illustrative exhibit we used during opening, but it's helpful. If you look at it, you can see how the case is charged. Each transaction, every check between Mr. Reeder and Mr. McAllister is two crimes. One is Securities Fraud and the other one is Theft by Deception in the First Degree.
>
> You see in Count I and Count II, for example, have the same date because it's the same check, the same transaction, same as III and IV. All the odd numbers counts are Securities Fraud, and all even counts are Theft by Deception. I hope that helps.

RP 7/16/12 p. 582-83. The facts of this case, the instructions given, the evidence, and the argument made it manifestly apparent to the jury that the State was not seeking multiple convictions for the same transaction.

Appellant makes essentially the same arguments that his conviction of fourteen counts of theft by deception violate double jeopardy, citing State v. Turner, 102 Wn. App. 202, 6 P.3d 1226 (2000). In Turner, the State charged the defendant with four separate counts of

theft for four overlapping schemes to steal money from his employer--by writing unauthorized checks to himself from his employer's payroll account, by writing unauthorized checks payable to another person from the payroll account, by writing unauthorized checks to himself from his employer's general checking account, and by making unauthorized purchases with his employer's credit card. The defendant was convicted of three counts and sentenced to concurrent sentences for each count within the standard sentence range for three counts of theft.

In reversing the conviction the court reasoned that the theft statute was ambiguous as to the unit of prosecution for separate schemes against the same victim during the same overlapping time periods. Id. at 204. The court did not hold that the theft statute was ambiguous as to the unit of prosecution when separate transactions are charged as separate counts. Turner does not support appellant's claim.

Even if the jury instructions given in appellant's case had failed to instruct the jury to find a separate and distinct criminal act for each count that error would not automatically result in a double jeopardy violation. In State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011), the defendant was convicted of five counts of rape. Although there was a separate

"to convict" instruction for each count the instructions all contained the same time period and victim. Although the court in Mutch held that the instructions were flawed because they failed to instruct the jury to find a separate and distinct criminal act for each count the court found no double jeopardy violation:

> Mutch's case presents a rare circumstance where, despite deficient jury instructions, it is nevertheless manifestly apparent that the jury found him guilty of five separate acts of rape to support five separate convictions. In fact, we are convinced beyond a reasonable doubt, based on the entire record, that the jury instructions did not actually effect a double jeopardy violation. The information charged Mutch with five counts based on allegations that constituted five separate units of prosecution. See State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998); see also Tili, 139 Wn.2d at 115, 985 P.2d 365. J.L. testified to five separate episodes of rape. This is the exact number of "to convict" instructions that were given alternatively for first and second degree rape. During its cross-examination of J.L., the defense did not focus on challenging her account of how many sexual acts occurred but rather asked more about her relationship and previous interactions with Mutch, suggesting consent. A detective testified that Mutch admitted to engaging in multiple sexual acts with J.L. The State discussed all five episodes of rape in its arguments, and the defense did not argue insufficiency of evidence as to the number of alleged criminal acts or question J.L.'s credibility regarding the number of rapes but instead argued that she consented and was not credible to the extent she denied consenting. In light of all of this, we find that it was manifestly apparent to the jury that each count represented a separate act; if the jury believed J.L. regarding one count,

> it would as to all. Mutch is not being punished multiple times for the same criminal act. We are convinced of this beyond a reasonable doubt: a double jeopardy violation did not actually follow from the jury instructions.

State v. Mutch, 171 Wn. 2d 646, 665-66, 254 P.3d 803, 814 (2011).

Here, as in Mutch, there were 14 separate "to convict" instructions for both securities fraud and first-degree theft, each with different dates or date ranges. The to convict instructions each related to a separate transaction between appellant and his victim each of which was supported by separate evidence. The State explained in its closing argument that each count was supported by a separate transaction between appellant and his victim and neither side argued at trial that there was only one transaction or that any single transaction could support multiple counts. In these circumstances it is manifestly apparent that the jury found appellant guilty of fourteen counts of securities fraud and fourteen counts of first-degree theft for fourteen separate and distinct criminal acts. Appellant's claim that his convictions violate the prohibition against double jeopardy is without merit.

E. CONCLUSION

For these reasons, Michael Reeder's appeal should be denied and his judgment and sentence upheld.

DATED this 8TH day of July, 2013.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Donnan, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the ***Brief of Respondent***, in STATE V. MICHAEL REEDER, Cause No. 692267-I, in the Court of Appeals, Division I, for the State of Washington.

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

MONICKA LY-SMITH
Done in Seattle, Washington

7/8/13
Date