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STATE OF WASHINGTON  
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No. 68138-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,  
Plaintiff-Appellee,

v.

SASSAN MEHRABIAN,  
Defendant-Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

The Honorable Sharon Armstrong, Judge

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APPELLANT'S OPENING BRIEF

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**I.**  
**ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that Mehrabian has properly waived his right to counsel.
2. Reversal of Count 1 is required because the “to-convict” instruction permitted the jury to convict Mehrabian based solely upon acts committed beyond the statutory limitation period.
3. There was insufficient evidence to conclude that Mehrabian deceived Woodinville as to any particulars.
4. Counts IV and V are the same criminal conduct.

**II.**  
**ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

1. Where Mehrabian never unequivocally waived his right to counsel, but represented himself at trial, must this Court reverse his conviction?
2. Where the jury could have convicted Mehrabian on Count 1 for acts that occurred outside the statute of limitations, must this Court reverse Count 1?
3. Where Mehrabian did not deceive Woodinville as to any fact material to the city’s decisions to buy the equipment at issue, may a jury nonetheless find him guilty of theft by deception?

4. Are Counts 4 and 5 the same criminal conduct when they took place against the same victim at the same time with the same intent?

### III. STATEMENT OF THE CASE

#### A. RIGHT TO COUNSEL

Trial first began in this case in June, 2011 before Judge Eadie. Pretrial motions were heard and determined, a jury was selected and at least one witness testified. Jon Zulauf represented the defendant. Then on June 8, 2011 a mistrial was declared because of a death in trial counsel's immediate family.

On June 28, 2011, the parties returned to court. At that time Mr.

Zulauf stated that:

I talked with Mr. Mehrabian yesterday and he asked...I think he's still in agreement with this...he asked me to argue the motions or act as his lawyer for the motions and then he would take over representing himself.

Supp. CP \_\_\_\_, Defendant's Motion for New Trial, Exhibit 2. After being informed of the defendant's wish to proceed pro se, the judge engaged in a lengthy discussion with Mehrabian regarding the risks of acting as his own counsel. *Id.* at 18-27. At the end of that colloquy, the judge asked whether the defendant wished to proceed pro se. Mehrabian stated:

I want to be really honest. Up to today I was determined to be ... to go that pro se. But after listening to you I'm not quite sure to be honest with you. And it's a difficult case, as you know, you understand that I am at a crossroads in my life that I cannot make, you know definite decisions at this time.

*Id.* at 27. Judge Eadie also asked Mehrabian why he wished to proceed pro se. The defendant appeared to give two reasons, the first was that he had no more money and the second was that he was dissatisfied with the performance of his prior public defenders and with Zulauf. *Id.* at 22-24.

When asked, the prosecutor stated that she believed the waiver to be "equivocal" and objected to any order permitting Zulauf's withdrawal. *Id.* at 28.

Mehrabian then indicated that Zulauf agreed to stay on as stand-by counsel. When the prosecutor asked for a further colloquy Mehrabian stated that he would "rather not" go to the Office of Public Defense but "Definitely any kind of legal help I can get during the trial would be great." *Id.* at 29. He concluded that he wanted "to go pro se with Zulauf as standby counsel." *Id.* The prosecutor then stated that what she heard was equivocal ("yes I'd like an attorney, no I want to represent myself."). *Id.* at 30. Mehrabian then again stated that he did not want the public defender appointed, wanted to represent himself but with Zulauf as standby counsel. *Id.*

Mehrabian signed a conditional waiver of the right to counsel. The written waiver contained the notation that Zulauf was appointed as “stand-by” counsel. Supp. CP \_\_\_\_, Defendant’s Mot. For New Trial, Exhibit 1. On July 13, 2011, the parties appeared in presiding before Judge Kessler. At that time Judge Kessler had before him the written waiver. Supp. CP \_\_\_\_, Defendant’s Mot. For New. Trial, Exhibit 3 at 2. Zulauf asked to withdraw as standby counsel. *Id.* at 4, 5. Mehrabian again stated that he wanted Zulauf as standby counsel “because he is already familiar with this case. But if not, that’s fine, as long as I can have somebody at standby with me.” *Id.* at 4.

Judge Kessler stated that OPD had to provide stand-by counsel only if the Court ordered them to do so. He said: “I am not inclined to do that for you.” *Id.* at 5. The Court then continued the case for one week.

The next week Mehrabian appeared without counsel but indicated that he still wished to have standby counsel. Judge Kessler made it clear that Judge Eadie had already entered an order that he was proceeding pro se. It appears that Judge Kessler was unaware that the waiver was conditional. Supp. CP \_\_\_\_, Defendant’s Motion for New Trial, Exhibit 4 at 2.

Mehrabian represented himself during trial. The record is replete with examples of his misunderstandings regarding the rules of evidence,

procedure and law. Post-verdict, Mehrabian obtained counsel and filed a motion for new trial and argued that he had never unequivocally waived his right to counsel. The trial judge heard the motion. She made no findings about whether or not Mehrabian's waiver of his right to counsel in front of Judge Eadie was equivocal or not. 2nd Supp. CP at \_\_\_\_, Sub. \_\_\_\_, Order filed December 20, 2011. Instead, she found that:

Given the number discussions of Mr. Mehrabian's pro se status, the Court finds that it was unnecessary to give Mr. Mehrabian a second, full advisement concerning his pro se decision at the July 20, 2011, hearing or at any subsequent hearing.

**B. THE THEFT CHARGES**

Sassan Mehrabian and his ex-wife ran a company called Information Technology Solutions and Services Inc. [ITSSI]. 2nd Supp. CP \_\_\_\_, Trial Ex. 194. Mehrabian was also employed as the IT manager at the City of Woodinville [Woodinville]. RP 308. Mehrabian's duties included all aspects of the computer services for Woodinville government, including purchasing IT equipment. RP 309.

Ron Moisant owns Geek Deal. RP 567. That company sold computer equipment, including computers it built. RP 568. He met Mehrabian in 2005. Mehrabian told him that he worked for Woodinville and was in charge of buying computer equipment. Mehrabian also told Moisant that he also owned ITSSI. RP 571. According to Moisant,

Mehrabian said that he could not buy equipment for Woodinville via ITTSI because he worked for Woodinville. However, Geek Deal could sell products it bought from ITSSI to Woodinville. RP 571. In addition, Geek Deal built some systems for Woodinville. Mehrabian would call Moisant and state that he had purchased a particular item for Woodinville and Geek Deal needed to prepare an invoice for that item. RP 572. Mehrabian would give Moisant the description of the item he had purchased. RP 576. Moisant would then bill Woodinville for the item. Moisant paid the money he received from Woodinville to ITTSI minus the sales tax, the credit card fee and “a hundred bucks on top of that for my time.” RP 576.

As the wholesaler, ITTSI purchased the items at a lower cost than it actually billed Woodinville via Geek Deal. In fact, for every purchase Mehrabian was required to get three bids. But there was no evidence that Mehrabian failed to follow the proper Woodinville procurement procedures or that the equipment was not needed.<sup>1</sup> There was no evidence that the price Woodinville paid for the items was not the lowest price available.

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<sup>1</sup> Woodinville’s purchasing policies were admitted as Trial Ex. 193. 2nd Supp. CP \_\_\_\_\_. Mr. Katica testified as to how they were implemented. RP 312-316.

During Mehrabian's tenure at Woodinville there were annual inventories of the equipment. RP 497-498. In October 2007, an inventory was apparently performed by Mehrabian and three other Woodinville employees – Jeanne Yi, Adam Urbaniak and Gene Powers. 2<sup>nd</sup> Supp. CP \_\_\_\_\_, Trial Exhibit 1.

Mehrabian left his employment with Woodinville in February 2008. Within days Woodinville conducted a new inventory of the IT equipment and discovered "anomalies." RP 317. Apparently, Woodinville did not have all of its inventory "tagged" and tracked by serial number. RP 362-263, 373, 512. It also appears that Woodinville did not have a comprehensive system for tracking items that the city discontinued using, gave away, threw out or recycled.

Deborah Knight was Woodinville's assistant City Manager from 2000 until 2006. RP 399. She hired Mehrabian from 1998 until 2006. RP 401. She too described Woodinville's purchasing procedures. RP 401-404. She was asked if Woodinville expected that all computer items purchased on behalf of the city included a warranty. RP 404. She testified that "it depends" and that she didn't "recall specifically looking for that information when purchases were made." RP 404. She stated that Woodinville had done business with ITSSI but she did not know that Mehrabian was a director of that company. RP 406. She stated that the

fact that Mehrabian was associated with the company did not necessarily disqualify ITSSI from working with Woodinville. RP 409. Instead, “we’d probably have a different level of scrutiny.” *Id.* She also said that there might be a procedure for an employee to contract with Woodinville if the relationship was disclosed. RP 407, 424.

Gene Powers, another Woodinville employee in the IT department, stated that he worked for Mehrabian via ITTSI, and Woodinville knew about it. RP 491. He testified that:

I provided them with a written statement that said that in all cases the City would get first call on my services and that outside work would not interfere with my City duties.

RP 491; 2nd Supp. CP \_\_\_\_, State’s Exhibits 434, 435, 436, 437.

As a result of that investigation, the State charged Mehrabian with crimes at issue here. The State’s overarching theory was that Mehrabian committed “theft by deception” because he had never disclosed to Woodinville that Geek Deal was invoicing Woodinville for products that were really from ITTSI and that Mehrabian was profiting from those sales to Woodinville.<sup>2</sup> In addition, the State alleged that Woodinville had been

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<sup>2</sup> It appears that the State’s original theory was that Mehrabian had stolen the equipment or had improperly profited from the sale of the products. *See* Information and Certification for Probable Cause filed March 6, 2008, CP 1-14. In fact, Mehrabian permitted the police to search his home. The police found nothing stolen or illegal.

deceived about the quality of the products or the warranties associated with the products.

In support of its theory, the State called James Katica, the finance director for Woodinville. He testified generally as to Woodinville's purchasing policies. RP 312-330. When asked if he would have permitted Mehrabian to use his personal business to sell items to Woodinville, Katica said that he believed such an arrangement would be "against the law." RP 329. He stated that he "expected" that all items that Mehrabian purchased should have a warranty. RP 330. He stated that he never gave Mehrabian permission to purchase items and bill them to Woodinville. ER 330.

On March 6, 2009, the State charged Mehrabian with 5 counts of first degree theft and one count of attempted first degree theft. These counts are discussed below in greater detail.

Count 1 relates to a Compaq computer and a tape drive. Three bids were obtained. 2nd Supp. CP \_\_\_\_\_, State's Ex. 105. Woodinville paid \$2,395.80 for a Compaq computer workstation to Geek Deal.com. 2nd Supp. CP \_\_\_\_\_, State's Ex.103 and 104. Geek Deal invoiced Woodinville for the item. 2nd Supp. CP \_\_\_\_\_, State's Ex. 108. The actual item was purchased by Geek Deal from ITSSI. 2nd Supp. CP \_\_\_\_\_, State's Ex. 109.

The second item was a Quantum DLT Tape backup. Woodinville received this item. RP 502. Woodinville paid \$3,158.10 to Geek Deal for the item. 2nd Supp. CP \_\_\_\_\_, State's Ex. 114. It was received on February 28, 2006. Geek Deal then passed the money on to ITTSI. 2nd Supp. CP \_\_\_\_\_, State's Ex. 119.

The State charged this count as occurring on April 17, 2006. However, the purchase order for the computer by Geek Deal was submitted to Woodinville on March 3, 2006. 2nd Supp. CP \_\_\_\_\_, State's Ex. 108. The purchase order for the tape drive was submitted by Geek Deal to Woodinville on February 16, 2006.

Count 4, March 19, 2007: This Count concerns a FTP Server and a Cisco Firewall. Woodinville paid Geek Deal \$9,133.76 for the server. 2nd Supp. CP \_\_\_\_\_, State's Ex. 139. The invoice shows that this item was received by Woodinville on March 6, 2007. *Id.*, RP 503. Woodinville paid \$9,658.18 for a Cisco Pix Firewall. 2nd Supp. CP \_\_\_\_\_, State's Ex. 144. The Firewall was also received by Woodinville on March 6, 2007. *Id.* There was testimony, however, that the models of both of these items were different from the model numbers recorded on the invoices. RP 502-503.

Count 5, March 19, 2007: Woodinville paid \$2012.80 for a Wram Controller from Geek Deal.com. 2nd Supp. CP \_\_\_\_\_, Trial Ex. 149.

Woodinville paid \$7491.00 for a HP rack server from Geek Deal.com. 2nd Supp. CP \_\_\_\_, State's Ex. 155. Geek Deal paid a portion of that money to ITTSI. 2nd Supp. CP \_\_\_\_, State's Ex. 141.

Count 6, April 16, 2007, Attempted Theft: Woodinville paid 8,600.47 for a HP Proliant server DL 580. 2nd Supp. CP \_\_\_\_, Trial Ex. 165. It was received by Woodinville on April 2, 2007. *Id.* The 2008 inventory located a HP Pioliant Server DL 580 but it was only a Generation II model. RP 507.

Count 7, February 20, 2007: Woodinville paid Geek Deal.com \$6,300.00 for a Cisco Aironet. 2nd Supp. CP \_\_\_\_, State's Ex. 149. Geek Deal paid the money to ITTSI. 2nd Supp. CP \_\_\_\_, Trial Ex. 175. This item was received by Woodinville on February 2, 2007 and was located in the 2008 inventory, but was used. RP 504, 508.

Count 8: Woodinville paid Geek Deal.com \$8,160.00 for two Cisco Switches. 2nd Supp. CP \_\_\_\_, State's Ex. 180. Woodinville could not determine if the 24 port switch was missing or not. RP 508. Woodinville could not find the 48 port, however. RP 509. Geek Deal paid the money to ITTSI. 2nd Supp. CP \_\_\_\_, State's Ex. 186 and 189A.

Woodinville paid for a Cisco Firewall Failover. 2nd Supp. CP \_\_\_\_, Trial Ex. 182. Geek Deal paid that money to ITTSI. Woodinville did have such an item but asserted that it was "used." RP 509.

C. SENTENCING

At sentencing Mehrabian argued that Counts 4 and 5 were the “same criminal conduct.” The State admitted that it chose to structure its case by alleging that each of the charged thefts was completed on the date that Woodinville issued a check. The State argued that the state opted to use as the date of the crime, the date on City of Woodinville check that was issued as payment. At sentencing, however, the State asked the trial court to treat Counts IV and V as separate offenses to increase Mehrabian’s sentencing range, even though the checks were issued on the same day. The State’s only argument is that these checks are not the same criminal conduct because the checks were “processed by the bank” on different days.

The trial court denied the motion. The judge stated:

Well, I find that it was not the same criminal conduct. And as the cases cited by the State in the supplemental briefing indicated there’s a -- a difference between a continuing course of conduct and sequential acts. And in this case I think we have a series of sequential acts, two different intents on two different dates. And I don’t think the fact that they were paid on the same date changes the dates of his intent. So I will find it is not the same criminal conduct.

Judgment and sentence were entered. CP 158-166. This timely appeal followed.

#### IV. ARGUMENT

- A. MEHRABIAN NEVER UNEQUIVOCALLY WAIVED HIS RIGHT TO THE ASSISTANCE OF COUNSEL. THUS, A NEW TRIAL MUST BE ORDERED BECAUSE HE WAS UNCONSTITUTIONALLY DEPRIVED OF HIS CONST ART. 1, § 22 AND SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL.

The State and federal constitutions guarantee a criminal defendant both a right to counsel and the right to self-representation. *State v. Madsen*, 168 Wn.2d 496, 229 P.3d 714 (2010). But the right to self-representation is not self-executing, and “a criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand, and the demand must be unequivocal in the context of the record as a whole.” *State v. Modica*, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), *aff’d*, 164 Wn.2d 83, 186 P.3d 1062 (2008). A court must indulge in “every reasonable presumption” against a defendant’s waiver of the right to counsel. *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999), *cert. denied*, 531 U.S. 1125, 121 S.Ct. 880, 148 L.Ed.2d 789 (2001) (quoting *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 51 L.Ed.2d 424, *reh’g denied*, 431 U.S. 387, 97 S.Ct. 2200, 53 L.Ed.2d 240 (1977)).

In this case, Mehrabian never made an unequivocal request to proceed pro se. *State v. DeWeese*, 117 Wn.2d 369, 377-78, 816 P.2d 1

(1991). At the hearing in front of Judge Eadie, he said that he definitely needed legal help and wanted Mr. Zulauf as stand-by counsel. In fact, at every hearing, he indicated that he needed all the legal help that he could get. The only true colloquy in this case took place in front of Judge Eadie. And at the conclusion of that colloquy the prosecutor recognized that Mehrabian was willing to proceed pro se only if he had standby counsel or some other assistance in this case. This Court must reach the same conclusion. *See also United States v. Kienenberger*, 13 F.3d 1354 (9th Cir. 1994) (Even though defendant requested that he be counsel of record, where his requests were always accompanied by his insistence that court appoint “advisory” or “standby” counsel to assist him on procedural matters. Thus defendant’s request to proceed pro se was equivocal.).

The Supreme Court reached a similar conclusion in an even less equivocal request in *State v. Woods*, 143 Wn.2d 561, 23 P.3d 1046, *cert. denied*, 534 U.S. 964, 122 S.Ct. 374, 151 L.Ed.2d 285 (2001). There, when defense counsel requested a continuance of the trial date, the defendant stated he was prepared to proceed to trial without counsel on the original trial date. *Id.* at 587. The Supreme Court concluded the request could not be viewed as an unequivocal statement of his desire to proceed to trial pro se. *Id.* Rather, “[h]is statement, ..., merely revealed the

defendant's displeasure with his counsels' request to continue the trial for a lengthy period of time." *Id.*

Similarly, in *State v. Stenson*, 132 Wn.2d 668, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998), the defendant's motion to represent himself was found to be equivocal because it stemmed from disagreements over trial strategy between the defendant and his attorney. *Id.* at 739-40. The defendant told the trial court he did not want to represent himself but felt forced into it. *Id.* at 742. Therefore the court found that Stenson "really [did] not want to proceed without counsel" and properly denied his motion. *Id.*; *see also Turay*, 139 Wn.2d at 399 (defendant's request to proceed pro se as an alternative to his counsel of choice was equivocal).

Absent an unequivocal waiver, Mehrabian's convictions must be reversed.

B. REVERSAL OF COUNT 1 IS REQUIRED BECAUSE THE “TO-CONVICT” INSTRUCTION PERMITTED THE JURY TO CONVICT MEHRABIAN BASED SOLELY UPON ACTS COMMITTED BEYOND THE STATUTORY LIMITATION PERIOD

All of the counts in this case were governed by a three year statute of limitations. Former RCW 9A.04.080(h).<sup>3</sup> Where “successive takings are the result of a single, continuing criminal impulse or intent and are pursuant to the execution of a general larcenous scheme or plan, such successive takings constitute a single larceny regardless of the time which may elapse between each taking.” *State v. Vining*, 2 Wn. App. 802, 808-09, 472 P.2d 564 (1970). Because a continuing crime is not completed until the criminal impulse is terminated, the statutory limitation period does not commence until that time. *State v. Reid*, 74 Wn. App. 281, 290, 872 P.2d 1135 (1994). “Whether a criminal impulse continues into the statute of limitations period is a question of fact for the jury.” *State v. Mermis*, 105 Wn. App. 738, 746, 20 P.3d 1044 (2001); *State v. Dash*, 163 Wn. App. 63, 68-69, 259 P.3d 319, 321 (2011). The State is barred from prosecuting Mehrabian for conduct alleged in Count 1 unless his “criminal impulse” continued until at least March 6, 2006, three years prior to the date on which he was charged. *Dash*, 163 Wn. App. at 70.

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<sup>3</sup> The six year statute of limitations for theft by deception was not effective until July 26, 2009. Laws of Washington 2009 c 61.

But as to Count 1, there are facts to establish that, as to Mehrabian, the entire crime of theft by deception was completed on the date Geek Deal submitted the two purchase orders to Woodinville rather than on the date that Woodinville paid Geek Deal for the items. Those two invoices were submitted more than 3 years before March 6, 2009. Thus, a jury could find that Mehrabian’s “criminal impulse” was completed on that date. But the jury was not given the proper jury instructions on this issue.

Because this Court cannot determine whether the jury convicted Mehrabian based upon a continuing criminal impulse that extended into the statutory limitation period—that is, until at least March 6, 2006—this Court must reverse Mehrabian’s conviction and remand for a new trial on Count 1.

C. THERE WAS INSUFFICIENT EVIDENCE THAT WOODINVILLE RELIED ON ANY DECEPTION BY MEHRABIAN WHEN IT DECIDED TO BUY COMPUTER EQUIPMENT

The phrase “by color or aid of deception” means that the deception “operated to bring about the obtaining of the property or services.” RCW 9A.56.010(4). To satisfy that element of theft under RCW 9A.56.020(1)(b), the State must prove that the victim of the theft relied upon the defendant’s deception. *State v. Casey*, 81 Wn. App. 524, 527-31, 915 P.2d 587, *rev. denied*, 130 Wn.2d 1009, 928 P.2d 412 (1996). The

false representation need not be the sole means of inducing the defrauded person to part with his money, but it is sufficient if such representation was believed and relied upon by such person and in some measure operated to induce him to part with his property. *State v. Cooke*, 59 Wn.2d 804, 371 P.2d 39 (1962); *State v. Peterson*, 190 Wn. 668, 70 P.2d 306 (1937).

The State's primary argument for "deception" was:

That means that when Sam has Mr. Moisant bill the City on Geek Deal invoices for products that he purchased at a lower amount and tells Ron, as you can see in the emails, Here's what I want you to bill them, here's a higher amount, that's deception. Because (A) he's paid far less and has, as Mr. Katica told you, an ethical obligation to not do that; and (B) he's also representing that these items are coming from Geek Deal and that they are legitimately purchased under warranty.

And, again, Mr. Moisant told you that that certainly wasn't the case because he was sending it all back to Sam - - excuse me, Mr. Mehrabian, when they had questions about those items and, again, wouldn't have done so if anyone had said, Well, gee this isn't working or it's defective or what have you.

RP 947-948.

There was evidence that Geek Deal did not warrant the products it invoiced to Woodinville. But the State's evidence was that the manufacturers – not the resellers – were entities that provided that warranties. There was no evidence that any of the items purchased by Mehrabian for Woodinville did not have manufacturer warranties. RP

443. At best, the State’s evidence was that items purchased off Ebay “probably” had no warranty. RP 494.

Moreover, while Mr. Katica testified that Mehrabian had an obligation to disclose his relationship with ITTSI, his testimony alone was insufficient to convict Mr. Mehrabian beyond a reasonable doubt. The State did not present any proof that Woodinville had an prohibition against doing outside business with companies owned by employees. And, there was evidence that Woodinville had done business with ITTSI before the charging period. Gene Powers had worked for ITTSI and fully disclosed that to Woodinville. Even though ITTSI made money on the products it wholesaled to Woodinville via Geek Deal, there was no evidence that – even with a markup – ITTSI was not the lowest bidder.

Worse yet, there was no evidence that Woodinville relied on any deception by Mehrabian. Mehrabian followed the proper procurement procedures for items that Woodinville needed. Woodinville would have purchased the products regardless of who was the lowest bidder. Thus, no “theft” occurred.

D. COUNTS FOUR AND FIVE ARE THE SAME CRIMINAL CONDUCT

In determining whether separate crimes constitute the same criminal conduct, the court is directed to “focus on the extent to which the

criminal intent, objectively viewed, changed from one crime to the next.”<sup>7</sup> *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This analysis may include whether the crimes were part of the same scheme or plan and whether the criminal objectives changed. *State v. Calvert*, 79 Wn. App. 569, 578, 903 P.2d 1003 (1995), *review denied*, 129 Wn.2d 1005, 914 P.2d 65 (1996). Several Court of Appeals decisions have rejected a simultaneity requirement. *See State v. Calvert*, *supra* (two check forgeries occurring at the same bank on the same day treated as same criminal conduct even though it was unknown whether the checks were forged at the same time); *State v. Dolen*, 83 Wn. App. 361, 365, 921 P.2d 590 (1996), *review denied*, 131 Wn.2d 1006, 932 P.2d 644 (1997) (defendant’s convictions for child rape and child molestation, which could not have been committed at the same time, treated as same criminal conduct because the offenses were “continuous sexual behavior over a short period of time”); *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993) (defendant’s act of fellatio on a child, constituting second degree rape, encompassed the same criminal conduct as the defendant’s subsequent attempted anal intercourse with the same victim, constituting attempted second degree rape).

Here, the evidence is that on March 19, 2007, Mehrabian had the same criminal intent, the checks were issued at the same time and place

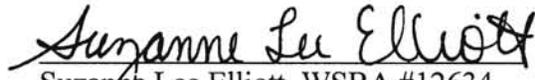
and Woodinville wrote both checks. The fact that the bank processed the checks on different days did not change Mehrabian's criminal intent from one crime to the next. In fact, it was completely serendipitous that the checks were "processed" at separate times.

**V.  
CONCLUSION**

This Court must reverse Mehrabian's convictions for the reasons stated above.

DATED this 8<sup>th</sup> day of August, 2012.

Respectfully submitted,

  
Suzanne Lee Elliott, WSBA #12634  
Attorney for Sassan Mehrabian

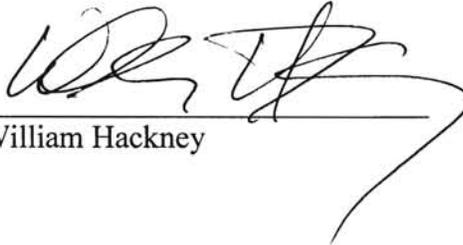
**CERTIFICATE OF SERVICE**

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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08 Aug 2012  
Date

  
William Hackney