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Court of Appeals Division II

State of Washington

Opinion Information Sheet

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JUDGES

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, No. 34719-9-II

consolidated with

Respondent and

Cross Appellant,

v.

ROBERT CORCORAN DINGMAN,

Appellant and

Cross Respondent.

No. 35949-9-II

PART PUBLISHED OPINION

Houghton, P.J. -- Robert Dingman appeals his conviction of 16 counts of first degree theft and 11 counts of money laundering.1 He argues that the trial court erred in denying his discovery requests.2 We agree and reverse and remand.

FACTS

Dingman owned a business called Quality Home Enclosures (QHE), which installed

1 Counts I, VII, X, XI, XII, XIV, XV, XVII, XVIII, XIX, XX, XXVI, XXXIV, XXXVII, XXXVIII, XXXIX, XLI, XLII, XLIII, XLIV, XLV, XLVI, XLVIII, XLIX, LI, LII, LIII.

2 In the unpublished portion of this opinion, we decide that prosecution for theft and money laundering violates double jeopardy, and we reject Dingman's arguments based on insufficiency of the evidence and instructional error. He raises other assignments of error that we do not address

because we reverse and remand, namely: ineffective assistance of counsel, sentencing error, and evidentiary error he raises pro se.

The State cross-appealed, raising two issues but dropped its claim that the trial court improperly dismissed some of the counts. Because we reverse and remand, we do not address its remaining restitution argument.

residential sunroom additions. Starting in March 2001, he distributed sunrooms manufactured by Four Seasons. In February 2002, Four Seasons contacted QHE, concerned about QHE's financial condition. In March 2002, Dingman hired a business analyst, who concluded that QHE would fail as a business. In April 2002, Four Seasons terminated its agreement with QHE.

The events leading to the criminal charges and convictions are as follows:

On June 6, 2001, Kent and Joyce Sharpe entered into a contract with QHE for a Four Seasons sunroom. They gave Dingman a $15,000 deposit at that time. On February 27, 2002, they paid him $7,652.75 for materials. In March, Dingman began preparing the site for the

sunroom, and he poured a concrete slab by April 18. QHE did no further work. Four Seasons ultimately installed the sunroom. Count I, theft.3

Georgia and Louis Murphy entered into a contract for a sunroom on September 21, 2001. They gave Dingman a $10,000 deposit. On October 13, they gave him an additional check for materials. QHE did limited work at the site by August 2002, but then its work ceased. Count VII, theft.

On October 2, 2001, Virginia and Scott Klemann entered into a contract with QHE for a sunroom and a kitchen remodel. On January 2, 2002, through a financing arrangement, they paid Dingman the full amount due under the contract. Count XI, money laundering. In June, Virginia spoke with Dingman and he told her that he was having financial problems. When she accused him of using their money for other projects, he responded, "that's how business works." 12 Report of Proceedings (RP) at 860. In August, Dingman poured the concrete for the sunroom foundation and installed the subfloor. He ordered the sunroom materials, but he needed another

3 We set forth each count resulting in a conviction.

check from the Klemanns to pick up the materials, which they gave him. Another company eventually installed the sunroom. Count X, theft.

Vicki Platts-Brown and Ronald Brown entered into a contract with QHE for a Four Seasons sunroom in October 2001. They paid a $22,260 deposit. In early March 2002, the Browns made a $16,695 payment. Count XIV, money laundering. In October 2002, after a building permit was issued, they spoke with Dingman, who said he was restructuring his business. Dingman contacted the Browns a few days later and told them he needed more money; he stated that the money they had previously paid had been used for operating expenses and IRS payments. The Browns asked for a refund and Dingman stated that he did not have the money. Count XII,

theft.

Ron and Marie Ressler entered into a contract for a sunroom. They received financing on November 30, 2001, and their bank submitted a check for the entire amount of the contract. Count XVII, money laundering. QHE completed a small amount of work on the project. Dingman met with the Resslers and told them he had not paid for their Four Seasons sunroom and asked them to change to another brand. They agreed. Dingman later did not pick up the new sunroom materials, and he did not complete the installation. The Resslers obtained a civil judgment against Dingman. Four Seasons eventually installed their sunroom. Count XV, theft.

Sean Tam and Amy Lam contracted with QHE for a sunroom on November 23, 2001. On March 5, 2002, they paid a $15,500 deposit. Count XIX, money laundering. After no work had been done, Amy contacted Dingman in July to cancel the contract. They never received a sunroom or a refund. Count XVIII, theft.

On January 8, 2002, Darlene Miller and Carol Kuhns entered into a contract with QHE for

a greenhouse addition to their residence. On February 9, a QHE employee collected $11,976 from them. QHE contractors poured footings in September. In October, after Miller and Kuhns learned that QHE was going out of business, they unsuccessfully tried to contact the company to cancel the agreement. QHE did not do any additional work. Count XX, theft.

Cindy Taylor and James Mathers contracted with QHE in February 2002. They paid a $7,365 deposit and a month later paid another $7,365 deposit. In September, Dingman worked two days on the property. On October 17, Taylor spoke with Dingman, who stated he was closing his business. Four Seasons eventually built the sunroom. Count XXVI, theft.

In April 2002, Vanessa and David Dunivan hired QHE to build an addition and remodel

their kitchen. On July 2, they gave Dingman a check to pay for cabinets, as some work had been started on the kitchen by this time. Home Depot contacted the Dunivans in July to say that the cabinets had been returned. Dingman told Vanessa there had been a mix-up with the check used to pay for the cabinets. After additional communications back and forth about the cabinets, Vanessa met with Dingman in October, and he told her that the IRS had taken his money. The Dunivans eventually removed Dingman's materials from their home and hung a "No Trespassing" sign. 23 RP at 1992. The project was not finished. Count XXXIV, theft.

Eddie and Vevely Smith entered into an agreement with QHE on June 3, 2002. They received financing for the project and paid QHE the contract amount on July 8. Count XXXVIII, money laundering. No work was ever done. Count XXXVII, theft.

John and Tok Sun Regan contracted for a sunroom on June 14, 2002, and paid a $10,000 deposit. In early August, after having trouble getting QHE to start work, John paid an additional

$10,000 to Dingman. Count XLI, money laundering. QHE did some foundation work in early

September. John had additional discussions with Dingman to try to get him to perform additional work; Dingman refused to return the money and did not perform any additional work. Count XXXIX, theft.

Lorraine and Fred Ferguson entered into a contract with QHE for a sunroom. They paid a deposit for materials on July 17, 2002. Count XLIII, money laundering. QHE did not apply for permits for the site and no work was ever done. Count XLII, theft.

Alice and Allen DeSart contracted with QHE in July 2002. They paid Dingman $4,000 on August 20, 2002. Count XLV, money laundering. Although the DeSarts contacted Dingman several times, he never worked on the project. Count XLIV, theft.

June and Wilford Gosnell entered into a contract with QHE for a sunroom in July 2002. On July 20, they paid Dingman $13,600. Count XLVIII, money laundering. Dingman started to prepare the site in August. The Gosnells learned that the check Dingman used to pay for the building permit bounced. No additional work was done, despite effort by the Gosnells to get Dingman to perform the work. Four Seasons eventually stepped in and built the sunroom. Count XLVI, theft.

Dree Snider and Liesl Bohn contracted for a sunroom in July 2002. They paid a deposit and on October 8 paid an additional $10,829.20 to Dingman for materials. After speaking with Dingman and telling him that she did not think he would do the work, Bohn tried to stop payment on the check but was too late. Count LI, money laundering. At the end of October, Dingman told Bohn that he had many projects to complete before starting her project. That was the last contact the homeowners had with Dingman. Count XLIX, theft.

On August 1, 2002, QHE agreed to build a sunroom for Regina Wade (now Keller). She

wrote a $10,000 check. Within the three-day revocation period in the contract, she asked for her money back. Count LIII, money laundering. Dingman never returned the money. Count LII, theft.

On March 19, 2003, the Pierce County Sheriff's Department searched Dingman's house. It seized nine computers. A detective created a mirror image copy of the computers' hard drives using a program called EnCase.

On January 17, 2006, by third amended information,4 the State charged Dingman with 21 counts of first degree theft under RCW 9A.56.020(1)(a)5 and .030(1)(a),6 and 33 counts of money laundering under RCW 9A.83.020(1)(a).7

On July 1, 2004, the State provided Dingman with some discovery. It included a report

containing information about the mirror image hard drive copies having been created using EnCase.

In August 2005, Dingman moved for additional discovery, requesting direct access to the computer hard drives seized from QHE or mirror image copies of the drives created in a program

4 We note the third amended information misnumbered the counts, skipping LIV and LV.

5 RCW 9A.56.020(1) provides: "'Theft' means: (a) To wrongfully obtain or exert 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 statute was amended in 2004 by adding "or her."

6 RCW 9A.56.030(1) provides in part: "A person is guilty of theft in the first degree if he or she commits theft of: (a) Property or services which exceed(s) one thousand five hundred dollars in value."

7 RCW 9A.83.020(1) provides: "A person is guilty of money laundering when that person conducts or attempts to conduct a financial transaction involving the proceeds of specified unlawful activity and: (a) Knows the property is proceeds of specified unlawful activity."

used by the defense's computer expert. The trial court denied the motion in part, ordering the State to produce only mirror image copies in the EnCase program it used for its investigation. A few weeks later, the trial court granted Dingman's motion for a continuance to allow his counsel to work with the EnCase files. In December 2005, Dingman requested another continuance because many of the computer files remained unexamined by his expert. The trial court denied this motion.

The case went to trial before a jury. For the theft counts, the State proceeded on a legal theory of theft by embezzlement as set out in State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993). As explained by the trial court, "[i]f the particular agreement between the parties, meaning the owner and the defendant, restricted the use of the funds to a specific purpose, the owner would have an interest in the money." 30 RP at 2955-56. According to the State, Dingman committed

theft by using the earmarked money inconsistent with the contractual purpose. Joy, 121 Wn.2d at 341 ("The owners in those cases had an interest in the money given to defendant to hold for the purchase of those materials, and when defendant used the money for other purposes, he appropriated the funds to his own use and committed theft by embezzlement.").

On Dingman's motion, the trial court dismissed 3 counts of first degree theft and 13 counts of money laundering for insufficient evidence. The jury found him not guilty of 2 counts of first degree theft and 9 counts of money laundering. It convicted him of the remaining 16 counts of first degree theft and 11 counts of money laundering.

Dingman appeals and the State cross-appeals.8

8 See footnote 1.

ANALYSIS9

Discovery

Dingman first contends that the trial court erred in ruling on his discovery motions. He asserts that the trial court denied him an opportunity to prepare his defense. We agree.

In August 2005, Dingman moved for the State to allow him to access his seized computers' hard drives to create his own mirror images, or to receive mirror images of the drives in a readable format. As noted, during its investigation, the State created mirror image copies of the drives using the EnCase program.

At argument on the motion, Dingman asserted that neither his computer forensic expert nor defense counsel had access to the EnCase program. His expert, Larry Karstetter, testified that a copy of the program cost $3,607. Karstetter said that he did not use the program because it was created for use by law enforcement, and he expressed concern that its search function could contain inherent bias against the defense. He added that in all other cases in which he needed hard

drive copies, the State provided the copies to him in a readable (non-EnCase) format.

The State's witnesses included Detective Gregory Dawson, who created the EnCase mirror image file for the State. He expressed two reservations about providing Dingman with the hard drives: the program, Ghost, used by Dingman's expert, could produce an inaccurate copy of the drives and the hard drives could be damaged because they had not been used for some time. Dawson stated that his office had a license to use Ghost but that he did not use it for forensic investigations.

9 We set forth additional facts where relevant to the appeal.

In summarizing Dingman's request to the trial court, defense counsel stated that he merely wanted the discovery in a format that the defense and its expert could use. He gave this example:

> The State has translated the computers into Farsi, a foreign language that we don't speak, and asked us to take Farsi because that's what they decided to do and it was convenient and maybe very wise on their part. Well, we don't want it in their language, your Honor. We want the discovery as it existed in Mr. Dingman's computers and as it still exists in Mr. Dingman's computers.

3 RP at 131. He added that the State already had an exact copy of the files in its possession, so it could easily detect if either Ghost or the age of the computers somehow altered the evidence.

The State countered that it did "not need to conform its investigation or its investigatory tools to the whims and desires of the defense." 3 RP at 132. It added that it had never had a problem with providing the copies of the files -- in EnCase format -- to the defense. Moreover, it reminded the trial court that more than a year earlier, it had told defense counsel it was using EnCase for its investigation.

The trial court denied the motion in part, ordering the State to provide the EnCase copies to the defense. The trial court found that the Ghost program would not provide an accurate

image of files contained in the single Redundant Array of Independent Disks (RAID)-configured computer. It also noted that the EnCase search function, criticized by the defense, was not the only search program available.

Approximately one month later, Dingman followed up with the trial court on the discovery request. Defense counsel explained that his office was trying to obtain a less expensive version of the software but had not yet purchased it. He requested a continuance.

The State agreed with the need for a continuance:

> The overall concern I think in dealing with this is that we -- the defendant has -- and it's the defendant's rights that are being protected -- has a right to

> effective assistance of counsel. It is the State's concern that if we don't give the defense attorney a sufficient amount of time to look into the computers -- and I think January would be reasonable -- then we're going to be retrying this case.

> And the goal I think of everybody is to try it once and to try it well and to get the case resolved that way.
>
> I understand the Court's concerns about the continuances in this matter, and those are legitimate concerns. But when we're sitting down and looking at a defendant's rights and the Sixth Amendment rights, I think the concerns of the amount of time a case has been around, I guess from the State's perspective, unfortunately would have to take second seat, if you will, to that particular matter.

4 RP at 158-59.

In December 2005, Dingman's counsel requested another continuance, in part because the defense had not fully accessed the information on the mirror images it received from the State in the EnCase format. Dingman's motion stated that his counsel had not yet viewed all of the computer files and that Dingman also had not had an opportunity to review them. Dingman's expert submitted an affidavit stating he was only able to review two of nine drives and, for the two examined, he encountered files that he could not yet open.

The Department of Assigned Counsel's Information Technology Specialist, Kathleen

LaCoste, submitted an affidavit stating defense counsel had purchased a new hard drive, submitted it to the State, and received 77 folders and 4,868 files on the drive from the State. She also said the EnCase program is "not usable without program specific training." Supp. Clerk's Papers, LaCoste Aff. at 1. The training cost was $1,500. She told the trial court no one in her office or the entire Pierce County computer support office was trained to use EnCase. She stated that the office had not purchased EnCase and that she had viewed some of the EnCase files using a 30-day trial version of another program, Mount Image Pro Software. This software could support the EnCase images, but it did "not substitute as an operating system that will actually run any of the associated programs required to open a specific file." Supp. CP, LaCoste Aff. at 2. She also reviewed the compact disk evidence submitted by the State. She said it functioned much

like the mirror image drive copies in that many of the files could not be opened or could not be opened in a readable format.

At a hearing on the motion, defense counsel stated "this is as fast as the people and the resources that were given to me to do this were able to move." 5 RP at 186. The State countered it previously produced hard copies of all of Dingman's business and bank records. It noted that at the time of the continuance request, the defense had possessed the hard drive mirror images for 71 days.

The trial court denied the motion, stating, "What I'm hearing is a lot of requests to do things that should have been done all along the way." 5 RP at 200-01. Dingman renewed the motion immediately before trial. Again, the trial court denied the motion.

Dingman now argues that the trial court erred in denying the discovery request. He asserts this error deprived him of meaningful access to evidence in order to prepare for trial,

which resulted in a failure to ensure that he received adequate representation by defense counsel. He also argues the decision deprived him of due process and violated Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 215 (1963).

State v. Boyd

After trial in this case, our Supreme Court decided State v. Boyd, 160 Wn.2d 424, 158 P.3d 54 (2007). In Boyd, the court examined the State's obligation to provide a defendant access to mirror image hard drives. The trial court had restricted access to the drives, "allowing defense counsel to access a mirror image of Boyd's hard drive, but only in a State facility . . . and only

through the State's operating system and software." Boyd, 160 Wn.2d at 430.

Our Supreme Court held that under CrR 4.7(a)(1)(v),10 the State had an obligation to provide the defense meaningful access to the hard drive copies. Boyd, 160 Wn.2d at 433-34. The

court opined that

> [G]iven the nature of the evidence, adequate representation requires providing a "mirror image" of that hard drive; enabling the defense attorney to consult with computer experts who can tell how the evidence made its way onto the computer. Forensic review might show that someone other than the defendant caused certain images to be downloaded. It may indicate when the images were downloaded. It may reveal how often and how recently images were viewed and other useful information based on where the images are stored on the device. Expert analysis of the application or program used to acquire the images may be useful. Providing a copy enables the expert to test that application or program using the same type and version of computer operating system as was used by the defendant, a difference that may alter how the program runs, stores data, and so forth. Analysis may also reveal that the images are not of children. This analysis requires greater access than can be afforded in the State's facility.
>
> Preparation may require lengthy access even where there are few images. The need for copies may flow also from constraints on experts such as access to the necessary tools and sufficient time. These concerns are relevant to Boyd, where the forensic expert intends to use particular diagnostic equipment from his lab and must review tens of thousands of images from potentially disparate sources.

Boyd, 160 Wn.2d at 436-37 (citations omitted); see also State v. Grenning, 142 Wn. App. 518,

535-36, 174 P.3d 706, (applying Boyd), review denied, 164 Wn.2d 1026 (2008).

10 CrR 4.7(a), prosecutor's obligations, provides:

> (1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:
>
> . . . .
>
> (v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant.

Dingman relies on Boyd's expansive language that speaks to allowing unfettered access to computer drives by the defense. The State counters that the trial court satisfied Boyd's requirements when it granted Dingman unrestricted access to a mirror image copy of the hard drives.

Boyd resolves that CrR 4.7(a)(1)(v) governs this issue. 160 Wn.2d at 432-33. By its plain language, the rule obligates the State to disclose all books, papers, documents, photographs, and tangible objects it has in its possession, "which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant." CrR 4.7(a)(1)(v). Under the rule, "the burden is on the State to establish, not merely claim or allege, the need for appropriate restrictions." Boyd, 160 Wn.2d at 433; CrR 4.7(a). The court added that discovery before trial should be as "'full and free as possible.'" Boyd, 160 Wn.2d at 434 (quoting State v. Yates, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)). Boyd, however, does not address the exact facts here: where the defense seeks to access the original hard drives or to have mirror image copies provided in a preferred format.

The State's Failure to Produce the Hard Drives for Dingman

A computer hard drive is a tangible object. These drives were "obtained from or belonged

to the defendant." CrR 4.7(a)(1)(v). CrR 4.7(a)(1)(v), therefore, requires that defense counsel be able to examine the drives absent an established State need for restrictions. Boyd, 160 Wn.2d at 433.

The State had not used the computers at any time after it accessed them to create the EnCase mirror image copies. The State posits there is a chance the computer hard drives would fail if accessed by Dingman because they sat unused in State custody for some period of time.

However, the State's speculation about possible damage fails the test set out in Boyd: that the State show -- rather than claim or allege -- that it is placing appropriate restrictions on discovery. 160 Wn.2d at 433. Even assuming the defense could damage a hard drive by turning a computer on, the State already has complete mirror images of the drives it created when it seized the hard

drives. These mirror images could be used to check any discrepancies between the computer drives when accessed by the State and when accessed by the defense.

Although Boyd does not cover the exact circumstances of Dingman's case, it counsels against unduly restricting access to electronic evidence in criminal matters. Boyd, in a footnote, touches on allowing a defendant to directly access computer hard drives, instead of simply mirror images of the drives. 160 Wn.2d at 433-44 n.4.

In footnote 4, the Boyd court references federal cases that involve restrictions on computer access by defendants in child pornography cases. 160 Wn.2d at 433. It quotes one case, United States v. O'Rourke, 470 F. Supp. 2d 1049, 1054 n.1 (D. Ariz. 2007), stating that if not for additional federal statutory restrictions on discovery in child pornography cases, under Fed. R. Crim. P. 16,11 it "'would grant the defense team possession of the hard drive.'" Boyd, 160 Wn.2d at 434 n.4 (quoting O'Rourke, 470 F. Supp. 2d at 1054 n.1); see also O'Rourke, 470

11 Fed. R. Crim. P. 16(a)(1) states:

> (E) Documents and Objects. Upon a defendant's request, the government must permit the defen00dant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control and:
>
> (i) the item is material to preparing the defense;
>
> (ii) the government intends to use the item in its case-in-chief at trial; or
>
> (iii) the item was obtained from or belongs to the defendant.

F. Supp. 2d at 1054 n.1 ([Federal] "Rule 16(a)(1)(E) provides that a defendant may inspect or copy evidence from the Government that is material to preparation of the defense, will be used in the Government's case-in-chief, or was obtained from the defendant. The hard drive falls within all three categories of discoverable information."). In light of the plain language of CrR 4.7(a)(1)(v), which gives the defense access to objects the defendant owned, and the State's

failure to meet its burden of proving restrictions were necessary, the trial court erred in denying Dingman's motion to access his hard drives.

The State's Failure to Provide a Readily Readable Mirror Image Copy

In the event he was not allowed to access the drives, Dingman also requested mirror image copies made with the Ghost program. At the discovery hearing, the State argued against this request and presented evidence that it would take time to copy the drives into the Ghost format, that Ghost may result in inaccurate copies, and that one computer drive could not be accurately copied using the Ghost format. The trial court also denied this request. Dingman raises this same issue on appeal. The State argues that it is not required to conform its investigation to Dingman's whims and that the trial court ruled correctly by only requiring the State to provide mirror images in the EnCase format. Dingman responds that his expert was not trained to use EnCase and that neither defense counsel nor the expert owned a version of EnCase.

Again, Boyd does not cover this exact scenario. It did, however, strike down the trial court's order requiring the defense to access the mirror image drives "only through the State's operating system and software." Boyd, 160 Wn.2d at 430. Another statement by a court analyzing a federal child pornography case indicates that the defense should be allowed to use its own hardware and software to analyze computer evidence:

> An ample opportunity to forensically examine seized computer items means an examination whereby the government can supply reasonably up-to-date tools (hardware and software) and facilities such that a defendant can construct a reasonable, available forensic defense, if one is available at all, and whereby the analysis will not be impeached because it was not supported by the proper hardware or software. An ample opportunity will permit a defense expert to utilize his or her hardware or software.

United States v. Flinn, 521 F. Supp. 2d 1097, 1101 (E.D. Cal. 2007) (emphasis added). Under this analysis, the State must meet its burden of showing a need for appropriate restrictions before

the trial court can limit a computer forensics expert's analysis of a defendant's hard drive to only the State's chosen software format. Boyd, 160 Wn.2d at 433.

As previously noted, any potential alteration to the hard drives original condition that the Ghost software might cause can be detected because the State has the EnCase mirror image copies. Moreover, the State has a license to use Ghost. The State's remaining related objections, that the conversion to Ghost would be time consuming and that it need not conform discovery to Dingman's whims, are insufficient to overcome the goal of open discovery set out in Boyd's12 analysis of CrR 4.7.13

12 Boyd emphasizes that inadequate discovery can violate the Fifth and Sixth Amendments. 160 Wn.2d at 434-35. On appeal, the State appears to argue that the denial of Dingman's motion was non-prejudicial and did not violate his constitutional rights because, for example, the State did not use any of the hard drive images at trial. We note, however, that the State, at argument before the trial court, recognized that proceeding to trial before Dingman had the opportunity to review the computer drives would violate his constitutional rights. Further, simply because particular evidence was not useful to the prosecution does not mean that the defense also would consider it irrelevant.

13 We further note that at some point after the trial court's denial of Dingman's discovery motion, the defense's expert acquired a program that could read EnCase files. Dingman's attorney then requested a second continuance related to the discovery matter in December 2005 to allow his team additional time to work with the computer files and programs. The State argued that another continuance was unwarranted because the defense had received the EnCase mirror images on September 29, 2005, and at the time of the motion, had possessed the images for approximately 71 days. The trial court denied the motion. But simply because the defense

In sum, we conclude that the trial court erred by requiring that the State provide only an EnCase mirror image of Dingman's hard drives to the defense. The remedy is to reverse and remand for a new trial.

Reversed and remanded.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record

pursuant to RCW 2.06.040, it is so ordered.

We next address only those issues that require reversal and dismissal or would arise on remand.14 Thus, we address Dingman's sufficiency of the evidence, instructional error and double jeopardy arguments.

Insufficient Evidence15

Dingman argues that insufficient evidence supports his convictions of first degree theft, as charged in counts I, VII, X, XII, XV, XVIII, XX, XXVI, XXXIV, XXXVII, XXXIX, XLII, XLIV, XLVI, and XLIX.16 He argues that under the law of the case doctrine, for each theft

attempted to comply with the trial court's order that it access the mirror images only in the EnCase format does not make the trial court's order correct. As of December 2005, the defense still did not own the EnCase format and was working with a compatible program that produced imperfect results.

14 See footnote 1.

15 We address Dingman's insufficiency of the evidence argument because if we were to reverse for insufficient evidence, retrial would be prohibited and the remedy would be dismissal with prejudice. State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998).

16 In a claim of insufficient evidence, we view the evidence in the light most favorable to the State and examine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006) (emphasis omitted) (quoting State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005))

count, the State assumed the burden of proving that he exercised unauthorized control over the victim's property "and that he possessed the intent to deprive from the outset of the charging period until its conclusion." Appellant's Br. at 26. He argues that the time elements were not proven beyond a reasonable doubt, requiring reversal and dismissal.

The State counters that in Washington, time is a material element of the crime only when the incident occurred outside of the charging period or there is an alibi defense, otherwise the phrase "on or about" is sufficient to admit proof of the act within the statute of limitations. Resp't's Br. at 35. The State explains that the date of each theft offense charged starts on the

date on which the defendant and the homeowner(s) entered into the building contract and continued through the "time when it could be established that the project had not been completed." Resp't's Br. at 35.

When instructing the jury for each theft crime charged, the trial court included language referencing a date range during which the crimes were allegedly committed. For example, for count I, a charge of first degree theft from Kent and Joyce Sharpe, the trial court instructed that the State needed to prove beyond a reasonable doubt that "on or about the 6th day of June 2001, through the 29th day of October, 2002" the defendant took property from the Sharpes worth more than $1,500. Clerk's Papers at 773. Similar language, with different dates, appears in the other counts.

Dingman relies on State v. Hickman, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998), and (internal quotations marks omitted). When a criminal defendant challenges the sufficiency of the evidence, we must draw all reasonable inferences from the evidence in favor of the State and

interpret it most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

State v. Jensen, 125 Wn. App. 319, 326, 104 P.3d 717 (2005), to support his argument.

Hickman states that jury instructions not objected to at trial become the law of the case and "[i]n criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction." 135 Wn.2d at 102. The Jensen case involved jury instructions that contained a date range. 125 Wn. App. at 326. The Jensen court acknowledged that the jury instructions became the law of the case. 125 Wn. App. at 326. The trial court considered the defendant's claim that the criminal acts occurred before the charging period but it rejected the argument on factual grounds. Jensen, 125 Wn. App. at 326-28.

The State relies on a pre-Hickman case, State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996). In Hayes, the State charged the defendant with child molestation occurring "on or about" a certain date "through" a second date. 81 Wn. App. at 432. The Hayes court held that where time was not a statutory element of the charged crime, the language used in the charging document was sufficient to include any criminal act occurring within the statute of limitations, so long as the defendant was not presenting an alibi defense. 81 Wn. App. at 432. Dingman calls into question the Hayes decision post-Hickman, claiming that the time period is now an element and it would no longer encompass any crime merely because it was committed within the statute of limitations.

Each of Dingman's arguments regarding the theft counts includes the contention that the State failed to prove that he had the intent to deprive a homeowner of money at the time the contract was signed -- the initial date for each charging period. "Dingman's partial satisfaction of

the contracts suggests he entered the agreements in good faith." Appellant's Br. at 83.

Specifically, with respect to each count, his argument provides:

Count I: Dingman entered into this contract when his business was running smoothly. He did not enter the contract with the intent to defraud.

Count VII: Dingman did not have the intent to defraud when he entered into the contract as shown by the fact that he started the project.

Count X: Dingman commenced the project by applying for a permit and pouring a foundation and installing a sub floor. The facts do not establish that when he entered the contract, he intended to commit theft.

Count XII: "That the Browns refused Dingman's offer [to add in a kitchen remodel to make up for project delays] does not establish he intended to deprive them of their money when they signed the contract . . . ." Appellant's Br. at 77.

Count XV: "Given [Dingman's] considerable effort to discharge [his] contractual obligations, it cannot be said beyond a reasonable doubt that Dingman intended to deprive [the homeowners] of property . . . when the contract was formed." Appellant's Br. at 77-78.

Count XVIII: "That the [homeowner's] money was not subsequently refunded [after they canceled the contract] does not establish Dingman had the

intent to commit theft when the contract was formed." Appellant's Br. at 78.

Count XX: There are two contracts at issue and for both the State failed to show the requisite intent to defraud at the outset of the contracting periods.

Count XXVI: "[E]vidence of significant compliance precludes the inference that he had the intent to deprive when he entered the contract." Appellant's Br. at 79.

Count XXXIV: "Given Dingman's continued efforts to work on the project, the State simply did not prove he had the intent to deprive from when the contract was formed . . . ." Appellant's Br. at 80.

Count XXXVII: There is no written contract in this count. The charging period begins when Dingman's daughter collected money from the homeowners. Here, the State failed to show that Dingman's daughter acted at Dingman's direction when she collected the money. Dingman maintains that this shows the State did not prove he had the intent to defraud at the start of the charging period.

Count XXXIX: Dingman's "apparent dishonesty at the end of [his company's] financial collapse does not establish he had the intent to deprive when he entered the contract . . . ." Appellant's Br. at 81.

Counts XLII, XLIV, and XLIX: All of the homeowners in these counts provided payment under the terms of the contract but no work was done. At the time these contracts were formed. Dingman "was still hopeful he could save his business and complete his existing jobs, thus he did not have intent to defraud at the start of the contract." Appellant's Br. at 82.

Count XLVI: "[G]iven Dingman's initial efforts to fulfill his contractual obligations, the State did not meet its burden of proving Dingman had the intent

to deprive when the contract was first formed." Appellant's Br. at 83.

Even assuming, first, that the charging period under the law of the case became an element of the crime of first degree theft and, second, that the State failed for each count to prove that the crime of theft began exactly on the contract date, we reject Dingman's argument that the crime charged needed to start exactly on the initial date of the charging period and continued through until exactly the last date of the charging period.

In Jensen, a case Dingman relies on, the charging period was "'on or about August 1, 2001 through February 19, 2002.'" 125 Wn. App. at 326. The Jensen court analyzed the sufficiency of the evidence presented to convict Jensen of indecent exposure and child molestation. It found that "[t]he jury could have reasonably found that these incidents occurred

within the charging period." Jensen, 125 Wn. App. at 326-27. In Jensen, the State presented no evidence regarding specific dates on which criminal events occurred and, importantly, the court imposed no requirement that the events needed to commence on the exact first day of the charging period and continue for the entire duration of the charging period. 125 Wn. App. at 326-28.

Here, Dingman disputes the facts presented regarding the exact starting date for each charging period, but he does not argue that insufficient evidence exists to support that the theft crimes occurred at some point after the first date of the charging period. Cf. Jensen, 125 Wn. App. at 326-28 (stating that defendant argued that some events took place before the charging period but finding that crimes occurred within the period); Hayes, 81 Wn. App. at 434-35 (allowing proof of crime that occurred shortly after charging period and declining to reach issue whether sufficient evidence existed to support crime committed before the charging period).

Neither does he dispute the final dates used for each charging period. Therefore, Dingman's

insufficiency of the evidence argument fails.

Petrich Instruction

Dingman further contends that if we reject his previous argument regarding multiple offenses throughout the charging period, the State instead had the burden of showing that individual acts during the charging period constituted theft. He argues that under this theory of the case, the trial court erred by failing to give a Petrich instruction to the jury.17 State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

The general rule for giving a unanimity instruction is:

> When the facts show two or more criminal acts which could constitute the crime charged, the jury must unanimously agree on the same act to convict the defendant. The State therefore must elect the specific criminal act on which it is

relying for conviction, or the trial court must instruct the jury that all the jurors must agree that the same underlying criminal act was proven beyond a reasonable doubt.

State v. Fiallo-Lopez, 78 Wn. App. 717, 723-24, 899 P.2d 1294 (1995) (citations omitted). But under an exception to this rule, where a defendant engaged in a "continuing course of conduct," the trial court does not need to provide a Petrich instruction. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

We look at the facts in a "commonsense manner" to determine whether criminal conduct constitutes a continuing course of conduct. Fiallo-Lopez, 78 Wn. App. at 724. To constitute a continuing course of conduct, there must be ongoing conduct with a single objective. State v. Garman, 100 Wn. App. 307, 313, 984 P.2d 453 (1999).

17 Neither Dingman's nor the State's brief identify whether Dingman requested a Petrich instruction at trial. This issue, however, may be raised for the first time on appeal. State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995).

Specifically, in each of the counts discussed in the previous section, excluding X, XVIII, XXXVII, XLII, and XLIV, the homeowners made multiple payments under the construction contracts. Dingman argues that because "[e]ach of these payments could have supported the

charged thefts," the trial court therefore erred in failing to give a Petrich unanimity instruction. Appellant's Br. at 86 (emphasis added).

The State counters that each theft charge encompassed a continuing act of theft: "A common sense [sic] review of the facts shows that the thefts were based upon the construction contracts . . . and the payments which the victims made to the appellant and his business pursuant to these contracts." Resp't's Br. at 49. Consequently, the State argues that the trial court need

not have given a Petrich instruction because that case applies only to multiple acts when each could support a conviction.

The State relies primarily on State v. Campbell, 69 Wn. App. 302, 848 P.2d 1292, rev'd on other grounds, 125 Wn.2d 797, 888 P.2d 1185 (1995). In Campbell, the State charged the defendant with welfare fraud. On appeal, the defendant argued that "the evidence showed 21 separate instances of conduct which could have formed the basis for separate counts." Campbell, 69 Wn. App. at 311. The defendant asked for a new trial under Petrich. Campbell, 69 Wn. App. at 311.

The Campbell court rejected the defendant's argument, stating that "the welfare fraud statute contemplates a continuing course of conduct in furtherance of the single goal of obtaining public assistance to which one is not entitled." 69 Wn. App. at 312. It concluded that "[t]he evidence showed that [the defendant] engaged in a sophisticated and broad scheme involving

numerous acts but in furtherance of a single goal." Campbell, 69 Wn. App. at 312. See Handran, 113 Wn.2d at 17-18 (concluding that separate acts of assault were part of a continuing course of conduct); State v. Love, 80 Wn. App. 357, 360-63, 908 P.2d 395 (1996) (finding that defendant's two instances of drug possession were part of an ongoing course of trafficking

conduct). The Campbell case supports the State's argument that under a single course of conduct, "the appellant's actions and promises were intended to obtain and then keep the victims' money without providing them with the project for which they had contracted." Resp't's Br. at 49.

Here, Dingman entered into one contract with each homeowner or set of homeowners. He took actions and made promises to the homeowners, ostensibly to fulfill the terms of the

contract. The overarching contractual framework demonstrates that his many acts and promises were done in furtherance of a single goal of depriving homeowners of the maximum possible amount of funds while fulfilling a minimum number of contractual promises.

In sum, we agree with the State that a Petrich instruction was not required.

Double Jeopardy

We address the double jeopardy question raised by Dingman because the issue is likely to arise on retrial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 822, 100 P.3d 291 (2004) ("Additionally, for purposes of guidance on retrial, we address Orange's two double jeopardy challenges."). We determine that convictions for both money laundering and theft violate double jeopardy in circumstances that demonstrate that the two offenses violate the same evidence test. Under these circumstances, we require that one category of charges be dismissed before retrial. In re Orange, 152 Wn.2d at 822 (stating that "because we conclude that Orange's convictions for

first degree attempted murder and first degree assault of Walker violated the constitutional prohibition against double jeopardy, one of the charges must be dismissed prior to retrial").

Dingman contends that the State prosecuted him for money laundering and first degree theft based on the same set of facts, in violation of double jeopardy. Specifically:

> At trial, the State advanced a novel theory in support of the money laundering charges. The theory depended on the premise that the property owners had a possessory interest in monies advanced under the contracts, thus the "financial transaction" element of the crime was established by Dingman's use of the funds for purposes other than the purposes for which those funds were designated by Dingman's staged payment system. This was essentially the same theory the State relied upon to support the defendant's theft convictions in State v. Joy, 121 Wn.2d 333, 851 P.2d 654 (1993), also a prosecution for failure to perform construction contracts under a theft by embezzlement theory.

Appellant's Br. at 89 (citation omitted).

The State counters that the same conduct does not support both charges. The State distinguishes the act of obtaining a check from a homeowner (theft) from the act of depositing or negotiating the check (money laundering).

The Washington State Constitution, article I, section 9, provides that a person may not be "twice put in jeopardy for the same offense." To analyze a double jeopardy claim, we must initially examine statutory language to see if the applicable statutes expressly permit punishment for the same act or transaction. State v. Calle, 125 Wn.2d 769, 776-77, 888 P.2d 155 (1995). We review claims of double jeopardy de novo. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

If the statutes do not speak to multiple punishments for the same act,18 we next apply the "same evidence" test. Jackman, 156 Wn.2d at 746. This test provides that "if each offense contains elements not contained in the other offense, the offenses are different and multiple

convictions can stand." Jackman, 156 Wn.2d at 747. The test requires a court to determine whether each conviction requires "'proof of a fact which the other does not.'" Jackman, 156

18 Neither party disputes that the applicable statutes do not speak to multiple punishments for the same act.

Wn.2d at 747 (quoting State v. Baldwin, 150 Wn.2d 448, 455, 78 P.3d 1005 (2003)) (internal quotation marks omitted).19

"Same evidence" Test

Under Dingman's analysis, because he committed what was traditionally known as theft by embezzlement, in that he appropriated contractually designated funds for his own use, he cannot also have committed the crime of money laundering. "The two crimes are inseparable and intertwined." Appellant's Br. at 90.

The trial court clearly understood the crime of theft to arise from Dingman's misuse of funds obtained under a contract that specified how the funds were meant to be used:

> Under the relevant statutes, theft requires that the relevant property or services be the property of another. To constitute property of another, the item must be one in which another person has an interest. And the defendant may not lawfully exert control over the item absent the permission of that person.
>
> If the particular agreement between the parties, meaning the owner and the defendant, restricted the use of the funds to a specific purpose, the owner would have an interest in the money. That is the application of the money to the purpose for which it was entrusted to the defendant.
>
> The question is whether the funds were received under agreements authorizing the defendant to hold or control the advance payments in which the homeowners had an interest and not authorizing defendant to exert control over the funds in a way inconsistent with the owner's permission to use the funds for materials. The key is whether there was a restriction or a limitation in the agreements giving the owners an interest in having the funds applied to the purchase of materials.
>
> And that is the standard that was followed in State v. Joy, and those are the standards followed by this Court in its analysis.

30 RP at 2955-56.

19 Even if the statutes pass the "same evidence" test, multiple convictions are not allowed if the legislature has "'otherwise clearly indicated its intent that the same conduct or transaction will not be punished under both statutes.'" Jackman, 156 Wn.2d 736, 746 (emphasis omitted) (quoting Baldwin, 150 Wn.2d at 455-56).

Dingman's argument has merit. The theft he committed required that he obtain payments under a construction contract and exert control over the funds in a manner inconsistent with the terms of the contract. Under this analysis, then, merely obtaining a check from a homeowner does not prove the crime as set out by the court. The crime of theft is not completed until the earmarked funds are misallocated. See Joy, 121 Wn.2d at 341 ("The owners in those cases had an interest in the money given to defendant to hold for the purchase of those materials, and when defendant used the money for other purposes, he appropriated the funds to his own use and committed theft by embezzlement.)." (Emphasis added.)

These unique facts, combined with the specific theft-embezzlement theory of Joy used by the State and adopted by the trial court, demonstrate that the act of theft (fund misallocation) could not be completed without money laundering (check depositing and misdirection of funds). State v. Womac, 160 Wn.2d 643, 654-56, 160 P.3d 40 (2007) (concluding that defendant could not have committed felony murder without committing assault); see also United States v. Christo, 129 F.3d 578, 580-82 (11th Cir. 1997) (finding insufficient evidence of money laundering where predicate crime of bank fraud required misapplication of funds); United States v. Savage, 67 F.3d 1435, 1441 (9th Cir. 1995) (for federal law, "Congress considered money laundering to be separate conduct occurring after completion of the underlying criminal offense").

Even though the theft and money laundering statutes have different elements, if "the statutory elements [for the two crimes] are compared in light of what did in fact occur," the theft-embezzlement could not have occurred without the money laundering. State v. Potter, 31 Wn.

App. 883, 888, 645 P.2d 60 (1982); see also In re Orange, 152 Wn.2d at 818-19 (examining facts of both crimes charged); State v. Walker, 143 Wn. App. 880, 886, 181 P.3d 31 (2008) ("[I]f

the evidence to prove one crime would also completely prove a second crime, the two crimes are the same in law and fact."). Following the analysis in Potter as explained in Orange, the two crimes under the theory of the case and as proved violate the same evidence test.

The usual remedy for a double jeopardy violation is to vacate the lesser conviction. State v. Nguyen, ____Wn.2d ____, 197 P.3d 673, 677 (2008). But in this matter, because we remand for retrial, we require only that "one [category] of the charges must be dismissed prior to retrial." In re Orange, 152 Wn.2d at 822.

Reversed and remanded.

_____

Houghton, P.J.

We concur:

_____

Bridgewater, J.

_____

Armstrong, J.