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14AP0354

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal No. 2014-AP354-CR
(Milwaukee County Case No. 10-CF-5940)

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JEFFREY L. ELVERMAN,
Defendant-Appellant.

.

Appeal From the Final Order Entered
in the Circuit Court for Milwaukee County,
The Honorable Dennis P. Moroney, Presiding

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JEFFREY L. ELVERMAN,
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I. THE EVIDENCE IS INSUFFICIENT TO PROVE BEYOND A REAONABLE DOUBT MR. ELVERMAN WAS GUILTY OF LARCENY THEFT GREATER THAN $10,000..... 6

A. Theory of Prosecution Erroneously Expanded..... 6

OR, alternatively,

B. As Ms. Phinney's Agent, Mr. Elverman Had Consent to Act and, Given Ms. Phinney's Words and Conduct, Did Not Know He Did Not Have Such Consent..... 11

The jury found Mr. Elverman guilty of larceny and the trial court entered judgment on this finding.

II. LARCENY THEFT UNDER WIS. STAT. §943.20(1)(a) IS NOT A "CONTINUING OFFENSE," THUS, THE STATE IS PRECLUDED FROM EXTENDING THE SIX-YEAR STATUTE OF LIMITATIONS FOR FELONY OFFENSES SET FORTH IN WIS. STAT. §939.74(1)..... 15

The trial court denied Mr. Elverman's pre-trial and post-conviction motions on this issue.

III. MILWAUKEE COUNTY DID NOT HAVE PROPER VENUE UNDER WIS. STAT.§971.19(2)..... 25

The trial court denied Mr. Elverman's pre-trial motion on this issue.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING DEFENSE COUNSEL'S REQUEST FOR A SPECIFIC UNANIMITY INSTRUCTION..... 27

The trial court denied Mr. Elverman's request for a specific unanimity instruction.

V. THE STATE FAILED TO TIMELY COMMENCE ITS PROSECUTION AGAINST MR. ELVERMAN, ACCORDINGLY, A JUDGMENT OF ACQUITTAL SHOULD BE ISSUED..... 31

The trial court denied Mr. Elverman's pre-trial and post-conviction motions on this issue.

VI. THE CHARGING DOCUMENTS ARE CONSTITUTIONALLY FATAL UNDER THE US AND WISCONSIN CONSTITUTUIONS FOR FAILING TO ADEQUATELY APPRISE MR. ELVERMAN OF THE NATURE AND CAUSE OF THE CHARGES AGAINST HIM..... 33

The trial court denied Mr. Elverman's post-conviction motion on this issue.

VII. COUNSEL WAS INEFFECTIVE THEREBY VIOLATING MR. ELVERMAN'S SIXTH AMEMDNMENT RIGHT TO COUNSEL..... 36

The trial court denied Mr. Elverman's post-conviction motion on this issue.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is appropriate in this case under Wis. Stat. (Rule) 809.22. Appellant's arguments clearly are substantial and do not fall within that class of frivolous or near frivolous arguments concerning which oral argument may be denied under Rule 809.22(2)(a). Mr. Elverman does not seek publication under Wis. Stat. (Rule) 809.23.

STATE OF WISCONSIN
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Appeal No. 2014-AP354-CR
(Milwaukee County Case No. 10-CF-5940)

STATE OF WISCONSIN,
Plaintiff-Respondent,

v.

JEFFREY L. ELVERMAN,
Defendant-Appellant.

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

The State charged Mr. Elverman with a single count of larceny theft in violation of Wis. Stat. §943.20(1)(a) for acts alleged to have occurred between March 25, 2003 and September 23, 2004.

On March 13, 2012, the jury found Mr. Elverman guilty of theft of more than $10,000. The court imposed 5 years probation, with an imposed and stayed sentence of 5 years initial confinement followed by 5 years of extended supervision. The court ordered him to pay $325,000 in restitution, $75,000 of which was paid on the date of sentencing.

After eight extensions totaling over one year of time to file, defense counsel filed a post-conviction motion on November 6,

2013. On February 3, 2014, the court denied defense counsel's motion. A notice of appeal was filed on February 11, 2014.

On June 5, 2014, Mr. Elverman obtained permission to proceed pro se. Following Court of Appeals approval, Mr. Elverman filed a supplemental post-conviction motion that was denied on August 26, 2014.

STATEMENT OF FACTS

Mr. Elverman was charged with a single count of larceny theft in violation of Wis. Stat. §943.20(1)(a). (Complaint,12/6/10). The State alleged that he "did intentionally transfer moveable property" that belonged to Dorothy Phinney by receiving a total of fifty-six separate checks signed by Dorothy Phinney to him, in an amount totaling $374,800. (***Id.***).

In 2001, Mr. Elverman was appointed as Ms. Phinney's agent pursuant to a bona fide durable power of attorney for finances (Complaint;Exh.26)(hereinafter "POA"). It granted Mr. Elverman "full power and authority to act for me [Ms. Phinney] as fully as though I myself were acting." (Exh.26).

The State's witness, Daniel Langenwalter, testified the POA was in effect during the time of the alleged transfers. (Tr.12/13/11,AM *at* 13-14,21). On January 25, 2011, the State filed an information charging that Mr. Elverman "between March 25, 2003 and September 23, 2004" did transfer Ms. Phinney's property in an amount of over $10,000. (Information,1/25/11).

Defense counsel argued if these actions were charged as separate counts, only *two* of the fifty-six checks would have fallen within the six year statute of limitations. (*See* Mtn. to Dismiss,2/28/11;*see also* State's Ex.1 (showing only two checks

transferred after September 8, 2004)); Wis. Stat. §939.74.[1]

Following the preliminary hearing, Mr. Elverman's attorney, Daniel Drigot, filed a motion to dismiss (Mtn. to Dismiss, 2/28/11) arguing that the evidence at the preliminary hearing was insufficient to establish that Ms. Phinney did not consent to the checks she signed to him in light of their "ongoing business relationship." (*Id.* at 3-4).

Defense counsel also argued that larceny theft under Wis. Stat. §943.20(1)(a) does not constitute a "continuing offense" to allow the State to charge a single count to extend the statute of limitations on counts that would fall outside the statute of limitations if charged individually. (***Id.*** at 5).

At the hearing, the Honorable Thomas P. Donegan presiding, rejected defense counsel's motion. This Court found that §971.36 allowed the single charge. (***Id.*** at 10-11;Decision and Order, 4/27/11).

Before trial, defense counsel submitted proposed jury instructions, including Instruction 517: Jury Agreement: Evidence of More than One Act Introduced to Prove One Charge. (Defendant's Proposed Jury Instructions, 11/28/11). Defense counsel also filed a motion requesting the use of a Special Verdict Form, on grounds that Mr. Elverman had a Sixth Amendment Right to a unanimous verdict, and a Fifth Amendment due process right to specificity in the charges brought against him. (Defendant's Proposed Special Verdict Form,11/28/11). The Form asked the jury to list which acts the jury unanimously agreed upon (by Date, Amount, and Venue). (***Id***).

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[1] Mr. Elverman executed an agreement on September 8, 2010 with the State, tolling the statute of limitations as of that date for 120 days but reserving his right to assert a defense under the statute of limitations for events that had already occurred at that point. (***Id.*** at 1-8).

This Court rejected the special verdict request, because "theft is a continuing offense." (Tr.12/12/11,AM at 4). Following the State's evidence, defense counsel again moved to dismiss. (Tr.12/14/11,AM at 32). Counsel argued that because testimony had established that Mr. Elverman was Ms. Phinney's power of attorney during this period of time, there was no way that he could have "accepted property from Ms. Phinney without her consent." (***Id.***).

Prior to instructions, defense counsel objected to the inclusion of instruction 255A. (Tr.12/14/11, PM at 9-10). Defense counsel again requested the inclusion of Instruction 517. (***Id.*** at 8-9). The court rejected the challenge to 255A. (***Id.*** at 9-13).

The State presented evidence that Ms. Phinney signed checks to Mr. Elverman between March of 2003 and September 2004 in an amount totaling $374,800. (Tr.12/13/11,AM at 17-21).

Marion Whelpley, an assistant who Mr. Elverman hired to work with Ms. Phinney, testified that she saw him discuss Ms. Phinney's finances with her. (Tr.12/13/11,AM at 38-39;81-82). Ms. Whelpley testified that on numerous occasions Mr. Elverman expressed concerns to Ms. Phinney regarding the costs of Mr. Elverman's services and Ms. Phinney indicated that "she didn't care what it cost, that she wanted Jeff [Mr. Elverman] and I to be in her life." (***Id.*** at 45). See also State's Ex 14 in Appendix, pages 2,3 and 6.

The jury found Mr. Elverman guilty of theft in an amount of more than $10,000.

ARGUMENT

This case contains numerous Wisconsin and Federal statutory and constitutional errors. There are so many issues of a constitutional dimension, it is worthy of a law school exam in both criminal procedure and constitutional law. As demonstrated below, the State and trial judges failed to properly address these issues.

Quite simply, the State and trial court have failed to properly apply the "continuing offense" doctrine established in *Toussie, infra,* and its progeny, including *Yashar, infra.* In fact, the State in the past has argued and acknowledged theft under 943.20 is ***NOT*** a continuing offense. *See Guzniczak, infra.* ***Incredibly***, neither the State nor the trial court has cited ***one*** case that applies the continuing offense theory to larceny theft. Supreme courts in other states have consistently refused to extend the doctrine to larceny theft.

If applied properly, the doctrine would at most find two of the fifty-six separate alleged events occurred within the six year felony statute of limitations. However, as established in *Jennings, infra*, even these last two acts were outside the limitation period. Additionally, these last two acts occurred entirely outside of Milwaukee County, thus based upon *Swinson, infra,* venue does not exist in Milwaukee County.

Separately, the State failed to seek an "aggregation theft theory" in the charging documents, yet it was allowed to aggregate the thefts. None of the alleged thefts exceeded $10,000, yet Mr. Elverman was convicted of one count of theft in excess of $10,000.

The power of attorney by operation of law granted Mr. Elverman the authority to consent to the transfers, and Ms. Phinney's words and conduct for seven years precluded him from knowing he did not have consent.

Moreover, the charging documents did not provide constitutional notice of the nature of the charges to allow Mr. Elverman to properly defend himself.

Any of the above errors is sufficient for this court to reverse the conviction, dismiss the Information and issue a judgment of acquittal. Thus, the order of the various arguments is not determinative as to their relative importance.

I. The Evidence Is Insufficient to Prove Beyond a Reasonable Doubt Mr. Elverman was Guilty of Larceny Theft Greater than $10,000.

A. Theory of Prosecution Erroneously Expanded.

Mr. Elverman was charged with a single count of larceny theft greater than $10,000, contrary to Wis. Stat. § 943.20(1)(a). The charging documents alleged various acts by Mr. Elverman, ***any one of which*** could have met the elements of the offense charged. The State failed to allege the separate acts were unified by a "single intent and design."

Importantly, not one alleged act was dependent or otherwise contingent upon the successful completion of a previous act, such as in a check kiting scheme. Moreover, the alleged separate acts were not automatically occurring or recurring, such as in a "failure to report" welfare fraud case. The Information and Complaint are in the Appendix(hereinafter the "Charging Documents").

Critically, the State failed to prove a single alleged act of theft by Mr. Elverman had a value in excess of $10,000. Assuming, *arguendo*, that the evidence may have been sufficient to show Mr. Elverman stole various items of property, the aggregate

value of which exceeded $10,000, that was ***not*** the offense charged by the State. ***The Charging Documents facially charged a complete offense, namely, a single act of larceny theft.***

Our Supreme Court has held "[t]he due process clause of the fourteenth amendment to the federal Constitution protects the accused in a criminal trial against conviction...'except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime **with which he is charged.**'" *State v. Zelenka*, 387 N.W. 2d 55 (WI 1986) quoting the U.S. Supreme Court in *In re Winship*, 397 U.S. 358, 364 (1970)(emphasis added).

In reviewing the sufficiency of the evidence, our Supreme Court has held "[a]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Poellinger*, 153 Wis.2d 493, 501, 451 N.W.2d 752 (1990).

Based upon our Supreme Court's recent decision in *State v. Beamon*, 2013 WI 47, the sufficiency of the evidence is weighed against the correct statutory requirements for the crime ***charged***. *Id.* ¶24. The cornerstone of this approach necessarily looks to the ***charging documents.*** Critically, there is no allegation in the Charging Documents that the alleged acts were pursuant to a single intent and design, ***a mens rea element.***

The Appendix contains numerous Wisconsin complaints in other theft cases which demonstrate the State's adoption of a theory of prosecution under an aggregation theory, namely, Wis. Stat. § 971.36. The State in Mr. Elverman's case ***chose not to adopt such a theory in the Charging Documents.***

Remarkably, even though the Charging Documents were ***void***

of any allegation that such acts were unified by a single intent and design, the jury was instructed that they could aggregate the various acts of theft. The Jury Instructions are in the Appendix. This instruction impermissibly ***broadened*** the State's theory of prosecution.

It is Mr. Elverman's constitutional right to be charged ***only on those allegations contained in the Charging Documents***. *Stirone v. United States*, 361 U..S. 212, 215-218, 80 S. Ct. 270, 272-273 (1960). ***Nothing*** in the Charging Documents alleges Mr. Elverman acted pursuant to a single intent and design. ***Even the State*** at trial argued Mr. Elverman possessed more than a single intent. See, *eg.*, the State's presentation of Mr. Elverman's receipt of a payment in April of 2004, that the State argued arose directly out of a new and independent impulse to pay his credit card bill following a Florida family vacation (Tr. Jury Trial, PM Session, Dec. 14, 2011, page 44-45—most notably lines 1-5 of page 45).

In *U.S. v. Leichtnam,* 948 F.2d 370, 377 (7th Cir. 1991), the Seventh Circuit indicated that "any broadening [of] the possible bases for conviction from that which appeared in the indictment is fatal. It is reversible per se." (citing *U.S. v. Miller*, 471 U.S. 130, 138, 105 S.Ct. 1811, 1816, 85 L.Ed.2d 99(1985).

While there are no reported Wisconsin cases addressing the constitutional impact of failing to unify the separate acts as required by 971.36, the decisions of the supreme courts in Illinois and Texas are on point.

The decision of the Illinois Supreme Court in *People v. Rowell,* 229 Ill 2d 82, 890 N.E. 2d 487, 495-496 (2008) is particularly instructive. It is the **ONLY** reported case that addresses the constitutional impact of failing to allege the mens rea element of "single intent and design." Shockingly, the trial court failed to consider this case.

In *Rowell*, the Illinois Supreme Court was asked to interpret its aggregation statute, 725 ILCS 5/111-4, which is ***virtually identical*** to Wis. Stat. § 971.36. The Illinois and Wisconsin aggregation statutes are in the Appendix. *Rowell* found that the State failed to allege that the defendant's separate acts were in furtherance of a "single intent and design." Accordingly, the State was precluded from aggregating the several alleged acts of theft.

Rowell found that although the State properly cited the applicable theft statute in its charging documents, it failed to cite the aggregation statute or the key words "single intent and design." ***Rowell held that because "single intent and design" addressed the defendant's mental state, it was an essential element of the offense.*** Without explanation, the trial court failed to address this issue.

Similarly, the Texas Court of Appeals in *Woods v. State, No. 13-07-00675-CR (2011)*, refused to allow the State to aggregate the various alleged acts of theft. In *Woods*, the defendant was charged and convicted of a ***single count*** of theft of property over $100,000, but less than $200,000. The defendant was accused of receiving nine separate checks totaling $105,840 between January 2005 and December 2005.

Woods refused to allow the State to aggregate the thefts because the indictment, like the Charging Documents, ***failed to connect*** the individual acts of the defendant. Importantly, none of the separate checks was over $100,000. *Woods* followed the approach adopted by the Texas Court of Appeals in numerous "aggregate theft" cases holding that ***where the indictment facially charges a complete offense under the simple theft statute, the prosecution cannot later attempt to aggregate those thefts***. *Thomason v. State*, 892 S.W. 2d 8, 11 (Tex Cr. App. 1994). *Whitehead v. State*, 745 S.W.2d 374 (Tex. Cr. App. 1988) and

Turner v. State, 636 S.W.2d 189 (Tex. Cr. App. 1980).

This court, in reviewing the sufficiency of the evidence, must compare the evidence to the Charging Documents, ignoring the jury instructions expanding the theory set forth therein. There is ***not one*** reported case allowing expansion of the theory of prosecution beyond that set forth in the charging instruments.

The claimed error was objected to by Mr. Elverman's trial counsel through his request for a special verdict requiring the jury to unanimously agree on which specific act or acts constituted theft. Through this request, defense counsel was requiring the State to prove which alleged act or acts of Mr. Elverman violated 943.20(1)(a) and exceeded $10,000. The trial court denied such request.

Our Supreme Court in *State. v. Duda*, 60 Wis.2d 431, 210 N.W. 763 (1973) quotes from Am. Jur. 2 wherein it states that "[i]t is well settled that a verdict will not cure a failure to allege a criminal offense ***or the omission of any essential allegation***: any such objection is ***fatal*** after as well as before the verdict.(emphasis added). *Id.*, 60 Wis.2d at 442, quoting 41 Am. Jur. 2d, Indictments and Information, p. 1072, sec. 310. ***Quite simply, the Charging Documents omit an essential allegation.*** The conviction cannot be sustained.

The Charging Documents ***facially allege a complete offense***, namely, a single act of theft. The State's theory of prosecution does not adopt the aggregation theory. Allowing aggregation violates Mr. Elverman's constitutional right to be convicted only on the theory of prosecution set forth in the Charging Documents. *Stirone*, *Winship*, *Zelenka*, *Beamon,* as well as numerous decisions of other state supreme courts, demand such a finding . The evidence ***failed to prove a single act of theft in excess of $10,000***. Mr. Elverman's conviction of theft greater than $10,000 cannot be sustained.

B. As Ms. Phinney's Agent, Mr. Elverman had Consent to Act and, Given Ms. Phinney's Words and Conduct, Did Not Know He Did Not Have Such Consent.

Separate from the analysis in **Section A.** above, the evidence is insufficient to support Mr. Elverman's conviction given he had consent----based upon the words and conduct of Ms. Phinney and given that he was acting as her agent pursuant to a bona fide power of attorney ("POA"), attached as part of the Appendix. Thus, it is factually impossible for Mr. Elverman to have known he did not have such consent.

The POA was "durable," meaning it continued in effect even if Ms. Phinney became incompetent in March 2003, as alleged by the State. The POA was broad in scope. It granted Mr. Elverman "full power and authority to act...in all matters as fully as though I myself were acting." There is no prohibition in the POA on transferring funds to Mr. Elverman. In fact, Ms. Phinney through her words and conduct over several years, specifically ***authorized*** such transfers.

The uncontroverted evidence at trial established that Ms. Phinney ***for several years prior to her alleged incompetency*** in March, 2003, made payments to Mr. Elverman ***in the same manner and similar amounts*** to those alleged to have constituted theft post-March of 2003. Additionally, evidence was presented that Ms. Phinney repeatedly acknowledged through her words the desire to make such payments. See State's Ex. 14, pgs. 2, 3 and 6 attached in the Appendix. It is ***hornbook law*** that such conduct and words amount to a grant of authority to Mr. Elverman to act in the manner he did. Specifically, Professor William A. Gregory, in his treatment

of agency law in the *Law of Agency and Partnership, Third Ed.*, states:

> **"A principal may by conduct alone or by a mixture of words and conduct express to his agent his willingness that the agent exercise certain authority. Authority so created is *just as real* as though created by language solemnly enunciated in a *power of attorney* under seal." (emphasis added).**

See, *The Law of Agency and Partnership, Third Edition (2001)* at page 43. This approach, referred to as the "intention of the principal" approach, is exactly the analysis adopted by our Supreme Court in *Russ v. Russ*, 302 Wis. 2d. 264, 734 N.W. 2d 874 (2007).

For several years, Ms. Phinney, while competent, through her words and conduct, authorized payments to Mr. Elverman. Thus, Mr. Elverman, ***as agent***, had the ***expressed authority*** to consent to the specific payments to Mr. Elverman, ***individually***, even after Ms. Phinney's alleged incompetency in March, 2003.

Without explanation, the trial court accepted the State's argument that Mr. Elverman's signature was required in order for him to be acting as Ms. Phinney's agent. **Yet, neither the State nor trial court cited any authority, case or legal theory to support such a position.**

Most importantly, there is ***no requirement*** in the POA that Mr. Elverman was required to sign his name to indicate he was then acting under the POA. To impose such a requirement is to add a restriction Ms. Phinney did not require. The uncontroverted trial evidence shows Mr. Elverman caused Ms. Phinney to sign her name to every check—this was the manner Mr. Elverman chose to act as her agent, and the POA cannot be read to require otherwise.

In fact, Wisconsin law at the time ***did not*** require the agent to disclose his identity via his signature. The suggested form of power

in effect during the subject period as set forth in Wisconsin's power of attorney statute ***did not*** contain any provisions concerning the need to disclose the agent's identity. See Wis. Stat. §§ 243.07, 243.10 (2003-04). In contrast, the suggested form adopted by our Legislature in 2010 does contain such a provision.

Separate from the consent granted by Ms. Phinney, the POA granted Mr. Elverman the power ***as agent*** to consent to transfers to himself. Indisputably, the facts show that Mr. Elverman was employed by Ms. Phinney for over seven years to assist her in all financial and health matters, ***which necessarily created an employer/employee relationship.*** This is not a case of self-dealing.

Thus, the cases cited by the State, namely, *Russ, supra* , *Alexopoulos v. Dakouras*, 48 Wis 2d 32, 179 N.W. 2D 836 (1970) and *Praefke v. American Enterprise Life Ins. Co.* , 257 Wis. 2d 637, 655 N.W. 2d 456 (2002) are not factually relevant nor for that matter jurisdictionally relevant in that those are civil cases, not criminal cases.

Russ, Alexopoulos and Praefke stand for the proposition an agent is precluded from making gifts, loans or exchanges of assets to himself if the subject power is silent on such transfers. Remarkably, the State presented ***no evidence*** that the payments made to Mr. Elverman were gifts, loans or for exchange of assets.

Wisconsin law ***authorizes*** attorneys in fact to compensate themselves ***even if*** the power is silent on the issue. See Wisconsin State Bar, Consumer Pamphlet Series: Durable Powers of Attorney for Finances and Other Property, pg. 5, attached in the Appendix. The State Bar's Pamphlet indicates "[y]ou may pay yourself reasonable compensation for your services as agent ***unless the document specifically provides that you may not***." (emphasis added). The POA does not preclude payment to Mr. Elverman for acting as Ms. Phinney's attorney in fact.

Additionally, as agent, Mr. Elverman was empowered to pay all bills of Ms. Phinney, including all fees incurred by her for Mr. Elverman's services ***as her personal assistant.*** These services had been provided by Mr. Elverman since 2001, with Ms. Phinney paying all such fees prior to her alleged incompetency in 2003.

As noted above, it is hornbook law that the words and conduct of the principal grant ***express authority*** to the agent to act in accordance with such words and conduct. No evidence was presented indicating Ms. Phinney was incapable of understanding her own words and conduct for ***several years*** prior to her alleged incompetency in which she made payments to Mr. Elverman in a "like amount and pattern" per the State's own witness. Mr. Elverman, as agent, simply continued to make payments to all service providers to Ms. Phinney, including himself, as Ms. Phinney did ***for several years before*** her incompetency.

For these reasons ***and separate from the fact Mr. Elverman, as Ms. Phinney's agent, consented to the transfers***, Mr. Elverman, in light of the uncontroverted evidence that Ms. Phinney made payments to Mr. Elverman in a similar and like amount before her incompetency, it was factually ***impossible*** for Mr. Elverman, ***individually***, to know Ms. Phinney did not consent to the transfers.

Ms. Phinney, through her uncontroverted words and conduct, granted Mr. Elverman the power, as agent, to consent to all transfers to himself, individually. These transfers were in a like amount and pattern for over seven years, and were not precluded by Wisconsin law. Separately, given Ms. Phinney's words and conduct, the facts fail to establish Mr. Elverman, individually, could have known Ms. Phinney did not consent to the transfers. Accordingly, the facts are insufficient to maintain a conviction of larceny theft under 943.20(1)(a).

II. Larceny Theft under Wis. Stat. §943.20(1)(a) is Not a "Continuing Offense," thus, the State is precluded from extending the six-year statute of limitations for felony offenses set forth in Wis. Stat. § 939.74(1).

Felony prosecutions in Wisconsin must be commenced within six years of commission of the alleged crime. Wis. Stat. §939.74(1). An offense is committed when it is completed, that is when each element of that offense has occurred. *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d. 1561(1970). *United States v. McGoff*, 831 F3d 1071, 1078 (D.C. 1987). Judge Starr of the United States Court of Appeals for the District of Columbia Circuit lucidly stated in *McGoff*,

> ***"[A]s first-year law students learn...a larceny is completed as soon as there has been an actual taking of the property of another without consent, with the intent permanently to deprive the owner of its use. The offense does not 'continue' over time. The crime is complete when the act is complete.*** " *McGoff* at 1078. (emphasis added).

943.20(1)(a), as charged by the State in our case, theft by larceny, cannot be construed to represent a "continuing offense." ***As shown below, the State in the past as well as numerous state Supreme Courts have deemed this is true even in repeated acts of theft by larceny.***

References to "theft by larceny" are used interchangeably with "theft" herein, but be advised that Mr. Elverman was charged with what has traditionally been referred to as theft by larceny **under 943.20(1)(a).** While Wisconsin has compiled its various "theft" offenses under Chapter 943, our Supreme Court has held that our Legislature retained the distinct elements of the common law crime of larceny in 943.20(1)(a). *State v. Tappa*, 127 Wis.2d 155, 378 N.W.2d 883 (1985).

The State argues that Wis. Stat. §971.36, a ***procedural form of pleading statute***, enables it to avoid the direct, categorical and precise language of 939.74. ***Yet remarkably, as shown below, even the State has argued and acknowledged in the past that 971.36 DOES NOT extend the limitations period beyond six years!*** The reason is obvious---*Toussie* and its progeny of numerous federal and state courts preclude any finding that larceny theft is a continuing offense. As demonstrated below, the ability to plead a continuous course of criminal conduct as one crime ***does not*** make it a continuing offense for ***statute of limitations purposes.*** This is where the trial court got it wrong.

The State argues that because 971.36 allows the pleading of a range of dates for the alleged series of acts, that the SOL is necessarily extended, yet offers no case law or other legal authority for this remarkable position. The State would like this court to avoid the Legislature's very specific act addressing the applicable SOL, namely, 939.74. In fact, as noted, ***even the State in the past*** has conceded 971.36 does ***NOT*** extend the SOL.

As noted, ***the State*** has previously agreed that 971.36 does not operate to extend the SOL for thefts under 943.20. In *State v. Guzniczak*, Case No. F-91-261(1991), the defendant was convicted of ***one count of embezzlement*** for numerous acts of theft from June 1985 through June of 1990. In its Sentencing Memorandum, a copy of which is in the Appendix, the State concluded that even though the State charged the defendant with ***one count of embezzlement under 971.36*** for engaging in a continuous course of conduct ***that extended well before June 1985,*** the six year statute of limitations for felony actions under 943.20 ***precluded the State from charging these earlier acts.*** See Page Four of the Memorandum. The diametrically opposed position of the State in this case is most troubling and smacks of malice.

Without question, allowing for the pleading of a range of dates under 971.36 is a modern rule of convenience. In fact, the statute contemplates "evidence" at the trial regarding individual acts of theft. If the Legislature had intended to extend the SOL for repeated acts of theft, it would have done so under **939.74, not 971.36.** Any conclusion otherwise creates an obvious ambiguity, in which case our Supreme Court has consistently held ***that penal statutes should be interpreted in favor the defendant.*** *State v. Bohacheff*, 114 Wis.2d 402, 338 N.W. 2d 466 (WI 1983) and *Austin v. State*, 86 Wis 2d 213, 271 N.W. 2d 668 (1978).

Our Supreme Court in addressing 943.20(1)(a) describes the illegal transfer as "***a separate volitional act.***" *State v. Tappa, supra*, 127 Wis.2d 155, 169,378 N.W.2d 883. Consistent with *Tappa,* each alleged act by Mr. Elverman ***required a renewed affirmative, volitional act interrupted significantly by time and space***. This defies the definition of a "continuing offense," as established in *Toussie*.

A careful reading of 971.36(4) reveals that it is focused on punishing the individual acts of theft, ***not the course of conduct or scheme.*** It contemplates a ***procedure*** whereby the State offers evidence of ***individual acts of thefts***, any one of which might be used to show a violation of 943.20(1)(a). Given *Tappa*, this requires the proof of separate volitional acts if more than one theft is found, effectively preventing this section from creating a continuing offense under *Toussie*. The State treats this procedural statute as a "RICO-like" substantive offense that ***punishes a scheme***, not the individual act or acts of theft.

That this particular section provides that double jeopardy does not apply to any acts of theft during the subject period for which evidence is NOT presented establishes the Legislature is intending to punish the individual acts, ***not the course of conduct or scheme.*** Given the need to prove the individual acts of theft

under 971.36(4), it is clear the State's proof of such acts is subject to all substantive and procedural rules---***including 939.74(1), the six year SOL for felony actions***.

Under 939.74, the Legislature has shown the intent and ability to extend the SOL for certain "course of conduct" offenses (Wis. Stat § 940-crimes against life and bodily security and Wis. Stat § 948-crimes against children). *See* 939.74(2d)(am). ***Nowhere*** does 939.74 address extension of the SOL for continuous acts of theft.

Toussie is the reason the State has previously agreed 971.36 does not extend the limitations period. Specifically, *Toussie* creates a two-pronged test to determine whether a particular crime is a "continuing offense." ***Most notably***, neither the State nor trial court has yet attempted to apply this two-pronged test to Mr. Elverman's case.

Specifically, a "continuing offense" only exists when (1) "the explicit language of the ***substantive*** criminal statute compels such a conclusion, or (2) the ***nature of the crime*** involved is such that Congress ***must assuredly*** have intended that it be treated as a continuing one." Toussie, 397 U.S. at 115. (emphasis added). *Toussie* indicates that the continuing offense doctrine should only be applied in **"limited circumstances"** and that criminal limitations statutes are to be **"liberally interpreted in favor of repose."** (emphasis added.) *Id.*

Useful to understanding Toussie's two-prong test is the U.S. Seventh Circuit's decision in *U.S. v. Yashar*, 166 F.3d 873 (7th Cir. 1999). In *Yashar*, the defendant was charged with ***a single count of embezzlement*** of more than $5,000. The *Yashar* court, in refusing to find embezzlement to be a "continuing offense, held that the phrase "continuing offense" is a ***term of art,*** and does **NOT** refer to a continuous course of criminal conduct. Rather, the phrase refers

to the ***nature of the crime*** alleged to have been violated, not the alleged conduct. *Id.* at 877.

Yashar indicates that conspiracy, escape and kidnapping are classic examples of a continuing offense. The doctrine has been found to exist in "failure to report" cases such as found by our Supreme Court in *John v. State*, 96 Wis. 2d 183, 291 N.W. 2d 502 (1980). Additionally, crimes of possession (drugs, guns, bombs) have been considered "continuing offenses." *See, eg., United States v. Berndt*, 530 F. 3d 553 (7th Cir. 2008).

An excellent discussion of *Toussie* and how it has been ***misapplied*** in charging a continuous "course of conduct," "scheme" or "violation" can be found in a 2012 Law Review article by Professor Jeffrey R. Boles of Temple University. Professor Boles notes that the failure to understand *Toussie* has led some courts to mistakenly treat a continuous course of criminal conduct or a pattern of criminal violations as a "continuing offense." "Easing the Tension Between Statutes of Limitations and the Continuing Offense Doctrine," Northwestern Journal of Law & Social Policy, Volume 7, Issue 2 Spring 2012 at page 243.

Professor Boles defines this fundamentally flawed approach as the "charged conduct" approach, with its spotlight on the factual allegations contained in the charging document. Professor Boles notes that such an approach "functionally eradicate[s] *Toussie's* second prong" and is "logically unsound." (emphasis added.) *id.*

Toussie indicates "[a] continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an ***UNINTERMITTENT*** force, however long a time it may occupy." (emphasis added). *Toussie* at 397 U. S. p. 136, quoting its earlier decision in *U.S. v. Midstate Co.*, 306 US 161 (1939). As Professor Boles notes, this requires that as the perpetrator engages in the continuing offense, "***a crime continues***

to be committed each moment." (emphasis added). Professor Boles at page 229. The holding of a child in a kidnapping case is a perfect example. Each day the child is held brings a renewed threat of the evil Congress sought to prevent. **Mr. Elverman's** ***INTERMITTENT act of negotiating and depositing a check separated in time by days and often by more than two weeks does NOT fit into this definition.***

Professor Boles' commentary is the most in-depth scholarly treatment on the "continuing offense" doctrine, and in fact was recently cited by the U.S. District Court, S.D. Georgia, in finding embezzlement was ***not*** a continuing offense. *U.S. v. Arnold*, No. CR 213-26, January 7, 2014. As *Arnold* indicates, ***"[w]here the statute anticipates a violation can occur multiple times in a scheme, the scheme itself should not be treated as a continuing offense, but rather the Court should treat each manifestation of the scheme as a discrete violation."***

To be sure, the above phrase is apropos in our case. 971.36 anticipates multiple thefts in a scheme. Following *Arnold*, this court must conclude 971.36 does not create a continuing offense.

Every reported case in other states has held that the doctrine ***does not*** apply to larceny theft, even in cases of repeated acts of larceny. *See eg.*, state supreme court decisions in *State v. Jacobs*, 607 N.W. 2d 679 (IA 2000)(over 150 transactions over a four and a half year period) and *State v. Schaaf*, 449 N.W. 2d 762 (NE 1989)(25 separate checks over four year period from same victim). See also, *State v. Diaz*, 814 So. 2D 466 (3rd D.C.A. FL 2002)(23 checks over a ten month period from same victim).

The continuing offense doctrine ***has not*** been extended to cases of larceny, even repeated acts of larceny, because *Toussie* and its progeny preclude it. Certainly, the first prong of *Toussie*---that the explicit language of the substantive statute compels such

conclusion---is easily dispensed with as there is no mention in Wis. Stat § 943.20(1)(a) that it is a continuing offense. This is in stark contrast to the statute analyzed by our Supreme Court in *John*. Similarly, the second prong of *Toussie*---that the ***nature*** of the substantive crime is such that the Legislature ***must assuredly*** have intended that it be a continuing offense---is not met.

Instructive on the application of *Toussie's* second prong, is our Supreme Court's decision in *John*. As indicated above, the Court looked to the ***substantive criminal statute alleged to have been violated***, namely, Wis. Stat § 49.12(9). The Court found it significant that the ***substantive*** statute used the phrase "continues to receive." *John* at 191. The Court went on to say that given that the objective of "failing to report" necessarily enables one to "continue to receive" benefits, the nature of the crime is that of a continuing offense. *Id.* at 193.

No such language can be found in 943.20. Without citing any case law or legal authority for doing so, the State looks to a ***procedural*** statute, 971.36, to determine the nature of the crime of larceny. Query why *John* did not look to 971.36 in making its determination regarding 49.12(9)? The reason is obvious--- *Toussie* requires the analysis be focused on the ***substantive*** statute charged, not a ***procedural*** form of pleading statute.

In the Preliminary Hearing, the State incorrectly interpreted *John* by stating that "*John v. State* establishes a theft is a continuing offense." (1/25/11 Transcript; 19:3-4). *John* does not provide such a blanket assertion regarding "theft", or more pertinent to our case, "theft by larceny. Rather, *John* is limited to holding that the failure to report under Wis. Stat § 49.12(9) creates a continuing offense.

Critically, the State in *Guzniczak* argued that embezzlement was not a continuing offense. It did so based upon *Toussie* and

John, which focus on the nature of the crime.

Using this approach, one necessarily concludes that the ***nature*** of theft by larceny under Wis. Stat § 943.20(1)(a) is such that it cannot be construed as a continuing offense. Larceny is complete upon the occurrence of four elements—1. Intentional transfer of property 2. without consent 3. knowing there was no consent and 4. with intent to permanently deprive. *Genova v. State,* 91 Wis. 2d 595, 283 N.W. 2d 483 (Wis.App. 1979).

Confusion exists in applying *Toussie* because prosecutors have attempted to expand *Toussie* ***by charging in one count*** a "continuous course of conduct" wherein multiple alleged criminal violations exist, some outside the statute of limitations ("SOL") and some within the SOL---so called "straddle offenses." This very issue was addressed by the Seventh Circuit in *Yashar*.

In *Yashar*, the court held that charging a continuous course of conduct or scheme ***in one count*** does ***not*** make the act a continuing offense. *Yashar* at 877. To do so, would add a third prong to *Toussie*, namely whether the charged conduct is continuous in nature. *Yashar* indicates "[t]hat would largely swallow the second factor of *Toussie*, which focuses on whether the crime by its nature is such that the [Legislature] must assuredly have intended that it be treated as a continuing one, and would eviscerate its narrow, selective approach." *Id.* .

As *Yashar*, subsequent courts and the commentary indicate, a prosecutorial decision regarding the scope of the charge would determine the running of the limitations period. ***As Yashar aptly notes, "[i]n that manner, the statute of limitations, designed as a control on governmental action, would instead be defined by it." Id at 878.***

The States of Illinois (720 ILCS 5/3-8), Florida (FL Stat.

Sec. 775.15(4), Hawaii (Haw. Rev. Stat. Sec. 701-108(4), Montana(MCA Sec 45-1-205(7), New Jersey (N.J.S.A. 2C:1-6b(1) and Ohio(ORC Sec. 2901.13(D), all have ***as part of*** their respective criminal statute of limitations, an "extender" for acts that are part of a "series of acts" or a "common scheme or continuing course of conduct." In fact, as noted earlier, Illinois has an identical aggregation statute to 971.36. Query why did the Illinois Legislature see a need to enact an extender SOL for a repeated acts of larceny if its aggregation statute made larceny a continuing offense? Wisconsin has no such "extender SOL" for a "continuing course of conduct" in 939.74, except relating to murder, bodily security and crimes against children, as noted above. ***It is the sole purview of the Legislature, not the judiciary, to create such an extension for repeated acts of theft.***

The State's effort to extend the SOL is fatal. It mistakenly argues that a continuous course of conduct transforms larceny into a continuing offense. This "charged conduct" approach directly conflicts with *Toussie*, *Yashar*, subsequent federal courts, various state Supreme Courts, *Guzniczak*, and the commentary.

Fundamentally, the State and trial court have confused the duplicity rule with the continuing offense doctrine. As *Yashar* holds, the ability to charge a series of thefts in one count does **NOT** answer whether the SOL is extended for conduct outside the SOL. Instructive on the distinction between the ability to charge a series of acts in one count, i.e., the duplicity rule, versus the ability of a continuous course of conduct to extend the SOL, i.e., the continuing offense doctrine, is found in *United States v. Sunia*, 643 F. Supp. 2d 51 (DC Cir Ct. 2009).

Like our case, *Sunia* involved a "straddle offense." In refusing to allow the violations outside the limitations period to survive notwithstanding the Government's effort to argue they are part of a "continuing course of conduct," the court made it clear

that it is ***inappropriate*** to use the "common scheme or continuing course of conduct" ***exception to the duplicity rule*** (the charging in one count of several acts) to likewise extend the SOL. The court indicated that the different context in which each arise "explain the differences in the scope of their application." *Id. at 70.*

In this regard, *Sunia* provides:

"[t]o use a doctrine whose outer boundaries are defined only by the need to provide sufficient notice to the defendant and clarity to the jury of the nature of the offense charged as a basis for tolling the statute of limitations would effectively replace the careful balancing performed in *Toussie* with a notice standard that in no way honors "the principle that criminal limitations statutes are to be liberally interpreted in favor of repose," let alone Congress's declaration "that the statute of limitations should not be extended except as otherwise expressly provided by law." *Toussie*, 397 U.S. at 115 (internal citation and quotation marks omitted).

971.36 enables the State, when appropriately availed of, to plead a single count of theft, and then at trial produce evidence of the ***theft or thefts*** it desires to prove to obtain a conviction. That the statute contemplates that in guilty plea or no contest cases, the State may provide a bill of particulars to enable the State to continue to prosecute for other thefts during the subject period demonstrates the section is aimed at punishing the individual acts of theft, not the scheme or course of conduct. Following *Sunia,* simply addressing duplicity concerns(as 971.36 does) does not make the offense a "continuing offense" for SOL purposes.

Note also that 971.36 is ***permissive***, meaning a prosecutor is not required to merge all of the alleged conduct in one count. The permissive nature of the aggregation statute was addressed by the Iowa Supreme Court in *State v. Jacobs, supra.*

In *Jacobs*, the court applied the *Toussie* two-pronged test to determine whether its theft and fraudulent practices statutes created

a "continuing offenses." The court found that because its aggregation statute, Iowa Code § 714.3(see Appendix), ***DID NOT*** require aggregation of the alleged 150 separate acts, it ***COULD NOT*** find a continuing offense. *Jacobs*, 607 N.W.2d 679, 689. This court must follow the sound reasoning of not only the Iowa Supreme Court but also the other state supreme courts.

943.20(1)(a) does not create a "continuing offense." Nor does 971.36, a procedural form of pleading statute. This conclusion is supported by *Toussie* and its progeny, as well as *John* and *Guzniczak,* and the decisions of other state supreme courts. The Seventh Circuit's decision in *Yashar* is most instructive. For these reasons, this court must find that Mr. Elverman's conviction cannot be maintained.

III. Milwaukee County did not have proper venue under Wis. Stat. Sec. 971.19(2).

Subject to **Argument V**, at most only the last two alleged thefts occurred within the applicable six year statute of limitations period under Wis. Stat. § 939.74(1). Accordingly, the inquiry concerning proper venue in this case is whether either of such thefts occurred in Milwaukee County. The general venue rule in Wisconsin, found in Wis. Stat. § 971.19(1), provides that "[c]riminal actions shall be tried in the county where the crime was committed, except as otherwise provided." Relevant to our case, subsection (2) of this section provides that [w]here 2 or more acts are requisite to the commission of any offense, the trial may be in any county in which any of ***such acts occurred***." (emphasis added).

Given 971.19(2), the issue is whether Mr. Elverman engaged in any "act" in Milwaukee County to commit either of the alleged thefts occurring on September 8, 2004 or September 22, 2004. Instructive on this issue is *State v. Swinson,* 261 Wis. 2d 633, 660 N.W. 2d 12 (Wis. App. 2003). In *Swinson*, the defendant was

charged with theft by fraud for sending numerous bogus invoices to the Kohler Company in Sheboygan County . The court, in applying 971.19(2), considered the six elements making up the offense of theft by fraud and held that "if *any* element occur[red] in Sheboygan [C]ounty, then that county can be the place of trial." *Swinson* at ¶ 21.

Swinson found venue existed because certain elements of theft by fraud ***occurred*** in Sheboygan County. Applying *Swinson* to our case, one necessarily finds that venue does not exist in Milwaukee County for the two acts of alleged theft occurring in September, 2004.

The facts establish that all of the alleged September 2004 activity with Ms. Phinney occurred in Ozaukee County. As *Swinson* found significant, in our case, the two relevant checks were **"cut"** by Ms. Phinney in **Ozaukee County**, thereby in the words of the *Swinson* court she "had parted with" money in Ozaukee County. *Swinson at ¶23.*

The record is **void** of any contact Mr. Elverman had with the victim in Milwaukee County in September, 2004. Moreover, the two checks received in September 2004 were deposited by Mr. Elverman in **Waukesha County**. Thus, he transferred the property to himself in Waukesha County. **His role in transferring the funds was complete upon such deposits**. Pretrial Hearing 1/25/11 Transcript 12:2-10.

The State in the preliminary hearing and at trial argued venue existed in Milwaukee County because the two September 2004 checks deposited by Mr. Elverman in Waukesha County were electronically processed by his bank in Milwaukee County. Such electronic processing had ***nothing*** to do with the acts of Mr. Elverman.

The State's approach is akin to the expansive approach of the federal government in mail fraud cases wherein the government has attempted to argue venue exists in any location in which "the mail passes through." See eg., *US v. Brennan*, 183 F.3d 139 (2d Cir. 1999) in which the court refused to follow the government's "passing through" test.

To be sure, if such a minimal "passing through" nexus to Milwaukee County is sufficient to find venue, absurd results follow. Query whether the bank's processing center was located in Ashland, WI. Would that give Ashland County venue?

There simply is nothing in the record that suggests that in September of 2004 **any** of the four elements of larceny theft ***occurred*** in Milwaukee County. Accordingly, venue did not exist and Mr. Elverman's conviction in Milwaukee County cannot be maintained.

IV. The Trial Court Committed Reversible Error by Refusing Defense Counsel's Request for a Specific Unanimity Instruction.

The right to a jury trial guaranteed by article I, sections 5 and 7 of the Wisconsin Constitution includes the right to a unanimous verdict with respect to the ultimate issue of guilt or innocence. *State v. Derango*, 2000 WI 89, ¶13, 236 Wis.2d 721. Our Supreme Court in *State v. Lomagro*, 113 Wis.2d 582, 335 N. W. 2d 583, 587 (1983), summarized the unanimity analysis as follows:

> The first step is to determine whether the jury has been presented with evidence of multiple crimes or evidence of alternate means of committing the *actus reus* element of one crime. ***If more than one crime is presented to the jury***, unanimity is required as to each. *Id.* at 419. If there is only one

> crime, jury unanimity on the particular alternative means of committing the crime is required only if the acts are conceptually distinct. Unanimity is not required if the acts are conceptually similar.(emphasis added).

In Mr. Elverman's case, the State presented 56 separate crimes to the jury, some of which were separated by more than two weeks. As provided in *State v. Gustafson*, 119 Wis. 2d 676, 697, 350 N.W.2d 653 (1984), "[i]f the conduct involves separate transactions and separate crimes, the court must then instruct the jury that unanimity is required as to each."

Post-trial, the State argued 971.36 gave the State authority to combine the several alleged acts of theft into one count. It cited *State v. Jacobsen*, 2013 AP 830, as authority to do so. Importantly, *Jacobson* provides that the ability to so plead is "limited by the purposes of the prohibition against duplicity," *id. at* ¶22, citing *Lomagro, supra.* Specifically, *Lomagro* states:

> "The purposes of the prohibition against duplicity are: (1) to assure that the defendant is sufficiently notified of the charge; (2) to protect the defendant against double jeopardy; (3) to avoid prejudice and confusion arising from evidentiary rulings during trial; (4) to assure that the defendant is appropriately sentenced for the crime charged; and (5) to guarantee jury unanimity." *Id.* at 586-587.

It is the fifth purpose, jury unanimity, which is of issue in Mr. Elverman's case. In *Jacobsen*, jury unanimity was not at issue given the defendant admitted to all of the factual allegations through ***her no contest plea***. *See Jacobsen*, n.3. ***For this reason alone, Jacobsen is inapposite to Mr. Elverman's case.***

In Mr. Elverman's case, the State charged him with theft over $10,000, ***yet it failed to prove a single check that exceeded such amount.*** Also, Mr. Elverman was acting pursuant to the POA, which granted him broad authority to transfer Ms. Phinney's funds,

including payments to compensate Ms. Phinney's assistants, including himself. The State presented evidence of over fifty separate incidents, some of which occurred more than two weeks apart.

Query which checks did the jurors find the State had proven were taken without Ms. Phinney's consent where Mr. Elverman knew she did not consent? Did the jurors find certain checks were negotiated pursuant to the POA while others were not? Did the jurors only agree on those checks outside of the SOL? Did the jurors unanimously agree on any checks? None of these questions can be answered due to the court's denial of the defense request for Jury Instruction 517 and a special verdict.

In our case, as noted earlier, our Supreme Court in *Tappa, supra*, found that 943.20(1)(a) creates five separate theft by larceny offenses. It ***does not*** set forth a single offense with five "means or modes" of commission. The statute contains no description of alternative means or modes to violate the statute. Moreover, 971.36 contemplates multiple "thefts" will be presented to prove the single crime. Thus, Mr. Elverman's case is a "multiple acts" case, ***not*** an "alternative means" case.

In "multiple acts" cases, numerous state supreme courts in other jurisdictions have found that the jury must be unanimous as to which act or incident constitutes the crime. See, eg., *State v. Celis-Garcia*, 344 S.W.3d 150 (MO. S. Ct. 2011); *State v. Muhm*, 775 N.W.2d 508, 518-20 (S.D. 2009); *State v. Gardner*, 118 Ohio St.3d 420, 889 N.E.2d 995, 1005-06 (2008) and *State v. Kitchen*, 110 Wash 2d 403, 756 P2d 105, 108 (1988).

The separate alleged acts in Mr. Elverman's case occurred in many cases multiple weeks apart. As cited in *Lomagro*, this case is akin to *Boldt v. State*, 72 Wis. 7, 38 N.W. 177 (1888). In *Boldt,* the State introduced evidence that the defendant, who was charged

with selling liquor without a license, sold to different people ***on different days***. *Id.* at 13, 38 N.W. at 178-79. The court reversed the conviction due to jury unanimity problems. *Lomagro* distinguished *Boldt* by indicating *Boldt* did not involve a single, continuous criminal transaction given days, not hours, separated the acts. *Lomargo*, 113 Wis. 2D at 596, 335 N.W.2d at 591.

Mr. Elverman's right to jury unanimity was not protected. Typically such failure has been subject to the harmless error rule. Instructive is the Washington Supreme Court decision in *Kitchen, supra*, which held that, in a "multiple acts" case, the analysis in determining whether the error is harmless ***presumes the error was prejudicial*** and can only be overcome if "no rational trier of fact could have entertained a reasonable doubt that ***each incident*** established the crime beyond a reasonable doubt." *Kitchen* at 110 Wash 2d at 406(emphasis added).

Applying the above to our case, it is clear given the varying facts, dates, separation in time of the alleged incidents, the extent of services provided by Mr. Elverman between ***each incident***, the application of the POA to ***each incident***, Mr. Elverman's knowledge on ***each occasion*** as to whether he did not have consent, and Ms. Phinney's varying mental condition , one cannot say that the State proved each incident beyond a reasonable doubt.

Without limiting the generality of the foregoing, it is important to note the jury was ***not*** required to find Ms. Phinney ***permanently*** incompetent during the ***entire*** alleged period of conduct. P. 3, Instructions. In the absence of a jury finding that Ms. Phinney was permanently incompetent for the entire alleged period, it is impossible for the court to find beyond a reasonable doubt that Ms. Phinney was incompetent ***on each day*** a check was issued to Mr. Elverman, and thus unable to consent. For this reason ***and others***, the conviction cannot be sustained by this court.

V. The State failed to timely commence its prosecution against Mr. Elverman, accordingly, a judgment of acquittal should be issued by this court.

Wis. Stat. § 939.74(1) is direct, categorical and precise. Relevant to this case, it establishes that the prosecution for a felony must commence within six years of the commission of the felony. The statute ***defines precisely*** when a prosecution is deemed to have ***commenced***, namely: (1) when a warrant or summons is issued, (2) when an indictment is found, or (3) when an information is filed.

In our case, the State charged Mr. Elverman with several acts of theft by larceny, the latest of which occurred on September 23, 2004. Ordinarily, this would require the State to have filed the Information by September 23, 2010. However, on September 8, 2010, the parties agreed to extend the limitations period until January 8, 2011. Thus, for purposes of this case and Wis. Stat. §939.74(1), the State needed to either (1) cause a warrant or summons to be issued before January 8, 2011 or (2) file an Information prior to such date. It did neither.

While the State did cause a complaint to be filed on December 6, 2011, that is ***not*** sufficient for purposes of determining ***when a prosecution has commenced under 939.74(1)***. The State's reliance on our Supreme Court's decision in *State v. Jennings*, 657 N.W.2d 393 (2003), is misguided. In *Jennings*, the court found that the filing of a complaint did commence a prosecution in cases where the defendant ***was already in custody due to incarceration***, finding that requiring the issuance of a warrant in such case would produce an "absurd result." Of course, our case is inapposite from *Jennings* as Mr. Elverman was ***not in custody*** on December 6, 2011.

It would NOT have been "absurd" to require the State to have a warrant or summons issued to Mr. Elverman. The State

chose NOT to do so. It was incumbent upon the State to timely file the Information. It failed to do so.

It is important to note the strong dissent in *Jennings* wherein Chief Justice Abrahamson unequivocally **follows the reasoning of District 1 Court of Appeals** to find that 939.74(1) is controlling, notwithstanding that two other statutory sections refer to the filing of a complaint as commencement of the case, namely, Wis Stat. §§ 967.05(1) and 968.02(2). As the Court of Appeals in *Jennings* indicated, "...the limitation placed upon felony prosecutions is statutory, direct, categorical and precise. In exacting terms, Wis. Stat. § 939.74 sets forth how and when a person formally becomes an accused." 250 Wis.2d 138, 145-146 (2001), 2002 WI App 16, 640 N.W.2d 165.

In denying Mr. Elverman's post-conviction motion, the trial court shockingly applies a "totality of the circumstances" test in applying 939.74(1), yet fails to cite any legislative or judicial authority for such a test. The reason is obvious, 939.74(1) is direct, categorical and precise. It necessarily creates a bright line test for determining when a case has "commenced" for limitation purposes. It is the Legislature's job to expand the scope of 939.74(1), not the judiciary.

The State of course desires a liberal application of 939.74(1). It argues that the section is tolled upon the earliest action in a case. The State argues that Mr. Elverman's initial appearance tolled the limitations period. If so, then 939.74(1) is rendered superfluous as in every felony matter an initial appearance and preliminary hearing must be held. Yet the statute is tolled only upon the filing of an information, which of course can only occur AFTER these preliminary proceedings. Query why? The answer of course is that ***939.74*** contemplates certain preliminary prosecutorial action before one becomes ***formally accused*** in this State.

It is important to recognize Mr. Elverman did not waive his right to a preliminary hearing and the associated probable cause determination. While Mr. Elverman's counsel requested the preliminary hearing be rescheduled, it was incumbent upon the State, NOT defense counsel, to assure the limitations period was similarly extended. The State failed to do so.

Again, in our case, no warrant or summons was issued—any suggestion that the filing of the complaint is sufficient fails to apply the ***direct, categorical and precise*** nature of 939.74(1). Mr. Elverman was not in custody on December 6, 2011, thus *Jennings* is inapposite. The Information was filed on January 25, 2011, more than two weeks after the required date for statute of limitations purposes. For these reasons, this court must issue a judgment of acquittal as the State failed to timely commence its prosecution under 939.74(1).

VI. The Charging Documents Are Constitutionally Fatal under the US and Wisconsin Constitutions For Failing to Adequately Apprise Mr. Elverman of the Nature and Cause of the Charges Against Him.

Our Supreme Court has stated that the due process clause of the Wisconsin Constitution, art. I, sec. 8, and art. I, sec. 7 and the Sixth Amendment to the United States Constitution guarantee the accused's right to be informed of the nature and cause of the accusation against him or her. *State v.Sorenson*, 143 Wis.2d 226, 253, 421 N. W. 2d 77(1988). This constitutional requirement was articulated by the Court in *Holesome v. State*, 40 Wis.2d 95, 105, 102, 161 N. W. 2d 283, 287 (1968):

> "In order to determine the sufficiency of the charge, two factors are considered. They are, whether the accusation is such that the defendant determine [sic]whether it states an offense to which he is able to plead ***and prepare a defense*** and whether conviction or acquittal is a bar to another prosecution for the same offense."

(emphasis added).

In our case, the Charging Documents fail to apprise Mr. Elverman of the ***need to defend*** himself that he did not act in furtherance of a single intent and design. ***The absence of such a fact precludes aggregation, thus, it is necessarily an essential element of the offense.***

The record establishes that Mr. Elverman offered ***no evidence or argument*** that the payments received by him were taken pursuant to numerous, individual impulses, rather than in furtherance of a single intention. The absence of such a defense establishes a ***"sine qua non"*** that the Charging Documents are constitutionally defective.

The Supreme Court has indicated "a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). See also *Schleiss v. State*, 239 N.W. 2d 68 (1976), *Clark v. State*, 214 N.W. 2d 450 (1974) and *Champlain v. State*, 193 N.W.2d 868 (1972), which all require that the Information must fully advise the defendant of the nature and cause of the accusations against him.

Schleiss is instructive. There the Information, like the one before this court, failed to allege all of the material elements of the offense alleged. In recognizing the need to provide such notice, the Court nevertheless found the Information before it provided such notice because it made reference to "the specific statutes" that incorporated all the material elements of the offense charged. *Schleiss* at 739-740. That is not so in our case---the only statute charged to have been violated in our case is Wis. Stat.§ 943.20(1)(a). That section contains ***no reference*** to single intent and design ***or*** the Statute allowing for aggregation if there was a single intent and design, namely, Wis. Stat. § 971.36.

Our Supreme Court has recognized on numerous occasions, "**the right to be clearly apprised of the criminal charges is constitutional in nature and cannot be avoided by more simplified rules of modern pleading.**" *State v. George*, 230 N.W.2d 253 (1975), quoting *Martin v. State*, 57 Wis.2d 499, 506, 204 N.W. 2D 499 (1973)(emphasis added).

As recently noted by the United States Court of Appeals for the District of Columbia, "[i]n the criminal context, courts have traditionally required greater clarity in draftsmanship than in civil contexts, commensurate with the bedrock principle that in a free country citizens who are potentially subject to criminal sanctions should have ***clear notice*** of the behavior that may cause sanctions to be visited upon them." *Oberwetter v. Hilliard*, 639 F.3d 545, 549 (D.C. Ct. of Appls. 2011)(emphasis added).

In facts virtually identical to Mr. Elverman's case, the Illinois Supreme court held in *Rowell, supra,* that the defendant was ***prejudiced in his defense*** because the charging documents failed to allege the individual thefts were in furtherance of a single intention and design. *Rowell* found it significant that the defendant offered no evidence that the subject thefts were taken pursuant to numerous individual impulses, rather than in furtherance of a single intention and design.

As in *Rowell,* Mr. Elverman's defense offered no evidence that the acts were taken pursuant to numerous individual impulses. **In fact, Atty. Drigot has acknowledged not being aware of the State's need to prove a single intent and design.** For these reasons, the State's attempt to aggregate the alleged acts by Mr. Elverman cannot be upheld.

Mr. Elverman's challenge to the sufficiency of the Charging Documents concerns an issue of a substantial constitutional nature. Thus, any attempt to argue that Mr. Elverman has "waived" his

right to challenge the Information as a result of Wis. Stat. §§971.31(2) and (5)(c) simply fails to appreciate the substance of the challenge. Our Supreme Court has recently addressed this very issue in *State v. Thompson*, 342 Wis. 2d 674, 818 N.W. 2d 904 (2012).

As *Thompson* recognized, the challenge is about more than the "insufficiency of the complaint." See *Thompson*, 818 N.W.2d at 919. *Thompson* noted that there are at least four statutes, Wis. Stat.§§ 971.26, 805.18, 968.22 and 971.29, which all "demonstrate that while the legislature does not demand perfection in the criminal process, it is nonetheless sensitive that procedural deficiencies not "prejudice the defendant" or affect a defendant's "substantial rights." *Id.* at 920.

In our case, the conviction cannot stand given that aggregation is necessary to find Mr. Elverman committed theft in excess of $10,000. Prejudice is present if aggregation is allowed.

VII. Counsel Was Ineffective Thereby Violating Mr. Elverman's Sixth Amendment Right to Counsel.

In so far as trial counsel failed to properly raise, preserve and/or develop the arguments herein, then counsel was ineffective. To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that counsel performed deficiently and (2) that the deficient performance prejudiced his defense. *State v. Artic*, 327 Wis.2d 392, 768 N.W.2d 430 (2010).

To prove deficient performance, the defendant must "identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 688, 690 (1984). To establish prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would

have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Smith*, 207 Wis.2d 258,276, 558 N.W. 2d 379 (1997)(citing *Strickland*, 466 U.S. at 694).

No apparent strategic reason existed for counsel's failure to properly raise, preserve and/or develop the arguments herein. Counsel argued this case could not be lawfully prosecuted as a single crime due to the "continuing offense" doctrine, and further sought a jury instruction on jury unanimity.

To the extent counsel failed to fully develop his argument for such positions, counsel's failure prejudiced Mr. Elverman. Had counsel properly raised, preserved and/or properly developed the arguments set forth herein, there is a reasonable probability the court would have discharged this case. Accordingly, this court must now render a judgment of acquittal.

CONCLUSION

As shown, this case entails a plethora of Wisconsin and Federal statutory and constitutional errors. As demonstrated, the State and trial judge failed to properly address these issues.

Quite simply, the State and trial court have failed to properly apply the "continuing offense" doctrine established in *Toussie* and its progeny, including *Yashar*. In fact, the State in the past has argued and acknowledged theft under 943.20 is ***NOT*** a continuing offense. Neither the State nor the trial court has cited one case that applies the continuing offense theory to larceny theft.

If applied properly, the doctrine would at most find two of the fifty-six separate alleged events occurred within the six year felony statute of limitations. However, as established in *Jennings*,

these last two acts were outside the limitation period. Additionally, these last two acts occurred outside of Milwaukee County. Based upon *Swinson,* venue does not exist in this county.

Separately, the State failed to seek an "aggregation theft theory" in the Charging Documents, yet it was allowed to aggregate the thefts. None of the alleged thefts exceeded $10,000, yet Mr. Elverman was convicted of one count of theft in excess of $10,000.

The power of attorney by operation of law granted Mr. Elverman the authority to consent to the transfers. Additionally, Ms. Phinney's words and conduct for seven years precluded him from knowing he did not have consent.

Moreover, the Charging Documents did not provide constitutional notice of the nature of the charges to allow Mr. Elverman to properly defend himself.

Any of the above errors is sufficient to require that this court reverse the conviction, dismiss the Information and issue a judgment of acquittal.

Respectfully submitted,

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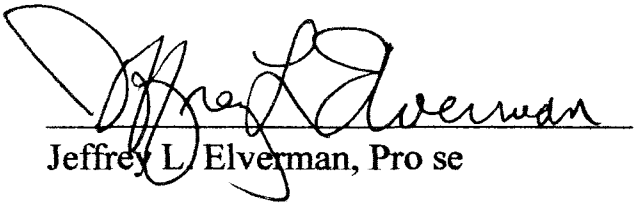
WIS. STAT. (RULE) 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rules) 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,937 words.



Jeffrey L. Elverman, Pro se

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that on the 15th day of October, 2014, I caused 10 copies of the Brief and Appendix of Defendant-Appellant Jeffrey L. Elverman to be mailed, properly addressed and postage prepaid to the Wisconsin Court of Appeals, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Jeffrey L. Elverman