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

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

JEFFREY L. ELVERMAN,
DEFENDANT-APPELLANT, PRO SE
618 HICKORY ROAD
TWIN LAKES, WI 53181
312-636-1080

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ARGUMENT

1. Larceny Theft under Wis. Stat. §943.20(1)(a) is Not a "Continuing Offense

After four months and several granted extensions, the State fails to cite one case applying the continuing offense doctrine to larceny. Rather shockingly, it hangs its proverbial hat and entire case on dictum in *John v. State*, 96 Wis. 2d 183, 291 N.W. 2d 502 (1980).

The State argues *John* in dictum states that the continuing offense doctrine has been applied to embezzlement. *Id.* at 189, citing a 1933 Minnesota case, *State v. Thang*, 188 Minn. 224, 246 N.W. 891(1933). First, the instant case is a larceny case, not an embezzlement case. Second, clearly the State has not read *Thang.*

Thang does not address the continuing offense doctrine-it addresses the discovery rule. It holds that embezzlement is chargeable upon discovery. Importantly, our Legislature adopted an identical approach for embezzlement in Wis. Stat. §939.74(2)(b) by extending the limitations period for one year beyond discovery.

Because of *Thang*, the State contends this court should ignore our 7th Circuit's decision in *U.S. v. Yashar*, 166 F.3d 873 (7th Cir. 1999). After reading *Thang*, the State's contention is meritless. *Yashar* is still good law, and this court should take note of its admonition against allowing prosecutorial discretion determine the applicable limitations period. *Yashar* at 878.

Concerning such prosecutorial discretion, it is important to note that 971.36 is permissive, not mandatory, meaning a

prosecutor is not required to merge all of the alleged conduct in one count. Given the similar permissive nature of its aggregation statute, the Iowa Supreme Court found that theft cannot be considered a continuing offense. *State v. Jacobs*, 607 N.W. 2d 679 (IA 2000)(over 150 transactions over a four and a half year period).

The State overstates the effect 971.36 has on the continuing offense doctrine. The statute contemplates evidence of individual "acts of theft." 971.36(4). This requires proof of separate volitional acts if more than one theft is found, preventing 971.36 from creating a continuing offense under *Toussie*.

The section addresses double jeopardy concerns by indicating double jeopardy does not apply for any "acts of theft" not presented at trial. *Id.* Without question, the Legislature is punishing the individual acts, not the ongoing nature of the course of conduct.

The State's Brief cites *State v. Ramirez*, 2001 WI App 158, 246 Wis. 2d 802, 633 N.W.2d 656. Critically, *Ramirez* focused on the language of the substantive crime charged as well as the legislative history of that crime to apply the continuing offense doctrine. It focused on the nature of identity theft. Clearly, this is the two –pronged approach required by *Toussie v. United States*, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d. 1561(1970).

Importantly, neither *John* nor *Ramirez* looked to Wis. Stat. §971.36, as the State desires. To do so, would undercut *Toussie* because it would incorrectly focus on the alleged conduct of the defendant, not the crime charged.

Professor Boles of Temple University defines this as the "charged conduct" approach and concludes such an approach "would functionally eradicate *Toussie's* second prong" and is "logically unsound." "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.

Toussie indicates that the continuing offense doctrine should be applied in "limited circumstances." *Toussie* at 115. Consequently, Professor Boles suggests that when applying the *Toussie* test, courts should implement the "rule of lenity" if they find that a criminal offense is ambiguous regarding whether its nature is discrete or continuing. *United States v. Enmons*, 410 U.S. 396, 411 (1973). This time-honored principle of statutory construction dictates that criminal statutes be strictly construed and any ambiguities resolved in favor of the defendant.

After four months and several extensions, the State fails to cite even one case that applies the continuing offense doctrine to larceny theft. The reason is obvious---there are none. *Toussie* and its progeny preclude it.

2. The State is precluded from aggregating the individual acts of Mr. Elverman.

The State argues that it did not have to allege an essential allegation in its complaint. Citing *State v. Charbarneau*, 82 Wis. 2d 644, 264 N.W.2d 227 (1978), the State argues the complaint sufficiently noticed Mr. Elverman of its intent to adopt the aggregation theory. *Charbarneau* is inapposite for a number of reasons.

In *Charbarneau*, the prosecutor filed an amended information giving the defendant notice of its intent to proceed under a party-to-a-crime theory. If the prosecutor wanted to give such notice of the aggregation theory to Mr. Elverman, he should have amended the information or sought leave from the court to do

so—he did neither.

More importantly, the Court in *Charbarneau* reviewed the filed complaint and found the allegations contained therein spelled out the crimes alleged in sufficient factual detail that could only lead to conviction on a party-to-a-crime theory. Consequently, the defendant had constitutionally required notice from the "four corners" of the complaint—unlike in the instant case.

No common sense reading of the subject complaint can conclude Mr. Elverman's separate acts were unified by a "single intent and design." While intent can be inferred from conduct, see *State v.Cydzik*, 60 Wis.2d 683, 211 N.W.2d 421(1973), it does not follow that Mr. Elverman acted with a "single intent." Rather, a more common sense conclusion is that Mr. Elverman acted with 56 separate intents.

Shockingly, the State engages in subterfuge by arguing in two parts of its Brief that the complaint did not identify any checks over $10,000, consequently, Mr. Elverman must have known the State was proceeding under an aggregation theory. See pages 6-7 and 9-10 of the State's Brief.

It is important to recognize the complaint identified only 13 of the alleged 56 checks---something the State fails to mention. Constitutional notice does not require Mr. Elverman engage in inferences and presumptions to conclude none of the other 43 checks was over $10,000. The State cites no authority that requires Mr. Elverman engage in such speculation.

The State, in citing *State v. Adams*, 152 Wis. 2d 68, 447 N.W.2d 90(Ct. App. 1989), indicates "[a] complaint is evaluated in a common sense rather than hypertechnical manner." *Adams* at 73. See page 6 of the State's Brief. What the State conveniently leaves out is the rest of that sentence, namely, that the complaint

must state the "essential facts." *Adams* at 73. An essential fact in this case is that Mr. Elverman's mental state consisted of a "single intent and design," not 56 separate intents. The complaint is fatal in this regard.

The State fails to cite Wis. Stat. §968.01(2), providing that "[a] criminal complaint is a written statement of the **essential facts** constituting the offense charged."(emphasis added). In recognition of its charging error, the State argues that its failure to avail of 971.36 was a mere technical error that did not prejudice Mr. Elverman and, thus, Wis. Stat. §971.26 operates to cure such error. The State argues the complaint did not list one check over $10,000, thus Mr. Elverman was not prejudiced. As detailed above, such a claim is most deceitful and misleading.

The State cites *State v. Jacobsen*, 2014 WI App 13, 352 Wis.2d 409, 842 N.W.2d 365 for its authority to use 971.36. *Jacobsen* is an embezzlement case and the complaint did allege facts that the defendant executed a "single deceptive scheme." The same is not true here. Mr. Elverman was charged with larceny, which to use 971.36 requires a "single intent and design," a mens rea element. The State failed to unify the 56 acts with a single intent and design.

The State argues that this court should ignore *People v. Rowell*, 890 N.E.2d 487 (2008). *Rowell* is extremely persuasive, given Illinois' aggregation statute is virtually identical to ours and it is the only reported case addressing the effect of failing to cite the aggregation statute or otherwise alleging that the acts were pursuant to a "single intent and design."

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.

The State treats this case as an embezzlement case. 971.36 can be used if there is a "single intent and design" or, alternatively, there is execution of a "single deceptive scheme." However, the charging documents do not allege a deceptive scheme nor does the charged crime, 943.20(1)(a), require one.

The prosecutor at trial argued Mr. Elverman acted from time to time with numerous, independent impulses. The State attempts to overcome this obvious error by analogizing to the intent of an embezzler who operates with a single deceptive scheme. See pg. 13 of State's brief.

The State's problem is this a larceny case, not embezzlement--the State did not allege a single deceptive scheme. There are numerous reasons the State charged this case as a larceny case, not the least of which is that Mr. Elverman's alleged conduct was discovered approximately two years before the State and Mr. Elverman agreed to toll the applicable limitations period. (Tr. Jury Trial, AM Session, Dec. 13, 2011, pg. 8.) Given the one year discovery rule for embezzlement in 939.74(2)(b), as discussed above, the State sought to charge this case as a larceny case.

3. The charging documents fail to adequately apprise Mr. Elverman of the nature and cause of the charges against him.

The State argues Mr. Elverman failed to timely challenge the constitutional defect in the charging document, notwithstanding that the challenge was personally raised by Mr. Elverman in his Post-Conviction Motion immediately upon representing himself.

Our Supreme Court has held certain constitutional rights can never be waived. Mr. Elverman never "knowingly" relinquished

this particular Sixth Amendment right. In *State v. Ndina*, 315 Wis. 2d 653, 761 N. W. 2d 612 (2009), our Supreme Court held that certain constitutional rights are so important that the right is only lost if "the defendant knowingly relinquishes the right." See ¶ 31. The defendant has "certain fundamental rights that may only be waived personally and expressly..." *Id.*

Ndina addressed various Sixth Amendment rights, similar to the right to be apprised of the nature and cause of the allegations. Mr. Elverman certainly did not "personally and expressly" waive his Sixth Amendment right. Any suggestion that the Sixth Amendment right to notice of the charges is less important than the right to a jury trial or assistance of counsel is arbitrary, capricious and without basis.

In the instant case, the conviction cannot stand given that the aggregation statute is necessary to find Mr. Elverman committed theft in excess of $10,000. Prejudice is present if aggregation is allowed. Mr. Elverman did not "knowingly, personally and expressly" waive any claim that the charging documents violated his Sixth Amendment rights.

The State offers not one case holding that procedural hearings before trial cure an unconstitutional charge. The State fails to note the pretrial hearings in this case focused exclusively on whether 971.36 enabled the State to use the continuing offense doctrine to cure its statute of limitations problem. On that issue, defense counsel disagreed and Mr. Elverman continues in disagreement.

At no time during the preliminary proceedings did the State notify Mr. Elverman that it needed 971.36 to aggregate the thefts to meet its chosen jurisdictional level. The State had all its evidence at that point. It was incumbent on the State, not Mr. Elverman, to move the court to amend the charging documents, if aggregation were necessary to meet its chosen jurisdictional level.

The constitutionality of the charges must be determined within the four corners of the charging documents, not from extraneous sources. This is exactly what the Court of Appeals in *Charbarneau, supra*, did....it looked to the complaint itself.

4. The State failed to timely file the Information as required in Wis. Stat. §939.74(1).

The only statute in Wisconsin that addresses when a case is "commenced" for statute of limitations purposes is Wis. Stat. §939.74. The State in its response fails to note this. Rather, it cites *State v. Jennings*, 657 N.W.2d 393 (2003). As Mr. Elverman's Brief indicates, *Jennings* is inapposite as Mr. Elverman was not in custody due to incarceration when the complaint was filed.

Additionally, the State acknowledges it failed to timely file its Information. It blames Mr. Elverman because of a change of counsel. Importantly, the parties jointly requested an extension of the hearing to January 11, 2011. See Preliminary Waiver, attached in Mr. Elverman's Supplemental Appendix. This was not an error created by defense counsel strategy.

The State had two weeks to consider the impact of extending the Preliminary Hearing date on its inability to timely file the Information. See attached email from defense counsel to D.A. Feiss. It chose to do nothing and in fact agreed to the January 11 hearing date. More importantly, on January 11, the hearing was once again extended to January 25 upon the sole need of the State to present more testimony. See pages 29-30 of the January 11, 2011 of the Preliminary Hearing attached in Mr. Elverman's Supplemental Appendix. Thus, any error concerning the filing of the Information rests solely and exclusively with the State. Once again, the State had the opportunity to consider the impact a delay of the Preliminary Hearing would have on its inability to timely file

an information. It unilaterally and affirmatively chose to ignore it--twice.

If the direct, categorical and precise language of Wis. Stat. § 939.74(1), is ignored, then it raises serious equal protection and due process concerns as to when the limitations period commences in Wisconsin.

5. Venue in Milwaukee County is improper.

Given the continuing offense doctrine does not apply in this case, there are only two checks potentially at issue, both of which were negotiated in Ozaukee County and deposited in Waukesha County. Even those checks are not subject to prosecution given Argument 4 above. However, for the sake of intellectual completeness, it is important to recognize Milwaukee County does not have jurisdiction due to the venue rule set forth in Wis. Stat.§971.19, as interpreted by the Court of Appeals in *State v. Swinson*, 261 Wis. 2d 633, 660 N.W. 2d 12 (Wis. App. 2003).

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 checks were "cut" by Ms. Phinney in Ozaukee County, thereby in the words of *Swinson* 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 were deposited by Mr. Elverman in Waukesha County. The State's own expert witness admits Mr. Elverman's role in transferring the funds was complete upon such deposits. Pretrial Hearing 1/25/11 Transcript 12:2-10.

The State argues the checks were electronically processed in

Milwaukee County. Such electronic processing had ***nothing*** to do with the acts of Mr. Elverman. 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?

6. Mr. Elverman was entitled to a jury unanimity instruction on each of the alleged acts of theft.

The State's response ignores Exhibit 1 to its case, which lists 56 separate checks, separated by multiple weeks. To be sure, the State focused on the individual checks. The jury was presented with 56 separate acts of crime. According to *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."

The State exclusively and fatally cites sexual assault cases to support its position. These cases focus on alternative means to commit that crime. Consequently, jury unanimity is not required. The instant controversy is not a sexual assault case.

7. Mr. Elverman was acting under a valid power of attorney and based upon the words and conduct of his principal was acting within the authority granted to him.

The State fails to cite one case where a person holding a power of attorney is guilty of larceny. The reason is obvious—there are none. More appropriately such cases are prosecuted as embezzlement.

The State cites civil cases addressing breaches of fiduciary duty. Importantly, a breach of a fiduciary duty is not necessarily a criminal act. Moreover, the words and conduct of Ms. Phinney for several years before her alleged incompetence, gave Mr. Elverman

reason to believe his payments were reasonable.

Thus, the State's attempt to refute the State Bar's clear direction on the ability of an agent to pay himself a reasonable fee ignores Ms. Phinney's words and conduct. See *The Law of Agency and Partnership, Third Edition (2001)* at page 43 wherein it indicates the words and conduct of a principal grant the agent authority as though created under a power of attorney.

8. Mr. Elverman was denied effective counsel.

The State indicates Mr. Elverman makes conclusory statements concerning his ineffective counsel claim. Apparently, the State failed to read the 17 pages of his Supplemental Postconviction motion, and the arguments in the initial Postconviction motion dated November 6, 2103 setting forth reasons for such deficient performance. As but one specific example, this is not a continuing offense doctrine case. There is not one reported case so holding. With proper research, defense counsel would have discovered that, and been able to convince the trial court the continuing offense doctrine does not apply.

CONCLUSION

For these reasons, Mr. Elverman requests this court vacate the conviction and dismiss the charge against him.

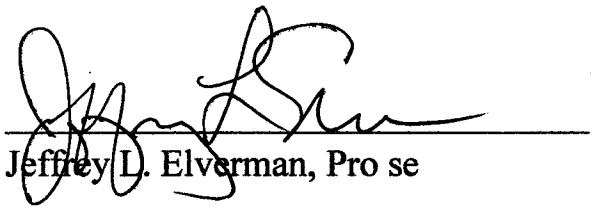
Dated at Twin Lakes, Wisconsin, February 17th, 2015

Respectfully submitted,

Jeffrey L. Elverman, Defendant-Appellant
618 Hickory Road
Twin Lakes, WI 53181
312-636-1080

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

I hereby certify that this reply 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 reply brief is 2,995 words.



Jeffrey L. Elverman, Pro se

CERTIFICATE OF MAILING

I hereby certify pursuant to Wis. Stat. (Rule) 809.80(4) that on the 17 day of February 2015, I caused 10 copies of the Reply Brief and Appendix of Defendant-Appellant Jeffrey L. Elverman be delivered to the Wisconsin Court of Appeals, 110 E. Main St., Ste. 215, P.O. Box 1688, Madison, Wisconsin 53701-1688.

Jeffrey L. Elverman