SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff, vs. LISA O'NEILL, Defendant.	)	No. 10-1-00675-0 KNT STATE'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. INTRODUCTION

The defendant is charged with theft in the first degree in Counts I through XIV, and assault in the fourth degree in Count XV. The defendant has moved to dismiss Counts I through XIV based on State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). She has not moved to dismiss Count XV, the assault charge. The defendant's motion to dismiss some of the counts against her should be denied because her motion fails to include all counts in the Information, because there are material disputed facts, and because when viewed in the light most favorable to the State, the evidence establishes a prima facie case of theft as charged in each count against the defendant.

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

II. STATEMENT OF FACTS

See the First Amended Information, and the Certification for Determination of Probable Cause attached and incorporated in the Affidavit of Page Ulrey in Opposition to the Defendant's Motion to Dismiss.

In addition to the above facts, the Affidavit of Page Ulrey also has attached and incorporated into it relevant police reports, statements of witnesses, and expert reports which deny or dispute the defendant's material factual assertions and provide additional material facts for the Court's consideration.

III. ARGUMENT

The defendant makes her motion to dismiss pursuant to State v. Knapstad, 107 Wn.2d 346 (1986). In that case, the Supreme Court defined a pretrial process for ruling on the sufficiency of the State's evidence in the context of such a motion. The requirements of this process include the following essential elements:

- The court is not being asked to resolve any disputed factual questions (State v.Knapstad, 107 Wn.2d at 350);
- The court, for purposes of the motion, is asked to believe the State's evidence and all reasonable inferences from this evidence as true (Id. at 350, 353);
- A Knapstad motion is initiated by sworn affidavit, alleging that there are no material disputed facts and that the undisputed facts to do not establish a prima facie case of guilt (Id. at 356);
- This affidavit must contain with specificity all facts and law relied upon in justification of the dismissal (Id.);
- Unless specifically denied, the factual matters alleged in the motion are deemed admitted (Id.);
- The State can defeat the motion by filing an affidavit which specifically denies the material facts alleged in the defendant's affidavit (Id.);
- If material factual allegations in the motion are denied or disputed by the State, denial of the motion to dismiss is mandatory (Id.).

See also Washington State Superior Court Criminal Rule 8.3(c).

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

According to Division One in State v. Brown, 64 Wn. App. 606, 611, 825 P.2d 350 (1992), the Knapstad decision is based on the premise that the trial court has authority to dismiss a prosecution before trial "'if the State's pleadings including any bill of particulars, are insufficient to raise a jury issue on all elements of the charge.' The court observed that 'when the material facts of a prosecution are not in dispute, the case is in the posture of an isolated and determinative issue of law as to whether the facts establish a prima facie case of guilt.'" State v. Brown, 64 Wn. App. at 611 (citing State v. Knapstad, 107 Wash.2d at 352-53).

The Brown court went on to say:

> Under Knapstad, the entire charge is dismissed without prejudice. Because jeopardy has not yet attached, Crist v. Bretz, 437 U.S. 28, 38, 98 S.Ct. 2156, 2162, 57 L.Ed.2d 24 (1978) (jeopardy attaches when the jury is sworn), the State's right to appeal or to refile the charge is preserved. See, e.g., Serfass v. United States, 420 U.S. 377, 392, 95 S.Ct. 1055, 1064, 43 L.Ed.2d 265 (1975); State v. Chiles, 53 Wash.App. 452, 455, 767 P.2d 597 (1989); 3 W. LaFave & J. Israel, Criminal Procedure § 24.3, at 82 (1984). Under such circumstances, the defendant is not forced to endure-and the State is not put to the expense of-a useless trial. Yet, the State is also not foreclosed from challenging the dismissal or from refiling the same charge based on new or additional evidence. Knapstad, 107 Wash.2d at 357, 729 P.2d 48.

State v. Brown, 64 Wn. App. at 613.

In Brown, the defense moved to dismiss aggravating circumstances alleged in a capital murder case, while leaving intact the underlying charge. Brown, 64 Wn. App. at 607. In reversing the trial court's order dismissing the aggravating factor, Division One held that the Knapstad procedure did not apply for the following three reasons:

> First, the Knapstad procedure rests on the assumption that the entire charge is the subject of the motion to dismiss. Thus, where the Knapstad motion is granted, it is granted without prejudice, and the State may either refile the case or appeal the decision because jeopardy has not attached. Second, unlike this case, the evidence before the court in Knapstad was relatively simple. All of the material facts were clearly undisputed and could be summarized in two or three sentences. Third, the State conceded that a conviction was unwarranted under the facts, yet insisted that he had the right to proceed with trial.

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

Brown at 612, citing Knapstad, 107 Wn.2d at 351, 357.

A. Under Knapstad and Brown, The Defendant's Motion Should Be Denied Because the Defendant has not Moved to Dismiss All Counts

The Defendant argues for dismissal of fourteen of the fifteen charges pending against her; such a motion is not allowable under Brown and Knapstad. In Brown, the court held that partial dismissal of charges in response to a pretrial Knapstad motion is inconsistent with the principles of promoting "fairness and judicial efficiency" and is therefore not authorized. State v. Brown, at 614.

Here, as in Brown, the defense is not moving to dismiss all charges against her. Such a motion is inconsistent with the principles underlying the Knapstad ruling. Knapstad contemplates the dismissal of all charges against a defendant without prejudice, in order to weed out those cases that the State will not be able to successfully prove at trial, and thus promote judicial efficiency. Brown considered the application of that principle to a motion for partial dismissal of charges, and rejected it. The Brown court reasoned that if a court were to grant a motion to dismiss only some charges pre-trial, the defendant would continue to face trial on the remaining charge/s. Further, if the State were to later refile the dismissed charges under a different legal theory, which is permitted under Knapstad, it would be vulnerable to a motion to dismiss on grounds of double jeopardy and mandatory joinder. Such a ruling would deprive the State of its right to a fair opportunity to present its case against a criminal defendant. Further, it would not promote the principles of fairness and judicial efficiency which underlie the ruling in Knapstad.

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

B. Under Knapstad and Brown, the Defendant's Motion Should Be Denied because Material Facts are in Dispute and When all of the Evidence is Viewed in the Light Most Favorable to the State, the Facts Establish a Prima Facie Case of Theft Against the Defendant.

The defendant is charged by way of the First Amended Information with fourteen counts of theft (Counts I through XIV) and one count of assault (Count XV). Of the theft counts, Counts I through VII are charged as theft by deception, and Counts VIII through XIV are charged as theft by deception and theft by embezzlement. The defendant argues that we cannot establish a prima facie case of theft by deception. She does not challenge the State's ability to establish a prima facie case of theft by embezzlement. For the same reasons set out above in the State's argument that partial dismissal is not allowed under Knapstad, the Court should not dismiss one prong of a charge that contains two or more prongs of theft. Thus, for this reason alone, the court should deny the defense motion to dismiss Counts VIII through XIV.

The defense argues that the theft counts charged in Counts I through XIV should be dismissed for two reasons. First, she argues that the State cannot establish a prima facie case of theft by deception. Second, she argues that because she is a joint account holder with the victim, she is entitled to use the funds that he deposited into their joint account. As set out below, the State disputes both of these claims on the grounds that there are numerous material facts in dispute, and that the facts, when taken in the light most favorable to the State, do establish a prima facie case of theft against the defendant.

1. The Defendant's Motion to Dismiss Counts I - XIV Should Be Denied Because When All of the Evidence is Viewed in the Light Most Favorable to the State, the Facts Establish a Prima Facie Case of Theft Against the Defendant, and Because There are Material Disputed Facts.

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

As noted above, Knapstad and Brown both contemplate dismissal in cases that are not factually complex. That is not the case here. Our case involves a nine-page Certification for Determination of Probable Cause and literally thousands of pages of complex discovery. Clearly this was not the type of simple, single-charge case for which the Knapstad procedure is intended.

To establish a prima facie case of the crime of theft in the first degree by deception for each charge in Counts I - XIV, the State must prove that that the defendant obtained control over the assets of the victim through color and aid of deception and that the value of the assets that the defendant acquired exceeded $1,500.

To establish a prima facie case of the additional prong of theft by embezzlement in Counts VIII through XIV, the State must prove that the defendant did exert unauthorized control over the assets of the victim and that the value of those assets exceeded $1,500.

The records attached and incorporated into the Affidavit of Page Ulrey that accompanies this Response include interviews of Leonard Swenson, his daughter Beverly Swenson, Virginia Baker, the police report of Renton Police Detective P. Montemayor, the psychiatric report of Leonard Swanson written by Angela Heald, MD, and summaries of the financial records from Banner Bank, Boeing Employee Credit Union, and Bank of America. The evidence contained in these documents clearly establishes a prima facie case of theft by deception and theft by embezzlement against the defendant.

The State has an abundance of evidence that the defendant used deception to obtain Leonard's assets. The interviews of Leonard Swenson and Dr. Heald note that Leonard has an eighth-grade education. Leonard has physical disabilities and cognitive limitations and impairments that made him vulnerable to the defendant's deceptive and controlling tactics during the charged time period.

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

Leonard married at a fairly young age, and he and his wife eventually raised a family. Leonard provided for his family by working at a local automobile body shop in Renton. Due to Leonard's deficits, his wife handled the finances for the family over their 34 years of marriage. Leonard's cognitive limitations, combined with his solid work and family relationships throughout most of his adulthood, contributed to making him more trusting of others. In the summer of 2005, Leonard's wife was killed by a drunk driver. Losing her was devastating for him and threw him into a tailspin. About six months after his wife's death, Leonard began to go to Classics Sports Bar in Renton a couple of times a week. Eight to nine months later, he met the defendant at the bar. The first time he met her, he followed her home at her invitation. About a week later, she asked him to spend the night at her house. Leonard slept in her basement. Shortly after that, the defendant asked Leonard to move in with her. Leonard believed that O'Neill was single. In talking to his daughter sometime around this time period, he told her, "Lisa might be your next stepmother." State's Exhibit G, at 12.

During this period, the defendant did nothing to discourage Leonard's impression that they would marry someday. In his interview with Det. Montemayor, Leonard was shown a number of different checks he'd written during the charging period. When asked about a check he'd written to Big Five sporting goods store for $1500, Leonard first said that that was to buy himself a pair of shoes. When questioned about the amount, he stated that he couldn't remember what the check was for. When asked about a large check he wrote 12 days later to Frye's Electronics, he responded, "That's when she was getting a computer." State's Exhibit D, at 19. He said the defendant was going to pay him back. Regarding a check for $7000 he'd written the day before that, Leonard denied writing the check. When asked about a check written during the same time period to "Auto Glass" with the notation "Lisa Glass" in the memo line, Leonard

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

stated that that was for the windshield of the defendant's truck. When asked if the defendant told him why she didn't have any money, Leonard responded that he had hoped they might have a relationship one day. He said, "She said someday we might get married, that age don't make a difference." Id., at 21

Leonard's interviews with Detective Montemayor and Dr. Heald recount numerous lies that the defendant told him and on which he relied in agreeing to live with her and to hand over control of his finances to her. The defendant told him that her house belonged to her aunt and that she was taking care of it for her. The defendant told Leonard that she was single. The defendant told him that she would take care of his bills for him. The defendant told Leonard that if he paid off her truck for her, she would make payments to him of $500 per month. She told him to change his bank from Banner Bank, where he had banked for years, to BECU, because BECU could do better for him. In order to convince Leonard to give her money to buy the home she was renting, she told him that he could one day buy into the house.

It is uncontroverted that none of these statements made by the defendant were true. In fact, the defendant's home belonged to a man named Mark Foster, not to her aunt. The defendant was not single, but had been dating a man named Stewart Wallace for years. The defendant made no $500 payments to Leonard in return for his paying off her truck. Leonard had a relationship with Banner Bank; the tellers there knew him and watched out for him. His finances fared far worse once his money was away from the watchful eyes of Banner Bank and at BECU. The defendant never allowed Leonard the option of buying into her home.

In addition to using deception to obtain control over Leonard's assets, the defendant used physical and psychological abuse to coerce him into acquiescing to her requests. On one occasion, the defendant was angry after getting in an argument with her parents. She opened the

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

door to the basement, which Leonard was standing behind. She told him to get out of the way. When he was unable to, she shoved the door into him, knocking him down the flight of stairs. After Leonard fell, the defendant didn't go to him or ask him if he was injured. On another occasion, the defendant hit Leonard with a phone, and another time with a rusty saw. On another occasion when they were on the defendant's deck, she got angry at him and said, "I oughta throw you off the deck about twenty feet down on the rockery." State's Exhibit D, at 54. The defendant frequently called Leonard names, including "moron," "faggot," and most often, "leprechaun." After Leonard had his stroke, from which he suffered a speech impairment, the defendant, on the occasions when she would invite him out with her friends, told him "not to say nothing to nobody else. Don't talk. Don't talk at all…. I couldn't talk good anyways, so she told me to be quiet." Id., at 56. Leonard stated that the defendant told him he had to call out before coming up to the main floor of the house, because he wasn't supposed to be up there. The defendant stopped paying Leonard's cell phone bill, so he lost his cell phone. He was not allowed to use the defendant's phones. All of this evidence, taken in its totality, clearly establishes a prima facie case of theft by deception.

In addition, the State will introduce evidence that the defendant committed theft by embezzlement from the joint accounts she opened with Leonard by taking his assets in the account through on-line transfers to her account, cash withdrawals via ATM and debit cards, and telephone banking. Leonard states in his interview with Detective Montemayor that he had no knowledge of any of this activity because he did not have access to or knowledge of how to use a computer for banking, he had no control over ATM or debit cards, and he had no knowledge of how to bank by phone. In the past, when he banked at Banner Bank, Leonard paid all his bills by check. However, he stopped doing this when the defendant told she would pay his bills by

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

phone. As mentioned above, the defendant convinced Leonard to close his Banner Bank accounts that he had had for years, and to open a new checking, savings, and $10,000 line of credit for him at BECU because BECU could do better for him. Regarding the line of credit, Leonard said it was opened over the telephone "because Lisa always did dealin' with the bank on—on the phone, and I would say… she would tell me—she would tell me to say this and that on the telephone." Id., at 28. Regarding opening the BECU accounts and later the Bank of America joint accounts, Leonard stated that the defendant told him to go sit down while she talked to the bank employees. Apart from sitting in the lobby of the banks and signing forms when the defendant told him to do so, Leonard's interview makes clear he had no knowledge of the accounts or their use.

While Leonard continued to bring money into the relationship, the defendant did not. A review of the bank records and witness statements in this case indicate that Leonard began the relationship owning a home, a truck, two certificates of deposit worth a total of $90,000, life insurance, proceeds from a settlement from his wife's death, and ultimately, unemployment and social security benefits. At the point when he left the defendant's home, Leonard had lost all of these assets, and could not afford to pay his bills; his credit was ruined. The defendant, on the other hand, owned her expensive truck free and clear, had purchased the home she'd been renting, and had numerous other new possessions.

The following table sets out each charged count and the corresponding assets that were taken. It was created from the bank records that are incorporated into the Affidavit of Page Ulrey.

COUNT	DATE	ORIG. SOURCE	Amount of Theft	Use of Theft Proceeds
Count 1	10/10/06	Swenson Banner Bank CD	$ 23,910.04	Converted CD to cashier's check to pay off Lisa O'N
Count 2	11/21/07	Swenson Social Security check	$ 1,700.00	Online transfer to O'Neill separate Bank of America

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

Count 3	12/19/07	Swenson Social Security check	$	1,625.00	Online transfer to O'Neill separate Bank of America
Count 4	1/11/08	Proceeds from sale of Leonard's House	$	4,100.00	Online transfer to O'Neill separate Bank of America
Count 5	1/16/08	Swenson Social Security check	$	1,600.00	Online transfer to O'Neill separate Bank of America
Count 6	2/12/08	Swenson Social Security check	$	1,644.00	Online transfer to O'Neill separate Bank of America
Count 7	3/19/08	Swenson Social Security check	$	1,644.06	Online transfer to O'Neill separate Bank of America
Count 8	4/2/08	Platinum Escrow check to Swenson	$	4,900.00	Online transfer to O'Neill separate Bank of America
Count 9	4/9/08	Platinum Escrow check to Swenson	$	2,620.00	Online transfer to O'Neill separate Bank of America
Count 10	4/17/08	Swenson Social Security check	$	1,644.00	Online transfer to O'Neill separate Bank of America
Count 11	5/21/08	Swenson Social Security check	$	1,640.00	Online transfer to O'Neill separate Bank of America
Count 12	6/18/08	Swenson Social Security check	$	1,600.00	Online transfer to O'Neill separate Bank of America
Count 13	6/30/08	Swenson check from Law Offices of David Richardson	$	6,800.00	Online transfer to O'Neill separate Bank of America
Count 14	9/30/06-6/30/08	**All of the above plus items below:**	**$**	**55,427.10**	
		Swenson Banner Bank CD	$	1,500.00	Check from Swenson to O'Neill
		Swenson Banner Bank CD	$	10,000.00	Converted CD to cashier's check written to O'Neill
		Swenson Banner Bank CD	$	7,000.00	Check from Swenson to O'Neill
		Swenson Bank Withdrawal	$	2,000.00	Withdrawal from Swenson to O'Neill separate BECU
		Swenson Banner Bank CD	$	3,000.00	Withdrawal from Swenson to O'Neill separate BECU
		Swenson line of credit withdrawal	$	5,000.00	Withdrawal from Swenson to O'Neill separate BECU
		Count 14 TOTAL	**$**	**83,927.10**	

As detailed above, the evidence the State will introduce in this case establishes a prima facie case of theft by deception and theft by embezzlement committed by the defendant over the course of the charging period of the Information.

The State's overview of the evidence in this case as set out above makes it clear that there are an abundance of material disputed facts regarding the tactics employed by the defendant to obtain control of Leonard's assets through deception and embezzlement. All those issues of material fact must be resolved at trial.

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

2. The Defendant's Motion to Dismiss Counts II through XIII Based on the Argument that as a Joint Account Holder She is Entitled to the Funds in the Account Should Be Denied.

.

The defendant raises a second argument for dismissal of Counts II through XIII, claiming that the State cannot establish a prima facie case of theft from the joint checking and savings accounts that she opened with Leonard, claiming that as a joint account holder, she is entitled to those funds. The defendant's claim is incorrect both legally and factually.

The law in Washington State governing ownership of joint accounts states:

> Funds on deposit in a joint account without right of survivorship and in a joint account with right of survivorship belong to the depositors in proportion to the net funds owned by each depositor on deposit in the account, unless the contract of deposit provides otherwise or there is clear and convincing evidence of a contrary intent at the time the account was created.

RCW 30.22.090(2)

Leonard Swenson will testify that the defendant took him to Bank of America to set up new joint checking and savings accounts. The Bank of America records for those accounts indicate that as of the time of their opening until they were closed, Leonard Swenson deposited a total of $40,956 into the accounts. See Exhibit H. During the same period of time, the defendant deposited a total of $94 into the accounts. Id. Of this $40,952 that Leonard put into the joint accounts, the defendant transferred $37,365 from the accounts into her own personal account and used that money for her own expenses. Id.

Washington law does not allow a depositor to infer that they have the consent of the other depositor for use of funds held in a joint account. Rather, the law

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

requires that such consent be clearly expressed, either by contract or by clearly stated intent at the time of the opening of the account. Here, there was no contract of deposit indicating that Leonard intended to share his money in the joint account with the defendant. Further, the defendant puts forth no evidence to establish that Leonard intended to share all of his funds in that account. Instead, the defendant claims that Leonard's consent to her use of the funds is established by virtue of the fact that they had a joint account together.

The State will introduce evidence that the defendant obtained the victim's funds through deception and undue influence. She took control of the victim's finances by promising him that she would take care of them, and pay his bills for him. She also played on his desire to remarry, and hinted at the possibility that they could do so one day. She established the joint account at Bank of America so that she could have unfettered access to Leonard Swenson's assets. By putting her name on the account, the defendant was able to transfer money out of the account into her own separate account for her own use without the victim's knowledge through on-line transfers. On the occasions when she actually did obtain Leonard's consent to a transfer of money, she obtained that consent by lying to Leonard, or by the use of undue influence. Clearly, there are material disputed facts regarding the establishment and use of the joint account that must be resolved at trial.

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429

IV. CONCLUSION

For all of the foregoing reasons, the State asks this Court to deny the Defendant's Motion to Dismiss under State v. Knapstad.

Dated this 24th day of August, 2011.

For DAN SATTERBERG, King County Prosecuting Attorney

By:_____
KATHY VAN OLST, WSBA No. 21186
Senior Deputy Prosecuting Attorney

By:_____
PAGE ULREY, WSBA No. 23585
Senior Deputy Prosecuting Attorney

Daniel T. Satterberg, Prosecuting Attorney
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, Washington 98032-4429