



State v. Mermis

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Concurring: C. Kenneth Grosse, H Joseph Coleman

UNPUBLISHED OPINION

This is the second appeal in this case. In *State v. Mermis*, 105 Wn. App. 738, 752, 20 P.3d 1044 (2001) (Mermis I), we decided the three-year statute of limitations did not bar the case against John Mermis for theft by deception and exertion of unauthorized control of Terry Johnson's Dodge Viper and the evidence supported the jury's guilty verdict. But we remanded for a new trial because the instructions did not ask the jury to decide whether the crime was committed within the three-year statute of limitations for theft.¹ On remand, a jury again convicted Mermis of theft by deception and exertion of unauthorized control of Johnson's Dodge Viper. In this appeal, Mermis challenges the trial court's decision that the State was entitled to introduce evidence related to Mermis's statements that he owned a cruise ship to prove theft by deception. Mermis also argues the to-convict jury instruction erroneously omits an essential element of the crime of theft by deception and there is insufficient evidence to sustain the jury verdict convicting him of unauthorized control. We affirm Mermis's conviction for theft by deception and exertion of unauthorized control.

FACTS ²

In August 1995, Ken Bernard introduced John Mermis to Terry Johnson. Johnson was a successful businessman and entrepreneur who had recently purchased Bernard's watersports business. Johnson and Mermis immediately hit it off and in the following weeks saw each other almost every day. Through representations about his background and his business dealings, Mermis presented himself as a successful businessman with significant assets who had substantial experience in the maritime and aviation industries. Mermis also created the impression that he was compassionate and devoted to his children and family.

Mermis told Johnson he was a retired airline pilot for United Airlines, he was one of the founders of the Bayliner Marine Corporation and the Mirage boat company, and he held a ship captain's license for large vessels. Mermis said he was married to a federal judge. Mermis claimed he was a three-time Vietnam veteran and after his wife left him he returned to Vietnam to adopt two Vietnamese boys to raise with his two boys. Mermis also told Johnson he collected cars, including a very rare Porsche from Germany.

When Mermis met Johnson, Mermis was promoting investment in his marine adventure cruise



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company, Seaquest Expeditions, Inc. (Seaquest). Mermis told Johnson he owned a cruise ship, the Crown Princess Martha,³ and was in the process of restoring it with \$5 million of his own money. Mermis planned to use the Crown Princess Martha for 5-14 day excursions to Alaska, Mexico, and Belize. Mermis gave Johnson a marketing plan that had been prepared for Seaquest. The information in the plan was consistent with Mermis's representations to Johnson. The plan described the adventure cruise business, stated the Crown Princess Martha had been totally renovated and projected aggregate sales by the end of the fifth year of \$22 million. In the section entitled "Biographies of Corporate Officers and Senior Managers,"⁴ Mermis was identified as the president of Seaquest. According to the description of Mermis's background, he had an industrial engineering degree from the University of New Mexico, graduated from the University of Oregon Business School, had a 100 ton Master's license and substantial and extensive aviation experience.

On September 6, Mermis overheard Johnson on the phone negotiating with a car dealer to sell his Dodge Viper for \$55,000. Mermis offered to save Johnson the commission and buy the Viper directly from him for \$55,000. Johnson agreed to sell Mermis the car and told his spouse to give Mermis the keys because he "wanted to drive it."⁵ Mermis had continuous possession of the Viper from that point on.

Johnson testified that he did not immediately demand Mermis pay him because Mermis had substantial assets and he trusted him. "Mr. Mermis and I were seeing each other on a daily basis. I had no reason to believe that he wasn't going to pay me. . He gave me lots of information that made me feel comfortable."⁶

On September 18, shortly after Mermis agreed to buy the Viper from Johnson, Johnson told Mermis he was concerned about the renovation of his yacht. Mermis went with Johnson and Gino D'Cafango, a ship captain recently hired to oversee the renovation work, to inspect the yacht. After inspecting the work done on the yacht, Mermis told Johnson the quality was inferior, and the \$250,000 Johnson had spent was excessive. Mermis said his crew was available to do the work and offered to complete the renovation within 30 days for \$50,000. Johnson told D'Cafango to work with Mermis and accepted Mermis's offer. Johnson gave Mermis \$25,000 to buy materials. D'Cafango testified Mermis told him he was a ship captain and a pilot and his crew had just finished working on his cruise ship, which was worth \$5.7 million. D'Cafango testified Mermis never did any work on the yacht and he never saw Mermis's crew.

On September 26, Mermis came to Johnson's house and said he needed the title to the Viper in order to get new license plates. Mermis also asked Johnson to sign a bill of sale. Johnson signed the title and the bill of sale. Mermis told Johnson, "he would stop by his apartment and pick up his checkbook and bring {Johnson} a check for \$55,000."⁷ Mermis never paid Johnson and kept the Viper.

On September 18, 1998, the State filed charges against Mermis alleging that on September 26, 1995, he committed first degree theft of the Viper by deception and exertion of unauthorized control.⁸ The



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jury convicted Mermis. In the first appeal, we held the evidence supported the jury's conviction of Mermis but remanded for a new trial because the jury was not instructed to decide whether the theft had occurred within the three-year statute of limitations.

At the beginning of the second trial, Mermis filed an ER 404(b) motion to exclude evidence of prior bad acts and business dealings with third parties that were irrelevant and unrelated to the crimes charged. Mermis argued the court should exclude evidence concerning his ownership of the Crown Princess Martha because the issues involved in a maritime mortgage were very complex and were unrelated to the crimes charged. The State argued that evidence regarding Mermis's business dealings and ownership interest in the Crown Princess Martha was necessary to prove the elements of the crime of theft by deception. The court ruled ER 404(b) did not apply and the evidence regarding Mermis's business dealings and ownership interest in the cruise ship was admissible to prove the elements of the crime of theft by deception.

The jury convicted Mermis of theft in the first degree by deception and exertion of unauthorized control.⁹ Mermis appeals.

ANALYSIS

Admission of Evidence Related to the Crown Princess Martha

The State's theory was that Johnson let Mermis take possession of the Viper without paying for it because he relied on Mermis's representations. In particular, Mermis's statements about his ownership and investment in the Crown Princess Martha led Johnson to believe Mermis had substantial assets and was a successful businessman. The trial court ruled the State had "the right to prove the elements of the offense that they've alleged,"¹⁰ and "all of the events relating to the ownership of the vessel . is admissible and is not, according to this court's ruling ., 404(b) evidence."¹¹ Mermis contends the trial court erred in ruling ER 404(b) did not apply.¹² Mermis claims that because his statement that he owned the ship was true, the trial court's decision to allow the State to present evidence about his financial circumstances and his interest in the Crown Princess Martha violated ER 404(b). Mermis also contends the trial court violated Article IV, section 16 of the Washington State Constitution by failing to rule as a matter of law that Mermis owned the Crown Princess Martha.

This court reviews a trial court's rulings on the admissibility of evidence for abuse of discretion. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Discretion is abused when it is exercised in a manifestly unreasonable manner, or based on untenable grounds or reasons. *Id.*¹³

The State has the burden to prove the elements of the crime charged beyond a reasonable doubt. *State v. Roberts*, 88 Wn.2d 337, 340, 562 P.2d 1259 (1977) (citing *In re Winship*, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). To convict Mermis of theft by deception the State had to prove



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Mermis (1) obtained control of the property of another, i.e., Johnson's Viper, (2) by color or aid of deception, (3) with the intent to deprive the owner of the property. RCW 9A.56.020(1)(b). "By color or aid of deception" means that the deception operated to bring about obtaining the property. RCW 9A.56.010(4). It is not necessary that deception is the sole means of obtaining the property. State v. Casey, 81 Wn. App. 524, 527, 915 P.2d 587 (1996) (quoting State v. Wellington, 34 Wn. App. 607, 611, 663 P.2d 496 (1983)). Deception is broadly defined to include conduct or words intended to create a false impression even though a particular statement or act might not be false. Casey, 81 Wn. App. at 528.

'Deception' occurs when an actor knowingly: (a) Creates or confirms another's false impression which the actor knows to be false; or (b) Fails to correct another's impression which the actor previously has created or confirmed; or . (e) Promises performance which the actor does not intend to perform or knows will not be performed.

RCW 9A.56.010(5).¹⁴ The statutory definition of deception does not require an express misrepresentation. Instead, the focus is on the false impression created rather than the falsity of any particular statement. Wellington, 34 Wn. App. at 610.

Johnson testified that he trusted Mermis and let Mermis take the Viper without first paying for it because he believed Mermis was a successful businessman with substantial assets.¹⁵

Q. Why did you give the car to Mr. Mermis before you got the cash?

A. Because I trusted him.

Q. Why did you trust him?

A. Because of what he told me about himself.

Q. What did you believe about Mr. Mermis based on the things he told you?

A. I believed Mr. Mermis was a successful businessman. Because he told me he had five million dollars invested in a vessel. That's a substantial amount of money. I believe he was credible. I relied on a lot of the information that Mr. Mermis gave me about himself, in terms of his credibility, his credentials, being the founder of Bayliner and being a former airline pilot and having served three terms in Vietnam and went back and adopted two oriental children. I thought he was a decent, substantial individual.¹⁶

Q. What representations, if any, did Mr. Mermis make to you that induced a sense of trust in you?

A. Well, over a period of three weeks to probably a month, and in some cases I heard it several times,



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not just to myself, but also while I was present to other people, that Mr. Mermis was, No. 1, an airline pilot for United Airlines. That Mr. Mermis had a 100-ton license as a captain on various ships and vessels. That Mr. Mermis' ex-wife was a federal judge in Oregon. That Mr. Mermis was one of the founders of Bayliner Corporation.

He was also one of the founders of a company called Mirage, which is a smaller boat. And that he had what they call hull number one, the very first part or first boat that was pulled out of the molds, in his garage. I was told by Mr. Mermis that he had served three terms in Vietnam. . And during one of those terms in Vietnam, I was told by Mr. Mermis that he was present with a squad of soldiers that invaded a village and killed two parents who had two children, Vietnamese children. And that after he got back, his wife, the federal judge, ran off with her high school sweetheart, left him. He decided to quit flying for United Airlines and get a job that kept him home more so he could be a family man and take care of his two boys. And he went back to Vietnam and brought back these two Vietnamese boys and adopted them, raised them.

He told me that all four of his children were college graduates. That one of them was a U.S. Marshall down in Oregon. Another one was veterinarian and one was a vice president for Costco. The fourth one was, I think he was a state patrolman in Oregon.

He told me that he owned a ship in England. The name of the ship was the Crown Princess Martha. The ship was very rich in history, had been built in 1918 or something like that. Accommodations on board from Hitler. It was taken over by Germany during the Second World War.

And he was in the process of restoring the ship, and he put five million dollars of his own money in it. And he planned to use it as a cruise ship, a venture cruise ship. And he had a business plan supporting that. It was about that thick.

Talking about making this adventure cruise and using it in the inside passage in the summertime and down to Mexico. Use it there in the winter time.

He told me that. I can't remember all of them.

Q. Why did this - what about these statements made you feel that Mr. Mermis was trustworthy?

A. I got a sense that Mr. Mermis was, No. 1, very financially stable. And No. 2, he was a family man. No. 3, that he had a lot of compassion for people. He went to Vietnam and adopted two children when he was present when they killed his parents. That he had the presence of mind and family structure so embedded in him that he was willing to quit his job as pilot to stay at home and take care of his four children.

He told me he collected cars. He had a number of automobiles that he brought over to the house from



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time to time, and he had a Porsche that he told me came from Germany. You can't get them in the United States anymore. It was very special Porsche and had a certain kind of engine in it.

All of his cars were kept very well. He said he never sold anything. He bought them and kept them forever.

So I felt Mr. Mermis was a very credible person.¹⁷

The State presented evidence to prove many of Mermis's statements to Johnson were not true and Mermis intended to create a false impression about his background and financial means to obtain Johnson's trust and deprive him of his property. The evidence and testimony at trial established Mermis did not have a degree in engineering or business, his former spouse was not a federal judge, he had not been in the military, he did not adopt two children from Vietnam, he did not have a ship captain's license, he never worked as a pilot for United Airlines and he was not a founder of either the Bayliner or Mirage boat companies. Mermis was employed as a part-time bookkeeper for Robbins Travel Service, Inc. and earned approximately \$14 an hour.

The State also presented evidence about Mermis's ownership interest and financial dealings related to the Crown Princess Martha. The evidence established Mermis did not purchase the Crown Princess Martha and without notice to the owners was able to register the Crown Princess Martha in his name. Additionally, Mermis did not invest any of his own money to refurbish the ship.

In September 1993, Mermis entered into an agreement with George Doubleday, d.b.a. Nathan M. Malle Associates (NMA), to purchase the Crown Princess Martha. NMA held a promissory note that was in default from Magellan Cruise Lines, Ltd. (Magellan). The note was secured by a First Naval Mortgage on the Crown Princess Martha. In the agreement with NMA, Mermis agreed to obtain assignments of the outstanding liens against the ship and institute a court sale to foreclose on NMA's mortgage. Mermis promised to pay at least \$520,000 in cash to purchase the Crown Princess Martha at the court sale, and he warranted that he had the capability to fund the \$520,000 purchase.¹⁸ In October 1993, Rod Carman, the attorney representing NMA and Mermis, provided Mermis with a letter authorizing him to take all reasonably necessary action on behalf of NMA with respect to the outstanding liens on the Crown Princess Martha.

Also in October 1993, Mermis entered into an agreement to buy the Crown Princess Martha from Magellan for \$50,000. The "Agreement of Sale" with Magellan stated that Mermis would take title of the ship subject to the \$366,000 mortgage held by NMA. According to Magellan's owner, Tony Elliott-Cannon, Mermis never paid the \$50,000, and he made no payments on the mortgage.

In December 1993, Mermis told Carman he needed a notarized letter to pay the outstanding fees for the ship's Panama registration. After consulting with Doubleday, Carman drafted a letter for Mermis that expressly stated Mermis was not authorized to release or modify NMA's mortgage on the ship.¹⁹



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Later, Mermis used the documents he had obtained to transfer NMA's mortgage to himself. Mermis then registered the Crown Princess Martha solely in his name in Belize.²⁰ In 1998, NMA and Magellan regained possession of the ship.²¹

Mermis argues the trial court erred in admitting evidence about the Crown Princess Martha because as a matter of law he was the legal owner of the ship. Mermis relies on the Agreement of Sale with Magellan and that the ship was registered in his name. But Mermis ignores the undisputed evidence that he never paid NMA or Magellan to purchase the ship, and he disregards the circumstances related to how he obtained registration of the ship in his name. Moreover, to establish theft by deception, the State did not have to prove a particular statement was false. Rather, the State had to show Mermis's representations were misleading and part of the false impression intentionally created by Mermis.²²

The State also presented evidence about Mermis's representations that he spent \$5 million of his own money to refurbish the Crown Princess Martha and it was ready to come to the United States to begin service in his adventure cruise ship business. According to the undisputed evidence, Mermis did not invest any of his own money to refurbish the ship. Only \$20,000 was invested in repairing the ship and the Crown Princess Martha was in very poor condition and not serviceable as a cruise ship.

The trial court did not abuse its discretion in admitting evidence about Mermis's agreements to purchase the Crown Princess Martha in September and October 1993, his financial circumstances and ability to pay the amounts due under the agreements, and the amount of money actually invested in the ship and spent on renovations, to prove theft by deception.²³ This evidence was relevant to prove the charged crime of theft by deception and was not "evidence of other crimes, wrongs or acts" under ER 404(b). Evidence is relevant if it has a tendency to prove or disprove a fact that is of consequence in the context of the other facts and applicable substantive law. ER 401; 5 Karl B. Tegland, Washington Practice: Evidence sec. 401.2, at 214 (4th ed. 1999). Mermis's representations that he owned the ship and had invested \$5 million of his own money in refurbishing it were an important part of the false impression Mermis created that led Johnson to trust Mermis and give him the Viper with his promise to pay later.

Relying on Article IV, section 16 of the Washington State Constitution, Mermis argues the trial court had a constitutional obligation to rule as a matter of law that Mermis owned the Crown Princess Martha because it is a legal question.²⁴ Whether Mermis obtained an ownership interest in the Crown Princess Martha was a factual, not a legal, question. The trial court did not err by failing to rule as a matter of law that Mermis owned the Crown Princess Martha.

Jury Instructions

Mermis contends "reliance" is an element of theft by deception and the trial court erred in refusing to include the element of reliance in the jury instructions.²⁵ Mermis's counsel challenged the



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omission of "reliance."²⁶ "I will note that the definition of color or aid of deception means that the deception operated to bring about or the obtaining of property of services without regard to the reliance upon the means, on the deceptive behavior."²⁷ The court ruled, "As we discussed in chambers, I believe that the language of 'operated to bring about' allows you to argue that the victim must in some way rely on the deceptive representation. The exception is noted."²⁸ Mermis contends that even if the instruction defining "by color or aid of deception" was sufficient to inform the jury of the element of actual reliance, the "to convict" instruction does not contain this element.

Alleged errors of law in jury instructions are reviewed de novo. *State v. Willis*, Wn.2d , 103 P.3d 1213, 1215 (2005). Jury instructions are proper when they permit the parties to argue their theory of the case, do not mislead the jury, and correctly inform the jury of the applicable law. *Id.*

In *State v. Casey*, 81 Wn. App. 524, 528, 915 P.2d 587 (1996), this court concluded that reliance was an essential element of the crime of theft by deception and its precursor, larceny by false pretenses.²⁹ We held the Legislature did not change the essential elements of the crime when it enacted the theft statute to replace larceny by false pretenses because it kept the operative language "by color or aid of deception," which requires reliance by the victim.³⁰

First, the terms "theft" and "larceny" are legally equivalent. Second, the Legislature chose to preserve the operative language "by color or aid of." Finally, substitution of the term "deception" for "false pretenses" merely indicates an intent to broaden the scope of the statute to include more kinds of devious behavior.

Id. (footnotes omitted). "Reliance is established where the deception in some measure operated as inducement." *Id.* at 529 (citing *State v. Zorich*, 72 Wn.2d 31, 34, 431 P.2d 584 (1967)).

"To-convict" instructions must contain all the elements of the crime. *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). Where an element is omitted from the "to-convict" instruction, other instructions that supply the missing element do not cure the defect. *Id.*

The "to-convict" instruction required the jury to find Mermis obtained control over Johnson's property by color or aid of deception. To convict the defendant of the crime of theft in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt.

(1) (a) That on or about September 26, 1995, the defendant, John Mermis, wrongfully obtained or exerted unauthorized control over property, to wit" {sic} a 1994 Dodge Viper automobile, of another or (b) That on or about September 26, 1995, the defendant committed the last act in a series of acts that were part of a single, continuing criminal impulse or intent and were pursuant to the execution of a general larcenous scheme or plan to, by color or aid of deception, obtain control over property, to wit: a 1994 Dodge Viper Automobile, of another;



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- (2) That the property exceeded \$1500 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.³¹

The jury instructions defined "by color or aid of deception." "By color or aid of deception means that the deception operated to bring about the obtaining of the property or services. It is not necessary that deception be the sole means of obtaining the property or services."³² Here, the to-convict jury instruction did not omit the essential elements of theft by deception and the jury instructions correctly informed the jury of the applicable law.³³

Theft by Exertion of Unauthorized Control

Mermis concedes sufficient evidence supports the jury verdict for theft by deception, but contends the evidence is insufficient to support the jury verdict for theft by unauthorized control and his conviction must be vacated.³⁴

Mermis was charged with theft by two alternative means: theft by deception and theft by unauthorized control. See RCW 9A.56.020. The jury returned a general verdict of guilty. Jury unanimity is required unless there is substantial evidence to support each of the alternative means charged. *State v. Linehan*, 147 Wn.2d 638, 645, 56 P.3d 542 (2002). If the evidence is insufficient to support the jury's verdict by either of the means submitted to the jury, Mermis's conviction cannot be affirmed. *State v. Ortega-Martinez*, 124 Wn.2d 702, 708, 881 P.2d 231 (1994).

A person commits the crime of theft in the first degree when he exerts unauthorized control over the property of another.³⁵ RCW 9A.56.020(1)(a). Property of another is property "in which another person has an interest, and the defendant may not lawfully exert control over the item absent the permission of that other person." *State v. Pike*, 118 Wn.2d 585, 590, 826 P.2d 152 (1992). Mermis claims that once he took possession of Johnson's Viper on September 6, 1995, Mermis had a superior possessory interest in the car. Mermis argues he cannot be convicted of theft by unauthorized control because the car was not the "property . of another" under RCW 9A.56.020(1)(a).

In *Mermis I*, this court squarely rejected the same argument. We held that when a thief takes delivery of goods by deception, or obtains title by fraud, he obtains at best voidable title, and the true owner



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has a right of possession superior to any claim of the wrongdoer.³⁶ Mermis I, 105 Wn. App. at 748-49. "Mermis had at best voidable title, and Johnson retained a possessory interest superior to Mermis' {sic}." Mermis I, 105 Wn. App. at 751. Likewise in the second trial, a rational trier of fact could have found beyond a reasonable doubt that the car was the "property of another." Because Mermis originally obtained control by deception,³⁷ the evidence was sufficient to support a finding of guilt of theft by unauthorized control.³⁸

CONCLUSION

The trial court did not abuse its discretion in admitting evidence of Mermis's misrepresentations to Johnson. The "to convict" jury instruction did not omit an element of the crime of theft by deception and there was sufficient evidence to support a finding of guilt of theft by unauthorized control. We affirm Mermis's conviction for theft in the first degree.

1. RCW 9A.04.080(1)(h).
2. The facts of this case are set forth in Mermis I and will not be repeated except as necessary to explain our analysis.
3. The cruise ship was named "Sport Rover," "Crown Princess Martha" and "Emerald Sea" at different times. When and how the name was changed is not relevant to the issues in this case, so the ship will be referred to throughout as the Crown Princess Martha.
4. Exhibit 12.
5. Agreed Report of Proceedings (ARP) at 117.
6. ARP at 119-20.
7. ARP at 152.
8. The Information states: That the defendant JOHN E. MERMIS in King County, Washington on or about September 26, 1995, with intent to deprive another of property, to-wit: a Dodge Viper having a value in excess of \$1,500, did obtain control over such property belonging to Terry Johnson by color and aid of deception, and, did exert unauthorized control over such property; Contrary to RCW 9A.56.030(1)(a) and 9A.56.020(1)(a) and (b).. Clerk's Papers (CP) at 1.
9. The court imposed a standard-range sentence.
10. RP (1/8/03) at 33.
11. RP (1/14/03) at 364-65.



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12. ER 404(b) provides: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

13. A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

14. These definitions comprise the jury instruction defining "deception" that was given in this case. See CP at 121.

15. Because Johnson died between the first trial and the second, the State used the transcript of his testimony at the first trial in presenting its case.

16. ARP at 74-5.

17. ARP at 137-40.

18. In the agreement, Mermis agreed that money from the court sale would be disbursed to the entities with outstanding liens against the ship, including NMA, and Mermis agreed to act as NMA's fiduciary to structure the admiralty sale process to ensure that NMA would receive at least \$420,000 from the sale proceeds.

19. Carman and John Devine, a businessman with experience in the maritime industry who introduced Mermis to Doubleday, testified that when Carman gave Mermis the notarized letter with the express limitation that Mermis could not release or modify NMA's mortgage on the ship, Mermis was furious and threatened to sue Carman's law firm.

20. Devine testified that a few days after Mermis obtained the letter from Carman, Mermis asked Devine to go to Olympia with him. Devine agreed, but when he asked Mermis why they were going, Mermis replied that "he didn't want to tell {him} in the event that {he} would ever be on the witness stand, so {he} wouldn't have to lie." RP (01/14/03) at 367. Devine said that Mermis went to the office of licensing in Olympia and obtained a document called an apostille, then had a courier pick up the document to send it to Panama. Carman and Devine testified that they later learned that the letter from Carman and the apostille Mermis picked up in Olympia were used by Mermis to transfer NMA's mortgage to himself and obtain registration for the ship in his name.

21. Elliott-Cannon and NMA later sold the ship, and, after being transferred a number of times, the ship was sold to a Swedish company for use as a hotel ship in Sweden.

22. The State did not argue Mermis did not own the ship because there was an outstanding mortgage on it. Mermis's reliance on *Graf v. State*, 118 Neb. 485, 225 N.W. 466 (1929), *Criner v. State*, 92 Fla. 483, 109 S.417 (1926), *State v. Eudaly*, 188 S.W. 110 (1916), and *Burroughs v. State*, 21 Md. App. 648, 320 A.2d 587, 591 (1974), is therefore misplaced.



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23. Because we agree with the trial court's conclusion that ER 404(b) did not apply, we need not address Mermis's alternative argument that even if some of the evidence was admissible under ER 404(b), the trial court admitted more evidence than was relevant. Likewise, we need not address Mermis's argument that evidence of his misrepresentations regarding the cruise ship were inadmissible under State v. Hartwig, 45 Wn.2d 76, 273 P.2d 482 (1954) (while evidence regarding defendant's fraudulent statements was admissible to prove theft by deception, evidence of other similar fraudulent acts was not admissible).

24. Article IV, section 16 provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

25. Although Mermis's proposed instructions did not include any different language regarding "reliance" as an element of the crime, omission of an element of the crime charged from the "to convict" instruction is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Thomas, 150 Wn.2d 821, 842-43, 83 P.3d 970 (2004).

26. See CP at 62-94 (especially 83 and 85).

27. RP (01/27/03) at 1251.

28. RP (01/27/03) at 1251.

29. The victim's reliance on false representations has long been recognized as an element of theft by deception. In State v. Zorich, 72 Wn.2d 31, 34, 431 P.2d 584 (1967), the Court stated: It is not sufficient for there to be merely a false representation, but the victim must have relied upon it. However, the false representation need not be the sole means of inducing the defrauded person to part with his money, but it is sufficient if such representation was believed and relied upon by such person and in some measure operated to induce him to part with his property. See also State v. Cooke, 59 Wn.2d 804, 371 P.2d 39 (1962); State v. Peterson, 190 Wash. 668, 70 P.2d 306 (1937).

30. Compare RCW 9A.56.010(4), (5) and RCW 9A.56.020(1)(b) with former RCW 9.54.010(2).

31. CP at 116 (emphasis in original). This instruction is based on WPIC 70.02, 11A Washington Pattern Jury Instructions -- Criminal, 70.02 at 38 (2d ed. 1994).

32. CP at 120. This is WPIC 79.03, 11A Washington Pattern Jury Instructions -- Criminal, 79.03 at 112 (2d ed. 1994). This instruction is identical to the statutory definition of "by color or aid of deception" in RCW 9A.56.010(4). While the WPIC's are not binding on the court, they are persuasive authority. State v. Mills, 116 Wn. App. 106, 116 n.24, 64 P.3d 1253, rev. granted, 75 P.3d 969 (2003).

33. The New Jersey cases Mermis relies on in his reply brief do not support a different conclusion. The instructions given in State v. Boratto, 80 N.J. 506, 404 A.2d 604 (1979), and State v. Varlese, 171 N.J. Super. 347, 409 A.2d 285 (1979), did not use the operative "by color or aid of deception" language that was included in the "to convict" instruction given in this case. Moreover, Johnson's actual reliance on Mermis's misrepresentations was supported by uncontroverted evidence.



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Johnson testified that he relied on Mermis's numerous false representations when he decided Mermis was trustworthy enough to take possession of the car before paying for it.

34. Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). The reviewing court must defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. *State v. Gerber*, 28 Wn. App. 214, 216-17, 622 P.2d 888 (1981). Thus, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

35. Under RCW 9A.56.010(19), "wrongfully obtains" or "exerts unauthorized control" means: (b) Having any property or services in one's possession, custody or control as . {a} person authorized by agreement . to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.

36. Mermis does not challenge the jury instruction that "{t}itle obtained by color or aid of deception does not convey to the wrongdoer an interest in the property superior to that of the true owner." CP at 124.

37. Mermis agrees that "title obtained by theft by deception is voidable," and voidable title is not superior to the possessory interest held by the original owner. App. Br. at 91, n.10. But not only is title obtained by the crime "theft by deception" voidable, under this court's decision in *Mermis I*, title obtained where delivery is obtained by deception or fraud is voidable, too. Thus even if the jury did not find all the elements of theft by deception occurred on September 6, e.g., if they found the theft of the car by deception was not complete until Mermis obtained the certificate of title and bill of sale on September 26, there was also sufficient evidence to support a finding that when Mermis obtained possession of the car on September 6, he did so by deception and thus obtained only voidable title subject to Johnson's continuing superior possessory interest.

38. Mermis also argues that this court in *Mermis I*, 105 Wn. App. 738, improperly relied on RCW 62A.2-507(2) in concluding that Johnson had a superior possessory interest in the car. Because we conclude the evidence was sufficient to support a finding of theft by unauthorized control based on Johnson's superior possessory interest in the car after Mermis obtained possession by deception, we need not address Mermis's arguments that RCW 62A.2-507(2) does not apply or that he was denied due process in his first appeal when this court cited RCW 62A.2-507(2) in its opinion.

