

Maw for six felony counts of Unsworn Falsification in the First Degree,³ one count for each year between 2009 and 2014 that he purportedly applied for PFDs and lied on the applications (Counts 1, 3, 5, 7, 9, and 11). The State further indicted Mr. Maw for six felony counts of Theft in the Second Degree,⁴ one count for each year that he allegedly received a PFD disbursement (Counts 2, 4, 6, 8, 10, and 12). Mr. Maw filed a motion to dismiss the second indictment on November 6, 2017;⁵ the State replied on January 8, 2018;⁶ and Mr. Maw filed a sur-reply on January 18, 2018.⁷ Mr. Maw submitted a copy of the grand jury transcript and copies of two grand jury exhibits (Grand Jury Exhibits 1 and 3) with his motion. For the reasons elaborated on below, the court GRANTS Mr. Maw's motion. The second indictment is hereby dismissed.⁸

B. *The Grand Jury Hearing*

The State argued to the grand jury that Mr. Maw committed unsworn falsification in the first degree when he allegedly answered “no” to the question on the 2009 through 2014 PFD applications asking “Were you gone from the State for more than 90 days?” The State claims that Mr. Maw was in fact outside Alaska each year from 2008 through 2013 for more than 90

³ ALASKA STAT. ANN. § 11.56.205 (West, Westlaw through Nov. 21, 2017).

⁴ *Id.* § 11.46.130(a)(1).

⁵ Motion to Dismiss Second Indictment, Case No. 1JU-16-43 CR (Nov. 16, 2017) [hereinafter *Motion to Dismiss*].

⁶ Opposition to Motion to Dismiss Second Indictment, Case No. 1JU-16-43 CR (Jan. 8, 2018) [hereinafter *Opposition*].

⁷ Reply in Support of Motion to Dismiss Second Indictment, Case No. 1JU-16-43 CR (Jan. 18, 2018) [hereinafter *Sur-reply*].

⁸ This order memorializes and explains the court's decision on the record on March 5, 2018 stating its intention to dismiss the second indictment. *See* March 5, 2018 Hearing at 8:36:55 a.m. to 8:37:27 a.m.

days.⁹ The State further argued that Mr. Maw committed theft by deception. The State claimed that the Permanent Fund Division disbursed PFD money to Mr. Maw each year precisely because he (allegedly) lied about how long he was outside the state. If Mr. Maw had answered “yes” to the 90-day question, he would have been prompted to answer additional questions so that the Permanent Fund Division could more accurately determine if he was still eligible notwithstanding the time he spent outside Alaska. But he allegedly did not and therefore deprived the Permanent Fund Division of the opportunity to make an informed decision. In the State’s words: Mr. Maw “didn’t give [the Permanent Fund Division] the opportunity to get the appropriate information to make that eligibility determination. He made it for them.”¹⁰

The State claims that it presented sufficient evidence to support its argument that Mr. Maw filled out, filed, and benefitted from the disputed PFDs. Namely, (1) Mr. Maw allegedly signed off on the disputed PFD applications using a verified electronic signature; (2) he was allegedly in Alaska when each of the disputed applications was filed; and (3) the PFD monies were disbursed into a bank account allegedly belonging to him.¹¹

The State called two witnesses at the grand jury hearing: PFD Investigator Shawn Stendevad and Department of Homeland Security (DHS), Homeland Security Investigations Special Agent Timothy Brady (“SA Brady”). The State instructed the

⁹ The State indicted Mr. Maw over PFD fraud for 2009 through 2014. PFD eligibility for any given year, however, is based on information from the preceding year. For example, 2009 eligibility is based on one’s situation in 2008. Hence the reference here, as well as at other places in the order, to the 2008 through 2013 time range.

¹⁰ Grand Jury Transcript at p. 57 lns. 17-20.

¹¹ See, e.g., *Sur-reply*, *supra* note 7, at p. 2.

grand jurors as to the definition of unsworn falsification in the first degree (AS 11.56.205), unsworn falsification in the second degree,¹² theft in the second degree (AS 11.46.100(a)(1)), and the definitions of “theft,”¹³ “theft by deception,”¹⁴ “Permanent Fund Dividend,”¹⁵ “deception,”¹⁶ “intentionally,”¹⁷ and “knowingly.”¹⁸ Otherwise, it did not provide the grand jury with any further legal instruction.¹⁹ The State introduced six exhibits. These included: Exhibit 1, PFD records; Exhibit 2, Alaska Airlines records; Exhibit 3, a summary of Mr. Maw’s border crossing records; Exhibit 4, employment records for the United Cook Drift Association; Exhibit 5, a summary table showing dates PFD applications were filed, dates signed, the application type, when the PFDs were issued, their value, and where they were deposited; and Exhibit 6, “Roland Maw timeline, location summary, 2008 through 2010.”²⁰

¹² ALASKA STAT. ANN. § 11.56.210 (West).

¹³ *Id.* § 11.46.100.

¹⁴ *Id.* § 11.46.180.

¹⁵ *Id.* § 43.23.095(5).

¹⁶ *Id.* § 11.81.900(b)(18).

¹⁷ *Id.* § 11.81.900(a)(1).

¹⁸ *Id.* § 11.56.210(a)(2).

¹⁹ In its opposition to the motion to dismiss, the State arguably reinvents its theft theory, introducing new law that it did not present to the grand jurors. *See Opposition, supra* note 6, at pp. 3-4; *Sur-reply, supra* note 7, at pp. 3-4. The court believes that if the State intended to prove its case for theft based on the law articulated in its opposition, then it should have informed the grand jurors of as much at the grand jury proceedings and have read them the relevant law. The court finds it is not appropriate for the State to begin introducing new theories in the present context and therefore rejects its argument. The court notes that this finding is *not* a statement on the validity or invalidity of the State’s argument. It is simply a statement that the State should not argue its indictment is proper based on theories and law that the grand jurors were never informed of or prompted to consider.

²⁰ *See, e.g.,* Grand Jury Transcript p. 62, lns. 12-16.

SA Brady testified about Exhibit 3. The State asked him to describe Mr. Maw's comings and goings from the United States. SA Brady responded:

Well, it appears to me that this individual resides in Montana and travels to Alaska to work in the summertime and returns back home again at the end of the -- it appears that his departure dates coincide with the end of the fishing season up in Alaska.²¹

SA Brady apparently reached the conclusion that Mr. Maw is a resident of Montana and not Alaska based on his finding multiple arrivals to the United States by vehicle from Canada to mostly Alaska and Montana. SA Brady's testimony was abbreviated.

The prosecution spent much of its time in front of the grand jury questioning Investigator Stendevad. Investigator Stendevad testified about how long she believed Mr. Maw was outside Alaska from 2008 to 2013: 121 days in 2008, 156 days in 2009, 141 days in 2010, 138 days in 2011, 180 days in 2012, and 156 days in 2013. At no time was Mr. Maw outside Alaska for more than 180 days. Investigator Stendevad explained that she calculated the amount of time Mr. Maw was outside Alaska versus inside the state by reviewing the answers that Mr. Maw allegedly provided on the 2009-2014 PFD applications, his Alaska Airlines travel records, his border crossing records, and his labor history. (The State did not authenticate any of these documents when it introduced them.)

Investigator Stendevad also noted that Mr. Maw allegedly filed his applications from inside Alaska and that he purportedly used an electronic signature to sign his applications that was verified by myAlaska. She did not explain how myAlaska verifies an individual's signature or otherwise tell the grand jurors anything about how a myAlaska account is associated with one

²¹ *Id.* at p. 18 ln. 24 to p. 19 ln. 4.

individual and one individual only.²² She also did not testify—and the State provided no evidence—that Mr. Maw was using the myAlaska account when the PFD applications in issue were filed.²³

In referring to Exhibit 5 during her testimony, Investigator Stendevad remarked that all the PFDs in issue were deposited into an account belonging to a Roland Maw. Otherwise, there was no other evidence besides this hearsay to establish that the accounts actually belonged to defendant Mr. Maw.²⁴

One grand juror asked Investigator Stendevad whether an individual can be eligible for a PFD if they are outside Alaska for more than 90 days but less than 180 days. In response, Investigator Stendevad explained that an individual can be eligible under those circumstances. She says, though, that the Permanent Fund Division could not determine if Mr. Maw qualified despite his absences from Alaska because he answered “no” to “Were you outside the State for more than 90 days?” and therefore was never prompted to file additional information.

During her testimony, Investigator Stendevad appeared to take it as a forgone conclusion that defendant Mr. Maw filled out and filed the disputed applications, like the following excerpt evidences:

Q. All right. When you -- did you look into this issue?

A. Yes I did.

Q. Okay. And what was one of the first things you did?

A. The first thing I did was look at the Permanent Fund Dividend’s system. It’s called the Dividend Application Information System, or DIAS for short. And I did confirm that [the defendant] Mr. Maw did have PFD applications on file through that current year,

²² See *id.* at p. 27 ln. 11 to p. 28 ln. 5.

²³ See *id.*

²⁴ See *id.* at p. 47 lns. 12-20.

which I think the most recent year we were looking at was 2014, because we got this in 2015.²⁵

Once Investigator Stendevad was done testifying, the State excused her. However, it called her back into the courtroom shortly thereafter. A juror asked the State whether PFD investigators attempted to reach out to Mr. Maw for clarification regarding his alleged applications. The prosecution called Investigator Stendevad back into the room to answer, and she provided that investigators did reach out but that Mr. Maw referred them to his attorney. The State immediately clarified that the grand jurors could not hold Mr. Maw's silence against him.²⁶

The grand jurors deliberated for about eight minutes and returned a true bill by a majority of at least 10 people on each count of the indictment.²⁷

C. Mr. Maw's Objections

- i. Mr. Maw asserts that the State did not present sufficient evidence to show that he filled out and filed the PFD applications in issue.

Mr. Maw argues that the State did not present any evidence to show that it was him "siting in the chair clicking the mouse."²⁸ Although the State presented information from DIAS by way of Investigator Stendevad's testimony, it did not link the data to the defendant. Mr. Maw says that the closest the State came was in its discussion of the myAlaska-verified electronic signature. However, as he rightfully points out, the State did not ever explain how a myAlaska

²⁵ See, e.g., *id.* at p. 25 lns.13-25.

²⁶ See Grand Jury Transcript at p. 60 lns. 7-25.

²⁷ *Id.* at p. 62, ln. 19 to p. 66, ln. 12.

²⁸ *Motion to Dismiss, supra* note 5, at p. 3.

account is unique to a singular individual, that the defendant was the person using the account, or that he was using the account when the applications in issue were filed.²⁹

In addition, Mr. Maw states that the fact that Mr. Maw was in Alaska when the disputed applications were filed is not dispositive: “The presence of a person in the state of Alaska when a crime is alleged to have been committed in Alaska has no evidentiary value.”³⁰

- ii.* Mr. Maw argues that the State did not properly instruct the grand jurors about the theft charges; that it failed to introduce sufficient evidence to prove he benefited from allegedly filling out and filing the PFD applications in issue; and that it improperly shifted the burden of proof of innocence to Mr. Maw.

First, Mr. Maw argues that the State did not provide the grand jurors with sufficient instruction regarding PFD eligibility.³¹ Second, he says this is important because, assuming he filled out and filed the applications in dispute and actually received the PFD monies, he could have in fact been eligible for the money despite his prolonged absences from Alaska each year from 2008 through 2013, and an individual cannot steal something to which they are entitled. He asserts that his claim as to eligibility is consistent with Investigator Stendevad’s testimony. As noted, the Investigator testified before the grand jury that an individual who is absent from Alaska for more than 90 days but less than 180 days can still be eligible for a PFD.³² Third, Mr. Maw asserts that the State failed to present any evidence that he was unqualified to receive PFD

²⁹ See, e.g., *id.* at pp. 3-4; see also notes 23 and 24, *supra*.

³⁰ *Sur-reply*, *supra* note 7, at p. 2.

³¹ See *Motion to Dismiss*, *supra* note 5, at pp. 4, 5-6, 10-12.

³² See *id.* at pp. 4, 6-8; see also, e.g., Grand Jury Transcript at p. 56 ln. 7 to p. 57 ln.7 (Investigator Stendevad responds to a juror, noting that the PFD administrators are unsure on the facts available as to whether Mr. Maw was eligible to receive PFD monies).

monies. He says that, as a result, the State impermissibly shifted the burden of proof to him to show that he was eligible for a PFD.³³ Regarding this last point, Mr. Maw offers:

In a theft offense, the prosecution cannot obtain an indictment by stating that it is unknown whether the defendant is entitled to the property [at issue], and then stating that the defendant did not provide information to prove that they are entitled to the property. But in this case, the prosecution did exactly that.³⁴

Mr. Maw is correct that a defendant in a criminal case enjoys a presumption of innocence and that the State bears the burden of proving each element of the crime accused.

iii. Mr. Maw asserts that the State presented improper evidence at trial and that the indictment must, as a result, be dismissed.

Mr. Maw asserts that both SA Brady and Investigator Stendevad provided improper testimony. First, Mr. Maw claims that SA Brady's testimony that Mr. Maw resides in Montana was improper opinion evidence.³⁵ Second, Mr. Maw asserts that it was improper for the prosecution to comment on his pre-arrest silence by way of Investigator Stendevad, who the State called back into the courtroom after she was excused to answer the grand juror's question about whether investigators tried to talk to Mr. Maw to clarify the situation.³⁶ He further argues

³³ See *Motion to Dismiss*, *supra* note 5, at pp. 4, 8-10.

³⁴ *Id.* at p. 8.

³⁵ See *Motion to Dismiss*, *supra* note 5, at pp. 12-13; see also ALASKA R. EVID. 701 ("If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.").

³⁶ See *Motion to Dismiss*, *supra* note 5, at pp. 13-15; see also, e.g., *Adams v. State*, 261 P.3d 758, 765 (Alaska 2011) ("Alaska case law protects a criminal defendant's right to remain silent both before and after arrest. As we explain below, evidence of a defendant's post-arrest silence is prohibited by the Alaska Constitution, and evidence of a defendant's pre-arrest silence will usually be inadmissible under Evidence Rule 403 due to its inherently low probative value and its high risk of unfair prejudice.").

that the State’s curative instruction was too little too late—that critical damage was done.³⁷ According to Mr. Maw, the State presented such sparse evidence that the prejudice from Investigator Stendevad’s was amplified.³⁸

II. LEGAL STANDARDS

A. Improper Evidence

When a defendant claims that the State presented inadmissible evidence to the grand jury, the court must determine whether the disputed evidence was in fact improper evidence. If the disputed evidence is improper, the court subtracts it from the case presented to the jury and decides whether the remaining evidence is legally sufficient to support the indictment.³⁹ Assuming the disputed evidence was not improper but was admissible, the court must still decide whether “the probative force of that admissible evidence was so weak and the unfair prejudice so strong that it appears likely the improper evidence was the decisive factor in the grand jury’s decision to indict.”⁴⁰

B. Sufficiency of the Evidence

In evaluating the sufficiency of the evidence before the grand jury, the court must draw all legitimate inferences in favor of the indictment and view the evidence in the light most favorable to upholding the indictment.⁴¹ The evidence is legally sufficient to support an

³⁷ See *Motion to Dismiss*, *supra* note 5, at pp. 15-16.

³⁸ *Id.* at p. 15.

³⁹ See *Stern v. State*, 827 P.2d 442, 445-46 (Alaska Ct. App. 1992).

⁴⁰ *Id.* at 446.

⁴¹ See *State v. Williams*, 855 P.2d 1337, 1346 (Alaska Ct. App. 1993).

indictment “when all evidence taken together, if unexplained or uncontradicted, would warrant a conviction of a defendant.”⁴²

III. DISCUSSION

The court believes that Mr. Maw’s objections are well-made. To prove that it was Mr. Maw who filled out and filed the disputed PFD applications, the State cannot rely solely on its representations that the applications were signed with Mr. Maw’s electronic signature, which is purportedly verified through the myAlaska program, and that Mr. Maw allegedly filed the applications while in Alaska. The State did not offer testimony or otherwise explain to the grand jurors how a myAlaska account is created and a person’s identity and their electronic signature are verified. It did not provide any proof that it was Mr. Maw who created the myAlaska account or that he was the individual using it when the State alleges he signed off on the disputed applications with an electronic signature. Second, mere presence in the State does not prove it was Mr. Maw who filled out and filed the applications. The State can rely on circumstantial evidence to prove its point, but this particular evidence is flimsy, to say the least. At risk of repeating itself, the court notes that the State simply has not presented evidence to show that defendant is the person who filled out and filed the disputed PFD applications. Therefore, the court dismisses Counts 1, 3, 5, 7, 9, and 11 for unsworn falsification.

The court also dismisses counts 2, 4, 6, 8, 10, and 12 for theft in the second degree. The court finds Mr. Maw’s argument regarding eligibility persuasive. That said, its decision today is based on the fact the State did not provide any evidence that Mr. Maw actually received the PFD

⁴² *Id.*

monies for which he allegedly applied. As noted, the only evidence that the State presented to prove that defendant Mr. Maw actually received the PFD monies was Investigator Stendevad's testimony that the money was deposited into an account belonging to a Roland Maw. The State did not present any evidence to establish that that bank account actually belonged to the defendant Mr. Maw. It did not introduce any bank records. Its entire case for proving that the defendant benefited by allegedly applying for PFDs is that the PFD monies were deposited into an account belonging to someone named Roland Maw. That is not sufficient evidence to support an indictment, and the theft counts must be dismissed.

Finally, the court agrees with Mr. Maw that the prosecution introduced improper evidence. First, SA Brady did present improper opinion evidence. SA Brady is not an expert on matters of residency. Moreover, his opinion was not consistent with the facts. All SA Brady knew about Mr. Maw was Mr. Maw's border crossing habits—nothing more. If that information was correct, Mr. Maw spent more time in Alaska each year from 2008 through 2013 than he did outside the state. SA Brady cannot have concluded on the border crossing data alone that Mr. Maw was a resident of Montana and not Alaska, and he should not have testified as much.

Second, Investigator Stendevad testified that Mr. Maw exercised his right to silence when approached by investigators. A defendant's pre-arrest silence cannot typically be used against them. It has little probative value but can be extremely prejudicial. Both SA Brady's and Investigator Stendevad's testimony went to core issues in this case. Moreover, it is not difficult to see that, in a case like this where concrete evidence of guilt is lacking, the witnesses' comments could easily tip the scales in the State's favor and result in a true bill. With respect to Investigator Stendevad's testimony, it is true the State immediately offered a curative

instruction. The court agrees with Mr. Maw, however, that the instruction was too little too late to overcome the prejudicial character of the testimony. As Mr. Maw wrote, “The improper presentation of evidence that Mr. Maw did not want to talk to Investigator Stendevad and wanted to talk to his lawyer could have been the piece of evidence that caused the grand jury to vote for indictment.”⁴³ When the court subtracts this improper evidence from the already insufficient evidence the State presented to the grand jury, it is only all the more certain that the indictment must be dismissed. Even if the evidence were not improper, the court is genuinely concerned that it was so prejudicial it could have materially influenced the grand jurors’ decision-making process.

The defendant may or may not have committed the crimes for which he was indicted, but the State simply has not provided sufficient evidence to prove that the grand jurors could legitimately return a true bill on any of the unsworn falsification or theft counts. Here, the grand jurors cannot have legitimately concluded that it was Mr. Maw who filled out, filed, and benefited from the PFD applications in issue. The court has too many misgivings about the way this case was presented to the grand jurors to allow it to move forward any further.

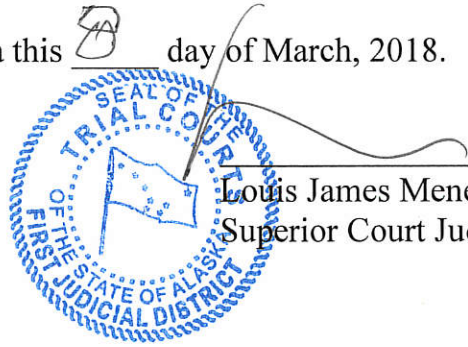
IV. CONCLUSION

In light of the foregoing, the court GRANTS Mr. Maw’s motion. The second indictment is dismissed.

⁴³ *Motion to Dismiss, supra* note 5, at p. 15.

In addition, the court directs that the parties appear on March 15, 2018 at 2:30 p.m. for 15 minutes for a brief status hearing regarding the State's misdemeanor charges against the defendant.

Entered at Juneau, Alaska this 15 day of March, 2018.



Louis James Menendez
Superior Court Judge

CERTIFICATION
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