

**DEBORAH RENGIL, MARGO
LLECHOLCH, and SHERRY TADAO,
Appellants,**

v.

**REPUBLIC OF PALAU,
Appellee.**

CRIMINAL APPEAL NO.12-001
Criminal Case No. 10-038

Supreme Court, Appellate Division
Republic of Palau

Decided: April 30, 2013

[1] **Criminal Law:** Due Process

According to the *Brady* rule, the suppression of exculpatory evidence by the prosecution in the face of a defendant's request violates the due process clause of the Constitution where that evidence is 'material' to guilt or punishment. Further, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

[2] **Evidence:** Weight of Evidence

It is not the duty of the appellate court to test the credibility of the witnesses, but rather to defer to a lower court's credibility determination.

[3] **Criminal Law:** Double Jeopardy

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or

only one, is whether each provision requires proof of a fact that the other does not.

[4] **Criminal Law:** Sufficiency of the Evidence

Courts review the sufficiency of the evidence only to determine whether, viewing the evidence in the light most favorable to the prosecution, and giving due deference to the trial court's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt.

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Counsel for Appellee: Timothy
McGillicuddy

BEFORE: ARTHUR NGIRAKLSONG,
Chief Justice; LOURDES F. MATERNE,
Associate Justice; and KATHERINE A.
MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the
Honorable ALEXANDRA F. FOSTER,
Associate Justice, presiding.

PER CURIAM:

This case concerns the convictions of three defendants who were charged with money laundering and grand larceny due to their unauthorized taking of bank funds while employees of Pacific Savings Bank.

For the following reasons, the decision of the Trial Division is **AFFIRMED**.¹

BACKGROUND

Defendants Deborah Rengiil, Margo Llecholch, and Sherry Tadao were employees of Pacific Savings Bank (hereinafter, PSB) for over ten years before it was closed by the Financial Institutions Commission in November 2006. Defendants also maintained loans with PSB. During the course of this employment, Defendants aided one another in issuing 52 checks without properly documenting them according to procedures established by the bank. As a result, the checks were not properly attached to Defendants' loans and the bank did not have an accurate record of Defendants' repayment obligations. For this, Rengiil and Tadao were each charged with 208 counts of Cheating, Grand Larceny, Embezzlement and Money Laundering as principals and as aiders and abettors. Llecholch faced 144 counts of the same.

On November 9, 2011, the Trial Division found Defendants guilty as charged. The court explained in detail in its written verdict the procedures that bank employees had to follow in order to borrow money. Simply, checks written by the bank on loans were recorded a number of ways, but the standard practice of PSB, about which Defendants were well aware, was to record any disbursements in an electronic "subsidiary" ledger at the end of each business day. PSB relied heavily on the subsidiary ledger for keeping track of the

amount of money that was borrowed against each loan as well as the interest that was accrued.

The Trial Division further explained that PSB's policies allowed multiple loopholes, which Defendants exploited to withdraw funds without triggering red flags. As a result, Defendants issued many checks, often to fictitious construction companies, which they did not record in the subsidiary ledger. Accordingly, their principal loan amounts and the interest they were charged were not affected by these withdrawals. In 2006, an outside accounting firm was asked to review and clean up specific loan files, including the loan files for bank employees, relevant to this case. During the course of this process, Emory Mesubed, the person who was tasked with this job, discovered the discrepancies in the subsidiary ledger. Mesubed testified that when he spoke to Defendants about their loan amounts, Defendants did not mention that they actually owed more money than that reflected in the subsidiary ledger.

Before the Trial Division, the Republic put on evidence to establish that Defendants used PSB funds as their own personal checking accounts while working in concert together to steal money from PSB. Defendants conceded that the checks they wrote were not posted to PSB's electronic system, but maintained that the amounts were each written down on a "grid note," which was kept in their personal loan files. They further asserted that they intended to repay the money they had taken from PSB.

As part of its case, the Republic sought to establish that Defendants did not

¹ Although Defendants request oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

properly record the checks they were issuing. The Republic did so by submitting bank records as evidence. Defendants requested and were shown all files in the Republic's possession that related to Defendants' loans with PSB. Nowhere within these files was there any recording of the checks at issue in this case.

Prior to trial, Defendants filed a motion with the court, seeking an order that would allow them to examine bank records for possibly exculpatory evidence. The Trial Division did not immediately respond to this motion but ultimately granted it almost three weeks before trial. Defendants and their counsel then had an opportunity to review bank files under supervision.

On the first day of trial, the Republic supplied Defendants with pictures of a container of documents, at least some of which had been destroyed, explaining that the Republic had discovered that there were some documents that they were unable to review or pass over to Defendants. Defendants used these pictures as a basis for their claim that the Republic violated their Due Process rights by failing to disclose the potential existence of exculpatory evidence. Counsel for the Republic explained that to her understanding, all of the relevant loan files for this case had been entered into evidence and that the documents from the container were from the early 1990s. Witness testimony confirmed these representations, and the Trial Division found this testimony to be credible. Accordingly, the Trial Division concluded that no files relevant to this case were destroyed by PSB employees, PSB receiver employees, or independent counsel.

Ultimately, the Trial Division found that the Republic proved the charges beyond a reasonable doubt. Defendants now appeal their convictions on a number of bases.

STANDARDS OF REVIEW

Defendants argue that the Trial Division violated their Due Process and other constitutional rights, including their right to have exculpatory evidence turned over to them, their right to counsel, and their right against being placed in double jeopardy. Such rights are purely questions of law, which we review *de novo*. *Lewiil Clan v. Edaruchei Clan*, 13 ROP 62, 66 (2006). "However, factual issues" related to any constitutional claims "are matters for the trial court, not the Appellate Division." *Id.* Accordingly, any factual issues are reviewed for clear error, which includes Defendants' claims concerning the sufficiency of the evidence. *Melekeok State Gov't v. Megreos*, 18 ROP 29, 33 (2011). Finally, Defendants, at least indirectly, challenge the Trial Division's statutory interpretation concerning the elements of the crimes for which they were charged. We review issues of statutory interpretation *de novo*. *Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 85 (2004).

DISCUSSION

I. Due Process Rights

[1] Defendants argue on appeal that their Due Process rights were violated when the Republic failed to disclose allegedly exculpatory evidence. Defendants assert that this failure amounted to a *Brady* violation, a rule adopted by this Court in *Ngiraked v. ROP*, 5 ROP Intrm. 159, 172

(1996) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). The *Brady* rule holds that “the suppression of exculpatory evidence by the prosecution in the face of a defendant’s request violates the due process clause of the . . . Constitution where that evidence is ‘material’ to guilt or punishment.” *Ngiraked*, 5 ROP Intrm. at 172. Further, evidence is “material” “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* (citation and internal quotation marks omitted).

The basis of Defendants’ *Brady* claim surrounds a container of documents that was discovered during the course of the proceedings. This container held PSB documents that had been damaged by water, some of which had become illegible. Accordingly, some of these documents were destroyed.

The Trial Division heard argument from independent counsel and heard testimony from two different witnesses, each of whom explained that the government did not destroy evidence and that the container held documents, mostly transactional in nature, from the early 1990s. Because the conduct charged in this case occurred ten to fifteen years after the dates on these documents, the Republic maintained that these documents could not contain exculpatory evidence. The Trial Division found this testimony credible and concluded that Defendants’ Due Process rights were not violated.

[2] We note, as we have done many times before, that “it is not the duty of the appellate court to test the credibility of the

witnesses, but rather to defer to a lower court’s credibility determination.” *Marino v. Andrew*, 18 ROP 67, 69 (2011) (citation and internal quotation marks omitted). The Appellate Division has the authority to override credibility determinations in special situations, but we will only be persuaded to do so when there is a compelling reason amounting to extraordinary circumstances that causes us to distrust the Trial Division’s decision. *Kotaro v. Ngotel*, 16 ROP 120, 123 (2009).

Reversal of the Trial Division’s credibility determination is not warranted here. Testimony regarding the destroyed documents came from individuals who had seen the files. Rengiil testified that all documents relevant to her loan file were kept in a location entirely different than where the container was found. The documents that were destroyed were not “material” as there is no reasonable probability that their accessibility by Defendants would have led to a different result in the proceeding. *See Ngiraked*, 5 ROP Intrm. at 172. We are satisfied that no wrongdoing concerning the destruction of potentially exculpatory evidence took place and that Defendants’ rights to Due Process were not violated.

Defendants’ other Due Process claim asserts that the Trial Division did not grant their discovery motion to review bank documents in sufficient time prior to trial. Defendants hoped to examine the documents in an effort to prove that PSB was responsible for generally poor bookkeeping. Defendants’ theory was that their conviction relied on the assertion that the lack of electronic recording of their own loan files was a rarity in PSB’s practices. Defendants

believed that if they could have found evidence of erroneous or deficient bookkeeping, such evidence could have mitigated proof of the elements of intent and cover up.

The Trial Division has discretion to grant discovery motions. *Ngiraked*, 5 ROP Intrm. at 167. In this case, it granted the discovery motion, and did so nineteen days prior to the trial. Defendants had nearly three weeks to view the documents. We are satisfied that the timing of the response to Defendants' motion did not constitute a violation of their Due Process rights.

II. Right to Counsel

Defendants next contend that their right to counsel was violated because they were unable to access the bank documents, which they requested to view, outside of the presence of prosecution witnesses. Defendants assert that because of this, they were unable to consult confidentially with their counsel during the review process and that such inability violated their right to counsel. ROP Const. art. IV, § 7. This argument has no merit.

Defendants provide only one case as an example of a court discussing the right to consult privately with an attorney. In that case, a United States court examined the question and determined that the lower court's refusal to allow a defendant to consult with his attorney privately during a lunch recess did *not* amount to a deprivation of that right. *See Abrams v. Barnett*, 100 F.3d 485, 490–91 (7th Cir. 1996).

We are aware of no case law in Palau or in the United States, and Defendants have

not presented us with any, that suggests that viewing documents under supervision, documents which contained confidential information, could constitute a deprivation of the right to counsel. Defendants were not deprived of their ability to consult their attorney. If they wanted to confidentially discuss these documents, they had the opportunity to pass notes or to talk about them after leaving the supervision of the prosecution witnesses. Accordingly, we deny Defendants' claim that their right to counsel was violated.

III. Convictions for Grand Larceny

Defendants argue that the Trial Division erred in finding that Defendants' actions met the elements for the crime of grand larceny, which are found in 17 PNC § 1902. We dismiss Defendants' argument here as it is based on inconsequential semantics.

The statute defining grand larceny reads:

Every person who shall unlawfully steal, take and carry away personal property of another, of the value of fifty dollars (\$50) or more, without the owner's knowledge or consent, and with the intent to permanently convert it to his own use, shall be guilty of grand larceny . . .

Id. See also *ROP v. Avenell*, 13 ROP 268, 271–72 (Tr. Div. 2006) (defining the statute). Defendants assert that the statute mandates that in order for conduct to constitute grand larceny, the perpetrator must have no right to the property at the time that it is taken and that here Defendants

did have a right to the property at the time it was taken, through their loans.

It is true that individuals with certain types of loans are able to receive checks issued under their loan agreements. And it is undisputed that Defendants had such loans. However, the trial court made the important and, what it called, “critical” distinction between checks properly recorded and checks not properly recorded. While failing to properly record the checks was not the criminal act itself, doing so would have turned their illegal actions into legal ones. The Republic contended that Defendants only had rights to the checks and funds if the checks were properly drawn from their loans. Importantly, the fact that a person has a loan with a bank does not exempt that person from grand larceny violations when he or she writes a check from the bank. By failing to properly record the checks, Defendants did not show a debt to the bank and instead took the money to convert it to their own undocumented use.

We agree with the Trial Division that so long as a check was not properly recorded, and thus internally tracked, it was not an established disbursement under the loan agreement and, thus, was not available for Defendants’ rightful taking. The Trial Division found that the checks were not properly recorded, which meant they were improperly taken, and we see no reason to overturn this ruling.

IV. Double Jeopardy

The next argument Defendants present is that punishing Defendants for both grand larceny and money laundering constituted a violation of the rule against

double jeopardy found in Article IV, section 6 of the Palau Constitution. Defendants assert that because the Trial Division used the fact that Defendants failed to record the checks on the subsidiary ledger to establish a violation of both charges, their rights were violated. Further, Defendants claim that the conviction for money laundering did not require proof of any additional element than conviction for the crime of grand larceny.

[3] In *ROP v. Avenell*, 13 ROP 268, 270–71 (Tr. Div. 2006), the court discussed the prohibition against double jeopardy, as articulated through the *Blockburger* test, which we have adopted. See *United States v. Blockburger*, 52 S. Ct. 180 (1932); *Scott v. ROP*, 10 ROP 92, 96 (2003) (explaining that courts in Palau use the *Blockburger* test to determine whether a defendant’s right against double jeopardy has been violated). The *Blockburger* court explained that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not.” *Blockburger*, 52 S. Ct. at 304.

In *Avenell*, the court considered three cases to illustrate how the principles discussed in *Blockburger* apply in a double jeopardy challenge. *Avenell*, 13 ROP at 272. The examples show that the court must look to the elements of each statutory provision and identify at least one element that each requires that the other does not. *Id.*

In this case, the statute defining money laundering requires that the person conceal, acquire, or possess property when that person knows that the property makes

up the proceeds of a crime. *See* 17 PNC § 3802. The statute defining grand larceny does not require this. *See* 17 PNC § 1902. It does, however, require that the perpetrator take property with the intent to convert, which is not required by the statute defining money laundering. Simply, each statute requires proof of an element that the other does not. Accordingly, Defendants' right against double jeopardy was not violated when they were convicted under both statutes.

We agree with the Republic that Defendants confuse indicia of guilt with the elements of the offenses. Defendants appear to assert that because the court relied on the fact that Defendants did not properly record the checks in order to establish a violation of both statutes, this is sufficient to prove that conviction under both statutes is a violation of double jeopardy. However, failing to record the checks was not an element of either offense. It merely provided evidence to support elements of each offense. Using the same evidence to provide support for multiple offenses is not a violation of the Double Jeopardy Clause.

V. Evidence Concerning Llecholch

The next argument for our review concerns only Defendant Llecholch. Llecholch asserts that the Trial Division failed to consider evidence that some of her disbursements were actually placed on the ledger in 2005. We agree with the Republic that the Trial Division did not fail in this regard and that whether or not the relevant disbursements were placed on the ledger in 2005 is immaterial to the charges.

In *Noah v. ROP*, 11 ROP 227, 230 (2004), we explained that although a criminal defendant may not have illegally possessed a firearm at the time of his arrest, "the government is only required to prove that the defendant committed the offense at some point in time." While the circumstances are different here, the principle is applicable. The Republic's job in this case was to prove that at some point in time Defendants committed the crimes for which they were charged.

Llecholch was charged and convicted of grand larceny. She completed the crime each time she stole checks from PSB, which was proven, in part, because she did not follow established procedures to record them by the end of the business day. While recording the checks a year later may have been an attempt to undo the crime, the Trial Division did not err in refusing to consider this as evidence that no crime was ever committed. Accordingly, we dismiss Llecholch's argument.

VI. Evidence Concerning Rengiil

The next point on appeal concerns only Defendant Rengiil. Rengiil argues, essentially, that because she had an \$80,000.00 construction loan with PSB, from which she had legal authority to draw funds, she could not logically be convicted of grand larceny for writing the checks from PSB. This argument is nonsensical and possibly frivolous.

The Trial Division took note that the critical piece of evidence in finding Defendants guilty of grand larceny was the fact that Defendants did *not* record their disbursements on the subsidiary ledger.

Where the checks were not properly recorded, no money was drawn on any loans, as far as PSB was concerned. It matters not whether Rengiil had a legal avenue for drawing money from the bank. The point is that she did not pursue that legal avenue and instead pursued an illegal one. Specifically, instead of borrowing money against her loan by properly recording the checks she issued, she issued checks without recording them so that they essentially were not attached to her name or her loan. For this she was charged and convicted on several counts of grand larceny, and the Trial Division did not err in its decision in this regard.

VII. Sufficiency of the Evidence

Defendants' final challenge on appeal is to the sufficiency of the evidence. Defendants assert that there was insufficient evidence to lead to their convictions on any count and that the lack of accurate bookkeeping at PSB precludes a finding of guilt because the court so heavily relied on the omission of records for Defendants' convictions.

[4] "This Court's review of the sufficiency of the evidence to support a conviction is very limited." *Aichi v. ROP*, 14 ROP 68, 69 (2007). "Convincing an appellate court that there was insufficient evidence for a conviction is a tall task; we review such a challenge for clear error and defer to the Trial Court's opportunity to assess the credibility of the witnesses." *Uehara v. ROP*, 17 ROP 167, 181 (2010). In reviewing such challenges, then, "[w]e ask only whether there is evidence, viewed in the light most favorable to the prosecution, from which a rational trier of

fact could have found defendant guilty beyond a reasonable doubt." *Id.* Where we conclude that a rational trier of fact could determine such, we will not disturb the conviction. *Id.*

Here, we are satisfied that there was sufficient evidence for the reasonable trier of fact to convict Defendants of their charged crimes. Simply, Defendants were charged with stealing funds from PSB by writing checks and using those bank funds as their own personal checking accounts. The prosecution established through testimony and other evidence that Defendants did not properly record the disbursements that they made. Defendants failed to rebut this evidence. Accordingly, the Trial Division had sufficient evidence before it to conclude that Defendants did in fact improperly take those funds with the requisite intent. Defendants have given us no reason on appeal to question the decision of the Trial Division based on the sufficiency of the evidence.

CONCLUSION

Based on the analysis above, we see no reason to overturn the convictions entered by the Trial Division. Accordingly, we **AFFIRM** on all accounts.