ALVORD, J., dissenting. "It is axiomatic that the state's burden of proof beyond a reasonable doubt applies to *each and every element* comprising the offense charged." (Emphasis added; internal quotation marks omitted.) *State* v. *Williams*, 220 Conn. 385, 398, 599 A.2d 1053 (1991). In the present case, the defendant, John Papandrea, was charged with nine counts of larceny in the first degree. In order for the jury to have found him guilty of those offenses, the state was required to prove that he had the felonious intent to deprive Homecare Management Strategies, Inc. (Homecare), of its property. Because I believe that the state failed to prove that essential element of the charged offenses beyond a reasonable doubt, I respectfully dissent.

The defendant never disputed that he had issued a number of checks, drawn on Homecare's accounts payable, to purchase artwork. He never claimed that he was authorized by Donna Galluzzo, the sole stockholder of Homecare, to issue those checks. His defense was that he honestly believed that he had a right to those funds because of the legitimate debt of more than $5 million owed by Homecare to White Oak Systems, LLC (White Oak), a company in which he held 85 percent of the stock. The testimony and exhibits admitted at trial supported that defense and failed, in my opinion, to prove that the defendant acted with the subjective knowledge that his actions constituted stealing. See *State* v. *Varszegi*, 33 Conn. App. 368, 372–74, 635 A.2d 816 (1993), cert. denied, 228 Conn. 921, 636 A.2d 851 (1994).[1]

Not surprisingly, there is no direct evidence of intent in this case. In such circumstances, intent may be inferred from circumstantial evidence, such as the events that occurred before and after the charged offenses, and the jury may infer that the defendant intended the natural consequences of his actions. See *State* v. *McRae*, 118 Conn. App. 315, 320, 983 A.2d 286 (2009). The majority concludes that the requisite specific intent can be inferred because (1) the defendant did not pay anything for his shares of stock in White Oak, (2) Donna Galluzzo did not authorize the defendant to issue Homecare's checks for his personal use, (3) the defendant did not request or receive permission to collect any debts owed to him as the majority shareholder of White Oak and (4) a debt owed to a corporation such as White Oak cannot be collected by a shareholder as a personal debt.[2] I do not believe that the reasons relied on by the majority are sufficient to establish the mens rea for larceny in the first degree. Those reasons are not inconsistent with the defendant's defense that he was entitled to those funds. Further,

there was overwhelming evidence that supported his defense.

Masonicare entered into a contract with Homecare in 1999 for financial support services.[3] Under the express terms of that contract, Homecare was paid $8 per patient visit. Of that amount, the contract provided that Homecare was to pay White Oak $4.57 for its software development supporting that patient care. The defendant claimed that the contractual per patient payment was never transferred by Homecare to White Oak, and the defense presented evidence, including the testimony of an expert witness and documentation, that indicated the debt to White Oak under the Masonicare contract had reached approximately $5.4 million at the time the Masonicare contract ended on September 30, 2004.[4]

In connection with implementing the Masonicare contract, Gianfranco Galluzzo, Donna Galluzzo's husband, directed Carl Caslowitz[5] to transfer 85 percent of White Oak's stock to the defendant, for "corporate convenience" and for no consideration. Caslowitz testified that he agreed to the transfer because Homecare was White Oak's principal client. He also testified that the stock had little or no value at that time. All of the checks used to purchase artwork had been issued while the defendant owned 85 percent of White Oak's stock.[6]

Upon the transfer of the stock, the defendant became the chief financial officer of White Oak, and, according to the testimony of Caslowitz, the defendant performed all of the functions normally performed by the chief financial officer of a company. He attended design meetings, assisted with the billing software, prepared and maintained the financial records for White Oak and coordinated the working relationship between Homecare and White Oak. He did not, however, receive a salary from White Oak. Caslowitz testified that the company gained in value. Caslowitz was concerned, however, about the viability of White Oak when the Masonicare-Homecare contract ended in September, 2004. Masonicare was Homecare's largest customer, and the Masonicare contract had been the primary source of Homecare's revenue from 2000 to 2004.

With the approaching end of the Masonicare contract, and the uncertainty of the future for both Homecare and White Oak, the defendant's actions indicated that he was concerned about the collection of the debt owed to White Oak.[7] As confirmed by Donna Galluzzo's testimony, she returned as full-time president of Homecare in early 2004 because its major contract with Masonicare would be ending, and she had to decide whether to close Homecare or to continue the business without that contract. It was around this time, on February 24, 2004, that the defendant authorized the issuance of the first check from Homecare's accounts payable to purchase artwork.

The defendant's subsequent actions also support his claim of entitlement to the moneys taken on behalf of White Oak. Caslowitz testified that he met with the defendant weeks before the April 1, 2005 meeting. At that time, the defendant initiated a conference call to his attorney to discuss the possibility of bringing a lawsuit against Homecare to collect the debt owed to White Oak pursuant to the terms of the Masonicare contract. Caslowitz also testified that prior to the April 1, 2005 meeting, the defendant told him that he wanted to enforce the Masonicare contract and that he was concerned that Gianfranco Galluzzo wanted to eliminate the debt due White Oak. The defendant indicated that one of the reasons that he had scheduled the April 1, 2005 meeting was to discuss the relationship between Homecare and White Oak.[8] On March 30, 2005, immediately prior to the scheduled meeting, the defendant transferred his entire interest in the White Oak stock back to Caslowitz.

Perhaps the most compelling reason for concluding that the state failed to prove felonious intent beyond a reasonable doubt is the evidence that the defendant's actions were taken openly and that he did not attempt to conceal what he had done. When he requested a check for payment for artwork, he did not use a fictitious name for the party to be paid or request that the check be made payable to cash. The checks, in sizeable amounts that would have attracted attention, were signed by the defendant and were made payable to individuals or to such companies as Rainmakers, Profiles in History, E.S. Lawrence Gallery and Fanfare Sports and Entertainment. On the check request forms, the defendant noted "partial payment of White Oak fee" and "due to [White Oak]" as the reasons for the requests. In Homecare's general ledger, the defendant deducted the amounts of the checks issued for artwork from the debt due White Oak from Homecare. In short, the defendant did not use fictitious payees or falsify documents, and there was no evidence whatsoever that Donna Galluzzo was unable to access Homecare's financial records. Further, the defendant ordered the artwork via his e-mail account at Homecare and had the artwork delivered to Homecare's corporate offices. He displayed the artwork in Homecare's offices.

Our case law quite clearly permits the inference of felonious intent when a defendant actively conceals his or her actions. In *State* v. *Dell*, 95 Conn. App. 24, 894 A.2d 1044, cert. denied, 278 Conn. 919, 901 A.2d 44 (2006), this court concluded that the trial court, as the fact finder, reasonably could have concluded that the evidence did not support the defendant's claim that he was entitled to the funds that he had embezzled as the treasurer of a nonprofit organization. The trial court had found that the defendant "engaged in a secret pattern of behavior, appropriating the moneys to himself in such

a manner as to conceal the true nature of his activities from others . . . .'' Id., 29. The trial court further found that ''there was no credible evidence that the defendant was entitled to the moneys at issue . . . .'' Id. In affirming the judgment, we noted: ''The [trial] court reasoned that the secretive and deceptive nature of the defendant's conduct made it less likely that the defendant acted under a claim of right. Under the facts of [Dell], such an inference was sound. The findings that the defendant acted in a secretive and deceptive manner, that the defendant appropriated the moneys at issue without authorization to do so, that no credible evidence supported the defendant's claim that he was entitled to the moneys at issue, that no credible evidence supported the defendant's claim that he acted with a good faith belief that he was entitled to the moneys at issue and that the defendant was experiencing financial problems at the time he appropriated the moneys at issue were significant.'' Id., 30–31. We therefore concluded that the evidence amply supported the trial court's ultimate finding that the defendant had appropriated the moneys wrongfully without a subjective belief that he was honestly entitled to do so. Id., 31.

While secretive conduct may belie a defendant's claim that he acted in accordance with a claim of right, actions taken openly and without concealment tend to strengthen a claim that a defendant acted in good faith under a claim of right. In *State* v. *Varszegi*, supra, 33 Conn. App. 368, this court concluded that the evidence was insufficient to prove beyond a reasonable doubt that a landlord had the requisite felonious intent to support a conviction of larceny in the third degree for taking his tenant's computers. The landlord claimed that he had a right to take the property because the tenant had defaulted in its rent payments, and their lease authorized the landlord to enter the tenant's premises and to seize personal property to recover unpaid rent. The landlord had entered the premises by picking the lock and, when confronted by a police officer, admitted that he had taken the computers and expressed his belief that his actions were proper and legal. Even though that police officer, and the officer's supervisor, told the landlord that they doubted that the defendant's conduct was lawful, the landlord sold the computers to recoup the unpaid rent despite the advice of law enforcement officials. Id., 370–71.

In reversing the judgment of conviction, this court first quoted from various sections and comments in American Jurisprudence that it found particularly apposite to the claim of right defense. ''One who takes property in good faith, under fair color of claim or title, honestly believing that . . . he has a right to take it, is not guilty of larceny even though he is mistaken in such belief, since in each case the felonious intent is lacking. . . . The general rule applies . . . to one who takes it with the honest belief that he has the right to

do so under a contract . . . .

"[I]t is generally held that because of a lack of felonious intent, one is not guilty of larceny who, in the honest belief that he has the right to do so, openly and avowedly takes the property of another without the latter's consent, as security for a debt bona fide claimed to be due him by the owner, or even to apply or credit it to the payment thereof." (Citation omitted; internal quotation marks omitted.) Id., 373. This court then held that "[i]f a person takes property in the honest, though mistaken belief, that he has a right to do so, he has not committed larceny." Id., 374. We concluded that the evidence in *Varszegi* was insufficient to prove felonious intent because the defendant "made no attempt to conceal either his identity or that he had in fact taken the computers. . . . Moreover . . . the defendant never wavered from his contention that his actions were lawful . . . ." Id., 375.

Similarly, in the present case, the defendant's actions were not secretive or deceptive. He was consistent in his position that White Oak was due moneys from Homecare under the terms of the Masonicare contract. When the Masonicare contract was coming to an end and the financial viability of the companies was questionable, the defendant began authorizing the checks at issue and deducted those amounts from the debt to White Oak. Further, prior to the April 1, 2005 meeting, he had expressed his concern to Caslowitz that Gianfranco Galluzzo wanted to eliminate the White Oak debt.

Under those circumstances, I cannot agree with the majority that inferences can be drawn from the evidence presented at trial that the defendant had the requisite felonious intent to support a conviction of larceny in the first degree. In my opinion, the evidence was insufficient to prove beyond a reasonable doubt that he acted with the subjective knowledge that he was wrongfully depriving Homecare of its property but, rather, was overwhelmingly supportive of his claim that he believed that he had a right to those funds as the majority shareholder in White Oak. "[W]e will reverse a judgment where the state's evidence is improbable and unconvincing and where all the facts found are insufficient to prove the guilt of the defendant beyond a reasonable doubt. . . . The case where that occurs is rare, and rightfully so, because of the great deference afforded the factual findings of the trier. *This*, *however*, *is one of those rare cases.*" (Citations omitted; emphasis added.) *State* v. *Osman*, 218 Conn. 432, 437, 589 A.2d 1227 (1991).

For those reasons, I would reverse the judgment of the trial court and remand the case with direction to vacate the conviction of nine counts of larceny in the first degree. Accordingly, I respectfully dissent.

[1] "If a person takes property in the honest, though mistaken belief, that he has a right to do so, he has not committed larceny." *State* v. *Varszegi*,

supra, 33 Conn. App. 374.

[2] No evidence was submitted at trial regarding White Oak's corporate structure or the rights of its majority and minority shareholders.

[3] The testimony at trial established that Masonicare, a health care provider, received its funds from medicare and medicaid. Masonicare then paid Homecare pursuant to the terms of this contract.

[4] Footnote 4 in the majority opinion states that "there was conflicting evidence as to whether Homecare, in fact, was indebted to White Oak." That conflicting evidence primarily consisted of testimony that, despite the terms of the written Masonicare contract obligating Homecare to pay $4.57 of every $8 paid by Masonicare per patient visit to White Oak, Homecare and White Oak had a *verbal* agreement to disregard that provision of the Masonicare contract. Carl Caslowitz, one of the original founders and the majority shareholder of White Oak, testified that the verbal agreement, which involved millions of dollars, was made by him on behalf of White Oak and by Donna Galluzzo and Gianfranco Galluzzo on behalf of Homecare. Caslowitz and Gianfranco Galluzzo are both attorneys. Gianfranco Galluzzo dictated the terms of the verbal agreement even though he had no ownership interest in Homecare. This verbal agreement to ignore the written provision of the Masonicare contract was not disclosed to Masonicare, medicare and medicaid.

Caslowitz admitted that Homecare owed a debt to White Oak but claimed that White Oak never expected to collect it because of the verbal agreement. Donna Galluzzo, when asked if Homecare owed White Oak millions of dollars, responded that she did not know; she did not deny the existence of a debt. Gianfranco Galluzzo, the spouse of Donna Galluzzo, testified that, "in my mind," Homecare never owed White Oak millions of dollars.

Gianfranco Galluzzo denied the existence of the debt but qualified his responses with disclaimers such as "in my mind" or "as far as I know." Moreover, when considered in the context of his entire testimony at trial, the significance of those equivocal statements is severely diminished. Gianfranco Galluzzo testified that he was a consultant for Homecare and oversaw the financial stability of that company. He received $500,000 in December, 2000, for services rendered to Homecare. A few days later, he requested and received a check in the amount of $250,000 from White Oak for his services as a consultant. Despite his claimed role as a financial consultant at the companies, he testified that he was "not totally familiar with [the Masonicare contract]," even though the majority of Homecare's revenue from 2000 to 2004 was derived from Masonicare. He testified that he did not know all the terms of the contract and had not read it "cover to cover." Further, he testified that he did not know the cash flow from Masonicare to Homecare because "I never looked at these financials."

The defendant's employment was terminated at the April 1, 2005 meeting, when Gianfranco Galluzzo discovered that the defendant had transferred the White Oak stock back to Caslowitz. Caslowitz testified that after the meeting, Gianfranco Galluzzo now wanted Caslowitz to transfer the White Oak stock to him. As requested, shortly after that meeting, Caslowitz transferred 65 percent of his stock in White Oak to White Oak Holdings, a company owned by Donna Galluzzo, and was paid $500,000 for that interest. Caslowitz testified that the debt to White Oak was eliminated at that time.

On the basis of the foregoing testimony, the evidence supported the defendant's claim that he had a good faith belief that Homecare owed White Oak over $5 million dollars under the terms of the Masonicare contract. No evidence was presented at trial that indicated that the defendant did not have a good faith belief that the debt to White Oak was legitimate.

[5] At the time of trial, Caslowitz was employed by White Oak as its president and chief executive officer. Sixty-five percent of the stock of White Oak then was held by White Oak Holdings, 13.75 percent by Caslowitz, 13.75 percent by Roger Palombizio and 7.5 percent by Terri Fox.

[6] While no evidence was submitted regarding the rights of the majority and minority shareholders of White Oak, we note that the total amount of the funds claimed to have been misappropriated by the defendant was substantially less than 85 percent of the $5.4 million debt owed White Oak by Homecare.

[7] From the testimony and exhibits, it reasonably could be inferred that the defendant particularly was concerned about moneys being available to satisfy the debt to White Oak because of the manner in which Gianfranco Galluzzo operated the companies. Even though he had no direct interest in Homecare, he acted as though he owned the company, and he directed the way payments were made between Homecare and White Oak. On occasion,

he would ask Cindy O'Sullivan, the director of finance at Homecare, to issue checks payable to cash for his use. He requested and she issued checks totaling $750,000 from Homecare and White Oak in 2000 for his consulting services. Gianfranco Galluzzo also was involved in outside projects, including the construction of houses and other buildings, and he authorized checks to be paid from Homecare's accounts in amounts totaling hundreds of thousands of dollars payable to contractors, lumber companies and building supply companies. He admitted that those expenses were totally unrelated to health care.

It is interesting to note that many of those construction contractors are on Homecare's approved vendors list. That list was created after the April 1, 2005 meeting. Gianfranco Galluzzo is not on the list. Robert Zdon, the accountant for both Homecare and White Oak, testified that Bernie Williams *is* one of the names on the approved vendors list. During the trial, O'Sullivan provided an explanation for the identification of Bernie Williams as a Homecare approved vendor. In December, 2000, Gianfranco Galluzzo requested that O'Sullivan issue a check, from Homecare's accounts, payable in the amount of $500,000. In determining the person to whom it should be made payable, O'Sullivan selected the name Bernie Williams because of a baseball card on her desk.

[8] Caslowitz testified that the defendant scheduled the April 1, 2005 meeting. Although Donna Galluzzo testified that she was upset about the delay, she also testified that the defendant indicated that he was servicing clients and that it was customary to give client demands top priority.