72069-4

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Court of Appeals
Division I
State of Washington

No. 72069-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DEBORAH JEAN LJUNGHAMMAR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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1. To prove the crime of first degree theft as charged, the State was required to prove beyond a reasonable doubt that Ms. Ljunghammar "exerted unauthorized control over the property of Shelarose Ljunghammar." Did the State fail to meet its burden of proof where the State did not prove that Ms. Ljunghammar had "control" over Shelarose's property, or that the transfers of property were not "authorized" by Shelarose?

2. The State violates a criminal defendant's constitutional right to silence where the State comments in a criminal trial on the defendant's exercise of her right to silence. Did the State violate Ms. Ljunghammar's constitutional right to silence where Ms. Ljunghammar

had a right to silence, she exercised that right, and the State commented in her criminal trial on her decision to exercise the right?

3. A person convicted of theft as an accomplice may not receive an exceptional sentence based on the statutory aggravator that the crime was a "major economic offense" unless the jury finds that the defendant *knew* the crime was a major economic offense. Did the court err in imposing an exceptional sentence based on the major economic offense aggravator, where Ms. Ljunghammar was convicted as an accomplice and the jury was not instructed, nor did it find, that she knew the crime was a major economic offense?

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C. STATEMENT OF THE CASE

Shelarose Ljunghammar is an elderly, widowed woman. 2/11/14RP 52; 2/12/14RP 4. She owned or co-owned several rental properties in the Seattle area, including an apartment complex.

2/11/14RP 51-52; 2/12/14RP 73. Shelarose did the bookkeeping for her rental properties. 2/11/14RP 46-47, 51-52.

Shelarose has four sons: Ralph, Keith, Daryl and Ivan. 2/11/14RP 46. The appellant, Deborah Ljunghammar, is Ivan's wife.

Ivan and Deborah began helping Shelarose with her bookkeeping around 2005. 2/11/14RP 56; 2/12/14RP 4-5, 44-45, 79. In addition, Ivan helped Shelarose to maintain her properties. 2/11/14RP 57; 2/12/14RP 21, 26, 81. She would pay him for his work. 2/12/14RP 22.

In July 2007, Shelarose executed a power of attorney naming Ivan as attorney in fact and Deborah as "alternate Attorney in fact." Exhibit 1. The power of attorney granted Ivan "all powers of an absolute owner over [Shelarose's] assets and liabilities," and granted him "all further powers as are necessary or desirable to provide for [Shelarose's] support, maintenance, emergencies, and urgent necessities." Exhibit 1 at 2. Deborah, as alternate attorney in fact, had no power to act in regard to Shelarose's property unless Ivan, as principal attorney in fact, was *unable or unwilling* to act. Exhibit 1; 2/12/14RP 132. There is no evidence that Deborah ever acted as "alternate Attorney in fact."

Attorney Charles Mullavey had represented Shelarose for many years. 2/12/14RP 108-09. He prepared the power of attorney on her behalf. 2/12/14RP 111. At the time, he had no questions or concerns regarding her mental capacity. 2/12/14RP 113, 120-26. He would never advise a client to execute a power of attorney if he thought she did not have the capacity to understand what she was signing. 2/12/14RP 121.

Mr. Mullavey met again with Shelarose, and her sons, in 2008 to discuss her estate planning. 2/12/14RP 109. Again Mr. Mullavey had no concerns about Shelarose's capacity. He said she understood the discussion and made her wishes clear. 2/12/14RP 109-10.

Over the next two to three years, several checks were written on Shelarose's bank accounts. Many were signed by Shelarose and some were signed by Ivan as attorney in fact. 2/18/14RP 156; 2/19/14RP 42; Exhibit 10. Many checks were written payable to Ivan, a few were written payable to Deborah, and some were written simply to "cash." Exhibit 5. The checks were written for varying amounts and for various purposes, as stated on the "memo" line of the check. Exhibit 5.

Shelarose purchased and signed a cashier's check for $13,500, which was payable to Deborah. Exhibit 12. Deborah cashed the check

and deposited the money into her bank account. 2/19/14RP 5-6; Exhibit 13.

In addition, some money was withdrawn from Shelarose's bank accounts or transferred directly from Shelarose's accounts into Ivan and Deborah's accounts. 2/18/14RP 151-52; 2/19/14RP 13; Exhibit 5. The evidence does not show who actually made those transactions, whether Shelarose or Ivan.

Likewise, several charges were made on Shelarose's credit card for various purposes. The evidence does not show who made those charges. 2/18/14RP 33, 138-40; Exhibit 7.

Over time, Ralph and Daryl began to believe that Ivan and Deborah were trying to isolate Shelarose from the rest of the family. 2/11/14RP 72-76. They had noticed that Shelarose was having trouble remembering things and doing her bookkeeping. 2/11/14RP 55; 2/12/14RP 78. Ralph called Adult Protective Services (APS). 2/11/14RP 72-76; 2/12/14RP 103. Daryl called the police. 2/12/14RP 103.

An investigator from APS and a police detective together went to Shelarose's house to investigate. 2/13/14RP 41-45. Shelarose

appeared happy and fit but seemed confused about why they were there and quickly forgot when they told her. 2/13/14RP 45-46.

In 2010, a professional agency was appointed to be Shelarose's guardian. 2/18/14RP 112. The court order appointing the guardian specified that Ivan and Deborah were to provide an accounting to the guardian of financial transactions involving Shelarose's accounts during the time period that Ivan was attorney in fact. 2/13/14RP 108-10. When Ivan and Deborah did not provide the accounting, the guardian obtained a court order requiring them to provide the information, under threat of court sanction. 2/13/14RP 110; 2/18/14RP 104, 130. In particular, the guardian was seeking an explanation for transactions the guardian deemed questionable because they did not appear on their face to be for Shelarose's benefit. 2/13/14RP 125-26. Deborah and Ivan did not provide the information. 2/13/14RP 111-14; 2/18/14RP 128.

The guardian obtained records from the banks directly. 2/13/14RP 114, 117.

The court ordered the guardian to pursue the funds unaccounted for. 2/13/14RP 131. On the eve of trial in the guardianship proceeding, Ivan and the guardian agreed on a settlement of $160,000.

2/13/14RP 131, 140. Ivan signed a confession of judgment for that amount. 2/13/14RP 132; Exhibit 6. Deborah never signed a confession of judgment.

The guardian then filed a petition requesting the court order Deborah to appear and show cause why she should not be held in contempt for failing to provide an accounting. CP 104.

Adult Protective Services shared its records of the investigation with the King County Prosecutor's Office. CP 112. The State charged both Ivan and Deborah, as co-defendants, with one count of first degree theft, alleging that, with an intent to deprive, they "did exert unauthorized control" over Shelarose's property. CP 87; RCW 9A.56.010(21)(c), .020(1)(a), and .030(1)(a). The State also alleged two statutory aggravating factors: (1) that the defendants knew the victim was particularly vulnerable or incapable of resistance and the victim's vulnerability was a substantial factor in the commission of the offense; and (2) that the crime was a "major economic offense." CP 87-88; RCW 9.94A.535(3)(b), (d).

Prior to trial, both Ivan and Deborah moved to preclude the State from presenting evidence or commenting on their exercise of their Fifth Amendment right to silence. CP 96-114; 2/04/14RP 94. Counsel

argued the defendants had a right to be silent in the face of the guardian's requests for information. CP 96-99, 100-14; 2/04/14RP 97-98; 2/11/14RP 28-29. The court denied the motion, ruling the defendants did not have a right to be silent during the guardianship proceeding. 2/11/14RP 32-33.

As a result, during the criminal trial, the State's witnesses testified that Ivan and Deborah repeatedly failed to provide an accounting when the guardian requested it. 2/13/14RP 108-14, 125-26; 2/18/14RP 104, 128-30. In addition, in opening statement and closing argument, over objection, the prosecutor commented at length about the defendants' refusal to provide an accounting despite repeated requests. 2/11/14RP 40-42; 2/20/14RP 54-55, 121-22, 127-34.

The jury found both defendants guilty of first degree theft as charged. CP 115. The jury answered "yes" on the special verdict form regarding the two aggravating factors. CP 116.

At sentencing, the court imposed an exceptional sentence upward based on the two aggravators. CP 118, 120.

At a later hearing, the court ordered Deborah to pay restitution in the amount of $160,000, "joint and several" with Ivan. CP 174.

D. ARGUMENT

1. The State did not prove the elements of first degree theft beyond a reasonable doubt

It is a fundamental rule of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt.[1] Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

To prove the charged crime of first degree theft, the State was required to prove beyond a reasonable doubt that Deborah "exerted unauthorized control over the property of Shelarose" with an intent to deprive Shelarose of the property. CP 159; RCW 9A.56.020(1)(a). To "exert unauthorized control" means

> having any property in one's possession, custody, or control, as attorney, or 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.

[1] In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

CP 154; RCW 9A.56.010(22)(b); see State v. Greathouse, 113 Wn. App. 889, 905, 56 P.3d 569 (2002) ("exerts unauthorized control" means "that one who holds possession, custody or control of property of another by virtue of a position of trust (such as that of attorney, agent or employee) violates that trust by converting the property to his or her own use or the use of any person other than the true owner or person entitled thereto"). The "exerts unauthorized control" theft alternative includes what was referred to as "embezzlement" under prior law. Greathouse, 113 Wn. App. at 907.

The State did not prove Deborah was guilty of theft as a principal because it presented no evidence to show that she had "possession, custody, or control" of Shelarose's property. Deborah did not sign any of the checks written on Shelarose's accounts. There is no evidence that she withdrew or transferred any money from Shelarose's accounts or ever used her credit card. Deborah was named "alternate Attorney in fact" in the power of attorney document, Exhibit 1, but there is no evidence that she ever exercised that authority. Although witnesses testified that Deborah helped Shelarose with her bookkeeping, that is not enough to prove that she had "possession,

custody, or control" of Shelarose's money. 2/11/14RP 56; 2/12/14RP 4-5, 44-45, 79.

The State also did not prove that Deborah was guilty as an accomplice to theft because it did not prove beyond a reasonable doubt that the transfers of money were not authorized by Shelarose. Shelarose plainly wanted Ivan to have control over her finances—she designated him as her attorney in fact in the power of attorney document. Exhibit 1. There is no question that Shelarose was competent and capable, and knew what she was doing, when she executed the document. 2/12/14RP 113, 120-26. She was competent and lucid one year later when she met with her attorney to discuss her estate planning. 2/12/14RP 109-10; 2/13/14RP 3. In fact, Shelarose was not deemed to be *in*competent until the guardian was appointed in 2010, after the charging period in this case. 2/13/14RP 103.

Shelarose signed many of the checks that the State relied upon to prove the theft, suggesting that she authorized the payments. 2/18/14RP 156; 2/19/14RP 42; Exhibit 10, 12. The State did not prove who withdrew or transferred the money from Shelarose's accounts or used her credit card, whether it was Shelarose herself or Ivan acting as attorney in fact. 2/18/14RP 33, 138-40, 151-52; 2/19/14RP 13; Exhibit

5, 7. But even if Ivan performed those actions, the State did not prove they were not authorized by Shelarose. A person designated attorney in fact in a power of attorney document may make gifts to himself or others if authorized to do so by the principal. In re Estate of Lennon, 108 Wn. App. 167, 183, 29 P.3d 1258 (2001).

There is no evidence that Shelarose did not authorize Ivan to make the money transfers. The State may not rely upon speculation to prove this essential fact. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). In sum, the evidence was not sufficient to prove beyond a reasonable doubt that Deborah was guilty of theft either as a principal or an accomplice.

2. The State violated Ms. Ljunghammar's constitutional right to silence by urging the jury to view her decision to exercise her right to silence as evidence of guilt

The Fifth Amendment to the United States Constitution provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." Article I, section 9 of the Washington Constitution similarly states that "[n]o person shall be compelled in any criminal case to give evidence against himself." Both provisions guarantee a defendant the right to be free from self-incrimination, including the right to silence. State v. Knapp, 148 Wn. App. 414, 420,

199 P.3d 505 (2009). The Court interprets the two provisions similarly, and liberally construes the right against self-incrimination. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

The right to silence exists prior to arrest. Id. at 241. The purpose of the right is to place the burden of producing evidence squarely on the State and "'to spare the accused from having to reveal, directly or indirectly, his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government.'" Id. (quoting Doe v. United States, 487 U.S. 201, 213, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988)). This policy supports applying the right liberally to pre-arrest silence. Id.

"[W]hen the State invites the jury to infer guilt from the invocation of the right to silence, the Fifth Amendment and article I, section 9 are violated." State v. Burke, 163 Wn.2d 204, 217, 181 P.3d 1 (2008). If the State uses an accused's exercise of the right to silence as evidence of guilt, the accused has effectively lost the right. Id. at 238. Moreover, the use of silence as evidence of guilt is improper because the defendant may be forced to testify to rebut such an inference. Id. at 217-18.

At the same time, an accused's silence is of little evidentiary value because it is "insolubly ambiguous." Easter, 130 Wn.2d at 238. Silence is ambiguous because an innocent person may have many reasons for not speaking. Burke, 163 Wn.2d at 218-19. Possible reasons include a person's awareness that she is under no obligation to speak or the natural caution that arises from her knowledge that anything she says might be used later against her at trial; a belief that efforts at exoneration would be futile; or because of explicit instructions not to speak from an attorney. Id.

Here, Deborah's constitutional right to silence was violated because (1) she had a right to be silent in response to the guardian's—and the court's—demands that she provide financial information, where potential criminal charges were looming; (2) she exercised her right by refusing to provide the information; and (3) the State repeatedly invited the jury to conclude that her silence implied she was guilty.

a. Deborah had a constitutional right to be silent in the guardianship proceeding

It is well-established that the constitutional protection against self-incrimination includes the right of an individual not to be compelled to give incriminating answers in any proceeding, whether "civil or criminal, administrative or judicial, investigatory or

adjudicatory." Kastigar v. United States, 406 U.S. 441, 444-45, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972). The Fifth Amendment

> not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). The privilege against self-incrimination "is an exception to the general principle that the Government has the right to everyone's testimony." Garner v. United States, 424 U.S. 648, 658 n.11, 96 S. Ct. 1178, 47 L. Ed. 2d 370 (1976).

The right against self-incrimination protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. Kastigar, 406 U.S. at 444-45. The answer need only furnish a link in the chain of evidence needed to prosecute the witness for a crime in order to be incriminating under the Fifth Amendment. Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 95 L. Ed. 1118 (1951).

Thus, a person may refuse to answer questions posed during an official investigation of a civil matter, if it is possible that the investigation will lead to a criminal prosecution. E.g., Mathis v. United States, 391 U.S. 1, 88 S. Ct. 1503, 20 L. Ed. 2d 381 (1968); State v. Nason, 96 Wn. App. 686, 981 P.2d 866 (1999). In Mathis, for instance, a government agent obtained documents and oral statements from Mathis while conducting a tax investigation for the purpose of a civil action. Mathis, 391 U.S. at 2. That evidence was later used against Mathis in a criminal prosecution, resulting in his conviction for knowingly filing false claims against the government. Id. The United States Supreme Court held that because "tax investigations frequently lead to criminal prosecutions," Mathis had a Fifth Amendment right to refuse to answer the tax investigator's questions.[2] Id. at 4.

Similarly, in Nason, a CPS investigator investigating allegations of child abuse for the purpose of a civil dependency action interviewed Nason and then reported Nason's incriminating statements to law enforcement, leading to Nason's criminal conviction for child assault.

[2] The Court held that because Mathis was questioned while he was in custody serving a sentence on an unrelated matter, the tax investigator was required to advise him prior to questioning of his right to silence pursuant to Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Mathis, 391 U.S. at 5.

Nason, 96 Wn. App. at 693. The Court held Nason had a constitutional right not to answer the investigator's questions even though the purpose of the investigation was for a civil proceeding, due to the possibility of criminal prosecution.[3] Id. at 694. Because the investigator was required to disclose incriminating information to law enforcement, he was not acting on Nason's behalf but was instead a State agent who "owed his allegiance to the State." Id.; see also Estelle v. Smith, 451 U.S. 454, 467-68, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981) (Smith had constitutional right not to answer questions put to him by psychiatrist who interviewed him for purpose of determining his competency to stand trial, where Smith's statements to psychiatrist were later used against him at penalty phase of trial).

Here, Deborah was subject to compulsion to "answer official questions" sufficient to trigger her Fifth Amendment right against self-incrimination. See Turley, 414 U.S. at 77. The guardian was not acting as a private individual but was rather conducting an official investigation as "an officer of the court." Seattle First Nat'l Bank v. Brommers, 89 Wn.2d 190, 200, 570 P.2d 1035 (1977) ("guardian is

[3] Again, because Nason was interviewed while in custody, the investigator was required to read him his Miranda rights before questioning him. Nason, 96 Wn. App. at 693-94.

deemed to be an officer of the court"); RCW 11.92.010 (providing that a guardian "shall at all times be under the general direction and control of the court"). Moreover, when the guardian testified at the criminal trial about Deborah's refusal to answer questions or provide an accounting, the guardian was acting as "an agent of the State." See Smith, 451 U.S. at 467.

Deborah's Fifth Amendment right to silence came into play because she was subjected to the "cruel trilemma of self-accusation, perjury or contempt." Doe, 487 U.S. at 212 (citation omitted). Deborah was under direct compulsion from the guardianship court to answer the guardian's questions. The court issued orders requiring her to provide an accounting, under threat of contempt. 2/13/14RP 108-10; 2/18/14RP 104, 130; CP 104. Further, the court had statutory authority to commit Deborah to jail if it suspected she had concealed, embezzled, conveyed or disposed of Shelarose's property and refused to answer questions about those matters. RCW 11.48.070.

Although the guardianship proceeding was a civil matter, as in Mathis and Nason, Deborah had a right not to answer the guardian's questions because of the reasonable possibility that any information she provided would be used against her in a criminal trial. Like a tax

investigation or a CPS investigation, a guardianship investigation to account for missing assets must frequently lead to a criminal prosecution, as it did in this case.

Deborah had a reasonable basis to conclude that any incriminating information she provided to the guardian would ultimately be used against her in a criminal trial. The possibility of criminal charges was not remote. The police were involved in the case from the beginning. A police detective went to Shelarose's home to investigate allegations that Ivan and Deborah were misusing Shelarose's funds at the same time as the investigator from APS. 2/13/14RP 41-45. APS shared the records of its investigation with the King County Prosecutor's Office. CP 112. Indeed, not long afterward, the prosecutor filed criminal charges against Ivan and Deborah. CP 87.

In sum, Deborah had a constitutional right to be silent in response to the guardian's questions and demands for an accounting because there was a reasonable possibility that any incriminating information she provided would be used against her in a criminal trial.

b. Deborah exercised her right to silence by refusing to provide the financial information requested

"Unlike the Sixth Amendment right of counsel, the Fifth Amendment right of silence requires no magic words." Burke, 163 Wn.2d at 220-21. "No special set of words is necessary to invoke the right," and "silence in the face of police questioning is quite expressive as to the person's intent to invoke the right." Easter, 130 Wn.2d at 239. A person need not invoke the right to silence unequivocally. Burke, 163 Wn.2d at 221.

Here, Deborah invoked her constitutional right to silence by remaining silent in the face of the guardian's inquiries and requests for information, and the threat of court sanction. Her actions plainly communicated her intent to invoke her right to silence.

Although generally a person who desires the protection of the right against self-incrimination must invoke it expressly at the time she relies on it, the right may be invoked through silence if assertion of the privilege would itself tend to incriminate. Salinas v. Texas, __ U.S. __, 133 S. Ct. 2174, 2179-80, 186 L. Ed. 2d 376 (2013). In Leary v. United States, for instance, the Supreme Court held that a taxpayer was not required to complete a tax form, or explicitly invoke his right to

silence at that time, in order to be entitled to the protections of the Fifth Amendment, where filling out the form would have revealed income from illegal activities. 395 U.S. 6, 28-29, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969). Similarly, in Albertson v. Subversive Activities Control Bd., the Court held members of the Communist Party were permitted to invoke their right to silence by not completing a registration form rather than invoking the right expressly "where response to any of the form's questions . . . might involve [them] in the admission of a crucial element of a crime." 382 U.S. 70, 77-79, 86 S. Ct. 194, 15 L. Ed. 2d 165 (1965).

Here, as in those cases, Deborah was permitted to invoke her right to silence through actual silence because responding in any degree to the request for an accounting might have involved the admission of criminal activity. Instead, Deborah's silence in the face of the guardian's repeated questioning was sufficiently "expressive as to [her] intent to invoke the right." Easter, 130 Wn.2d at 239.

c. The State violated Deborah's right to silence by inviting the jury to infer her decision to remain silent implied she was guilty, requiring reversal of the conviction

"[W]hen the State invites the jury to infer guilt from the invocation of the right to silence, the Fifth Amendment and article I,

section 9 of the Washington Constitution are violated." Burke, 163 Wn.2d at 217.

Here, the State repeatedly invited the jury to infer Deborah's guilt from her invocation of her right to silence, resulting in a violation of her constitutional right against self-incrimination. The guardian, a State witness, testified that Ivan and Deborah were initially ordered by the court to provide an accounting but they did not. 2/13/14RP 109-11. The guardian testified that the court instructed her to try again to obtain the information but again Ivan and Deborah did not provide it. 2/18/14RP 130. At that point, she filed a petition, which led to a "citation" and "summons." 2/18/14RP 130. She said that despite the repeated court orders, "we never received an accounting." 2/18/14RP 128.

The prosecutor commented at length in opening statement and closing argument on Deborah's silence in response to the guardian's requests for information, inviting the jury to infer that her silence was evidence of guilt. 2/11/14RP 40-42; 2/20/14RP 54-55, 121-22, 127-34. The prosecutor stated that the guardian "naturally turn[ed] to Ivan and Deborah" for the records but "despite repeated requests, they receive[d]" nothing but old bank records from 2001, which were

"useless." 2/20/14RP 54. The prosecutor said that after the guardian "discovered there were a lot of very suspicious checks made to Deborah and Ivan Ljunghammar," the guardian again asked the defendants for an accounting. 2/20/14RP 55. The guardian asked the defendants to "please come in and explain what these checks are for," but "received no response from either defendant. Nothing." 2/20/14RP 55. The prosecutor asked, why did Ivan not say the money was a "loan" or a "gift"? 2/20/14RP 121. Instead, "there were repeated requests for the bank records, which they never provided, for an accounting, for explanations of what these amounts were. Not one." 2/20/14RP 121. The defendants did not provide "any records," or "any explanation," or "an accounting, despite being ordered to do so by the court." 2/20/14RP 121.

The constitutional violation resulting from the prosecutor's repeated comments on Deborah's silence is presumed prejudicial and the State bears the burden to prove it was harmless beyond a reasonable doubt. Burke, 163 Wn.2d at 222-23. The error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and the

untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Id.

Here, the untainted evidence of Deborah's guilt was far from overwhelming. As argued above, the State presented no evidence to show that Deborah ever had "possession, custody or control" over Shelarose's property and therefore did not prove she was guilty of theft as a principal. The evidence of Deborah's guilt as an accomplice was also limited because the State did not prove that any of the financial transactions were not "authorized" by Shelarose. Instead, the prosecutor's repeated references to Deborah's silence had the improper effect of encouraging the jury to overlook these deficiencies of proof and conclude that she must be guilty because she was trying to hide incriminating evidence from the guardian. As in Easter, "the State's emphasis on [Deborah's] silence to argue [her] guilt may well have swayed the jury." Easter, 130 Wn.2d at 242. Thus, the error is not harmless and the conviction must be reversed.

3. The court was not authorized to impose an exceptional sentence on Deborah based on the "major economic offense" aggravator

The trial court imposed an exceptional sentence based on the statutory aggravator that the crime was a "major economic offense."

CP 122; RCW 9.94A.535(3)(d). That was improper because Deborah was convicted as an accomplice and the jury did not find that she *knew* the offense was a "major economic offense." CP 116, 166; State v. Hayes, __ Wn.2d __, 342 P.3d 1144 (2015).

In Hayes, Hayes was convicted as an accomplice of first degree identity theft. 342 P.3d at 1146. The trial court imposed an exceptional sentence based on the jury's finding that the offense was a "major economic offense." Id. at 1145; RCW 9.94A.535(3)(d). But the jury did not find that Hayes "had any knowledge that informs the aggravating factors for a major economic offense, such as whether he knew the offense would involve multiple victims or would involve a high degree of sophistication." Id. at 1148. The Supreme Court reversed, holding that "[w]ithout a finding of knowledge that indicates that the jury found the aggravating factors on the basis of Hayes's own conduct, they cannot apply to Hayes." Id.

The Supreme Court explained that, in passing the current complicity statute, RCW 9A.08.020(3), the Legislature indicated it did not intend punishment for accomplices to be "coextensive with liability" and instead intended that "individual sentencing decisions would rest within the discretion of the sentencing judge." Id. at 1145-

46. When the Legislature passed the SRA, it indicated its intent that punishment be "proportionate to the seriousness of the offense and the offender's criminal history," and that sentencing judges should "impose *individualized* punishment within a range on the basis of the seriousness of the offense and the offender's criminal history." Id. at 1146. Together, these statutory provisions mean that a sentencing judge "can impose an exceptional sentence on an accomplice only where the accomplice's own conduct informs the aggravating factor." Id. at 1147. Thus,

> for aggravating factors that are phrased in relation to "the current offense" to apply to an accomplice, the jury must find that the defendant had some knowledge that informs that factor. Because factors phrased in this way potentially permit imposing an exceptional sentence more broadly than would be consistent with the SRA, this finding of knowledge ensures that the defendant's own conduct formed the basis of the sentence.

Id. at 1148. Because the jury's special verdict did not show "a finding of knowledge that indicates that the jury found the aggravating factors on the basis of Hayes's own conduct, they cannot apply to Hayes." Id. at 1148. The court therefore vacated the exceptional sentence.

Hayes requires reversal of Deborah's exceptional sentence. Deborah was convicted as an accomplice to first degree theft. Yet the jury was not asked to find whether her individual conduct informed the

"major economic offense" aggravator.[4] Further, the special verdict form does not show "a finding of knowledge that indicates that the jury found the aggravating factors on the basis of [Deborah's] own conduct." Hayes, 342 P.3d at 1148. The special verdict form merely states the jury found that the crime was "a major economic offense or series of offenses." CP 116. Therefore, the aggravating factor cannot apply to Deborah and the exceptional sentence must be vacated. Hayes, 342 P.3d 1148.

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[4] The instruction informed the jury it must find:

> To find that this crime is a major economic offense, at least one of the following factors must be proved beyond a reasonable doubt:
>
> (1) The crime involved multiple incidents per victim: or
>
> (2) The crime involved actual monetary loss substantially greater than typical for the crime; or
>
> (3) The crime involved a high degree of sophistication or planning or occurred over a lengthy period of time; or
>
> (4) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crime.
>
> The above factors are alternatives. This means that if you find from the evidence that any one of the alternative factors has been proved beyond a reasonable doubt, then it will be your duty to answer "yes" on the special verdict form. To return a verdict of "yes," the jury need not be unanimous as to which of the alternatives has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

CP 169.

Remand for resentencing is necessary where a sentencing court places significant weight on an improper factor or where some factors are improper and the sentence significantly deviates from the standard range. State v. Ferguson, 142 Wn.2d 631, 649 & 649 n.81, 15 P.3d 1271 (2001). Under such circumstances, remand is appropriate even if the trial court states in its written findings that that each of the aggravating factors relied upon is a substantial and compelling reason justifying an exceptional sentence. State v. Smith, 123 Wn.2d 51, 58 n.8, 864 P.2d 1371 (1993).

Here, the court imposed an exceptional sentence based on two aggravating factors found by the jury: that the crime was a "major economic offense," and that "the defendant kn[e]w that the victim was particularly vulnerable or incapable of resistance." CP 116, 122. As discussed, the "major economic offense" aggravator was improper. The standard range for the offense was 0 to 90 days. CP 118. The court imposed an exceptional sentence of 10 months, which was significantly greater than the standard range. CP 120. Thus, the sentence must be vacated and remanded for resentencing. Ferguson, 142 Wn.2d at 649.

The trial court's boilerplate finding that each aggravating factor, standing alone, was sufficient to impose the exceptional sentence is not sufficient to sustain the sentence on appeal. The court entered a boilerplate finding that:

> Each one of these aggravating circumstances is a substantial and compelling reason, standing alone, that is sufficient justification for the length of the exceptional sentence imposed. In the event that an appellate court affirms at least one of the substantial and compelling reasons, the length of the sentence should remain the same.

CP 123.

A boilerplate finding, standing alone, is antithetical to the notion of individualized consideration of specific circumstances. See, e.g., In re Dependency of K.N.J., 171 Wn.2d 568, 257 P.3d 522 (2011) (concluding a boilerplate finding alone was insufficient to show the trial court gave independent consideration of necessary facts); Hardman v. Barnhart, 362 F.3d 676, 679 (10th Cir. 2004) (explaining boilerplate findings in the absence of a more thorough analysis did not establish the trial court conducted an individualized consideration of witness credibility).

In State v. Blazina, __ Wn.2d __, 344 P.3d 680 (2015), for example, the Washington Supreme Court recently held that a

sentencing court's boilerplate language stating that it engaged in the inquiry necessary to impose legal financial obligations was not sufficient to show that the court actually made the necessary individualized inquiry into the defendant's current and future ability to pay.

Similarly, here, the court's boilerplate finding that each aggravating circumstance was alone sufficient to impose the exceptional sentence is not sufficient to show it actually made the necessary individualized inquiry into whether it would have imposed the same sentence had it known that the "major economic offense" aggravator was improper. Thus, the exceptional sentence must be vacated and remanded for resentencing.

4. The trial court did not have statutory authority to order Deborah to pay restitution joint and several with Ivan

The trial court ordered Deborah to pay restitution in the amount of $160,000 "joint and several" with Ivan, over defense objection. CP 174; 10/10/14RP 11-12. The court made no inquiry into whether this amount was appropriate given Deborah's individual conduct or culpability. Because the trial court did not have statutory authority to

impose "joint and several" restitution, the restitution order must be vacated.

A court's authority to order restitution is derived solely from statute. State v. Gonzalez, 168 Wn.2d 256, 261, 226 P.3d 131 (2010). A restitution order is void if statutory provisions are not followed. State v. Lewis, 57 Wn. App. 921, 924, 791 P.2d 250 (1990). The Court reviews questions of statutory interpretation de novo. Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007).

a. Under a plain reading, the statute does not authorize a sentencing court to impose joint and several restitution on an adult felony offender

When interpreting the SRA, "the court's objective is to determine the legislature's intent." State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). The surest indication of legislative intent is the language enacted by the legislature, so if the meaning of a statute is plain on its face, the Court "'give[s] effect to that plain meaning.'" Id. (quoting Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). In determining the plain meaning of a provision, the Court looks to the text of the statutory provision in question, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Id. "Reference to a

statute's context to determine its plain meaning also includes examining closely related statutes, because legislators enact legislation in light of existing statutes." Campbell & Gwinn, 146 Wn.2d at 11-12.

The SRA directs sentencing courts to "order restitution as provided in RCW 9.94A.750 and 9.94A.753." RCW 9.94A.505(7). Neither of those provisions expressly authorizes a court to impose "joint and several" restitution. To the contrary, the plain language of the statute indicates the Legislature's intent that restitution be imposed based only on the offender's individual culpability.

The statute provides that "restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment for injury to persons, and lost wages resulting from injury." RCW 9.94A.750(3). The plain meaning of the statute is to authorize restitution that is commensurate with the offender's *individual* conduct. The statute "provides a trial court with the discretion to order a defendant to pay restitution for the expenses that are caused *by his or her criminal acts*." State v. Enstone, 137 Wn.2d 675, 680, 974 P.2d 828 (1999) (emphasis added). That interpretation is consistent with one of the goals of the restitution statute which is to "require[] the

defendant to face the consequences of his criminal conduct." Id. (internal quotation marks and citation omitted). In addition, the statute is designed to promote respect for the law by providing punishment that is just. State v. Davison, 116 Wn.2d 917, 922, 809 P.2d 1374 (1991).

None of these goals of restitution supports an interpretation of the statute that permits a court to impose joint and several restitution. Requiring an offender to pay joint and several restitution with a co-defendant not only requires her to "face the consequences of *her* criminal conduct," it also requires her to face the consequences of *someone else's* conduct. Imposing restitution based on someone else's criminal conduct does not promote respect for the law by providing punishment that is just and commensurate with an individual's criminal culpability.

Moreover, a comparison of the restitution provisions of the SRA to the restitution provisions of the Juvenile Justice Act further supports the conclusion that the Legislature did not intend to authorize joint and several restitution at adult felony sentencings. It is an "elementary rule that where the Legislature uses certain statutory language in one instance, and different language in another, there is a different legislative intent." United Parcel Serv., Inc. v. Dept. of Revenue, 102

Wn.2d 355, 362, 687 P.2d 186 (1984). The Court "cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission." Jenkins v. Bellingham Mun. Court, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981). Thus, for instance, in Enstone, the Supreme Court concluded that because the Legislature has frequently used the term "foreseeability" in other statutes but did not include an express "foreseeability" requirement in the restitution statute, the Legislature "did not intend to require a sentencing court to find that a victim's damages are foreseeable before ordering a defendant to pay restitution" under the SRA. Enstone, 137 Wn.2d at 680.

Similarly, here, the Legislature included a provision authorizing "joint and several" restitution in juvenile cases but did not include a comparable provision in the SRA, compelling the conclusion that the Legislature did not intend to authorize joint and several restitution at adult felony sentencings.

The Juvenile Justice Act provides that: "If the respondent participated in the crime with another person or person, all such participants shall be jointly and severally responsible for the payment of restitution." RCW 13.40.190(1)(f). This "provision for joint and

several responsibility demonstrates the legislature's intent: an individual's actual conduct does not determine the extent of his responsibility for [juvenile] restitution; instead, all acts which form the crime are imputed, for restitution purposes, to any participant." State v. Hiett, 154 Wn.2d 560, 565, 115 P.3d 274 (2005).

As stated, there is no comparable provision in the SRA. The Legislature's inclusion of a joint and several requirement in the Juvenile Justice Act, and its omission from the SRA, compels the conclusion that the Legislature did not intend to authorize sentencing courts to impose joint and several restitution in adult felony cases. See Enstone, 137 Wn.2d at 680. Moreover, joint and several restitution is contrary to the SRA's focus on punishment that is commensurate with an individual's own conduct and culpability.

b. Imposing joint and several restitution on a person convicted as an accomplice is inconsistent with the SRA's mandate that punishment be tailored to the offender's individual culpability

Restitution is a component of an offender's punishment under the SRA. RCW 9.95A.505(7); State v. Kinneman, 155 Wn.2d 272, 281, 119 P.3d 350 (2005) ("restitution is punishment").

As discussed, the Legislature did not intend punishment for accomplices to be "coextensive with liability." Hayes, 342 P.3d at 1145-46. Instead, the Legislature intended that punishment be individualized and proportionate to the seriousness of the offender's own conduct. Id. A court should not impose a particular punishment on a person convicted as an accomplice simply because it imposed the same punishment on the person convicted as a principal.

Thus, a court may not impose joint and several restitution on an accomplice but must instead impose individualized restitution that is commensurate with the damage caused by the person's own conduct. Here, Deborah was convicted as an accomplice. The court was not authorized to order her to pay $160,000 in restitution simply because it ordered Ivan to pay the same amount. The court should have imposed a restitution award that was commensurate with Deborah's individual conduct.

Because the court was not authorized to impose joint and several restitution on Deborah, the restitution order is void. Lewis, 57 Wn. App. at 924.

E. CONCLUSION

The State did not prove the elements of the crime beyond a reasonable doubt, requiring the conviction be reversed and the charge dismissed. Alternatively, the State violated Ms. Ljunghammer's constitutional right not to incriminate herself, requiring the conviction be reversed and remanded for a new trial. In addition, the exceptional sentence is contrary to statute, requiring the exceptional sentence be vacated and the case remanded for resentencing. The restitution award is not authorized by statute, requiring that it be vacated

Respectfully submitted this 13th day of April, 2015.

s/ Maureen M. Cyr

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DEBORAH LJUNGHAMMAR, Appellant.	)))))))))	NO. 72067-8-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF APRIL, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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