

NO. 74436-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JANET BAUML,

Appellant.

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Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

| | Page |
|---|------|
| A. <u>ISSUES PRESENTED</u> | 1 |
| B. <u>STATEMENT OF THE CASE</u> | 4 |
| 1. PROCEDURAL FACTS | 4 |
| 2. SUBSTANTIVE FACTS | 4 |
| a. Cooper And Bauml Relationship | 4 |
| b. Bauml's Finances And Initial Loans From Cooper | 7 |
| c. Bauml's Requests For Loans | 8 |
| d. Bauml's Representations About Repayment .. | 10 |
| e. All Checks From Cooper To Bauml | 11 |
| f. Cooper's Liquidation Of Her Lifesavings To Fund Loans To Bauml..... | 12 |
| g. Bauml's Disappearance | 14 |
| h. Police Contact; And Cooper's Dementia..... | 17 |
| i. Financial Records | 20 |
| C. <u>ARGUMENT</u> | 23 |
| 1. THERE WAS SUFFICIENT EVIDENCE FOR ALL COUNTS TO SUPPORT THE JURY'S FINDING THAT BAUML COMMITTED THEFT BY DECEPTION WITH INTENT TO DEPRIVE | 23 |
| a. There Was Sufficient Evidence That Bauml Deceived Cooper; And Cooper Relied On These Deceptions | 24 |

| | | |
|------|--|----|
| i. | There was sufficient evidence to find that Bauml deceived Cooper regarding her ability to repay the money, and that Cooper relied on this deception | 27 |
| ii. | There was sufficient evidence to find that Bauml deceived Cooper regarding her intent to repay the money; and that Cooper relied on this deception | 30 |
| iii. | There was sufficient evidence to find that Bauml deceived Cooper regarding her relationship intentions; and that Cooper relied on this deception..... | 32 |
| iv. | There was sufficient evidence to find that Bauml deceived Cooper regarding the reasons she needed the money; and that Cooper relied on this deception | 34 |
| b. | There Was Sufficient Evidence That Bauml Intended To Deprive Cooper..... | 47 |
| 2. | BAUML RECEIVED A FAIR TRIAL UNDER THE GIVEN INSTRUCTIONS; AND, ANY ERROR WAS HARMLESS | 50 |
| a. | Additional Facts Relevant To The Declined Jury Instruction..... | 51 |
| b. | The Trial Court's Instructions Satisfied Bauml's Right To A Fair Trial Because They Accurately Informed The Jury Of The Law And Allowed Bauml To Argue Her Defense Theory..... | 53 |

| | | |
|----|---|----|
| c. | Any Trial Court Error In Declining To Give Bauml's Proposed Instruction Was Harmless..... | 57 |
| 3. | THE TRIAL COURT PROPERLY DECLINED TO GIVE BAUML A FIRST-TIME OFFENDER WAIVER | 59 |
| a. | Additional Facts Relevant To Sentencing | 60 |
| b. | The Trial Court Did Not Abuse Discretion In Imposing A Standard Range Sentence | 65 |
| D. | <u>CONCLUSION</u> | 68 |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Keller v. City of Spokane, 146 Wn.2d 237,
44 P.3d 845 (2002)..... 58

Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701,
575 P.2d 215 (1978)..... 25

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995)..... 24

State v. Benn, 120 Wn.2d 631,
845 P.2d 289 (1993)..... 53

State v. Bledsoe, 33 Wn. App. 720,
658 P.2d 674 (1983)..... 54

State v. Boze, 47 Wn. App. 477,
735 P.2d 696 (1987)..... 65

State v. Brown, 132 Wn.2d 529,
940 P.2d 546 (1997)..... 54

State v. Casey, 81 Wn. App. 524,
915 P.2d 587 (1996)..... 26, 27, 43

State v. Cross, 156 Wn.2d 580,
132 P.3d 80 (2006)..... 53

State v. Deiro, 20 Wn. App. 637,
581 P.2d 1079 (1978)..... 54

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107 (2000)..... 25

State v. Garcia-Martinez, 88 Wn. App. 322,
944 P.2d 1104 (1997)..... 66

| | |
|---|------------|
| <u>State v. Grayson</u> , 154 Wn.2d 333, 111 P.3d 1183 (2005)..... | 65, 66, 68 |
| <u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)..... | 25 |
| <u>State v. Herzog</u> , 112 Wn.2d 419, 771 P.2d 739 (1989)..... | 65 |
| <u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991)..... | 58 |
| <u>State v. Huckins</u> , 66 Wn. App. 213, 836 P.2d 230 (1992)..... | 55 |
| <u>State v. Johnson</u> , 97 Wn. App. 679, 988 P.2d 460 (1999)..... | 65 |
| <u>State v. Kennard</u> , 101 Wn. App. 533, 6 P.3d 38 (2000)..... | 53 |
| <u>State v. Komok</u> , 113 Wn.2d 810, 783 P.2d 1061 (1989)..... | 49 |
| <u>State v. Kovac</u> , 50 Wn. App. 117, 747 P.2d 484 (1987)..... | 25 |
| <u>State v. McNallie</u> , 64 Wn. App. 101, 823 P.2d 1122 (Div. I 1992), <u>aff'd</u> , 120 Wn. 2d 925, 846 P.2d 1358 (1993)..... | 58 |
| <u>State v. Mehrabian</u> , 175 Wn. App. 678, 308 P.3d 660 (Div. I 2013)..... | 26, 52 |
| <u>State v. Mermis</u> , 105 Wn. App. 738, 20 P.3d 1044 (2001)..... | 32 |
| <u>State v. Ng</u> , 110 Wn.2d 32, 750 P.2d 632 (1988)..... | 53 |
| <u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995)..... | 53 |

| | |
|---|--------|
| <u>State v. Rice</u> , 102 Wn.2d 120, 683 P.2d 199 (1984)..... | 58 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)..... | 25 |
| <u>State v. Welty</u> , 44 Wn. App. 281, 726 P.2d 472 (1986)..... | 65 |
| <u>State v. Zorich</u> , 72 Wn.2d 31, 431 P.2d 584 (1967)..... | 27, 43 |
| <u>Thomas v. French</u> , 99 Wn.2d 95, 659 P.2d 1097 (1983)..... | 58 |

Statutes

Washington State:

| | |
|---------------------|--------|
| RCW 9.94A.530 | 66 |
| RCW 9.94A.585 | 65 |
| RCW 9.94A.650 | 65 |
| RCW 9A.56.010 | 26, 30 |
| RCW 9A.56.020 | 26, 51 |
| RCW 9A.56.030 | 26, 51 |

Other Authorities

| | |
|-------------------------|--------|
| WPIC 79.01 (2008) | 51, 55 |
| WPIC 79.03..... | 51, 55 |
| WPIC 79.04..... | 52 |

A. ISSUES PRESENTED

1. Under Washington law, when charging felony theft by deception, the State must prove that the defendant deceived the victim to obtain control over her property. The State must also prove that the victim relied upon the defendant's deception. The deception need not be the sole inducement; and, it is sufficient that the deception was believed and in some measure operated to induce the victim to part with the property. The State's evidence showed that Bauml ingratiated herself into Cooper's life and finances and "borrowed" over \$200,000 from Cooper by falsely claiming she needed expensive treatment for herself and son, and promising to repay the loans with an imminent injury settlement and million dollar investment return from a Nu Skin company merger. Cooper testified that she trusted and believed Bauml's representations when she lent the money. The evidence also indicated that Bauml had not been injured in an accident, did not receive the treatment she claimed she needed, paid a pittance toward her son's treatment, did not have a substantial investment in Nu Skin, spent the money on a car and other expensive lifestyle purchases, and essentially vanished when Cooper had nothing more to lend.

When viewed in the light most favorable to the State, was there sufficient evidence for a rational jury to find that Bauml deceived Cooper regarding her intended use of the money, and her ability and intention to repay the money she borrowed? When viewed in the light most favorable to the State, was there sufficient evidence for a rational jury to find that Cooper relied upon and was induced in some measure to part with her money by Bauml's deceptions?

2. A court reviewing a sufficiency of the evidence claim must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. During trial, Cooper, who suffers from dementia, made an isolated, ambiguous comment that all Bauml had to do was ask and she would have given her the money. Drawing all reasonable inferences in favor of the State, was that isolated comment inconsistent with the other evidence such that a rational jury could discredit it?

3. For theft by deception, the State must also prove that the defendant intended to deprive the victim of the property at the time of the taking. The State's evidence showed that despite having over \$60,000 in other income and loans, Bauml never made

a payment to Cooper. Bauml also lied about the reasons she needed the money and her ability to repay it. Moreover, when Cooper expressly asked for a payment, Bauml essentially vanished and concocted false stories about losing her phone and traveling out of state. When viewed in the light most favorable to the State, was there sufficient evidence for a rational jury to find that Bauml intended to deprive Cooper of her money?

4. Jury instructions are sufficient if, taken as a whole, they accurately inform the jury of the relevant law, are not misleading, and allow the defendant to argue her theory of the case. An instructional error is harmless if there was no prejudice. Did the trial court properly decline to give Bauml's proposed instruction defining "aid of deception," where the court's "theft" and "aid of deception" instructions accurately stated the law and permitted Bauml to argue her theory of defense?

5. A sentencing trial court must exercise discretion when deciding whether to impose a First-Time Offender Waiver ("FTOW") at sentencing. The court abuses its discretion when it categorically refuses to consider an FTOW for a class of offenders. Did the trial court properly decline to impose an FTOW, where the record shows

the trial court's decision was based, not on an offender class, but on the facts supporting the convictions?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Janet Bauml was charged with six counts of theft in the first degree and four counts of theft in the second degree.¹ CP 48-54. A major economic offense aggravator was added to all counts. Id. A jury found Bauml guilty on counts two through nine, and failed to reach a verdict on count one. 2RP² 917-20; CP 175-76, 216. The jury also found the aggravators. Id. Bauml was sentenced to 59.5 concurrent months on each count. CP 197-204; 2RP 948-49. Bauml appeals. CP 205-15.

2. SUBSTANTIVE FACTS

a. Cooper And Bauml Relationship.

In 2006, Marina Cooper was 77 years old and living alone in her own home in Redmond. 2RP 14-15. Cooper's husband was

¹ The ten felony theft counts relate to victim Mariana Cooper. CP 48-54. Bauml was also charged with two counts of felony theft related to Jeffrey Michell, which are not relevant or discussed herein. Id.

² The verbatim record of proceedings in this case is divided into two sets. The first set, which consists of the dates: 7/27/15; 10/1/15; 10/13/15- 10/15/15; 10/19/15; 10/21/15; 10/22/15, are consecutively paginated 1-532, and will be referred to as simply "1RP." The second set, which consists of the following dates: 10/26/15- 10/10/28/15; 11/2/15- 11/5/15, are consecutively paginated 1-952, and will be referred to as simply "2RP."

long deceased and her children and grandchildren lived in Yakima and in Snohomish County. 2RP 14-16. One day while Cooper was visiting with a neighbor, the neighbor introduced her to Janet Bauml. 2RP 16, 18-19. Bauml had been hired by Cooper's neighbor, who was returning from a nursing home, to clean out and organize her home to make it more livable. 2RP 18-19.

After meeting Bauml, Cooper was surprised when Bauml appeared uninvited at Cooper's doorstep. 2RP 19-20. Although Cooper felt they had nothing in common, she invited Bauml in and they visited. 2RP 20-21, 23. Thereafter, Bauml continued showing up at Cooper's home weekly. 2RP 20, 23. Over time, these visits became an almost daily event, and Cooper eventually felt that they were true friends. 2RP 20, 24-25. As the months progressed, Cooper and Bauml shared much personal information about their lives. 2RP 24. Cooper was very vulnerable during this time because her daughter was fighting a years-long battle with cancer, and ultimately passed away in November 2007. 1RP 479, 480-83. During the last years of her illness, Cooper's daughter lived with Cooper's granddaughter, Amy Lecoq, in Snohomish County. 1RP 479-80. Amy was consumed with the job of providing care to her mother and the rest of her family, along with her full-time work,

leaving her little time to pay attention to her elderly grandmother. 1RP 481. Amy did observe, however, that Cooper suffered intense grief over her daughter's illness and death. 1RP 483. During this time, Bauml provided emotional support and company, including introducing her own daughter and son to Cooper and spending several Christmases with Cooper. See 2RP 26-29.

After more than a year, around the time of her daughter's death, Cooper trusted Bauml so much that she asked Bauml to help her with paying her bills and balancing her checkbook each month. 2RP 24-26. Cooper thought herself financially capable, but felt that at her age she should have someone looking out for her and she trusted Bauml. 2RP 24-26. As part of this financial planning, Cooper took Bauml to a meeting with Cooper's financial advisor, who gave Bauml information about Cooper's investment retirement account. 2RP 437-38, 440-43. It was the first time in the financial advisor's career that a client had brought a non-relative with them. 2RP 443, 453. Cooper trusted Bauml so much that in August 2009, she and Bauml visited an attorney (that Bauml recommended) in order to draw up and immediately execute estate planning documents, including documents which made Bauml her durable power of attorney for both finances and healthcare and the personal representative of her

estate. 2RP 34-36, 335, 341, 343-44, 379-50, 353. In the attorney's experience, it was not typical for a client to bring a non-family member with them. 2RP 364. Cooper also added Bauml's name to her bank accounts because she thought it was part of making Bauml the executor of her estate. 2RP 36-37.

b. Bauml's Finances And Initial Loans From Cooper.

Bauml, however, had no regular source of income, as she was dependent on her organizational business. 2RP 30; 730, 733, 768-69. Bauml began trying to sell cosmetic products for a company called Nu Skin. 2RP 30, 823-24. The endeavor involved Bauml buying products from the company, demonstrating them at people's homes, and, presumably, taking orders from them. Id. However, Bauml never truly followed through on her Nu Skin business and it was not profitable. 2RP 730; see also 818-19, 823-24. By early 2008, according to Bauml's credit report and bank records, she had \$34,832 in debt on five credit cards. 2RP 572-73.

At some point, Bauml began talking with Cooper about needing money. 2RP 37. She would openly discuss with Cooper her financial difficulties, her concerns about paying rent and utilities, and her need to support two teenage children as a single mother. 2RP

22-23, 27, 37. The first time Bauml asked Cooper for money, she said it was to pay rent and utilities. 2RP 37-38. On February 2, 2008, Cooper gave Bauml a \$3,000 check and deemed it a gift. 2RP 38, 61, 63. Two to three months later, Bauml again asked Cooper for money. 2RP 39. Thereafter, Bauml began asking Cooper for money every month to few months and always asked for it as a loan. 2RP 38-39. Although Cooper gave Bauml the first \$3,000 as a gift, every check she gave Cooper thereafter she deemed a loan. 2RP 38, 63, 75-76.

c. Bauml's Requests For Loans.

Bauml began telling Cooper that she had suffered childhood emotional trauma. 2RP 44-46. Bauml said that her trauma arose from her mother smothering her with pillows, as well as causing her to be falsely arrested. 2RP 48-49. She claimed that the jailers let her go after a few days, but she was so afraid to go home that she lived with a friend and then in a treehouse at night and went to school every day. 2RP 49. Cooper believed Bauml. 2RP 50. Bauml convinced Cooper that she did not have health insurance; although Bauml's daughter testified at trial that she was on her mother's state health insurance policy during this period. 2RP 46, 744. Bauml's daughter also testified at trial that she was not aware of

her mother needing treatment related to traumatic stress or mental health issues. 2RP 746. Nonetheless, Bauml told Cooper she needed expensive PTSD treatments that cost \$50,000 per round of treatment; and, she asked to borrow the money for her treatment. 2RP 44-46, 72. Cooper lent Bauml \$50,000 for the treatment. Id. Bauml subsequently told Cooper that she needed another \$50,000 for a second round of treatment. Id. Cooper loaned her the money. Id. Cooper understood that both \$50,000 checks in their entirety were going to be spent on the medical treatment. 2RP 72. In total, Cooper wrote \$128,000 worth of checks to Bauml because Cooper believed Bauml needed the medical treatment. See 2RP 44-49, 70-74, 626-27, 630-31, 633.

Cooper also told Bauml about her son's drug addiction, and said that she needed money to pay for his treatment and legal bills. 2RP 42-44, 102. At one point, Bauml asked for \$32,000, and another time \$10,000 to help with her son's drug addiction. 2RP 43. Cooper lent the money requested and believed the entire amount she lent was going toward Bauml's son's treatment. 2RP 70.

The more money Bauml asked for, the more emotional and desperate she tried to appear to Cooper. 2RP 40, 42, 44, 46. Cooper would ask, 'don't you have anyone else?' 2RP 40. But

ultimately, Cooper would always agree to lend the money and she would write Bauml a check. 2RP 41. Cooper felt that Bauml was “family,” and she wanted to help her and her children in any way she could. Id. Cooper was so worried about Bauml’s financial situation that she made meals and sent them home with Bauml to ensure that her children had enough to eat. 2RP 26-27. Because Cooper trusted and believed what Bauml told her about why she needed the money, Cooper never tried to verify any of Bauml’s stories. 2RP 50.

d. Bauml’s Representations About Repayment.

After the first gift, each time Cooper gave Bauml money, Bauml promised to repay Cooper. 2RP 41. In fact, Bauml repeatedly told Cooper that she was going to pay her back. 2RP 125-26. Bauml would often claim that she would soon be receiving a large car accident insurance settlement, and that the disbursement was only pending her medical release. 2RP 41. However, Bauml’s daughter, who lived with Bauml, testified that she was not aware of her mother being in any car accident. 2RP 743. Nor did Bauml ever mention to her daughter that she was expecting a large insurance settlement. 2RP 752. Although Bauml’s son recalled Bauml being in a car accident at some point when they lived in Redmond, he testified that nobody was injured. 2RP 818.

BaumI also told Cooper that she was awaiting a one million dollar investment return from Nu Skin; however, she could not get her money until the company completed a merger. 2RP 41-42. Cooper trusted and believed BaumI's stories that she was going to be getting windfalls from the accident settlement and Nu Skin investment; and, she believed BaumI was going to use this money to pay her back. 2RP 42, 125. At trial, BaumI's daughter testified that BaumI had never talked about an investment or merger, or that she was expecting a large windfall from Nu Skin. 2RP 751-52.

e. All Checks From Cooper To BaumI.³

The money Cooper lent to BaumI is listed in the table below:

| Check Date | Check # | Amount | Memo Line | Charged as Count |
|------------|---------|-------------|-----------|------------------|
| 2/2/2008 | 3103 | \$3,000.00 | | uncharged |
| 4/5/2008 | 1073 | \$4,500.00 | | uncharged |
| 6/7/2008 | 3204 | \$2,000.00 | | uncharged |
| 7/2/2008 | 1114 | \$2,000.00 | Loan | uncharged |
| 7/28/2008 | 1128 | \$1,000.00 | | uncharged |
| 8/1/2008 | 1115 | \$3,925.00 | | uncharged |
| 9/10/2008 | 1139 | \$4,867.00 | | uncharged |
| 9/20/2008 | 3284 | \$400.00 | | uncharged |
| 10/27/2008 | 1156 | \$3,000.00 | | uncharged |
| 10/29/2008 | 0590 | \$1,800.00 | | uncharged |
| 11/25/2008 | 3317 | \$100.00 | | uncharged |
| 12/16/2008 | 1018 | \$10,000.00 | | uncharged |
| 3/30/2009 | 0257 | \$5,000.00 | | 1 |

³ Not all Cooper to BaumI checks were charged as crimes, due to prosecutorial discretion and Statute of Limitations issues. Regardless, the State presented evidence regarding all payments made to Janet BaumI as evidence of intent and *res gestae*. See Exhibits 33, 34, 35, 36.

| Check Date | Check # | Amount | Memo Line | Charged as Count |
|--------------|---------|---------------------|----------------|------------------|
| 4/30/2009 | 1021 | \$10,000.00 | Loan | 2 |
| 7/31/2009 | 3492 | \$145.57 | Nu Skin | uncharged |
| 7/31/2009 | 3504 | \$350.00 | | uncharged |
| 8/18/2009 | 3512 | \$600.00 | | uncharged |
| 9/10/2009 | 3532 | \$3,000.00 | | 3 |
| 9/16/2009 | 3536 | \$32,000.00 | | 4 |
| 12/2/2009 | 3605 | \$50,000.00 | Med. Treatment | 5 |
| 1/26/2010 | 3640 | \$50,000.00 | | 6 |
| 7/20/2010 | 1024 | \$21,000.00 | Med. Treatment | 7 |
| 7/31/2010 | 3800 | \$4,000.00 | Med. Treatment | 8 |
| 1/7/2011 | 3938 | \$3,000.00 | | 9 |
| 5/23/2011 | 4024 | \$2,200.00 | Loan to Janet | 10 |
| TOTAL | | \$217,887.57 | | |

See 2RP 61-76; see also Exhibits 33, 34, 35, 36.

f. Cooper's Liquidation Of Her Lifesavings To Fund Loans To Bauml.

As the loans progressed, Bauml depleted the money in Cooper's bank account. 2RP 50-51. To further fund Bauml's ongoing requests for loans, Bauml would suggest which of Cooper's credit cards she could take cash advances from. 2RP 50-52. Cooper had never before taken cash advances and had never had credit card debt. 2RP 51-52. In order to lend Bauml the money she was requesting, Cooper initially took out at least 13 cash advances on her three credit cards in an amount totaling \$49,092 worth of debt until she had maxed them out. 2RP 575-77.

After Cooper's credit cards were maxed out, she found herself with monthly credit card payments of \$1,000 a month. 2RP 53. As a result, Cooper considered taking out a reverse mortgage because she was paying so much for the cash advances and had depleted her savings. 2RP 52. Cooper needed money to update carpeting, paint her home, and install a new roof on her house. 2RP 52-53. At the time, Cooper owed approximately \$75,000 on her mortgage. 2RP 55. Cooper discussed taking out a reverse mortgage with Bauml. 2RP 52. Bauml encouraged and promoted the idea; so, Cooper, with Bauml's assistance, obtained a reverse mortgage on her home in June 2009 (Bauml introduced her to the mortgage broker and attended all meetings related to the loan). 2RP 54-55, 115. Cooper did not consult with her financial advisor, daughter or anyone other than Bauml before obtaining the reverse mortgage. 2RP 54.

There were a total of five disbursements from the reverse mortgage. 2RP 578. The first \$50,000 disbursement was wired into Cooper's bank account and was used to pay off her credit cards, with approximately \$5,000 left over. 2RP 578. Cooper was only able to afford painting the inside of her home and new carpeting, but not the other work. 2RP 58. However, the remaining four disbursements, which totaled \$136,000, were deposited into Cooper's accounts and

then turned over in their entirety to Bauml in the form of checks written from Cooper's accounts for the exact amounts of those disbursements. 2RP 56-57, 578-79.

After the reverse mortgage funds were no longer available, Cooper resorted to more cash advances for another \$24,000, bringing the total amount of credit card cash advances taken by Cooper for Bauml's loans to \$73,092. 2RP 575-78.

The total amount of debt that Cooper incurred for Bauml's direct benefit consisted of \$209,092 in credit card advances and reverse mortgage funds. 2RP 579. Cooper also took \$8,795.57 from her regular pension and social security income savings and lent it to Bauml. 2RP 579-80. Accordingly, the total cash advance, reverse mortgage funds, and regular income funds from Cooper to Bauml totaled \$217,887.57. 2RP 580. Cooper testified at trial that she never put Bauml's promises to pay in writing or ask Bauml to sign a promissory note because she "trusted her." 2RP 76.

g. Bauml's Disappearance.

After Cooper gave Bauml the last check, Bauml told Cooper that she had checked the internet and knew the merger with Nu Skin would happen very soon, so she would be able to repay the loans. 2RP 59. In July 2011, Bauml told Cooper that she was going to

California for Nu Skin training. 2RP 80. Bauml promised Cooper that she would be receiving a million dollars in Nu Skin money by the end of the month. 2RP 78. Bauml was supposed to repay back some of Cooper's money in a lump sum in the summer 2011. 2RP 81-82.

However, Bauml simply stopped calling or visiting Cooper. 2RP 78. By August 2011, Cooper was very worried because she needed to pay \$21,000 for a new roof and did not have the funds. 2RP 78. She was depending upon Bauml to make a payment to her to finance the project. Id. Cooper began calling Bauml urgently and leaving many messages about her need for the money and pressing her for some repayment. 2RP 78, 81-83, 125-27. Bauml did not return Cooper's calls or messages. 2RP 78. Cooper continued to try desperately to contact Bauml, even resorting to calling Bauml's daughter, but she was not able to get in touch with Bauml. 2RP 79-83.

After some time and many messages, Bauml eventually called her back, claiming she had broken her phone and needed to get a new one. 2RP 78. Cooper explained to Bauml that she needed the money to pay for her roof. 2RP 84. By September of 2011, despite not having received any money from Bauml, Cooper had no choice

but to proceed with the new roof. 2RP 81, 83. Cooper had to pay for the roof in installment payments. 2RP 84.

Cooper did not hear from or see Bauml again until Christmas Eve of 2011, when Bauml dropped off a teapot with a \$15 price tag still attached to the bottom as a Christmas gift. 2RP 83. Bauml said she had been in Canada and had a car accident, which resulted in Bauml having to pay for the damages and being asked to leave the country. 2RP 85. Bauml did not offer any explanation as to why she did not have any repayment money. 2RP 85-86. At this point, Cooper had come to realize that it was a certainty that Bauml was never going to repay her. 2RP 85-86, 128. She testified at trial that, "I was pretty upset with [Bauml] by that time, and I was just certain I was never going to get any [money], so I—and I was going to Christmas Eve candlelight service and I—I didn't want to prolong her visit any longer." Id. Bauml did not offer any information about repayment before leaving. 2RP 86.

Notably, at trial Bauml's daughter testified that during the summer and fall of 2011, Bauml had a cell phone and had never changed the number. 2RP 749. Moreover, she testified that she lived with her mother during this period and she was not aware of Bauml taking any trips to California or Canada. 2RP 749-50. She

recalled her mother being around at that time. 2RP 750. Similarly, Bauml's son, who was living at home at the time, testified that he was not aware of Bauml taking any extended trips, and in particular not to California or Canada in 2011. 2RP 822-23. He also testified that he had never known Bauml to lose her phone and have to replace it. 2RP 825.

Bauml never repaid a single penny of the over \$200,000 she had "borrowed" from Cooper. 2RP 83, 86. When Cooper was asked at trial whether she would have lent Bauml all of this money if she had known that Cooper was never going to pay her back, she replied, "of course not." 2RP 89-90. Prior to requesting payment to fund her roof and receiving nothing, Cooper had confidently believed Bauml would repay her because she trusted her and because "she was always going to have that money floating around that I never did get to see." See RP 125-26.

h. Police Contact; And Cooper's Dementia.

Cooper did not tell her family or friends about the loans she had given Bauml, until February 2012 when she told her granddaughter, Amy, that she believed she had been scammed by Bauml. 2RP 87, 493-95. Cooper was anxious, emotional, teary-eyed and shaking as she spoke. 2RP 494. After Amy and her husband

pieced together Cooper's bank records and conveyed to Cooper that she had given Bauml over \$180,000 by their estimation, Cooper said "oh, my gosh, I did not know it was that much money." 2RP 495-97. Cooper did not seem to have an understanding of the amount of money she had lent. 2RP 495. With Amy's assistance, Cooper made a report to the Redmond Police Department in February 2012, because she did not want Bauml to do the same thing to anyone else. 2RP 87-88. Cooper eventually ended up moving to an assisted living facility. 2RP 89.

The investigation undertaken by the Redmond Police Department included a cognitive assessment of Cooper by Tara Breitenbucher, a Geriatric Mental Health Specialist with the Geriatric Regional Assessment Team (GRAT). 2RP 159-60. Breitenbucher testified that after interviewing Cooper and administering a variety of tests, she diagnosed Cooper with moderate dementia. 2RP 181. Specifically, Cooper had frontal lobe impairment, which affected her executive functioning, as well as memory impairment. 2RP 145, 181, 190-94, 199-201, 216-17, 219. Breitenbucher relied not only on Cooper's decision-making involving Bauml, but also an occasion where Cooper had received a call from someone claiming to be her grandson and asking that she wire \$3,000 to Costa Rica. 2RP

179-81. Despite the fact that Cooper was unable to tell whether it was in fact her grandson on the phone, she went to the bank to wire the money. Id. A bank employee who recognized that Cooper was falling prey to a scam managed to intervene. Id. Breitenbucher also testified that dementia results in losing the ability to judge who is good and who is bad for you, and that it is common for sufferers to become attached to people outside the family. 2RP 180. She explained that Cooper's form of dementia was difficult for laypeople to detect, but it would be easier to detect for a person that was going over her finances with her. 2RP 228-30.

At trial, Bauml called Cooper's primary care physician as a witness to testify that he had run tests and did not believe Cooper had dementia, but he also testified that he was not a geriatrician or an expert in evaluating cognition. 2RP 689-90. Moreover, he testified that if he has concerns regarding dementia he sometimes refers patients to GRAT because they have an expertise in this area. 2RP 690-91. He also testified that the lab tests he ordered for Cooper, which came back normal, were used to rule out other causes of cognitive dysfunction, and that there is no blood test for diagnosing dementia. 2RP 696-99.

i. Financial Records.

A Redmond detective assigned to the case executed search warrants for Cooper and Bauml's bank records, credit reports, and Bauml's Polyclinic records. 2RP 474, 481-82, 484, 486-87. King County Prosecutor's Office Financial Analyst Rebecca Tyrell analyzed the records obtained (involving a total of 20 accounts), tracking all deposits originating from Cooper's accounts via credit card cash advances, withdrawals from checking and savings accounts, and the reverse mortgage funds. 2RP 555, 562-66, 572. She created spreadsheets and pivot summaries showing where funds came from and how they were spent, all of which were introduced as exhibits at trial. See Exhibits 33, 34, 35, 36.⁴ Exhibits 33, 34, 35, and 36 have been designated for purposes of this appeal.

Based on her review, Tyrell testified at trial with respect to the movement of funds for each charged count. See 2RP 555, 562-66, 572; Exs. 33, 34, 35, 36. The testimony and records established that Cooper wrote \$128,000 worth of checks to Bauml because Cooper believed Bauml needed PTSD medical treatment. See 2RP 44-49, 70-74, 626-27, 630-31, 633. However, Bauml's Polyclinic records

⁴ At trial, Exhibits 35 and 36 were admitted, while Exhibits 33 and 34 were admitted for illustrative purposes only.

during the loan periods revealed that the only treatment she received was for an underactive thyroid, and there was no treatment for PTSD or anything to do with imaging. See Ex. 41. Similarly, none of Bauml's bank records related to the PTSD treatment loans showed payments to the Polyclinic. Ex. 33 at 8145⁵, 8150, 8156-57, 8159; Ex. 34 at 19-49; see also Exs. 35, 36.

With respect to Bauml's son's drug treatment, the evidence showed that Cooper wrote at least \$42,000 worth of checks (counts two and four) to Bauml for her son's drug addiction treatment and medications. 2RP 43, 69-70. Bauml's son, however, testified that his drug addiction "medication" consisted solely of buying suboxone "on the street," and Bauml only gave no more than \$300 to buy it. 2RP 811-14. He also testified that he received alternative treatments for his addiction through yoga, counselors, and other providers that he thoroughly listed during his testimony; however, Bauml's bank records indicate that the total amount Bauml spent on those providers was \$5,785. See 2RP 779-82, 799-811; Ex. 33 at 8136, 8145, 8150, 8156-57, 8159; Ex. 34 at 10-12, 14-49; see also Exs. 35, 36.

⁵ Ex. 33 is bates stamped "Bauml_J 8134," et. seq. Only the bates numbers will be used, e.g., 8134, 8135, etc.

Tyrell's testimony and the records obtained showed that Bauml spent the money she obtained from Cooper to finance lifestyle purchases, for example: Bauml paid \$12,000 cash for a car, took travel vacation trips to Massachusetts and along the Oregon and Washington coasts, and bought thousands of dollars in Nu Skin products for her business. See, e.g., 2RP 62-66, 327-28, 331-32, 613, 625-26, 629-30; Ex. 33 at 8145, 8150, 8156-57; Ex. 34 at 19-26. She made a single \$2,043.65 purchase at Macy's East. 2RP 628. She purchased clothes at Coldwater Creek and Nordstrom Rack, and attended yoga classes. See Ex. 33 at 8135, 8140. She ate out at restaurants, bought new tires and purchased airline tickets. See, e.g., Ex. 33 at 8140-41, 8145, 8150, Ex. 34 at 14-18, 26-36; see also Exs. 35, 36. She made payments to her own credit cards and got her nails done. See, e.g., Ex. 33 at 8140, 8150, 8156. She spent \$5,175 to pay her rent three months in advance. 2RP 532-33, 604. She also paid her Verizon, Comcast, Waste Management bills and bought an additional \$1,700 in Nu Skin products with Cooper's Discover card. 2RP 636-37, 644-45, 648. There were many other purchases. See Exs. 33, 34, 35, 36. Moreover, Bauml's bank records showed that of the \$217,887.57 worth of checks she received from Cooper, Bauml kept \$124,188 in cash. 2RP 642-43; Exs. 35, 36.

Tyrell also testified that, between February 4, 2008 to January 18, 2012, Bauml's total "income" that was not related to Cooper was \$30,257.87. 2RP 643. Bauml's Nu Skin earnings were no more than \$400. 2RP 644. Of the \$30,257, \$15,000 came from an inheritance distribution in January 2009. 2RP 645. Between 2009 and 2012, Bauml also borrowed at least \$31,700 from Jeffrey Michell.⁶ 2RP 370, 411, 415, 419-20. Tyrell testified that none of the funds Bauml received from the inheritance, Nu Skin, or Michell were ever paid to Cooper. 2RP 645-46.

C. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE FOR ALL COUNTS TO SUPPORT THE JURY'S FINDING THAT BAUML COMMITTED THEFT BY DECEPTION WITH INTENT TO DEPRIVE.

Bauml challenges the sufficiency of the evidence to support the jury's finding that Bauml deceived Cooper into giving her money through falsehoods about her intended use of the money. Bauml further challenges that Cooper did not rely on Bauml's deception about her intended use of the money. Bauml bases this challenge on her assertion that Cooper at one point testified that she would have given the money to Bauml if she had asked. Finally, Bauml

⁶ Michell was the alleged victim in counts eleven and twelve, which the jury was unable to reach a verdict on. CP 48-54, 175-76, 216.

argues that there was insufficient evidence to prove that Bauml intended to permanently deprive Cooper by not repaying the loans. She argues that the testimony established that Bauml repeatedly promised to repay the loans and Cooper believed her. Bauml's claims are without merit.

First, the State need only show that Bauml induced Cooper into parting with her money through any deception. The evidence supports a rational jury finding that Bauml deceived Cooper into giving her money through multiple falsehoods, i.e., regarding her ability and intention to repay the money she borrowed, the true nature of their relationship, and her intended use of the money. Second, the evidence supports a rational jury's finding that Bauml intended to deprive Cooper of her money.

a. There Was Sufficient Evidence That Bauml Deceived Cooper; And Cooper Relied On These Deceptions.

The standard a reviewing court uses in analyzing an evidentiary insufficiency claim is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found each essential element of the charge beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). "A claim of insufficiency admits the truth of the State's

evidence and all inferences that reasonably can be drawn therefrom.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court neither weighs the evidence nor needs to be convinced that it established guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107 (2000). A trier of fact may properly render a guilty verdict based on circumstantial evidence alone, even if the evidence is also consistent with the hypothesis of innocence. State v. Kovac, 50 Wn. App. 117, 119, 747 P.2d 484 (1987). A conviction will not be overturned unless there is no substantial evidence to support it. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 709-10, 575 P.2d 215 (1978).

To find Bauml guilty of theft, either in the first or second degree, by means of deception, the jury had to be satisfied beyond a reasonable doubt of each of the following elements:

- (1) That the defendant, by color or aid of deception, obtained control over property of another;
and
- (2) That the property exceeded the charged degree’s designated required value (over

\$5,000/\$1,500 (depending on the year the crime occurred) for first degree and over \$750 for second degree); and

(3) That the defendant intended to deprive the other person of the property.

RCW 9A.56.020(1)(b); .030(1)(a).

“By color or aid of deception” means that the deception operated to bring about the obtaining of the property. RCW 9A.56.010(4). Deception can occur when the defendant knowingly creates or confirms another’s false impression which the actor knows to be false, or fails to correct another’s impression which had been previously created or confirmed; or, promises performance which the actor does not intend to perform or knows will not be performed. RCW 9A.56.010(5)(a), (b), (e). Deception can include representations about past or existing facts, representations about future facts, inducement achieved by means other than conduct or words, and inducement achieved by creating a false impression even though particular statements or acts may not be false. State v. Casey, 81 Wn. App. 524, 528, 915 P.2d 587 (1996). The theft by deception statute focuses on the overall impression created or made rather than the falsity of any particular statement. State v. Mehrabian, 175 Wn. App. 678, 700, 308 P.3d 660 (2013).

Where theft by deception is charged, the State must prove that the victim relied upon the defendant's deception, but it need not prove that the deception was the sole inducement for the victim to give up the property. Casey, 81 Wn. App. at 529. "It is sufficient that the false representations were believed and relied upon by the victim and in some measure operated to induce the victim to part with the property." State v. Zorich, 72 Wn.2d 31, 34, 431 P.2d 584 (1967).

- i. **There was sufficient evidence to find that Bauml deceived Cooper regarding her ability to repay the money, and that Cooper relied on this deception.**

Here, the evidence, when viewed in the light most favorable to the State, was sufficient for a rational jury to find that Bauml in some measure induced Cooper into handing over \$200,000 of her lifesavings by creating a false impression of her ability to repay the money she was asking for. Bauml explicitly claimed that she intended to repay Cooper with money from an insurance settlement related to her injuries in a car accident. She said that the settlement was only pending her doctor's medical release. Yet, Bauml's son and daughter testified that they lived with Bauml and had never known her to be injured in an auto accident.

Cooper testified that after Bauml's claims of an injury settlement had run its course, Bauml then claimed that she was going to repay Cooper with the proceeds from a one million dollar return on a Nu Skin investment. Bauml claimed her windfall was pending an imminent Nu Skin merger. Bauml went so far as to engage in theatrics by going to a computer to check the internet regarding the merger status. Yet, Bauml's son and daughter testified that Bauml's Nu Skin investment consisted of buying cosmetic products from Nu Skin and selling them out of her home. Moreover, they testified that she was too depressed to seriously pursue this venture, and that she never discussed a "merger" that would bring her a windfall. Bauml's bank records established that her involvement with Nu Skin consisted solely of spending \$5,700 of Cooper's money to buy Nu Skin products, from which she recovered only \$400 from Nu Skin in return. There was nothing in the record that supported the notion that Bauml was going to get an injury settlement, much less a million-dollar investment windfall from a Nu Skin merger.

Cooper testified that Bauml would volunteer this information regarding income windfall prospects, creating an impression of her ability to repay the money she was asking for. Viewing the

evidence in the light most favorable to the State, it was sufficient for a rational jury to find beyond a reasonable doubt that Bauml deceived Cooper about her ability to repay more than \$200,000 in loans through a pending settlement and million-dollar Nu Skin investment return.

The evidence also supports a rational jury's finding that Cooper relied on Bauml's deceptive statements regarding her ability to repay the money. Cooper's testimony established that she trusted and believed Bauml's repeated claims that she was going to pay her back with the imminent injury settlement and million-dollar Nu Skin investment windfall. See 2RP 41-42, 58-59, 78, 81-82, 125-26. At one point, Bauml even testified that she did not much bother to press Bauml for repayment until 2011 because Bauml repeatedly promised she was going to repay the money, and "she (Bauml) was always going to have that money floating around that I never did get to see." RP 125-26. The evidence was sufficient for a rational jury to find that Cooper relied on Bauml's deceptive statements regarding her ability to repay the money.

- ii. There was sufficient evidence to find that Bauml deceived Cooper regarding her intent to repay the money; and that Cooper relied on this deception.**

The evidence, when viewed in the light most favorable to the State, was also sufficient for a rational jury to find that Bauml in some measure induced Cooper into handing over \$200,000 of her lifesavings by creating a false impression of her intent to repay the loans. The evidence shows that Bauml, while essentially unemployed, systematically borrowed ever increasingly exorbitant sums of money from an elderly and emotionally fragile, isolated woman, while repeatedly asserting fabricated outlandish claims of a pending million-dollar investment return and injury settlement as her means of repayment. This circumstantial evidence alone is sufficient to support a rational jury's finding that Bauml never seriously intended to repay Cooper. RCW 9A.56.010(5)(e) (Deception can occur when the defendant promises performance which the actor does not intend to perform or knows will not be performed).

The record, however, contained additional evidence that Bauml was lying to Cooper about her intention to repay the money. Specifically, between February 4, 2008 through January 18, 2012,

BaumI had income of \$30,257 (\$15,000 of which was an inheritance windfall in January 2009) and borrowed at least \$31,700 from Jeff Michell. Yet, BaumI failed to pay Cooper a single penny during this period.

The most direct evidence of BaumI's intention not to repay any money was on display when Cooper expressly asked for some measure of payment in August 2011 so that she could afford her roof work. BaumI responded by avoiding Cooper's calls and failing to return her repeated messages. Moreover, when she did speak with Cooper she fabricated stories about losing her cell phone and being on trips to California and Canada – all claims that both her son and daughter refuted at trial. Viewing all of the above evidence in the light most favorable to the State, it is sufficient for a rational jury to find that BaumI deceived Cooper about her intent to repay the more than \$200,000 that she took from Cooper.

The evidence also supports a rational jury's finding that Cooper relied on BaumI's deceptive statements regarding her intent to repay the loans. Cooper testified repeatedly that she considered the money that she gave BaumI to be a loan, and that BaumI repeatedly promised to repay the money. She said that she trusted BaumI's promises to repay the money. In fact, when Cooper was

asked at trial whether she would have lent Bauml all of the money if she had known that Cooper was never going to pay her back, she replied, "of course not." 2RP 89-90.

In sum, the evidence, when viewed in the light most favorable to the State, was sufficient for a rational jury to find that Bauml induced Cooper into handing over \$200,000 of her lifesavings by creating a false impression of her intent to repay the money.

- iii. **There was sufficient evidence to find that Bauml deceived Cooper regarding her relationship intentions; and that Cooper relied on this deception.**

The evidence, when viewed in the light most favorable to the State, was also sufficient for a rational jury to find that the entire relationship between Bauml and Cooper was premised on Bauml's false representation that she was there to befriend and help Cooper when her sole focus was to actually groom and eventually take possession of Cooper's money. See State v. Mermis, 105 Wn. App. 738, 744, 20 P.3d 1044 (2001) (evidence that an "entire relationship was based on deception" showed the defendant obtained control of a car by deception). The testimony established that Bauml initially showed up at the doorstep of the elderly Cooper

unsolicited, remained persistent in returning, showered Cooper with attention and affection, got involved in Cooper's finances, systematically took money totaling hundreds of thousands under the guise of "loans" needed for emotionally charged purposes, fabricated her ability and intent to repay the loans, and then, when Cooper's money was all gone, Bauml stopped coming to Cooper's home or even returning Cooper's repeated calls. When viewed in the light most favorable to the State, a rational jury could find that Bauml deceived Cooper about the true nature of their relationship.

The evidence also supports the finding that Cooper relied on Bauml's false niceties and "friendship" when she loaned the money. Cooper specifically testified that when Bauml would ask for more money, Cooper would ask Bauml, "don't you have anyone else?" 2RP 40. But when Bauml persisted, Cooper ultimately always loaned the money because she felt that Bauml was her family, and she wanted to help her and her children in any way she could. 2RP 41. The evidence, when viewed in the light most favorable to the State, was sufficient for a rational jury to find that Bauml in some measure induced Cooper into loaning her over \$200,000 in lifesavings by creating a false impression of their "friendship."

- iv. There was sufficient evidence to find that Bauml deceived Cooper regarding the reasons she needed the money; and that Cooper relied on this deception.**

With respect to counts two and four through nine, the evidence, when viewed in the light most favorable to the State, was sufficient for a rational jury to find that Bauml deceived Cooper about the reasons she needed the money.⁷ Cooper's testimony established that Bauml induced Cooper into giving her increasing disbursements of money by providing very specific and emotional reasons for needing the money that were designed to emotionally manipulate Cooper. The evidence supported the reasonable inference that the reasons Bauml gave were untrue and Bauml did not spend the money as she indicated she would.

Specifically, Bauml told Cooper she needed money for her son's drug treatment and legal bills (identified as counts two and four). Relative to count two, Cooper testified that she gave Bauml a \$10,000 check for medications and a treatment program to help her son get off of drugs, and she believed the entire amount was going

⁷ Though Cooper is unable to recollect any specific reasons Bauml named for needing the money asked for and provided in counts three, and ten, the falsehoods regarding her intent and ability to repay remain the same for each of the 10 counts, thus providing the element of deception required to prove the charge. With respect to count one, the jury was unable to reach a verdict on that count and therefore it is not at issue here. CP 175-76, 216.

toward this cause. 2RP 43-44, 69-70. However, Bauml's bank records showed only \$1,605 of the \$10,000 was spent on providers that Bauml's son testified he had seen for alternative treatment (Vibrational Psychology, Impax Medical, and John Stiles). Ex. 33 at 8136; Ex. 34 at 12; see also Exs. 35, 36; 2RP 805, 809-10. Moreover, Bauml's son testified that Bauml only gave him approximately \$300 to buy suboxone medication "on the street." 2RP 811-14. Instead, the bank records showed that Bauml spent the funds on items such as \$1,577.82 on Nu Skin products, \$459 on Bikram Yoga, \$420 at QFC, \$362.68 to Verizon Wireless, \$104.65 at Nordstrom Rack, \$94.24 at Target, \$66.50 at Seattle Aquarium, \$16.95 at a WA Liquor Store, and on other personal items. See Exs. 33 at 8136; Ex. 34 at 12; see also Exs. 35, 36. In sum, the evidence showed that, out of the \$10,000, Bauml spent at most \$1,605 on treatment and \$300 on "medication." Accordingly, the evidence was sufficient for a rational jury to find that Bauml deceived Cooper about the reason she needed at least \$8,095 of the \$10,000 given. CP 149.

Relative to count four, Cooper testified she gave Bauml a \$32,000 check for Bauml's son's drug treatment, and Cooper believed all the money would be spent on this. 2RP 43-44, 69-70.

However, the bank records did not show any payments made to drug treatment facilities flowing from the \$32,000 check. Ex. 33 at 8140-41; Ex. 34 at 14-18; Exs. 35, 36. And, the only alternative treatment provider payment was \$580 for John Stiles. Id. Bauml's bank records showed that she used Cooper's check to buy two cashier's checks. 2RP 604. One of the cashier's checks was made payable to Andrew Clarke, Bauml's landlord, for \$5,175. 2RP 604. Clarke testified at trial that Bauml gave him the cashier's check to pay her rent three months in advance. 2RP 532-33. Bauml used the rest of the proceeds from Cooper, \$26,825, to buy a second cashier's check made payable to herself. 2RP 604. Bauml then deposited \$25,825 of her check, and kept \$1,000 in cash. 2RP 605-06. Out of the deposited funds, Bauml made cash withdrawals totaling \$11,410. 2RP 606. She made a \$2,300 payment to a dentist. Id. She also made \$1,100 in payments on her own credit card. Ex. 33 at 8140. Bauml's records also showed that she used the deposited funds to make thousands of dollars in purchases at various clothing, office and home supply stores and restaurants. Ex. 33 at 8140-41; Ex. 34 at 14-18; Exs. 35, 36. Bauml completely spent the \$26,825 within two months. 2RP 608. In sum, of the \$32,000, the records show Bauml spent at most

\$580 on treatment. Accordingly, the evidence is sufficient for a rational jury to find that Bauml deceived Cooper about the reason she needed over \$31,000 of the \$32,000 given. CP 153.

Counts five, six, seven, eight and nine all involved Bauml telling Cooper that she needed the money borrowed (which totaled \$128,000) for her own treatment at The Polyclinic. Cooper testified that Bauml said she needed "imaging" treatment for PTSD. Bauml's Polyclinic records during the loan periods revealed that the only treatment she received was for an underactive thyroid, and there was no treatment for PTSD or anything to do with imaging. See Ex. 41 (Bauml Polyclinic Records). Not surprisingly, none of Bauml's bank records related to counts five, six, seven, eight and nine showed payments to the Polyclinic. Ex. 33 at 8145, 8150, 8156-57, 8159; Ex. 34 at 19-49; Exs. 35, 36. Even considering the alternative treatment providers Bauml's son said he received treatment from, the *total* amount Bauml spent on treatment, according to Bauml's bank records, was \$5,785. See 2RP 779-82, 799-811; Ex. 33 at 8145, 8150, 8156-57, 8159; Ex. 34 at 19-49; see also Exs. 35, 36. Moreover, as discussed below by count, Bauml spent the funds that were intended for this treatment on non-treatment purchases.

Relevant to count five, Cooper testified that she gave Bauml a \$50,000 check, which had "med treatment" written on the memo line, and which she expected would be spent in its entirety at the Polyclinic for Bauml's PTSD treatment. 2RP 44-49, 70-72, 74, 610; Ex 34 at 20. Bauml's bank records, however, showed no payments to the Polyclinic flowing from this check. Ex. 35 at 25-26. Bauml's bank records established that Bauml kept \$5,500 in cash, and used the rest of the funds to buy four cashier's checks. 2RP 611, 615; Ex. 34 at 19-26. The first cashier's check was made payable to Russell Dawson for \$4,500. 2RP 612; Ex. 34 at 19-26. The second cashier's check was made payable to Klaus Dittman for \$10,000. Ex. 34 at 19-26. At trial, Dittman testified that in 2009 he sold Bauml his Honda vehicle for \$12,000, and Bauml paid him, in part, with a \$10,000 cashier's check. 2RP 327-28, 331-32. At the same time, Bauml also used these proceeds to write a check to the Department of Licensing for \$1,005.50, with "Honda 2003 LX" written in the memo line. 2RP 613. The third and fourth cashier's checks that Bauml bought were for \$10,000 and \$20,000 and were both made payable to herself. 2RP 611. Bauml deposited the checks into her account and kept \$5,000 cash back. 2RP 614. Bauml subsequently withdrew an additional \$9,800 in cash from the

deposited funds. 2RP 615. In total, out of the \$50,000 Bauml received from Cooper in this instance, Bauml took a total of \$20,300 in cash. 2RP 615-16.

Further, Bauml's bank records show that with the deposited funds she paid \$2,000 to Klaus Dittman for the balance of her car purchase. She also made large payments on her cell phone and credit card accounts, as well as numerous retail store purchases unrelated to medical treatment. Ex. 33 at 8145; Ex. 34 at 19-26; Exs. 35, 36. Aside from a \$205 payment to one of her son's treatment providers (John Stiles), there were no medically-related charges. Id. Accordingly, the evidence was sufficient for a rational jury to find that Bauml deceived Cooper about the reason she needed at least \$49,000 of the \$50,000 given. CP 154.

Count six also involved Cooper writing a \$50,000 check to Bauml. 2RP 617; Ex. 34 at 26-36. Cooper recalled that she wrote this check to Bauml because Bauml claimed that she needed another round of PTSD medical treatment at the Polyclinic; and, Cooper believed all of the funds would be spent on the treatment. 2RP 70-72, 74; see also 2RP 44-49, 72. The bank records, however, showed no payments to the Polyclinic flowing from this check. Ex. 33 at 8150; Ex. 34 at 26-36. Instead, Bauml used the

\$50,000 check to get \$9,000 in cash, and to buy three cashier's checks. 2RP 616, 618. The cashier's checks were in the amounts of \$11,000, \$15,000, and \$15,000; and all were made payable to Bauml. 2RP 618; Ex. 34 at 26-36. Bauml then deposited the checks, and kept \$15,500 in cash. 2RP 619-22; Ex. 34 at 26-36. Bauml then subsequently took another \$7,900 in cash from the deposited funds. 2RP 623-24; Ex. 33 at 8150; Ex. 34 at 26-36.

Bauml's bank records show that she spent funds on travel in Oregon. 2RP 625-26; Ex. 33 at 8150; Ex. 34 at 26-36. She spent thousands of dollars on airfare and payments to her own credit card. Ex. 33 at 8150. And, she spent thousands of dollars at various stores and restaurants. Ex. 33 at 8150; Ex. 34 at 26-36. Aside from \$2,225 in payments to her son's treatment providers (John Stiles, Mary O'Malley, and Joseph Vizzard), there were no medically-related charges. Ex. 33 at 8150; 2RP 802-03, 806, 809. Accordingly, the evidence is sufficient for a rational jury to find that Bauml deceived Cooper about the reason she needed \$47,000 of the \$50,000 given. CP 157.

Count seven involved a check for \$21,000, also with "Med treatment" written in the memo line. Ex. 34 at 38. After depositing the check, Bauml subsequently took \$6,363 in a series of cash

withdrawals. 2RP 627-28. Her records show that she spent thousands of dollars of the deposited funds on travel in Massachusetts, Oregon and Washington. 2RP 629-30; Ex. 33 at 8156-57; Ex. 34 at 37-43. She also made thousands of dollars in payments on her own credit card, cable and cell phone accounts. Ex. 33 at 8156. And, she made numerous purchases at various retail stores and restaurants. Ex. 33 at 8156-57; Ex. 34 at 37-43. Aside from a \$1,000 payment to one of her son's treatment providers (Mary O'Malley), there were no medically-related charges. Ex. 33 at 8150, 8156-57; Ex. 34 at 37-43; 2RP 781, 801. Accordingly, the evidence is sufficient for a rational jury to find that Bauml deceived Cooper about the reason she needed \$20,000 of the \$21,000 given. CP 159.

Count eight involved a check for \$4,000, also with "Med treatment" written in the memo line. 2RP 73, 630-31; Ex. 34 at 43-45. Cooper testified that she believed that checks marked "medical treatment" were going to be spent for Bauml's PTSD Polyclinic medical treatment or to buy Bauml's son's drug addiction medication. 2RP 74. The State's financial analyst testified that Bauml cashed the check and deposited none of it. 2RP 630-31; Ex. 34 at 43-45. Accordingly, there are no records of any Polyclinic

treatment payments. Id.; see also Ex. 44 (Bauml's Polyclinic Records). With respect to Bauml's son's medication, at most Bauml gave him \$300 to buy suboxone on the street. 2RP 811-14. Accordingly, the evidence is sufficient for a rational jury to find that Bauml deceived Cooper about the reason she needed over \$3,000 of the \$4,000 given. CP 161.

Count nine involved a check for \$3,000 with "Medical treatment" in the memo line. 2RP 633; Ex. 34 at 45-49. Bauml took \$800 cash back, and deposited the remainder of the funds into her account. 2RP 634; Ex. 33 at 8159; Ex. 34 at 45-49. Of the deposited proceeds, Bauml took an additional \$1,400 in subsequent cash withdrawals. Id. She also made a \$500 payment on her own credit card, and made several retail store purchases. Ex. 33 at 8159; Ex. 34 at 49. The records showed no expenditures for any possible treatment providers. Ex. 33 at 8159. Accordingly, the evidence is sufficient for a rational jury to find that Bauml deceived Cooper about the reason she needed all of the \$3,000 given. CP 163.

Contrary to Bauml's assertion, the evidence also supports the jury's finding that Cooper relied on the deceptive reasons Bauml gave for needing the money. Cooper expressly testified that

she loaned Bauml money in response to Bauml's emotional and desperate pleas for money to treat her PTSD and her son's drug addiction. Cooper testified that she believed the money was all being spent toward these reasons. Moreover, the circumstantial evidence shows that Cooper needed her money to support herself financially for the rest of her life and that she lived frugally and had taken great measures, including retaining a financial planner and estate planning attorney, to safeguard her lifesavings. The above evidence is overwhelmingly sufficient for a rational jury to find that in some measure Cooper relied on Bauml's deceptive and dramatic representations about needing the money for trauma treatment and addiction, rather than simply being willing to give away her lifesavings without regard to why Bauml needed the money.

Casey, 81 Wn. App. at 529 (necessary reliance is established when the deception "in some measure operated as inducement"); State v. Zorich, 72 Wn.2d 31, 34, 431 P.2d 584 (1967) (not required that the deception be the sole means of inducing the victim to part with her property).

Notwithstanding the overwhelming evidence to the contrary, Bauml argues that Cooper did not rely on Bauml's deception about her intended use of the money. Bauml bases this challenge on her

assertion that Cooper testified that she did not condition the loans on any purpose and Cooper would have given the money to Bauml if she had asked. Bauml's argument must be rejected because it does not draw all reasonable inferences in favor of the State, as required for a sufficiency challenge.

First, even if Cooper did not rely on the deceptive reasons Bauml gave for needing the money, the State presented evidence above that Cooper relied on Bauml's deceptive representations regarding her ability and intent to repay the money, and on Bauml's false representation that she was there to befriend and help Cooper. Bauml has not challenged any of these other reliances. Consequently, even if Bauml were correct in asserting that there was insufficient evidence that Cooper relied on Bauml's reasons for needing the money, Bauml fails to show that the State did not satisfy the reliance element needed to prove the charges.

Second, Bauml's claim that Cooper testified that she would have given the money if Bauml had asked and the reason for needing the money did not matter to her is not supported by a fair reading of the record as a whole. In particular, the isolated statements by Cooper that Bauml depends on are misconstrued

and inconsistent with Cooper's other statements, and fail to recognize Cooper's cognitive impairment.

Specifically, it appears Bauml is relying on the following testimony by Cooper at trial:

Q: Did you ever request that Janet spell out *specifically* where all the money was going?

A: No.

Q Did you ever condition these loans on a complete accounting of *specifically* where the money was going?

A: No.

2RP 103 (emphasis added).

Q: Were any of the checks that we discussed today that you testified to besides the first one gifts to Janet Bauml?

A: No. Why—why would I when all I had—all she had to do was ask, and I'd give it to her.

Q: So, if she'd asked you to give it her, you would have said yes.

A: Yes.

2RP 130.

The first exchange above merely indicates that Cooper did not require a *detailed* or *specific* accounting of how the money was being spent. She did not testify that the reasons Bauml needed the money did not matter to her.

With respect to Cooper's isolated statement that she would have given the money if Bauml had asked, Bauml attempts to

interpret this to mean that “the reason for [Bauml] needing the money did not matter to [Cooper].” However, the actual statement that Cooper made simply does not articulate the additional leap that Cooper was willing to give Bauml \$217,000 without any regard for the reasons Bauml needed the money.

Additionally, if Cooper’s isolated statements are interpreted in the way Bauml wants them to be interpreted, they are entirely inconsistent with the rest of Cooper’s testimony that she loaned Bauml money for reasons related to Bauml’s PTSD and her son’s drug addiction (reasons which were also noted in the memo line of multiple checks that Cooper wrote to Bauml). It was the sole province of the jury to weigh the isolated statement against the other testimony and evidence. As discussed at length above, when viewed in the light most favorable to the State, the evidence that Cooper relied on Bauml’s reasons for needing the money was sufficient for a rational jury to find that Cooper intended to make loans for specific purposes and she relied upon Bauml’s stated reasons.

Further, the State presented evidence, in particular the testimony of Tara Breitenbucher, that Cooper suffers from impaired judgment as a result of her diagnosed dementia. 2RP 145, 181,

190-94, 199-201, 216-17, 219. Thus, Cooper might have been confused by the question. This is particularly true where Cooper, at 86 years of age, had been testifying for several hours when she made the statement at issue on redirect examination. For example, during her testimony, Cooper also could neither remember how much of the \$186,000 in reverse mortgage funds she had kept for herself (almost none), nor whether she paid off some of the credit card debt with the reverse mortgage proceeds (she did). 2RP 57, 59.

As the trial court found in denying Bauml's half time motion to dismiss, Cooper's statement that she would have given Bauml the money if she had asked is a mere conditional hypothetical statement. 2RP 670; CP 111-12. It is not evidence of what actually took place.

b. There Was Sufficient Evidence That Bauml Intended To Deprive Cooper.

Bauml additionally argues that there was insufficient evidence to prove that Bauml intended to permanently deprive Cooper by not repaying the loans. She argues that the testimony established that Bauml repeatedly promised to repay the loans and Cooper believed her. She further argues that there was no

evidence of Bauml's intent to the contrary, i.e., that she did not intend to repay. Bauml's argument is without merit.

There was sufficient evidence for a rational jury to find that Bauml intended to deprive Cooper for each count. The financial evidence shows that even when Bauml had funds available to make a payment to Cooper, Bauml made no effort to do so. It also shows that the money earmarked for specific purposes such as medical treatment or drug treatment was not used for those purposes. This fact was never disclosed to Cooper by Bauml; Cooper testified that she believed the money she provided was going toward drug and medical treatment and legal bills as represented. Further, the financial records show that there was never any reasonable prospect for a windfall from Nu Skin, particularly given Bauml's own limited investment and practically non-existent income from sources other than Cooper and Michell. When viewed in the light most favorable to the State, the financial evidence supports a finding that Bauml intended to deprive Cooper as to all counts.

Additionally, while the State must prove that the defendant intended to deprive the victim of the property at the time of the taking, there is no requirement that the State prove the defendant

intended to permanently deprive. State v. Komok, 113 Wn.2d 810, 816, 783 P.2d 1061 (1989) (a taking need not be permanent to support a finding of guilt under the theft statute). The evidence supported a rational jury's finding that a taking and intent to deprive occurred.

Bauml's actions support the jury's conclusion that she intended to deprive Cooper of the funds, and not repay them. Cooper testified that in August 2011 she began repeatedly calling and leaving multiple messages for Bauml over the course of months in an attempt to secure some form of repayment so that she could replace her roof. Bauml responded by generally failing to receive or return Cooper's calls; and, the one instance Bauml managed to return a phone call resulted in Bauml concocting a story about being out of state and losing her phone (claims rebutted by Bauml's son and daughter). Moreover, despite Cooper's repeated pleas for some form of repayment beginning in August 2011, Cooper failed to repay a single dollar, despite her repeated previous promises that she would make a payment and/or repay the loans. Despite Cooper's repeated requests for repayment beginning in August 2011, Bauml never made a payment, discussed repayment, or even made any contact. In February

2012, Cooper was so distraught that she confessed to her granddaughter that she had been swindled, and the police were subsequently contacted. In light of this evidence, Bauml's claim that there is no evidence that she did not intend to repay and that she did not intend to permanently deprive Bauml falls flat and must be rejected. When the evidence is viewed in the light most favorable to the State, it is overwhelmingly sufficient to support a rational jury's finding that Bauml intended to deprive Cooper of her money.

In sum, taking all inferences in the light most favorable to the State, the evidence was sufficient to permit the jury to find that Bauml obtained Cooper's money by color or aid of deception, that Cooper relied on Bauml's deception, and that Bauml intended to deprive Cooper.

2. BAUML RECEIVED A FAIR TRIAL UNDER THE GIVEN INSTRUCTIONS; AND, ANY ERROR WAS HARMLESS.

Bauml contends that the trial court erred by refusing to give one of her proposed jury instructions defining the term "aid of deception." Bauml asserts that the trial court's refusal to give this proposed instruction violated her right to present a defense because it prevented her from arguing her theory of the case.

Bauml's claim is without merit. The trial court's instructions correctly stated the law and permitted both parties to argue their theories of the case to the jury. Finally, even if the court erred in not giving Bauml's proffered instruction, it was harmless error.

a. Additional Facts Relevant To The Declined Jury Instruction.

The State charged Bauml with theft by color or aid of deception. RCW 9A.56.020(1)(b); .030(1)(a).

The court's instructions defining "theft," "color or aid of deception," and "deception," tracked the statutory definition, and mirrored the pattern jury instruction, providing:

Theft means to obtain control over the property or services of another, or the value thereof, by color or aid of deception, with intent to deprive that person of such property or services.

CP 143; WPIC 79.01 (2008).

By color or aid of deception means that the deception operated to bring about the obtaining of the property or services. It is not necessary that deception be the sole means of obtaining the property or services.

CP 144; WPIC 79.03 (emphasis added).

Deception occurs when an actor knowingly creates or confirms another's false impression which the actor knows to be false, or fails to correct another's impression which the actor previously has created or confirmed, or prevents another from acquiring information material to the disposition of the property

involved, or promises performance which the actor does not intend to perform or knows will not be performed.

CP 145; WPIC 79.04.

Prior to closing arguments, Bauml's defense counsel proposed the following jury instruction:

Acquiring property by "aid of deception" requires that the victim relied on the deception. If the victim would have parted with the property even if the true facts were known, there is no theft. State v. Mehrabian, 175 Wn. App. 678, 701 (Div. 2013).

CP 121,123; 2RP 834. The defense's proposed instruction was not a WPIC, but instead derived from State v. Mehrabian, 175 Wn. App. 678, 701 (Div. I 2013). Defense argued that it should be included because they believed "it's relevant to our trial. And, it's the law [...]." 2RP 835. The State opposed the jury instruction on the grounds that the case had a very limited application and was inapplicable to the present theft by deception case. 2RP 835-37. The trial court declined to include defense's additional instruction on the grounds that it was not persuaded that the case defense cited held that "if the victim would have parted with the property even if the true facts were known, there is no theft." 2RP 842. Defense counsel took exception to the trial court's refusal to give their proposed jury instruction. 2RP 844-45.

b. The Trial Court's Instructions Satisfied Bauml's Right To A Fair Trial Because They Accurately Informed The Jury Of The Law And Allowed Bauml To Argue Her Defense Theory.

A trial court has substantial discretion in the wording of jury instructions. State v. Kennard, 101 Wn. App. 533, 536-37, 6 P.3d 38 (2000). The instructions satisfy the defendant's right to a fair trial if, taken as a whole, they accurately inform the jury of the relevant law, are not misleading, and allow the defendant to argue his theory of the case. State v. Benn, 120 Wn.2d 631, 655, 845 P.2d 289 (1993); State v. Ng, 110 Wn.2d 32, 41, 750 P.2d 632 (1988). "It is reversible error to instruct the jury in a manner that would relieve the State of [its] burden" to prove "every essential element of a criminal offense beyond a reasonable doubt." State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

Although an appellate court generally reviews claimed errors in jury instructions *de novo*, "it is within the sound discretion of the trial court to determine the appropriateness of granting a request to define words of common understanding." State v. Cross, 156 Wn.2d 580, 617, 132 P.3d 80 (2006). "Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary

understanding or self-explanatory.” State v. Brown, 132 Wn.2d 529, 611-12, 940 P.2d 546 (1997). There is no constitutional requirement to further instruct the jury with respect to legally defining any particular element, unless such element is not a matter of common understanding. State v. Bledsoe, 33 Wn. App. 720, 658 P.2d 674 (1983) (the term “intent” is commonly understood). Moreover, instructions should not be so factually detailed as to emphasize certain aspects of a party’s case and thus point up or buttress his argument to the jury, but rather should be limited to enunciating basic and essential elements of the legal rules necessary to enable the parties to each present their theories of the case. See State v. Deiro, 20 Wn. App. 637, 640, 581 P.2d 1079 (1978).

BaumI argues that the trial court’s refusal to instruct the jury on an additional definition of “aid of deception,” as a supplement to the WPIC definition, resulted in the court giving an “aid of deception” definition that was cursory, unhelpful to BaumI’s theory of defense, and that prevented her from arguing her theory of the case. Her argument is not supported by law or the record. The applicable inquiry is whether the instructions as given correctly stated the law and permitted BaumI to argue her theory of the case

to the jury. State v. Huckins, 66 Wn. App. 213, 217, 836 P.2d 230 (1992).

The court's instructions defining "theft" and "color or aid of deception" tracked the statutory definition, and mirrored the pattern jury instruction. Moreover, as in Huckins, "the instructions as given embraced the concept that [the] proposed instruction advanced." Id., 66 Wn. App. at 217. The "theft" definition instruction advised the jury that before it could convict the defendant of the counts charged, it first had to conclude that, for each count, the defendant obtained control over the property by "aid of deception." CP 143; WPIC 79.01. The "aid of deception" definition instruction advised the jury that the term meant that the "deception [must have] operated to bring about the obtaining of property." CP 144; WPIC 79.03. The court's instruction included the concept that Bauml's proposed instruction advanced, and Bauml was able to argue it in closing.

Specifically, in her brief, Bauml articulated the theory of defense that she claims she was not allowed to argue:

[Bauml's] theory of defense was that she did not deceive Ms. Cooper, Ms. Cooper gave the money willingly to help Ms. Bauml, and Ms. Cooper would have given Ms. Bauml the money even if she knew what Ms. Bauml ultimately did with it.

Br. of Appellant at 17. The record, however, shows that Bauml argued every part of her theory repeatedly during closing argument. For example, the court's instructions allowed Bauml to expressly argue that "[Bauml] did not deceive Ms. Cooper." 2RP 908. At another point, she elaborated that there was no deception because Cooper spent some of the money on "psychiatrists and chiropractors and alternative medicines and therapies, and Chris's treatments and medicine [...]," as she had indicated that she would when she borrowed the money. 2RP 903.

The court's instructions also allowed Bauml to argue her theory that because Cooper had willingly given Bauml the money to help her, Cooper would have given Bauml the money regardless of the reason and even if she knew what Bauml ultimately did with it. For example, defense counsel argued "Ms. Cooper's loans to Janet were given willfully," "with no strings attached," and "[every time Janet asked for money, Ms. Cooper would write her a check, no questions asked. In fact, Ms. Cooper testified that all she had to do was ask, and I would give it to her. There's nothing deceitful, illegal, or criminal in that arrangement." Id.

Similarly, she argued that the State had failed to show that Cooper relied on the reasons Bauml gave for needing the money because Cooper “testified that all Janet needed to do was ask and she would have given her all the money [...]” 2RP 903-04; see also 2RP 908-09 (“In addition, Ms. Cooper did not rely on the reasons that Janet gave her. If [Cooper] had cared [...] other than knowing she was helping Janet and her family, she would have kept better track of it.”); 2RP 902 (Cooper gave the money “because she was generous, because she cared, because she was close to Janet like she’d never been with her own daughter; because Janet needed it, because Janet was grateful, because she herself didn’t need the money.”).

In sum, the trial court’s instructions, defining “theft” and “aid of deception,” correctly stated the law and allowed Bauml to argue her theory of defense to the jury.

c. Any Trial Court Error In Declining To Give Bauml’s Proposed Instruction Was Harmless.

Even if the court erred in not giving Bauml’s proposed instruction, it was harmless error.

A constitutional error may be found harmless if the appellate court is convinced beyond a reasonable doubt that the jury would

have reached the same result in the absence of the error. State v. Hoffman, 116 Wn.2d 51, 97, 804 P.2d 577 (1991). Although more commonly applied to cases of evidentiary error, the rule is equally applicable to instructional error. Hoffman, at 97; State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984); State v. McNallie, 64 Wn. App. 101, 109, 823 P.2d 1122, 1126 (Div. I 1992), aff'd, 120 Wn. 2d 925, 846 P.2d 1358 (1993). Error without prejudice is not grounds for reversal, and error will not be considered prejudicial unless it affects, or presumptively affects, outcome of trial. See Keller v. City of Spokane, 146 Wn.2d 237, 249, 44 P.3d 845 (2002) (even if an instruction is misleading and thus erroneous, it will not require reversal unless prejudice is shown); Thomas v. French, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983).

Here, any failure to properly instruct was not prejudicial. The instructions given in this case permitted Bauml to argue her theory that she did not deceive Cooper, that Cooper gave the money willingly, and that Cooper would have given Bauml the money even if she knew what Bauml ultimately did with it. Defense counsel made exactly these arguments.

This Court can conclude, if the requested instruction had been given, the jury would have returned exactly the same verdicts.

The material portion of Bauml's requested "aid of deception" instruction is that the jury needed to find that "If the victim would have parted with the property even if the true facts were known, there is no theft." However, the instructions given required the jury to find that the deception caused the victim to part with the property. CP 144. Because the defense-proposed instruction simply reiterated this principle in a different way, it could not have affected the verdict.

Notably, the jury did not convict Bauml on count one, but convicted her on all nine other counts. The crucial difference in the testimony for which the jury convicted and for which the jury did not convict was that the first check was given as a gift with no strings attached, even though it was being spent on rent and utilities. 2RP 37-38. The jury's actions make it apparent that the jury understood the State was required to prove deception caused the victim to part with the property. Accordingly, the absence of the defense-proposed instruction did not cause prejudice; and, was therefore harmless error.

3. THE TRIAL COURT PROPERLY DECLINED TO GIVE BAUML A FIRST-TIME OFFENDER WAIVER.

BaumI asserts that the trial court refused to consider her request for a first-time offender waiver because she was in a class of offenders “convicted of a theft involving a large sum of money.” She asserts that in doing so the trial court effectively failed to exercise discretion at sentencing and is subject to reversal. BaumI’s argument is without merit. The record shows that the trial court exercised its discretion and properly relied on the facts of the crimes in imposing the sentence.

a. Additional Facts Relevant To Sentencing.

At sentencing, the State advised the trial court that BaumI had been convicted of five counts of first degree theft, four counts of second degree theft, and a major economic offense aggravator for each count. 2RP 930. BaumI’s standard range for first degree theft was 33-43 months; and her range for second degree theft was 17-22 months. 2RP 931. Despite the fact that the major economic offense aggravator had been found by the jury, the State only recommended that BaumI be sentenced to the high end of the standard range, which amounted to 43 months, to be served concurrently, along with restitution of \$175,200. Id. The State advised the court that it was not seeking a sentence above the standard range even though the aggravator had been found

because it felt that 43 months was appropriate. Id. The State, however, added that:

I want to point out to the Court how much these crimes impacted Mariana Cooper. As the Court is aware, she accrued massive credit card debt from the takings by the Defendant. She had to file for bankruptcy. She lost her home. She lost her good credit. She had to move into assisted living. And she is now not certain she will have enough money to keep her in her current apartment in her facility.

2RP 931-32. The State opposed a First-Time Offender Waiver (“FTOW”):

The Defendant, as the Court knows, is going to be asking for a first-time offender waiver, and asking for mental health treatment. And I wanted the Court to know about our interview with Dr. O’Neal, who is a Defense expert who interviewed the Defendant. We interviewed him during the trial. And he was subsequently withdrawn as a Defense witness. But, a few things that he said I thought the Court should know. One thing he said is the Defendant does not meet the criteria for any mental health disorder. He said he would not support a diminished capacity defense in this case. He said—though he didn’t make any specific findings as to psychiatric [ma]llingering [sic], he found her to be dramatic, emotional, and eccentric. And he said specifically that she does not meet the criteria for PTSD. Your Honor, it’s the State’s belief that despite what Ms. Bauml claimed, she knew perfectly well she would never have the money to repay Ms. Cooper. On the rare occasions when she did have other income, according to her financial records as analyzed by Ms. Tyrell, she did not use that money to repay Mariana Cooper. The Defendant took advantage of Mariana’s complete trust in her, and she deliberately and cruelly exploited

her. And that is the reason the State is asking for a high-end sentence here.

2RP 932.

The court then heard from Cooper's granddaughter, Amy Lecoq. 2RP 933. Lecoq conveyed that Bauml had stolen her grandmother's money, trust, confidence, independence and pride. Id. She surmised that Bauml had given Cooper "false love" during Cooper's daughter's illness and death, so that she could groom and gain Cooper's trust. 2RP 934. She also lamented that Cooper wasted countless hours involved in Bauml's criminal case, filing bankruptcy, selling her home, relocating, worrying about her future, and stressing over the trial. Id. Lecoq also noted that Bauml used her children in her scheme, and that Bauml began her financial exploitation just two months after Cooper's daughter had died. Id. Lecoq ended by observing that Bauml did not appear to feel remorse or guilt for what she had put Cooper and her family through. 2RP 936.

Cooper addressed the court and asked that Bauml be sentenced to seven years. Id. Cooper said that despite all the harm, lies, and manipulation that left her hurting and grieving for a while, she was no longer angry with Bauml because she did not

want to live with those feelings inside her. Id. She added that she was sad for Bauml, and most of all for what she did to her children. Id. She expressed that her goal in pressing charges was to stop Bauml from doing the same thing to anyone else again. Id.

Defense counsel then asked the court to impose an FTOW, on the grounds that it was “a legally appropriate and permissible sentence given Ms. Bauml’s lack of criminal history and the nature of these convictions.” 2RP 937. She also argued that Bauml had been in a desperate situation, given her need to support her family and avoid losing her son to drugs and herself to depression. Id. She asserted that Bauml had simply “turned to her best friend,” and Cooper had saved Bauml and her family. 2RP 938. She noted Bauml’s daughter graduated from college, and her son was off of drugs. 2RP 938-39.

Bauml also addressed the court. She said that she was grateful to Cooper for all her help and friendship; and, she would not have made it without her. Id. She professed that she loved Cooper and that they had spent a lot of time together. Id. She said her family would not have made it without Cooper. Id.

In declining to impose an FTOW, and instead imposing the maximum standard range sentence on each count, the court in relevant part stated:

I am surprised that the State was not seeking an exceptional sentence in the case. The funds were exceptional in the Court's view. However, I think they perhaps have rationalized it by so many counts. And to effectively create a criminal history, that would be very difficult for you to stay out of prison if you keep doing these things.

The Court's going to impose the maximum term on the range. I am not going to impose the first-offender waiver. I'm not persuaded that the kind of conduct that Ms. Bauml experienced—or, excuse me, the kind of experience that Ms. Cooper had justifies that. This is a scenario where there was a continuous effort to take money. You perceived it as a true need. But, you didn't explore these other options; you just kept coming back to her. That was pathological. And it was wrong—morally wrong. I don't think you see that. I don't think your children see it. You have this twisted, Ms. Bauml. This isn't about what Mariana did for you. This is about what you did to Ms. Cooper. And somehow you have this in your head that it was all, you know, out of friendship. It was deceit, deceit. And it's because of that that I'm imposing the maximum term on each of these counts.

The State is being very generous in its recommendation that they be served concurrently. The law requires it. But, frankly, the facts don't. But, it is because the law requires it, I'll impose concurrent sentence. To deplete anyone of their life savings—and—and let's not forget that your son's mistaken about a pattern and a practice. There was a pattern

here. You just weren't convicted of the other offenses.

2RP 948-49.

b. The Trial Court Did Not Abuse Discretion In Imposing A Standard Range Sentence.

As a general rule, a standard range sentence is not reviewable. RCW 9.94A.585(1). However, an offender may always challenge the procedure by which a sentence was imposed. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183, 1185-86 (2005), citing State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989).

Under a first-time offender waiver, a sentencing court may waive the imposition of a sentence within the standard range and impose a sentence up to ninety days of confinement. RCW 9.94A.650. The trial court has broad discretion in sentencing a defendant under the first-time offender option, or in refusing to grant this option. State v. Johnson, 97 Wn. App. 679, 682, 988 P.2d 460, 462 (1999), citing State v. Welty, 44 Wn. App. 281, 283-84, 726 P.2d 472 (1986), and State v. Boze, 47 Wn. App. 477, 735 P.2d 696 (1987). A trial court is not required to give reasons on the record for its refusal to consider a defendant for a first time offender option. Boze, 47 Wn. App. at 480-81. Under the SRA, a trial judge may rely on facts that are admitted, proven, or

acknowledged to determine “any sentence,” including whether to sentence a defendant to an FTOW. RCW 9.94A.530(2); see Grayson, 154 Wn.2d at 339.

While trial judges have considerable discretion under the SRA, they are still required to act within its strictures and principles of due process of law. Grayson, 154 Wn.2d at 342. While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered. Id., citing State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997). A trial court abuses discretion when “it refuses categorically to impose an exceptional sentence below the standard range under any circumstances.” Grayson, 154 Wn.2d at 342, quoting Garcia-Martinez at 330. The failure to consider an exceptional sentence is reversible error. Grayson, 154 Wn.2d at 342. Similarly, where a defendant has requested a sentencing alternative authorized by statute, the categorical refusal to consider the sentence, or the refusal to consider it for a class of offenders, is effectively a failure to exercise discretion and is subject to reversal. Grayson, 154 Wn.2d at 342, citing Garcia-Martinez, 88 Wn. App. at 330.

Here, the record shows that the trial court properly exercised its discretion at Bauml's sentencing. The trial court declined to impose an FTOW, and imposed a standard range sentence, solely based on its consideration of case-specific facts. Specifically, the trial court articulated that an FTOW was not justified under these facts given the systematic nature of the crime. 2RP 948. Moreover, Bauml did not appear to see how she had victimized Cooper and depleted her lifesavings, choosing instead to distortedly see what had occurred as some act of friendship that had benefitted them. Id. The court also noted that despite the major economic offense aggravator being found on all nine counts, the State had not sought an exceptional upward sentence. 2RP 949. Moreover, Bauml was receiving concurrent sentences on all nine counts. Id.

Bauml's claim that the trial court sentencing ruling amounted to a blanket denial of a class of offenders "convicted of a theft involving a large sum of money" is not supported by the record or by law. A review of the record shows that the trial court did not even reference the amount that Bauml stole, much less characterize it as "a large sum of money." Moreover, even if the trial court had mentioned the amount of money stolen, nothing in

the record shows that the trial court lumped Bauml into any class or group of people of any sort. Nor does the record reflect, unlike in Grayson, that the court considered any extrajudicial information at the sentencing hearing. Everything that the court relied upon was properly derived from either the trial or sentencing hearing testimony and arguments. Bauml cannot sustain her argument simply on her own wildly strained interpretation of the court's unambiguous case-specific reasons. The trial court's sentencing ruling should be affirmed.


D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Bauml's judgment and sentence. Given Bauml's age and the large restitution amount imposed, the State will not request appellate costs.

DATED this 9th day of February, 2017.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

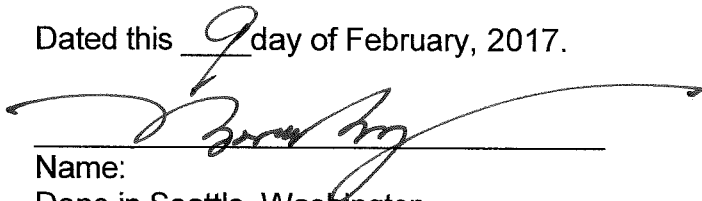
By: 
RAUL MARTINEZ, WSBA #31848
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Thomas Kummerow, the attorney for the appellant, at Tom@washapp.org, containing a copy of the BRIEF OF RESPONDENT, in State v. Janet L Bauml, Cause No. 74436-4, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 9 day of February, 2017.



Name:
Done in Seattle, Washington