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Court of Appeals
Division I
State of Washington
3/31/2021 4:16 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
4/1/2021
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Supreme Court No. 99613-0
Court of Appeals No. 80065-5-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HELEN M. DAHLL,

Petitioner.

PETITION FOR REVIEW

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Statutes

Other Authorities

Court Rules

A. IDENTITY OF PETITIONER/DECISION BELOW

Helen Dahll requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Dahll, No. 80065-5-I, filed on March 1, 2021. A copy of the Court of Appeals' opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Did the court abuse its discretion in refusing to dismiss criminal charges where, due to government mismanagement, the State belatedly disclosed relevant evidence that prejudiced Helen's constitutional right to be represented by adequately prepared counsel?

2. Did the court err in refusing to admit evidence relevant to Helen's defense?

3. Did the State fail to prove beyond a reasonable doubt that Helen wrongfully obtained money from John's bank accounts and did not have a good faith basis to believe she had a right to the funds?

C. STATEMENT OF THE CASE

Helen Dahll and her father John had a close and affectionate relationship.[1] RP 821, 853-54, 1283. Helen's parents supported her

[1] For the sake of clarity, Helen, John, and Mary Dahll will be referred to by their first names in this brief.

financially due to her chronic disability. RP 469, 539-40, 1291. John wanted Helen to have access to his bank accounts. His accounts at Boeing Employees' Credit Union (BECU) were joint accounts with Helen as a joint accountholder. RP 1477-80, 1820-24, 1827-28, 1835-55, 1881-83; Exhibit 49.

John executed a will in 1992 leaving all of his money to Helen if his wife Mary predeceased him. RP 72. He also gave Helen power of attorney in case he should become incapacitated. RP 919-20. And he named Helen as the personal representative for his estate. RP 927.

Over time, John suffered from dementia and was no longer able to take care of himself. RP 559-66, 633-39, 649, 809, 838. He moved in with Helen so that she could take care of him. RP 434. She had trouble taking care of him by herself and hired part-time in-home caregivers to help her. RP 434, 463, 529, 640, 809-10, 870-79, 1282-83.

Eventually, neighbors and medical providers became concerned that Helen was leaving John alone too often and not providing adequate care, so they contacted Adult Protective Services. RP 438, 457, 479, 696-97. After an investigation, a guardian was appointed. RP 717.

After examining John's finances, the guardian concluded that over $200,000 was missing and unaccounted for from John's accounts.

RP 787-89. Also, after the guardian was appointed, Helen withdrew $8,800 from John's Edward Jones investment account and deposited the money into a new account at US Bank. RP 937-39, 946-50.

Helen was charged with one count of first degree theft for the missing funds, one count of attempted first degree theft for the money she withdrew from John's Edwards Jones account, and one count of third degree criminal mistreatment. CP 38-40.

The State's theory for count I was that, during the charging period, Helen transferred a large amount of money from John's joint accounts into her solo accounts and then made several ATM cash withdrawals from those accounts, while spending less money on valid expenses than she had previously. RP 1570-71, 1650, 1784-86.

The defense theory was that Helen had a right to the funds or a good faith claim of title to the funds. CP 319.

The trial judge precluded Helen from presenting evidence relevant to this defense. First, the defense wished to inform the jury that John had left his money to Helen in his will. RP 72-79. Given that John supported Helen financially, whether he left his money to her in his will was relevant to whether he wanted her to spend his money on herself

while he was alive. RP 78-79. The court disagreed, ruling the evidence was not relevant. RP 79.

Second, the defense moved to admit evidence that Helen's house was currently in foreclosure. RP 536-37. This evidence, along with Helen's entire financial situation, was relevant to the question what happened to the money she allegedly stole. It was essential to the defense because it showed she did not spend the money on herself. RP 536-37. The court agreed the evidence was relevant but ruled it was inadmissible because it was overly prejudicial in that it might elicit sympathy from the jury. RP 538.

The defense never pursued the theory that someone other than Helen withdrew the cash because the State had asserted from the beginning that only Helen had access to those accounts. RP 1580-81. Instead, the defense theory was that Helen took the cash with John's approval and for his benefit, which governed how the defense investigated the case and proceeded at trial. RP 399-402, 462-68, 778, 781, 785, 818-21, 853, 894, 1193, 1279-82.

Well after the lengthy trial began, the State realized that its understanding of who owned the accounts from which the cash was withdrawn was incorrect. Belatedly, the deputy prosecutor requested

clarification from the BECU record custodian about the ownership of the accounts. In response, the record custodian provided new documents showing that all but one of the accounts the State had believed were Helen's solo accounts were in fact joint accounts with John. RP 1222-23, 1431-35, 1575-76.

In response to late disclosures from the State, defense counsel moved to dismiss the case under CrR 8.3(b), CrR 4.7, and due process. RP 1394-97; CP 97-119, 137-48. Counsel argued the State should have determined well before now who owned the accounts, given that the ownership of the money in the accounts was a central issue in the case and the State's burden to prove. RP 1218-25, 1310-11, 1394-97, 1447-49. Making sense of this new information midtrial was a substantial challenge for defense counsel, given the density of all of the information provided. RP 1307, 1446.

Moreover, the new information might support a different theory of the case. For example, if John were indeed a joint accountholder on Helen's accounts, perhaps a caregiver or someone else had taken him to an ATM and withdrawn the cash, or used his debit card. RP 1394-97, 1448-49. Had counsel known this information earlier, he would have investigated the viability of an alternative defense. RP 1448-49.

Although the court was disturbed that the State had proceeded with the prosecution without knowing who owned the accounts, the court denied the motion to dismiss. RP 1455-58. The court reasoned the new information did not affect the State's theory of the case, which had always been that Helen took money from John's accounts and did not use the funds for his benefit. RP 1453-57.

A short time later that day, the prosecutor informed the court and the defense that the BECU record custodian had just provided additional new information. RP 1487. The custodian determined that the one account she had thought was Helen's solo account was in fact a joint account. RP 1488-95, 1532-35. Also, it turned out that Helen's mother Mary was the authorized owner of one of the accounts, with John and Helen as joint accountholders. RP 1494, 1497. And there were new records involving someone named "Adrian Dahll," whom neither Helen nor counsel had ever heard of. RP 1500.

Counsel once again moved to dismiss the case under CrR 8.3(b), CrR 4.7, and due process. RP 1488, 1578-97; CP 137-48. Again, the court expressed concern about the State's late disclosures and agreed with the defense that "this is starting to feel like mismanagement." RP

1491, 1496, 1652-53. Nonetheless, the court denied the motion to dismiss. RP 1650-53.

Thereafter, the State's financial analyst testified that, during the charging period, $319,344.65 in cash was withdrawn via ATM from Helen's joint accounts, whereas prior to the charging period, only $24,676.99 was withdrawn. RP 1784-85. The bank statements did not indicate who made the ATM withdrawals. RP 1854. The jury found Helen guilty of all three counts as charged. CP 226, 233, 235.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The court abused its discretion in refusing to dismiss the case after the State belatedly disclosed relevant information that prejudiced Helen's constitutional right to proceed with fully prepared counsel.

Well after this lengthy and complicated trial began and several witnesses had testified, the prosecutor disclosed new information about the ownership of the bank accounts. RP 1575-76. Most significant, the prosecutor disclosed that the accounts from which the ATM withdrawals were made were not Helen's solo accounts but rather were joint accounts with John and Helen. RP 1222-23, 1431-35. As a result of this disclosure, the defense learned for the first time during the middle of trial that someone other than Helen had access to the

accounts from which the money was allegedly stolen. RP 1394-97, 1499, 1578.

The trial court agreed with the defense that the State's late disclosure of new information "[wa]s starting to feel like mismanagement." RP 1496. But confusingly, the court found the late disclosures did not amount to government mismanagement and did not prejudice the defense because it did not change the State's theory of the case. RP 1650-53.

The court's ruling is illogical and an abuse of discretion. Although the newly disclosed information did not change the State's theory of the case, defense counsel only learned as a result of the untimely disclosures that John, or someone using his identity, could have taken the money from the accounts. Prior to the disclosures, counsel had no reason to pursue this possible defense. Moreover, it was the *State's* and not the defense's burden to determine who owned and had access to the accounts. The State had a duty to act with due diligence to determine whether the information it intended to rely upon was accurate, and to disclose that information in a timely manner. Because the State failed to meet its obligations and Helen's ability to

proceed with prepared counsel was prejudiced, the court's ruling denying the motion to dismiss must be reversed.

Criminal court rule 8.3(b) provides a trial court authority to dismiss a criminal prosecution "in the furtherance of justice" due to "governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial."

A defendant is entitled to relief under the rule if she shows both governmental misconduct and actual prejudice. State v. Salgado-Mendoza, 189 Wn.2d 420, 427-28, 403 P.3d 45 (2017). The governmental misconduct "'need not be of an evil or dishonest nature; *simple mismanagement is sufficient.*'" Michielli, 132 Wn.2d at 239-40 (quoting State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1990)) (emphasis in Michielli).

The delayed disclosure of information the State is required to provide may support a finding of governmental misconduct. Salgado-Mendoza, 189 Wn.2d at 432. "Misconduct occurs when the prosecutor inexcusably fails to act with due diligence, resulting in material facts not being disclosed until shortly before a crucial stage in the litigation process." Id. (quotation marks and citation omitted). The prosecutor's

duty of due diligence includes the duty to pursue the disclosure of information the prosecutor does not have. Salgado-Mendoza, 189 Wn.2d at 434.

In Salgado-Mendoza, the prosecutor did not disclose the name of the toxicologist it intended to call as a witness until the morning of trial. 189 Wn.2d at 425. The late disclosure of the information amounted to government mismanagement because the prosecutor's duty of due diligence included the duty to obtain information that was not within the prosecutor's possession or knowledge. Id. at 433-34.

Similarly, in State v. Sherman, the prosecutor had an obligation to disclose all records submitted by the defendant's employer to the IRS relating to her employment during a particular time period, but by the time of trial the State had not disclosed the information. State v. Sherman, 59 Wn. App. 763, 765, 801 P.2d 274 (1990). The State breached its duty because, although the material was not in the hands of the State, it was available to its chief witness, the employer. Id. at 770.

Here, as in Salgado-Mendoza and Sherman, the State failed to timely disclose information it was required to provide. The central issue in the case was whether Helen stole money from her father's bank accounts. Whether the money was taken from bank accounts to which

only Helen had access was relevant evidence the State was required to disclose. See State v. Cole, 117 Wn. App. 870, 879, 73 P.3d 411 (2003). Even though the information was in the hands of a third party, BECU, the State's duty of due diligence included the duty to obtain and disclose the information. Salgado-Mendoza, 189 Wn.2d at 434-35.

The trial court found the late disclosure of the information did not amount to government mismanagement in part because Helen herself should have been aware of it, and "neither defense nor the State inquired as to the ownership." RP 1650-53. This finding is erroneous. The State bore the burden to obtain and disclose the information, not the defense. The defense had no obligation to make an independent effort to obtain the information. See Sherman, 59 Wn. App. at 768-69.

The late disclosure of the discoverable information regarding the ownership of the bank accounts justified a finding of government mismanagement and supported dismissal of the charges. Salgado-Mendoza, 189 Wn.2d at 434-45; Sherman, 59 Wn. App. at 768-69.

Moreover, the late disclosure prejudiced Helen's right to a fair trial. The new information injected into the case well after the trial began took counsel off guard. As counsel explained, making sense of these new facts, given the density of all of the information already

provided, was a substantial challenge. RP 1307, 1446. Counsel had no time to investigate the new information, incorporate it into the defense in a meaningful way, or double-check its accuracy. RP 1311, 1382, 1499, 1593-94. Counsel could not investigate to make sure that no additional relevant information was not still missing. RP 1458-60.

Given the late disclosure of relevant information three and a half weeks into trial, and the inability of the defense to accommodate the new information in a meaningful way or prepare a possible alternative defense, the only appropriate remedy was dismissal. RP 1499, 1593-94.

2. The trial court abused its discretion and violated Helen's right to present a full defense by excluding evidence relevant to the defense.

Over objection, the trial court excluded evidence that John had left his money to Helen in his will. RP 72-79. The court also excluded, over objection, evidence that Helen's house was currently in foreclosure. RP 536-37. Because the evidence was relevant to Helen's defense, the court abused its discretion and violated Helen's constitutional right to present a full defense.

An accused in a criminal trial has a fundamental state and federal constitutional right to present a full defense. "'The right of an accused in a criminal trial to due process is, in essence, the right to a

fair opportunity to defend against the State's accusations.'" State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

The constitutional right to present a complete defense includes the right to present evidence relevant to the defense. State v. Orn, No. 98056-0, 2021 WL 1032900, at *4 (Wash. Mar. 18, 2021). If evidence is relevant to the defense, it may not be excluded unless the State shows a compelling interest to exclude it. Id. at *5. "To justify exclusion, the State must show that the evidence is 'so prejudicial as to disrupt the fairness of the factfinding process.'" Id. (quoting State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

Here, the evidence that John left his money to Helen in his will was highly probative of the defense. It made the fact that John wanted Helen to use his money while he was alive more probable than it would be without the evidence. John plainly intended to give Helen some of his money while he was alive, as he willingly supported her financially throughout much of her life due to her disability. RP 456, 525, 1295. Further, John allowed Helen to be a joint accountholder on his bank accounts, thereby giving her access to his money. RP 1842. The fact

that John intended to leave Helen whatever remained of his estate after he died simply reinforced the fact that he intended to share his money with her.

Second, the evidence that Helen's house was in foreclosure at the time of trial was also probative of the defense. Testimony established that Helen lived frugally and did not spend much money on herself. RP 468, 1284-85. After the State seized John's assets as a result of the guardianship, Helen had little money to live on and could no longer pay her home association dues. RP 539-40. Whether her house was in foreclosure was just as relevant as the other evidence admitted that tended to show she did not lavishly spend on herself the money she allegedly took from John. RP 536-37.

In fact, the trial court agreed the evidence regarding the foreclosure of Helen's house was relevant but ruled it was not admissible because it might elicit sympathy from the jury. RP 538. This ruling is erroneous. The evidence regarding the house foreclosure was no more likely to elicit sympathy from the jury than the evidence that Helen could no longer afford to pay her home association dues. Moreover, the evidence was not sufficiently prejudicial to override Helen's need for it. See Orn, 2021 WL 1032900, at *5.

The error in excluding the evidence was not harmless beyond a reasonable doubt. Had the jury heard that John intended to leave all of his money to Helen after he died, they would have been more likely to accept her defense that he intended her to use his money freely while he was still alive. Had they heard that she could no longer afford to pay her mortgage, they would have been more likely to accept her defense that she did not take John's money wrongfully. The erroneous exclusion of the evidence requires reversal.

3. The State did not prove beyond a reasonable doubt that Helen took John's money wrongfully with the intent to steal.

It is a complete defense to any prosecution for theft that the property was "appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable." CP 319; RCW 9A.56.020(2)(a); State v. Mora, 110 Wn. App. 850, 855, 43 P.3d 38 (2002). The phrase "claim of title" means "a right of ownership or entitlement to possession." CP 320.

The defense of good faith claim of title negates the essential element of intent to steal. Mora, 110 Wn. App. at 855. It says a defendant "cannot be guilty of theft if he or she takes property under a

good faith subjective belief that he or she has the rights of ownership or is entitled to possession of the property." Id.

Because good faith claim of title negates the element of intent to steal, the State bears the burden to disprove it beyond a reasonable doubt. State v. Hicks, 102 Wn.2d 182, 187, 683 P.2d 186 (1984); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

To disprove Helen's defense of good faith claim of title, the State bore the burden to prove she wrongfully obtained the "property of another," with the intent to deprive. CP 313; RCW 9A.56.020(1). "Property of another" implicates the definition of "owner" provided in the theft statute. State v. Longshore, 141 Wn.2d 414, 421, 5 P.3d 1256 (2000). The definition of "owner" "establishes the level of interest necessary to claim a right to property." State v. Lau, 174 Wn. App. 857, 868, 300 P.3d 838 (2013). The statute defines "owner" as "a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services." RCW 9A.56.010(11); see CP 317.

Funds on deposit in a joint bank account "belong to each depositor in proportion to their ownership of the funds, unless the contract of deposit provides otherwise or there is evidence of a contrary intent at the time the account was created." CP 318; Mora, 110 Wn. App. at 857; RCW 30A.22.090(2).

The statute creates a rebuttable presumption that funds in a joint account are owned by the depositors in proportion to the amount deposited by each. Fireman's Fund Insurance Co. v. Northwest Paving and Construction Co., 77 Wn. App. 474, 476, 891 P.2d 747 (1995). That presumption may be overcome by either a contract of deposit or evidence of a contrary intent at the time the account was opened. CP 318; Fireman's Fund Insurance Co., 77 Wn. App. at 476; RCW 30A.22.090(2).

A joint account has aspects of two contracts: one between the depositors and the bank, and a second between the depositors themselves. Fireman's Fund Insurance, 77 Wn. App. at 477. The bank's "account card," "signature card," or similar documentation governs the contract between the depositors and the bank. Id. But extrinsic evidence may also be considered in determining the agreement between the accountholders. Id.

Here, the signature card for John's BECU accounts, signed by John as the primary accountholder and Mary and Helen as joint accountholders, states, "It is understood and agreed by and between the subscribers hereto that the money now on deposit or hereafter deposited in BOEING EMPLOYEES' CREDIT UNION *is the joint property of the persons signing the reverse of this card*, owned by us as joint tenants with right of survivorship." Exhibit 49 (emphasis added).

Regardless of the *legal* ramifications of this document, a person of ordinary understanding without legal training would reasonably understand that each of the joint accountholders had equal ownership or possessory rights to the funds contained in the joint accounts. The document plainly states that the money in the accounts "is the joint property" of the persons signing the document. Id. The ordinary meaning of "joint" is "united, joined, or sharing with another (as in a right or status)." https://www.merriam-webster.com/dictionary/joint. Thus, a person of ordinary understanding would reasonably believe the money in the accounts was "shared" among the joint accountholders.

The bank's master enrollment and member agreement that John, Mary and Helen signed in December 2000, reinforces this conclusion. That documents states, "any joint accountholders . . . will have as much

right to withdraw funds from deposit or loan accounts as the primary member does. Except when agreement states otherwise, joint accountholders . . . *have all the rights of the primary member* . . . ." Exhibit 51 (emphasis added); RP 1882-83. Again, a person of ordinary understanding would conclude from this document that all of the joint accountholders "have all the rights" to the money in the accounts as the primary member. Id. That is, an ordinary person would conclude that each accountholder had an equal right to possess the money as any other accountholder.

The understanding between John and Helen extrinsic to these documents also supports Helen's defense that she had a good faith claim of title to the money in John's accounts. John supported Helen financially and allowed her to withdraw money at will from his bank accounts. RP 469, 539-40, 1291, 1477, 1820-24, 1827-28, 1835-55, 1881-83. The State presented no evidence that John placed any restrictions on Helen's use of his money. John lived with Helen toward the end of his life and she paid for her expenses, his expenses, and their joint expenses out of the money in his accounts. RP 434, 529-40, 1291. She naturally assumed she had "a right of ownership or entitlement to possession" of the money. CP 320.

In sum, the State did not prove beyond a reasonable doubt that Helen did not have a good faith claim of title to the money.

E. CONCLUSION

For the reasons provided, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 31st day of March, 2021.

/s Maureen M. Cyr
State Bar Number 28724
Washington Appellate Project – 91052
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone: (206) 587-2711
Fax: (206) 587-2710
Email: maureen@washapp.org

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3/1/2021
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. HELEN M. DAHLL, Appellant.	)	No. 80065-5-I UNPUBLISHED OPINION

VERELLEN, J. — Helen Dahll assigns error to her convictions for first degree theft and attempted first degree theft. She contends the court erred by excluding evidence, the State prejudiced her right to a fair trial by mismanaging discovery, and the State failed to disprove her good faith claim of title defense to the money she was charged with stealing from her elderly father, John Dahll.[1]

Helen fails to show the court abused its discretion by concluding her father's will was irrelevant to her right to his money before his death and by concluding the probative value of the foreclosure of her home after the charging period did not outweigh its emotional impact.

[1] Because they have the same last name, we refer to John and Helen Dahll by their first names.

She also fails to prove actual prejudice from discovery mismanagement by the State because evidence timely disclosed revealed the same information and would have let her attorney pose the same theory she now argues was unavailable to her.

And she fails to demonstrate the State presented insufficient evidence to disprove her defense of an open and avowed taking of her father's money under a good faith claim of title.

Therefore, we affirm.

FACTS

In April of 2012, Helen became a caregiver for her elderly father John and, after a power of attorney he had signed years earlier took effect, became his attorney-in-fact. John was in the early stages of dementia and suffered from heart disease, congestive heart failure, and arthritis in his knees, among other health problems. Helen hired a home healthcare provider, and John began receiving 24-hour care in his house.

In the spring of 2014, John moved in with Helen, and she rented out his house. She reduced his caretaking hours to only four per day. By this time, he was unable to toilet himself, prepare meals, manage his medications, or get around independently. Helen's neighbors began noticing she often went out for hours and left John alone. Helen would leave the front door unlocked when she went out, so her neighbors would check on John. More than once, a neighbor found John lying on the floor and calling out for Helen, unaware she had left him

alone. As more neighbors became concerned for John's welfare, they submitted reports to Adult Protective Services (APS).

On October 8, 2015, an APS investigator visited John. She noticed his limited cognitive abilities, such as not knowing the date or time, not knowing who was visiting him, not knowing how long Helen left him alone, and being unaware he was unable to care for himself. She returned again on November 4 after a home healthcare worker arrived to find John cold, shivering, and precariously positioned in his bed.

On November 14, the APS investigator returned to check on John, and Helen refused to let her in, relenting only after the police arrived. The investigator found John lying in his own waste and wearing clothes stained with urine and blood. He had a bright red sore on his tailbone and a bloody wound on his buttocks. Helen said she knew he needed 24-hour care but could not afford it because John had only $15,000 in certificates of deposit and no savings. She said his only income was from his Boeing pension and from renting out his house. Helen had not worked in over 10 years due to her own medical issues, and John had financially supported her.

John was moved into an adult family home in November of 2015. On February 3, 2016, an independent guardian was appointed, over Helen's objection, for John's person and estate. The appointment ended Helen's role as John's attorney-in-fact. The guardian reviewed John's finances and discovered at least $200,000 missing from his checking and savings accounts,

all of which were at BECU. The guardian called the police. John died on September 15, 2016, and the guardian became personal representative of his estate.

Helen was charged with committing first degree theft between April 1, 2014 and February 22, 2016, attempted first degree theft between March 22 and 23, 2016, and third degree criminal mistreatment between June 1, 2015 and November 16, 2015. The State's theory was that Helen took John's money through many unauthorized automated teller machine (ATM) withdrawals. Helen's pretrial theory was that she spent the missing money both on John's care and to support herself, which he had intended for her to do by making her a joint accountholder. The court excluded evidence that John had made Helen the primary beneficiary of his estate and that Helen's home was in foreclosure at the time of trial.

In the middle of trial, the records officer for BECU provided documents to the State that had not been disclosed previously. Account documents showed several accounts identified as Helen's alone were actually joint accounts held by Helen and John. Helen moved to dismiss under CrR 8.3(b), arguing the late disclosures were prejudicial discovery violations caused by governmental misconduct. The court denied her motion. The jury found Helen guilty of all charges.

Helen appeals, assigning error to only the theft and attempted theft convictions.

ANALYSIS

I. Evidentiary Rulings

Helen contends her right to present a defense was violated by the court excluding two pieces of evidence. We review a court's evidentiary decisions for abuse of discretion and review de novo whether the defendant's right to present a defense was violated.[2]

She argues the court erred when it excluded relevant evidence from John's 1992 will designating her as the primary beneficiary of his estate.

"'To be relevant . . . evidence must (1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case.'"[3] The threshold for relevancy is very low, and even minimally relevant evidence is admissible.[4] Irrelevant evidence is inadmissible.[5] A defendant has no right to introduce inadmissible evidence.[6]

In 1992, John signed a will designating Helen the personal representative and primary beneficiary of his estate if his wife Mary

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[2] State v. Bedada, 13 Wn. App. 2d 185, 194, 463 P.3d 125 (2020) (citing State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019); State v. Clark, 187 Wn.2d 641, 648-56, 389 P.3d 462 (2017)).

[3] State v. Weaville, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (alteration in original) (quoting Davidson v. Municipality of Metro. Seattle, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)).

[4] State v. Briejer, 172 Wn. App. 209, 225, 289 P.3d 698 (2012) (quoting State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)).

[5] ER 402.

[6] Bedada, 13 Wn. App. 2d at 193 (citing State v. Blair, 3 Wn. App. 2d 343, 349, 415 P.3d 1232 (2018)).

predeceased him. The court allowed evidence John designated Helen as his personal representative but excluded his decision to make Helen his primary beneficiary. She argues the court erred because her status as primary beneficiary was probative of her defense that John let Helen use his money on herself during his lifetime.

An heir cannot have an interest in another's estate until that person's death.[7] "Prior to that event there is no 'heir' because no one can be the heir of a living person."[8] This is true for both realty and personalty in an estate.[9] Helen provides no authority that a will evidences a living person's intent to make inter vivos gifts.[10]

Helen was accused of taking John's money without his authorization. John's will had no effect on Helen's legal interest in his money before his death. Because John's decision to make Helen his primary beneficiary was not probative of her legal right to his money nor of John's intent to make gifts to her

[7] See Matter of Estate of Baird, 131 Wn.2d 514, 520, 933 P.2d 1031 (1997) ("An intestate interest is created only upon the death of the creator of the interest, i.e., the death of the intestate.") (citing In re Wiltermood's Estate, 78 Wn.2d 238, 240, 472 P.2d 536 (1970).

[8] Wiltermood, 78 Wn.2d at 240.

[9] In re Verchot's Estate, 4 Wn.2d 574, 582, 104 P.2d 490 (1940).

[10] John's will is not part of the appellate record, and Helen does not argue it contained language attempting to make or acknowledging any inter vivos gift.

while alive, the evidence was not relevant. Helen fails to show the court erred or infringed upon her right to present a defense.[11]

Helen also argues the court erred when it excluded evidence her home entered foreclosure after the charging period. Helen sought to introduce evidence of the foreclosure to argue it made it less likely she stole thousands of dollars from her father only to stop paying her mortgage. The court concluded the evidence was minimally probative, and ER 403 barred the evidence as unduly prejudicial in Helen's favor.

Relevant evidence can be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice."[12] "'Evidence likely to provoke an emotional response rather than a rational decision is unfairly prejudicial.'"[13] A court considers the whole case when weighing the risk of unfair prejudice, including:

> "the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered

[11] See Bedada, 13 Wn. App. 2d at 193 (no right to present inadmissible evidence).

[12] ER 403.

[13] State v. Nguyen, 10 Wn. App. 2d 797, 820, 450 P.3d 630 (2020) (quoting State v. Johnson, 90 Wn. App. 54, 61, 950 P.2d 981 (1998)), review denied sub nom. State v. Thanh Pham Nguyen, 195 Wn.2d 1012, 460 P.3d 178 (2020).

> is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction."[14]

When the evidence is of high probative value, "it appears no state interest can be compelling enough to preclude its introduction" without violating the state and federal constitutions.[15]

Helen analogizes to State v. Jones, where our Supreme Court held retrial was required after a defendant being tried for rape was prohibited from testifying the sex was consensual or from cross-examining the victim about having consented.[16] Only a police officer and the victim testified, and the State did not call other witnesses to the alleged rape.[17] Under those circumstances, evidence of consensual sex was the defendant's "entire defense" and had "extremely high probative value."[18] Excluding it violated the defendant's right to present a defense, requiring retrial.[19]

Helen sought to introduce evidence of the foreclosure to illustrate she could not afford her mortgage and therefore could not have stolen hundreds of thousands of dollars years earlier. Unlike Jones, evidence of the foreclosure is minimally probative of the crimes charged. It occurred outside the charging

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[14] Bedada, 13 Wn. App. 2d at 193-94 (quoting State v. Kendrick, 47 Wn. App. 620, 628, 736 P.2d 1079 (1987)).

[15] State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting State v. Hudlow, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)).

[16] 168 Wn.2d 73, 717-18, 721, 230 P.3d 576 (2010).

[17] Id. at 718.

[18] Id. at 721.

[19] Id. at 721, 725.

period and after Helen lost access to John's accounts. Only by layering inferences does it suggest Helen's innocence. Again, unlike Jones, other evidence allowed the same argument. Helen introduced evidence she had not paid her homeowner's association dues since John died and elicited other testimony she should "write a book on how to survive with no cash for two or three years."[20] She also introduced evidence that John had supported her financially "for some time."[21] The evidence of foreclosure had little probative value because it could not directly establish Helen's innocence, and she introduced other evidence allowing the same arguments. Helen fails to show the court abused its discretion by concluding the foreclosure's minimal probative value was outweighed by its emotional impact.

II. CrR 8.3(b) Motion to Dismiss

Helen contends the State prejudiced her by mismanaging discovery when it failed to timely obtain and provide documents showing she and John held many joint bank accounts, which prevented her attorney from adequately preparing and from pursuing the theory that someone stole John's identity to make the ATM withdrawals.

[20] Report of Proceedings (RP) (Jan. 29, 2019) at 1284.

[21] RP (Jan. 10, 2019) at 469.

We review a court's decision on a CrR 8.3(b) motion to dismiss for abuse of discretion.[22] A court abuses its discretion where its decision rests on untenable grounds or was made for untenable reasons.[23]

A court can dismiss a charge against a defendant under CrR 8.3(b) when the defendant shows arbitrary action or misconduct by the government prejudiced her right to a fair trial. The movant has the burden of proving both misconduct and resulting prejudice.[24] "[G]overnmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient."[25] Where misconduct is proven, dismissal is an "extraordinary remedy" to be granted "only as a last resort"[26] upon a showing "of not merely speculative prejudice but actual prejudice to the defendant's right to a fair trial."[27]

Assuming the State mismanaged discovery by failing to thoroughly investigate and timely disclose the ownership of Helen's various accounts at BECU, she fails to prove actual prejudice. In August 2017, the State timely disclosed evidence during discovery, including three documents showing Helen and John's history of joint accounts: BECU member account signature cards

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[22] State v. Brooks, 149 Wn. App. 373, 384, 203 P.3d 397 (2009) (citing State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993)).

[23] Id. (citing Blackwell, 120 Wn.2d at 830).

[24] State v. Salgado-Mendoza, 189 Wn.2d 420, 427, 403 P.3d 45 (2017).

[25] Blackwell, 120 Wn.2d at 831 (citing State v. Dailey, 93 Wn.2d 454, 457, 610 P.2d 357 (1980)).

[26] Brooks, 149 Wn. App. at 384 (citing Wilson, 149 Wn.2d at 12).

[27] State v. Rohrich, 149 Wn.2d 647, 649, 71 P.3d 638 (2003).

from 1985 and 1987 creating joint accounts for John, Mary, and Helen, and a 2000 BECU Master Enrollment and Member Agreement identifying John, Mary, and Helen as joint account owners. Pretrial, defense counsel argued Helen had a legal right to John's money because "[Helen] was listed as a joint accountholder, and she has been for decades on both of her parents' accounts. Not all of them, but on many of their accounts, [Helen] was listed as a joint accountholder."[28] Thus, pretrial, defense counsel knew Helen and John held joint accounts and used that information to articulate an exculpatory theory.

These circumstances are similar to State v. Woods[29] and State v. Salgado-Mendoza.[30] In Woods, the state crime laboratory failed to diligently analyze a defendant's DNA,[31] causing a multi-month delay.[32] The court concluded the defendant failed to demonstrate prejudicial misconduct because the delay did not "cause the interjection of new information into the case,"[33] especially when the defendant had always known the State intended to use his DNA to prove his guilt.[34] In Salgado-Mendoza, a defendant driver charged with driving under the influence did not suffer actual prejudice when the State

[28] RP (Jan. 7, 2019) at 73.

[29] 143 Wn.2d 561, 23 P.3d 1046 (2001).

[30] 189 Wn.2d 420, 403 P.3d 45 (2017).

[31] Deoxyribonucleic acid.

[32] Woods, 143 Wn.2d at 583.

[33] Id. at 584.

[34] Id. at 584-85.

mismanaged its case by failing to disclose the identity of its expert toxicologist before the morning of trial.[35] Five months before trial, the State had provided the names of nine potential toxicologists from the state crime laboratory, all of whom were available for interviews and whose resumes and professional backgrounds were also available online.[36] Regardless of which toxicologist testified, defense counsel could have expected each to testify about the same set of topics about blood alcohol testing.[37] The driver articulated a risk of prejudice but failed to prove actual prejudice.[38]

On this record, Helen had sufficient evidence of joint account ownership to articulate a defense theory and prepare for trial on it, and she fails to show the belated discovery and disclosure prevented her from preparing an alternate exculpatory theory also based upon joint account ownership. As in Woods and Salgado-Mendoza, the State's mismanagement of discovery did not prevent defense counsel from preparing for trial or force counsel to proceed unprepared. Because Helen fails to prove actual prejudice, the court did not abuse its discretion by denying her CrR 8.3(b) motion to dismiss.

III. Substantial Evidence Challenge

Helen contends the State failed to produce substantial evidence disproving her statutory "good faith claim of title" defense to theft. Substantial

[35] Salgado-Mendoza, 189 Wn.2d at 435.

[36] Id. at 438.

[37] Id. at 438-39.

[38] Id. at 435-36.

evidence supports a jury's finding when, "'after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[39] A challenge to the sufficiency of the evidence admits the truth of the evidence and all reasonable inferences from it.[40]

A person is guilty of first degree theft when, with the intent to deprive, she wrongfully obtains or exerts unauthorized control over at least $5,000 of another's property.[41] It is a complete defense to any charge of theft that the allegedly stolen property was "'appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable.'"[42] The defense has two elements: "(1) an open and avowed taking of property and (2) a good faith claim of title to the property."[43] The State did not dispute the evidence supported giving this instruction, and it had to disprove the defense beyond a reasonable doubt.[44]

The core of Helen's argument is that the evidence showed she could have had a reasonable, good faith belief in her right to use John's money for

[39] State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (quoting State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006)).

[40] State v. Miller, 14 Wn. App. 2d 469, 481, 471 P.3d 927 (2020) (quoting State v. Condon, 182 Wn.2d 307, 314, 343 P.3d 357 (2015)).

[41] RCW 9A.56.020(1)(a); RCW 9A.56.030(1)(a).

[42] State v. Mora, 110 Wn. App. 850, 855, 43 P.3d 38 (2002) (quoting RCW 9A.56.020(2)).

[43] State v. Ager, 128 Wn.2d 85, 95, 904 P.2d 715 (1995).

[44] State v. Hicks, 102 Wn.2d 182, 186-87, 683 P.2d 186 (1984).

her own benefit. But we review the evidence in a light most favorable to the State after assuming its truth and defer to the jury about witness credibility, conflicting testimony, and persuasiveness of evidence.[45] Thus, the question is not whether a juror could have found for Helen but whether a reasonable juror could have concluded beyond a reasonable doubt that Helen did not have a good faith claim of title to at least $5,000 of John's money.[46]

Helen relies upon a BECU Master Enrollment and Member Agreement governing her and John's joint accounts to argue she had a good faith belief in her right to John's money.[47] The agreement provides "that any joint account-holders (with respect to deposits) . . . will have as much right to withdraw funds from deposit or loan accounts as the primary member does."[48]

But the right to withdraw funds from an account does not change ownership of the funds.[49] RCW 30A.22.090(2) provides that funds held in a

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[45] Miller, 14 Wn. App. 2d at 481 (citing Condon, 182 Wn.2d at 314; State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), aff'd, 166 Wn.2d 380, 208 P.3d 1107 (2009)).

[46] Davis, 182 Wn.2d at 227; RCW 9A.56.020(2)(a); RCW 9A.56.030(1)(a).

[47] Helen also relies upon language from a depository account signature card from 1987 to support her argument. Because the Master Enrollment Agreement is from 2000, was signed by Helen, John, and Mary, and expressly "contains the terms and conditions governing membership in BECU and its deposit products," exhibit 51, at 2, it necessarily superseded any prior agreement governing depository accounts.

[48] Ex. 51, at 2.

[49] See Mora, 110 Wn. App. at 856 ("A joint tenant may have the right to withdraw funds, but this does not mean he or she owns the funds.") (citing In re Estate of Tosh, 83 Wn. App. 158, 166, 920 P.2d 1230 (1996)).

joint account "belong to the depositors in proportion to the net funds owned by each depositor on deposit in the account, unless the contract of deposit provides otherwise." Unchallenged jury instruction 13 echoed these rules. The Master Enrollment agreement speaks only to the right to withdraw; it is silent about ownership. Thus, viewed in a light most favorable to the State, a reasonable juror could have concluded Helen did not have a good faith belief in her ownership over John's monies in their joint accounts.

Other evidence supports this conclusion. Helen told the APS investigator she used $18,400 of John's money to buy a car, and she planned on repaying him. No evidence showed repayment. Beginning on July 15, 2014, and continuing for years, Helen accepted a $1,200 monthly rent payment for John's house, despite identifying it as one of his assets and explaining she rented it out to help manage his money. Helen wrote the lease and required that the rent be paid to her. Especially when combined with the Master Enrollment Agreement, a reasonable juror could conclude Helen did not have a good faith claim of title over at least 5,000 of the dollars she took from John.

A reasonable juror could also conclude that Helen's conduct around taking John's money was not open and avowed. Helen defied a court order and refused to provide an accounting of John's finances to the guardian. Helen lied to the APS investigator about John's income, claiming he received the rent from his house when John's accounts showed no record of rent payments. She lied to the investigator again in October of 2015, saying that John had no savings

and only $15,000 invested in certificates of deposit, when he actually had at least $100,000 in cash and Helen had already withdrawn over $100,000 from his accounts that year alone. Helen also lied about John's financial status in January 2015 when she told a nurse John could only afford four hours of daily home care, despite his net worth of $525,000 and Helen having recently withdrawn $79,608 in cash from his accounts. And Helen lied about her financial status to her neighbors. For example, one neighbor testified Helen described herself as "independently wealthy."[50] From this evidence, a reasonable juror could conclude beyond a reasonable doubt that Helen was not taking John's money openly and avowedly.

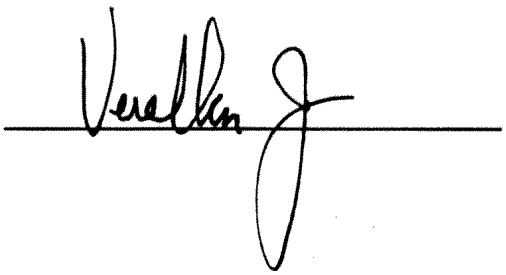
To the extent Helen contends the State failed to disprove the "good faith claim of title defense" for the attempted theft charge, substantial evidence supports the jury's conclusion. Helen's power of attorney was revoked on February 3, 2016, when an independent guardian was appointed for John's person and estate. Helen's attorney signed the order appointing the guardian. On March 22, within hours of the guardian reminding Helen her power of attorney had been revoked, Helen took John into the bank and used $8,800 from his individual investment account to open a new joint bank account. She then withdrew several hundred dollars from the account. From this, a reasonable juror could conclude Helen did not have a good faith claim of title

[50] RP (Jan. 10, 2019) at 452.

when opening the joint account with John's investments and withdrawing money.

Because the State presented sufficient evidence to demonstrate beyond a reasonable doubt that Helen took and attempted to take more than $5,000 of John's money and did not do so under a good faith claim of title or openly and avowedly, substantial evidence supported the jury's verdicts.

Therefore, we affirm.



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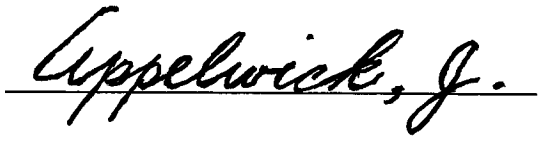

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☒ respondent Gavriel Jacobs, DPA
[gavriel.jacobs@kingcounty.gov]
King County Prosecutor's Office-Appellate Unit
[PAOAppellateUnitMail@kingcounty.gov]

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: March 31, 2021
Washington Appellate Project

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